

# 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 9                      6 NOVEMBER 2012                      PAGES 1020 TO 1153

#### HELD AT

CIVIC CENTRE, RUSTENBURG, NORTH WEST PROVINCE



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1 [PROCEEDINGS ON 6 NOVEMBER 2012]  
 2 [09:15] CHAIRPERSON: The Commission resumes and  
 3 I would remind those who have cell phones with them, please  
 4 turn them off. It is very disturbing to have cell phones  
 5 going off in the middle of a hearing. We were debating the  
 6 question of the formulation – well, firstly whether there  
 7 should be a separate hearing and, secondly, the formulation  
 8 of the issues if there is going to be one. I think it's  
 9 your turn Ms Lewis, is that correct?  
 10 MS LEWIS: Yes, thank you Mr Chairperson.  
 11 Mr Chairperson, in summary, the families support the  
 12 proposal by the evidence leaders. I will give the reasons  
 13 for that in response to what I understood Mr Semenya's five  
 14 main submissions to be, namely, firstly the issue of  
 15 whether SAPS's conduct on the 16th August and whether that  
 16 was reasonable and justifiable, can be determined  
 17 separately to the issue of the conduct of the other parties  
 18 covered by the terms of reference.  
 19 Secondly, the issue raised by Mr Semenya that, in  
 20 his submission, adopting the evidence leaders' proposal  
 21 necessarily means looking at SAPS's conduct in isolation.  
 22 Thirdly, the submission that adopting the  
 23 evidence leaders' proposal means an amendment to the  
 24 Commission's terms of reference. Fourthly, the issue of  
 25 prejudice and, fifthly, the issue of the Commission's

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1 credibility and whether that could be negatively – whether  
 2 that could be affected or negatively implicated.  
 3 To address the first issue then, Mr Chairperson,  
 4 the issue of whether SAPS's conduct can be looked at or  
 5 whether the conduct of SAPS on the 16th August can be  
 6 considered separately to the conduct of the other parties.  
 7 Mr Chairperson, in the families' submission the issue of  
 8 whether SAPS's conduct on the 16th August was lawful, can  
 9 clearly be determined separately to the issue of the  
 10 conduct of the other parties.  
 11 My understanding is that the other parties'  
 12 conduct relates to whether acts or omissions on their  
 13 behalf led to a climate where the use of force was  
 14 necessary, the use of force on the scale employed by SAPS,  
 15 whether there was any contribution by an act or omission on  
 16 the part of the other parties. The question in relation to  
 17 SAPS is separate to that and it is whether the use of force  
 18 itself was lawful or not. Mr Chairperson – or  
 19 proportionate, yes.  
 20 CHAIRPERSON: Or proportionate –  
 21 MS LEWIS: Indeed. And so the answer,  
 22 with respect Mr Chairperson, the answer to Mr Semenya's  
 23 question of why we should or whether we could consider  
 24 SAPS's conduct separately, is quite simply because SAPS is  
 25 the only party who was the physical cause of the death of

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1 the family members of those who I represent. To  
 2 encapsulate it in a sentence, Mr Chairperson, the legality  
 3 of conduct leading to the use of force or the degree of  
 4 force used is separate to the question of whether the  
 5 manner in which that force was used was lawful or not, and  
 6 for that reason we submit that –  
 7 CHAIRPERSON: [Inaudible]  
 8 MS LEWIS: I'll repeat.  
 9 CHAIRPERSON: [Inaudible]  
 10 MS LEWIS: Indeed, Mr Chairperson.  
 11 CHAIRPERSON: Separate from –  
 12 MS LEWIS: Is separate from the question  
 13 of whether the manner in which force was used was lawful or  
 14 not. Mr Chairperson, insofar as those who I represent are  
 15 concerned, it is clearly that question which they need an  
 16 answer to as soon as possible and that is so for two  
 17 reasons. Firstly, to give them the closure that they need,  
 18 to try as best as they can to heal and move forwards and  
 19 secondly, Mr Chairperson, because regardless of how much  
 20 they would want to be here for the entire proceedings, it's  
 21 unlikely to be possible for all of the family members to  
 22 attend for the full duration of the Commission. Some of  
 23 the family members have small children who they need to get  
 24 home to and some of the family members also need to try and  
 25 find a way to step into the void that has been left by

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1 their only breadwinner.  
 2 And so to conclude on point 1, Mr Chairperson,  
 3 the issue of SAPS's – the legality of SAPS's conduct on the  
 4 16th can and should be determined as part of the first  
 5 phase, as the evidence leaders have suggested.  
 6 To move then to the second issue which I  
 7 understood Mr Semenya to raise, which was that adopting the  
 8 suggestion would mean looking only at SAPS's conduct and  
 9 looking at it in isolation. Mr Chairperson, with respect,  
 10 in the families' submission that is a misconception of what  
 11 the evidence leaders are suggesting. The proposal from the  
 12 evidence leaders clearly states that the facts and the  
 13 events of the days preceding the 9th – preceding the 16th  
 14 August, that is the days from the 9th to the 16th August,  
 15 should be considered and determined, that evidence should  
 16 be led in relation to those events. And Mr Chairperson,  
 17 indeed if one looks – if one has had a brief look at the  
 18 PowerPoint presentation which is going to be presented  
 19 today, it is clear that SAPS intends to lead evidence on  
 20 those points and there's been no dispute from the other  
 21 parties. And so, Mr Chairperson, to conclude on that  
 22 point, it is – with respect, it's a misconception to say  
 23 that accepting the proposal of the evidence leaders means  
 24 looking at SAPS's conduct and only SAPS's conduct.  
 25 To move then, Mr Chairperson, to the third point,

<p style="text-align: right;">Page 1024</p> <p>1 the issue of whether accepting this proposal means amending  2 the Commission's terms of reference. With respect, Mr  3 Chairperson, that is again clearly a mischaracterisation of  4 what the evidence leaders are proposing. The evidence  5 leaders are not saying that we should look at only SAPS's  6 conduct, it simply suggests a phased approach to  7 determining the liability or lack of liability of the  8 relevant parties mentioned in the terms of reference and,  9 as we submitted, it is entirely possible to divide the  10 issues in the manner in which the evidence leaders suggest.  11 Mr Chairperson, again with respect, that must fall within  12 the Commission's power to regulate its own processes, which  13 it does have under the terms of reference read together  14 with the regulations.</p> <p>15 Indeed, Mr Chairperson, in view of the short  16 space of time that the Chair, that this Commission has been  17 given to carry out this complex inquiry, it must be that  18 this Commission has the power to regulate its own processes  19 to ensure an efficient and expedient process.</p> <p>20 To move on then to the fourth issue, the question  21 of prejudice, Mr Chairperson as I have submitted, the  22 evidence leaders are not suggesting simply looking at  23 SAPS's conduct. They are clearly saying we need to look at  24 the conduct of all of those parties mentioned in the terms  25 of reference and so at that level there can be no question</p>	<p style="text-align: right;">Page 1026</p> <p>1 after that careful and deliberate consideration which this  2 Commission will, without doubt, apply to the matter before  3 it – if, after that process, the decision of this  4 Commission is that some or all of those public perceptions  5 were justified, well, Mr Chairperson, the fact that for a  6 month or two SAPS's conduct alone is in the spotlight as it  7 were, that cannot constitute prejudice. In my submission  8 what that is, is the end result of a society that's founded  9 on certain rights and values and which holds organs of  10 state to account - but Mr Chairperson, even if that could  11 constitute prejudice, it is clearly outweighed by the  12 interests of the families in having this matter determined  13 and in giving them the closure that they need and the  14 ability to try and move on with their lives.</p> <p>15 Finally, Mr Chairperson, on the issue of whether  16 the credibility of the Commission could perhaps be  17 negatively affected, again with respect Mr Chairperson, we  18 submit that that cannot be. If the findings by the  19 Commission are preliminary findings, subject to findings in  20 the phases to follow, there can be no adverse implications  21 for the Commission's credibility.</p> <p>22 [09:35] Indeed, Mr Chairperson, I would submit that it is  23 to the contrary. A delay of – until March or April next  24 year in a determination by this Commission on this central  25 issue, would have – would, I would submit, be the factor</p>
<p style="text-align: right;">Page 1025</p> <p>1 of prejudice to SAPS.</p> <p>2 The only other submission which I understood Mr  3 Semenya to make in relation to prejudice was that regarding  4 the public perception of SAPS and Mr Chairperson, with  5 respect, that could never be considered prejudice in the  6 way that we understand it in a proceeding such as this one.  7 Again, with respect to certain submissions that Mr Semenya  8 made yesterday, the negative public perceptions were,  9 existed from the time of the events themselves, before the  10 President took the decision to constitute this Commission  11 and before any party submitted an opening statement or an  12 opening submission. Indeed those public perceptions were a  13 fundamental reason for the President taking the decision to  14 constitute this Commission.</p> <p>15 And so, Mr Chairperson, if as Mr Semenya  16 suggests, those public perceptions are incorrect and  17 unfair, then it would seem that the best way to dispel them  18 would be for this Commission to consider and decide on  19 whether SAPS did or did not act reasonably or justifiably  20 on 16th August and so, Mr Chairperson, having that question  21 decided up front as part of phase 1 would, in my  22 submission, be to SAPS's advantage. But Mr Chairperson,  23 if, after a careful weighing of all the evidence and the  24 relevant conduct in relation to the specific dates that  25 we're looking at of all of the parties concerned – if,</p>	<p style="text-align: right;">Page 1027</p> <p>1 that is likely to negatively impact on the credibility of  2 the Commission. And on that basis too, Mr Commissioner, I  3 would urge, with respect, the Commission to adopt the  4 approach that has been suggested by the evidence leaders.  5 Those are my submissions.</p> <p>6 CHAIRPERSON: Thank you, Ms Lewis. I  7 think it's your turn next, Mr Mpofo. Sorry, one of my  8 commissioners, Adv Tokota, wishes to ask you a question.</p> <p>9 COMMISSIONER TOKOTA: Ms Lewis, it seems  10 to me that your concern on theme 1 is directed at the  11 events of the 16th. Why should we not consider the events  12 from the 9th to the 16th? And your submission seems to me  13 to be that those events prior to the 16th can only, by the  14 way, be considered, just by the way, but the Commission  15 must make a finding of the events of the 16th. Why should  16 we do that?</p> <p>17 MS LEWIS: Thank you, Commissioner.  18 Commissioner, perhaps I didn't make myself clear enough on  19 that point. Our submission is that the events of the  20 preceding days should be looked at as fully as is necessary  21 to answer the primary legal question which is posed in  22 phase 1 by the evidence leaders, namely whether the conduct  23 of SAPS was reasonable and justifiable. And so it's only  24 to that extent, it's only to the extent of the legal  25 question posed that the events of the 16th are more</p>

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1 relevant.

2 In other words, my understanding is that for

3 phase 1 under the proposal of the evidence leaders there's

4 only one legal question raised, as it were, and that is

5 whether the conduct of SAPS was reasonable and justifiable

6 or not –

7 CHAIRPERSON: The question posed by –

8 sorry to interrupt you.

9 MS LEWIS: Yes.

10 CHAIRPERSON: - proposed by them, also

11 looks at the conduct of the miners, as to whether they

12 could be held liable in respect of the deaths of their

13 fellows who were killed in the shootings and whether they

14 could be held liable for attempted murder or assault on the

15 police.

16 MS LEWIS: Yes, absolutely.

17 CHAIRPERSON: There is that side as well.

18 MS LEWIS: Yes, Mr Chairperson, and the

19 other parties mentioned in the terms of reference. So to

20 the extent that it's necessary to consider the events and

21 the actions of all of the other parties, including the

22 miners - and of course that has to be part of the

23 consideration but the only legal question then, that all

24 goes to determine whether or not the conduct of SAPS was

25 reasonable and justifiable.

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1 COMMISSIONER TOKOTA: One last question

2 on this topic. Is it your submission that we should just

3 consider those incidents prior to the 16th, make no finding

4 but insofar as the events of the 16th then we must make a

5 finding only in relation to the conduct of the SAPS, to the

6 exclusion of other parties. Is that your submission, or is

7 it your submission that we should not only consider the

8 events prior to the 16th – there were deaths, although you

9 are representing 21 families, there is also, there are

10 deaths before that. Why should we not make a finding in

11 respect of those deaths, if we make findings at all in the

12 interim report?

13 MS LEWIS: Yes, thank you, Mr

14 Commissioner. Mr Commissioner, our submission is that to

15 the extent – I don't want to go too far but I will submit

16 that it would be relevant and it is clearly encompassed

17 within the terms of reference that this Commission should,

18 to the extent that it can, make findings on who is – on who

19 was responsible for those deaths. I think that that is

20 also a matter of public interest. It does fall within the

21 terms of reference of the Commission and I do think that

22 that should form part of the Commission's findings.

23 Sorry, Mr Commissioner, just to clarify. Our

24 submission is that that should be determined as part of

25 phase 1.

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1 COMMISSIONER TOKOTA: To the delay now –

2 the Chairman has, right from the onset, emphasised the

3 desirability of concluding the work of this Commission

4 within a minimum of delay. Now how do we control – you've

5 mentioned a very important point to me, namely that we

6 should not delay the findings up until March or April, but

7 how do we control that delay if the legal representatives

8 are to cross-examine for a week a witness, so that we are

9 even unable to make an interim report until May next year.

10 How do we control that – in relation to the first phase

11 only?

12 MS LEWIS: Mr Commissioner, I think I

13 would be stating the obvious if I say that that obviously

14 is a difficult issue. It raises the issue which I think

15 the Chairperson raised on the first day about thoroughness

16 versus expediency. In my submission, Mr Chairperson –

17 CHAIRPERSON: Not expediency, expedition.

18 MS LEWIS: Expedition, I beg your pardon,

19 expedition – yes, thank you. But those are problems that

20 will arise whether we streamline the process in the way

21 that the evidence leaders suggest or not and, in my

22 submission, the way in which the evidence leaders have

23 suggesting defining the phases and the issues would, I

24 would think, make it easier to control those problems.

25 Beyond that, Mr Commissioner, I'm afraid I don't have

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1 further suggestions or comments.

2 CHAIRPERSON: Thank you, Ms Lewis. We're

3 going to call on Mr Mpfu next but I think Mr Bham has

4 indicate he'd like to say something first. He has already

5 spoken but it's probably best for him to get a chance to

6 make his point now, before Mr Mpfu addresses us. Mr Bham?

7 MR BHAM SC: Thank you, Mr Chairman, I'm

8 not going to make any submissions but I've just heard the

9 question asked by Adv Tokota and in order to deal with

10 that, I want to make an additional suggestion which the

11 parties can then deal with and that would be - in addition

12 to the suggested amendments we made yesterday – that would

13 be to include a new paragraph 4 – sorry, a new paragraph

14 2.4 to read as follows, "The culpability of any party" –

15 I'll read that again. "The culpability of any party for

16 the deaths and injuries to any persons and damage to

17 property at Marikana during the period 9 to 16 August

18 2012." I think the point is well made that you can't

19 simply look at the deaths on the 16th. Your terms of

20 reference requires you to look at the days preceding that.

21 I would make the suggestion and, in my submission, it would

22 take care of the issue that you've raised which I think is

23 a good issue.

24 CHAIRPERSON: Mr Bham, thank you for

25 that. I'm not sure that culpability is the right word

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1 because the defence raised by the SAPS, as I understood the  
 2 opening statement, was that the members of the service  
 3 acted in self-defence or certainly private defence - they  
 4 may have been either defending themselves or defending  
 5 their colleagues. Now legally, as I understand it, whether  
 6 the defence of self-defence or private defence can be  
 7 raised goes more to lawfulness than to culpability. So  
 8 possibly one could say culpability and lawfulness – or it  
 9 might be safer, of course, to stick to the words of the  
 10 terms of reference which I think cover both, reasonableness  
 11 and justifiability, which I think are synonyms for the  
 12 words that have been used.

13 MR BHAM SC: May I then suggest wording  
 14 which is in non-judgmental terms at this stage? Instead of  
 15 saying culpability of any party, to change that to, the  
 16 causes of and responsibility for the deaths. In other  
 17 words, that then makes it neutral at this stage because  
 18 you've got to hear the evidence and make the finding. So I  
 19 would suggest it reads as follows, "The causes of and  
 20 responsibility for the deaths and injuries" – and then it's  
 21 as I've written earlier.

22 CHAIRPERSON: Thank you, Mr Bham. Your  
 23 turn now, Mr Mpfu.

24 MR CHASKALSON: Mr Chair, I'm sorry to  
 25 interrupt but if I might –

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1 CHAIRPERSON: I'm sorry, Mr Chaskalson, I  
 2 didn't see that you wanted to speak. Do you want to speak  
 3 first before Mr Mpfu?

4 MR CHASKALSON: Please, because I'd like  
 5 to respond to Mr Bham's proposal because I think if we are  
 6 going to open it up, it's crucial to draw a distinction  
 7 that narrows responsibility to legal responsibility because  
 8 otherwise, in truth, what we're doing is having no  
 9 separation at all. We're going to be investigating housing  
 10 money, micro-lending and the like as well. So I think some  
 11 notion of legal liability has to be built in, in relation  
 12 to the other deaths just as it has in relation to the  
 13 deaths of the 16th.

14 CHAIRPERSON: Thank you, Mr Chaskalson.  
 15 Mr Bham, do you want to reply at this stage? We're having  
 16 a bit of a ping pong match at the moment but would you like  
 17 to say something at this stage in response to that point?

18 MR BHAM SC: Again I'm persuaded by the  
 19 point. I think before the words "responsibility for", to  
 20 put in "legal responsibility for." I think the point is  
 21 sound and that captures what I'd intended.

22 CHAIRPERSON: The same point of course  
 23 relates to the word "causes." You see, part of the problem  
 24 is that we are called upon – problem is not the right word  
 25 but part of what's before us is that we're called upon to

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1 say what we think the causes were. The causes are the  
 2 direct – the point that you made earlier I think – the  
 3 question of the directly relevant causes, sort of  
 4 juristically connected causes, and then there are ancillary  
 5 causes like some of the points that were raised by Mr  
 6 Chaskalson, like the impact of micro-lending and garnishee  
 7 orders and that sort of thing. Those are matter which, I'm  
 8 not sure if you could hold a micro-lender – I would imagine  
 9 you clearly can't – hold a micro-lender who gets an unfair  
 10 garnishee order, you couldn't hold him liable for the  
 11 deaths but in the broad sense it might be – obviously  
 12 subject to the evidence we're going to hear – it might be  
 13 that that kind of situation was linked, in the broad  
 14 causative sense, with what happened and that clearly is  
 15 something we're not going to get into at this phase, as I  
 16 understand it. Anyway, you conceded that Mr Chaskalson had  
 17 a raised a point to which you had no reply, so I'll ask Mr  
 18 Mpfu now to address us.

19 MR MPOFU: Thank you very much,  
 20 Chairperson. Chairperson, maybe if I may, before I make my  
 21 submissions, just say this. The parties which I represent  
 22 obviously have a very direct interest in this question  
 23 insofar as the second part of Mr Chaskalson's proposal  
 24 relates to the issue, as you pointed out, of their being  
 25 charged for the murder of their fellow protestors. And

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1 that, in a way, almost places us in the same situation as  
 2 Mr Semenya but I'll show that we are different from him or  
 3 we view the matter differently in that we support the  
 4 proposal of the evidence leaders.

