

RealTime Transcriptions

TRANSCRIPTION OF THE

COMMISSION OF INQUIRY

MARIKANA

BEFORE TRIBUNAL

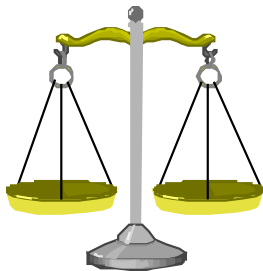
THE HONOURABLE MR JUSTICE FARLAM (RETIRED) - CHAIRPERSON
MR TOKOTA SC
MS HEMRAJ SC

HELD ON

DAY 8 5 NOVEMBER 2012 PAGES 848 TO 1019

HELD AT

CIVIC CENTRE, RUSTENBURG, NORTH WEST PROVINCE



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64 10th Avenue, Highlands North, Johannesburg
P O Box 721, Highlands North, 2037
Tel: 011-440-3647 Fax: 011-440-9119 Cell: 083 273-5335
E-mail: realtime@pixie.co.za
Web Address: <http://mysite.mweb.co.za/residents/pak06278>

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1 [PROCEEDINGS ON 5 NOVEMBER 2012]
 2 [09:07] CHAIRPERSON: The Commission resumes.
 3 Captain, I must remind you, you are still under oath.
 4 CAPTAIN MOHLAKI: That's correct.
 5 MS LEWIS: Mr Chairperson, might I be
 6 permitted to put a couple of preliminary issues on record
 7 on behalf of the families?
 8 CHAIRPERSON: Have they been communicated
 9 to the appropriate authorities first? Remember last time –
 10 I don't know what issues you're going to put on record but
 11 remember last time there were certain accusations against
 12 the police, which Mr Semanya had not been told about in
 13 advance so he wasn't able to deal with them on the spot.
 14 Now if the points that you want to put on record are
 15 matters in respect of which one or other of the parties'
 16 representatives might wish to say something, then the
 17 question I ask you is, have you informed that
 18 representative already so that he will be able to deal with
 19 the points you're going to raise or does that point not
 20 arise?
 21 MS LEWIS: Yes. Mr Chairperson, as far
 22 as I'm aware the Department of Justice is not represented
 23 and that's the only party that it would involve. We have
 24 communicated –
 25 CHAIRPERSON: Please proceed, please

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1 proceed.
 2 MS LEWIS: We have communicated it by e-
 3 mail to the Commission and the evidence leaders. Mr
 4 Chairperson, all of the families, save for one, are here
 5 and are represented. The issue, the first issue is that
 6 the persons responsible for transporting them have not been
 7 communicating with our attorney about their travel
 8 arrangements and board and lodging arrangements, which we
 9 have requested them to do, but the second issue, Mr
 10 Chairperson, is that –
 11 CHAIRPERSON: Sorry to interrupt you. I
 12 will ensure that the secretary communicates that to the
 13 people concerned to ensure that that omission doesn't
 14 recur.
 15 MS LEWIS: Thank you. Thank you, Mr
 16 Chairperson.
 17 CHAIRPERSON: The second point you want
 18 to raise?
 19 MS LEWIS: The second issue is that when
 20 the families were initially contacted by the Department,
 21 they were told that arrangements would be made for two
 22 members from each family to travel and attend. They were
 23 informed on Saturday for the first time, at the earliest,
 24 that in fact only one person would be allowed to attend.
 25 Some of the family representatives were told as they were

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1 boarding the bus that only one person could attend and so
 2 they had to get off the bus, et cetera. This has two
 3 implications, firstly, we feel that it does impact on the
 4 family members – it is a matter, it does cause pain and
 5 indignity. And the second issue, Mr Chairperson, is that
 6 widows of those, of the deceased who wished to attend are
 7 now in a position where they have to choose between
 8 attending and their culture because their culture forbids
 9 them from travelling alone whilst they are in mourning and
 10 so this does have quite serious adverse implications for
 11 their dignity and so we just wish to place that on record.
 12 CHAIRPERSON: Is there anybody who wishes
 13 to say anything in response to or with regard to what has
 14 been said?
 15 MR MADLANGA SC: At this stage, Mr
 16 Chairman and commissioners, once my learned colleague
 17 across started making the points, I sent somebody to
 18 request the secretary of the Commission to come in. He is
 19 here and he says that he would like to say something.
 20 CHAIRPERSON: Yes. Yes, Mr Setati, what
 21 do you wish to say?
 22 MR SETATI: Thank you very much,
 23 Chairperson. Chairperson, I'm going to give clarity
 24 firstly to the issue of bringing the families here.
 25 Chairperson –

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1 CHAIRPERSON: Before you do that, the
 2 first point that was made before you got here was that,
 3 contrary to the previous understanding, there's been no
 4 communication between the officials of the Commission
 5 responsible for transporting the family members here and
 6 the attorney who represent them and there was previously an
 7 understanding that there would be communication and they
 8 would be told what witness statement happening and it was
 9 said that that didn't happen and I said that I would speak
 10 to you and – with a view to seeing that that omission is
 11 not repeated. So you're now aware of that point. You now
 12 want to deal with the second point which was raised.
 13 MR SETATI: Thank you, Chairperson. We
 14 have been in communication with some of the attorneys that
 15 represent the families, e-mail communication has been done
 16 on our part. You know, I don't know, maybe we have not
 17 covered everyone but Chairperson, in the same breath I
 18 would like also to indicate that we worked tirelessly to
 19 make sure that the families are here and we have done so,
 20 you know, and it was done in the light of the amended
 21 regulations that were finalised by Friday, you know, which
 22 provides clearly that every family will be represented by a
 23 single representative, you know, and that is law, it was
 24 within the confines of the law you know. Now Chairperson,
 25 I don't like to go into the reason behind those regulations

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1 being made but we have tried our level best, you know, to
2 comply with the law you know, and make sure that the
3 families are here as we promised.

4 CHAIRPERSON: The point that is the
5 subject of – the thrust, really, of the second aspect
6 raised relates to the fact that only one family member is
7 being funded to come, being accommodated here, which
8 creates a problem in relation to widows who, for cultural
9 reasons, are not really permitted – are not permitted to
10 travel on their own and so they have a choice, either they
11 come on their own or to break or not comply with the
12 cultural norms which operate. That's the point that's
13 being made. As you say, we really have no control over -
14 the regulations are made by the President, not by this
15 Commission, and we can't order the President to alter the
16 regulations that have been drafted. The point that was
17 made was, as I understand it, pertinently put to those
18 involved in drafting the regulations. I don't know why the
19 decision was taken not to give effect to it. There may
20 well have been reasons, substantial reasons which were not
21 communicated to us but we, I'm afraid, can't take the
22 matter any further but you've placed it on record. I take
23 it that's as far as it can go. Do you accept that?

24 MS LEWIS: Yes, Mr Chairperson.

25 MR MAHLANGU: Mr Chairperson, the people

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1 adequate warning so that you can do what you consider
2 appropriate at the relevant time.

3 Thank you. Who is going to continue with the
4 cross-examination? Mr Mpfu?

5 MR MPOFU: Thank you, Chairperson. Just
6 to reinforce what you said - at some stage, we've arranged
7 with the evidence leaders about the videos – when that's
8 going to happen we'll probably ask for a short adjournment
9 so that the arrangements should be done, if it doesn't
10 coincide with a normal adjournment. Thank you.

11 CROSS-EXAMINATION BY MR MPOFU (CONTD):
12 Captain, good morning.

13 CAPTAIN MOHLAKI: Good morning.

14 CHAIRPERSON: Before you say anything
15 further, Mr Mpfu, I understand Mr Madlanga wants to say
16 something.

17 MR MPOFU: Yes.

18 MR MADLANGA SC: The video is ready, or
19 the several pieces of it are ready, thank you.

20 MR MPOFU: Yes. No, thanks. Yes, what
21 we indicated is that at the stage of the cross-examination
22 when we need it to be played then we'll indicate and that –
23 thank you very much. Thank you, Captain. Did you have a
24 good weekend?

25 CAPTAIN MOHLAKI: Exactly.

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1 putting these proceedings on record have indicated that the
2 lady who spoke on behalf of the families has not placed
3 herself on record.

4 CHAIRPERSON: I'm sure she will hasten to
5 remedy that omission.

6 MS LEWIS: I will. Nicole is the first
7 name and the surname is Lewis, L-E-W-I-S.

8 CHAIRPERSON: I understand that we have
9 families now from Lesotho and Swaziland. I don't think we
10 specifically welcomed them before. We are very grateful to
11 you for taking the trouble to come here to attend this
12 Commission which concerns the death of your loved ones. I
13 must say to you and also to other members of the families
14 who are here that I understand that video material is going
15 to be shown today which may also cause you a lot of grief
16 and sadness and so I ask the evidence leaders before that
17 evidence is led or those videos are shown, to indicate that
18 clearly. So you may wish to leave the auditorium at that
19 stage and go to one of the adjoining rooms where I
20 understand the people will be present who may well be able
21 to assist you to deal with the terrible emotional problems
22 that you'll encounter when you see this, if you see this
23 material. But I'm warning, giving a warning that will
24 happen and making a suggestion as to what you might
25 consider doing, but I ask the evidence leaders to give us

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1 MR MPOFU: Orlando Pirates lost to -

2 Thank you, now –

3 MR BIZOS SC: May I suggest that we get
4 on with -

5 CHAIRPERSON: - on the point of
6 suggesting that you ask focused questions and not indulge
7 in general banter but, Mr Mpfu, you've heard Mr Bizos's
8 point –

9 MR MPOFU: Thank you very much.

10 CHAIRPERSON: I suggest we proceed with
11 the matter before us.

12 MR MPOFU: Yes, thank you Chair. I think
13 that intervention is the one that wastes more time, but
14 Captain you indicated at some stage that your estimations
15 of distance are not to be relied on and that's why I think
16 you said something – that's why you carry around a
17 measuring tape. Correct? Remember that?

18 CAPTAIN MOHLAKI: I do remember, Chair
19 and commissioners. Let me explain it. I said when it's
20 coming to time, we were deducting from the measurement that
21 if it was 1.8 that means it will be 1.3, that means the
22 time may be – but not the exact measurement of points,
23 between the points.

24 MR MPOFU: Yes. Can I suggest to you
25 that also your measurements of time are also not very

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1 reliable?

2 CAPTAIN MOHLAKI: I don't understand in

3 which fashion, Chair.

4 MR MPOFU: Okay. Your evidence is that

5 you arrived at scene 1, on your observation, shortly after

6 the shooting had happened and before the people were

7 attended to, remember that?

8 CAPTAIN MOHLAKI: No, sorry Chair, I said

9 when I arrived there the paramedics and the police were

10 still moving around the injured and the dead bodies when I

11 arrived.

12 MR MPOFU: No, that is not what you said,

13 Captain. I said to you on Friday that when you arrived,

14 the people had not been attended to and I asked you whether

15 they started to be attended to in your presence and you

16 agreed with both propositions.

17 CAPTAIN MOHLAKI: Chair, I think there

18 was a recording on Friday. We better refer to it because

19 what I remember very well, I said when I arrived I saw the

20 paramedics and the police moving around the injured and

21 dead bodies.

22 MR MPOFU: Chairperson, I seem to have

23 mislaid my record.

24 CHAIRPERSON: My colleague Adv Hemraj is

25 looking at the moment through the transcript which she

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1 downloaded, which was sent to us, and so I suggest you move

2 on to another point unless it's crucial –

3 MR MPOFU: Yes, I'll come back to that.

4 CHAIRPERSON: And when she's found the

5 passage in the transcript we can come back.

6 MR MPOFU: Thank you, thank you very

7 much, Chair. Okay Chairperson, I mean Captain, we'll come

8 back to that issue. And you also said that, you said the

9 distance between scene 1 and scene 2 was just less than a

10 kilometre, when I put it to you.

11 CAPTAIN MOHLAKI: That's correct.

12 Specifically I said 500 metres.

13 MR MPOFU: Yes. And yet in your evidence

14 you also indicated at some stage that you drove about 10

15 minutes to cover that distance.

16 CAPTAIN MOHLAKI: No, I said from the

17 holding area to scene 1, by then I was not aware that

18 there'd be a scene 1 but next to the kraal is the one that

19 I said 10 minutes, not from scene 1 to scene 2.

20 [09:27] MR MPOFU: Okay. Alright, when the

21 record arrives I'll also show you that you gave evidence,

22 not – I know that whole debate we had about the 20 minutes,

23 15 minutes, I'm not referring to that, you gave separate

24 evidence that from scene 1 to scene 2, when you discovered

25 that your Captain or whoever you were looking for was not

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1 there – it took you 10 minutes. I'll show it to you at a

2 later stage, so we'll also revisit that.

3 CHAIRPERSON: Might I interpose at this

4 stage and say in future, when cross-examination is intended

5 to be based upon something said on the previous occasion,

6 it would be helpful if the cross-examiner were to identify

7 in advance in the transcript where the passage he is

8 referring to is, so it saves a lot of time.

9 MR MPOFU: Yes, Chairperson –

10 CHAIRPERSON: I'm not criticising you

11 this time -

12 MR MPOFU: Yes, no, no –

13 CHAIRPERSON: - for the future.

14 MR MPOFU: I just apologise - the record

15 should have been here, somehow it's left in my car. So

16 I'll revisit the – I apologise for that, Chairperson.

17 CAPTAIN MOHLAKI: Yes, sir, I still

18 remember I walked from scene 1 to scene 2 but I don't

19 remember recording the time. Then if I've estimated 10

20 minutes, I won't disagree with you.

21 MR MPOFU: Okay. Yes, no, the record

22 will show. It might be or you who is making the mistake

23 here. Okay, now can I also suggest that your cartridge

24 collection skills are also not entirely reliable in the

25 sense that you missed quite a number of shells in your 24

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1 hours of searching the area?

2 CAPTAIN MOHLAKI: I think if you can

3 explain to me how many because my memory - if my memory

4 serves me well, I've shown on the 31st one cartridge case of

5 a rifle that I marked CC2 and on the day of inspection in

6 loco, the 1st of October, I recovered one 9 millimetre

7 cartridge case.

8 MR MPOFU: No, in fact what happened is

9 that some of the cartridges were recovered by IPID, one was

10 recovered by my attorney during the inspection in loco and

11 my attorney is the not the best, has not the best sight in

12 the world, and I've discovered that another one was found

13 in one of the bodies at the mortuary. I suppose that one

14 we can't blame you for. Do you go along with that?

15 CAPTAIN MOHLAKI: The one that you are

16 referring to of IPID recovering, because we are talking

17 about two scenes, scene 1 and scene 2 and I was processing

18 scene 2 – if they can come and specify where in scene 2

19 they've recovered that, because up to today there's no-one

20 who showed me where those alleged cartridge cases were

21 recovered from, is it from scene 1 or from scene 2 and

22 where.

23 MR MPOFU: Alright, can you try and

24 estimate for us the time it took between your arrival which

25 you place at about four, and when it started getting dark,

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1 how long had you been at the scene for?

2 CAPTAIN MOHLAKI: As I've indicated, I

3 arrived around 4 o'clock and I departed the scene 15:10 –

4 MR MPOFU: The following day.

5 CAPTAIN MOHLAKI: And specifically to

6 answer your question when it comes to darkness, I think it

7 was around past six to seven.

8 MR MPOFU: Okay, so in other words it was

9 almost two hours after you had been at the scene.

10 CAPTAIN MOHLAKI: That's correct, Chair

11 and commissioners.

12 MR MPOFU: Most of the photographs that

13 were taken, were taken during the dark hours, is that

14 correct?

15 CAPTAIN MOHLAKI: Especially the bodies,

16 it's true but if you check the cartridge cases, the first

17 cartridge to recover, it was a 9 millimetre cartridge that

18 I marked P and –

19 MR MPOFU: Yes, I'm talking about the

20 bodies, sorry.

21 CAPTAIN MOHLAKI: If you're talking about

22 the bodies, it's true, it was darkness.

23 MR MPOFU: Yes. In other words, you

24 started to take the bodies more than two hours after

25 arriving there?

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1 CAPTAIN MOHLAKI: That's correct, Chair

2 and commissioners.

3 MR MPOFU: And in fact you can observe

4 from the photos that there's a spotlight that is put on the

5 specific spot where the body is and then the photo is

6 taken. Is that how it happened?

7 CAPTAIN MOHLAKI: Some, that's correct.

8 MR MPOFU: In other instances the

9 lighting from the Nyalas was used, correct?

10 CAPTAIN MOHLAKI: I don't agree with you.

11 MR MPOFU: Chairperson, sir, I've just

12 discovered that my record was here all along, it just fell

13 from the chair, so we'll look for the passages. Can you

14 please explain to the Commission the reason why it took you

15 so long before you photographed the bodies?

16 CAPTAIN MOHLAKI: When I arrived at the

17 crime scene – let me state specifically, referring to scene

18 2 –

19 MR MPOFU: Yes.

20 CAPTAIN MOHLAKI: Constable Molefe had to

21 start videographing the things, then the golden rule when

22 it comes to videographing of a crime scene, it must not be

23 marked. Then he videographed the crime scene. From there,

24 before I can even take photos I have to make a walk-through

25 that initially I never managed to make it, as I've

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1 explained to the Chair and commissioners that the scene –

2 there was movement of paramedics and the police, so I have

3 to wait until they get out of the crime scene. And

4 secondly, there's no need for me to rush to take photos

5 because I have to gather, to make a sketch plan and gather

6 all the required information. If that is the course of,

7 maybe as you are saying, two hours later but to me two

8 hours it was close. I will have to wait even four hours or

9 plus, it would depend on the situation.

10 MR MPOFU: Would you agree that the

11 longer you wait, the higher the chances that the evidence

12 might be interfered with?

13 CAPTAIN MOHLAKI: I disagree with you,

14 Chair and commissioners, because the purpose of doing,

15 recording a video, is to grab those evidence, that they may

16 be contaminated or disturbed at the time I'm coming to take

17 photos.

18 MR MPOFU: Ja, but that answer seems to

19 agree with what I'm saying. You're just suggesting what

20 the cure is. I said to you, would you agree that the

21 longer you wait, the more the chances of the evidence being

22 interfered with and you're saying if it was interfered

23 with, the video would have captured it. But my question

24 is, do you agree that the longer you wait, the higher the

25 chances of interference?

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1 CAPTAIN MOHLAKI: Let me first

2 understand. Are we referring to the crime scene 2 or are

3 you referring – you are just asking under general?

4 MR MPOFU: Under general – well, and also

5 in relation to this particular crime scene because there

6 were many bodies all over the show and if it was one body

7 then I suppose you could just stand there and make sure

8 there's no interference.

9 CAPTAIN MOHLAKI: To respond to your

10 question, Chair, if I would make my walk-through, that is

11 where I will record all the evidence that is surrounding

12 the body or within the body, but I'm not authorised maybe

13 to remove anything from the body. So I'll photograph it,

14 but we'll take the body to SAP mortuary for further

15 investigation. So in that case I won't say some of the

16 evidence was maybe tampered with, especially surrounding

17 the bodies.

18 MR MPOFU: Okay. You still didn't answer

19 the question but I'll move on. In this particular case are

20 you aware that there was some interference with the

21 evidence?

22 CAPTAIN MOHLAKI: Automatically when I

23 saw police and paramedics moving around the crime scene,

24 the possibilities are there.

25 MR MPOFU: Ja.

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1 CAPTAIN MOHLAKI: But I was not – no-one
 2 indicated to me that there is tampering of a crime scene
 3 but the movement of the police and the paramedics on my
 4 arrival at the crime scene, they give me that the
 5 possibility of tampering with the crime scene may be there.

6 MR MPOFU: Okay, thank you, I think that
 7 goes back to my original question. Now that we are agreed
 8 about that, would you agree that that possibility of
 9 interference is increased proportionately to the time delay
 10 that you might have before you record the evidence?

11 CAPTAIN MOHLAKI: I cannot agree with you
 12 because I don't know to which extent that disturbance of a
 13 crime scene by the movement of the paramedics and the
 14 police were, I don't have that extent so I cannot maybe
 15 agree with you that at a certain extent the interference
 16 was there. I cannot put it, that on record.

17 MR MPOFU: Right. The place that you
 18 observed at scene 2 was strewn with abundant traditional
 19 weapons, is that correct?

20 CAPTAIN MOHLAKI: That's correct, Chair
 21 and commissioners.

22 MR MPOFU: And the fact that a particular
 23 dead body might fall next to particular traditional weapons
 24 could be simply because the place was littered with
 25 traditional weapons, is that correct?

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1 CAPTAIN MOHLAKI: That's correct, I agree
 2 with you.

3 MR MPOFU: Did you see anybody trying to
 4 place traditional weapons next to the bodies before you
 5 took the photographs?

6 CAPTAIN MOHLAKI: Not at all.

7 MR MPOFU: Can you turn to page –
 8 firstly, before you do that, maybe you might assist us.
 9 Just in your own experience as a policeman you've seen
 10 people who have been shot dead?

11 CAPTAIN MOHLAKI: That's correct, Chair
 12 and commissioners.

13 MR MPOFU: And would it be a fair
 14 statement to say that if somebody was holding an object and
 15 then they are shot dead, it's highly unlikely that that
 16 object would still be in their hands or within close
 17 proximity to them.

18 CAPTAIN MOHLAKI: No, in that one I don't
 19 think I can –

20 MR MPOFU: That's okay –

21 CAPTAIN MOHLAKI: Ja, I don't want to
 22 commit myself.

23 MR MPOFU: Fair enough, I'm just taking a
 24 chance since you are a policeman. Now you can turn to the
 25 picture of body J, Mr Samphendu. Sorry it's B72, Mr

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1 Chairman, B72.

2 CHAIRPERSON: Mr Mpofo, I take it you
 3 don't want these photographs to be put up on the monitors.

4 MR MPOFU: No, not at this stage, Mr
 5 Chairman.

6 CHAIRPERSON: You understand if anything
 7 of that happens, then there must be warning.

8 MR MPOFU: I'll warn you. As it pleases
 9 the Chairperson, thanks. Are you there?

10 CAPTAIN MOHLAKI: That's correct, Chair
 11 and commissioners.

12 MR MPOFU: Would you agree that the
 13 impression that would be created by someone looking at this
 14 picture is that those weapons that you can see there,
 15 particularly the panga on the left hand side of the body,
 16 that it was being carried by this person?

17 CAPTAIN MOHLAKI: I won't agree with you
 18 because it's lying there on the ground there –

19 MR MPOFU: Lying on the body.

20 CAPTAIN MOHLAKI: Sorry?

21 MR MPOFU: I don't know if we're on the
 22 same page, B72. I'm talking about the panga is lying on
 23 the body itself.

24 CAPTAIN MOHLAKI: On the body. Maybe you
 25 must check because I've got G on my scene 2 and we've got G

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1 on scene 1.

2 MR MPOFU: Sorry, it's J.

3 CAPTAIN MOHLAKI: Oh, J, sorry –

4 MR MPOFU: Sorry, I'm sorry, B72. Mr
 5 Samphendu.

6 CAPTAIN MOHLAKI: Yes, I can see.

7 MR MPOFU: And what's your reaction now
 8 to my question, now that you've got the correct picture?

9 CAPTAIN MOHLAKI: Can you repeat your
 10 question because I was concentrating on body G, so how I've
 11 got body I.

12 MR MPOFU: Okay. No, it's J, sir, J. J,
 13 J.

14 [09:47] MR MAHLANGU: Okay, it's IJ, the one with
 15 converse -

16 MR MPOFU: Converse All-star, correct.

17 MR MAHLANGU: Correct, thank you, Chair.

18 MR MPOFU: Yes, okay. Yes, I'll remind
 19 you of my question. My question was would you agree that
 20 someone looking at this picture would, or might take the
 21 impression that those weapons, and particularly the panga
 22 that is placed on the body, was, or belonged to that
 23 person?

24 CAPTAIN MOHLAKI: Correct, Chair and
 25 Commissioners.

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1 MR MPOFU: And you see that there are two
2 sticks, the two sticks on each side of the body, and the
3 panga, and they're all lying nicely in parallel.
4 CAPTAIN MOHLAKI: That's correct, I see
5 them.
6 MR MPOFU: Now would you be surprised if
7 I tell you that evidence will be shown that that panga was
8 placed there by somebody other than Mr Samphendu?
9 CAPTAIN MOHLAKI: If you've got that
10 evidence and you show me, I will just have a look on it,
11 because I don't have any clue or any evidence that is, or
12 supporting what you are saying now.
13 MR MPOFU: Fair enough. Okay, that's
14 fair enough, but for the purposes of this, if you can try,
15 just ask me for, and assume that I will place that evidence
16 before the Commission, and if I do so then what would be
17 your comment?
18 CAPTAIN MOHLAKI: I will comment after
19 I've seen that, Chair and Commissioners.
20 MR MPOFU: Okay, that's fine. We will
21 show, when we do show the video, I will show you that at
22 the point at which the video was taken there was no panga
23 on Mr Samphendu's body.
24 CHAIRPERSON: Mr Mpofu, these questions I
25 think would be more sensibly put, if I may say so, after

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1 the video has been seen. I mean what's the point putting a
2 hypothetical question to the witness, you will see
3 something later, if you see it what comment are you going
4 to make. When he's seen it, you can then ask him for his
5 comments. I mean the comments in abstracto without having
6 seen the video first won't have any value anyway. So I'd
7 suggest we carry on.
8 MR MPOFU: Okay. Chairperson, I would
9 have thought in cross-examination I'm entitled to put it
10 upfront before I confront him with the evidence, but I'll
11 go along with that.
12 CHAIRPERSON: Yes, but I have powers
13 under the regulations to control the proceedings and ensure
14 that questions are focussed and the time is not wasted.
15 MR MPOFU: Right. Okay, sorry Chair, but
16 the issue of, I mean Captain, I thought the issue of
17 interfering with the evidence, we'll then come to that at
18 another stage, after the –
19 CHAIRPERSON: Mr Mpofu, sorry. Look, I
20 don't want to hamper your cross-examination, but I would
21 like it to be focussed and –
22 MR MPOFU: Appreciate, Chair.
23 CHAIRPERSON: - it doesn't waste much
24 time. If you have information, have a video which shows
25 that that body before the captain came on the scene, and

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1 the weapons on the photograph that we have on photo 72 are
2 not there, which leads reluctantly to the inference that
3 they were planted there at some stage before the captain
4 arrived, then that evidence obviously will be very
5 important, and when you've shown it you can ask the captain
6 all sorts of questions about what inferences he draws from
7 it. It's not necessarily helpful to ask him questions
8 about inferences he draws which the Commission is in an
9 equally strong position to draw, but I don't want to hamper
10 your cross-examination but I do want to try to focus things
11 so that we use the time that we have in a constructive
12 manner.
13 MR MPOFU: Chair, yes. I appreciate
14 that, Chair. I thought, really what I'm doing is in the
15 same way that I would say to the witness a witness will
16 come and say this, I wouldn't think that I would have to
17 call that witness right now and then I could question him
18 about that witness who might come two weeks later. But I –
19 CHAIRPERSON: I've given my ruling, Mr
20 Mpofu. Let's not waste time. Let's carry on.
21 MR MPOFU: Ja. Okay, actually what I'm
22 asking you is whether if evidence is placed before the
23 Commission by whatever means that that panga was not there
24 before, at some stage before you took the photograph, what
25 would be your comment, Sir?