5 Why does it place us in the same place as Mr  
 6 Semenya? All the fears that were expressed by Mr Semenya  
 7 of a prejudicial finding, an early prejudicial finding as  
 8 such, apply equally to us because this doesn't say whether  
 9 the finding is going to be positive or negative. It might  
 10 well be that the finding here reinforces the fact that our  
 11 people should have been charged, as much as it might  
 12 reinforce the culpability or lack of it on the part of the  
 13 police. So we cannot pre-empt that.

14 The question that needs to be debated is whether  
 15 this proposal makes it easier and more convenient to get an  
 16 early result on some of the issues.

17 Now, there are two issues that arise here and  
 18 they are the following, whether – and Mr Semenya put it  
 19 eloquently. It is the question of the legal permissibility  
 20 of doing what is being proposed and then the second issue,  
 21 which Mr Semenya did not address is, assuming that it is  
 22 legally permissible to do so, is it convenient? Is it the  
 23 right thing to do, so to speak, and that's where the issues  
 24 of convenience and prejudice and all that will come in.  
 25 And let me deal with the second issue because

1 it's the easiest one, the – it's a more factual issue.  
 2 That's the issue that the panel, having listened to all of  
 3 us, will then say – assuming of course that it's legally  
 4 permissible because if it's not legally permissible then it  
 5 doesn't matter how convenient it may be, you just cannot do  
 6 it. Assuming it's legally permissible, let's look at the  
 7 question of convenience and prejudice jointly and I'll use  
 8 the usual way in which convenience is looked at in these  
 9 kinds of matters, whether it's a separation of trials, or  
 10 rather of issues in terms of Rule 33(4)

11 or a separation of trials in the criminal law.  
 12 [09:55] The convenience is usually broken down into the  
 13 following aspects, the convenience of the parties, the  
 14 convenience of the court or in this case of the Commission  
 15 and then the general disposal of the litigation. Now if  
 16 you look at those three aspects, clearly from the point of  
 17 view of the convenience of the parties, you've heard from  
 18 what one might call the primary victims which are the  
 19 families of the deceased people and the other secondary  
 20 victims, which are the people that I represent.

21 It is eminently convenient to us and, I think,  
 22 all the parties have said so or rather at least those that  
 23 have spoken, except of course sap, and the reason why it is  
 24 convenient, Chairperson, is – I think it was the  
 25 Chairperson who put it – for the people that I represent

1 the question is quite simple, whether they must sit with  
 2 this hanging over their heads for the next six, seven or  
 3 eight months where they are potentially murder accused  
 4 facing 34 counts of murder and potentially 34 life  
 5 sentences, or whether that question should be determined as  
 6 early as possible so that they know their fate either way.

7 The convenience of the families of the deceased  
 8 protestors has already been explained by Ms Lewis and the  
 9 other parties have also explained the convenience to them  
 10 of the suggestion. So it's clear that on – if you use the  
 11 test of convenience, then it is convenient to make the  
 12 separation.

13 The convenience of the Commission, once again  
 14 that's self-evident. It must be remembered that this  
 15 question of the phasing was raised by you, Chairperson, I  
 16 think on day 1 or day 2 of this Commission and it's obvious  
 17 why that issue was raised. It was raised because, as  
 18 commissioners – it was raised because, as commissioners,  
 19 you get what you get. What you are served with are wide  
 20 terms of reference and obviously you had to find a  
 21 practical way of arranging the task that you have been  
 22 given by the President.

23 And Chairperson, the ability to arrange this  
 24 matter which covers basically matters which might take, go  
 25 and take up to the past 100 years of what happened in the

1 mining industry and living conditions and so on and so on,  
 2 is clearly a matter of convenience. One doesn't need to  
 3 motivate that, but the key issue is this last point of the  
 4 general disposal of the litigation or of the proceedings  
 5 and it is on this issue, Chair, that clearly – and that's  
 6 why it's important, this exercise we are doing here now, at  
 7 face value we might waste two days debating this but if it  
 8 is for us to save two months in the end, then clearly it is  
 9 an investment well made and I think that is the only  
 10 motivation that the evidence leaders have, is obviously to  
 11 have a logical arrangement of the issues but also to  
 12 shorten, insofar as it is humanly possible, the  
 13 proceedings, the issue of expedition which has been  
 14 referred to before.

15 So on a test of convenience the suggestion passes  
 16 with flying colours. But then of course, and Mr Semanya is  
 17 quite correct, you can't just look at convenience. You  
 18 have to weight that with, against potential prejudice that  
 19 might arise and our submission is that the proposal is not  
 20 prejudicial to any of the parties and not even to the  
 21 police themselves.

22 The strongest point that is made suggesting  
 23 prejudice is this thing of the public opinion and sort of  
 24 early judgment of the police. Well, whether that judgment  
 25 comes now or in six months' time, it's going to come and

1 one cannot profit from the mere fact that you have wide  
 2 terms of reference because the primary issue, and it has  
 3 been said by many people here, which triggered the  
 4 Commission, is clearly the events of the 16th or taking into  
 5 account what Commissioner Tokota said, at best the events  
 6 of the 9th to the 16th if that is eventually incorporated.

7 Now the issue, Chair, is not to say that there  
 8 are no disadvantages. Things in life don't work like that.  
 9 Obviously each of the suggestions from the evidence leaders  
 10 and from Mr Semanya will have its own advantages and  
 11 disadvantages. The simple point we make is that such  
 12 disadvantages that are being pointed out by Mr Semanya are  
 13 not insurmountable and in fact I might incorporate in that  
 14 statement, even the disadvantages that were pointed out by  
 15 Mr Tip, which are valid but our submission is that all of  
 16 those are not insurmountable. And one of the cures to  
 17 mitigate those disadvantages, we are going to suggest, is  
 18 that there are two cures. One is the relevance test that  
 19 has been introduced by Mr Bham, the other one is an element  
 20 of flexibility.

21 I won't address the question of relevance, the  
 22 panel is quite familiar with the relevance test, but what  
 23 do I mean by flexibility? I mean this, one cannot read  
 24 into the suggestion that is being made as creating Chinese  
 25 walls between the two phases. Ultimately, Mr Chairman,

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1 there is one Commission. Nobody is proposing that you must  
2 have two commissions or three commissions or four  
3 commissions. What is being proposed are phases of the same  
4 Commission.

5 Now in that situation, clearly and patently there  
6 will be grey areas, there will be overlaps and those  
7 overlaps can be managed by the practitioners that are here  
8 and by the commissioners. And I want to use the example  
9 that was used by Mr Tip in illustrating this point, which  
10 is the issue of the sangomas and so on. If that issue, for  
11 argument's sake, happens to feature in both phase 1 and  
12 phase 2, then so be it. That cannot be a reason for not  
13 phasing the Commission. That issue can be raised in phase  
14 1 insofar as it is relevant to phase 1 and if it arises  
15 again, it will arise again but the advantage, Chair, is  
16 that it is very likely, on the contrary, that once the  
17 issue arises in the context of phase 1 it might save us  
18 time insofar as it might reappear or occur in phase 2. So  
19 even on issues of that species the mere fact that there are  
20 these overlaps is not an argument against the proposal. It  
21 is an argument, as they say, where the exception proves the  
22 rule and I have no doubt that the panel will be able to  
23 discriminate between those overlapping issues and the  
24 extent of their overlap between phase 1 and phase 2, but  
25 that's not something that should faze us, if you'll excuse

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1 the pun, that should deter us, so to speak.

2 So that, those submissions then, Chair, deal with  
3 the issues of what I call I call the second issue which was  
4 not addressed and in any event insofar as it was not  
5 addressed by any party, then those submissions should stand  
6 and that's the question of convenience, prejudice and so  
7 on. But as I said, I'm now going to deal with the question  
8 of legal permissibility because, as I've already said, even  
9 however convenient it might be, if you are not – if your  
10 hands are tied legally then that's the end of the inquiry.

11 Chairperson, I want to address this very, very  
12 carefully. My submission, my overall submission is that Mr  
13 Semenya's position on the legal permissibility or otherwise  
14 is based on a misreading of the terms of reference, among  
15 other things, and that misreading is both from textual and  
16 a contextual point of view. Textually –

17 CHAIRPERSON: Mr Mpofo, I think we must  
18 give the interpreter a chance to keep up.

19 MR MPOFU: Oh yes, of course. For  
20 example, Mr Semenya said in paragraph 12 of his submissions  
21 that the Commission cannot make a finding on whether the  
22 protestors should be held criminally liable for the deaths  
23 of 34 protestors. What it can do is to make a  
24 recommendation to the President that persons may be  
25 criminally charged. The terms of reference gainsay this –

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1 not in the manner that one can be found criminally liable  
2 here, but the issue of recommendation.

3 Recommendation in the terms of reference, Chair,  
4 only appears in paragraph 1 of the terms of reference. The  
5 terms of reference say that the Commission – and this will  
6 be important later – shall inquire into, make findings,  
7 report and make recommendations concerning the following,  
8 and then it says whether Lonmin was whatever, SAPS and NUM  
9 and AMCU. That's paragraph 1.

10 The part that deals with criminal liability does  
11 not talk about recommendation. It reads as follows in very  
12 peremptory terms, "The Commission shall" – this is  
13 paragraph 5 – "The Commission shall, where appropriate,  
14 refer any matter for prosecution." That's a very different  
15 thing to paragraph 1. The Commission is impelled to refer  
16 matter for prosecution. Now obviously that doesn't make  
17 the prosecution, rather the Commission to be the National  
18 Director of Public Prosecutions, all it says is that it  
19 will refer the matter. They'll obviously make their own  
20 decision. And that is all that is being addressed by this  
21 recommendation. It is, if you like, the corollary of that  
22 in relation to the 272 people, is to non-refer as it were,  
23 that matter for prosecution. So that is a matter which  
24 falls squarely within the province of the Commission, not  
25 only squarely but it is a matter which is provided for with

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1 the use of the word "shall" as an obligation on the part of  
2 the Commission.

3 So it's not correct to read the issue of  
4 recommendations which is referred to in paragraph 1 and try  
5 and read it into paragraph 5 which provides for something  
6 completely different.

7 But still sticking to the textual analysis of the  
8 terms of reference, the high water mark, Chairperson, of  
9 the issues and the issues that seem to concern honourable  
10 Commissioner Tokota as well, is paragraph 4 of the terms of  
11 reference which reads as follows, "The Commission shall" –  
12 again - "submit interim reports and recommendations to the  
13 President each month prior to the final report being  
14 presented" and so on and so on.

15 Now what does that mean, Chair? It means, and it  
16 addresses the issue of findings – I'm sure all of us at  
17 least will agree on one thing, that the Commission cannot  
18 make recommendations to anybody – I'm just pausing because  
19 I wanted the Chair to hear this point. I know you are also  
20 listening. Should I continue? Yes. The simple point I'm  
21 making under this heading, Chair, is that the Commission  
22 cannot make recommendations to anybody without making  
23 findings. That's how it goes in any process of this  
24 nature. It's investigation, finding, recommendation. So  
25 the provision of paragraph 4 which says you'll make interim

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1 reports and recommendations is pregnant of the fact that  
 2 you have to make findings because you can't make  
 3 recommendations if you have not made any findings, as it  
 4 were.

5 And so it is – in the text of the terms of  
 6 reference there is no doubt that the Commission is entitled  
 7 to make interim findings. When we talk about an interim  
 8 report, that interim report will contain whatever the  
 9 material is and the findings in relation to and  
 10 recommendations interim, but all of those – and I'm sure  
 11 all of us know that the Commission will obviously make  
 12 those interim reports

13 [10:15] with the necessary disclaimers, if you like, and  
 14 qualifications that say this is an interim report, there is  
 15 still the final report, some of these things might be  
 16 affected by material that comes later, blah-blah-blah. All  
 17 that will naturally come in the preamble to such –

18 CHAIRPERSON: Interim reports can include  
 19 indications that findings are only interim, made subject to  
 20 revision and so on.

21 MR MPOFU: Subject – yes, but that such  
 22 reports are permissible under the terms of reference is  
 23 patently clear. Chairperson – sorry -

24 COMMISSIONER HEMRAJ: Recommendations  
 25 might also refer to matters other than an evaluation of

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1 evidence and the finding on that.

2 MR MPOFU: Absolutely, yes.

3 COMMISSIONER HEMRAJ: Yes.

4 MR MPOFU: That's correct,  
 5 recommendations may or may not be based on findings but  
 6 they can also be – they could be on incidental matters such  
 7 as, let's say for example, the Commission could say let's  
 8 speed up that investigation on the planting of evidence or  
 9 what –

10 CHAIRPERSON: I think an obvious example  
 11 of a recommendation that could be made without prejudice to  
 12 any findings on the so-called merits of the matter, might  
 13 be a recommendation that all the video cameras in the  
 14 helicopters should be put in working order before  
 15 helicopters are used, so that if there's an incident of  
 16 this kind in the future there will be a lot of rival video  
 17 material available. Now, that wouldn't prejudice any  
 18 finding on the merits, of course, it would simply be a  
 19 statement that we've been given a bit of difficulty by the  
 20 fact that the video cameras allegedly weren't working and  
 21 that in future that problem shouldn't arise. So that could  
 22 be a recommendation made which doesn't actually impinge on  
 23 the merits but assists in the future in – I won't say  
 24 similar events because I hope there never ever will be  
 25 similar events, but you understand what I mean, public

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1 order policing situations.

2 MR MPOFU: Yes, Chairperson, and in fact  
 3 what the Chairperson has just said now touches on something  
 4 even more fundamental and above all of us sitting here,  
 5 which is the public interest, the convenience in relation  
 6 to the public interest. Why should the Commission not be  
 7 able to make that recommendation until April, May, whatever  
 8 the time lines that have been estimated, if it may assist  
 9 in another policing situation next week? So there's the  
 10 public interest in that some of the things should be dealt  
 11 with expeditiously.

12 Now the issue now –

13 COMMISSIONER TOKOTA: Sorry, Mr Mpofu –

14 MR MPOFU: Sorry, sorry.

15 COMMISSIONER TOKOTA: With regard to the  
 16 interim report, can't that also just imply that, as Mr  
 17 Semenza said, progress report, not necessarily interim  
 18 findings?

19 MR MPOFU: Yes. Of course it can,  
 20 Commissioner Tokota, it certainly can. Nobody is saying –  
 21 you know it can be either this one or that one. It can be  
 22 an interim progress report but here it's an interim report  
 23 and recommendation, so we can't change the terms of  
 24 reference. So it can be –

25 COMMISSIONER TOKOTA: Let me cut you

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1 there.

2 MR MPOFU: Ja.

3 COMMISSIONER TOKOTA: If you go back to  
 4 regulation 1 –

5 MR MPOFU: Yes.

6 COMMISSIONER TOKOTA: - which you read,  
 7 it says "The Commission shall inquire into, make findings"  
 8 –

9 MR MPOFU: Yes.

10 COMMISSIONER TOKOTA: Right - "make  
 11 reports" –

12 MR MPOFU: Report on.

13 COMMISSIONER TOKOTA: Ja, make reports.

14 MR MPOFU: Yes.

15 COMMISSIONER TOKOTA: Make  
 16 recommendations.

17 MR MPOFU: Yes.

18 COMMISSIONER TOKOTA: The finding is  
 19 completely outside, so it's the report and recommendations  
 20 in the interim –

21 MR MPOFU: No –

22 COMMISSIONER TOKOTA: Not findings and –  
 23 yes, not findings. In the interim you make reports and  
 24 recommendations.

25 MR MPOFU: Yes, no, I –



<p style="text-align: right;">Page 1048</p> <p>1 COMMISSIONER TOKOTA: I interpret that, 2 as Mr Semenya submitted, as saying that just make a 3 progress report and recommendations, if any, like the one 4 mentioned by the Chairman.</p> <p>5 MR MPOFU: Yes, Commissioner Tokota, you 6 and I are in full agreement that clearly one of the things 7 that is envisaged in that paragraph is what we call 8 progress reports. The only question where you and I differ 9 is whether that is the only thing that is permissible under 10 paragraph 4 and I would submit that it is not. The mere 11 fact that you should have progress reports which require 12 recommendations, suggest that it's not a question of only – 13 if the President wanted to say, I want progress reports, 14 you know, is everybody okay and how many witnesses have 15 been led so far, then they would have said so. That is 16 not, it cannot – that paragraph 4 cannot be confined to 17 that. It doesn't mean it doesn't include it, of course it 18 does. So that's the issue.</p> <p>19 The next issue that I want to address, and it's a 20 more fundamental issue which is the real legal issue that I 21 think is bedevilling this debate and that, Chairperson, is 22 a brief debate on two legal concepts which are at play – 23 lawfulness and causation. And I think that for me, if I 24 can diagnose where the problem is, I think where we are 25 missing each other is on those two issues.</p>	<p style="text-align: right;">Page 1050</p> <p>1 is – and this is where I think much of the confusion comes 2 from. It is true, as Mr Semenya says, that in respect of 3 Lonmin, AMCU, NUM and SAPS, the operative or operational 4 verb that is used in the terms of reference is "caused." 5 In other words, you get – I think in 1.1.6 whether Lonmin 6 by any act, directly or indirectly, caused loss of life and 7 so on. Then in 1.2.4, whether SAPS by act or omission, 8 directly or indirectly caused loss of life and so on – and 9 so with AMCU and NUM. So that's the kernel of the terms of 10 reference, but when it comes to SAPS, when it comes to 11 SAPS, Mr Chairman, this issue of whether or not SAPS caused 12 the death and injury of those people, is no longer an issue 13 in this Commission and I'll explain why.</p> <p>14 The causation in the legal sense of who pulled 15 the trigger and so on, has been considered in the opening 16 statement. So there is no doubt in anybody's mind sitting 17 here that SAPS caused the deaths of those people. The only 18 issue which they raise, rightly and they are entitled to 19 do, is whether in causing those deaths they were acting 20 lawfully or unlawfully. That's the only issue.</p> <p>21 CHAIRPERSON: Well, it doesn't – I think 22 the terms of reference talk about whether they acted 23 reasonably and justifiably. So prima facie looks to me as 24 if both culpability and legality, lawfulness – 25 MR MPOFU: Are the issues.</p>
<p style="text-align: right;">Page 1049</p> <p>1 Let's start with lawfulness. Mr Semenya's 2 submission essentially is that the Commission is not 3 enjoined to make a finding on the lawfulness of SAPS's 4 conduct. That cannot be so. That's a contradiction in 5 terms. You can't raise a self-defence which is what you 6 call justification – the criminal law writers either call 7 it defences excluding lawfulness or they call it 8 justification for shorthand – but self-defence, as I say, 9 is a defence that excludes lawfulness. So you can't raise 10 –</p> <p>11 CHAIRPERSON: Self-defence is a defence 12 which excludes unlawfulness.</p> <p>13 MR MPOFU: Excuse me – that excludes 14 unlawfulness, in other words that relates to, that 15 introduces lawfulness. Thank you, Mr Chairman, correct. 16 So you can't raise a defence that excludes unlawfulness and 17 in the same breath say that the inquiry is that about 18 lawfulness. That's just – I don't understand that at all.</p> <p>19 And so the issue of whether or not self-defence 20 is established, given the concessions that have been made 21 and the opening statement which I'll refer to just now, is 22 clearly and squarely the issue of lawfulness and that is 23 why the evidence leaders framed that particular paragraph 24 as they did, the lawfulness or otherwise.</p> <p>25 Now, the next question is causation and this one</p>	<p style="text-align: right;">Page 1051</p> <p>1 CHAIRPERSON: - are the issues. 2 MR MPOFU: Ja. 3 CHAIRPERSON: Of course the defence of 4 self-defence or private defence involves lawfulness. 5 MR MPOFU: Yes. 6 CHAIRPERSON: But there may be broader 7 questions of reasonableness – 8 MR MPOFU: Yes. 9 CHAIRPERSON: - in relation to the nature 10 of the plan - 11 MR MPOFU: Absolutely. 12 CHAIRPERSON: Whether foreseeable things 13 could go wrong, whether the plan was a foolish plan in the 14 first place, regard being had to what was foreseeable - 15 these are matters which would have to be looked at and they 16 would be relevant, I take it – 17 MR MPOFU: Yes. 18 CHAIRPERSON: - in relation to 19 culpability and not lawfulness – 20 MR MPOFU: Yes. 21 CHAIRPERSON: - but would be squarely 22 covered by the terms of reference. 23 MR MPOFU: Yes. 24 CHAIRPERSON: It's a prima facie view I'm 25 expressing, you understand.</p>

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1 MR MPOFU: I agree fully, Chairperson.  
 2 If you use the vernacular of the terms of reference, those  
 3 questions are raised in 1.2.2 of the terms of reference  
 4 which says, "The precise facts and circumstances which gave  
 5 rise to the use of all or/and any force and whether this  
 6 was reasonable and justifiable in the particular  
 7 circumstances." And that's the SAPS, if you like, the SAPS  
 8 terms of reference and my submission is simply that that is  
 9 the question in 1.2.4 – my submission is that that is the  
 10 question in 1.2.4 which is still open and that is the  
 11 question that the proposal from the evidence leaders seeks  
 12 to deal with. But the proposal from the evidence leaders  
 13 cannot, in respect of SAPS, deal with this other question  
 14 of whether they directly or indirectly caused loss of life  
 15 because that issue is now common cause. If you read, and  
 16 I'm not going to quote but if you read Mr Semanya's opening  
 17 address in general it's quite clear that the issue of the  
 18 causation, the factual causation if you like, of the deaths  
 19 is not something that they're going to contest. It is  
 20 something that they accept, directly or indirectly, as it  
 21 were.

22 So there can't be any prejudice in relation to  
 23 that, but the second issue which is more crucial, Chair, is  
 24 that -the folly of this argument is that it suggests that  
 25 the inquiry is whether or not SAPS is the only cause. That

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1 is not the inquiry. There might be 101 causes of what  
 2 happened there. So inquiring into the question of whether  
 3 or not SAPS is a cause does not necessarily absolve Lonmin,  
 4 NUM - even this category which gets neglected where the  
 5 terms of reference says whether the conduct of individuals  
 6 and loose groupings in fomenting or otherwise promoting a  
 7 situation – so all those might well be causes as well, but  
 8 the question that will be inquired into in phase 1 is  
 9 whether SAPS is a cause.

10 An example I can use, Chairperson, is like in a  
 11 criminal case if there are five people who rob a bank and  
 12 only three of them are caught, you inquire into their own  
 13 relationship with the crime. If the others are  
 14 subsequently caught two years later, of course they might  
 15 also be causes and they are not going to be absolved simply  
 16 because some other people have been – in other words, there  
 17 are multiple causes. And that's why the terms of reference  
 18 very widely use the words "directly indirectly caused"  
 19 because it opens it up to the wide range of causation  
 20 starting from direct causes, proximate causes, all the  
 21 terms that the lawyers use, contributory causes, even  
 22 remote causes there might be. And that's why in our  
 23 opening address, paragraph 6 thereof, we said these are the  
 24 direct causes and we said it was SAPS and Lonmin and we  
 25 said these are the contributory causes and then we said it

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1 was the general situation in the mining industry and the  
 2 trade union issues and so on and so on, because the terms  
 3 of reference open wide the whole spectrum of causation to  
 4 the Commission.

5 So there's nothing preventing the Commission for  
 6 example, just to make a wide example, the Commission could  
 7 say one of the remote causes was the weather, the police  
 8 just felt that it was just too cold or too hot and they  
 9 wanted to go home and say, you know, they moved  
 10 precipitately. But that doesn't mean that is a sole cause  
 11 or a direct cause or – it just means it might well be one  
 12 of the contributory factors, but the inquiry that is  
 13 postulated by the evidence leaders seeks to deal with the  
 14 causation or the causative relationship between the events  
 15 postulated, of SAPS, and tomorrow it might be somebody  
 16 else, tomorrow it might be somebody else and there's no  
 17 limit to that. And that, I think, is the key distinction  
 18 that needs to be appreciated.

19 Last point, Chair, and it's just an analogy and  
 20 it goes back to what the Chairperson said, that you can  
 21 always qualify in the report itself, the quality of such  
 22 findings that have been made. This is the same situation  
 23 that happens in section 174 of the Criminal Procedure Act  
 24 where, at a particular stage, the court is able to say  
 25 look, prima facie at this stage the person, there is enough

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1 for them to face the trial, to go ahead. That does not  
 2 mean that that person is necessarily going to be found  
 3 guilty at the end of the trial. What it means is that as  
 4 at that point there is an interim finding either way of the  
 5 prima facie spectrum as to where the issues stand, but it  
 6 may well be that at the end, that prima facie view which  
 7 was taken at the section 174 stage is actually, by the  
 8 introduction of other evidence, actually toppled. So  
 9 that's just an example just to show that a judicial  
 10 commission of inquiry is clearly capable – and that's why  
 11 the person who is appointed to chair it is a Judge –  
 12 clearly capable of making those nuance distinctions and  
 13 qualifying an interim report from the final report. And  
 14 those are the submissions, Chair, generally we support the  
 15 recommendation with the amendments. Thanks.

16 Sorry, Chairperson, just one point. I just  
 17 forgot to say that – and this particularly refers to our  
 18 situation in relation to the issue of convenience –  
 19 obviously for parties like ourselves who, as we have said  
 20 before, have even problems with resources for the  
 21 Commission, any suggestion that may seek to shorten the  
 22 proceedings will be of much assistance to our clients,  
 23 particularly insofar as this recommendation relates to them  
 24 very directly. Thank you, Chair.

25 CHAIRPERSON: Yes, thank you, Mr Mpofu.

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1 Is there any other representative of the parties who wishes  
2 to make submissions on the matter presently under  
3 discussion before I call on Mr Chaskalson to reply?  
4 [10:35] MS CHABEDI: Chairperson, for the DMR we  
5 don't intend making any submissions since that we'll abide  
6 by the Commissioners' decision on this issue.  
7 CHAIRPERSON: - think DMR is necessarily  
8 involved in the first phase, but they may find in the  
9 second phase they have things to deal with then.  
10 MS CHABEDI: That's exactly the point,  
11 Chairperson.  
12 CHAIRPERSON: I see Mr Semenya has raised  
13 his hand; I'll give him a chance, but is there anybody else  
14 representing any of the other parties who wishes to make  
15 submissions in this regard? I can see the red lights in  
16 the front row when they're turned on; I can't always see  
17 them in the back row. So if someone in one of the rows  
18 other than the front row wishes to make submissions, I'd be  
19 grateful if he or she would raise a hand so that I can see  
20 that he or she wishes to speak. Yes?  
21 MR GUMBI: Chairperson, we don't have  
22 further submission. We want to place ourselves on record  
23 that on behalf of POPCRU we support such submission in this  
24 respect that this Commission must make a finding based on  
25 the evidence presented before it. It mustn't apply a

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1 piecemeal reasoning approach when assessing or determining  
2 whether the conduct of SAPS was fair or not. We are of the  
3 view that the holistic approach must prevail in determining  
4 the conduct of SAPS, we submit.  
5 CHAIRPERSON: Yes.  
6 MR TOKOTA SC: Mr Gumbi, I just want to  
7 check with you, are you of the view that the Commission  
8 doesn't have the power to divide the proceedings into  
9 phases?  
10 MR GUMBI: It is my respectful  
11 submission, Commissioner, that the manner in which this  
12 Commission must assess whatever evidence is presented  
13 before it should employ a holistic approach, because once  
14 you start putting phases throughout, so this Commission,  
15 the hands of this Commission will be confined. This  
16 Commission will be required to apply this piecemeal  
17 reasoning approach that I've indicated earlier on, without  
18 applying a holistic approach. The best way, we submit on  
19 behalf of POPCRU, is that this Commission must assess all  
20 the evidence presented before it, then they make a  
21 recommendation at the end of the day without applying a  
22 piecemeal reasoning approach in assessing all the evidence  
23 presented before it. In essence we are of the view that  
24 this Commission is not entitled to divide the phases in  
25 assessing the evidence before it.

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1 CHAIRPERSON: I'm not interested in your  
2 views, Mr Gumbi. I'm not interested in anybody's, the  
3 views of any counsel. Counsel are to make submissions. I  
4 used to be chastised when I was a younger advocate for  
5 telling the court what I think, and when I went on the  
6 bench I used to say the same to counsel who tell me what  
7 they think. I'm not interested in what people think; I'm  
8 interested in their submissions. If you have submissions  
9 to make, make them, but don't take me into your confidence  
10 and tell me what you think, because I'm not interested.  
11 MR GUMBI: I do apologise, Chairperson.  
12 We submit on behalf of POPCRU.  
13 CHAIRPERSON: Mr Gumbi, is there any  
14 further submissions to make?  
15 MR GUMBI: That's our submission,  
16 Chairperson.  
17 CHAIRPERSON: Thank you, Mr Gumbi. If  
18 anybody else, before I give Mr Semenya a chance to say  
19 something, he indicated he wishes to do so - nobody else?  
20 Right, Mr Semenya.  
21 MR SEMENYA SC: Chairperson, thank you.  
22 Chair, the Terms of Reference require the Commission to do  
23 four things. The first is to make an inquiry. The second  
24 are findings. Third is to make a report, and the fourth is  
25 to make recommendations. Now let's see how these are

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1 couched. In an unhappy way it starts by looking at Lonmin  
2 as though that was to be the phase 1 –  
3 CHAIRPERSON: I'm sorry to interrupt you.  
4 You didn't quite correctly state what it said. It doesn't  
5 say make a report; it says report –  
6 MR SEMENYA SC: No, not a report –  
7 CHAIRPERSON: "Commission should inquiry  
8 into, make findings, report on, and make recommendations,"  
9 and then further down in 4 it talks about submitting  
10 interim reports and recommendations. I understand the  
11 argument you wish to address us, is what is covered by the  
12 phrase "interim reports," but it's not correct, we say,  
13 we're called upon to make a report. We're called upon to  
14 report.  
15 MR SEMENYA SC: I may have articulated it  
16 poorly. I do recognise that it is to report. I'm saying  
17 those are the four elements to it, and –  
18 CHAIRPERSON: [Inaudible]  
19 MR SEMENYA SC: Indeed. Indeed, Chair,  
20 and then it says in relation to Lonmin, goes to paragraph  
21 1.1.6 and says, "Whether by act or omission Lonmin directly  
22 or indirectly caused loss of life or damage to persons or  
23 property." Now there again it talks about positive  
24 conduct, which is act or omissions, and then it says about  
25 those, whether they were direct causes or omissions, or

<p style="text-align: right;">Page 1060</p> <p>1 whether they were indirect causes or omissions. Now what  2 the evidence leader is intending to do, he says don't look  3 at omissions which directly caused it, don't look at  4 omissions which indirectly caused it. For the first phase  5 we just want you to look at the conduct which directly  6 caused it. I don't know where they get that as a basis  7 for.</p> <p>8 When it comes to SAPS, Chair and Commissioners, I  9 want to go to paragraph 1.2.4, it is couched in identical  10 language to 1.1.6, "Whether by act or omission SAPS  11 directly or indirectly caused loss of life or harm to  12 persons or to property." Still the same thing, if you look  13 at what it says about the NUM, and that is in paragraph  14 1.3.3, and – no, to AMCU. That is 1.3.3, exactly in  15 identical language. In relation to NUM it is 1.4.3.</p> <p>16 Now Mr Mporu must be correct to say what caused  17 the death of 34 people on the 16th, it's common cause, it's  18 the police shooting. So we're not expediting their matter  19 purely to cover the cause. It is what are the underlying  20 reasons resulting in the loss of those 34 lives. That is  21 the inquiry, and to say now if we are to look at the  22 explaining factors for it, we cannot then break it up into  23 various pieces.</p> <p>24 Chair, there are two fundamental problems that we  25 raise in the separation, and we have attempted to listen</p>	<p style="text-align: right;">Page 1062</p> <p>1 recommendation be given, as early as possible. If the  2 result of the evidence, the submissions is that such a  3 policy is inappropriate and unlawful, it might be  4 appropriate for that message to be given sooner rather than  5 later. – interrupt you so you can deal with the point, not  6 because I'm firmly of that view, but I want the benefit of  7 your submissions.</p> <p>8 MR SEMENYA SC: Chair, certainly that  9 type of recommendation done earlier than later is  10 preferable, but what is not being answered by any of these  11 arguments is that why in relation to the Police is there  12 more compelling cogency for it sooner? Why is it not  13 equally compelling to make the recommendation sooner that  14 mine houses faced with industrial action must resolve those  15 without the intervention of the Police? That, we submit,  16 is equally urgent. It equally addresses the issue, than to  17 just say the Police must be heard first, and there's no  18 cogent or compelling reason that is offered for that  19 approach.</p> <p>20 CHAIRPERSON: Inherent to what you were  21 saying, seems to be prima facie, is that you accept that  22 there may be issues which are urgent, which require early  23 consideration and report in some or other form. The  24 argument that you're advancing at this point is that  25 insofar as there are such issues, they are equally urgent</p>
<p style="text-align: right;">Page 1061</p> <p>1 quite closely to the arguments that have been offered. We  2 are not told why SAPS should be inquired into first above  3 all else. Might I make this submission, Chair. Mr  4 Mathunjwa is going to come, and Mr Mathunjwa is going to  5 say to the Commission the protesters were willing to disarm  6 and to get away from the koppie, only if Lonmin could  7 listen to them. That's all they wanted. Why is that not a  8 serious omission, the nature of which must be reported on  9 first? There are unrests in Rustenburg. There may  10 possibly be a congregation of protesters on the point. Why  11 shouldn't mine bosses be told that type of omission can  12 result in the death of 34 people? Why is such a  13 recommendation not urgent?</p> <p>14 We ask the questions rhetorically because it is  15 self-impelled that it is an important recommendation which  16 must be made urgently. What the Police have done, can't be  17 undone, but what the mine bosses do from day to day may  18 urgently require recommendation by the Commission, sooner  19 than later, if we are to expedite anything. Now –</p> <p>20 CHAIRPERSON: - interrupt you. I don't  21 know what your case is going to be. We will hear  22 presumably with your presentation, but if the case is that  23 a remilitarised police service decides to use maximum force  24 as a technique in public order policing, it may be  25 desirable that a finding be made, alternatively</p>	<p style="text-align: right;">Page 1063</p> <p>1 and shouldn't be dealt with one after the other, because  2 some of the other issues we're called upon to report on do  3 not fall into that urgent category, it would seem from what  4 you were saying. So are you now proceeding from the  5 premise that it would be appropriate to have separate  6 reports, separate investigations into certain issues, but  7 it's inappropriate to concentrate solely on SAPS at this  8 stage because there is another one which is equally urgent  9 and equally compelling? Or am I misunderstanding your  10 argument?</p> <p>11 MR SEMENYA SC: No, Chair, I'm making a  12 different argument. I'm saying in the first place the  13 Commission is better placed in making its findings, whether  14 provisional or otherwise, having had the benefit of all the  15 evidence. But if we are told there should be splits made,  16 there should be phases made, I can't see how one is more  17 cogent and compelling than the other. That's the second  18 element I'm addressing. But Chair, we do know what  19 commissions are for, as opposed to other legal processes.  20 Commissions, as far as the precedent is concerned, serves  21 two purposes; one is to be told what happened, but most  22 importantly, it is the recommendation that would avert a  23 similar occurrence in the future. The mine bosses may be  24 told that to ride on a high horse in the face of such  25 looming public violence and protests might not necessarily</p>

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1 be the prudent thing to do. That type of thing is the type  
2 of thing that the recommendations of the Commission may  
3 inform future conduct.

4 Now the unlawfulness of the conduct of the  
5 Police, it's a matter on which the Commission will speak  
6 on, but it is not the type of thing that is going to advise  
7 the Police their precedent on how to avert a future event  
8 of this nature. It is a finding in relation to matters  
9 that are a fait accompli. It relates to past conduct. I  
10 can't see the urgency for it. If it were that urgent, we  
11 would be having criminal prosecutions running alongside  
12 with the Commission. Nothing stops that from happening.

13 Might I just address in passing the prejudice  
14 which Mr Mpofu says he's suffering. As we know things -  
15 and it addresses point 2.3 of the recommendations, I mean  
16 of the proposal - Mr Mpofu's clients are no longer charged  
17 with murder and attempted murder -

18 CHAIRPERSON: Charges were provisionally  
19 withdrawn against them, subject, pending the Commission.  
20 So I understand the statement made by the Provincial  
21 Director of Public Prosecutions wasn't a final withdrawal;  
22 it was expressly said to be provisional, depending upon  
23 what comes out in this Commission. If I misunderstood,  
24 what I put to you is factually incorrect, you must please  
25 correct me, but that was what I remember reading in the

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1 newspapers.

2 MR SEMENYA SC: Chairperson, maybe that's  
3 English, but withdrawal of charges is always a provisional  
4 decision, always. If -

5 CHAIRPERSON: The word "provisional" was  
6 expressly used by the PDPP, as I understand it.

7 MR SEMENYA SC: The submission we're  
8 making, Chair, is that it's only semantics. Once the  
9 charges are withdrawn without evidence having been led, the  
10 NDPP will in law always have the right to institute those  
11 proceedings if evidence comes about. Of course they may  
12 have very well used the word "provisional," but it adds  
13 nothing to the legal right which the prosecution enjoys.

14 The amendment by Mr Bham does not remove the  
15 problem, because once we have 2.4, and as they correctly  
16 concede, we have to look at all the events and the facts,  
17 then there's no other phases. If I understood it, it  
18 should now read, "The process of, and legal  
19 responsibilities of any party for the death and injuries,"  
20 and if we include "commission and omissions," we want to  
21 advance the argument later, is that the omission by Lonmin  
22 to refuse a simple thing like negotiating with the strikers  
23 who were willing, as the Commission will hear the evidence,  
24 Mr Mathunjwa says to the Police, "Tomorrow is going to be a  
25 happy day for us, the 16th, because the protesters are going

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1 to disarm, because Lonmin will address the workers." It  
2 refused to do it. That's an omission which squarely falls  
3 within the Terms of Reference, and if that can be seen to  
4 be directly or indirectly the cause of the loss of 34  
5 lives, then it's a matter on which the Commission should  
6 speak on. But at this hour, our submission is that it is  
7 undesirable to separate the issues in the manner proposed  
8 by the evidence leaders, and more importantly, secondly,  
9 nobody's answering what is the status of provisional  
10 findings, of factual findings, of final findings, that are  
11 made in the interim reports, should later evidence reveal  
12 that it needs to be nuanced differently. Nobody's  
13 answering that question, and that can be avoided if the  
14 Commission makes a complete report based on the benefit of  
15 all the evidence. That's only possible if we do the  
16 Commission, as they often are done, without splitting them  
17 into sub-heads. Those are our submissions, Chair.