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1 CAPTAIN MOHLAKI: Okay Chair, my comment
2 on that, it will be possibly the panga or that item was
3 removed and later replaced. That will be my comment.
4 MR MPOFU: Either way, whether the taking
5 away or the replacement or whatever, would that amount to
6 interference with the evidence?
7 CAPTAIN MOHLAKI: It would depend.
8 Somebody must explain why it was removed and it was taken
9 back. That person maybe can give the Commission a clear
10 indication on what was happening, because unfortunately I
11 was not there and I don't have reasons why it was removed
12 and replaced.
13 COMMISSIONER HEMRAJ: Mr Mpofu, it's not
14 suggested for one moment that this witness was aware that
15 those bodies were lying there without these weapons next to
16 them?
17 MR MPOFU: No, no, definitely not. Thank
18 you very much. No, that's why I was referring to –
19 CHAIRPERSON: Sorry to interrupt you.
20 The further point is that if you have evidence to indicate
21 that at an earlier stage after the person had died weapons
22 weren't there, but weapons obviously were subsequently
23 placed there before he arrived on the scene, that would be
24 evidence of interference with the scene. You don't have to
25 ask him would it be interference with the scene; you're

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1 asking him a question which we don't need evidence on
2 because the Commission can draw its own inference. So it
3 is a bit time-wasting, really, but carry on.

4 MR MPOFU: Alright, the weapons that you
5 did gather or that were gathered in the end were very few.
6 I counted about 20 to 25 on, which could fit on top of one
7 blanket. Is that correct?

8 CAPTAIN MOHLAKI: Not correct, Chair and
9 Commissioners.

10 MR MPOFU: Did you have another
11 collection of weapons, apart from the weapons on the
12 blanket on B38? Is it 38? No, no, sorry, that was the
13 wrong reference. 81, sorry, thank you very much. Ja, B81.

14 MR MAHLANGU: Mr Chairperson, may I be
15 excused just for a minute?

16 CHAIRPERSON: In view of the fact that
17 the interpreter is going to be absent for a short while, I
18 don't know whether you want to show the video now, after
19 this due warning has been given, so we don't waste time.
20 But if you've worked out a cross-examination and the
21 showing of the video, it's important that that should occur
22 later, after you've asked a number of preliminary
23 questions, obviously my suggestion will not find favour
24 with you. But if the purpose of the cross-examination is
25 to show him things which appear different from the way they

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1 do on the photographs which he took, from which the
2 inference is inescapable that there was some interference
3 between a video that you have shown and the photographs,
4 then it's not necessary to get him to say in advance if
5 that wasn't there on the video but is on your photograph,
6 will you agree there's interference. You don't need to ask
7 him that question because the answer is obvious. But
8 anyway –

9 MR MPOFU: No, I heard that, Chair, the
10 first time.

11 CHAIRPERSON: Sorry?

12 MR MPOFU: Yes, that's why I moved away
13 from that –

14 CHAIRPERSON: Yes, all I'm asking is
15 would it be convenient perhaps for us, I was hoping to save
16 time but I see the interpreter is back anyway, so we can
17 carry on.

18 MR MPOFU: Ja.

19 MR MAHLANGU: Thank you.

20 MR MPOFU: Now on B81, you see that
21 collection of weapons?

22 CAPTAIN MOHLAKI: You're referring to the
23 one on blanket?

24 MR MPOFU: Yes, Sir.

25 CAPTAIN MOHLAKI: No, they are not the

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1 only weapons that were collected. Also those we see on
2 the, around the bodies were collected by me.

3 MR MPOFU: Okay, but they were not
4 photographed.

5 CAPTAIN MOHLAKI: The one on top of the
6 blankets I found them, I photographed them in that position
7 because they were allegedly put by some of the police
8 officials on that blanket, and the ones around the bodies
9 that you were referring to, I'm the one who photographed
10 them. If I never photographed there you're not going to
11 see them on that, around those bodies.

12 MR MPOFU: No Sir, please. Captain,
13 please, you heard that time is of the essence here. I'm
14 not referring to photos that might have coincidentally been
15 next to the bodies while you were photographing the bodies.
16 I'm saying weapons, weapons as weapons, are they the only
17 weapons that were collected and photographed by you, yes or
18 no?

19 CAPTAIN MOHLAKI: No.

20 MR MPOFU: Okay, so apart from these
21 weapons and the weapons that happened to be next to the
22 bodies, which other collection of weapons did you take
23 photographs of?

24 CAPTAIN MOHLAKI: More or less similar to
25 the one on top of the blankets.

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1 MR MPOFU: Ja, where?

2 CAPTAIN MOHLAKI: They were lying around
3 the area because my request by the evidence leaders was
4 that I must place the weapons in my slides, the ones which
5 show that around the bodies there were some weapons, but
6 they never requested me to place all the photos where I've
7 collected all the dangerous weapons. That is why maybe you
8 see only the blanket with some weapons around the bodies.

9 That was request from the evidence leaders, but if you've
10 got the whole CD of my photographs you will see what I did
11 at the crime scene.

12 MR MPOFU: And in your evidence-in-chief
13 you said that you didn't place much store or importance on
14 these weapons because by definition they constituted
15 interference. Is that correct?

16 CAPTAIN MOHLAKI: Not correct. I never
17 make that statement. I don't remember, recall making that
18 statement.

19 MR MPOFU: You didn't say that you found
20 weapons on top of a blanket and you found them in this
21 position, you were told that the police had collected the
22 weapons and placed them there and that you took some kind
23 of exception to that?

24 CAPTAIN MOHLAKI: I don't know if you
25 were quoting what I've said, or you add after what I've

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1 said. Can you read what I've said? Maybe I will
2 understand it much better.

3 MR MPOFU: Okay, I'll find it, but do you
4 find anything untoward by the fact that these weapons had
5 already been collected by the policemen?

6 CAPTAIN MOHLAKI: The ones on the
7 blankets, I was told that police they are the ones who put
8 it on the, put them on the blanket. The ones that were
9 lying around, I'm the one who collected them.

10 MR MPOFU: No Sir, that's not the
11 question. The question is whether did you find anything
12 wrong or objectionable from the fact that these weapons had
13 already been collected by other people?

14 CAPTAIN MOHLAKI: I don't have a
15 background what was happening because the only thing when I
16 asked they asked the people who were arrested, they have to
17 be searched, and if you've got a dangerous weapon they have
18 to disarm you because you cannot, I mean arrest somebody
19 with a dangerous weapon and leave him there because as I've
20 explained to the Chair and the Commissioners, that area
21 where this blankets and the dangerous weapons were, there
22 was, I call it temporary medical centre and a holding area
23 because all the arrested suspects were placed on that area.
24 There was no way they can leave the suspects with dangerous
25 weapons. To me it was a valid reason.

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1 MR MPOFU: Okay, I suppose that means you
2 didn't find anything wrong with it.

3 CAPTAIN MOHLAKI: That's correct, Chair
4 and Commissioners.

5 MR MPOFU: Right, the other issue that
6 I'd like to canvass with you is your evidence on Friday
7 that you gave the two –

8 CHAIRPERSON: I take it you mean his
9 evidence on Wednesday.

10 MR MPOFU: On Wednesday. Was it
11 Wednesday? Yes, when we finished Wednesday. Thank you,
12 Chair. Your evidence on the previous day, on Wednesday,
13 was that you gave two videos to Colonel Botha.

14 CAPTAIN MOHLAKI: Not correct. I gave
15 Colonel Botha one video of Constable Molefe.

16 MR MPOFU: Yes, okay. Okay, you didn't
17 give him the other one made by Henderson, you didn't give
18 it to him.

19 CAPTAIN MOHLAKI: That's correct, Chair
20 and Commissioners.

21 MR MPOFU: No, you're quite right. In
22 fact you said it was booked somewhere and you don't know
23 what became of it, ja. My apology for that. But in any
24 event, the issue I want to raise with you is that Colonel
25 Botha's evidence when he was asked by me, supplemented by

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1 the Chairperson, was that he was not aware of any other
2 video evidence taken by members of the LCRC. Now if you
3 gave him the video then somebody is not telling the truth.
4 It's either you gave him the video, or he doesn't – and
5 fortunately he didn't say he doesn't remember, which he
6 didn't remember a lot. He said he was not aware, or did
7 not know whether there was another video.

8 MR MADLANGA SC: Mr Chairman,
9 Commissioners, I might be wrong altogether on this and I
10 stand corrected. My recollection seems to be that the
11 context with Colonel Botha was about videos taken from the
12 air, as it were, but I might be wrong altogether.

13 CHAIRPERSON: It coincides with my
14 memory, but again we have a transcript of Wednesday's
15 evidence. So again if anything turns on the point, the
16 passage should be able to be found, but again if he says,
17 if Colonel Botha said one thing and he says something else,
18 well we've got to clearly choose between the two, not
19 possible to reconcile the two, again it's not a matter you
20 have to put to the witness necessarily. It's on the
21 record.

22 [10:07] MR MPOFU: Okay, alright. So I don't
23 have to give the evidence, the witness a chance to maybe
24 give an explanation. Okay, right, and by the way, apropos
25 Mr Madlanga's comments, the reference, he is wrong and the

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1 reference is on page 355 to 356, 355, 356 of the record,
2 where there's questioning by me and the Chairperson also
3 clarified my question, even said that's not an answer to
4 the question, and so on. The question is, "Do you know
5 what happened to the videos that they took, do you know
6 what happened to them?" You said, "That's what I want to
7 say. I don't think they took evidence because they were at
8 the holding area," but – leave it at that then. There will
9 also – evidence – evidence is going to be led to the effect
10 that the – at scene 2 were – hiding – were shot, and that
11 evidence is also corroborated by comments made from one of
12 the helicopters which said they are hiding, something, I
13 quoted earlier in the record but it specifically referred
14 to hiding. Now from your point of view, all I'd like to
15 establish is whether it is correct that the majority of the
16 bodies that you found were either next to rocks, large
17 rocks, between rocks and also next to the bushy areas or
18 the trees. Would you agree with that?

19 CAPTAIN MOHLAKI: That's correct. I
20 agree with you.

21 MR MPOFU: And your evidence on Wednesday
22 in describing the rocks, you said these rocks were big
23 enough to cover the whole body. Remember that?

24 CAPTAIN MOHLAKI: That's correct, from
25 other angle.

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1 MR MPOFU: And that with the exception of
 2 I think body number C, Mr Mpumza, most of the bodies were
 3 in the position that I have described?
 4 CAPTAIN MOHLAKI: Including also body
 5 number N was on the open stage –
 6 MR MPOFU: Fair enough, yes. I think
 7 body N is marginal, so let's also accept that as an
 8 exception.
 9 CAPTAIN MOHLAKI: That's correct, I agree
 10 with you.
 11 MR MPOFU: Thank you. And that would be
 12 consistent with this idea of people who were hiding away.
 13 CAPTAIN MOHLAKI: No, I was not there. I
 14 don't know what was happening for that body to end up
 15 between the two rocks, so I won't agree or disagree with
 16 you.
 17 MR MPOFU: Or disagree, fair enough.
 18 Okay. Did you have occasion to observe the wounds on the
 19 bodies?
 20 CAPTAIN MOHLAKI: Not at all.
 21 MR MPOFU: You didn't see any wounds?
 22 CAPTAIN MOHLAKI: I saw some bullet
 23 wounds, but I never went in detail because I never wanted
 24 to disturb with the bodies as the arrangement will be made
 25 that the bodies must be taken to our SAPS government

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1 mortuary where proper investigation will be conducted,
 2 specifically on the bodies.
 3 MR MPOFU: Okay, so you may or may not be
 4 able to comment on this, or it might jog your memory. If I
 5 say to you that the majority of the bodies, actually 10 of
 6 them, bodies A, C, D, E, F, G, H, I, J, K, L, all had one
 7 single wound, would you be able to comment on that?
 8 CAPTAIN MOHLAKI: I won't be able because
 9 I've never checked them, but I saw that each and every body
 10 it was having a gun wound, but to count them, not at all.
 11 MR MPOFU: Yes, Chairperson sorry, I've
 12 just made a mistake. F is not a body, so make that nine,
 13 and that three of the bodies, body B, K and M, Messrs
 14 Thelejane, Ngxande and Pato, they each had about, they had
 15 two wounds actually.
 16 CAPTAIN MOHLAKI: I won't disagree or
 17 agree with you because that is something, I never counted
 18 them because sometimes you find that there's an entrance
 19 wound and exit wound, but that will, it will be done at the
 20 mortuary, not at the crime scene.
 21 MR MPOFU: Okay, alright. Let me, I know
 22 it Captain, and I apologise for this. Really what I'm
 23 getting at is that once again body number C was the
 24 exception to what I've just said to you in the sense that
 25 it had about 12 wounds. Would you agree at least that that

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1 body had more wounds than what you observed? In general,
 2 I'm not saying you counted them.
 3 CAPTAIN MOHLAKI: Ja, on body C I will
 4 say I've counted up to give. It will be five plus.
 5 MR MPOFU: Okay, alright. Thank you.
 6 When did you count them?
 7 CAPTAIN MOHLAKI: At the crime scene,
 8 because it seems as if, if you check the body of body C,
 9 the paramedics or somebody was busy with the body, so they
 10 opened the clothing, so that is why I managed to see that
 11 it may be plus-minus five.
 12 MR MPOFU: Chairperson, can I pause a
 13 little bit? It looks like there's –
 14 CHAIRPERSON: I think it might be
 15 appropriate for us to take a short adjournment.
 16 MR MPOFU: Thank you, Chairperson.
 17 [INQUIRY ADJOURNS INQUIRY RESUMES]
 18 [10:44] CHAIRPERSON: I want to make an appeal to
 19 media representatives and others who may be in possession
 20 of the photographs which are available on their computers,
 21 not to expose them if they are sitting near family members
 22 because I understand that the person who was distressed,
 23 the lady who was distressed by questions that were being
 24 asked shortly before we took the adjournment, saw a
 25 photograph on a computer which was opened up by a media

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1 representative sitting in the auditorium and I want to
 2 appeal to media representatives and others who may have the
 3 material on their computers not to expose them so that
 4 members of the family can see them. When material which
 5 may cause distress – in all cases I imagine will cause
 6 distress – to family members is to be shown, I think we
 7 must follow it as an absolute rule that there's adequate
 8 warning beforehand, because people have come here for
 9 various reasons but particularly because they wish to get
 10 closure by being present when these matters are looked at
 11 and gone over, but they don't come to be exposed
 12 unnecessarily to grief and sadness which inevitably follows
 13 from, if they see pictures of that kind. So I take it that
 14 what I've said will be borne in mind. Mr Mpofu –
 15 MR MPOFU: Thank you, Chairperson.
 16 CHAIRPERSON: You may continue with your
 17 questioning.
 18 MR MPOFU: Yes.
 19 CHAIRPERSON: Before you do so, Captain
 20 you are still under oath.
 21 CAPTAIN MOHLAKI: That's correct, sir.
 22 CROSS-EXAMINATION BY MR MPOFU (CONTD):
 23 Thank you, Chair, and apropos your remarks, Chair, I must
 24 say that I considered and discussed with my team because
 25 the reason why we were referring to people by name is

<p style="text-align: right;">Page 884</p> <p>1 because we didn't want to impersonally refer to them and 2 I've now conferred with the representatives of the families 3 and the certainly say that they would prefer people to be 4 referred by name so that the families know – 5 CHAIRPERSON: I understand that. 6 MR MPOFU: - but obviously not the 7 pictures. 8 CHAIRPERSON: These deceased people were 9 people, with everything that goes with that, and it would 10 be wrong for them just to be nameless letters or numbers. 11 MR MPOFU: Thank you. 12 CHAIRPERSON: That would not be showing 13 the respect for the dead – 14 MR MPOFU: Thank you, Chair. 15 CHAIRPERSON: - we should show. 16 MR MPOFU: Thank you, Chairperson, I'm 17 just trying to switch off my cell phone. 18 CHAIRPERSON: Setting an example to 19 others which I hope they will follow. 20 MR MPOFU: Yes, thank you. Thank you, 21 Chair, I'm sorry. Captain, when it came to the Nyala that 22 was damaged, you certainly instructed the people to take 23 specific footage of the – obviously they're not wounds but 24 the spots of the damage, correct? 25 CAPTAIN MOHLAKI: Can you repeat your</p>	<p style="text-align: right;">Page 886</p> <p>1 scene 2? 2 CAPTAIN MOHLAKI: That's correct, Chair 3 and commissioners. 4 MR MPOFU: The one that had 15 bullets 5 and is a 15 bullet carrier, was that found on a person or 6 was it found abandoned? 7 CAPTAIN MOHLAKI: It was found abandoned, 8 Chair. 9 MR MPOFU: And the other two, you were 10 told by detectives that the persons on whom they were found 11 had been captured. 12 CAPTAIN MOHLAKI: That's correct, Chair. 13 MR MPOFU: And you could see the guns 14 when they were referring to them. 15 CAPTAIN MOHLAKI: That's correct, Chair. 16 MR MPOFU: And you could see the 17 arrestees? 18 CAPTAIN MOHLAKI: Not at all. 19 MR MPOFU: Do you know or were you told 20 what happened to these people who were allegedly in 21 possession of these two firearms? 22 CAPTAIN MOHLAKI: I was told that they 23 are arrested and transported somewhere around Marikana but 24 specifically where around Marikana, I'm not sure, I don't 25 know.</p>
<p style="text-align: right;">Page 885</p> <p>1 question? I don't understand what you are – 2 MR MPOFU: When it came to the Nyala, did 3 you take the trouble to focus on the specific areas where 4 the marks were being, were exhibited on the front edge, I 5 think you said, of the Nyala? 6 CAPTAIN MOHLAKI: That's correct, Chair. 7 What we did, Colonel – Lieutenant-Colonel Bisi showed us 8 the Nyala and some bullet marks on the Nyala, then we 9 videographed the damages. 10 MR MPOFU: And just another matter which 11 you may or not be able to help us with - when you got to 12 scene 2, the burning grass, there was burning grass all 13 over around the koppie, did you notice that? 14 CAPTAIN MOHLAKI: That's correct, Chair. 15 MR MPOFU: And by the time you took the 16 photos there was no longer, the grass was no longer 17 burning, correct? 18 CAPTAIN MOHLAKI: That's correct, Chair. 19 MR MPOFU: Would you happen to know how 20 that came about or what the purpose thereof might be? 21 CAPTAIN MOHLAKI: I don't have any idea 22 what was happening with the burning of the grass. 23 MR MPOFU: Okay. Now we're going to talk 24 a bit about the firearms. Do I understand your evidence 25 correctly that in total three firearms were recovered from</p>	<p style="text-align: right;">Page 887</p> <p>1 CHAIRPERSON: Can you remember who told 2 you that? 3 CAPTAIN MOHLAKI: The two constables who 4 were in possession of those firearms, they were the 5 complainant in that case. 6 MR MPOFU: Yes. 7 CHAIRPERSON: I want to know their names. 8 What you're giving us now is hearsay. If we can identify 9 the people who told you what you've reported to us then we 10 can get direct evidence from them. 11 CAPTAIN MOHLAKI: Thank you, Chair. I 12 just want to try to locate their names in my records here. 13 CHAIRPERSON: I see. 14 MR MPOFU: Okay. 15 CAPTAIN MOHLAKI: Thank you, Chair, I've 16 got my records with me now. For Marikana CAS number 17 136/08/2012 it was Constable Xhosa. 18 CHAIRPERSON: That relates to one of the 19 firearms, does it? 20 CAPTAIN MOHLAKI: That's correct, Chair. 21 CHAIRPERSON: And the other firearm? 22 CAPTAIN MOHLAKI: The other firearm, it 23 was Constable Qeta, Q-E-T-A. 24 CHAIRPERSON: What's the number of that 25 case?</p>

<p style="text-align: right;">Page 888</p> <p>1 CAPTAIN MOHLAKI: Marikana CAS136/8/2012.</p> <p>2 MR MPOFU: Nobody said to you that either</p> <p>3 one of these people, or both, was killed?</p> <p>4 CAPTAIN MOHLAKI: Not at all, Chair and</p> <p>5 commissioners.</p> <p>6 MR MPOFU: Nobody said either one or both</p> <p>7 of them was seriously injured?</p> <p>8 CAPTAIN MOHLAKI: Not at all, Chair and</p> <p>9 commissioners.</p> <p>10 MR MPOFU: Okay, now when you say they</p> <p>11 were taken somewhere in Marikana, would that be in police</p> <p>12 custody?</p> <p>13 CAPTAIN MOHLAKI: I hope so because they</p> <p>14 said to me that they were arrested. The owner - those two</p> <p>15 suspects who were in possession of those two firearms were</p> <p>16 arrested and taken.</p> <p>17 MR MPOFU: So if one of them was killed</p> <p>18 and if one of them was seriously injured, that might then</p> <p>19 have happened afterwards?</p> <p>20 CAPTAIN MOHLAKI: I won't know because I</p> <p>21 don't know, maybe the two they can explain in which</p> <p>22 condition those two suspects were because I've never</p> <p>23 observed them or seen them. So they may be injured before</p> <p>24 they were arrested or they may be - I'm not sure, I won't</p> <p>25 comment on that one.</p>	<p style="text-align: right;">Page 890</p> <p>1 MR MPOFU: Yes.</p> <p>2 CHAIRPERSON: I won't stop you but we can</p> <p>3 call for those dockets. They may well be - I haven't gone</p> <p>4 through all the SAPS documents but they have been made</p> <p>5 available but if these two dockets weren't part of the</p> <p>6 material that's been made available, we can call for them</p> <p>7 and get them. They will presumably tell us, the dockets</p> <p>8 will presumably tell us who was allegedly found in</p> <p>9 possession of these firearms. We will then be able to see</p> <p>10 whether those, one of those persons is listed among the</p> <p>11 deceased. We will also be able to see whether one of those</p> <p>12 persons has been injured, but I'm not sure that the</p> <p>13 valuable time of this Commission is being, if I may say,</p> <p>14 constructively employed in directing these questions to</p> <p>15 this witness. The information you want is obviously</p> <p>16 important. You've established from him that no-one</p> <p>17 mentioned that these people had, either of these people had</p> <p>18 died or been injured. That you've got on record but the</p> <p>19 remaining information you want, you can get in the manner</p> <p>20 I've suggested. So may I suggest you move onto another</p> <p>21 point?</p> <p>22 MR MPOFU: Thank you, Chairperson. Yes,</p> <p>23 thank you Chairperson, I appreciate the - as I said, this</p> <p>24 was really confined to what was told to him and I've got</p> <p>25 that. Apropos Mr Semenya's question, I have indicated that</p>
<p style="text-align: right;">Page 889</p> <p>1 MR MPOFU: No, no, thank you Captain. I</p> <p>2 don't want to be unfair. All - I'm just talking about what</p> <p>3 they told you. I accept what you say, that they will</p> <p>4 obviously shed more light but for the purpose of this we</p> <p>5 are interested in what they said to you. So I take it then</p> <p>6 from your answers that if I told you that one of those</p> <p>7 people was killed and another one was seriously injured and</p> <p>8 riddled with bullets until he went to ICU, you would either</p> <p>9 be surprised or not be surprised.</p> <p>10 CAPTAIN MOHLAKI: I will be surprised</p> <p>11 because unless if you identify to me from those 14 bodies</p> <p>12 that I found at the scene, you'll explain to me you are</p> <p>13 referring to this body number or what.</p> <p>14 CHAIRPERSON: Mr Semenya, I see you've</p> <p>15 turned your microphone on. Do you want to say something?</p> <p>16 MR SEMENYA SC: Sir, I wish to invite Mr</p> <p>17 Mpofo to tell us whether this is just a hypothesis or a</p> <p>18 version because if it is, we would need to investigate it</p> <p>19 and deal with it.</p> <p>20 MR MPOFU: Thank you, Chairperson, no,</p> <p>21 it's not - certainly not a hypothesis -</p> <p>22 CHAIRPERSON: What I wanted to say was,</p> <p>23 you know in order to save time, I don't think this is the</p> <p>24 right witness to ask these questions of, unless there's a</p> <p>25 particular reason why you're asking them.</p>	<p style="text-align: right;">Page 891</p> <p>1 it's not a hypothesis. Actually we represent one of the</p> <p>2 persons, the one who was injured but we'll deal with that</p> <p>3 when we deal with the dockets.</p> <p>4 CHAIRPERSON: I think Mr Semenya would</p> <p>5 like you to tell him which person -</p> <p>6 MR MPOFU: When I say hypothesis -</p> <p>7 CHAIRPERSON: - you represent was in possession or</p> <p>8 allegedly in possession of a firearm and was injured, so</p> <p>9 that he can make enquiries.</p> <p>10 MR MPOFU: That's correct, that's exactly</p> <p>11 what I'm doing.</p> <p>12 CHAIRPERSON: Alright, well, will you</p> <p>13 just tell us who the person is and then Mr Semenya can make</p> <p>14 a note of it and cause the necessary enquiries to be made.</p> <p>15 MR MPOFU: Yes.</p> <p>16 CHAIRPERSON: Or if you haven't got the</p> <p>17 information in front of you at the moment -</p> <p>18 MR MPOFU: I do.</p> <p>19 CHAIRPERSON: You have?</p> <p>20 MR MPOFU: Yes.</p> <p>21 CHAIRPERSON: Well, just tell us quickly</p> <p>22 and then we can move on.</p> <p>23 MR MPOFU: Yes, that's what I'm doing,</p> <p>24 Chair. The person is Msoxolo Madidiwane.</p> <p>25 CHAIRPERSON: Do you know the name of the</p>

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1 deceased person who you say was the other person who was
 2 allegedly found in possession of one of these two firearms
 3 that form the subject matter of these two case numbers that
 4 we've got?