18 [10:55] CHAIRPERSON: Mr Bham has indicated he  
19 wants to say something but Adv Hemraj and Adv Tokota both  
20 want to ask questions of Mr Semenya, so we'll give - so  
21 what I'll do is, I'll allow them to ask the questions, Mr  
22 Semenya's reply, then I'll give Mr Bham a chance, then  
23 we'll take the tea adjournment and Mr Chaskalson can reply.

24 COMMISSIONER HEMRAJ: Mr Semenya, if the  
25 police are raising any aspect of self-defence and alleging

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1 any threat by any of the persons gathered there, then a  
2 finding in that regard surely must be related to the  
3 inquiry envisaged in 1.3.2 and 1.4.2. What do you say  
4 about that?

5 MR SEMENYA SC: It is correct so.

6 COMMISSIONER HEMRAJ: So a final decision  
7 must take the inquiry envisaged therein into account, is  
8 that not so?

9 MR SEMENYA SC: It is, it is so.

10 COMMISSIONER HEMRAJ: Thank you.

11 COMMISSIONER TOKOTA: What I want to  
12 check with you is the question of the legality of the  
13 Commission regulating its own conduct, namely to divide the  
14 proceedings into phases - not necessarily making findings  
15 in regard thereto, or else perhaps making findings, interim  
16 findings in regard to those phases, what is illegal about  
17 that?

18 MR SEMENYA SC: Clearly, Chair, the  
19 Commission has the power to regulate the conduct of the  
20 hearing. It's a procedural issue as opposed to a  
21 substantive power. Now, the submission we're making is,  
22 these phases are undesirable if you have the power to  
23 regulate the affairs. It's undesirable to do it in the  
24 manner proposed by the evidence leaders. It is undesirable  
25 because it produces the difficulties that you are alluding

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1 to already.  
 2 What is the status of findings made in an interim  
 3 report, which finding may be tempered by evidence that is  
 4 led subsequently? And the cure, Mr Mpofo says, all you  
 5 need to say is, we are making findings that may change  
 6 should the evidence so direct. What do we do? Once the  
 7 evidence is tested, do we say to witnesses in the second  
 8 phase – the Commission has already made a provisional  
 9 finding on this, so you can't go there? Is that how we  
 10 come into respecting the provisional findings until they  
 11 are changed in a final report? Or do we change it at that  
 12 time because the status of that finding is purely  
 13 provisional?

14 COMMISSIONER TOKOTA: Is it not  
 15 convenient for the Commission – I'm not trying, I'm not  
 16 necessarily agreeing with Mr Mpofo that the convenience  
 17 should be made for the parties. If it falls within that  
 18 ambit, it's fine. Is it not convenient for the Commission  
 19 and also convenient for the parties themselves for purposes  
 20 of preparation and then possibly directing questions and  
 21 presenting evidence to divide the proceedings into phases,  
 22 so that we know that at this phase this is the type of  
 23 inquiry we are making, so that the parties may be able to  
 24 prepare themselves for this and present the evidence in  
 25 regard thereto.

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1 MR SEMENYA SC: Commissioner Tokota,  
 2 we're already doing that. After this there will be a  
 3 presentation of the SAPS, there will be SAPS witnesses who  
 4 testify. Other witnesses or other parties will come after,  
 5 so we are already sequencing that and the parties will be  
 6 able to prepare in knowing exactly what evidence comes  
 7 first. Now that, to us, seems like the type of power that  
 8 the terms of reference confers on the Commission, which are  
 9 matters procedural and if that sequencing is directed, it  
 10 will be competent. Our difficulty is interim findings, an  
 11 interim – or final findings in interim reports.

12 CHAIRPERSON: Mr Semanya, it often  
 13 happens in the course of a trial – and one thinks  
 14 particularly of the analogy of a criminal trial – that a  
 15 court makes a finding, gives a ruling sometimes which is  
 16 interlocutory. It's not appealable because it's not a  
 17 final order, final ruling – final order I mean – and it's  
 18 subject to revision if something else comes up. An example  
 19 that occurs to one, it often happens, a court holds a  
 20 statement by an accused to be admissible. In the course of  
 21 the trial, however, it turns out that there was a threat of  
 22 some kind or violence directed against the accused. The  
 23 court then revisits its finding and reverses its ruling  
 24 that the statement was admissible.  
 25 Now that's just one example of interlocutory

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1 orders made in the course of trials, subject to revision –  
 2 in fact the test is, as to whether it's appealable, is  
 3 whether it could've been revised during the course of the  
 4 trial. So it's a concept that is well known to lawyers,  
 5 which applies every day in trials. Why can't it apply in a  
 6 Commission?

7 MR SEMENYA SC: Chair, it is – even in  
 8 those instances on procedural matters, never findings of  
 9 fact that are made subject to change. The admissibility  
 10 issue can never be a function of, I am making a factual  
 11 finding that this statement is truthful, which finding of  
 12 fact I will later change at the end of the hearing. And  
 13 that is the difficulty we have, we are being invited to  
 14 make factual findings, which factual findings will then  
 15 impel a conclusion in law whether the conduct was lawful or  
 16 otherwise. It is that which is our difficulty. That a  
 17 document may be, or that hearsay evidence may be admitted  
 18 provisionally, it is also on a procedural issue. It is  
 19 never on a substantive basis and that we understand, but  
 20 what we are being invited to do is, after phase 1 and after  
 21 the report on phase 1 is made, that's the end of the boat,  
 22 we're going to look at other things now.

23 CHAIRPERSON: Alright. So am I correct  
 24 in saying that your objection – I think you did say this  
 25 already, I just want to make sure I understood you

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1 correctly - your complaint is about findings. You don't  
 2 object to the division of, from a procedural point of view,  
 3 of the hearing into different phases for the reception of  
 4 evidence on particular topics and you don't object either,  
 5 as I understand you, to the division suggested by Mr  
 6 Chaskalson in the document that he formulated and  
 7 presented. Your complaint solely is, we mustn't make  
 8 findings, whether final or interim, on those issues at the  
 9 end of each phase because of the prejudice and so forth  
 10 that you refer to. Is that an accurate statement of what  
 11 you say?

12 MR SEMENYA SC: It is an accurate  
 13 statement, Chair, but I must be understood properly. Once  
 14 the formulation is to determine the lawfulness or  
 15 otherwise, that legal conclusion will have to rest on a  
 16 factual finding and that is the difficulty we have.

17 CHAIRPERSON: As I understand it you  
 18 don't - for various reasons, I mean the one example might  
 19 be that while we're busy hearing evidence about the micro-  
 20 lenders and the desirability of garnishee – or the  
 21 undesirability of garnishee orders which take a vast amount  
 22 of someone's take home pay, he's got hardly anything left –  
 23 while we're busy with that, you may suddenly discover some  
 24 evidence, come across some evidence which has a vital  
 25 bearing on whether the police acted in self-defence or

1 private defence, whether the use of force witness statement  
2 justified and reasonable in the circumstances. You don't  
3 want to be stopped by an earlier finding from leading such  
4 further evidence as you may discover on the point –  
5 obviously the fact that it comes up later might be  
6 suspicious, it might not be accepted, but if it's a genuine  
7 case that you found a witness you didn't know about before,  
8 who threw important light on this issue, you don't want to  
9 be stopped from leading that evidence down the track. Is  
10 that basically what you're saying?

11 MR SEMENYA SC: More pointedly, that the  
12 President would be sitting with that report already with  
13 the findings made.

14 CHAIRPERSON: I understand. Mr Bham, I  
15 think we may receive what extra submissions you have to  
16 make with more receptivity if we've had a cup of tea, so  
17 we'll take the tea adjournment at this stage for 15  
18 minutes.

19 MR BHAM SC: I might make it with a  
20 clearer throat.

21 [COMMISSION ADJOURNS COMMISSION RESUMES]

22 [11:27] CHAIRPERSON: The Commission resumes. Mr  
23 Bham, are you now able to address us?

24 MR BHAM SC: Mr Chairman, thank you very  
25 much, commissioners. There are really two issues I want to

1 deal with. The one is the ambit of theme 1 as has been  
2 proposed and when I talk of as has been proposed, I include  
3 our suggestions, and the other one is the whole question  
4 about reports and findings and I'll deal with that. There  
5 are five points I want to make on that.

6 In relation to the first issue, it seems to us  
7 that Mr Semenya has read it far too narrowly and his  
8 illustration and his example illustrates just how narrowly  
9 he's read it, understood and unjustifiably narrowly,  
10 because he makes the example of what Mr Mathunjwa suggested  
11 is – what is suggested Mr Mathunjwa will say about Lonmin,  
12 namely that during that period they hadn't wanted to speak  
13 to the mineworkers and had they done so, things might have  
14 been different.

15 Now, if you look at the ambit of what has been  
16 proposed for theme 1, the events from the 9th to the 16th,  
17 an investigation of the facts directly related to and  
18 relevant to those events, then that evidence which was  
19 spoken about in the opening submissions by Mr Bruinders  
20 will be relevant to that theme and will be led. In other  
21 words, anything said about Lonmin's conduct specifically  
22 during that period, as opposed to Lonmin's policies on  
23 housing and its relationship with the unions – anything  
24 said about its conduct in relation to that period,  
25 specifically falls within these themes of reference –

1 sorry, within theme 1 as it has been phrased.

2 What theme 1 seeks to do is to distinguish  
3 between the direct events from the 9th to the 16th on the  
4 one hand and the issues which are of a broader socio-  
5 political nature, which have created the environment within  
6 which those issues can be – occurred. So if one doesn't  
7 read it as narrowly as has been read by Mr Semenya, then  
8 the problem is not a real problem.

9 As far as the question of interim reports and  
10 findings, firstly just if you look at the terms of  
11 reference there are two points that stand out. In  
12 paragraph 1 the wording is, "The Commission shall inquire  
13 into, make findings" and then it says, "report on and make  
14 recommendations." Only, it reports on. It's going to  
15 report on its inquiry into and the findings it makes.  
16 Otherwise there's no purpose in reporting. So when it says  
17 report on, it makes – it's a reference to report on the  
18 inquiry into and the findings made in relation to the  
19 specific issues.

20 So when you then go to paragraph 4 where it says,  
21 "The Commission shall submit interim reports and  
22 recommendations to the President," it's interim reports on  
23 the inquiry into, and any findings.

24 Now let's just go to the question of findings  
25 because what we're doing at the moment is] we're debating

1 the question of findings in vacuo in a manner which may  
2 unnecessarily and unjustifiably tie the Commission's hands  
3 one way or the other. We shouldn't debate it now in vacuo,  
4 for five reasons.

5 Firstly, you need to know what specific issue may  
6 be the subject matter of a finding in the monthly reports,  
7 whether preliminary or final. Clearly, once you've  
8 identified that specific issue that you will know whether,  
9 in relation to that issue, it is appropriate or not to make  
10 any findings, whether preliminary or final. And I have no  
11 doubt, Mr Chairman, commissioners, that to the extent that  
12 you are minded because you think the evidence justifies  
13 that to make a finding, whether preliminary or final,  
14 you're first going to afford the legal representatives of  
15 the parties an opportunity to address you on the  
16 appropriateness of making the finding and the finding that  
17 should be made.

18 At that point in time in relation to the specific  
19 issue, questions such as prejudice, appropriateness,  
20 whether it will be impacted upon later, can be dealt with.  
21 But don't tie your hand now to say we're not going to make  
22 any types of findings because you may then find that you've  
23 lost the opportunity in your monthly reports, where  
24 appropriate and where it is correct to do so, to make a  
25 finding of some sort or the other and where you've given

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1 the parties the opportunity to deal with questions such as  
 2 whether the preliminary finding could potentially change  
 3 down the line, the potential prejudice, the appropriateness  
 4 of making the finding and the like.

5 Again I suggest to you that what this seems to us  
 6 to be directed towards, theme 1, is to separate out the  
 7 actual events and the direct causes of those events and  
 8 that doesn't exclude the other parties. It includes SAPS  
 9 but it includes the other role players in that period,  
 10 whether those role players be Lonmin or AMCU, the striking  
 11 workers or the NUM, but it's what they did during that  
 12 period. It seeks to take that and have you deal with that  
 13 separately from what comes later, which is a much broader  
 14 topic, namely all of the contributory factors which  
 15 contributed towards the creation of the environment within  
 16 which that could occur.

17 We would submit that you should really follow  
 18 that path and allow the parties to deal with what - a  
 19 confined topic, manageable, which will get - either bring  
 20 out the evidence in a sensible manner and arrive at certain  
 21 conclusions to the extent appropriate. Thank you, Mr  
 22 Chair.

23 CHAIRPERSON: Yes, Mr Mpfu?  
 24 MR MPOFU: Thank you, Mr Chairman, I  
 25 don't want to be involved in what you've called ping-pong,

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1 Mr Chairman, but just one small issue. Mr Semenya has  
 2 asked what he calls a rhetorical question as to why SAPS,  
 3 as it were, should be singled out for the first inquiry and  
 4 I just want to suggest that that question is not so  
 5 rhetorical, Chair. There's a non-legal and a legal answer  
 6 to it. The non-legal answer, the general answer is simply  
 7 that the people identified in the preamble, in other words  
 8 the 44 people who were killed, 77 injured and more than 250  
 9 arrested, it's common cause that those were committed by  
 10 SAPS. So that distinguishes them from the other parties,  
 11 but the legal answer, Chair, is that of the four parties  
 12 that have been postulated as the cause, SAPS is the only  
 13 one that has admitted that it was the cause of the - of  
 14 those events. The other parties - NUM, AMCU and Lonmin -  
 15 in their opening addresses have absolved themselves of any  
 16 responsibility.

17 Now that brings the question of onus. That means  
 18 that in relation to SAPS, and that's what distinguishes  
 19 them from the other parties - they, by that admission have,  
 20 wittingly or unwittingly attracted an onus to prove the  
 21 lawfulness of the self-defence and therefore they are the -  
 22 they cannot be lumped with the other parties, and that is  
 23 the important distinction between them and the other three.  
 24 Thank you, Chair.

25 CHAIRPERSON: Mr Chaskalson, do you wish

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1 to say anything in reply?  
 2 MR CHASKALSON: Very briefly, Mr  
 3 Chairperson. There seem to be three questions. The first  
 4 is whether our proposal is lawful, the second is whether  
 5 it's a convenient or desirable separation and the third is  
 6 whether it's unfair.

7 If I can start with unlawfulness, in our  
 8 submission the complaint of unlawfulness is, with respect,  
 9 misplaced. By the time that it finishes its proceedings  
 10 this Commission must address all of the issues covered by  
 11 its terms of reference, that is what the Commission's broad  
 12 mandate is. But the sequence in which it chooses to do so  
 13 is a matter for you, Mr Chairperson and your fellow  
 14 commissioners. The Commission can choose to address one  
 15 issue first and another issue later.

16 The power of the Commission is to make findings  
 17 and recommendations, so the power of the Commission to make  
 18 findings and recommendations before it has completed its  
 19 business is expressly conferred by the terms of reference,  
 20 that's paragraph 4.

21 So the only issue in relation to legality is  
 22 whether the question or the issues we have framed are  
 23 issues covered by the terms of reference. If they're  
 24 covered by the terms of reference, the Commission may  
 25 lawfully choose to deal with them first and to make

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1 findings in relation to them.

2 The only complaint in this regard that I  
 3 understand to come from any of the parties is the complaint  
 4 from SAPS and I understand that, that complaint is to go to  
 5 whether the issues we have framed in relation to the SAPS  
 6 to be issues which are covered by the terms of reference.  
 7 Well, Mr Chairperson, they plainly are covered by the terms  
 8 of reference. Paragraph 1.2.4 of the terms of reference  
 9 requires the Commission to determine whether the SAPS "by  
 10 act or omission, directly or indirectly, caused loss of  
 11 life or harm to persons or property." And 1.2.2 asks the  
 12 Commission to inquire into "the precise facts and  
 13 circumstances which gave rise to the use of all any force  
 14 by SAPS and whether this was reasonable and justifiable in  
 15 the particular circumstances."

16 Our paragraph 2.2 which focuses on the lawfulness of the  
 17 conduct of SAPS in fatally shooting 34 people on 16 August  
 18 and injuring protestors who were not fatally wounded,  
 19 embraces both 1.2.2 and 1.2.4. I do want to emphasise this  
 20 point because some of the debate has proceeded on the  
 21 assumption that the only issue raised by paragraph 2.2 is  
 22 the question of justifiability of the killing but as you  
 23 yourself, Mr Chairperson, pointed out, in fact the issue  
 24 goes broader than that or the issues go broader than that.

25 There are two separate inquiries. The first is



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1 the justification inquiry in relation to the claim of  
 2 private defence concerning the shootings of 18 August –  
 3 that would be clause 1.2.4. The second would relate to the  
 4 planning and implementation of the operation on 16 August,  
 5 including any acts and omission in relation thereto that  
 6 may give rise to legal liability, independent of issues of  
 7 private defence. It may have been a negligently planned  
 8 operation, there may have been a duty in the middle of the  
 9 operation to stop it. Those issues must also be traversed  
 10 under our proposal.

11 So what we are saying in relation to our proposed  
 12 paragraph 2.2 is, let's focus on the legality issues which  
 13 are the issues raised by 1.2.2 and 1.2.4 first – and we  
 14 submit that's plainly within the terms of reference and it  
 15 is lawfully permissible for this Commission to choose to  
 16 make that separation if it is convenient, fair and  
 17 desirable.

18 So the legality complaint falls away, in our  
 19 submission. That leaves the issues of convenience and  
 20 fairness. We've already addressed our submissions in  
 21 relation to the convenience of early findings on the  
 22 lawfulness of the SAPS conduct and the potential liability  
 23 of the crowd of protestors. Those were my opening  
 24 submissions. I don't want to repeat them, I don't want to  
 25 repeat other submissions that have been made by all parties

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1 other than SAPS in relation to convenience.

2 We do concede that in terms of the processes of  
 3 the Commission it would be convenient to make findings of  
 4 legal responsibility of all parties in relation to all  
 5 deaths from 9 to 16 August, once the facts of those deaths  
 6 are to be investigated in the first phase anyway. Once  
 7 we're going to be looking at those deaths it seems to us  
 8 that it would be convenient to deal with legal  
 9 responsibility for those deaths at the same time.

10 So we would broadly associate ourself with the  
 11 second amendment proposed by Mr Bham but we would emphasise  
 12 that for the separation to remain convenient, it must be  
 13 clear that we are confining ourselves in the first phase to  
 14 questions of legal responsibility and legal causation, not  
 15 moral responsibility or sociological causation. Those are  
 16 issues which are for a later stage in the Commission.

17 We would submit that the formulation that Mr Bham  
 18 has proposed is one which would adequately confine that  
 19 first inquiry and if I might just read that formulation,  
 20 which would come in as a last paragraph 2.4. "The direct  
 21 causes of and legal responsibility for" – "and legal  
 22 responsibility of any party for the deaths and injuries to  
 23 any persons and damage to property at Marikana during the  
 24 period 9 to 16 August 2012."

25 CHAIRPERSON: [Inaudible]

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1 MR CHASKALSON: - for and injuries to any  
 2 persons and damage to property at Marikana during the  
 3 period 9 to 16 August. The separation then becomes between  
 4 who is held – well, the first phase is what happened, who  
 5 should be held – what were the direct causes, who should be  
 6 held legally responsible, as opposed to the more long term  
 7 planning and recommendation issues that will be addressed  
 8 in the second phase and what broader structural changes to  
 9 a whole range of practices might avoid an incident of this  
 10 nature in the future.

11 I would presume that Mr Semenya's submissions in  
 12 relation to fairness would fall away if Mr Bham's second  
 13 amendment, or the amendment we've just discussed is  
 14 introduced, because then everybody's legal liability is  
 15 being addressed in one phase at the beginning and the  
 16 distinction is not between SAPS on the one hand and other  
 17 parties, or SAPS and protestors on the one hand and other  
 18 parties. It is between direct causes and legal  
 19 responsibility on the one hand and long range causes and  
 20 forward looking recommendations to avoid a repeat of this  
 21 on the other.

22 Lastly, I would also emphasise in relation to  
 23 fairness that a decision on separation does not determine a  
 24 decision on whether any final findings and recommendations  
 25 will be made at the end of phase 1, still less what those

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1 findings and recommendations will be or may be, if they are  
 2 to be made. And in that respect much of this debate, we  
 3 would submit, is premature because we don't know what  
 4 evidence is going to be led in phase 1 and what issues will  
 5 be quite capable of being disposed of finally at the end of  
 6 phase 1 until we've heard that evidence. But once we've  
 7 heard that evidence, if at that stage Mr Semenya can  
 8 persuade you that it would be unfair to SAPS to make  
 9 certain findings or recommendations because there are now  
 10 other issues which are still to be canvassed in phase 2  
 11 which might affect the reasoning of the Commission in that  
 12 regard, well then doubtless the Commission won't make such  
 13 findings or recommendations. So questions of fairness can  
 14 be addressed or can adequately be protected at the time at  
 15 which any party calls upon the Commission to make a final  
 16 finding at the end of phase 1.

17 So we would stand by our separation proposal,  
 18 subject to the addition of this extra paragraph 2.4 which  
 19 we have quoted to the Commission and we would ask the  
 20 Commission to make a ruling in those terms.

21 [11:47] CHAIRPERSON: Are those your submissions,  
 22 Mr Chaskalson?

23 MR CHASKALSON: Those are our  
 24 submissions.

25 CHAIRPERSON: We'd be grateful if you'd

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1 give us your document as finally amended. You don't have  
 2 to give it to us now. We don't propose indicating at this  
 3 stage what our decision is in regard to the point that's  
 4 been debated, we hope to be able to do that on Thursday or  
 5 on Friday. Anyway, it's not important that a ruling be  
 6 given now because we understand that we're going to have  
 7 the police presentation but if you could give us your  
 8 document in its final revised form, say by the end of the  
 9 day – and I can just indicate at this stage that we are not  
 10 having the second session this afternoon, so we will stop  
 11 at 3:30 this afternoon and we will recommence at 10 o'clock  
 12 on Thursday, we're not sitting tomorrow. If you can give  
 13 us, before the end of today, the document in revised form,  
 14 we will consider it and give our ruling either on Thursday  
 15 or on Friday. Thank you.

16 Mr Semenya, are you now ready to start your  
 17 presentation?

18 MR SEMENYA SC: Yes, Chair.

19 CHAIRPERSON: Before Mr Semenya gives  
 20 his, starts his presentation, I want to thank the parties,  
 21 the evidence leaders particularly Mr Chaskalson and all the  
 22 parties for the submissions they've made on this issue,  
 23 which is obviously very important and we'll carefully  
 24 consider everything that's been said and then indicate what  
 25 our attitude is, as I say, either on Thursday or Friday.

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1 Mr Semenya, would you now like to start?

2 MR SEMENYA SC: Chair, perhaps we can  
 3 even avoid a ruling. If I understand the paragraph 2.4, we  
 4 might not even resist the so-called phasing then. If the  
 5 legal responsibility of AMCU, of Lonmin, of NUM, is to be  
 6 inquired into in the first phase then perhaps there is no  
 7 reason for a ruling.

8 CHAIRPERSON: Well, that's something that  
 9 we can also deal with on Thursday but what you've said,  
 10 which I think is very fair, is that in the light of that  
 11 amendment the phasing itself is not really in issue. The  
 12 only question in issue is whether we should indicate  
 13 whether we will or perhaps may give interim rulings at the  
 14 end of the first phase – I say may because the point made  
 15 by Mr Chaskalson was, it might be possible for you, for  
 16 example, to say to us a particular interim ruling would be  
 17 inappropriate or perhaps any interim ruling would be  
 18 inappropriate. The only question outstanding now is  
 19 whether we should indicate on Thursday or Friday whether we  
 20 may give an interim ruling at the end of the first phase  
 21 but for the rest, all the controversy is now over, the  
 22 phasing and the delineation of the phasing is accepted and  
 23 we can now carry on with evidence on the first phase.  
 24 Please proceed.

25 MR SEMENYA SC: Yes Chair, but the record

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1 must also show that what we still think is unresolved is  
 2 whether, in the report, factual or finding –

3 CHAIRPERSON: That's what I said –

4 MR SEMENYA SC: - interim or otherwise –

5 CHAIRPERSON: I'm sorry if you didn't  
 6 understand me.

7 MR SEMENYA SC: No –

8 CHAIRPERSON: We will say on Thursday or  
 9 Friday when we're ready, when we've considered all the  
 10 arguments and so forth, we will indicate whether we will be  
 11 open – perhaps that's the best way to put it – to make  
 12 interim findings at the end of the first phase. What's  
 13 been said by Mr Chaskalson is that we should make findings  
 14 but – interim findings – but if any of the parties feel  
 15 that a particular interim finding or perhaps any interim  
 16 finding will be inappropriate at the end of the first  
 17 phase, that issue could be dealt with them. He said it's  
 18 premature at this stage, but that's the only issue that's  
 19 open now. The controversy has receded into the distance as  
 20 far as the actual delineation of the evidence to be covered  
 21 in the first phase – I think that's correct, isn't it?  
 22 Let's carry on with the first phase.

23 MR SEMENYA SC: Chair, we call Colonel  
 24 Scott. It's a Lieutenant-Colonel, Chair. I'm told it  
 25 might take some logistical doing to have the technology

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1 speak and work. Should we adjourn for a moment, Chair?

2 CHAIRPERSON: The Commission will adjourn  
 3 for five minutes.

4 [COMMISSION ADJOURNS COMMISSION RESUMES]

5 [12:16] CHAIRPERSON: The Commission resumes. Mr  
 6 Semenya, may I ask you – this presentation is really, I  
 7 take it, an extension of your opening statement and you  
 8 mentioned Lieutenant-Colonel Scott. I take it he himself  
 9 cannot give direct evidence on many of the matters covered  
 10 in the presentation, is that right?

11 MR SEMENYA SC: That's correct, Mr Chair.

12 CHAIRPERSON: He will, I take it, in due  
 13 course be able to give evidence about those matters which  
 14 he has personal knowledge of?

15 MR SEMENYA SC: Indeed, Chair, and –

16 CHAIRPERSON: So it seems to me that it's  
 17 not necessary for us to swear him in at this stage.

18 MR SEMENYA SC: That is –

19 CHAIRPERSON: He can just be our guide,  
 20 as Mr Chaskalson was in the case of the video material we  
 21 saw.

22 MR SEMENYA SC: Indeed –

23 CHAIRPERSON: But when he is going to  
 24 give evidence about matters in his own, within his own  
 25 knowledge, then I'll swear him in. Is that correct?

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1 MR SEMENYA SC: That is correct, Chair,  
 2 and perhaps we need to mention that Colonel Scott,  
 3 Lieutenant-Colonel Scott is indeed one of those people who  
 4 are on the list of witnesses that we intend to call, but in  
 5 terms of viva voce evidence our preference is to start with  
 6 General Annandale. So at this hour we are just going to be  
 7 using the presentation by Colonel Visser and Lieutenant-  
 8 Colonel Scott with – not under oath.  
 9 CHAIRPERSON: Yes.  
 10 MR BIZOS SC: With respect –  
 11 CHAIRPERSON: You don't have to stand, Mr  
 12 Bizos –  
 13 MR BIZOS SC: For once I've already  
 14 stood. Mr Chairman – I beg your pardon – Mr Chairman, in  
 15 my experience since 1954 I have never had a presentation,  
 16 presentations are done by fashion agents and people like  
 17 that in order to sell goods. I asked my learned friend on  
 18 what basis was this person called to make a presentation  
 19 and he told me it was a presentation and he was not going  
 20 to be asked to make an oath. I asked him, he's merely  
 21 going to show us the material. The next question that I  
 22 asked my learned friend, did he gather it? Yes, he  
 23 gathered it. Did he edit it? And if I remember correctly,  
 24 he said yes, he edited it. Will he say who he got it from?  
 25 Yes, he'll say where he got it from. That sounds to me as

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1 evidence from which cross-examination may be necessary to  
 2 emerge and I don't know what is a presentation or an  
 3 opening address. An opening address is done by a member of  
 4 our profession as to what he is going to prove. That's all  
 5 I want to say. We want clarity on this unprecedented  
 6 procedure that a senior policeman who, by the way, on the  
 7 information before us – I think it's a 19 page statement  
 8 that he made in which it starts that he has personal  
 9 knowledge about the planning of this operation. On what  
 10 basis can we listen to anything that we has to say – I  
 11 don't know.  
 12 CHAIRPERSON: Mr Bizos, this is – as I  
 13 understand the presentation – in effect an extension of the  
 14 opening address. This is a Commission, this is not a  
 15 trial. I understand what you say about trials. This is a  
 16 Commission which is able to have, to determine its own  
 17 procedure. What is important is, he will be called as a  
 18 witness and will then be able to be cross-examined about  
 19 the planning and all the matters of which he has personal  
 20 knowledge, all the investigation he did, the preparation he  
 21 did and if – we are told he's on the list of police  
 22 witnesses but I can give you my personal assurance that if,  
 23 for some reason, Mr Semenya decides not to call him, I will  
 24 see to it that he's called and you'll get the opportunity  
 25 to question him, but I think as a matter of convenient

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1 presentation of the case, let's hear the presentation, let  
 2 them call General Annandale if they want to but you have my  
 3 promise recorded that if they don't call him, I'll get him  
 4 called and you can cross-examine.  
 5 MR BIZOS SC: Thank you, Chair.  
 6 CHAIRPERSON: Are you happy?  
 7 MR BIZOS SC: Yes.  
 8 CHAIRPERSON: Right. Mr Semenya, could  
 9 you carry on? Your full names?  
 10 VICTOR VISSER: Victor Visser, sir.  
 11 CHAIRPERSON: Victor Visser Scott?  
 12 LT-COL VISSER: No, only Victor Visser.  
 13 Colonel Scott will do the second half of the presentation.  
 14 CHAIRPERSON: Are you [inaudible]?  
 15 LT-COL VISSER: Yes.  
 16 CHAIRPERSON: So you're going to make  
 17 part of the presentation?  
 18 LT-COL VISSER: Yes, sir.  
 19 CHAIRPERSON: You are Lieutenant-Colonel  
 20 Visser, you're going to present part of the presentation?  
 21 LT-COL VISSER: Yes.  
 22 CHAIRPERSON: And I'm not sure whether  
 23 you're on the witnesses list but if you aren't, I'll see to  
 24 it that you give evidence –  
 25 LT-COL VISSER: That's fine.

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1 CHAIRPERSON: - so that the parties can  
 2 cross-examine.  
 3 LT-COL VISSER: That's fine.  
 4 CHAIRPERSON: The promise I gave you, Mr  
 5 Bizos, is correspondingly amended. Please proceed,  
 6 Lieutenant-Colonel.  
 7 LT-COL VISSER: Thank you, Mr  
 8 Chairperson, members of the Commission, others present.  
 9 Like I was introduced, I'm Colonel Victor Visser. I'm a  
 10 trained work study officer and I was brought in as an  
 11 objective person that was not at the scene in question, to  
 12 compile a report and do the presentation. The presentation  
 13 will be done in two parts. I will do the first half of the  
 14 presentation and the second half of the presentation will  
 15 be done by Lieutenant-Colonel Scott.  
 16 Thanks, so we're proceeding then with the  
 17 presentation. The first slide, looking at a build-up in  
 18 the history of the events that led to the unfortunate  
 19 incidents of Friday. The incidents left 44 people dead, 94  
 20 injured, 271 arrested and looking at the incidents out of  
 21 that there is – a judicial commission of inquiry was  
 22 established that will look into the incidents.  
 23 Next slide. With regard to the mandate of the  
 24 Commission, just to refresh your minds, four aspects that  
 25 are important, relevant to the police, the nature, extent

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1 and application of any standing orders, policy  
 2 considerations, legislation or other instructions in  
 3 dealing with the situation that gives rise to the incident,  
 4 the facts and circumstances that give rise to the use of  
 5 force and whether or not it was reasonable and justified,  
 6 to examine the role of the police played through its  
 7 respective units and whether or not, by act or omission, it  
 8 directly or indirectly caused loss of life, harm to persons  
 9 or property.

10 Thanks, next slide. The presentation will try  
 11 and tell the unfortunate story of how regrettable 44 people  
 12 lost their lives, including two people of the police  
 13 service as well. Throughout the presentation there will be  
 14 disturbing images of people that lost their lives during  
 15 the incidents, just to give an indication to what the  
 16 police were dealing with building up to the incident on  
 17 Thursday, just to quickly highlight, the main  
 18 responsibility of the police service as set out by the  
 19 vision and the mission of the police is to create a safe  
 20 and secure environment through prevention of crime,  
 21 investigation of crime, ensuring criminals are brought to  
 22 justice and to assist in addressing of root causes of  
 23 crime.

24 In addition to this core business of the police,  
 25 the police also got involved in various other aspects of

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1 society building up to these incidents, looking at conflict  
 2 between mineworkers, conflict between workers and unions,  
 3 conflict between rival unions, conflict between mine  
 4 management, unions and workers. Throughout this process,  
 5 the police had to adopt the roles not only of security but  
 6 negotiator and protector as well.

7 One important aspect that must be noted is that  
 8 police members are not functioning in isolation from the  
 9 community, but we are part of the community that we served  
 10 – we’re only the community members that stand up and was  
 11 willing to serve and protect. The police members and the  
 12 police services, in dealing with all these incidents, were  
 13 also affected in the same way as everybody else. The whole  
 14 unfortunate incident was a reflection of various sectors of  
 15 society that were not functioning well.

16 Next slide. A summary of the escalation of  
 17 violence from the 10th of August to the 16th August.

18 On Friday the 10th August, protestors wounded two  
 19 persons during a clash of rival unions.

20 On Saturday 11th of August five wounded persons  
 21 were found by mine security. Three persons were also  
 22 wounded during a march.

23 Sunday 12th of August, protestors killed two of  
 24 the mine security guards. Protestors later that evening  
 25 also killed two of the mine employees and torched nine

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1 vehicles.

2 Monday the 13th August, protestors killed two  
 3 members of the police, wounded one member of the police.  
 4 Police killed two protestors, one protestor was stabbed to  
 5 death and five protestors were wounded by the police.

6 Still continuing, on Tuesday the 14th of August,  
 7 while the police implement phase 1 of our operational plan  
 8 focusing on negotiations, another body of a mine supervisor  
 9 was found near the koppie where the people were gathered.

10 On Wednesday the 15th of August, the police  
 11 continued with negotiations. At the end of the day  
 12 protestors committed to putting down their weapons at 9  
 13 o'clock the following day, that'll be Thursday, the 16th.

14 On Thursday the 16th of August, police implement  
 15 phase 2 of the operational plan, deployed the barbed wire.  
 16 Protestors charged the police. In that incident 34  
 17 protestors were killed, 78 protestors were wounded.

18 To continue with the build-up of the events that  
 19 led to the Thursday, the violent nature and aggression of  
 20 protestors were a reflection of public violence that was  
 21 experienced at the other mines earlier in the year as well.  
 22 Information showed that the unrest was based on the rivalry  
 23 between two unions, the National Union of Mineworkers, NUM,  
 24 and the Association of Mineworkers and Construction Union,  
 25 AMCU. Also workers involved at these unrests at other

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1 mines earlier in the year also ended up joining the unrest  
 2 at Lonmin at the koppie.

3 Throughout the presentation we will show photos  
 4 and we will show videos, adding and emphasising certain  
 5 aspects of our presentation. The first video is an  
 6 interview on Eye Witness News. This news report indicated,  
 7 about the union dynamics in South Africa, giving a  
 8 comprehensive explanation about the initial conflicts.  
 9 We're going to play the video for you.

10 [VIDEO IS SHOWN]  
 11 [12:36] The interview is explaining some of the union  
 12 dynamics and mainly the rivalry between the NUM and the  
 13 AMCU unions.

14 A short summary of some of the incidents  
 15 previously in the year at the mines in region. Looking at  
 16 the Impala Platinum Mine, from January to July 2012, 23  
 17 incidents were reported ranging from public violence,  
 18 assault with grievous bodily harm, malicious injury to  
 19 property, intimidation, attempted murder to murder, 68  
 20 criminal cases were registered.

21 Looking at Kwezi Platinum Mine also in the same  
 22 region, from February to August 2012, 12 incidents also  
 23 ranging from assault with grievous bodily harm,  
 24 intimidation, malicious injury to property, also attempted  
 25 murder and murder, 16 criminal cases were registered.