5 MR MPOFU: No.

6 CHAIRPERSON: If so, you can give it to
 7 us.

8 MR MPOFU: I don't.

9 CHAIRPERSON: Alright.

10 MR MPOFU: I just know that he was killed
 11 –

12 CHAIRPERSON: Okay.

13 MR MPOFU: Thanks Chair. Just before we
 14 play the video, did you observe any of the dead bodies to
 15 be in handcuffs?

16 CAPTAIN MOHLAKI: Not at all, Chair and
 17 commissioners.

18 MR MPOFU: Or with hands tied to the back
 19 with one or other instrument?

20 CAPTAIN MOHLAKI: To be clear,
 21 Chairperson, the bodies that I photographed when I arrived
 22 there - there 14 bodies – there was no no-one who was
 23 handcuffed or tied.

24 MR MPOFU: Or tied. Yes, thank you. And
 25 by the way, do you know what happened to the other bodies

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1 because Brigadier Van Zyl gave evidence that 18 people were
 2 killed in scene 2?

3 CAPTAIN MOHLAKI: When I make a follow-
 4 up, because I was surprised to hear they are talking about
 5 18 and I am talking about 14, I was told that the other
 6 four that they are talking about, they are the ones who
 7 died at the hospital or on their way to hospital, I'm not
 8 sure. They are the four that are added to the 14 bodies to
 9 make it 18 but at the crime scene there were 14 dead
 10 bodies.

11 [11:04] CHAIRPERSON: Mr Semenya, you turned your
 12 microphone on. Do you want to say something?

13 MR SEMENYA SC: I wanted to establish
 14 where Mr Van Zyl has testified, certainly not before us.

15 CHAIRPERSON: He obviously hasn't
 16 testified here. It's clearly a reference to his evidence
 17 at the bail inquiry, I take it. Is that right?

18 MR MPOFU: Correct, Chair.

19 CHAIRPERSON: Alright.

20 MR MPOFU: Thank you. In any event, the
 21 witness has explained that the other four must have died in
 22 hospital. Thank you, Chair. Or on the way, but certainly
 23 not photographed by him. The arrested protesters were made
 24 - according to the evidence that has been led – were made
 25 to lie facing face down in that flat, you know in scene 2

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1 there is that flat area between the rocks. Did you observe
 2 any of that?

3 CAPTAIN MOHLAKI: That's correct, I did
 4 observe that.

5 MR MPOFU: According to us there were at
 6 least 270 of those people. Can you just tell us what you
 7 observed since you were there, whether you saw them in that
 8 kind of group or were they in batches or were they at
 9 different places of the flat area or what?

10 CAPTAIN MOHLAKI: What I observed on that
 11 flat area, that is why I call it a holding area and a
 12 temporary medical centre, because there were arrested
 13 people there and injured people were treated on that area.
 14 So to estimate how many were there, I've never got a chance
 15 to count them. I mean I'm not good in estimations.

16 MR MPOFU: Yes, I know.

17 CAPTAIN MOHLAKI: Please. But what I
 18 did, I took a measurement of that flat area that you are
 19 referring to so that maybe you can see if those numbers
 20 that you are counting, it can be accommodated in that area.
 21 I don't know.

22 MR MPOFU: Ja, and what was your finding?
 23 Do you think that number that I mentioned could fit there?

24 CAPTAIN MOHLAKI: I don't know. I never
 25 counted the number. I only measured the area where the

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1 people, I call it the temporary holding area, medical
 2 treatment for injured people and a holding area for
 3 arrested people.

4 CHAIRPERSON: Give us your measurements
 5 and Mr Mpofo can do the arithmetic.

6 CAPTAIN MOHLAKI: Chair, I'm still trying
 7 to locate my documents here. Sorry Chair, I don't see
 8 where I've recorded my - of that medical or holding area,
 9 but I can make it available at the time –

10 MR MPOFU: Okay, no that's fine. No,
 11 we'll get it as an admission later -

12 CHAIRPERSON: Yes.

13 CAPTAIN MOHLAKI: That's alright.

14 MR MPOFU: - from Mr –

15 CHAIRPERSON: That's the way to go
 16 forward.

17 MR MPOFU: Thank you. In any event, did
 18 you observe some of those people being assaulted,
 19 manhandled, kicked?

20 CAPTAIN MOHLAKI: Not at all, Chair and
 21 Commissioners.

22 MR MPOFU: Did you observe their ultimate
 23 removal into, I think the evidence will be about five
 24 trucks?

25 CAPTAIN MOHLAKI: I observed about two or

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1 three trucks, because some were taking this other side of
 2 the hill, of the koppie, and the other one that side, but
 3 what I observed, I saw three trucks.
 4 MR MPOFU: Okay. Okay, irrespective of
 5 the number of trucks, where, time-wise - and you've already
 6 said you have issues with estimation - by the time they
 7 were being removed from the time that you first observed
 8 them, can you give us an indication how much time they
 9 spent there facing downwards?
 10 CAPTAIN MOHLAKI: It will be between when
 11 I finished photographing body B, before I go and photograph
 12 body C, but I'm not sure about what time because I've never
 13 recorded the time when they were taken from that holding
 14 area.
 15 MR MPOFU: Okay, and we know that you
 16 only started photographing after about two hours.
 17 CAPTAIN MOHLAKI: That's correct, Chair
 18 and Commissioners.
 19 MR MPOFU: So I take it from that answer
 20 that then you cannot tell us for how long, at least by the
 21 time you first observed them they were already facing down.
 22 CAPTAIN MOHLAKI: That's correct, Chair
 23 and Commissioners.
 24 MR MPOFU: And from that time to the time
 25 of their ultimate removal, how much time transpired, or

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1 expired?
 2 CAPTAIN MOHLAKI: I'm not sure. I've
 3 never recorded the time.
 4 MR MPOFU: Roughly. An hour, two hours?
 5 CAPTAIN MOHLAKI: I don't want to lie to
 6 this Commission, so to say hour and two hours, I'll be
 7 lying. I've never recorded the time. The only thing that
 8 we did, I said Molefe recorded the scene as it is.
 9 MR MPOFU: Okay, anyway, okay let's just
 10 say then from your evidence in totality, by the time they
 11 were removed it was already dark?
 12 CAPTAIN MOHLAKI: That's correct, Chair.
 13 MR MPOFU: Did you observe among the -
 14 okay, this might be a difficult one. Among the arrested
 15 people, were you able to distinguish between the arrested
 16 and the injured, or were they mixed up?
 17 CAPTAIN MOHLAKI: They were mixed up. I
 18 was not aware, I was not able to maybe separate the
 19 holding, the arrested one with the injured ones.
 20 MR MPOFU: Okay, fair enough, and since
 21 this was part of - this was part of the scene, correct?
 22 CAPTAIN MOHLAKI: In which manner?
 23 MR MPOFU: No, the presence of these
 24 people and their, well all we have described now was part
 25 of the scene?

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1 CAPTAIN MOHLAKI: That's correct.
 2 MR MPOFU: Did you take any photographs
 3 or video footage of the arrested and injured people?
 4 CAPTAIN MOHLAKI: I think Molefe,
 5 Constable Molefe will have to cover that because that is
 6 why I said to Molefe, "You must record the scene as it is,"
 7 because when you check my standard operation procedure I
 8 cannot process a crime scene with movement of people or
 9 injured people, because when I arrive at the scene we have
 10 to save the life of the people first. So if the paramedics
 11 are busy, helping injured or somebody's arrested, I have to
 12 wait until everything is concluded.
 13 MR MPOFU: Okay, but now sitting there,
 14 do you know whether or not photographs and/or video
 15 material of these groups that we're talking about was
 16 taken?
 17 CAPTAIN MOHLAKI: I'm not aware if
 18 there's any photos were taken because they may be taken by
 19 someone but at the crime scene, myself, I've never taken a
 20 photo of injured person or arrested person.
 21 MR MPOFU: Okay, let's put it like this.
 22 On that day, whether the person was injured, arrested or
 23 deceased, did you observe any person or persons who were
 24 handcuffed or had their hands tied to the back?
 25 CAPTAIN MOHLAKI: Not at all, because

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1 when Molefe was doing a videographing of the crime scene, I
 2 was not with Molefe. I just indicated to Molefe what to do
 3 because I must not appear on the video.
 4 MR MPOFU: Well the evidence even from
 5 the video will be that there are visible persons who are in
 6 the condition that I have described. I cannot say as I'm
 7 sitting here now whether the particular person - and we'll
 8 pause the video when it gets to there - whether that person
 9 was injured or deceased or simply handcuffed.
 10 CAPTAIN MOHLAKI: Okay, I'll wait and
 11 see.
 12 MR MPOFU: Well, my observation - and I'm
 13 no expert, I can assure you - is that at least one of those
 14 persons, the way he's lying on the ground, is that he might
 15 be deceased.
 16 CHAIRPERSON: Mr Mpofo, where is this
 17 taking us? Are you giving evidence or are you asking the
 18 witness -
 19 MR MPOFU: I -
 20 CHAIRPERSON: - testify about? What's
 21 happening?
 22 MR MPOFU: I'm putting something to the
 23 witness, which will be confirmed by evidence -
 24 CHAIRPERSON: Okay, let's find out if
 25 he's - are you, you heard what Mr Mpofo put to you. Are

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1 you able to comment on whether he's correct or incorrect or
2 don't you know?
3 CAPTAIN MOHLAKI: No, I won't be able.
4 That is why I'm saying, if I can watch the video, maybe
5 I'll be able, but as I've indicated, I know of 14 bodies,
6 the position, how they look, but the one that he's
7 referring to me now, I don't have any comment to do.
8 MR MPOFU: Okay, thank you. We'll get
9 there. Okay, thank you, Captain. When I put something to
10 you it's because it will be said in evidence. It's just an
11 opportunity for you, maybe it might jolt your memory or you
12 might have another comment which will help us. But be that
13 as it may, did you observe any of the injured people being
14 airlifted from the scene?
15 CAPTAIN MOHLAKI: Yes, I still remember
16 there was, I don't know specifically, this paramedics
17 chopper. I once saw one landing at the crime scene.
18 MR MPOFU: Ja, while we are at that, when
19 you arrived at the scene, when you were still at scene 1,
20 did you observe the three or four choppers which were
21 hovering above scene 2?
22 CAPTAIN MOHLAKI: Not at all, Chair and
23 Commissioners.
24 MR MPOFU: Thanks, Chairperson, at this
25 point could we have the video and the necessary –

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1 CHAIRPERSON: We're now going to see the
2 video which Constable Molefe was responsible for. I
3 understand that on it are depicted dead bodies of people,
4 injured people, and I'm quite sure that the family members
5 whose loved ones are depicted on the video will find it
6 very distressful to watch the video. I'm going to adjourn
7 for a few moments to, for five minutes to enable them to
8 leave the auditorium if they wish, and we will then have
9 the video shown. Have arrangements been made for the video
10 to be seen by those who wish to see it in another room?
11 MR MADLANGA SC: That is so, that has
12 been arranged, Chairperson, thanks.
13 CHAIRPERSON: The Commission will now
14 adjourn for five minutes.
15 [INQUIRY ADJOURNS INQUIRY RESUMES]
16 [11:25] CHAIRPERSON: I understand that a number
17 of the family members have indicated that they wish to be
18 present when the video is shown and they appreciate it may
19 cause them distress but it's distress, if they're prepared
20 to undergo if they consider it appropriate for them to do
21 so. So we'll now see the video.
22 MR MPOFU: Chairperson, if I may, just
23 before you came up I just had a conversation with Mr
24 Semanya and I was just running up to give instructions to
25 try and minimise the extent of the footage, so – and then

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1 the panel came back. So if I can, I'll kind of give the
2 instructions from here. I have made an arrangement with
3 Elmo, or Telmo, yes – to show only the video number 3.
4 That video covers most of the issues, so they don't need to
5 show the other.
6 CHAIRPERSON: If it's necessary for us
7 later to see the other videos, we will do so.
8 MR MPOFU: Yes.
9 CHAIRPERSON: But we're very largely in
10 the hands of the representatives of the parties or the
11 evidence leaders. For the moment you only –
12 MR MPOFU: For my purpose –
13 CHAIRPERSON: - refer to video 3?
14 MR MPOFU: Yes, Chair.
15 [VIDEO IS SHOWN]
16 MR MPOFU: Chairperson, I'm sorry to do
17 this. I've just received instructions that the other clips
18 should also be played. If I may - I know we've just come
19 back – just ask for a short adjournment so that I can take
20 proper instructions on that issue.
21 CHAIRPERSON: Certainly. If you consider
22 it necessary – you've seen the clips, I haven't.
23 MR MPOFU: I have, Chairperson.
24 CHAIRPERSON: If you consider it
25 necessary to address the members of the family, I

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1 understand they have the right to see the clips and even if
2 they're aware of the fact that it may cause them distress
3 they may feel it's distress that's appropriate for them to
4 undergo –
5 MR MPOFU: Yes.
6 CHAIRPERSON: But still –
7 MR MPOFU: Chairperson –
8 CHAIRPERSON: One understands and one's
9 got great empathy and compassion for them –
10 MR MPOFU: Thank you.
11 CHAIRPERSON: Will you please address
12 them appropriately -
13 MR MPOFU: Yes, Chair.
14 CHAIRPERSON: - five minutes
15 MR MPOFU: Yes, Chair. And it's not so
16 much for the distress, Chair, I was just trying to save
17 time, so we'll just indicate. Thank you, Chair.
18 [INQUIRY ADJOURNS INQUIRY RESUMES]
19 [11:46] CHAIRPERSON: The Commission will resume.
20 MR MPOFU: Thank you very much,
21 Chairperson, and once again I apologise for the delay. It
22 has now been agreed that there's no need to show the other
23 clips because they cover mainly issues that have either
24 been conceded or incidental to the cross-examination.
25 Chairperson, can I just make a remark, just address the

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1 Chair. The issue of the panga, I don't intend to deal with
 2 it now. We saw some of the footage which may or may not be
 3 the one that was played last night, but when I went up
 4 there, Chair - and I think it's my professional duty to
 5 disclose this - when I went up there and saw part of the
 6 footage that has been played now, I was able to observe
 7 something which may or may not be that panga. So what I'll
 8 propose to do is we'll go through the footage and maybe see
 9 it together with Mr Semenya, and if it's necessary to make
 10 an admission one way or the other at that stage, but I will
 11 not deal with it in cross-examination.

12 CHAIRPERSON: It seems a sensible way of
 13 going things.

14 MR MPOFU: Thanks, Chair.

15 CHAIRPERSON: And we concentrate on -

16 MR MPOFU: On something which might not
 17 be - thank you, Chair. Captain, I'm going to try and ask
 18 you questions so that we avoid having to replay and pause
 19 and so on, but if we have to, we have to. Did you observe
 20 at the beginning of the video, and later on when you moved
 21 towards the rocks, people who seemed to be either in
 22 handcuffs or have their hands tied at the back? Because if
 23 you have observed that then we don't have to play the
 24 video.

25 CAPTAIN MOHLAKI: Ja, I did observe that,

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1 Chairperson and Commissioners.

2 MR MPOFU: Okay, and I don't want to push
 3 you too far, you have already said - and I've already
 4 confessed that I'm not an expert - the second person who's
 5 near the rocks whose hands look to be tied at the back has
 6 his head right on the ground. Would you agree with that?

7 CAPTAIN MOHLAKI: Yes, I do agree,
 8 Chairperson and Commissioners.

9 MR MPOFU: Did you take any photos of
 10 particularly this second person, or well, you did say you
 11 did not even observe it, but did you find it, did you see
 12 what you've just seen on the video or are you seeing it for
 13 the first time? Maybe let's, that's the fair question.

14 CAPTAIN MOHLAKI: No, not for the first
 15 time.

16 MR MPOFU: Okay, so you did observe these
 17 visuals in real life on the day?

18 CAPTAIN MOHLAKI: Correct.

19 MR MPOFU: And are you able to explain
 20 your earlier evidence that nobody was handcuffed or tied to
 21 the back?

22 CAPTAIN MOHLAKI: No, my evidence, I was
 23 saying, you were asking me that did I observe if people
 24 were handcuffed and on the holding area, then I said no. I
 25 did saw people lying there, but I've never observed them

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1 handcuffing. Specifically to respond to your question,
 2 that person that I've observed is the person who's, the
 3 position of that person is between firearm which I've
 4 marked number F and body G and H and if you come through
 5 that two rocks, that is where you're going to get body I
 6 and J. But when I took photos that person was already
 7 removed from there.

8 MR MPOFU: Well, I don't want to take you
 9 to task, Captain, but my question at the time that you
 10 responded to was broad enough to cover what you have said.
 11 I said did you observe anybody, whether arrested, injured
 12 or killed, who had handcuffs on them, and you said - on
 13 that day - and you said no.

14 CAPTAIN MOHLAKI: Okay, if you are saying
 15 that like that, the Chairperson will make a call because
 16 what I'm saying is the way I understand your question, but
 17 you can also see there that that body, actually that
 18 injured person was between firearm and the body G and H and
 19 if you come back you are going to that body I and J. That
 20 is the position of that body, that, actually that injured
 21 person.

22 MR MPOFU: Is your evidence now that the
 23 second person that we see with handcuffs or another object
 24 at, near the rocks, that that person was injured?

25 CAPTAIN MOHLAKI: According to my

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1 observation when I took photos that person was not there.

2 MR MPOFU: Okay, well there are two
 3 issues that arise from that. One is how do you know that
 4 the person was not killed?

5 CAPTAIN MOHLAKI: If he was killed they
 6 were going to indicate to me that this is another body,
 7 because if you check that person is lying between body G
 8 and H and I and J. Those G and H and I and J are dead
 9 bodies. Then when I photograph, that is where I found the
 10 firearm which I marked it F and I went to G and H because
 11 that person by then he was removed from there.

12 MR MPOFU: I see, so you're making an
 13 assumption that he was not dead?

14 CAPTAIN MOHLAKI: It's possible, because
 15 if he was dead he was going to be left there because all
 16 the bodies, the paramedics were checking the bodies and the
 17 dead ones they will indicate that this person is dead, then
 18 they leave it there. So if there's, managed to, maybe to
 19 certify that one dead and removed, somebody will explain.
 20 I don't know who's that person.

21 MR MPOFU: Okay. The second issue is
 22 whether you would characterise the removal of that person
 23 as a form of interference with the scene.

24 CAPTAIN MOHLAKI: I won't say that,
 25 Chair, because if he was injured, I mean they must save his

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1 life, unless you can tell me now that at the end of the
2 day on that day of the shooting he end up dead, I don't
3 know until now. If you can tell me that, yes I will agree
4 with you, but for now I will took as if he was injured and
5 removed for, to save his life.

6 MR MPOFU: Yes, no, I understand that.
7 I'm afraid I can't help you there. The next issue that
8 arises is that let's assume that he was injured for the
9 purposes of this question, then I need you to explain your
10 earlier answer that you did not observe anybody, whether
11 injured, arrested or killed, who had been put in that
12 position. I used "handcuffed." I'm prepared to, I've
13 tried to look at the video very closely and it's not clear
14 if it's handcuff or just a rope or something. So that's
15 why I'm sort of hesitant. So when I use "handcuff,"
16 forgive me, I'm using it liberally, as it were. So the
17 question is that you had earlier indicated that you had not
18 observed anybody, whether injured, dead or arrested, who
19 had been handcuffed.

20 CAPTAIN MOHLAKI: That's correct, Chair.

21 MR MPOFU: Would you like to change that
22 answer now?

23 CAPTAIN MOHLAKI: No, I won't change it
24 because I was not videographing the scene. So you are
25 referring now, because I see it from the video, at the

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1 crime scene I've never observed that because my opening
2 statement I've said to the Chairperson where was a movement
3 of paramedics and police, so we never did manage to make
4 our proper walk-through. If we have done proper walk-
5 through I was going maybe to manage to see that person that
6 we are agreeing that, for continuation of this Commission,
7 that he was injured. I was going to, maybe to be able to
8 record what's happening with that injured person, but I was
9 explaining that I just viewed the people on the holding
10 area and on the temporary medical centre. So I never went
11 individual bodies to observe it, which one was handcuffed,
12 which one not handcuff, which one was injured, the damages
13 that were caused by those injuries.

14 MR MPOFU: Yes, I don't want to waste
15 much time on this, but since I'm going to argue that your
16 evidence on this aspect is contradictory, I think I'll ask
17 you one more question. Your evidence is that with
18 reference tot his particular person you observed the person
19 and then when you were taking photographs, the person had
20 been removed. Am I correct so far?

21 CAPTAIN MOHLAKI: You are not correct.

22 MR MPOFU: So your earlier evidence about
23 his removal, from which you deduced that he must have been
24 injured, what should we do about that?

25 CAPTAIN MOHLAKI: I think the Chairperson

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1 will make a call, because what I was saying is that I
2 observed people injured and in the holding area, but
3 because of not doing a proper walkthrough due to movement
4 of paramedics and the police, I've never managed to
5 identify that person with, you are saying it may be
6 handcuff or what. For the argument sake you said we must
7 agree that it's handcuffs.

8 MR MPOFU: Yes.

9 CAPTAIN MOHLAKI: But if I'm looking now
10 at the video, yes I can see it that this is the person with
11 handcuffs possibly. But you are asking me about what I've
12 observed at the scene on the day of the incident. I was
13 responding to that.

14 MR MPOFU: Okay, fine, the record will
15 show whatever you said. Now in respect of the other
16 persons right at the beginning of the video who are in the
17 open area and who also seem to be shackled, what is your
18 comment? Did you also not observe them?

19 CAPTAIN MOHLAKI: I've never observed
20 them closely. I just viewed them from the distance because
21 they were lying there, people, police were moving. So that
22 is when I requested Constable Molefe, "Video the scene as
23 it is so that we maybe one day," like today now we can show
24 that this is what was happening on that day of incident.

25 MR MPOFU: No Captain, once again I'll

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1 ask you one more question because, to save time. My
2 question really is about your own observations and I want,
3 I'm going to argue at some stage that the persons who are
4 shackled in the open were so clearly visible that someone
5 who had spent hours at the scene must have seen the people
6 who have been shackled. So as I say, I'm giving you the
7 opportunity to explain your alleged non-observance of such
8 a patent thing, as it were. You understand where I'm
9 going?

10 CAPTAIN MOHLAKI: I will comment on that,
11 Chair, because my duty, one of the primary function of my
12 duty when I arrive at the crime scene is to photograph the
13 crime scene. Before I can do that I have to make a walk-
14 through, but before I can make a walk-through, I cannot
15 make a walk-through in the, at the same time the paramedics
16 and the police are walking around. So I won't be able to
17 record or observe closely, because I cannot just stand at
18 the distance and say I'm observing this is happening. What
19 I observed is that the police and paramedics are walking
20 around. So the best thing to do, let's videograph the
21 scene.

22 MR MPOFU: Yes. When did you make your
23 first walk-through, as you call it?

24 CAPTAIN MOHLAKI: Immediately after
25 Molefe finished to videograph and inform me that he's

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1 finished with the videographing, then I photographed my
 2 case information around 18:26. Then from there we make our
 3 walk-through to check the bodies and now to start making
 4 record. By then there were still police officials and
 5 paramedics that they are removing people from the crime
 6 scene.

7 MR MPOFU: If you don't mind me asking,
 8 Captain, what were you doing for the two and a half hours
 9 that preceded that time?

10 CAPTAIN MOHLAKI: I have to give
 11 Constable Molefe opportunity to videograph and give a
 12 feedback. From there we plan how are we going to process
 13 the crime scene, while we are waiting for assistance.
 14 There's no hurry maybe to investigate, to process, or
 15 saying it's two hours expired, because if they can save the
 16 life of the people, I'll be happy.