<p style="text-align: right;">Page 1096</p> <p>1 Coming now to Lonmin Platinum Mine earlier in the 2 year, from February to July 2012, 12 incidents were also 3 reported, also ranging from assault GBH, malicious damage, 4 injury to property, intimidation, attempted murder and 5 murder, nine criminal cases were registered. 6 Looking at this picture and the history of 7 violence, we're going to start with Friday, 10th of August, 8 and the incidents that occurred on that Friday. 9 On Thursday the 9th of August, information was 10 already received about the planned march to the mine 11 offices on Friday the 9th. The public order policing unit 12 of Rustenburg was notified for assistance and on that 13 specific day 29 members of our public order policing unit 14 as well as visible policing members of Marikana police 15 station itself, was employed or deployed to handle the 16 situation as normal crowd management. 17 Next slide. Throughout the presentation, we're 18 going to take it in sequence on time, looking now at Friday 19 the 10th of August, starting at 7 o'clock in the morning, 20 protestors already started to gather at the Wonderkop 21 Stadium. The police also arrived at the scene and followed 22 the protestors as they marched to the mine headquarters. 23 The protestors proceeded to the mine's offices to voice the 24 wage disputes of the rock drilling operators. The big 25 group of protestors was stopped with - outside the security</p>	<p style="text-align: right;">Page 1098</p> <p>1 course you'll be able to question him about it, but you're 2 correct, what we have on the screen is not the complete 3 version of what he's saying to us but the extra stuff we'll 4 get in due course, I take it. 5 MS LEWIS: Thank you, Chairperson. 6 LT-COL VISSER: Here and there slight 7 changes were made to the presentation, coming to - I think 8 we'll get to it after Thursday. On Thursday we'll give you 9 new copies of the presentation itself. This morning we 10 just had a power problem down below, but we'll give you new 11 copies of the presentation but there's also a narrative 12 available, so the presentation is only a point-wise aspect. 13 As visible policing patrols continued throughout 14 the evening, police members on patrol heard gunshots. 15 After investigation they could not find any incidents but 16 it was reported the next morning that two mine employees 17 were found in hospital that were shot. 18 The next slide is just giving you a geographical 19 orientation about, if we're looking at the koppie and we're 20 looking at Wonderkop Stadium and we're looking at the march 21 itself - it's a little bit small on the screen - what you 22 see there is first of all the koppies where the scene on 23 Thursday happened. If you look at the Wonderkop Stadium 24 just to the right - that's where the people gathered and 25 then they marched all the way to the mine headquarters.</p>
<p style="text-align: right;">Page 1097</p> <p>1 gates and a delegation of 10 leaders were identified and 2 allowed to enter the mine premises to talk to mine 3 management. 4 At 12 o'clock the delegation of 10 members 5 returned. They addressed the group and they indicated to 6 the group that mine management are not negotiating with 7 them since there was a two year wage agreement already in 8 place. The protestors then returned to the Wonderkop 9 Stadium where they were again addressed by the leadership. 10 After that they dispersed peacefully. Police were still 11 visible in the area, doing patrols. Throughout the course 12 of the evening various incidents of intimidation were 13 reported to the mine security. Because of the intimidation 14 factor, no cases were registered at the police itself. At 15 one of the incidents 25 rubber rounds were shot at the 16 protestors by mine security and they dispersed. 17 MS LEWIS: I'm sorry to interrupt, Mr 18 Chair, but I'm not sure that we have the correct version of 19 the presentation. What is being said by - 20 CHAIRPERSON: What the Colonel - 21 MS LEWIS: - certainly does not appear on 22 our slide. 23 CHAIRPERSON: - is saying, appears to be 24 an amplification of what is on the screen, but it's being 25 transcribed and when he goes and gives evidence in due</p>	<p style="text-align: right;">Page 1099</p> <p>1 Right, if you go to the next slide, it's about a 2 seven minute video of the march on the Friday. What we 3 want to indicate is, looking at the nature of the march, 4 the posture of the protestors, so you're going to get an 5 idea what happens on the Friday itself. 6 [VIDEO IS SHOWN *WHILE WITNESS CONTINUES TO 7 SPEAK] 8 It's important to note that at this stage there's 9 no dangerous weapons that's present. The protestors are 10 [indistinct] to the police lines that were set there. 11 There's placards and there's knobkerries that's available 12 and assegais and the dangerous weapons following the 13 incidents in the coming days, is not visible on the Friday 14 itself. The placards that are available indicate the 15 12 500 demand of the rock drill operators. 16 So that was the protest march and the mood of the 17 protestors during the march on the Friday. 18 Just a quick summary looking at the Friday, after 19 information was received about the gathering, the gathering 20 was policed from 7 o'clock in the morning till 2 o'clock in 21 the afternoon, after which the protestors dispersed 22 peacefully. The area was patrolled the rest of the evening 23 without any further incidents. It's only the next morning 24 that the report was received about two people that were 25 shot and that were taken up in hospital.</p>

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1 Coming to the next day, Saturday the 11th of  
 2 August, again information that was received by the police  
 3 is that the situation was still serious, police visibility  
 4 is still required in the area and it was also reported as  
 5 such by Brigadier Engelbrecht, our provincial head, crime  
 6 intelligence, to Major-General Pembe.

7 The operational deployment for the day - the  
 8 previous day's contingency plan was still in place to deal  
 9 with the march and the situation. Again 16 additional  
 10 public order policing members were deployed with the  
 11 visible policing members of Marikana.

12 In looking at the events of the day, Saturday the  
 13 11th, at 6 o'clock my security reported that already a group  
 14 of about 2 000 protestors were gathered at the Wonderkop  
 15 Stadium. My security also confirmed faction fights the  
 16 previous night and confirmed the report of two persons that  
 17 were shot during these confrontations. At round about 8:30  
 18 the protestors that were gathered at the Wonderkop Stadium  
 19 marched to the NUM's local office. Before they could reach  
 20 the offices, conflict was experienced between rival union  
 21 groups and two mine employees were shot during these  
 22 confrontations. At 9 o'clock in the morning mine security  
 23 reported again, reports of one additional person that was  
 24 found shot and wounded and it was possibly linked to the  
 25 same incident earlier.

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1 At 12 o'clock in the morning a group of about 50  
 2 male members was seen performing rituals at the Wonderkop  
 3 koppie. That was witnessed by police members and the rest  
 4 of the day no further incidents were reported.

5 The next slide is just to give you a geographical  
 6 orientation again relevant to the NUM office and the  
 7 Wonderkop Stadium as well, the Wonderkop Stadium where the  
 8 members gathered. On the Friday they marched in the  
 9 opposite direction to the mine head office. On the  
 10 Saturday they marched in the opposite direction, on their  
 11 way to the NUM offices. About halfway in between they were  
 12 stopped by members from other unions and that is where the  
 13 clash took place.

14 Looking at the summary of the events of the  
 15 Saturday the 11th, visibility was maintained through police  
 16 patrols in the general area around Marikana. In the  
 17 morning three protestors were shot during confrontations.  
 18 These confrontations happened on mine premises and the  
 19 police were only called out to the scene after it happened.  
 20 Then reports were also received then of protestors involved  
 21 in rituals of some sort.

22 Casualties, looking at the Friday and the  
 23 Saturday, on Friday protestors wounded, two persons, on  
 24 Saturday three protestors wounded, so that's a total of  
 25 five.

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1 Coming to Sunday the 12th August, again the  
 2 information received by the police, the situation is still  
 3 very tense. Information was also received early in the  
 4 morning that protestors planned to torch the NUM offices  
 5 and the police satellite station next to it. Operational  
 6 deployments for the day, the previous day's contingency  
 7 plan was still put in place to monitor and address the  
 8 situation. Because of the information received and the  
 9 escalation of violence, 39 members were initially deployed,  
 10 followed by an additional 52 that evening.

11 Starting with the events of Sunday, the 12th of  
 12 August, 7:30 in the morning a report was received, mine  
 13 security reported that they found five persons that had  
 14 been shot, two persons had been assaulted. They were taken  
 15 to hospital. Because of intimidation these people did not  
 16 register any criminal cases.

17 Later in the morning at 10:30, two to three  
 18 thousand protestors again marched to the NUM offices. They  
 19 were again – before they could reach the NUM offices they  
 20 were stopped by four members of the mine security.  
 21 [12:56] The protestors started singing songs while  
 22 sitting in a crouching position. It seemed like they were  
 23 preparing to attack. Rubber bullets were shot by the mine  
 24 security. Two of the mine securities were overpowered,  
 25 hack to death, one of them was torched as well. The other

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1 two mine security guards fled the scene. Also in the same  
 2 incident two security vehicles were torched. The two  
 3 shotguns and ammunition of the two mine security guards  
 4 were also robbed.

5 In the next slide again a geographical  
 6 orientation, again looking at the Wonderkop Stadium area  
 7 indicated in green. Protestors gathered and were planned  
 8 were to march to the NUM offices but again, before they  
 9 could reach the NUM offices the clash with the mine  
 10 security happened. Please, a warning, some of –

11 CHAIRPERSON: Just hang on. It's nearly  
 12 one o'clock. I take it we're now moving – is this still  
 13 the pictures from the 12th –

14 LT-COL VISSER: We're almost finished  
 15 with the 12th.

16 CHAIRPERSON: - or the 13th?

17 LT-COL VISSER: We're almost finished  
 18 with the 12th.

19 CHAIRPERSON: The 12th and then we'll take  
 20 the adjournment, yes. You say there are graphic images of  
 21 deceased persons. Let's pause for a couple of minutes to  
 22 give anyone who wishes to leave the opportunity to do so.  
 23 The interpreter will explain, so that those who wish to  
 24 leave, can leave.

25 LT-COL VISSER: Persons that don't want

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1 to see the following images have an opportunity to leave  
2 now.

3 MS BARNES: Chair, it might be useful to  
4 tell people that the images are in relation to the deceased  
5 security guards.

6 LT-COL VISSER: The images are an  
7 integrated part of our presentation to give an indication  
8 what the situation, that we were dealing with. The first  
9 slide indicates one of the vehicles that were torched. The  
10 next slide is one of the mine security guards that were  
11 hacked and stabbed to death. From close by it's apparent  
12 that the tongue of the security guard was also cut out.

13 The next photo is an indication of the security  
14 guard that was hacked, stabbed and burnt to death.

15 The next slide indicates one of the burnt  
16 vehicles and one of – the mine security guard that was  
17 burnt, part of his legs is still visible in the vehicle.

18 The next slide indicates from the mine security,  
19 some of the protestors are very small but they're running  
20 away with the shotgun, one of the shotguns that were robbed  
21 by the security guards.

22 The next slide indicates at 2 o'clock the rituals  
23 that were witnessed from our air wing. It's not very  
24 clear, on later pictures it's very clearer. It's  
25 approximately 200 male members that are standing in half

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1 circles undertaking some sort of ritual.

2 Continuing with the 12th, at 6 o'clock that  
3 evening after the incident the police established a JOC, a  
4 joint operational centre, with the mine security at the  
5 Lonmin mine's rescue unit. 10 o'clock that evening  
6 protestors infiltrated the production area at the K4 shaft,  
7 assaulting employees who were on duty, fatally wounding two  
8 of them and torching nine motor vehicles.

9 Again the next slide just to give you some  
10 geographical orientation, the Wonderkop is again indicated  
11 there and again the incident happened again in the opposite  
12 direction again at the K4 shaft, in the opposite direction  
13 of the NUM offices.

14 Again the next slide that we're going to show  
15 with relation to the two employees that were killed on  
16 Monday.

17 CHAIRPERSON: Perhaps it's appropriate at  
18 this stage to stop. This is the 13th we've come to?

19 LT-COL VISSER: No, we're still on the  
20 12th.

21 CHAIRPERSON: The Monday was the 13th.

22 LT-COL VISSER: Sorry, it's still on the  
23 Sunday, the Sunday evening the two employees –

24 CHAIRPERSON: Alright –

25 LT-COL VISSER: We're about three slides

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1 from the end.

2 CHAIRPERSON: We'll do that.

3 LT-COL VISSER: So again if there are any  
4 people that are going to find this disturbing, we will  
5 allow you the opportunity to leave. Okay, we're going to  
6 continue. There's one –

7 MR MADLANGA SC: Sorry Chair,  
8 commissioners, perhaps if the names of the people, of the  
9 deceased people could be given because otherwise it is  
10 meaningless to the audience. I think probably one of the  
11 names is Mr Mabebe. I'm not sure of the second name.

12 LT-COL VISSER: I don't have them with me  
13 right now, so maybe if that's the case we must break for  
14 lunch just now.

15 CHAIRPERSON: We'll adjourn now for lunch  
16 and then read them out, so those who think they might be  
17 distressed by seeing the pictures, have an opportunity to  
18 leave. We'll adjourn now until 2 o'clock.

19 [COMMISSION ADJOURNS COMMISSION RESUMES]

20 [14:05] CHAIRPERSON: Good afternoon, the  
21 Commission resumes. Mr Madlanga, you raised your hand and  
22 turned on your microphone.

23 MR MADLANGA SC: Thank you Chairman,  
24 commissioners. There's a matter that I would like, with  
25 the Commission's leave, to interpose at this stage. I'm

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1 loath to raise it at the time that the Commission rises  
2 because the Commission may end up sitting longer than it  
3 had intended to for today, because it may lead to a bit of  
4 argument perhaps.

5 CHAIRPERSON: The Commission is going to  
6 adjourn at 3:30 because I have to catch an aeroplane.

7 MR MADLANGA SC: Yes. It is exactly –

8 CHAIRPERSON: If we have to adjourn while  
9 someone is in the middle of a sentence, we will adjourn.

10 MR MADLANGA SC: Commissioners, the  
11 matter that I wish to raise relates to the sequence of the  
12 testimony to be given by witnesses and what I'm going to be  
13 asking for is for the Commission to give a direction in  
14 this regard.

15 Commissioners, if one were to posit a situation  
16 where evidence leaders had been appointed and no, there  
17 were no legal representatives for "parties," it would,  
18 without question, be a decision of the evidence leaders  
19 which witnesses they call first, subject of course to a  
20 view that the Commission might take on the matter because  
21 this is a Commission hearing so the Commission might say  
22 no, we'd like to hear that witness before that one. But  
23 subject to that, it would really be the decision of the  
24 evidence leaders who they would like to call first.

25 It so happens here that the various parties are

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1 represented by legal representatives but I would submit,  
2 commissioners, that that does not detract from the fact  
3 that pre-eminently it is still the decision of the evidence  
4 leaders who should lead evidence first, subject to the  
5 rider that I indicated earlier. Now, coming to what we are  
6 going to be asking for –

7 CHAIRPERSON: I'm sorry to interrupt you.  
8 I'm not sure that it's correct to say it's the decision of  
9 the evidence leaders who has to lead witnesses. Subject to  
10 what others may say, this is a prima facie view, I would've  
11 thought the evidence leaders would have the prerogative,  
12 subject to what the Commission says, to decide on the order  
13 of witnesses but that if a witness that was represented it  
14 would be appropriate to afford the witness's representative  
15 the opportunity to lead the witness's evidence-in-chief.

16 So it's not a question of who leads the witness but  
17 normally a party's representative would lead him or her,  
18 but the decision as to the order in which witnesses are to  
19 give evidence would rest with the evidence leaders prima  
20 facie, subject obviously to direction by the Commission.

21 MR MADLANGA SC: Chair, I'm not at all in  
22 disagreement with that. Perhaps it's a matter of  
23 articulation and I do not even think that I was drawing  
24 that sort of distinction but so as not to waste time, I  
25 agree fully. And Chair, as I was submitting, to come

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1 closer to the point that we want to make, we as evidence  
2 leaders approached Mr Mpofu and Mr Bruinders to lead their  
3 witnesses first. What informed that decision was the fact  
4 that –

5 CHAIRPERSON: I'm sorry to interrupt you.

6 MR MADLANGA SC: Yes.

7 CHAIRPERSON: Do you mean all their  
8 witnesses or just particular witnesses? I mean  
9 theoretically Mr Mpofu may want to lead 30 witnesses. Are  
10 you suggesting he should lead all his 30 witnesses first or  
11 were there particular witnesses who you thought should be  
12 led at the beginning, as it were, and that you wanted Mr  
13 Mpofu to lead those witnesses first?

14 MR MADLANGA SC: Chair, we would prefer  
15 not to dictate which witnesses should be called but in our  
16 interaction with Mr Mpofu we had identified certain  
17 witnesses and in fact the number was five, the witnesses  
18 that we as evidence leaders had identified, but we would  
19 still choose not to dictate to the parties. We will be  
20 furnished with a list of witnesses and we will see  
21 beforehand what witnesses these two parties intend calling  
22 and we may then engage each other on the issue that the  
23 Chairman is raising but we would prefer, at this stage at  
24 least, to say that we would not want to dictate.

25 That said, so we approached our learned

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1 colleagues with the request that they should lead their  
2 witnesses first. My learned friend Mr Mpofu was non-  
3 committal on the matter. I see he is smiling and I'm sure  
4 he will agree with that. Mr Bruinders, on the other hand,  
5 accepted our request but in fairness to him, I must say  
6 that he did say that that would depend on the co-operation  
7 that he would get from Mr Mpofu's witnesses. And the  
8 context perhaps, if I may, was that that was at the time  
9 when some of Mr Mpofu's clients were under arrest and what  
10 Mr Bruinders was alluding to was the fact that possibly  
11 some of the people that he might want to call, may well  
12 still be under arrest and my understanding was that that  
13 was what he was referring to at the time. But the point  
14 is, he was otherwise unequivocally accepting that he would  
15 go first.

16 Now yesterday I was approached by Mr Mpofu and Ms  
17 Barnes and they said that they would rather prefer to lead  
18 their witnesses only after SAPS has led its witnesses.  
19 They would prefer for SAPS to go first. Chair, we are  
20 opposed to that and we are not opposed for the sake of it.  
21 There are practical considerations in that regard.

22 We have, quite recently, made several requests  
23 for documents. One was made on the 22nd of October, the  
24 next one on the 29th of October, another one on the 4th of  
25 November, another one on the 5th and the last one on the 6th

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1 of November, this morning. Chair, there have been  
2 responses to the requests but the responses are by far not  
3 complete.

4 Now, the practical difficulty that this presents  
5 us with is that if SAPS were to start with its case now we,  
6 as evidence leaders – I would imagine even some of the  
7 other parties – will not be in a position to meet SAPS's  
8 case at all, not at this stage. There is a lot of  
9 documentation involved. SAPS have given us bulky, copious  
10 documentation. We have even had to buy terabyte external  
11 hard drives in order to be able to have that documentation  
12 in electrical format.

13 Now, the simple point Chair, it would not work,  
14 it is impracticable if SAPS were, say, to start its case on  
15 Friday or even next week for that matter – not at this  
16 stage, not prior to us having all the documents that we  
17 require.

18 On the other hand, I did not hear my colleagues  
19 for AMCU and Mr Dali's 200-and so clients, I did not  
20 understand them to make the point that they are not in a  
21 position to present their cases. Rather, the sense that I  
22 got was that it was more for convenience but in fairness to  
23 them, they are in a better position to articulate their  
24 point but at least in their request to us I did not hear  
25 any practical considerations as to why they would prefer to



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1 go after SAPS.

2 CHAIRPERSON: May I ask you a question?

3 MR MADLANGA SC: Yes.

4 CHAIRPERSON: The five witnesses you

5 identified, did they make statements to IPID?

6 MR MADLANGA SC: Yes – yes, Chair.

7 CHAIRPERSON: And are their statements in

8 the IPID bundle that was made available to us all?

9 MR MADLANGA SC: Yes, they have

10 statements there, Chairperson.

11 CHAIRPERSON: Thank you.

12 MR MADLANGA SC: So in short, Chair, we

13 would ask for a direction from the Commission that AMCU/Mr

14 Mpfu's clients should go first and that should be as early

15 as the beginning of next week, Chair.

16 CHAIRPERSON: Ms Barnes, do you wish to

17 say anything in regard to what Mr Madlanga has said?

18 MS BARNES: Yes, thank you, Chair.

19 Chair, if I might first place something on record. I

20 intended to do it immediately after we resumed after lunch

21 but Mr Madlanga pipped me to the post. I didn't raise it

22 this morning because I didn't have all the facts clear, but

23 I do now. It is something that I have raised with the

24 evidence leaders and also with, by my learned colleagues

25 here today, including Mr Semenya, and it's this, Chair.

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1 The treasurer of AMCU, Mr Jimmy Gama – a very disturbing

2 incident occurred yesterday afternoon in relation to him

3 and his family. His child was at home, had just arrived

4 home after school, when three men wearing balaclavas

5 approached the child and said to the child that they would

6 come back that night to get his father and he should tell

7 his father that. The Gama family then made alternative

8 arrangements for the evening and have also laid a charge at

9 the police station in this regard.

10 So Chair, Mr Gama has been present in the

11 Commission on many occasions. He is – he had, it was

12 intended that he would be, that he would be one of AMCU's

13 witnesses. We are extremely concerned. Our view is that

14 this is an instance of intimidation against one of our

15 witnesses. I just wish to place it on record at this

16 stage.