17 MR MPOFU: Yes Captain, don't get me
 18 wrong here. At this stage I'm not questioning the length
 19 of time. All – maybe let me just put it to you. I'd like
 20 to say that in that two or two and a half hours one of the
 21 things that you were doing was to observe the scene, even
 22 for the purposes of making that decision of when it would
 23 be opportune for your team to move in.

24 CAPTAIN MOHLAKI: Yes, if it was just an
 25 ordinary crime scene it was going to be like as you are

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1 saying, but as I explained before that this scene, it was
 2 not an easy scene that you will say maybe within 30 minutes
 3 we have to take photos or within 15 minutes we have to take
 4 photos. It was not easy for me, so the decision that I
 5 took on that day, if you don't agree with it I don't have a
 6 problem with that but I have to take a decision, then that
 7 is what I decided to do on that day.

8 [12:07] MR MPOFU: And where exactly at scene 2
 9 did you spend that two and a half hours?

10 CAPTAIN MOHLAKI: When I arrived at the
 11 crime scene I just parked my vehicle next to Molefe, away
 12 from the scene, just on that side of body C but away from
 13 that because that is how I manage my crime scene.

14 MR MPOFU: But from wherever you were,
 15 you were able to make an informed decision as to whether
 16 the crime was now ripe for you to move in or whether it was
 17 still too busy, correct?

18 CAPTAIN MOHLAKI: I was standing now
 19 between two decisions to make, that must I process like
 20 this or must I wait? So what witness statement important
 21 at that time is that, let me wait, let them save the lives
 22 of the people. Fortunately they did manage to save some,
 23 so that means I take a right decision maybe.

24 MR MPOFU: Captain, I'm sorry, you're not
 25 answering my questions and it's quite frustrating. I hear

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1 what you're saying. My simple question was, from where you
 2 were next to body C and so on as you explained, were you
 3 able to observe the scene to such an extent that you were
 4 able to make the decision as to whether it was still too
 5 early to move in with your team and at a particular point
 6 that it was appropriate to do so?

7 CAPTAIN MOHLAKI: Okay, before I respond
 8 to your question let me just make apology if I'm
 9 frustrating you, that is not my intention.

10 MR MPOFU: Apology is accepted.

11 CAPTAIN MOHLAKI: Okay. Then to respond
 12 to your question, where I was positioned I was able to see
 13 the area where the holding area for arrested people and
 14 temporary medical centre –

15 MR MPOFU: Thank you.

16 CAPTAIN MOHLAKI: But to see the overall
 17 or overview of the crime scene, it was not going to be easy
 18 for me to take that decision.

19 MR MPOFU: Yes. Thank you, Captain, and
 20 the apology is accepted. I think so far we have been
 21 working well, so I didn't – I was just expressing a little
 22 frustration. Now the – you've mentioned body C, towards
 23 the end of the video did you hear the loud laughter of the
 24 policemen as they were approaching body C?

25 CAPTAIN MOHLAKI: That's correct, Chair

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1 and commissioners.

2 MR MPOFU: And that body that is shown
 3 lying upwards after the laughter, is that of Mr Mpumza,
 4 body number C, is that correct? The one that had many –
 5 that you say you observed about five or six wounds, is that
 6 the same body?

7 CAPTAIN MOHLAKI: You are saying it's
 8 Thobile Mpumza?

9 MR MPOFU: Mpumza, yes.

10 CAPTAIN MOHLAKI: That's correct, Chair.

11 MR MPOFU: Is that correct? And the
 12 bodies of Mr Nokamba and Mr Samphendu, which are
 13 respectively I and J, are almost on top of each other. Mr
 14 Nokamba's leg is on top of Mr Samphendu, is that correct?

15 CAPTAIN MOHLAKI: That's correct, Chair
 16 and commissioners.

17 MR MPOFU: Did you observe that?

18 CAPTAIN MOHLAKI: Yes, I did.

19 MR MPOFU: And body, the body of Mr
 20 Nokamba is the body that was missed in the aerial photo
 21 where you kindly assisted the Commission to point out that
 22 there was another body, is that correct??

23 CAPTAIN MOHLAKI: The body of?

24 MR MPOFU: The body I, Mr Nokamba. I'm
 25 saying – you remember earlier you gave evidence, whenever

1 you were giving evidence-in-chief, that in the aerial
2 photograph that you were helping us to correct, that one of
3 the bodies had been missed and all I want to establish is
4 that that was the body of Mr Nokamba which is body number A
5 – I'm sorry, I'm sorry – I for Iris.

6 CAPTAIN MOHLAKI: That's correct, Chair
7 and commissioners.

8 MR MPOFU: Mr Chair, if I may – just for
9 one second. Chairperson, thank you very much. I have
10 nothing further for this witness and thank you for your
11 patience, Chair.

12 CHAIRPERSON: Thank you. Do any of the
13 other representatives of the parties wish to ask questions
14 of the witness? Some of those who have cross-examined
15 already may wish to ask further questions flowing from the
16 video we saw. If you wish to cross-examine – yes?

17 CROSS-EXAMINATION BY MR GUMBI: Yes,
18 Chairperson. I'm willing to cross-examine this witness.
19 Captain, maybe as a point of entry let me introduce myself.
20 My name is Louis Gumbi, instructed by Mofomme Attorneys.
21 I'm representing POPCRU in these proceedings. Captain, I
22 hope you are in a better position to see me.

23 CAPTAIN MOHLAKI: Ja, more or less.

24 MR GUMBI: Yes. Captain, your testimony
25 kept on highlighting the working conditions under which you

1 operate as a crime scene expert and I wanted to zoom in,
2 into those working conditions – specifically on the day in
3 question, that is the 16th of August 2012.

4 CAPTAIN MOHLAKI: Can you repeat your
5 question? Sorry sir, can you repeat your question?

6 MR GUMBI: I'm saying that –

7 CHAIRPERSON: He hasn't asked a question
8 yet.

9 MR GUMBI: - your evidence, in fact your
10 testimony kept on raising working conditions under which
11 you operate as a crime scene expert, so I wanted to zoom
12 into those working conditions, specifically on the day in
13 question. Do you understand me, sir? As a police officer,
14 for how long have you been a crime scene expert?

15 CAPTAIN MOHLAKI: For 12 years, Chair and
16 commissioners.

17 MR GUMBI: Would I be correct that as a
18 crime scene expert you are exposed to different gruesome
19 crime scenes on a daily basis, monthly basis, even on a
20 weekly basis?

21 CAPTAIN MOHLAKI: That's correct, Chair
22 and commissioners.

23 MR GUMBI: Sometimes you are summoned to
24 attend a crime scene, car crash crime scene or fire crime
25 scene, even murder crime scenes on a daily basis?

1 CAPTAIN MOHLAKI: That's correct, Chair
2 and commissioners.

3 MR GUMBI: Will I be correct to tell you
4 that your job as a crime scene expert requires you to be
5 proper and fit, both physically and mentally?

6 CAPTAIN MOHLAKI: That's correct, Chair
7 and commissioners.

8 MR GUMBI: And will I be correct that
9 sometimes you are summoned to attend a crime scene after-
10 hours because most of the crimes are committed after-hours,
11 like for instance at night?

12 CAPTAIN MOHLAKI: That's correct, Chair
13 and commissioners.

14 MR GUMBI: And you sometimes will go to a
15 crime scene without knowing how gruesome the crime scene
16 is.

17 CAPTAIN MOHLAKI: That's correct, Chair
18 and commissioners.

19 MR GUMBI: On the 16th of August 2012 you
20 attended this crime scene without knowing the magnitude of
21 the crime scene.

22 CAPTAIN MOHLAKI: That's correct, Chair
23 and commissioners.

24 MR GUMBI: And you were not even briefed
25 how magnitude this crime scene is.

1 CAPTAIN MOHLAKI: Yes, I will agree with
2 you but if you are saying I was not briefed, you are
3 referring specifically to attending to the scene because in
4 the morning I was briefed what to do for the day.
5 Unfortunately the shooting happened, so there was no time
6 to go back to JOC maybe for briefing. We have to take
7 decisions while we are at the crime scene.

8 MR GUMBI: Yes, that's my point. You
9 weren't aware that you are going to attend a crime scene of
10 such a magnitude on that day.

11 CAPTAIN MOHLAKI: That's correct, Chair
12 and commissioners.

13 MR GUMBI: When you attended the crime
14 scene, you testified before this Commission that the crime
15 scene was still alive, paramedics were moving all over,
16 police officers were moving all over.

17 CAPTAIN MOHLAKI: That's correct, Chair
18 and commissioners.

19 MR GUMBI: Would it be correct, Captain,
20 that this was a unique crime scene in your experience as a
21 crime scene investigator or as a miner?

22 CAPTAIN MOHLAKI: That's correct, Chair
23 and commissioners.

24 MR GUMBI: Would I be correct, Captain,
25 that your job as a crime scene expert required you to

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1 process the crime scene in detail and it requires you to
 2 implement maximum concentration when you're processing the
 3 crime scene?
 4 CAPTAIN MOHLAKI: That's correct, Chair
 5 and commissioners.
 6 MR GUMBI: Is it correct also again,
 7 Captain, that when you arrive at the crime scene,
 8 procedurally you have to secure the crime scene?
 9 CAPTAIN MOHLAKI: Yes, it's true if, when
 10 I arrive at the crime scene, it is not correctly cordoned
 11 off but usually or the norm, the practice is the first
 12 person to arrive at the crime scene, he may be a visible
 13 member from the community service centre or from
 14 detectives, the first one to arrive there is the – one of
 15 his responsibilities is to cordon the crime scene but if I
 16 arrive and I see that the scene is not cordoned, I will do
 17 that.
 18 MR GUMBI: Would I be correct, Captain,
 19 that as you testified earlier on, that this was a unique
 20 crime scene and it was difficult for you to control the
 21 crime scene because paramedics and police officers, they
 22 were moving all over the crime scene?
 23 CAPTAIN MOHLAKI: That's correct, but
 24 what we did on the day in question, we – I requested that
 25 one Nyala must monitor the other side of the hill, one

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1 Nyala the other side of the hill and the other Nyala the
 2 other side of the hill and the remaining side is the side
 3 that when you go back, you are walking towards crime scene
 4 1. I'm highlighting this because I allowed the police and
 5 the paramedics to work so that there's no other people who
 6 would be moving from outside the crime scene to come into
 7 the crime scene.
 8 MR GUMBI: Okay but after that, as you
 9 testified earlier on, you did take a walk through the scene
 10 of the crime.
 11 CAPTAIN MOHLAKI: That's correct, Chair.
 12 MR GUMBI: And would I be correct,
 13 Captain, that when you took a walk through the scene of a
 14 crime you were trying to locate evidence within the
 15 vicinity of the crime scene?
 16 CAPTAIN MOHLAKI: That's correct, Chair
 17 and commissioners.
 18 MR GUMBI: And while you were taking a
 19 walk through the scene of the crime, you observed injured
 20 people, you observed dead bodies that were lying within the
 21 vicinity of the crime scene.
 22 CAPTAIN MOHLAKI: No, it's not like that.
 23 I cannot make a walk through while the injured people are
 24 still at the crime scene. That is why I'm allowing the
 25 paramedics to do their job to save lives. After they have

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1 removed what they can remove, I will then make my walk
 2 through. That is why I never managed to see the injured
 3 people closely because that is not part of my standard
 4 operating procedure.
 5 MR GUMBI: Yes, if I were to rephrase my
 6 question, through you Chairperson, what I'm saying is that
 7 on that day in question you took a walk through the scene
 8 of the crime, then you observed those dead bodies besides
 9 those injured people that they were taking away.
 10 CAPTAIN MOHLAKI: That's correct, Chair
 11 and commissioners.
 12 MR GUMBI: And those dead bodies, they
 13 were injured and they were bleeding, I assume.
 14 CAPTAIN MOHLAKI: That's correct, Chair.
 15 MR MAHLANGU: I'm sorry, Mr Chairperson,
 16 bleeding as in the present, or bled?
 17 [12:27] MR GUMBI: Bled. Would it be correct,
 18 Captain, that those images you've just referred to, they're
 19 not good at all, they're horrific images?
 20 CAPTAIN MOHLAKI: That's correct, Chair
 21 and commissioners.
 22 MR GUMBI: And at all times while you
 23 were there - I believe that you were there until the next
 24 day and you were busy observing those horrific images there
 25 throughout the night.

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1 CAPTAIN MOHLAKI: That's correct, Chair
 2 and commissioners.
 3 MR GUMBI: And then the next day you went
 4 to your home. I assume you are married, you are a father,
 5 you are a husband.
 6 CAPTAIN MOHLAKI: That's correct, Chair
 7 and commissioners.
 8 MR GUMBI: Would I be correct, Captain,
 9 that you didn't receive any debriefing intervention after
 10 you examined this crime scene?
 11 CAPTAIN MOHLAKI: I will disagree with
 12 you.
 13 MR GUMBI: Have you ever received any
 14 debriefing intervention after remaining this crime scene?
 15 CAPTAIN MOHLAKI: Are you referring
 16 immediately after the –
 17 MR GUMBI: Immediately –
 18 CAPTAIN MOHLAKI: - or between the 16th
 19 and maybe today, as we are speaking?
 20 MR GUMBI: I'm saying that between the
 21 16th and the 17th before you went home.
 22 CAPTAIN MOHLAKI: No, I now understand
 23 your question. No, not at all. I agree with you, I never
 24 attend to any ESW.
 25 MR GUMBI: In your career as a crime

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1 scene expert –

2 CHAIRPERSON: Mr Gumbi, you'll forgive me

3 but how are these, is this line of questioning going to

4 assist the Commission to answer any of the questions which

5 arise for decision under the terms of reference?

6 MR GUMBI: Chairperson, I was just

7 briefly dealing with the working conditions under which

8 Captain –

9 CHAIRPERSON: Are the working conditions

10 - forgive me – are the working conditions under which the

11 members of the police force were operating on the day in

12 question, particularly this particular witness was

13 operating, how are they going to assist us to answer the

14 questions we're called upon to answer under the terms of

15 reference?

16 MR GUMBI: I do believe, Chairperson,

17 that during the course of these proceedings we have a team

18 dealing with the SAPS and the violence. So for me it was a

19 good opportunity to deal with that issue through this

20 witness's –

21 CHAIRPERSON: Have you dealt with it now?

22 MR GUMBI: I'm almost done, Chairperson.

23 CHAIRPERSON: Alright, well –

24 MR GUMBI: Yes. So the conclusion,

25 Captain, in your career as a crime scene expert, how many

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1 occasions have you ever received debriefing intervention

2 after cross-examining a horrible crime scene, if you can

3 estimate?

4 CAPTAIN MOHLAKI: I'm not good in

5 estimation but let me say if – the EAW are there to assist

6 us, so we just make an agreement with them that when I

7 finish standby I must go and attend to, for debriefing, but

8 if it's a push, I feel that I cannot take it any longer but

9 it's not yet the finishing of my standby, I will consult

10 with them because they are there 24 hours.

11 MR GUMBI: Those video images that were

12 played before this Commission, are they not haunting you at

13 night?

14 CHAIRPERSON: I'm sorry, Mr Gumbi, how on

15 earth does that question assist us to answer any of the

16 issues which arise out of the terms of reference?

17 MR GUMBI: Chairperson, I thought that

18 this witness did highlight some working conditions under

19 which he operated so –

20 CHAIRPERSON: No, but how could that –

21 we're not busy enquiring into the working conditions of the

22 police after they've examined the scene of this crime and

23 whether they're debriefed and whether the imagines haunt

24 them. That's not one of the issues that we're called upon

25 to write a report on, so how does it help us? Aren't you

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1 wasting time now? I've been patient with you because I

2 couldn't see where you were going but I thought maybe you

3 were going somewhere and I didn't want to be unkind and

4 difficult but really, are you helping us at all –

5 MR GUMBI: Yes, Chairperson, I think it

6 was my last question this one, but if the Chairperson –

7 CHAIRPERSON: If it's your last question

8 then you've concluded your cross-examination?

9 MR GUMBI: Yes.

10 CHAIRPERSON: Alright. Good, thank you.

11 Does anybody else wish to ask any questions? Mr Bizos?

12 CROSS-EXAMINATION BY MR BIZOS SC:

13 Captain, when we were watching the visual there was talking

14 going on in a language which I and most of my colleagues do

15 not understand. Did you pick up anything of significance

16 in the conversations that were taking place in the loud

17 voice whilst you were there?

18 CAPTAIN MOHLAKI: I only picked up that

19 the people they were talking and suddenly there was a loud

20 laugh, but I never picked up specifically what they were

21 saying.

22 MR BIZOS SC: Mr Chairman, I would submit

23 that the evidence presenters should actually try and

24 decipher what was said. It may be of some importance in

25 the evidence that may emerge and I want to put just one

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1 last question. Did you hear loud laughter?

2 CAPTAIN MOHLAKI: That's correct, Chair

3 and commissioners.

4 MR BIZOS SC: Can you tell us what might

5 have kindled that laughter? Was there anything to laugh

6 about around there?

7 CAPTAIN MOHLAKI: I don't know at all,

8 Chair.

9 MR BIZOS SC: Thank you, Mr Chairman, I

10 have no further questions. I hope that the suggestion will

11 be taken up.

12 CHAIRPERSON: I would be surprised if it

13 wasn't but I'll ask Mr Madlanga to comment in a moment, but

14 let's see whether there's anybody else who wants to cross-

15 examine the witness.

16 MS BARNES: Chair, if I might place

17 myself on record? Adv Barnes representing AMCU. Chair, on

18 the last occasion Adv Bruinders reserved AMCU's rights to

19 cross-examine further just on matters arising out of the

20 video.

21 CHAIRPERSON: You wish to exercise those

22 rights now on behalf of AMCU?

23 MS BARNES: I do, Mr Chair.

24 CHAIRPERSON: Please do so.

25 MS BARNES: Thank you.

<p style="text-align: right;">Page 928</p> <p>1 CROSS-EXAMINATION BY MS BARNES: Captain, 2 you testified on the last occasion that traditional weapons 3 were found next to body C, that is Mr Mpumza, is that 4 correct? 5 CAPTAIN MOHLAKI: That's correct, Chair 6 and commissioners. 7 MS BARNES: What were the weapons, do you 8 recall? 9 CAPTAIN MOHLAKI: I will have to refer to 10 my photos. 11 MS BARNES: Right. I think you'll find 12 it at B63. 13 MR MAHLANGU: Mr Chair, the recorders 14 once again ask if counsel now asking questions would just 15 clearly put herself on record. 16 MS BARNES: Yes, I believe I did so 17 earlier – 18 CHAIRPERSON: Yes, she did. She's Adv 19 Heidi Barnes, she did say that when she started. 20 CAPTAIN MOHLAKI: Okay, I'm with the 21 picture now. 22 MR MAHLANGU: Mr Chair, the recorders 23 once again ask if counsel now asking questions would just 24 clearly put herself on record. 25 MS BARNES: Yes, I believe I did so</p>	<p style="text-align: right;">Page 930</p> <p>1 MS BARNES: Were you present when the 2 paramedic attended to Mr Mpumza? 3 CAPTAIN MOHLAKI: Not at all, Chair. 4 MS BARNES: So when you arrived and you 5 saw Mr Mpumza's body for the first time, the paramedics had 6 already attended to him, is that correct? 7 CAPTAIN MOHLAKI: That's correct, Chair. 8 MS BARNES: And they had opened his shirt 9 and that is how you were able to see the bullet wounds, is 10 that correct? 11 CAPTAIN MOHLAKI: That's correct, Chair. 12 MS BARNES: I wonder if we could at this 13 stage play the video that we have seen earlier, but just 14 from a minute 9:40? It's just the last section. I wonder 15 if perhaps the members of the audience could be given an 16 appropriate warning that it will now be shown again. 17 CHAIRPERSON: We're going to see parts of 18 the video which we saw before and there are some 19 distressing scenes on it and those who think that they may 20 find those unbearable to look at, I'll give you an 21 opportunity to leave now or as mentioned before, that 22 people concerned felt that, unpleasant though it was, they 23 thought it appropriate that they should be here to see it – 24 but if they have reconsidered the matter and would like to 25 leave before, I'll give you two minutes to leave before the</p>
<p style="text-align: right;">Page 929</p> <p>1 earlier – 2 CHAIRPERSON: Yes, she did. She's Adv 3 Heidi Barnes, she did say that when she started. Yes, can 4 you tell us which traditional weapons you were referring to 5 in your evidence on the last occasion? 6 CAPTAIN MOHLAKI: I don't know their 7 names but it was just, like if you check on top of the body 8 there on the head, it's an iron bar with a sharp end and 9 also when you look up, there's also the one that is 10 crossing there. It's just unfortunate I don't know the 11 names of those, those weapons. And if you can have other 12 photos from different angles, specifically for these 13 bodies, you will be able to see them closely. 14 MS BARNES: For the record, for the 15 record, you are essentially identifying a spear and a piece 16 of sharpened iron and a stick, isn't that correct? 17 CAPTAIN MOHLAKI: That's correct, Chair 18 and commissioners. 19 MS BARNES: Now you testified earlier 20 this morning that when you saw Mr Mpumza's body, you were 21 able to see some bullet wounds in his chest because his 22 shirt had been opened by the paramedics. Do you recall 23 giving that evidence earlier this morning? 24 CAPTAIN MOHLAKI: That's correct, Chair 25 and commissioners.</p>	<p style="text-align: right;">Page 931</p> <p>1 video is re-shown on this particular aspect. 2 MR MADLANGA SC: Mr Chairman, 3 commissioners, perhaps this video should be given an 4 exhibit number. It should be H, if it is given that number 5 - 6 CHAIRPERSON: So Constable Molefe's video 7 will be – or certainly clip 3 of it is all we've seen so 8 far – will be Exhibit H. Is that correct? 9 MR MADLANGA SC: Part 3 of – yes, yes, 10 part 3 of his video, Chair. 11 CHAIRPERSON: Yes, very well. From now 12 on that video will be so described, thank you. 13 MS BARNES: I wonder if I might indicate 14 to the evidence leaders at a particular point at which, if 15 we might pause the video once it starts. Thank you very 16 much. 17 CHAIRPERSON: I think you have to 18 indicate it to those who are responsible for showing the 19 videos, who are at the back of the auditorium at the top. 20 [VIDEO IS SHOWN] 21 MS BARNES: It's the wrong video – 22 CAPTAIN MOHLAKI: Chair, commissioners – 23 MR MADLANGA SC: That's another video. 24 That's Mr Riley's video. I don't – 25 CHAIRPERSON: I hadn't recognised that</p>

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1 video at all. It's Exhibit H, Constable Molefe's video
 2 clip, part 3 of it starting at 9 minutes 40 seconds. Is
 3 that correct, Adv Barnes?
 4 MS BARNES: That's correct, Chair.
 5 [VIDEO IS SHOWN]
 6 MS BARNES: If we could pause at this
 7 stage, please? If you could perhaps just indicate,
 8 Captain, that that is one of the traditional weapons that
 9 you identified on the 16th, is that correct?
 10 CAPTAIN MOHLAKI: That's correct, Chair.
 11 MS BARNES: If you could continue,
 12 please?
 13 [VIDEO IS SHOWN]
 14 MS BARNES: You can pause there, please.
 15 Captain, could you just identify the second traditional
 16 weapon on the video?
 17 CAPTAIN MOHLAKI: I'm not sure what is
 18 it. The one that is there, it's passed, a black object. I
 19 don't know if it's an iron bar or is a stick, I'm not sure.
 20 MS BARNES: Is that what you saw on the
 21 16th?
 22 CAPTAIN MOHLAKI: That's correct, Chair.
 23 MS BARNES: Can you also just indicate
 24 for the record how close those traditional weapons are to
 25 Mr Mpumza's body?

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1 CAPTAIN MOHLAKI: That's correct, Chair
 2 and commissioners.
 3 MS BARNES: If you could just give an
 4 indication sir, please, for the record, of how close those
 5 weapons are seen lying to the body?
 6 CAPTAIN MOHLAKI: I never took the
 7 measurement between the body and the closest traditional
 8 weapons but I will estimate two or less metres.
 9 MS BARNES: Thank you, thank you,
 10 Captain. We can stop the video there and then if we might
 11 play the second video at this stage? The second video is
 12 an entirely different video and it is also, it does also
 13 contain disturbing footage.
 14 MR MADLANGA SC: Mr Chairman,
 15 commissioners, my understanding I that that one is Captain
 16 Ryland's video and it should be marked I. Thank you.
 17 CHAIRPERSON: Thank you, Mr Madlanga.
 18 [12:47] MS BARNES: This video can be shown from
 19 two minutes and two seconds in, thank you.
 20 [VIDEO IS SHOWN]
 21 MS BARNES: Just pause it there, please.
 22 Captain, do you agree with me that what we've seen there is
 23 the paramedic approaching the body, is that correct? I
 24 don't know if you were able to see it clearly.
 25 CAPTAIN MOHLAKI: Unless if we replay it

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1 because I do not identify it, the paramedics that you are
 2 referring to.
 3 MS BARNES: Alright, it's playing.
 4 [VIDEO IS SHOWN]
 5 MS BARNES: Alright, if we could pause it
 6 here, please. Sir, do you see that that is the paramedic
 7 attending to the body?
 8 CAPTAIN MOHLAKI: No, it's not the
 9 paramedic. I understand it's a police official.
 10 MS BARNES: Do you see that Mr Mpumza's
 11 shirt at this stage is still buttoned closed? Have you
 12 observed that?
 13 CAPTAIN MOHLAKI: That's correct, Chair
 14 and commissioners.
 15 MS BARNES: Alright, please continue.
 16 [VIDEO IS SHOWN]
 17 MS BARNES: You can pause it there,
 18 please. Sorry, in fact you can continue at this stage.
 19 [VIDEO IS SHOWN]
 20 MS BARNES: You can pause there, I may
 21 have just missed it. Captain, what I'd like to draw your
 22 attention to is the fact – and we may need to look a little
 23 bit more closely – but to the fact that there are no
 24 traditional weapons lying near the body at this stage, do
 25 you see that?

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1 CAPTAIN MOHLAKI: That's correct, Chair
 2 and commissioners.
 3 MS BARNES: Perhaps if the tape could be
 4 rewind slowly, if that's possible, just so that the
 5 Captain can observe the ground around the body.
 6 [VIDEO IS SHOWN]
 7 MS BARNES: Captain, can you confirm that
 8 there are no traditional weapons close to the body on that
 9 video?
 10 CAPTAIN MOHLAKI: Yes, I cannot identify
 11 any traditional weapons around the body.
 12 MS BARNES: Do you perhaps have an
 13 explanation for why there are no weapons in this video but
 14 there are weapons in the video that follows?
 15 CAPTAIN MOHLAKI: I don't have any idea
 16 at all.
 17 MS BARNES: Thank you, Chair, no further
 18 questions.
 19 CHAIRPERSON: Thank you, Adv Barnes. Any
 20 other representative of any of the parties wish to ask
 21 relevant questions? Yes, Mr Semanya?
 22 CROSS-EXAMINATION BY MR SEMENYA SC:
 23 Thank you, Chair. Captain, I'm told that when processing a
 24 scene like this, one would need to do a – to plot a grid,
 25 is that correct?

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1 CAPTAIN MOHLAKI: That's correct, Chair.
 2 MR SEMENYA SC: And that's part of your
 3 standing operating procedures?
 4 CAPTAIN MOHLAKI: That's correct, Chair.
 5 MR SEMENYA SC: The precise reason for
 6 that is to, as expertly as possible, make sure you don't
 7 miss any piece of evidence that may be proof material.
 8 CAPTAIN MOHLAKI: That's correct, Chair
 9 and commissioners.
 10 MR SEMENYA SC: Your evidence is that you
 11 inspected a radius of 100 metres, you would recall, around
 12 Mr Mpumza's body. Do you recall that?
 13 CAPTAIN MOHLAKI: That's correct, Chair
 14 and commissioners.
 15 MR SEMENYA SC: Was that done on a
 16 plotted grid, that 100, 150 metres you testified about?
 17 CAPTAIN MOHLAKI: Repeat your question,
 18 Chair?
 19 MR SEMENYA SC: Was that done on a
 20 plotted grid, that 100 or 150 metres that you testified
 21 about?
 22 CAPTAIN MOHLAKI: I don't understand your
 23 question. How, what do you mean by a plotted grid?
 24 MR SEMENYA SC: Don't you plot a grid,
 25 make your imaginary lines that you'd move along and come

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1 back, just so that you comb the area thoroughly, as
 2 thorough as you can?
 3 CAPTAIN MOHLAKI: Thanks, Chair, I
 4 understand your question. It depends on which searching
 5 method are you going to use because on that day of the 16th,
 6 the 17th, we were just making a single formation of – we
 7 were nine LCRC members. Then we just walked outside there,
 8 from the inside going outside, that is the searching method
 9 that we were using on that day.
 10 MR SEMENYA SC: And that holds true for
 11 the entire area, including the southern side of the koppie?
 12 CAPTAIN MOHLAKI: That's correct, Chair.
 13 MR SEMENYA SC: Can I invite you to have
 14 a look at B47? That's your sketch plan.
 15 CAPTAIN MOHLAKI: I'm ready,
 16 Commissioner.
 17 MR SEMENYA SC: On the southern side of
 18 the plan more or less where you have, to the left of AA13,
 19 AA24, do you see that?
 20 CAPTAIN MOHLAKI: That's correct, Chair.
 21 MR SEMENYA SC: Later evidence will be
 22 that members of the Canine discharged approximately 83
 23 shots that are not reflected on your sketch, is that
 24 possible?
 25 CAPTAIN MOHLAKI: What is going to

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1 reflect –
 2 CHAIRPERSON: Sorry, sorry, forgive me
 3 for interrupting. You said later, I take it –
 4 MR SEMENYA SC: Later evidence.
 5 CHAIRPERSON: Oh, later evidence will
 6 indicate that prior to his coming on the scene, shots were
 7 fired which are not reflected on his – yes, thank you.
 8 CAPTAIN MOHLAKI: What is reflecting here
 9 is what I got on the day of my investigation at the crime
 10 scene. If somebody would come and explain that there were,
 11 83 shots were fired as you are saying, but I only recovered
 12 the cartridges that I've indicated to that.
 13 MR SEMENYA SC: What I'm trying to cover
 14 with you is that it is possible that some of these were not
 15 picked up in your processing?
 16 CAPTAIN MOHLAKI: That's correct, Chair
 17 and commissioners.
 18 MR SEMENYA SC: So too will be the case
 19 in relation to Mr Mpumza's body where he was at C. The
 20 evidence will be that no less than 12 shots were fired but
 21 there are no cartridges that seemed to be picked up by the
 22 LCRC in terms of your sketch plan.
 23 CAPTAIN MOHLAKI: That's correct, Chair
 24 and commissioners.
 25 MR SEMENYA SC: Those are the questions,

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1 Chair.
 2 CHAIRPERSON: Thank you, Mr Semenya.
 3 Yes, Mr Mpofu?
 4 MR MPOFU: Yes, Chairperson, just one
 5 question arising from the video, the second video.
 6 CHAIRPERSON: Yes, certainly. You can
 7 ask two if you like.
 8 MR MPOFU: I'll try and stick to that,
 9 Chair.
 10 FURTHER CROSS-EXAMINATION BY MR MPOFU:
 11 Captain, if you go to B63, this is in relation to something
 12 that you and I covered earlier, would you agree with me
 13 that that body or rather the picture indicates that it is
 14 already dark and the spotlight is shining on the body?
 15 CAPTAIN MOHLAKI: I've not yet got the
 16 picture.
 17 MR MPOFU: Oh, sorry -
 18 CAPTAIN MOHLAKI: What is the body
 19 number?
 20 MR MPOFU: 63, body C.
 21 CAPTAIN MOHLAKI: Body C.
 22 MR MPOFU: The one that you were talking
 23 about now.
 24 CAPTAIN MOHLAKI: We don't have body C.
 25 Sorry Chair, we don't have body C. Maybe we're missing –

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1 MR MPOFU: Okay.

2 CAPTAIN MOHLAKI: Okay Chair, I'm ready.

3 MR MPOFU: Do you want me to repeat the

4 question?

5 CAPTAIN MOHLAKI: Please, please Chair.

6 MR MPOFU: I'm saying in relation to what

7 you and I covered earlier, namely that the photos were

8 taken at night, would you agree that the photo indicates

9 that there's a spotlight shining on the body but the rest

10 of the surrounds are dark?

11 CAPTAIN MOHLAKI: That's correct, Chair

12 and commissioners.

13 MR MPOFU: And without having to play the

14 video again, would you agree that when the – what you

15 described as the policeman, arrived next to the body, it's

16 broad daylight, actually the sun is shining on his arm?

17 CAPTAIN MOHLAKI: That's correct, Chair.

18 MR MPOFU: So would it be fair then to

19 say that those traditional weapons that appeared there must

20 have arrived at a time between that broad daylight and this

21 darkness?

22 CAPTAIN MOHLAKI: That's correct, Chair

23 and commissioners.

24 MR MPOFU: Thank you, Chair.

25 CHAIRPERSON: The Commission will now

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1 adjourn until two o'clock.

2 [INQUIRY ADJOURNS INQUIRY RESUMES]

3 [14:03] CHAIRPERSON: Commission resumes. Is

4 there anyone who wishes to ask any further questions in

5 cross-examination, before I invite Mr Madlanga to re-

6 examine? Mr Madlanga, do you have any questions in re-

7 examination?

8 MR MADLANGA SC: Just a few, Mr Chairman,

9 Commissioners. When you were cross-examined by Mr

10 Bruinders you initially said that whilst you were waiting

11 at the holding area you sat in your car, but later in your

12 testimony you mentioned a conversation about Pirates and

13 Chiefs Football Clubs. Does this mean that conversation

14 took place whilst you were in your cars, or what does that

15 mean?

16 CAPTAIN MOHLAKI: Six hours was a very

17 long time, so we were sitting in our different cars and

18 sometimes we just go and stand outside. So I never record

19 all the movement of we were inside the vehicle, from there

20 we go out and we talked, because one will sit in his

21 vehicle, one will come and visit him in, while he's in his

22 vehicle, or some will be standing outside the vehicle just

23 talking, because it was just an ongoing process.

24 MR MADLANGA SC: Mr Bruinders also asked

25 you to indicate on B46, which is your Google map, the

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1 movement of paramedics from the emergency medical centre to

2 where you said the ambulances were. As I understood what

3 you indicated, you indicated movement from that centre in a

4 southerly direction, and you indicated that the ambulances

5 were somewhere, I would say south-easterly direction, that

6 is below the koppie. Would I be capturing what you said

7 correctly?

8 CAPTAIN MOHLAKI: That's correct, Chair

9 and Commissioners.

10 MR MADLANGA SC: Now what I would like to

11 establish, was this vehicular or human traffic, or was it

12 cars or people that were moving from the emergency medical

13 centre down to where the ambulances were?

14 CAPTAIN MOHLAKI: It was the movement of

15 the paramedics walking, not driving.

16 MR MADLANGA SC: During the time that you

17 observed their movement, did you ever see them walking or

18 moving in the obscure places, like between the rocks where

19 some of the bodies were?

20 CAPTAIN MOHLAKI: I don't recall seeing

21 them going that side. Maybe, Chair, if you allow me to

22 explain, the problem is I never got enough time maybe to

23 observe everything that was happening, so what I did,

24 immediately when I saw a movement of paramedics and the

25 police I requested Molefe that, "Molefe, the best way to do

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1 is to record, video record the movement or the scene as it

2 is."

3 MR MADLANGA SC: You testified under

4 cross-examination about CAS135/8/2012 and CAS136/8/2012.

5 If you must, please look at your records and just tell me

6 whether you're able to indicate who the accused were in

7 those two matters.

8 CAPTAIN MOHLAKI: Just mention the case

9 numbers again.

10 MR MADLANGA SC: CAS135/8/2012 and

11 CAS136/8/2012.

12 CAPTAIN MOHLAKI: Can you repeat your

13 question, Chair?

14 MR MADLANGA SC: You indicated – I don't

15 want to go back to my notes now and see which one of the

16 legal representatives was cross-examining you, but under

17 cross-examination do you recall - or I think it was Adv

18 Mpofo – you mentioned CAS135 and CAS136, both of August

19 2012. Do you remember that?

20 CAPTAIN MOHLAKI: That's correct, Chair.

21 MR MADLANGA SC: Now my question is, are

22 you able to tell who the accused were in those two cases,

23 if any people were actually charged in respect of the cases

24 that had been opened, or the dockets that had been opened?

25 Are you able to tell who the accused were?

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1 CAPTAIN MOHLAKI: Not at all, Chair. I
 2 never make a follow-up to check who was the accused and if
 3 they were charged.
 4 MR MADLANGA SC: At what stage did you
 5 prepare your sketch plan, that is the sketch plan which is
 6 part of your slide show?
 7 CAPTAIN MOHLAKI: My sketch plan was
 8 ready before the Commission started. Then immediately
 9 after the first visit, the 1st of October, I have to add
 10 another point, the CC3, that 9-millimetre cartridge case
 11 that was recovered on the day of inspection.
 12 MR MADLANGA SC: But when had you drawn
 13 it? When did you draw it, or prepare it? I know it was
 14 ready before the Commission commenced the proceedings, or
 15 the hearings, but when had you drawn it up?
 16 CAPTAIN MOHLAKI: Let me be clear with
 17 your question. Referring, including the cartridge that I
 18 recover after inspection, or before that?
 19 MR MADLANGA SC: Before that.
 20 CAPTAIN MOHLAKI: Before that, if my
 21 memory serves me well, it was ready, because I was aware
 22 that the Commission will be starting on the 1st of October.
 23 Before the 1st of October it was ready. Specifically to say
 24 this day it was ready, it won't be easy because it is
 25 ongoing process of making photos and making sketch ready.

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1 MR MADLANGA SC: Do I understand you to
 2 be saying you drew it over a period of time?
 3 CAPTAIN MOHLAKI: That's correct, Chair.
 4 MR MADLANGA SC: Mr Chairman,
 5 Commissioners, I would with the leave of the Commission
 6 like to lead the witness on certain photographs that were
 7 taken by Warrant Officer Ramanala, that's R-A-M-A-N-A-L-A,
 8 who is there from POP Springs, Public Order Police,
 9 Springs. I have raised the issue with my learned friend Mr
 10 Semenya. These photographs were discovered by SAPS itself
 11 and Mr Semenya indicated to me that SAPS will not be
 12 objecting to us leading the evidence and in fact will be
 13 accepting that these are indeed Warrant Officer Ramanala's
 14 photographs. If anything needs to be proved with regard to
 15 the photographs, it would be the time when they were taken,
 16 but even on that, Mr Chairman, Mr Semenya indicated that if
 17 it's clear that those were taken in broad daylight, SAPS is
 18 not likely to object to us proceeding on the basis that
 19 they were taken during the day and before Captain Mohlaki's
 20 photographs were taken.
 21 MR SEMENYA SC: We consent to that,
 22 Chair.
 23 CHAIRPERSON: Very well, Mr Madlanga, you
 24 may lead the evidence. It will be new evidence, so
 25 obviously everyone will have a chance to cross-examine all

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1 over again.
 2 MR MADLANGA SC: Yes Chair, thank you.
 3 Mr Dos Reis, can you please play the slide? Mr Dos Reis,
 4 I'm sorry for pronouncing you "Rice." Dos Reis. It's the
 5 B version, the B presentation, Mr Reis.
 6 CHAIRPERSON: You did say how the
 7 photographer's name was to be spelt, but I didn't write it
 8 down. Could you please repeat it for me?
 9 MR MADLANGA SC: Ramanala, R-A-M-A-N-A-L-
 10 A, Warrant Officer.
 11 CHAIRPERSON: Thank you.
 12 MR MADLANGA SC: POP Springs, Mr
 13 Chairman. Again, Chairperson, these are gruesome
 14 photographs which may be upsetting or cause stress to some
 15 of the people in the audience.
 16 CHAIRPERSON: We'll again wait two
 17 minutes before they are shown, and anyone who wants to
 18 leave during that period is free to do so. There is a
 19 warning again that they are gruesome and they may cause
 20 distress. Mr Madlanga, have you got hard copies for us, or
 21 have you only got the photographs that –
 22 MR MADLANGA SC: At this stage, Chair,
 23 it's just the electronic version, but we will prepare hard
 24 copies, and may this be handed in as exhibit J, Mr
 25 Chairman.

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1 CHAIRPERSON: Well yes, I was going to
 2 hand in, before we move on to what's effectively new
 3 matter, an extract of the diary which he referred to on
 4 Wednesday, the pages of his diary covering the period the
 5 15th to the 17th of August. I suspect that we could make
 6 those exhibit I and then we could make the –
 7 MR MADLANGA SC: Haven't we had I, Mr
 8 Chair? Mr Ryland's video.
 9 CHAIRPERSON: Oh, I beg your pardon.
 10 Yes, you're quite right. Mr Ryland's video is I, so this
 11 will be J and Warrant Officer Ramanala's photographs will
 12 then be K.
 13 MR MADLANGA SC: Yes Mr Chair, thank you.
 14 Can we then see the slide, please?
 15 CHAIRPERSON: - idea to ask the captain
 16 what he, if he can identify what –
 17 MR MADLANGA SC: Captain, can you
 18 identify that photograph and are you able to tell who took
 19 it?
 20 CAPTAIN MOHLAKI: It will be me who took
 21 that photos.
 22 MR MADLANGA SC: And you see there are
 23 weapons there. Do you want to quickly describe them?
 24 CAPTAIN MOHLAKI: Yes, I can see some
 25 weapons next to the bodies.

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1 MR MADLANGA SC: Tell us what you see and
2 next to whom.
3 CAPTAIN MOHLAKI: I can see the body I,
4 the one that is close to us. The, next to the body there –
5 MR MADLANGA SC: Just a minute. Mr Dos
6 Reis, can you please zoom in there? Please continue.
7 CAPTAIN MOHLAKI: Okay, body I, the one
8 that was zoomed in, I can see the side, there's an axe next
9 to the hands and also a stick between the two bodies.
10 MR MADLANGA SC: Can you please lower the
11 picture so that we see the body on top better? What do you
12 see there?
13 CAPTAIN MOHLAKI: Also I can see there,
14 usually they call it a butcher knife or what, on the, next
15 to the hands.
16 MR MADLANGA SC: Please move on. Next
17 slide, please. The top picture, is that yours?
18 CAPTAIN MOHLAKI: That's correct, Chair.
19 MR MADLANGA SC: And the one below, is
20 that yours?
21 CAPTAIN MOHLAKI: Not at all, Chair.
22 MR MADLANGA SC: Mr Chairman,
23 Commissioners, that's, the one below is Warrant Officer
24 Ramanala's photograph and it's photograph number 245
25 according the sequencing of the photographs. And in the

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1 photographs in the hard drive it's \Photos\Thursday 16.
2 Now can you recognise the body in the picture below? Are
3 you able to tell which body that is, from your own
4 photographs?
5 CAPTAIN MOHLAKI: It will be body J.
6 MR MADLANGA SC: And you indicate a few
7 moments back that next to body J in your photograph there
8 is what you referred to as a butcher knife, right next to
9 the hand of body J, not so?
10 CAPTAIN MOHLAKI: That's correct, Chair.
11 CHAIRPERSON: Mr Madlanga, am I correct
12 in saying that the upper picture, which was taken by the
13 captain, is B70, 7-0?
14 MR MADLANGA SC: Yes, it is B70, Chair,
15 yes, and the butcher knife is showing there. Thank you.
16 Now look at the bottom picture, Warrant Officer Ramanala's
17 picture. Is the butcher knife there?
18 CAPTAIN MOHLAKI: No, it's not there.
19 CHAIRPERSON: May I ask a question? Do
20 you know when Warrant Officer Ramanala's photographs were
21 taken? I take it they were taken before yours were, but
22 can you tell us what, how long before your pictures were
23 taken did Warrant Officer Ramanala take his?
24 CAPTAIN MOHLAKI: Chair, I don't know
25 exactly what time did he took the picture, because I never

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1 saw him taking those pictures.
2 CHAIRPERSON: Did he take the pictures
3 before you did?
4 CAPTAIN MOHLAKI: It looks like that,
5 Chair.
6 MR MADLANGA SC: Next slide, please.
7 It's the same picture, but do you want to focus on what is
8 close to the body below, the body with something red around
9 the waist?
10 CHAIRPERSON: Same picture again, being
11 B70, 7-0.
12 [14:23] MR MADLANGA SC: You see that the axe is
13 right against the hand there.
14 CAPTAIN MOHLAKI: That's correct, Chair.
15 MR MADLANGA SC: Next slide, please. Do
16 you see the axe anywhere there? That is on the bottom
17 picture.
18 CAPTAIN MOHLAKI: Not at all.
19 CHAIRPERSON: There appear to be two
20 bottom pictures, number 244 and number 268.
21 MR MADLANGA SC: Mr Dos Reis, can you
22 please zoom in on photo 268? Do you see the axe now that
23 is next to the body on photograph 268?
24 CAPTAIN MOHLAKI: That's correct, Chair.
25 MR MADLANGA SC: Is it still right

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1 against the hand as it was in the other photograph?
2 CAPTAIN MOHLAKI: No.
3 MR MADLANGA SC: It is a bit of a
4 distance away from the body in fact.
5 CAPTAIN MOHLAKI: That's correct, Chair.
6 MR MADLANGA SC: Next slide, please.
7 That is your body K, not so?
8 CAPTAIN MOHLAKI: Correct, Chair.
9 MR MADLANGA SC: The picture that was
10 taken by you?
11 CAPTAIN MOHLAKI: That's correct, Chair.
12 MR MADLANGA SC: Next slide, please. Is
13 that the same body?
14 CAPTAIN MOHLAKI: That's correct, Chair.
15 CHAIRPERSON: - picture looks like B74.
16 Is that correct?
17 MR MADLANGA SC: Yes, it is, Mr
18 Chairperson, thank you. Please move to the next slide.
19 Now your photograph is the one on top, not so?
20 CAPTAIN MOHLAKI: Correct, Chair.
21 MR MADLANGA SC: And is there a weapon
22 next to it? If so, what is it?
23 CAPTAIN MOHLAKI: Yes, it's true, there's
24 a weapon. It was a bow with a sharp end.
25 MR MADLANGA SC: It looks like a spear to

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1 me. Would that be an incorrect description?
 2 CAPTAIN MOHLAKI: Ja, if you are saying
 3 spear, yes I'll agree with you.
 4 MR MADLANGA SC: Now look at the
 5 photograph below, 248, the body wrapped in a blanket. Is
 6 that the same body as your body, or as the one in the
 7 picture above, the one that you took above?
 8 CAPTAIN MOHLAKI: Ja, they look the same.
 9 MR MADLANGA SC: Can you see the spear
 10 next to that one? That is the one below.
 11 CAPTAIN MOHLAKI: I don't see any spear.
 12 MR MADLANGA SC: Next slide, please. Did
 13 you take that photograph?
 14 CAPTAIN MOHLAKI: Correct, chair.
 15 MR MADLANGA SC: And which body is that
 16 one?
 17 CAPTAIN MOHLAKI: It's body N.
 18 MR MADLANGA SC: There seems to be quite
 19 a number of weapons around it. Do you want to describe
 20 them?
 21 CHAIRPERSON: Is that going to be helpful
 22 if we said that's B79, I think?
 23 MR MADLANGA SC: Yes, Mr Chairman,
 24 Commissioners, that is so, thank you.
 25 CAPTAIN MOHLAKI: I see a spear and a

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1 rod, two rods, or is it a stick or rod this side on the
 2 right-hand side of the body facing downwards, and also that
 3 other side, I don't know if it's a stick or is it a rod.
 4 MR MADLANGA SC: Mr Dos Reis, please zoom
 5 in on each one of those objects. That seems to be, that is
 6 this side of the body, to be a spear, a stick and a
 7 knobkierie.
 8 CAPTAIN MOHLAKI: That's correct, Chair.
 9 MR MADLANGA SC: And a stick also that
 10 side of the body next to the feet.
 11 CAPTAIN MOHLAKI: That's correct, Chair.
 12 MR MADLANGA SC: Next slide, please. The
 13 picture at the top, that's yours, not so?
 14 CAPTAIN MOHLAKI: Correct, it's mine.
 15 CHAIRPERSON: That's B79.
 16 MR MADLANGA SC: Thank you, Chair.
 17 CHAIRPERSON: And then the two below, 230
 18 and 231 –
 19 MR MADLANGA SC: 230 and 231, are those
 20 yours?
 21 CAPTAIN MOHLAKI: No.
 22 MR MADLANGA SC: Now can you look closely
 23 at those. There's quite a number of weapons next to that
 24 body. Do you see any weapons next to it on photographs 230
 25 and 231?

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1 CAPTAIN MOHLAKI: I don't see any
 2 weapons.
 3 MR MADLANGA SC: And do you agree that
 4 the photographs at least on the face of it appear to have
 5 been taken in broad daylight?
 6 CAPTAIN MOHLAKI: Yes, the two on the
 7 bottom, that's correct.
 8 MR MADLANGA SC: Next slide, please.
 9 Whose photograph is that one, or who took that photograph?
 10 CAPTAIN MOHLAKI: Myself, Chair.
 11 MR MADLANGA SC: What weapon, if any, do
 12 you see next to it?
 13 CAPTAIN MOHLAKI: Okay, I see a yellow, I
 14 don't know if it's a stick or it's a rod. Perhaps let's
 15 move to the next slide for better viewing.
 16 CHAIRPERSON: That appears to be B80.
 17 MR MADLANGA SC: Yes, Chair, thank you.
 18 Is that the same body, that is body O?
 19 CAPTAIN MOHLAKI: That's correct, Chair.
 20 MR MADLANGA SC: What weapons do you see
 21 next to it?
 22 CAPTAIN MOHLAKI: I can see two, one is
 23 an iron rod with a black, I don't know if it's a handle or
 24 what, and also a yellow one just across that black one.
 25 MR MADLANGA SC: Even though not quite at

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1 90 degrees, but the yellow one is standing almost at 90
 2 degrees to the smaller one, the little rod, not so?
 3 CAPTAIN MOHLAKI: That's correct, Chair.
 4 MR MADLANGA SC: Next slide, please. The
 5 photograph at the top is the one that was taken by you, not
 6 so?
 7 CAPTAIN MOHLAKI: Correct, Chair.
 8 CHAIRPERSON: - B80.
 9 MR MADLANGA SC: Yes, yes, still B80.
 10 Thank you, Chair, and on it, that is the one above, you can
 11 still see the two weapons, not so?
 12 CAPTAIN MOHLAKI: Correct. I can still
 13 see them.
 14 MR MADLANGA SC: Describe the weapons
 15 that you see on the two photographs at the bottom, that is
 16 photographs 278 and 279. And please zoom in, Mr Dos Reis.
 17 CAPTAIN MOHLAKI: I can only see one
 18 yellow weapon, and the position is turned a little bit, not
 19 like in the first photo that was taken by me, and the other
 20 weapon is not, I can't see it there.
 21 MR MADLANGA SC: Next slide, please. Did
 22 you take that photograph?
 23 CAPTAIN MOHLAKI: That's correct, Chair.
 24 MR MADLANGA SC: And which body is that?
 25 CAPTAIN MOHLAKI: It's body M.