17 CHAIRPERSON: Is Mr Gama one of the five?

18 I didn't – Mr Madlanga didn't tell us the names of the five

19 witnesses whom he suggests should be called.

20 MS BARNES: I don't believe so.

21 CHAIRPERSON: I understood him to say

22 that he proposed that you should call all your witnesses

23 first which - the five plus any others you wish to call.

24 So you say Mr Gama wasn't one of the five but –

25 MS BARNES: No, Chair –

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1 CHAIRPERSON: But he was one of the ones

2 you proposed calling.

3 MS BARNES: Yes, Chair. There are two

4 categories, in a sense. There are the miners themselves

5 who, some of whom are AMCU members but they're also Mr

6 Mpfu's clients and he and his team have been representing

7 them in the criminal proceedings. So we're working

8 together to some extent, but essentially they are Mr

9 Mpfu's clients. Then the other category would be the AMCU

10 leaders and officials and they would also be giving

11 evidence and Mr Gama would fall into that category.

12 CHAIRPERSON: Were the AMCU leaders and

13 officials among the five whose names were given to you by

14 Mr Madlanga?

15 MS BARNES: No, those five are miners.

16 CHAIRPERSON: Now in relation to this

17 incident that you've told us about, you simply said that

18 three men came wearing balaclavas.

19 MS BARNES: Correct.

20 CHAIRPERSON: And you say – from what you

21 say it sounds like clear attempted intimidation. Are you

22 able to suggest from where the – what the source of the

23 intimidation was? Was it the police or was it another

24 trade union or was it just ordinary individuals? What is

25 the probable, shall we say, or possible source of the

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1 intimidation?

2 MS BARNES: Chair, I can't say at this

3 stage. It's not entirely clear. I simply needed to place

4 it on record in the Commission.

5 CHAIRPERSON: Well, you've placed it on

6 record and it's probably unnecessary for me to say what I'm

7 going to say but I'll say it all the same and that is that

8 all concerned with this Commission or interested in the

9 activities of this Commission, or watching it on

10 television, must realise that intimidation of witnesses is

11 a very serious matter. Apart from the fact that it's an

12 offence under the regulations it's also, I'm almost

13 certain, a common law crime of a very serious nature and

14 anyone who indulges in conduct of that kind and who is

15 apprehended, will be subjected to the full force of the law

16 and I want that to be clearly understood.

17 This Commission has an important function to

18 perform. Its duty, as is well known, is to ascertain the

19 facts, what precisely happened over the period of the 9th to

20 the 16th August at Marikana. It will do its best to ensure

21 that no stone is left unturned, that as far as it is

22 humanly possible, the relevant facts will be ascertained

23 and the truth will be set out in this report.

24 Anything further that need be said on this topic

25 at this stage, Ms Barnes?

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1 MS BARNES: No, Chair. I would, though,  
 2 like to respond to what Mr Madlanga has said. Chair, I was  
 3 not here last week when Mr Madlanga had a conversation with  
 4 Adv Bruinders but I have spoken to Adv Bruinders this  
 5 morning on the telephone and he informed me that he had not  
 6 understood that the request was for either AMCU or – AMCU  
 7 witnesses or striker witnesses to give evidence after a  
 8 mere presentation by SAPS. As we have established, this is  
 9 not evidence under oath, it's simply a mammoth opening  
 10 statement. His understanding was that SAPS would give the  
 11 presentation and then lead evidence under oath, that would  
 12 be cross-examined and at that stage the evidence of both  
 13 AMCU officials and striking workers would be led. So I'm  
 14 afraid that there was a misunderstanding between Mr  
 15 Madlanga and Adv Bruinders last week.

16 The position of AMCU, Chair, is that – we say for  
 17 both principled and practical reasons that SAPS should  
 18 really start leading the evidence in this inquiry. The  
 19 principled reason is really that SAPS has raised the issue  
 20 of self-defence and so if one was in – these aren't, of  
 21 course civil proceedings but if one was in a court they  
 22 would attract an onus in that regard and they would be  
 23 required to start.

24 [14:25] CHAIRPERSON: Sorry to interrupt you. If  
 25 they were in a criminal course, even if their defence was

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1 self-defence, they still wouldn't have to start. The state  
 2 would have to start. This is neither a criminal court nor  
 3 a civil court but I'm not sure how an analogy in a criminal  
 4 – in a civil court, necessarily helps if the position in  
 5 the criminal court would be precisely the opposite, but I  
 6 don't know if this is the place to be, or an occasion to be  
 7 technical. The question is, would there be any prejudice  
 8 or disadvantage to your side if their witnesses got a  
 9 chance to tell their story first? I'm not sure that all  
 10 your witnesses should come, but I assume that the five  
 11 people whom Mr Madlanga has referred to, who are miners,  
 12 would – I take it – be able to tell the story from the  
 13 miners' point of view from, one assumes, the 9th to the  
 14 16th. Would they suffer any disadvantage or any prejudice  
 15 if they were given the opportunity to tell their story  
 16 first?

17 We've heard from Mr Madlanga what the  
 18 disadvantage is from his point of view and it's the point  
 19 of view of representatives of the other parties that the  
 20 police give their evidence first because they couldn't be  
 21 properly cross-examined because all the documents which  
 22 have been sought have not been provided and it'll take a  
 23 lot of time to go through them and prepare focused, non-  
 24 time wasting cross-examination. So we – that's the reason  
 25 he's put. The disadvantage, from a practical point of

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1 view, of the police giving their evidence first – is there  
 2 any disadvantage or prejudice that the five people to whom  
 3 Mr Madlanga referred would suffer if they were given the  
 4 opportunity to tell their story first under oath?

5 MS BARNES: Chair, there would be massive  
 6 prejudice. We are nowhere near ready to begin with our  
 7 case. This is, in part, because of the arrest of our  
 8 witnesses, they spent over a week in jail, they were  
 9 tortured in jail, they are now reluctant to consult with us  
 10 and we have experienced enormous difficulties in that  
 11 regard. So that is in regard to the taking of the witness  
 12 statements which, as I think was indicated previously by  
 13 Adv Bruinders, were incomplete when they were arrested and  
 14 they haven't been completed and it's going to take some  
 15 time still to complete them.

16 The other very big issue –

17 CHAIRPERSON: Sorry to interrupt you.  
 18 Statements apparently were taken by IPID. There are, so –  
 19 I'm not talking about all your witnesses, I'm just talking  
 20 about the five. The five witnesses in question, so Mr  
 21 Madlanga tells us, were interviewed by IPID, the statements  
 22 were minuted from them, we have copies of those because  
 23 we've been given the whole, the full IPID file. So I don't  
 24 quite understand the point that you've just made.

25 MS BARNES: Chair, the –

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1 CHAIRPERSON: Ms Barnes, before you  
 2 proceed. Mr Mpofo, these are also your clients. If you  
 3 are prepared to call them to lead their evidence next week  
 4 then of course Mr Bruinders' and Ms Barnes' reluctance will  
 5 no longer operate as a factor. So I must ask you first – I  
 6 don't want a long story, but just yes or no.

7 MR MPOFU: No.

8 CHAIRPERSON: Are you prepared to call  
 9 them next week?

10 MR MPOFU: No.

11 CHAIRPERSON: No. Thank you. Ms Barnes,  
 12 please proceed.

13 MS BARNES: Chair, the IPID statements  
 14 are extremely limited, as you would've seen. Those  
 15 witnesses have more to say than that and obviously if  
 16 they're called one would want them to give their full story  
 17 and they would be fully cross-examined and so that is what  
 18 I refer to. When I refer to the statements that our team,  
 19 together with Mr Mpofo's team, have been taking, they are  
 20 comprehensive statements covering everything that these  
 21 witnesses know. They go way beyond the IPID statements.

22 CHAIRPERSON: Between now and Monday – I  
 23 don't know whether it even would be Monday but it might be  
 24 – between now and Monday would it not be possible to at  
 25 least take statements from one or two of them?

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1 MS BARNES: Chair, the other difficulty –  
 2 perhaps if I can just round off on the matter of the  
 3 statements – the IPID statements of course, as you would  
 4 have seen, only relates to what happened on the 16th. Some  
 5 of those people have knowledge about what happened on other  
 6 days as well. So the statements, the final statements will  
 7 be significantly, significantly larger and more detailed  
 8 than the IPID statements.  
 9 The other critical issue though, Chair, is the  
 10 information that we've received from SAPS. Mr Madlanga has  
 11 referred to the enormous quantity of information and the  
 12 difficulties that they are having. Well, with respect, we  
 13 are in exactly the same position. Chair, last week we  
 14 received a hard drive from SAPS which had 50 gigabytes of  
 15 information on it. It has, to be precise, 2 951 items on  
 16 it. Chair, we got that last week, we're still working  
 17 through that. On Sunday we received more information,  
 18 another 47 gigabytes of information – that includes videos,  
 19 videos of things that happened on the 12th and the 13th  
 20 that, Chair, I have not yet had an opportunity to look at.  
 21 We need to look at those videos and the photographs and all  
 22 the items on the additional material given to us on Sunday  
 23 and we need to show it to our witnesses. That hasn't been  
 24 done and that is going to take some time. That can  
 25 inconceivably not happen before Monday.

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1 CHAIRPERSON: Please proceed.  
 2 MS BARNES: Chair, it does seem to us  
 3 that by contrast, that SAPS has prepared a very detailed  
 4 and comprehensive presentation which does also cover all  
 5 the events that happened on all the days. We don't have  
 6 comprehensive information that covers the events of the  
 7 week and nor does Mr Mpofo's team and so it would certainly  
 8 make sense from that perspective to start with the SAPS  
 9 evidence. They certainly have the most comprehensive  
 10 information in relation to the events.  
 11 CHAIRPERSON: I take it the presentation  
 12 certainly can be shown to the five witnesses.  
 13 MS BARNES: I beg your pardon, Chair?  
 14 CHAIRPERSON: I take it the presentation  
 15 which we're seeing now can be shown – I don't know if the  
 16 five witnesses are in court but if they're not, presumably  
 17 it can be shown to them before Monday.  
 18 MS BARNES: Yes. The presentation could  
 19 be, Chair, but the problem is, there are numerous  
 20 additional videos. There's video footage of the 12th, the  
 21 13th, the 11th, the 10th. We haven't seen all that footage,  
 22 that footage hasn't been shown to our witnesses. They  
 23 obviously need to be fully apprised of all the evidence and  
 24 the material so that when they're cross-examined they are  
 25 not prejudiced.

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1 CHAIRPERSON: Anything further you want  
 2 to say?  
 3 MS BARNES: Those are our submissions,  
 4 Chair. If we were – I would also need to take further, if  
 5 we were to be pressed as to time limits in this regard I  
 6 would certainly need an opportunity to take some  
 7 instructions in that regard but certainly next week would  
 8 not be possible –  
 9 CHAIRPERSON: Are you saying the whole of  
 10 next week you couldn't manage?  
 11 MS BARNES: Next week would not be  
 12 possible from a practical point of view, Chair.  
 13 CHAIRPERSON: I can see you've turned  
 14 your microphone on, that means you want to say something  
 15 too?  
 16 MR MPOFU: Well, I would think so, Chair,  
 17 after what Mr Madlanga was saying. Chair, let me first  
 18 clear this thing of the five witnesses. I think Mr  
 19 Madlanga maybe doesn't remember it the way it happened.  
 20 The question of the five witnesses belongs to a different  
 21 discussion we had about two weeks ago when Mr Madlanga was  
 22 asking for us to provide five people to him to call at a  
 23 particular stage. Subsequent to that he came back to us  
 24 and said no, the arrangement is now different, he is  
 25 withdrawing that request and maybe - the rest of what he

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1 said is then what happened, to say what they would like us  
 2 to do is to go first, so to speak, and the rest of what he  
 3 said is correct. We couldn't commit, we said we'll  
 4 consider the request and so on and so on, and that's where  
 5 matters stand as far as that is concerned. So we shouldn't  
 6 conflate the thing of the five witnesses who would be  
 7 called by them and our ability to start.  
 8 As far as the issue of us being forced – and I'm  
 9 using that just to deal with what he's saying – to start,  
 10 then I don't think that that can be done, Mr Chair. Of  
 11 course our starting point –  
 12 CHAIRPERSON: Sorry to interrupt you. It  
 13 wouldn't be a question of your being forced to start. The  
 14 Commission determines or is entitled to determine the order  
 15 of witnesses.  
 16 MR MPOFU: Yes.  
 17 CHAIRPERSON: We have the power to cause  
 18 witnesses to be called. We call someone and the witness  
 19 gives evidence. It's not a question of anyone, any party  
 20 being forced to lead evidence. The witnesses give evidence  
 21 because they're subpoenaed to give evidence by the  
 22 Commission.  
 23 As I understand it, as a matter of courtesy, it  
 24 would be appropriate to allow the – or to afford the  
 25 opportunity to the representatives of the witness, if the

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1 witness is represented, to lead the witness's evidence. If  
 2 you decline to do that then obviously the witness could be  
 3 led by one of the evidence leaders. So it's not a question  
 4 of your side being forced to lead evidence, but now it's  
 5 clear what we're dealing with perhaps you can continue with  
 6 your argument.

7 MR MPOFU: Yes, thank you, Chair. No, I  
 8 meant it this way, Chair, and I think these issues are not  
 9 being separated properly. It's one thing to say will you  
 10 call Mr so and so and if you're not ready we will call him  
 11 and so on. That's a different matter. What is being  
 12 proposed, Chair, and maybe Mr Madlanga didn't say it as  
 13 forcefully as he said it to us, is that we should start  
 14 with our case. Now that's a completely different animal to  
 15 –

16 CHAIRPERSON: I'm sorry to interrupt you.  
 17 That's what he said here too.

18 MR MPOFU: Ja.

19 CHAIRPERSON: And I indicated, I think –

20 MR MPOFU: Yes.

21 CHAIRPERSON: - that I didn't think that  
 22 was a good idea, that I could understand if you've got a  
 23 lot of witnesses to call, you've got detailed preparations  
 24 to do.

25 MR MPOFU: No –

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1 CHAIRPERSON: I'm only concerned with the  
 2 five witnesses, that's all.

3 MR MPOFU: Yes. No, fair enough.

4 CHAIRPERSON: That's a different matter.  
 5 Now I think it wouldn't be fair, speaking for myself –

6 MR MPOFU: Thank you, Chair.

7 CHAIRPERSON: - to force you to open your  
 8 case first.

9 MR MPOFU: Thank you.

10 CHAIRPERSON: But here are five witnesses  
 11 who apparently will be able to give us an introduction,  
 12 tell us what happened, set the scene as it were.

13 MR MPOFU: Thank you, Chair. No, we're  
 14 together. Then if that issue is out of the discussion, the  
 15 issue of starting with our case and so on – thank you,  
 16 Chair.

17 CHAIRPERSON: I wouldn't go along with  
 18 that.

19 MR MPOFU: Thank you very much.

20 CHAIRPERSON: What would your attitude be  
 21 if the five witnesses – if you're not ready by Monday  
 22 perhaps you could call the first one on Tuesday but you  
 23 understand what the issue is. It sounds as if we're going  
 24 to lose a lot of time and as you know, for various reasons,  
 25 we haven't been able to sit continuously since the 1st of

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1 October.

2 MR MPOFU: Yes.

3 CHAIRPERSON: Time is limited. It's  
 4 important that we don't waste time and it's quite clear  
 5 that when the police witnesses give evidence, cross-  
 6 examination is going to stand over because you're all – not  
 7 only Mr Madlanga and the other evidence leaders but you  
 8 people as well – will have to make your way through this  
 9 enormous amount of information, some of which hasn't been  
 10 provided yet, so time will be lost there.

11 I must say, speaking – giving a prima facie view,  
 12 I would've thought that it would be sensible for a number  
 13 of witnesses, say five, who can give evidence from the  
 14 beginning, as it were, present their case clearly to the  
 15 Commission, which would then be the background against  
 16 which the evidence of the police could be cross-examined  
 17 and tested. I understand, however, that the mere fact that  
 18 statements are in our possession mightn't be enough, you'd  
 19 have to have consultations with the witnesses and certainly  
 20 they should be shown the police presentation and – but I'm  
 21 not sure that you would require much more than that.  
 22 Obviously if any questions were asked of witnesses in  
 23 cross-examination which I felt prejudiced them, I would  
 24 intervene and protect them as far as I could. You know,  
 25 say for example they were asked about a video that they

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1 hadn't seen, I would insist they be given an opportunity to  
 2 see it before questions are asked and that sort of thing.  
 3 But I must - I don't see the problem that's being raised,  
 4 particularly as now the misunderstanding has been taken out  
 5 of the way. You've heard what I have to say, how do you  
 6 respond?

7 MR MPOFU: Thank you, Chair. My response  
 8 is as follows, Chair. Let me take one step back. All  
 9 things being equal, as the economists would say, we would  
 10 prefer SAPS to lead their case and I think that I don't  
 11 even have to motivate why that should be so. We understand  
 12 what Mr Madlanga is saying –

13 CHAIRPERSON: Well, perhaps you should,  
 14 perhaps you should. I understand the analogy of the civil  
 15 case, but I put another analogy to you –

16 MR MPOFU: Ja.

17 CHAIRPERSON: Which is perhaps equally  
 18 forceful.

19 MR MPOFU: Yes.

20 CHAIRPERSON: Particularly as it is  
 21 alleged by your side that what the police did constitutes  
 22 criminal offences and what might well happen at the end, we  
 23 might – I don't say we will, because we might do precisely  
 24 the opposite but we might perhaps recommend that certain  
 25 members of the police service should be prosecuted and

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1 even, it might even relate to the issue of senior members  
2 of the police service. So this is not just a potential  
3 civil case we're busy with.

4 MR MPOFU: Ja.

5 CHAIRPERSON: We're busy with something  
6 far more serious than that.

7 MR MPOFU: Well, Chair, in that case then  
8 our case is even stronger because our – at least my  
9 particular clients are exactly in that position of facing  
10 criminal prosecution, so –

11 CHAIRPERSON: No, but the evidence they  
12 give here can't be used against them if it prejudices them  
13 in any way because the regulations make that clear.

14 MR MPOFU: Yes, but the same for the  
15 police. So that issue cancels itself because whatever  
16 potential criminal jeopardy that the police might face is  
17 exactly the same that the 300 arrested miners face. So I  
18 think let's put that issue on the side because it cancels  
19 out.

20 The point Chair, is – well, what I'm saying is  
21 that just given the nature of the Commission and the  
22 various allegations that have been made and the submissions  
23 that have been made by the parties up to now – and I think  
24 Mr Madlanga would agree as well – save for the practical  
25 difficulties, that he hasn't received certain information

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1 and so on and so on, the SAPS, as I understood his  
2 presentation he would have no problems with SAPS starting  
3 but he says, well, there is this outstanding, there is that  
4 outstanding and it might be disjointed, which we sympathise  
5 with because obviously SAPS has piles of –

6 CHAIRPERSON: I think he's also concerned  
7 about the loss of valuable time.

8 MR MPOFU: Yes.

9 CHAIRPERSON: We have a limited time for  
10 this inquiry.

11 MR MPOFU: Yes.

12 CHAIRPERSON: And every day lost is a  
13 serious matter.

14 MR MPOFU: And Chair, as participants in  
15 the Commission we obviously would like to help inasmuch as  
16 we can, but not to the prejudice of our case. And we have  
17 – I might reveal that there is a particular witness whose  
18 name I wouldn't like to reveal now, that Mr Madlanga and I  
19 have spoken about who might be called in the course of the  
20 next week or so and that is in the spirit of trying to  
21 assist as much as we can. But in as far as the witnesses  
22 that we originally intended to call as part of a continuous  
23 story that we want to present here, we would not be  
24 disposed to have them called prematurely and out of line to  
25 whatever plans we might have had about calling them when we

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1 do our case as such.