1 CHAIRPERSON: That looks like B77.
 2 MR MADLANGA SC: Yes, Chair, thank you.
 3 Next slide, please. Can you describe what you see on
 4 there? Is that still your photograph?
 5 CAPTAIN MOHLAKI: That's correct, Chair.
 6 MR MADLANGA SC: And please describe the
 7 weapon that you see there.
 8 CAPTAIN MOHLAKI: I can see something
 9 like the, that, I said it's a butcher knife - I don't know
 10 if it's the correct name for it - with a yellow handle.
 11 MR MADLANGA SC: And am I correct to say
 12 that that weapon is actually underneath the hand or arm of
 13 the deceased person there?
 14 CAPTAIN MOHLAKI: That's correct, Chair.
 15 MR MADLANGA SC: Next slide, please. The
 16 one above, or at the top, is that the same photograph, that
 17 is yours?
 18 CAPTAIN MOHLAKI: That's correct, Chair.
 19 MR MADLANGA SC: And the two below, 270
 20 and 271, are those yours?
 21 CAPTAIN MOHLAKI: No.
 22 MR MADLANGA SC: And quite plainly that
 23 butcher knife is not there.
 24 CAPTAIN MOHLAKI: Correct.
 25 CHAIRPERSON: Mr Madlanga, on B77 it

1 Chairman, Commissioners, thank you.
 2 CHAIRPERSON: Thank you. Mr Semenya,
 3 would you care to cross-examine this witness on this new
 4 evidence?
 5 MR SEMENYA SC: Chair, no more beyond for
 6 the record stating that the National Commissioner of Police
 7 has instituted an investigation to try and ascertain the
 8 circumstances, given the contrasting pictures that have
 9 been shown.
 10 CHAIRPERSON: Thank you, Mr Semenya. Mr
 11 Bham, do you have any questions on behalf of Lonmin?
 12 MR BHAM SC: No, Mr Chairman, none.
 13 CHAIRPERSON: Mr Tip, on behalf of NUM?
 14 MR TIP SC: No questions, Mr Chair.
 15 CHAIRPERSON: Adv Barnes appearing for
 16 AMCU?
 17 MS BARNES: No questions, Chair.
 18 CHAIRPERSON: Mr Bizos?
 19 MR BIZOS SC: - of the witness, but I
 20 wish to address you and the, Mr Chairman, and the members
 21 of the Commission. The evidence that has been presented
 22 clearly shows that there were very serious attempts -
 23 CHAIRPERSON: Sorry to interrupt you, Mr
 24 Bizos. I understand you want to address us and you want to
 25 explain the significance of this evidence.

1 looks as if there's a rod next to the left foot, inside the
 2 left foot actually of the deceased on that picture, which
 3 also doesn't appear to be there on 270 or 271. Is that
 4 correct?
 5 MR MADLANGA SC: Let me perhaps ask Mr
 6 Dos Reis to zoom in, Mr Chair. Mr Chair yes, it's quite
 7 noticeable. Do you agree, Captain, that there's a rod
 8 between the legs in your photograph?
 9 CAPTAIN MOHLAKI: I do agree, Chair.
 10 MR MADLANGA SC: Let's go to the next
 11 slide to see if that rod is there as well. Is it there,
 12 Captain?
 13 CAPTAIN MOHLAKI: I can't see it clearly.
 14 I don't know what is just under the stick, what is that.
 15 MR MADLANGA SC: Perhaps let's go back so
 16 that you can look at it closely, see what it looks like and
 17 then see if you see anything that resembles it in the
 18 picture that we use for comparison.
 19 CAPTAIN MOHLAKI: Ja, I can see it on my
 20 photo.
 21 MR MADLANGA SC: Do you see it in the
 22 other photographs? That is the ones that are not yours.
 23 CAPTAIN MOHLAKI: It's not appearing, I
 24 don't see it.
 25 MR MADLANGA SC: That is the evidence, Mr

1 MR BIZOS SC: Yes.
 2 CHAIRPERSON: Perhaps I should give
 3 everyone else a chance to cross-examine first -
 4 MR BIZOS SC: Yes.
 5 CHAIRPERSON: And then you can address
 6 us.
 7 MR BIZOS SC: Yes, and then I can have my
 8 say.
 9 CHAIRPERSON: Sorry, are you an advocate
 10 or an attorney, Ms Lewis? I'm sorry.
 11 MS LEWIS: Apologies, Chair. I'm an
 12 advocate. I have no questions in cross-examination.
 13 CHAIRPERSON: Mr Mpofo, we know you're an
 14 advocate. Have you got any questions?
 15 MR MPOFU: Yes, thank you, Chair. Just
 16 the customary one question which turns out to be three,
 17 Chair. Once again I don't want to have to go through the
 18 pictures again, but would you agree that if you look at
 19 photographs 248, 268, 230, 231, 278, 279 - sorry, they're
 20 not in order - 270 and 271, the ones that were lower
 21 generally speaking, would you agree that in some or most of
 22 those photographs you can actually see the sunrays? In
 23 other words they must have been taken during the day, would
 24 you agree?
 25 CAPTAIN MOHLAKI: I do agree.

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1 MR MPOFU: Thank you, Chair.
 2 CHAIRPERSON: Thank you, Mr Mpofu. Is
 3 there anyone else who wishes to ask questions before I give
 4 Mr Bizos – no, Mr Madlanga, to re-examine, but I'm trying
 5 to get the cross-examination out of the way first and then
 6 you want to re-examine before Mr Bizos addresses us.
 7 MR MADLANGA SC: Not re-exam, Chair, just
 8 a point I want to raise, but it may be later.
 9 CHAIRPERSON: Right, does anybody else
 10 wish to cross-examine? Mr Madlanga, do you want to speak
 11 before Mr Bizos does?
 12 MR MADLANGA SC: Yes. Chair, this may
 13 become quite important later. My learned colleague Mr
 14 Semenya has indicated that the National Commissioner of
 15 Police has instituted an investigation as to what the
 16 explanation for all this is, or may be, but we are
 17 interested to know when that investigation was instituted.
 18 Is it right from the beginning or is it something that
 19 happened today or whenever? We just want to, we want
 20 clarity on that.
 21 CHAIRPERSON: Mr Semenya, can you give Mr
 22 Madlanga the clarity he seeks?
 23 MR SEMENYA SC: I can definitely state
 24 that when this material was given to us, it was a Thursday,
 25 two weeks ago the investigation was launched immediately

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1 that time.
 2 [14:43] CHAIRPERSON: Mr Madlanga, do you want to
 3 say, comment at all or say anything further in relation to
 4 what Mr Semenya said?
 5 MR MADLANGA SC: Nothing further, thank
 6 you, Chair.
 7 CHAIRPERSON: Mr Mpofu.
 8 MR MPOFU: Yes, Chair. Well mine is just
 9 a small comment, Chair, that we would have appreciated in
 10 the morning before lunch when we were cross-examining
 11 around this very aspect of possibly weapons being placed
 12 next to the bodies, which we did at length, if this
 13 investigation had been brought to our attention that would
 14 have saved a lot of time. We wouldn't have gone through
 15 some of the material we went through on the video. Thank
 16 you, Chair.
 17 CHAIRPERSON: Thank you, Mr Mpofu. Mr
 18 Bizos, I think you said you wanted to address the
 19 Commission.
 20 MR BIZOS SC: The evidence that we have
 21 seen, partly this morning, but more especially this
 22 afternoon, shows clearly that there is at least a strong
 23 prima facie case that there was a deliberate attempt to
 24 defeat the ends of justice shortly after the events took
 25 place. Changing the evidence is a very serious offence.

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1 With due respect to the Commissioner of Police, who
 2 unhappily on her public statements has not been an
 3 impartial observer in these matters, we submit that it is
 4 not to be left. She can do whatever she wants to do, but I
 5 would submit with the greatest respect that the ball is in
 6 the Commission's park and should call as a matter of
 7 urgency on the evidence givers to produce as witnesses as
 8 soon as possible that were in charge of this scene, senior
 9 officers, who could have prevented this falsifying the
 10 facts that your Commission is looking into, and that the
 11 Commission should take the responsibility of actually
 12 inquiring into, as a matter of urgency, who is the officer
 13 in charge and who were the people around that had an
 14 opportunity to really insult the administration of justice
 15 in our country. It's a matter of the utmost urgency; it
 16 can't be left alone – I'm sorry, Mr Interpreter, but you
 17 might as well let me finish with one or two more sentences
 18 and then, you've got a good memory, you'll be able to give
 19 –
 20 MR MAHLANGU: Okay, ja.
 21 MR BIZOS SC: Mr Chairman, this came as a
 22 great surprise to us, and I'm sure that it has come as a
 23 great surprise to –
 24 CHAIRPERSON: Not only to you, Mr Bizos.
 25 MR BIZOS SC: Yes, yes. This is why,

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1 with the greatest respect, we can't leave it for the matter
 2 to be investigated by the Commissioner of Police. We in
 3 the Commission must investigate it as a matter of urgency,
 4 and the best way of doing it is who was the most senior
 5 officer that took responsibility of what happened in the
 6 Klein Koppie before the shooting, and particularly on this
 7 evidence, after the shooting. I do not believe that we can
 8 put it on a back burner and hope that the Commissioner will
 9 come with possibly a self-serving report in her own time.
 10 Thank you, Mr Chair.
 11 CHAIRPERSON: Mr Semenya, you've
 12 indicated you want to say something.
 13 MR SEMENYA SC: Yes, Chair. Perhaps it
 14 is to seek protection, Chair, or guidance, as Mr Mpofu had
 15 used the word. I don't know whether we're listening to
 16 closing argument or what, and I don't know whether it is
 17 proper to say there is a possible report which will be
 18 self-serving. If there is anything inculpatory on the face
 19 of this, it may not be contaminating the police service as
 20 a whole on the operation. Shouldn't we wait for the
 21 evidence to be there and then make this condemnatory
 22 remarks in relation to who could possibly be responsible
 23 for them?
 24 CHAIRPERSON: Thank you. Mr Madlanga, do
 25 you wish to comment?

<p style="text-align: right;">Page 964</p> <p>1 MR MADLANGA SC: Chair, at this stage we 2 are not in a position to respond to either of our 3 colleagues. We would rather prefer to apply our minds to 4 the matter.</p> <p>5 CHAIRPERSON: Yes, thank you. I think Mr 6 Semenya is of course correct in saying that it's premature 7 to be too condemnatory, or to be condemnatory of say the 8 Commissioner of Police or those very senior officials in 9 the police force. It's premature to express any 10 condemnation. What is important is the matter be 11 investigated as thoroughly as possible, and I think it that 12 implicitly in what you were saying is that you will leave 13 no stone unturned to see that this matter is investigated 14 thoroughly.</p> <p>15 MR MADLANGA SC: Chair, I think that we 16 were able today to lead the evidence of this nature is 17 indicative of the fact that we are trying our best to 18 investigate the matter.</p> <p>19 CHAIRPERSON: And in fairness, I think it 20 can be said that these photographs were made available to 21 you by the SAP Service. They didn't seek to conceal these 22 photographs or hide their existence. That's correct, is it 23 not?</p> <p>24 MR MADLANGA SC: That is so, Chair.</p> <p>25 CHAIRPERSON: So that must be part of the</p>	<p style="text-align: right;">Page 966</p> <p>1 briefly speak to the logic of the separation that we 2 propose.</p> <p>3 Our document, for the benefit of people who don't 4 have it in front of them, reads as follows. "The first 5 phase of the Commission will examine the events of 9 to 16 6 August 2012 at Marikana which led to the deaths of at least 7 44 people, more than 70 people being injured, and damage 8 and destruction to property," and we call those events, 9 "the events." Our proposal is that the first phase will 10 not examine the underlying causes of the events. It will 11 be confined to the following issues. Firstly, an 12 investigation of the facts of the events themselves; 13 secondly, an investigation of the lawfulness of the conduct 14 of the SAPS and its members in fatally shooting 34 people 15 on 16 August 2012 and in injuring protesters who were not 16 fatally wounded; and thirdly, an investigation into whether 17 participants in the crowd of protesters at Wonderkop on 16 18 August 2012 should be held criminally liable for the death 19 of 34 of their fellow protesters, and/or in respect of the 20 alleged attempted murder or assault of SAPS members at the 21 scene.</p> <p>22 We propose this separation because we submit that 23 there are two pressing issues on which this Commission 24 should pronounce as quickly as possible. The first is the 25 lawfulness of the conduct of the SAPS on the day, 16 August</p>
<p style="text-align: right;">Page 965</p> <p>1 record.</p> <p>2 MR MADLANGA SC: That is so, yes.</p> <p>3 CHAIRPERSON: Mr Madlanga, have you got 4 another witness to call, or what is going to happen now?</p> <p>5 MR MADLANGA SC: Chair, we don't.</p> <p>6 According to the sequencing which we indicated to our 7 learned colleagues, our understanding is that the SAPS 8 presentation should be next. We still do have another 9 crime scene expert, but he's writing examinations and the 10 earliest he's available is on Friday, and that is Warrant 11 Officer Thamae.</p> <p>12 CHAIRPERSON: Thank you. Well then 13 before we get on to the police presentation, which I'll ask 14 Mr Semenya to say something about that in a moment, there 15 is still one piece of outstanding business that requires 16 consideration, and that relates to the formulation of the 17 scope of inquiry for the first theme, as we call it, and I 18 think Mr Chaskalson has been handling that, so perhaps he 19 can take us some distance further on, on that aspect of the 20 case.</p> <p>21 MR CHASKALSON SC: Thank you, Mr 22 Chairperson. We've distributed our proposed definition of 23 what topics, or what issues should be addressed in the 24 first theme. I understand that the Commissioners have a 25 copy of it, all of the parties have a copy, and if I might</p>	<p style="text-align: right;">Page 967</p> <p>1 2012. We say this is a pressing issue which must be 2 addressed as soon as possible because we understand this to 3 be the issue that really prompted the creation of this 4 Commission of Inquiry and that drew the attention of the 5 whole country, and indeed most of the world, to the events 6 at Marikana. Since the advent of democracy in this country 7 there has not been a comparable incident in which large 8 numbers of people have been killed by police in one 9 episode, or in one incident, and the lawfulness of that 10 conduct is something on which the Commission must pronounce 11 as quickly as possible.</p> <p>12 There is in our submission a second issue which 13 demands immediate attention, and that is the issue of the 14 potential criminal liability of the participants in the 15 crowd of protesters. We say this issue also demands 16 immediate attention because there is a criminal trial that 17 was instituted and then provisionally withdrawn pending the 18 outcome of this Commission's findings. So there are a 19 large number of people sitting with criminal charges 20 hanging over their heads, pending the decision of this 21 Commission, and we submit that decision should be reached 22 sooner rather than later. If people are to stand trial 23 it's in the interest of justice that that trial should be 24 heard without unreasonable delay, and if people are not to 25 stand trial, they are entitled to know that as quickly as</p>

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1 possible.

2 Those are the two issues which we've identified
3 in paragraphs 2.2 and 2.3 of our proposal. In paragraph
4 2.1 we propose that this Commission in phase 1 should also
5 investigate the facts of the events themselves. We say,
6 and in that regard we emphasise that when we refer to the
7 events, we're referring to the events from 9 to 16 August,
8 not just on 16 August. We propose that the first phase
9 should investigate the events from 9 to 16 August because
10 in our submission those events are not easily separable
11 from the two questions which we submit have to be decided
12 in the first place, the lawfulness of the Police conduct
13 and the question whether the participants in the crowd
14 should stand trial, should be held criminally liable.

15 In our submission questions of the liability of
16 other parties, like the unions and Lonmin, are separable
17 from these two pressing issues and should stand over for
18 later determination because those issues cannot simply be
19 separated from questions relating to the underlying causes
20 of the events. So our proposed separation is designed to
21 enable the Commission as quickly as possible to be in a
22 position to pronounce on the two issues which we submit are
23 the issues which demand a speedy decision.

24 [15:03] And to repeat those are the lawfulness of the
25 conduct of the SAPS and its members in fatally shooting 34

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1 people on 16 August 2012 and in injuring protestors who
2 were not fatally wounded. And the question whether
3 participants in the crowd of protestors at Wonderkop on 16
4 August 2012 should be held criminally liable for the death
5 of 34 of their fellow protestors and/or in respect of the
6 alleged murder or assault of SAPS, attempted murder or
7 assault of SAPS members at the scene. Those are our
8 primary submissions.

9 CHAIRPERSON: Thank you, Mr Chaskalson.
10 Do any of the representatives of the parties have comments
11 to make upon what Mr Chaskalson has said?

12 MR TIP SC: Mr Chair, if I may. The
13 position is that at the pre-hearing meeting on the 24th
14 October, which is Wednesday two weeks ago, there was a good
15 deal of discussion about the need for a clear delineation
16 between the various phases of the work of the commission
17 and that all the parties, I think, expressed a wish to be
18 clear also about what the nature is of the findings and
19 recommendations that might be made at the conclusion of
20 what was described as the first phase of the inquiry being
21 the one that has been articulated in the document which our
22 learned friend, Mr Chaskalson, has tabled. And the – as a
23 consequence of that debate, NUM took it upon itself through
24 its representatives to circulate a memorandum that sought
25 to capture the debate that had taken place in the course of

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1 that meeting. That was circulated on Friday, the 26th to
2 the commission to the evidence leaders, to all the parties
3 and it's not my wish this afternoon to present that, as it
4 were, as a set of submissions but if I might distil from it
5 and from the proceedings at that meeting on the 24th two
6 aspects that we respectfully believe that the commission
7 should take into account in deciding precisely how its
8 programme over the next several months should be settled.
9 Mr Chair, in the first place, we take as our departure
10 point the terms of reference themselves, and that of course
11 is the document that must stand at the heart of any
12 deliberations and any decision-making that is made, and on
13 our reading of it, and that of course is not necessarily a
14 conclusive one, that we interpret the terms of reference as
15 posing to this commission a central task, which is to reach
16 findings and to make recommendations concerning the tragic
17 events at Marikana during the period in question, that is
18 the 9th to the 16th August 2012, and that it should for that
19 purpose have regard to four parties in particular, being
20 Lonmin, the South African Police Service, AMCU and NUM and
21 then also to see whether the Department of Mineral
22 Resources has in any way played a role and then of course
23 there's a catchall for any loose groupings or individuals.
24 But all of that concertina's in our respectful view into a
25 need for there to be in effect a collective assessment of

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1 responsibility for the purpose of the first round and that
2 it may become problematic in relation to those terms of
3 reference to treat the first phase of the inquiry as though
4 it can be reduced to an examination of the events at the
5 koppie, scene number 1, scene number 2 and then of course
6 particular events where other persons unfortunately met
7 their death and to treat those as though they can be viewed
8 in isolation, in other words, in the sense, Mr Chair,
9 Commissioners that there's a succession of mini inquests
10 that were performed rather than a holistic commission of
11 inquiry. The second aspect that I'd like just to
12 highlight, if I may, is that we of course share –
13 CHAIRPERSON: You and I both owe the
14 interpreter an apology. I think we must let him interpret
15 what you've said so far.

16 MR TIP SC: I tender mine freely, I went
17 on for a long time, sorry. Mr Chair, may I proceed? The
18 second aspect that we wish to highlight concerns the
19 division to be drawn between phase 1 and phase 2 matters
20 and I want to say first of all that we, without
21 reservation, endorse the importance of reaching a
22 conclusion on the principle matters before this commission
23 and undoubtedly those revolve around the shootings and that
24 those should be a conclusion about them and a
25 recommendation about them should be made as soon as

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1 possible. And nothing that I say, Mr Chair, should be
 2 construed as though I am seeking in any way to indefinitely
 3 extend the work of this commission and that all of it gets
 4 put into one parcel, as it were, and that, that parcel
 5 cannot be revealed until April or May next year, that's not
 6 the position at all. But what we have at the moment is a
 7 distinction that has been drawn in fairly detailed terms
 8 between phase 1 and as it is articulated in this proposal,
 9 that is a fairly narrowly focused one. And then there is
 10 what is called a phase 2, which has a collection of
 11 different themes, and they may range from matters such as
 12 conflict on mines generally to the manner in which the SAPS
 13 conducts itself in public order policing situations and so
 14 on. Many -

15 ARBITRATOR: I'm sorry, I didn't
 16 understand, Mr Chaskalson, correct me if I'm wrong, I
 17 didn't understand that issue, the conduct of the police in
 18 relation to the public order issues to be regarded as
 19 falling under phase 2. If I misunderstood then he will
 20 correct me. My understanding is that the remaining issues
 21 dealing with Lonmin, its policies and actions and failures
 22 to act and so on, the position of the two unions, possibly
 23 the position even of non-unionised workers, the government
 24 departments involved, apart from the police, I understood
 25 those all come together, because it's not possible, as I

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1 understand it, to separate those issues into separate
 2 phases because you can't look at Lonmin in isolation from
 3 the way it dealt with the trade unions, you can't look at
 4 the trade union in isolation with Lonmin, and also of
 5 course, from the government departments, particularly
 6 Mineral Resources and Labour. So I didn't understand
 7 anything different from that was being proposed, but I do
 8 understand the position of the police and their public
 9 policy, public order rather, policing approach would be
 10 part of the first phase. I'm sorry to interrupt you but I
 11 think that's correct, Mr Chaskalson?

12 MR TIP SC: Chair, I'm reminded that the
 13 interpreter is looking anxious to keep everyone up to date.

14 CHAIRPERSON: If I understood Mr
 15 Chaskalson correctly because if I didn't, the sooner he
 16 puts me right the better.

17 MR CHASKALSON: Mr Chairperson, you did
 18 understand me correctly and I fear that I must take some
 19 responsibility for Mr Tip's confusion because I suspect
 20 that that comes from a document which was circulated by the
 21 evidence leaders approximately a fortnight ago. On that
 22 document there are several issues relating to the SAPS
 23 which were presented as issues for theme 2 or for later
 24 phases of the commission. There remain some issues, for
 25 instance one of the issues was the relationship with the

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1 SAPS with Lonmin, NUM and AMCU as an issue to be
 2 investigated, that can't be investigated sensibly in a
 3 stage of the commission that's not going to be addressing
 4 issues relating to NUM, Lonmin or AMCU. But certainly
 5 questions relating to public order policing and appropriate
 6 methods of public order policing in a context like the
 7 people faced on the 16th August would be squarely an issue
 8 for this first phase of the commission.

9 CHAIRPERSON: Mr Tip, I interrupted you.

10 MR TIP SC: Yes, Mr Chair, let me just
 11 say one or two things about the schedule of proposed phase
 12 2 topics. This is certainly understood by the parties
 13 broadly as far as I can tell as a live document and it was
 14 agreed that we would in fact respond on the 2nd November,
 15 last Friday, to them and NUM did and it set out what it
 16 thought should be dealt with within the terms of phase 1
 17 what could be separated out as phase 2, and thirdly, what
 18 might be inappropriate for this commission to look at, at
 19 all. But be that as it may, it has some utility for the
 20 purpose of the current debate, I think because it does very
 21 helpfully set out a compendium of topics that could be
 22 thought of as falling within a second phase of the work of
 23 this commission. And again it's not my intention to work
 24 through those topics at this stage, I'd rather try and draw
 25 out a few principles from it that we want to put forward in

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1 the hope that that might be a constructive way of moving
 2 forward and hopefully again also enjoy the support of all
 3 the parties.

4 Mr Chair, what I propose to do is just to take
 5 two topics from this phase 2 and I dare say that what Mr
 6 Chaskalson has said a moment ago, that it will accord with
 7 his approach and I dare say with that of the commission.
 8 For instance, we have under this proposed phase 2 a topic
 9 called the specific collective bargaining arrangement at
 10 Lonmin prior to August 2012. Now that one might say that
 11 can be hived off into a separate inquiry, that's the whole,
 12 it's a sub-category of collective bargaining, one can look
 13 at it in those terms, but in our respectful view, it is an
 14 important ingredient in the interaction between the key
 15 players and the events leading up to 16 August and after,
 16 so that for example, as one has seen on the video material
 17 that we received from SAPS attempts are made by union
 18 leaders to address the people on the koppie at scene 1,
 19 before the events. They react in different ways to the
 20 different leaderships, that's a matter of detail, I'm not
 21 going into it, but in order to appreciate why that would be
 22 part of the significant events of the day, and why indeed
 23 that would be part of the approach of SAPS to the
 24 management of the events of that day, cannot really be
 25 understood - I'm talking now about the attempts to

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1 negotiate – that cannot really be properly appreciated,
 2 with respect, if it is not rooted in the collective
 3 bargaining aspects immediately prior, well not immediately
 4 prior but in the month or so prior to the events
 5 themselves. So what were the demands that were made by the
 6 people who ended up on the koppie? What was the response
 7 of Lonmin to those demands? How are they dealt with? What
 8 was the reaction of NUM to those demands? Only then can
 9 one say, right, we're now going to look at the march of the
 10 10th August to see what characterised that march. Was it
 11 just a peaceful march and so on or was there more to it?
 12 All of those events, in our submission, build up a pattern,
 13 or not necessarily a pattern but a series of events within
 14 which the ultimate explosion of shooting at the koppie on
 15 the 16th August needs to be evaluated so that people's
 16 conduct can be properly appreciated. Now in saying that,
 17 and in our memorandum, perhaps I might just echo this, in
 18 our memorandum we drew attention to a concern that was
 19 raised by Mr Semenya at the meeting on the 24th October,
 20 muti, the role of muti. Now that is also a sub-class of a
 21 phase 2 investigation on this document, but Mr Semenya
 22 quite strongly pressed for that to be part of the phase 1
 23 inquiry. Mr Chair, I am going to draw these remarks to a
 24 close but -
 25 [15:23] CHAIRPERSON: About the muti issue?

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1 MR TIP SC: Yes.
 2 CHAIRPERSON: You said that Mr Semenya
 3 felt very strongly or urged very strongly that this muti
 4 issue should be part of the first phase and I must say I
 5 understand where he comes from. It may well – I know the
 6 muti – some parties deny that the muti issue played a role
 7 at all, others say it did. If it did, it might explain
 8 some conduct of certain parties. If, of course, it was an
 9 issue on the table and the police were aware of it, it
 10 might also have a bearing on what they should've foreseen
 11 as a reasonably probable or possible consequence of the
 12 disposition that they made. It might also have a bearing
 13 on the first theme.
 14 MR TIP SC: Yes. Mr Chair that, with
 15 respect, is in our view the approach that should be adopted
 16 and perhaps by way of drawing our remarks to a conclusion,
 17 I would use just those two topics to illustrate a general
 18 theme. The one is that collective bargaining can be
 19 treated as an entire investigation into all sorts of
 20 matters related to collective bargaining or –
 21 CHAIRPERSON: It can either be – sorry,
 22 it can either be a topic for this Commission, collective
 23 bargaining in general, or under the powers that the
 24 Commission has been given to refer certain topics for
 25 further investigation by others, it might perhaps – without

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1 frustrating it one way or t'other, might perhaps be a
 2 suitable way of dealing with it but your point is, of
 3 course, the specific issues of collective bargaining in
 4 relation to Lonmin in the period preceding the 16th is –
 5 would appear to be the kind of matter which this Commission
 6 should not necessarily in the first phase but certainly
 7 before the end, grapple with.
 8 MR TIP SC: We would submit that
 9 consideration needs to be given to whether it doesn't find
 10 its way into phase 1 and in the limited sense, only in the
 11 sense that it is relevant to an explanation and an
 12 understanding of the conduct of the key players.
 13 A similar consideration arises in respect of the
 14 muti question. In this document there is a general topic
 15 called "Traditional healers and violence." Now, that
 16 clearly is not a topic for phase 1 but where it comes to
 17 what was happening at the koppie and was there in fact the
 18 administration of muti, should the police have been aware
 19 of that, should they have taken that into account in their
 20 planning, did they – that may fall into a different part of
 21 the scale of the matter and what - our respectful
 22 submission really comes down to this, Mr Chair and
 23 commissioners, that we - and I'll echo that we subscribe
 24 absolutely to the need for expedition in respect of key
 25 events, that we entirely believe that there may be topics

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1 that properly arise for consideration by the Commission but
 2 as an underlying cause that is somewhat remote to the real
 3 understanding of the triggers of the events on the 16th and
 4 other days and that the filter that should be drawn perhaps
 5 is one that should be a little more accommodating than the
 6 formulation that is presently in the proposal that has been
 7 tabled by Mr Chaskalson and of course the conventional
 8 instrument there, we would respectfully submit, is that of
 9 relevance. So that if a topic arises such as collective
 10 bargaining at Lonmin, such as the administration of muti on
 11 the day, on the 16th of August, then the Commission will
 12 say, well, that appears to us, on proper motivation, to be
 13 something that we should hear something about – to the
 14 point that it is relevant, not as an independent inquiry or
 15 the examination of an underlying cause to that extent, but
 16 merely is it relevant to an understanding of that. And
 17 that, with respect, we believe that the current proposal is
 18 somewhat limited in that regard.
 19 I may add finally, Mr Chair - Mr Interpreter?
 20 CHAIRPERSON: Mr Tip?
 21 MR TIP SC: Mr Chair, just in conclusion
 22 –
 23 CHAIRPERSON: Your final point, as I
 24 understand.
 25 MR TIP SC: Sorry?

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1 CHAIRPERSON: Your final point, as I
2 understand.

3 MR TIP SC: It is my final point, yes. I
4 was just going to take the liberty of mentioning that in
5 your address to us on the very first morning, on the 1st of
6 October, and also last week you referred on both occasions
7 to the general criterion of relevance and we would
8 respectfully submit that that is something that should
9 populate this proposal. Once one has that approach then we
10 believe also that the entire question about whether the
11 findings will be final or what their precise nature will
12 be, will fall away because there will be an integrated and
13 complete phase 1.

14 CHAIRPERSON: I see it's time for the tea
15 adjournment. Before we take it, I want to ask Mr Madlanga
16 a question. Mr Madlanga, have you got a short witness whom
17 we can hear for the rest of the afternoon and finish by 5
18 o'clock, because if you haven't it seems to me it might be
19 sensible for me to take the adjournment now without
20 indicating when it's supposed to end, to give the parties a
21 chance to discuss this matter further.

22 Implicit in what Mr Tip said is he agrees with
23 the idea of a phase 1. He sounds as if he's got some
24 suggestions as to the amendment of the draft that Mr
25 Chaskalson has read to us. It might be helpful if he and

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1 Mr Chaskalson and the representative of the other parties
2 got together over a cup of tea to see whether some common
3 ground can be found. It may well be that the problems can
4 be dealt with in that way. It may also be that some or
5 other of the parties may be opposed to the idea of a
6 separate inquiry altogether, phase 1. That's something
7 that we would have to consider but I'll take the
8 adjournment now – sorry –

9 MR MADLANGA SC: Before the adjournment,
10 Chairperson –

11 CHAIRPERSON: I'll take the adjournment
12 now and I won't say when it will end and I will – we will
13 either come back when we're told that the parties are ready
14 for us to come back or we'll just carry on again tomorrow
15 morning. I understand tomorrow morning is likely to
16 commence with the police presentation, is that correct, Mr
17 Semenya?

18 MR SEMENYA SC: That's indeed correct,
19 Chair.

20 CHAIRPERSON: How long is the police
21 presentation likely to take?

22 MR SEMENYA SC: If my guesstimate is as
23 good as the Captain there, with interpretation it would be
24 more than a day.

25 MR MADLANGA SC: Mr Chairperson, just

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1 before the adjournment, the witness –

2 CHAIRPERSON: Oh yes, I beg the witness's
3 pardon. I'm sure he found the discussion fascinating but I
4 take it he would prefer to go home. Captain, thank you for
5 your evidence, you're excused from further attendance. I
6 think, with reflection, the points made to me by my fellow
7 commissioners are correct, that at this stage we will
8 adjourn until tomorrow morning for the beginning of the
9 presentation but we would express the hope that the parties
10 would then get together and discuss the matters we've been
11 debating for the last few minutes to see whether some
12 common ground can't be arrived at. Mr Semenya, you've
13 turned your microphone on.

14 MR SEMENYA SC: Chair, we're going to be
15 making the submissions that the splitting should be
16 resisted and –

17 CHAIRPERSON: I expected as much, that's
18 why I said I thought – I said one or other of the parties
19 might take that line and it may well be that your
20 submissions will prevail but it may also be they won't, so
21 if the other parties are all agreed on a way forward it may
22 be that your submissions will be unavailing but it's
23 premature to gaze into a crystal ball and try to predict
24 what will happen after you've made your submissions.

25 MR SEMENYA SC: Yes, Chair. Now, the

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1 only limited purpose of my address is that we may not start
2 with the presentation of the evidence because we still wish
3 to make those arguments to you. So if the Chair and
4 commissioners were otherwise inclined and there were no
5 witnesses for this afternoon, rather we handle this
6 presentation.

7 CHAIRPERSON: Quarter of an hour tea
8 adjournment then we'll hear you, Mr Semenya.

9 [INQUIRY ADJOURNS INQUIRY RESUMES]

10 [16:00] CHAIRPERSON: The Commission resumes. I
11 think, Mr Semenya, you wanted to speak now, did you – or
12 anybody else? Is Mr Chaskalson with us? Alright, Mr
13 Chaskalson, I was proposing to call on Mr Semenya at this
14 stage. Mr Semenya?

15 MR SEMENYA SC: Thank you, Chairperson.
16 We have prepared some written submissions why, in our
17 respectful view, the terms of reference ought not to be
18 split the way they are. And by way of introduction we do
19 state that we have considered the proposed formulation by
20 the evidence leaders of the issues to which they propose
21 the first phase of the Commission's investigation should be
22 confined.

23 The proposal, as you said, is that the
24 investigation has to be split to address three distinct
25 issues, the first being a factual investigation of the

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1 events of 9 to 16 August 2012, an investigation of the
2 lawfulness of the SAPS conduct in fatally shooting 34
3 people on 16 August 2012 and injuries others, an
4 investigation into the criminal liability of the crowd of
5 protestors for the deaths of 34 fellow protestors and for
6 the alleged attempted murder or assault by them on SAPS
7 members on 16 August 2012.

8 Mr Chair, in our view the proposed confinement of
9 issues or segregation of those issues to be investigated in
10 the first phase, we would submit is not legally permissible
11 nor fair to the SAPS. In addressing the legal
12 impermissibility we will submit that insofar as they relate
13 to the SAPS, the Commission's terms of reference enjoin the
14 Commission to enquire into, make findings, report on and
15 make recommendations in relation to those aspects. It
16 points to the inquiry and findings in relation to the
17 nature, extent and application of any standing orders,
18 policy considerations, legislation or other instructions in
19 dealing with the situation which gave rise to this
20 incident, in relation to the SAPS the precise facts and
21 circumstances gave rise to the use of all and any force and
22 whether this was reasonable and justifiable in the
23 particular circumstances. The role played by SAPS through
24 its respective units, individually and collectively, in
25 dealing with this incident and whether, by act or omission,

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1 it directly or indirectly caused loss of life or harm to
2 persons or property.

3 Chair, members of the Commission, the first thing
4 to be said about this is that the inquiry into "whether by
5 act or conduct, the SAPS directly or indirectly caused the
6 loss of life or harm to persons or property" is a theme
7 that runs common also in relation to Lonmin, AMCU and to
8 NUM. What the evidence leaders' truncated formulation
9 achieves – and we are not saying this is their intention –
10 is to throw focus exclusively on the conduct of the SAPS
11 that caused a loss of life or harm, without investigating
12 the conduct of Lonmin, AMCU and NUM.

13 We submit that not only is this considerably
14 unfair to the SAPS, it is also a legally impermissible
15 variation of the Commission's terms of reference, even if
16 unintended, and on a proper construction of the
17 Commission's terms of reference the conduct of Lonmin, AMCU
18 and NUM is just as integral in the Commission of Inquiry
19 into the loss of life as the conduct of the SAPS. We make
20 the point that we are not aware of any right in law that
21 the evidence leaders may have to vary the Commission's
22 terms of reference or agitate for such extrajudicial
23 variation by the parties.

24 The second point is that the Commission is also
25 charged with enquiring into whether AMCU and NUM exercised

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1 effective control over their respective members and those
2 affiliated to them with a view to "ensuring that their
3 conduct was lawful and did not endanger the lives and
4 property of other persons." Those are squarely in the
5 terms of reference paras 1.3.2 and 1.4.2. By focusing
6 exclusively, and we may add perhaps in the so-called the
7 first phase, on the SAPS conduct, the evidence leaders'
8 formulation of what they term the first phase is not the
9 very central theme in the Commission's inquiry into the
10 loss of life on 16 August 2012. On a proper construction,
11 the terms of reference do not permit of such cherry
12 picking.

13 Thirdly, there are allegations that at least AMCU
14 members were killed while marching to NUM offices during
15 the course of the week leading up to the Thursday, 16
16 August 2012. That was conveyed to the Commission by AMCU's
17 counsel during his opening address. And, of course,
18 remember behind the SAPS barbed wire in the direction of
19 where the protestors were charging at scene 1, is where the
20 NUM offices were located. An inquiry into the loss of life
21 on 16th August 2012 that focuses only on the SAPS's conduct
22 will exclude a very material dimension of evidence in
23 relation to the events of that day. This is not what is
24 envisaged by the Commission's terms of reference.

25 And if we may interrupt ourselves here, Chair and

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1 members of the Commission, clearly the deaths that occurred
2 on the Monday the 13th have nothing to do with the
3 culpability of the SAPS. This also would raise issues of
4 culpability unrelated to the SAPS but, most pointedly,
5 these are precursors to what transpired on the 16th.

6 CHAIRPERSON: Mr Semenya, is it correct
7 to say that the people who died on the 13th weren't, at
8 least possibly, killed by members of the SAPS? As far as I
9 understand the evidence, there was some kind of engagement
10 near the railway line and two – in which two policemen were
11 killed and civilians were killed as well.

12 MR SEMENYA SC: The submission will at
13 least be correct, Chair, in relation to the two policemen
14 who were killed and so too the other two civilians when
15 that happened and if that is the conduct that we know was a
16 precursor, may have had a bearing on what transpires on
17 Thursday the 16th to delineate those and not speak about the
18 culpability in the first report to us, we submit, causes
19 the prejudice you are alluding to and there may very well
20 be a debate but we make the submission under paragraph 10
21 that, "In the fourth place, the Commission is not required
22 to enquire into lawfulness of the SAPS conduct in relation
23 to the death of 34 protestors on 16th August 2012 or during
24 any period."

25 CHAIRPERSON: Is that correct, if the

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1 terms of reference require an investigation into whether
 2 the use of force by the SAPS was reasonable and
 3 justifiable, isn't that another way of raising the question
 4 of the lawfulness of the conduct?

5 MR SEMENYA SC: That's why, Chair, I'm
 6 saying it may be very well open to debate. That lawfulness
 7 may provoke, also in direct answer to that inquiry, all the
 8 available evidence that anyone prosecuted with the
 9 consequences of that death would have to raise. May I make
 10 an example, Chair, and this is precisely the type of issues
 11 we engaged the evidence leaders with. There are no less
 12 than 100 members of the SAPS who discharged their firearms
 13 during the period. In contrast to what is an inquest and
 14 in contrast to what may very well be criminal prosecutions
 15 arising out of this, if the lawfulness of each and every
 16 conduct is to be enquired into then it means that we may
 17 have to lead evidence of 100 witnesses just to answer to
 18 that point.

19 CHAIRPERSON: I'm not sure that point is
 20 valid but on the assumption that it is, would it not
 21 equally apply in regard to the question as to whether the
 22 use of force was reasonable and justifiable because each
 23 one who used force, fired his firearm, the question would
 24 be – and someone died in consequence – the question would
 25 be whether that homicide was justifiable or not. So the

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1 same argument that you raise in relation to paragraph 10
 2 also would apply in regard to paragraph 11, would it not?

3 MR SEMENYA SC: Chair, what we are
 4 perhaps trying to test is the specificity with which the
 5 Commission wants to go into the loss of each and every life
 6 in the Commission.

7 CHAIRPERSON: For myself, and obviously a
 8 prima facie view, I would not be happy – it might be
 9 unavoidable but I would not be happy if this Commission
 10 were to be, in effect, a rehearsal for the prosecution of
 11 every person who might conceivably stand trial at some
 12 later stage. I don't think that would be appropriate and I
 13 don't think it would be desirable but that's a prima facie
 14 reaction to the point you're putting to me.

15 MR SEMENYA SC: Thank you, Chair. And as
 16 we make the submission, Chair, we are either going to offer
 17 the Commission a broad view, even by commanders of the
 18 various units who are saying so many fire – fire was
 19 discharged by so many people of my members in this
 20 particular direction – but once we begin to discuss in
 21 specific terms the lawfulness of each and every of the
 22 conduct, I can't see how we'd come to that conclusion,
 23 particularly on members who are saying they discharged in
 24 self-defence unless you call them – each and every one of
 25 them – and they give you an account in respect of each and

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1 every bullet they discharged. That's the difficulty we are
 2 postulating, at
 3 [16:20] least at this stage and to submit that the
 4 formulation in the terms of reference which apply equally
 5 to Lonmin, AMCU and NUM, does not countenance an inquiry
 6 into the lawfulness of SAPS conduct in this regard. If the
 7 evidence leaders construe it as so doing, then the
 8 lawfulness of the conduct of Lonmin, AMCU and NUM must also
 9 be ascertained in relation to the death of 34 protestors on
 10 16th August 2012. And we may even interrupt ourselves to
 11 make the submission, Chair, that the urgency with which
 12 South Africa or the rest of the world, as Mr Chaskalson
 13 says, would want a speedy answer on this aspect, it's as
 14 equally urgent that that answer is given in relation to the
 15 participation of all those people who are identified in the
 16 terms of reference. There is no cogent reason why the one
 17 is more urgent than the other.

18 We make the submission that it's obvious, Chair,
 19 that this Commission has no criminal jurisdiction. In our
 20 humble submission, it cannot make a finding on whether the
 21 protestors should be held criminally liable for the death
 22 of 34 protestors. We concede that the Commission can make
 23 a recommendation to the President that persons may be
 24 criminally charged based on the evidence that was tendered
 25 before it. We also make the concession that this may be

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1 done by the Commission without pronouncing itself on their
 2 guilt or prospects of their being held criminally liable.

3 CHAIRPERSON: Sorry, if such a
 4 recommendation were to be made, I'm not sure it's – whether
 5 it's made to the President or to the DPP but that's not a
 6 matter we need debate at the moment – if a recommendation
 7 is going to be made, how can you make it without
 8 considering either whether there's a prima facie case or
 9 whether there is a reasonable prospect of getting a
 10 conviction or whether there is a – I think it was described
 11 in another context as a winnable case against the accused.
 12 You can't make a recommendation in regard to possible
 13 prosecution without applying your mind to one or other of
 14 those questions, if not all of them, surely.

15 MR SEMENYA SC: Chair, no doubt that any
 16 recommendation, even directed to the NDPP, to look at the
 17 evidence and the conclusion of the Commission had formed a
 18 finding that prima facie some criminal responsibility rests
 19 here or there or the other – we concede that to be within
 20 your competent powers. And to address further below what
 21 we consider questions of fairness as opposed to legal
 22 correctness and to make the submission that, from our
 23 perspective, it is an open secret that the SAPS has already
 24 been found guilty in a court of public opinion, given the
 25 nature of the remarks that are made, almost wantonly,

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1 throughout this hearing up to this point. And we regret
2 that this public perception has also been fuelled by
3 counsel, in the glare of television cameras, making
4 prejudicial statements about the SAPS from the bar, which
5 statements should ordinarily have been more appropriately
6 left for evidence.

7 For example, Chair, the Commission has been told
8 about the SAPS shooting protestors "in the back of the
9 head" without any ballistic evidence having been led in
10 this regard. Allegations of police torture have been made
11 from the bar and reported as fact in the public media and
12 this correctly triggered the ire of the Chair.

13 CHAIRPERSON: Mr Semenya, I was very
14 careful to say that if the allegations were well-founded
15 they would be taken seriously. I was aware of the fact
16 that they were merely allegations, they might well be
17 denied, the denials might well be correct, which is why I
18 was very careful to say if the allegations are well-founded
19 they must be taken seriously. So what you put here in the
20 last sentence is simply incomplete.

21 MR SEMENYA SC: Yes Chair, it will be
22 corrected because the objection was also predicated on the
23 hypothesis that the evidence will support the conclusion
24 but, with respect, making the assertion does not cure the
25 problem – not from the Chair, but from whoever it came from

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1 - making that comment, responded to it as we objected, as
2 it were does not un-ring the bell. I'm not putting it any
3 higher than that.

4 Given that line that we say in paragraph 16, "It
5 is not beyond the realms of possibility that once the
6 Commission has made a finding on the lawfulness of the SAPS
7 conduct in relation to the fatal shooting of 34 protestors
8 on 16th August 2012, the prophecy will have fulfilled
9 itself and not much else of public interest will remain for
10 the Commission to inquire into." In our submission this
11 would be grossly inequitable and might I adumbrate on that,
12 Chair?

13 CHAIRPERSON: I just want to put to you,
14 of course, that it doesn't follow that the finding would be
15 against the SAPS. The Commission could find that, faced
16 with the situation that they were faced with, the conduct
17 of the members of the police service was justifiable,
18 lawful, was prompted by considerations of self-defence and
19 so forth. So that you seem to predicate the submissions
20 you make on an assumption of a finding against you. I'm
21 sure that wasn't done intentionally but I merely want to
22 point out to you that it doesn't follow there will be a
23 finding against the SAPS. There might well be a finding in
24 favour of the SAPS or there might be a finding in favour of
25 the SAPS in relation to scene 1, but based to some extent

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1 on concessions that you made in your opening speech, there
2 might be less favourable findings in relation to scene 2
3 but – so it doesn't follow that the inequity that you talk
4 about will necessarily result.

5 MR SEMENYA SC: Well, Chair, we would not
6 complain if the shoe was not pinching. I'm not advancing
7 arguments which are favourable to our cause if that outcome
8 had to result, but we are definitely making this
9 submission, Chair, that an opportunity for a finding by the
10 Commission of joint responsibility will not result once we
11 break it into themes.

12 CHAIRPERSON: I don't understand that
13 either. If there were a finding, for the sake of argument
14 - it's a possibility - against the SAPS in relation to the
15 first phase, it doesn't mean that that would be a finding
16 of sole responsibility and the remaining questions relating
17 to the possible liability of the other parties would still
18 remain open for decision. And at the end of the day there
19 might well be a decision that there wasn't sole
20 responsibility but there was joint responsibility and that
21 other actors were also involved. So that seems to be
22 essentially what – you seem to be saying exactly the
23 opposite in para 16 and I'm not sure, with respect – I put
24 the difficulties, you see, so you can deal with it – that
25 the submission is well-founded.

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1 MR SEMENYA SC: Chair, we make no point
2 higher than a finding that the deaths of 34 people was a
3 result of joint responsibility. If that finding was made
4 based on the evidence, it's distinctly different than a
5 finding that says A is responsible for now, we are going to
6 look at an opportunity to see whether evidence will reveal
7 somebody else.

8 CHAIRPERSON: This is all hypothetical at
9 this stage but it will be somebody else as well, not just –
10 not somebody else. Unless there was a finding of sole
11 responsibility in the first phase - which is not, as I
12 understand, envisaged in the draft that we're considering –
13 it would always be open in the later phases to find that
14 there were other, as I said, other actors who were also
15 responsible and who would be jointly responsible. So I'm
16 not sure that you're deducing that point correctly.

17 MR SEMENYA SC: Chair, our response is
18 this, that we can avoid the result where the conclusion
19 that the evidence established two, three, four, five
20 players to have been responsible for this outcome, will not
21 eventuate if we begin to write reports in terms of the
22 first one now and if the evidence establishes the second
23 one later, et cetera. We're saying from a public
24 perception perspective as well, it is better the
25 Commission's finding reports conclusively on everybody at

<p style="text-align: right;">Page 996</p> <p>1 the same time, that's the argument we're making.</p> <p>2 COMMISSIONER TOKOTA: Would it make any</p> <p>3 difference to your submission if we were to go along with</p> <p>4 these phases and yet at the end we don't make any finding</p> <p>5 in the interim report as such?</p> <p>6 MR SEMENYA SC: Commissioner, that would</p> <p>7 kill my argument completely because our apprehension is</p> <p>8 that there would be interim reports making final</p> <p>9 determinations on matters of phase 1, where the possibility</p> <p>10 is that looking into phase 2 or phase 3, there may be</p> <p>11 evidence impacting on the correctness or otherwise of a</p> <p>12 finding already made in relation to phase 1. That is our</p> <p>13 apprehension.</p> <p>14 CHAIRPERSON: To be fair to you, your</p> <p>15 apprehension wouldn't only be limited, I imagine, to a</p> <p>16 final finding at the first phase because we know that even</p> <p>17 preliminary findings can sometimes work mischief because</p> <p>18 once a judicial officer has committed him or herself to a</p> <p>19 finding, albeit provisional, it sometimes requires several</p> <p>20 cases of dynamite to persuade the judicial officer to move</p> <p>21 away from the finding, so I'm aware of that. I think, if I</p> <p>22 may say so, you put your case too low on this particular</p> <p>23 part of the case.</p> <p>24 MR SEMENYA SC: I'll always take counsel</p> <p>25 from you, Chair, but to make the point -</p>	<p style="text-align: right;">Page 998</p> <p>1 thought themselves invincible, it can help you understand</p> <p>2 their conduct in relation to what is called phase 2, but</p> <p>3 that element has been phased to phase 2. If we ask the</p> <p>4 question rhetorically, Chair, will we be precluded from</p> <p>5 advancing particular evidence on the basis that that</p> <p>6 evidence is irrelevant in relation to phase 1, we will see</p> <p>7 it in phase 2, on a matter that clearly belongs to the same</p> <p>8 terms of reference of the Commission? And to say that the</p> <p>9 terms of reference, properly construed, require an inquiry</p> <p>10 also into the conduct of Lonmin, AMCU and NUM in relation</p> <p>11 to the loss of life, not only on Thursday, 16th August</p> <p>12 2012, but also throughout the period covered by the</p> <p>13 Commission's terms of reference. And we make the</p> <p>14 submission that an isolated or segregated inquiry in the</p> <p>15 first phase, so-called, only in the SAPS conduct in that</p> <p>16 connection, followed by a finding thereon, may render</p> <p>17 pointless any subsequent inquiry into the conduct of</p> <p>18 Lonmin, AMCU and NUM in that connection. And by way of</p> <p>19 contrast, it is not unlikely that once the Commission has</p> <p>20 inquired into and made findings on the SAPS's conduct in</p> <p>21 connection with the loss of life on 16th August 2012 in a</p> <p>22 separate "first phase" and then subsequently find in the</p> <p>23 second phase that a positive intervention by Lonmin to</p> <p>24 negotiate a resettlement with the protestors, as it in fact</p> <p>25 had done on 23 July 2012 according to its own discovered</p>
<p style="text-align: right;">Page 997</p> <p>1 CHAIRPERSON: Sometimes it's dangerous –</p> <p>2 MR SEMENYA SC: In paragraph 17 we say,</p> <p>3 "What is more, the suggestion that the very last event in a</p> <p>4 series of interrelated events should be dealt with in</p> <p>5 isolation and in the first phase, seems to us to be placing</p> <p>6 the cart before the horse. On our reading, it is clear</p> <p>7 from the manner in which the evidence leaders have</p> <p>8 formulated the three issues that they have identified for</p> <p>9 investigation in the first phase, that the events preceding</p> <p>10 16th August 2012 will be largely, if not entirely,</p> <p>11 irrelevant to the culpability of the SAPS conduct. An</p> <p>12 inquiry into the lawfulness of the SAPS conduct in relation</p> <p>13 to the fatal shooting of 34 people on 16th August 2012,</p> <p>14 ring-fences the inquiry not only as regards the number of</p> <p>15 fatalities but also as regards the date of those</p> <p>16 fatalities. So too, we submit, the inquiry into the</p> <p>17 criminal liability of protestors for their conduct on 16th</p> <p>18 August 2012 in relation to the death of 34 of their fellow</p> <p>19 protestors."</p> <p>20 Chair, may we interpose here with another</p> <p>21 illustration of the submission we seek to make.</p> <p>22 [16:40] If the Commission ultimately accepts the expert</p> <p>23 opinion of the professor about what mental frame those</p> <p>24 people would be operating under with the use of the mutu,</p> <p>25 it may very well be that if you ultimately accept that they</p>	<p style="text-align: right;">Page 999</p> <p>1 documents, could have averted the tragedy or that a</p> <p>2 positive intervention by the Department of Mineral</p> <p>3 Resources or Labour in the early stages of the stand-off</p> <p>4 could have averted the tragedy, the Commission's earlier</p> <p>5 first phase finding may have to be attenuated.</p> <p>6 The possible effect that a finding in a later</p> <p>7 phase may have on the first phase militates against the</p> <p>8 preparation and submission of a report on findings in the</p> <p>9 first phase, we submit. And Chair, members of the</p> <p>10 Commission, you would realise that we do not favour the</p> <p>11 approach contended for by the evidence leaders for the</p> <p>12 reasons and difficulties that we articulate in this</p> <p>13 document, but if we should fail to persuade the Commission</p> <p>14 or the evidence leaders in this respect and the division of</p> <p>15 the Commission's task into themes or phases continues to be</p> <p>16 favoured by the Commission, then at least the first phase</p> <p>17 must remain true to the Commission's true terms of</p> <p>18 reference.</p> <p>19 A probe in isolation of only the SAPS culpability</p> <p>20 in connection with 34 deaths in only one out of the eight</p> <p>21 to 10 days that form the compass of the Commission's</p> <p>22 inquiry, is not a true implementation of the terms of</p> <p>23 reference, we would submit, because the pith and marrow of</p> <p>24 the Commission's mandate will be at the end once a finding</p> <p>25 has been made on this isolated probe and very little scope</p>

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1 will remain for the second phase and subsequent other
2 phases. And we would contend that the inquiry into the
3 reasonableness and justifiability of the SAPS's use of
4 force be made not in isolation but in the context of the
5 roles played by Lonmin, AMCU, NUM, the protestors
6 themselves and other parties whose conduct is, according to
7 the terms of reference, to be probed. And to dispel what
8 may be public opinion out there, our submission is that
9 this is not an inquiry into police conduct in a single day
10 alone, it is a much broader inquiry into various possible
11 causes of the tragedy in Marikana over a period of some
12 eight to 10 days and we would argue against the splitting
13 of the terms of reference.

14 And finally, we make the submission that the
15 correct interpretation of the terms of reference calling on
16 the Commission to submit interim reports each month prior
17 to the final report being presented to the President, is no
18 more than that the Commission is to present progress
19 reports of the inquiry on a month-to-month basis.

20 What the terms of reference do not connote and we
21 make this point with some force, Chair, do not connote, is
22 that the terms of reference are to be broken down into
23 various themes, each theme to be investigated, determined,
24 final findings and recommendations to be made in respect of
25 each and every theme, which appears to be the approach of

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1 the evidence leaders as we read the proposal.

2 Those would be our submissions for resisting the
3 proposal, Chair.

4 CHAIRPERSON: Thank you, Mr Semenya.

5 We've already heard from Mr Tip from Lonmin –

6 COMMISSIONER HEMRAJ: Can I just –

7 CHAIRPERSON: Certainly.

8 COMMISSIONER HEMRAJ: Mr Semenya, do I

9 understand that you say that the danger of making interim
10 submissions is that subsequent evidence might stand – I beg
11 your pardon –

12 CHAIRPERSON: Interim findings.

13 COMMISSIONER HEMRAJ: Interim findings,
14 is that subsequent evidence might practically stand that on
15 its head and so it detracts from the credibility of the
16 findings as well.

17 MR SEMENYA SC: That's indeed our
18 submission, madam.

19 COMMISSIONER HEMRAJ: Thank you.

20 CHAIRPERSON: We've heard from Mr Tip
21 from Lonmin. Ms Barnes, I think you are appearing today
22 for AMCU, is that correct? Do you have any submissions to
23 make?

24 MS BARNES: That's correct, Chair. Yes

25 Chair, as far as AMCU's concerned, we strongly support the

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1 evidence leaders' proposal. In our submission there needs
2 to be closure for these families. There also needs to be
3 certainty for the accused persons and those things need to
4 happen as quickly as possible in the public interest and in
5 the interest of justice and we submit that there are really
6 two questions here. The one is whether the phases are
7 capable of rational separation, is – are the factual
8 inquiries severable from the inquiries into the underlying
9 causes and we submit that they clearly are. The fact of
10 the matter is that the killings happened here – either
11 those killing were justifiable or they were not
12 justifiable. So those inquiries, those factual questions
13 we submit are entirely severable from the run-up questions
14 and the questions to which various parties may or may not
15 have contributed to the situation that eventually resulted
16 in those killings. So Chair, we would submit that while
17 there will of course be some overlap, fundamentally the
18 questions are capable of separation and that's really the
19 first important point in our submission.

20 The second one is, is there prejudice to any of
21 the parties if the inquiry is separated in this manner and
22 we submit not. Again, killings happened, they were
23 justifiable or they were not. The prejudice that Adv
24 Semenya has pointed to is the perception in relation to the
25 SAPS if a finding is made at an early stage. To the extent

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1 that that may be prejudice, well, we would submit there in
2 the first instance that that would not of course be a final
3 and exclusive finding in relation to SAPS only, that's the
4 first point - but even if that were to constitute some sort
5 of prejudice, we submit when that is weighed against the
6 other issues at stake here, the issue, the need for
7 certainty, the need for closure, the need for justice to be
8 done, then we submit that the balance of prejudice must
9 favour the splitting of the inquiry into the phases as the
10 evidence leaders have proposed. And so we would support
11 the proposal for those reasons.

12 COMMISSIONER TOKOTA: Ms Barnes, if I
13 understand Mr Semenya's submission the objection is based
14 on, mainly on two reasons. First, why should the first
15 phase be directed exclusively at the conduct of the police
16 when in fact, in terms of the terms of reference, the
17 parties are mentioned such as AMCU, NUM, Lonmin and other
18 parties, why should those parties also not fall within the
19 first phase?

20 Secondly, why should then the Commission make
21 interim findings which may at a later stage, when the probe
22 is being made by the other parties, may actually turn out
23 to be somewhat different from the first finding, thereby
24 tainting the credibility of this Commission? If I
25 understood him correctly, those are the main objections to

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1 the – it's hearsay anyway.

2 MR SEMENYA SC: Indeed, I could not have
3 said it with such clarity and so succinctly.

4 MS BARNES: Thank you, commissioner. Our
5 understanding is that the first phase would not be directed
6 at the conduct of SAPS alone, it would be directed at the
7 events of the 9th to the 16th and essentially the killings
8 that happened on those days. So it would be an
9 investigation into the killings and into whether they were
10 reasonable and justifiable and not only into the conduct of
11 SAPS and we submit that is rationally severable from the
12 inquiry into whether the various parties contributed to an
13 environment which may have led up to that situation.

14 The concern, though, from our side is that these
15 critical issues be determined with reasonable expedition
16 and if all the various underling causes are dealt with, the
17 reality is that the Commission will take many months to do
18 its work. And so we submit that a critical issue as far as
19 the credibility of the Commission is concerned, is to make
20 those critical factual findings as soon as possible and
21 with as much expedition as possible in the circumstances.

22 CHAIRPERSON: Mr Bham, I'm sorry, I
23 didn't intend to omit you but the line I was following
24 previously was – I called on AMCU after I called on NUM but
25 of course you hadn't spoken before NUM did, but do you wish

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1 to make any submissions on behalf of Lonmin on this aspect
2 of the matter?

3 MR BHAM SC: I do, Mr Chair. Mr Chair,
4 subject to one caveat and a slight amendment, Lonmin
5 supports the separation proposed. The amendment that I
6 speak of is something that we have discussed with Mr
7 Chaskalson. I understand counsel for NUM supports it as
8 well and that's to include the word, if I might give it to
9 you, in the document handed up by Mr Chaskalson in
10 paragraph 2 where it says, "The first phase will not
11 examine the underlying causes of the event, it will be
12 confined to the following issues." And then in 2.1, "An
13 investigation of the facts" – and after the word "facts" to
14 put in the words "directly relating and relating and
15 relevant to the events themselves."
16 [17:00] Now I give you that amendment up front because we
17 support it in that form and I want to try and demonstrate
18 to you, Mr Chairman and commissioners, that the
19 interpretation of this document as given to it by my
20 learned friend Mr Semenya for SAPS is far too narrow in
21 interpretation. Secondly, it does not give due regard to
22 the structure of the terms of reference of the Commission
23 itself and in particular what you have referred to, Mr
24 Chairman, on a number of occasions, the provisions of
25 paragraph 1.2.2 of the terms of reference.

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1 May I first go to the terms of reference because
2 that's the starting point. You are driven by the terms of
3 reference and you survive and exist because of the terms of
4 reference. The terms of reference start off in its first
5 paragraph by saying, "The Commission is appointed to
6 investigate matters" – and it puts matters in very broad
7 terms – "matters of public, national and international
8 concern" and then it says, "arising out of the events at
9 the area commonly known as the Marikana Mine in Rustenburg
10 from Saturday, August 9 to Thursday, 18 August, which led
11 to the deaths of approximately 44 people, more than 70
12 persons being injured, approximately more than 250 persons"

13 –
14 So in other words, matters of public interest.
15 Its starting point is to enjoin you to look at matters of
16 public interest arising out of the events which occurred on
17 a particular day.

18 It then says in paragraph 1 that you are required
19 to inquire into, make findings, report on and make
20 recommendations concerning the following – it then
21 identifies specifically four role players, Lonmin, the
22 South African Police Services, AMCU and NUM. It then
23 identifies, to a lesser extent, the Department of Mineral
24 Resources and then finally the conduct of individuals and
25 loose groupings. But when it identifies each of those

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1 parties, it does so in two contexts. The first is to
2 identify an issue relating to what actually occurred
3 between the 9th and 16th when there was loss of life, damage
4 to property and persons. It doesn't talk about loss of
5 life or damage to personal property beyond that period.
6 You're confined to that particular period and for that
7 reason you're required to establish what actually occurred
8 in that period and what went wrong in that period and
9 having determined what actually occurred during the period,
10 you're then required to inquire into underlying causes.
11 Now that really is another way of saying, look at
12 everything which contributed towards the environment within
13 which those tragic events occurred.

14 For purposes of your inquiry they are related,
15 firstly what actually occurred and who bore responsibility
16 for the events during between the 9th and the 16th and
17 secondly, who was responsible for creating the environment.
18 Let me give you an example. On the one end of the scale
19 you've got the firing of a gun as a result of which
20 somebody dropped dead. That's something that directly
21 occurred in that period. On the other end of the spectrum
22 you might find evidence being led at some stage that poor
23 housing conditions, poor education, poor working conditions
24 assisted in creating an environment where people were so
25 frustrated that they went on strike and it led to the

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1 nature and character of the strike, but whereas the former
2 is a sine qua non of somebody's death – the firing of the
3 gun directed at that person – the latter, namely poor
4 living conditions, is not the sine qua non of the death
5 because you could have poor living conditions which may
6 create the environment within which those events took
7 place, but doesn't necessarily lead to the actual deaths or
8 injury to person or property.

9 Now, the President has proclaimed that you
10 inquire into both, not just what actually occurred and what
11 directly led to the death, but in order to ensure in the
12 future that something like this is avoided and doesn't
13 recur again, that you look at the underlying causes which
14 created that environment. But in order to understand what
15 you're looking at and what you're investigating when you
16 investigate underlying causes which created the
17 environment, you need to understand what actually occurred.
18 In other words, what is it that you're investigating the
19 underlying causes for? And you can only know that once
20 you've determined and understood what occurred in that
21 period.

22 Now against those submissions, I'd like to go to
23 the document which Mr Chaskalson has handed up to you and
24 indicate to you why, with the change I gave you and sorry,
25 there's one more change we have spoken about, if I could

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1 just give that to you. In paragraph 2 where it says "the
2 first phase," if you could delete the words "will not
3 examine the underlying causes of the events" – full stop –
4 "It," so that it reads "The first phase will be confined to
5 the following issues." And while I read in that manner, we
6 support it because it starts off - and this is quite
7 important, it is not so that it exclusively focuses on the
8 SAPS and I've tried to demonstrate that to you and I'll try
9 to demonstrate to you that it is consistent with the terms
10 of reference contained in the proclamation.

11 In paragraph 1 it starts off by stating, "The
12 first phase of the Commission will examine the events of 9
13 to 16 August 2012 at Marikana which led to the death of at
14 least 44 people, more than 70 people being injured and
15 damage and destruction to the property" and it defines that
16 as the events. So when it talks of the events, it doesn't
17 limit itself to the 16th, it talks about the events
18 commencing on the 9th and going through to the 16th.
19 Remember, you're required to examine events up to the 16th
20 and not beyond that.

21 It then goes on to indicate what the first phase
22 will be confined to and it starts off with an investigation
23 of the facts of the events themselves and we've added the
24 words, "an investigation of the facts directly relating and
25 relevant to the events." Now the events are from the 9th to

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1 the 16th. It's not going to be a narrow investigation, as
2 narrow an investigation as my learned friend Mr Semanya
3 suggests, because what it's going to cover for example is
4 what led to the strike. When I say what led to the strike,
5 what is directly relevant to that. The strike was a strike
6 by RBOs flowing from a demand for a 12 500 basic wage and
7 of course one needs to understand where that emanated from
8 and the engagement between the strikers and Lonmin in
9 relation to the 12 500, otherwise it's completely out of
10 context. And when you say relevant to and directly
11 relating to it, it allows for that.

12 It would similarly include evidence being
13 permitted of the NUM's attitude to that issue as and when
14 they became aware of it. It would similarly permit for
15 evidence of the meetings held between the strikers, both
16 with Lonmin management as well as amongst themselves
17 preceding the strike itself.

18 Once you get to the 10th, everything which
19 occurred, all of those events – that would include the
20 march to the Lonmin offices on the morning of the 10th, the
21 events on the evening of the 10th at Rowland shaft where
22 rubber bullets and teargas were fired, the march to the NUM
23 offices and what occurred on the 11th - I'm not going to now
24 state what versions – I just want to indicate the type of
25 events which will arise. It would include the events on

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1 the evening of the 11th August at the Karee shaft where a
2 worker was killed, vehicles were burnt. It would include
3 the engagement in that period between Lonmin management and
4 the SAPS when Lonmin management sought the assistance of
5 the SAPS. It would include what Lonmin is criticised for
6 in the opening address by the SAPS about its refusal to
7 engage with the strikers. It would include evidence of the
8 march on the NUM offices on the 12th and the tragic loss of
9 life of two Lonmin security officers. It would include the
10 growing SAPS presence and why that had occurred, what role
11 Lonmin had in requesting that and what role SAPS decided on
12 its own.

13 An investigation of those events between those
14 dates will also include what happened on the 13th, it would
15 include what happened on the 14th, what happened on the
16 15th. I'm not going to detail all of those events, you've
17 been given a chronology, and it would include the
18 participation of the different role players in that period,
19 whether it be AMCU, whether it be NUM, whether it be the
20 strikers themselves, whether it be the Minister, whether it
21 be Lonmin and whether it be the SAPS.

22 So when you look at 2.1 it essentially dovetails
23 with the factual investigation you are enjoined to
24 undertake and inquire upon as set out in the terms of
25 reference and once you've gone through that exercise,

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1 you'll perfectly well then understand, when you look at the
2 underlying causes, what you're looking at the underlying
3 cases in relation to.

4 There is a concern, I understand, about the
5 aspect, the lawfulness of the conduct of the SAPS coming
6 into focus but it will be in the context of all of those
7 facts that I've set out being explored and in fact, if you
8 look at 1.2.2 of the terms of reference – not of the terms
9 of reference – ja, of the terms of reference as presented
10 where it says, "The precise facts and circumstances which
11 gave rise to the use of force or any force, such as in
12 relation to the SAPS, and whether this was reasonable and
13 justifiable in the particular circumstances when it was
14 used on the 16th." There's no suggestion that there was any
15 other party standing alongside the SAPS. You're going to
16 have to inquire into that question at some point or the
17 other and it will not be impacted upon by any of the
18 findings or underlying causes of the matter.

19 CHAIRPERSON: If it was reasonable and
20 justifiable then it would be lawful, I take it.

21 MR BHAM SC: That is so, but I then want
22 to get to the final point because this really appears to be
23 the essence of my learned friend Mr Semanya's concern and
24 that is whether or not you are going to make any
25 preliminary or final findings in your interim reports. Now

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1 it is suggested, first of all, what has been given to you
2 is framed in the format of the structure of what will be
3 examined in phase 1. How you write your report has not
4 even entered into the debate. It's something that you're
5 going to have to determine. You're going to have to
6 determine, having heard the evidence in phase 1, having
7 understood the facts, having made the inquiries, how you're
8 going to report on it and whether it will at that stage be
9 advisable for you to make any final or preliminary findings
10 of the type which may be prejudicial or may not be
11 prejudicial, but it is something for to determine.

12 Let's not conflate what is within your province
13 in relation to the findings, whether final or preliminary
14 that you've got to make, with the sensible structure of how
15 we approach the evidence in a manner which is manageable
16 and allows us to best put all of the facts before you –
17 firstly, in order to determine what actually occurred in
18 that period and thereafter to look at the underlying causes
19 with reference to what actually occurred in that period.

20 One - my final word on the topic. We support
21 this, finally, as well because we've been grappling and I
22 suppose – and I'd be surprised if everybody else hasn't had
23 the same difficulty – with our preparation for the hearing
24 because we're not exactly sure what ambit of evidence we
25 need to put together. If we were to go as wide as – in one

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1 long hearing session, in other words where there's a free
2 for all of all evidence, it will take us a long time to put
3 together everything we would need to put together, whereas
4 this phased approach structured as it presently is, would
5 allow us to focus our energies on putting evidence relevant
6 to this first and thereafter knowing what we need to deal
7 with in respect of topics which are far broader in their
8 ambit. They relate to socio-economic conditions, they
9 relate to union politics, they relate to our own
10 relationship with different unions, they relate to the DMR
11 and our compliance with the Mining Charter. Those topics
12 are enormous. We've starting working on that but I can
13 tell you that if we don't have a confined hearing now,
14 governed by the issue of relevance, we're going to find
15 that before we know it, the facts of what occurred between
16 the 9th and the 16th is going to sink in an examination of
17 those issues which created an environment within which
18 those facts occurred.

19 We would urge upon you that we follow an approach
20 which practically permits this commission to make
21 meaningful progress.

22 CHAIRPERSON: Are those your submissions?

23 MR BHAM SC: Those are our submissions.

24 CHAIRPERSON: Yes. Now I'm proposing to
25 go on till half past five. I think the next person to be

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1 called on is Mr Bizos. I don't know whether he can finish
2 by half past –

3 MR BIZOS SC: Yes please, I've got to -

4 CHAIRPERSON: Yes and then if we don't
5 finish by half past five then we'll have to carry on
6 tomorrow at nine. Mr Bizos?

7 [17:20] MR BIZOS SC: Mr Chairman we, the Legal
8 Resources Centre, believe that we should support the
9 submissions made by the persons that have spoken up to now,
10 with the exception of course of our learned friends Mr
11 Semanya. I'm going to suggest that a possible practical
12 solution, suggestion, which I want to suggest to the
13 Commission – when we agreed on, at our meeting – and if I
14 remember correctly Mr Semanya was there – we did not intend
15 to submit that any of those issues that are of concern,
16 that we shouldn't deal with anything else but what happened
17 on the 16th August. It was not the basis of the discussion
18 and I do believe that what Mr Tip suggested after quoting
19 paragraph 5 of the contents of the terms of reference, he
20 said in paragraph 12 - this provision could have been
21 better worded but its intention is clear. It would cover,
22 for instance, matters that come to the attention of the
23 Commission that warrant further scrutiny and/or action,
24 which cannot properly or effectively be accommodated within
25 the present terms of reference. The issue of micro-lending

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1 may be an appropriate example. It bears on the lives of
 2 many mineworkers but does not meaningfully present itself
 3 as a cause of the violence. And I underline that, as a
 4 cause of the violence. If the Commission were to view that
 5 it should be investigated, with the engagement of the
 6 relevant institutions, then paragraph 5 would provide an
 7 effective route.

8 I want to extend on that. It was not intended to
 9 prevent people cross-examining or examining the deaths of
 10 the two policemen or the bad conditions or the absence of
 11 housing, if any one of the parties wanted to raise it as a
 12 causa for the main catastrophe that occurred on the 16th of
 13 August. And I would suggest that the Commission should
 14 bear that in mind and that it would assure everyone that if
 15 we did suggest, and the Commission adopted the suggestion,
 16 that the question of the police conduct during the period –
 17 not only on the 16th but during the period – was relevant,
 18 we should concentrate on that and be practical, Mr
 19 Chairman.

20 We have 24 large files of evidence that has been
 21 communicated to us as a result of the hard work that the
 22 evidence leaders have provided. I would say that about 90%
 23 of it deals with the conduct of the police on the 16th.

24 On question of prejudice, and I agree with my
 25 colleague Ms Barnes, is very much in favour of not ruling

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1 that I have decided finally that there will be a
 2 separation, but I will accommodate anyone that wants to
 3 raise anything that may be germane to the main issue – how
 4 did the 35 people come to die? And a couple of them, of
 5 the people that shot, want to say, well, I was very upset
 6 about the death of two of our colleagues – they actually
 7 say that impliedly in their statements, not very many of
 8 them, but if that is to be taken, a factor to be taken into
 9 consideration, we don't have to separate the killings that
 10 took place before.

11 Similarly, if someone says – I think that my
 12 learned friend Mr Semenya is too experienced a practitioner
 13 to think that what may be termed an act of revenge two
 14 weeks later, is a defence to criminal responsibility for
 15 the person that shot on the 16th but it may not be necessary
 16 for the Commission, within the foreseeable future, to come
 17 to a conclusion as to whether the killings were lawful or
 18 not. And you have the power, Mr Commissioner, with great
 19 respect, together with your commissioners, to direct the
 20 proceedings and direct that this is the issue which we will
 21 primarily concern ourselves with in the near future and we
 22 will leave open –

23 CHAIRPERSON: How would you phrase –
 24 MR BIZOS SC: I beg your pardon?
 25 CHAIRPERSON: How would you phrase,

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1 formulate that?
 2 MR BIZOS SC: The way I would formulate
 3 it, with respect, would be that it is not necessary for the
 4 Commission to make a substantive ruling on this issue at
 5 this stage, that we should – we would direct the evidence
 6 givers, in view of the volume of work that has already been
 7 done on the conduct of the police particularly on the 16th
 8 of August, to concentrate in presenting evidence on that
 9 issue and the Commission will make allowances for evidence
 10 germane either to be led or in cross-examination in order
 11 that – if Mr Semenya thinks that the muti evidence is
 12 important to his case and he wants to present it during
 13 this period, I'm sure that the Commission will give him an
 14 opportunity to do that, but we do not have to actually
 15 reach a stage where there is a ruling at this stage which
 16 may deal for the distant future. It is not necessary, but
 17 what is necessary, particularly for the reasons advanced by
 18 Ms Barnes and my colleague Mr Bham and Mr Tip – and I
 19 actually left the meeting that we had on this, thinking
 20 that there was consensus that we should really push what
 21 happened on the 16th but apparently I was wrong. Mr Semenya
 22 disagrees, but he can be accommodated without a ruling in
 23 his favour in the broad terms that he wants at this stage.
 24 I think that I've made myself clear. I don't want –
 25 CHAIRPERSON: Ms Lewis, are you going to

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1 address us on – in place of your leader, Mr Ntsebeza? You
 2 don't have to address us now, I just want to know. Do you
 3 propose to –
 4 MS LEWIS: Mr Chair –
 5 CHAIRPERSON: How long are you going to
 6 be?
 7 MS LEWIS: I am going to address you. I
 8 would prefer to do that tomorrow morning.
 9 CHAIRPERSON: Right. No, I was going to
 10 suggest that if you were going to speak for more than two
 11 minutes, if we –
 12 MS LEWIS: Yes.
 13 [INQUIRY ADJOURNED]
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