2 CHAIRPERSON: Are those witnesses among  
3 the five that Mr Madlanga referred to?

4 MR MPOFU: Yes, they are, unfortunately  
5 they are, Chair. And number 2, Chair, even if let's say  
6 one or two of those witnesses were marginal as to whether  
7 they are in our line-up or not, the same prejudice that  
8 SAPS might suffer by calling whatever they are ready with  
9 now and maybe doing another chunk later, would be befall us  
10 because we would also be asked now to be chunking our  
11 evidence. So I don't see why, if SAPS is ready with  
12 whatever they are ready with - let's say they are ready  
13 with 10 witnesses but they're not ready with another 15 –  
14 why they cannot start with whatever witnesses they are  
15 ready with and then we cross whatever bridge we might come  
16 to when we come to it.

17 CHAIRPERSON: I didn't understand Mr  
18 Madlanga's request to be based on any considerations of  
19 prejudice to the police. His submissions were based upon  
20 the prejudice that he would suffer and we as a Commission  
21 would suffer because he wouldn't be able to cross-examine  
22 the police witnesses because he has to go through this  
23 enormous amount of material, which has only recently come  
24 or is still on the way. So prejudice to the police doesn't  
25 come into it, as I understand what he has to say.

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1 [14:45] MR MPOFU: Thank you, Chair. No, thanks,  
2 I appreciate that point.

3 COMMISSIONER TOKOTA: Mr Mpofu, before  
4 you, I just want to remove this perception which I think is  
5 prevailing amongst other legal practitioners. Firstly,  
6 this is not a court of law, secondly – either criminal or  
7 civil. Secondly, the proceedings here are actually at the  
8 hands of the Commission, so no-one is at stake who is being  
9 framed as an accused person or as a litigant who must prove  
10 what the onus is on him and so on. The onus is on every  
11 party that has to present its case here, every one of them,  
12 regardless of whether the perception is that the police  
13 were wrong in shooting people or the miners were wrong in  
14 killing police – that does not concern the Commission. The  
15 Commission's mandate is to investigate what caused or which  
16 – all the events that culminated in the 16th tragedy.

17 Now, is it not true that legally it is the  
18 Commission's call to decide who must be called first? The  
19 consultation of parties is by way of courtesy and parties  
20 being represented by legal practitioners, it is expected  
21 that the practitioners will continuously prepare and assist  
22 the Commission in this regard.

23 MR MPOFU: No, Chairperson and – Chair  
24 and honourable commissioners, I agree with what  
25 Commissioner Tokota has said, but we can't run away from

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1 the fact that there has to be some logical procedure to  
 2 discharge that duty. Of course the duty of the Commission,  
 3 the Commission has got all the powers to determine who  
 4 should come and so on, but the Commission is not here, with  
 5 the greatest respect, to determine whether the miners, you  
 6 know, were marching for a living wage or whatever concerns  
 7 them. The Commission is here to determine four things,  
 8 whether the police, Lonmin, AMCU and NUM caused the death  
 9 and injury and arrest of the people. So that, just that  
 10 statement alone – forget about whether there, what the  
 11 procedures are going to be – that's the primary task of the  
 12 Commission and our view is that in discharging that task,  
 13 either one of those four parties which have been accused,  
 14 not by us or rather at least placed in a position where  
 15 they have to explain their conduct by the President, not by  
 16 the Commission, then either one of those parties must come  
 17 here and say whether or not they were the cause or not the  
 18 cause. One cannot ask the people who, to that extent of  
 19 the terms of reference of the Commission, are the victims  
 20 per se, by any description to be the ones who come here and  
 21 answer these 12 questions or so that are posed in the  
 22 Commission.  
 23 So that goes without saying and it's not a matter  
 24 – whether it's a court of law or whatever it is, it must  
 25 have a logic that is based on the terms of reference

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1 because the logic has been dictated by the terms of  
 2 reference and there's nothing that says that if our clients  
 3 were not – our clients, as I said even on day 1 – our  
 4 clients are here to assist the Commission in finding the  
 5 truth in answering its own questions and that's why we are  
 6 here in the first place. But our being here or not being  
 7 here would not stop the Commission from having to discharge  
 8 its work. Thank you.  
 9 CHAIRPERSON: The terms of reference  
 10 don't indicate the order in which witnesses should give  
 11 evidence.  
 12 MR MPOFU: Yes.  
 13 CHAIRPERSON: It's quite clear that the  
 14 Commission is given plenary power to decide which witnesses  
 15 should give evidence –  
 16 MR MPOFU: Correct.  
 17 CHAIRPERSON: - in which order. So don't  
 18 understand that last point you made.  
 19 MR MPOFU: Yes -  
 20 CHAIRPERSON: But anyway you've made –  
 21 MR MPOFU: Chair, yes, I appreciate that.  
 22 Maybe let me put it this way. We accept without  
 23 reservation the power of the Commission to determine the  
 24 order of witnesses. What we are doing is to try and seek  
 25 to persuade the Commission that it is not desirable to

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1 request or force or ask, under these circumstances, that we  
 2 should do so. So we're not questioning the fact that the  
 3 Commission, whatever we say, might come back and say, well,  
 4 this is what we have decided – that we're not questioning,  
 5 but we seek to persuade you, Chair and commissioners, that  
 6 what has been suggested is not going to necessarily assist  
 7 the Commission. It's going to prejudice our case insofar  
 8 as we're going to have to bring it in a piecemeal fashion  
 9 and, more importantly, if the people that we are consulting  
 10 with, with all the difficulties that are associated with  
 11 that, we are bringing to them the evidence, the material  
 12 that we get from SAPS and the material that we are getting  
 13 from evidence leaders. So if the material from SAPS is  
 14 incomplete, how are we going to consult with those people  
 15 to such an extent that we are satisfied that they are able  
 16 to assist the Commission maximally?  
 17 CHAIRPERSON: - from Mr Madlanga whether  
 18 the material that he's still waiting for is material which  
 19 in any way relates to the five witnesses he's mentioned,  
 20 let's ask him that. Mr Madlanga?  
 21 MR MADLANGA SC: No, it does not, Mr  
 22 Chair. I will respond more fully as to the basis for us  
 23 identifying these five witnesses but the material –  
 24 CHAIRPERSON: Sorry, before you respond  
 25 can I ask you a question?

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1 MR MADLANGA SC: Yes.  
 2 CHAIRPERSON: Is it possible for you and  
 3 Mr Mpofo and Ms Barnes and/or Mr Bruinders, if he is  
 4 available, to agree on two of the five who would ashen be  
 5 ready to give evidence by Monday? The necessary  
 6 consultation could be held, perhaps videos that have not  
 7 been seen can be shown to them. Is that possible?  
 8 MR MADLANGA SC: Chair, I cannot say is  
 9 it possible to agree but I can say it is possible to engage  
 10 each other.  
 11 CHAIRPERSON: My colleague, Commissioner  
 12 Tokota, wants to ask Mr Mpofo another question.  
 13 COMMISSIONER TOKOTA: This question is  
 14 not only directed to you, it's directed to AMCU as well  
 15 probably, NUM. In the light of what you have reported here  
 16 earlier and today, namely the intimidation of witnesses  
 17 which it would appear this intimidation is directed at  
 18 miners, is it not expedient and actually an ideal thing to  
 19 start with you, so that these intimidation things do not,  
 20 you know –  
 21 MR MPOFU: Thank you, thank you. I  
 22 understand the question. No, on the contrary. The  
 23 intimidation of our witnesses is exactly what – as I said  
 24 last week – is exactly what has caused –  
 25 COMMISSIONER TOKOTA: Let me cut you

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1 again.

2 MR MPOFU: Sorry.

3 COMMISSIONER TOKOTA: More particularly

4 that some of the witnesses have in fact been killed, so it

5 becomes more urgent to use them whilst, before the killing.

6 Some of them are –

7 MR MPOFU: No, no –

8 CHAIRPERSON: I would intervene – I don't

9 want any more people killed but what I would say is this,

10 the longer the period there is before a witness goes in the

11 box, the more opportunity there is for someone to seek to

12 intimidate him or deal with him in a violent fashion. Once

13 the witness has given evidence, there's no longer any

14 opportunity to intimidate him not to give evidence. There

15 might be some kind of further action by way of retribution

16 for what he said but presumably if there's any danger of

17 that, arrangements could be made to protect the witnesses

18 because in fact the Witnesses Protection Act even applies

19 in the case of witnesses before commissions. But the point

20 that my colleague Commissioner Tokota put to you can't be

21 wished away as easily as you endeavour to do –

22 MR MPOFU: No, I –

23 CHAIRPERSON: Because the longer, the

24 longer – as I said, the longer the period before the

25 witness goes in the box, the more time there is for some

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1 malevolent person or persons to take inappropriate action.

2 MR MPOFU: Thank you, Chair. Well, two

3 questions, two answers to that. One is that I don't see

4 how, if somebody can be intimidated from giving evidence –

5 well, I suppose when they do give that evidence then they

6 might even be killed in reprisal. So I don't see how the

7 threat gets removed simply because you've now carried out

8 that that some criminal person doesn't want you to do.

9 That's the first one.

10 The second issue is, in the context of the people

11 that I represent, those five people are negligible. So, I

12 mean I represent more than 300 people, so it would be cold

13 comfort to try and minimise intimidation in respect of two

14 or three of them and the other 200, 300 or so are still in

15 exactly the same position. That I'm afraid doesn't –

16 cannot come into, at least our weighing –

17 CHAIRPERSON: Mr Mpofu, I'm sorry I don't

18 understand. I can understand there will always be the

19 danger of intimidation. Whether your witnesses give

20 evidence – those witnesses that we're talking about – give

21 evidence next week or next month or next year, there'll

22 always be that danger.

23 MR MPOFU: Correct.

24 CHAIRPERSON: I don't understand how the

25 danger then is increased by the witnesses giving evidence

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1 earlier. Certainly attempts to intimidate the witness so

2 as to prevent the witness from giving evidence, could no

3 longer be made once the witness has given evidence. Other

4 considerations may apply, which could be dealt with under

5 the Witness Protection Act, but the main submission you've

6 just been making I'm afraid is too subtle for me to

7 understand.

8 MR MPOFU: I'll explain it, Chair. All

9 I'm saying, my case is not whether the threat is increased

10 or decreased. My response is, to what Adv Tokota has put

11 that the threat would be decreased, and I'm saying it would

12 not necessarily be decreased simply because the person

13 testifies next week as opposed to next month. That's all

14 I'm saying.

15 Now, the issue about the intimidation that

16 affects the debate, the debate that we're having, is the

17 following. The mere reason, one of the reasons why we were

18 not able to be of assistance to Mr Madlanga, as I said here

19 last week, was exactly because our – when I was intimating

20 that we might be helpful to him, we were in a particular

21 mode of preparation. That mode of preparation was severely

22 disrupted in the past two weeks because our team had to be

23 depleted and run around doing bail applications and so on.

24 So that our own preparation, even to the extent to which we

25 could offer those people to Mr Madlanga, was to that extent

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1 disrupted and that is the truth of the matter. Our team is

2 already small and all – I don't want to go into all the

3 other problems of our team, but the intimidation, the

4 relevance of the intimidation is that it has impeded us

5 from even being able to say yes, this witness is ready for

6 you, Mr Madlanga, or not.

7 So all we are asking for is for sympathy from the

8 Commission, that we are, just as SAPS is having practical

9 problems and is not able to call its witnesses, so are we

10 and we don't see why SAPS's problems must be understood -

11 CHAIRPERSON: No, Mr Mpofu, I'm afraid

12 you haven't understood. I didn't hear Mr Semenya saying he

13 can't call his witnesses, he's not ready.

14 MR MPOFU: Mr Madlanga.

15 CHAIRPERSON: Mr Madlanga said they want

16 to call their witnesses, I'm not ready to cross-examine

17 them, that's what he said. If you – obviously it would be

18 inappropriate for me to give preferential treatment and

19 protection to the police and to deprive you of that and

20 that's not what we've been asked to do. So that last point

21 of yours, I'm afraid, has got no merit at all but have you

22 any more meritorious points to make?

23 MR MPOFU: Yes I do, Chair. And the

24 bottom line, Chair, is that we are not in a position – it

25 would be undesirable and prejudicial to our case as such,

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1 as a block, for us to be compelled one way or the other by  
2 anybody to call our witnesses out of turn. If the  
3 Commission, despite what we have said, decides to subpoena  
4 and call certain people, well, that's got nothing to do  
5 with us, then the evidence leaders can do whatever they  
6 want to do in that respect but we ourselves are not going  
7 to voluntarily call our witnesses when they are not ready.  
8 We won't, or even lead them, let me put it that way.

9 Chairperson, on a more conciliatory note, the  
10 suggestion that came from the Chair about two witnesses is  
11 something - I've just been whispering to my team - is  
12 something that we will try to reach Mr Madlanga on. I'm  
13 not making any undertakings but we will see what we can do  
14 there.

15 CHAIRPERSON: Subject to what Mr Madlanga  
16 may say, it sounds as if that may be the way forward and I  
17 certainly want to say that we expect all the parties to do  
18 their best to assist us and we are grateful for the  
19 assistance that we're receiving and there is a spirit, so  
20 far, of co-operation and assistance which I hope will  
21 continue until the end of the Commission. And if you're  
22 able to implement the non-promise you made, I certainly  
23 would appreciate it. Mr Madlanga, do you want to say  
24 anything further?

25 MR MADLANGA SC: Mr Chairman, perhaps on

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1 the last point, the point that Mr Mpofo won't lead his  
2 witnesses and cannot be forced to do so, what I would just  
3 like to say - and it ties in, in a sense, with what the  
4 Chairman said last, which is the spirit of co-operation -  
5 Chairman, as counsel, which Mr Mpofo also is, we usually  
6 work under very hard and trying circumstances. I would  
7 have thought that if witnesses, and only five have been  
8 identified, between now and Monday or at the latest Tuesday  
9 of next week, hard working practitioners like Mr Mpofo  
10 should be in a position to lead those witnesses. So  
11 putting it no higher than saying at the level of co-  
12 operation, I would imagine that Mr Mpofo, if he were to be  
13 so minded and indeed even my colleague Ms Barnes, they  
14 should be in a position to lead the witnesses.

15 Now going back to, just very briefly, the issue  
16 of self-defence. Of course the Chairman touched on it and,  
17 with respect, what he raised with Ms Barnes was to the  
18 point but I just want to take that issue further. Ms  
19 Barnes' point on self-defence failed or fails to take into  
20 consideration other factors. The terms of reference do not  
21 relate only to the killings of the 16th and indeed when an  
22 attempt was being made by way of submissions this morning  
23 on how to delineate the issue on phase 1, in the end the  
24 evidence leaders accepted that there should actually be -  
25 or rather that the killings pre-16 August should also form

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1 part of phase 1.  
2 [15:05] Now if that be so, that puts paid to the point  
3 that Ms Barnes made about self-defence because it will only  
4 relate to the killings of the 16th, but of course I'm well  
5 aware that the Commission has not made any findings at this  
6 stage in that regard, but it may well be, who knows, that  
7 the Commission will in the end accept that the pre-16th  
8 August killings, damage to property, et cetera, should also  
9 form part of the terms of reference.

10 CHAIRPERSON: If I can interrupt you, it  
11 seems to me that there's now just a consensus between all  
12 the parties on the delineation of the issues for phase 1.  
13 The only question outstanding is whether the possibility  
14 should be kept open of interim findings at the end of phase  
15 1. That seemed to be the only point in issue at the end of  
16 the debate. So you can accept that, I think you can accept  
17 that the Commission is happy with the delineation as  
18 agreed. Ultimately it's basically a combination of Mr  
19 Bham's point read with the original draft of Mr Chaskalson.  
20 That delineation of the issues for phase 1 is accepted and  
21 acceptable. It's only the question of the possibility of  
22 interim findings that's outstanding. Anyway, so you can  
23 proceed on that basis.

24 MR MADLANGA SC: That then, Chairman,  
25 thank you, buttresses the point I was making that that puts

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1 paid to the submission by Ms Barnes about self-defence and  
2 that being the reason why SAPS should go first.

3 Then Ms Barnes also made a submission which I  
4 feel is actually contradictory. She says that SAPS is  
5 ready to proceed, but at the same time she says that she,  
6 like us, the evidence leaders, is not in a position to - or  
7 rather would not be in a position, if I understood her  
8 correctly - for the same reasons, be able to engage SAPS's  
9 case.

10 Now if that be so, to me it seems it's not  
11 workable to want SAPS to go first because if SAPS goes  
12 first we can't engage or meet the case of SAPS and she too  
13 cannot meet the case of SAPS because she, like us, as I  
14 understood her, still needs to go through a whole lot of  
15 material. Are the SAPS witnesses going to be paraded here  
16 without us either cross-examining or meaningfully cross-  
17 examining them? That, Mr Chairman and commissioners,  
18 actually demonstrates that it is not workable at this stage  
19 for SAPS to lead its witnesses - impracticable, we still  
20 need a lot of documentation from SAPS and once we get it,  
21 we need to work through it. It's as simple as all that.  
22 It's not a case of being unprepared, it's more a case that  
23 we still have not received that documentation. Once we  
24 receive it we will need to work through it, that requires  
25 time.



<p style="text-align: right;">Page 1144</p> <p>1 Then coming to the points made by Mr Mpfu. I  2 did not conflate issues with regard to the five witnesses.  3 I was quite aware of the context in which he and I raised  4 the issue or the question of the five witnesses. I agree  5 with him fully, but how it arose and how – because in my  6 submissions earlier I did not mention the five witnesses, I  7 only mentioned them when the Chairman asked me who exactly  8 I would like called and whether I would like Mr Mpfu to  9 call all – that’s when I mentioned the five witnesses and I  10 was by no means conflating issues. I was saying our focus  11 as evidence leaders was only on five of his witnesses and  12 in saying that in response to that question by the  13 Chairman, I did not then have to say, but Chair, that was  14 not the context of me and Mr Mpfu having said A, B, C, D.  15 I did not have to say that. The simple point I'm making,  16 Chair, is that I did not conflate any issues in that  17 regard.</p> <p>18 Another point made by Mr Mpfu –  19 CHAIRPERSON: Mr Madlanga, I think the  20 interpreter would like to interpret what you’ve said  21 because he thinks he has enough to interpret for the  22 moment. He doesn’t have to wait until the next couple of  23 paragraphs of your submission. Mr Madlanga?  24 MR MADLANGA SC: Thank you, thank you  25 Chair. Then Mr Mpfu also said that, responding to – I</p>	<p style="text-align: right;">Page 1146</p> <p>1 witnesses or which short list of witnesses can or should be  2 called. I am loath to engage the question of what was said  3 and not said by us as lawyers –  4 CHAIRPERSON: Mr Madlanga, please forgive  5 me for interrupting. I'm not particularly interested in  6 the exchanges that you have with your learned friends –  7 MR MADLANGA SC: Yes.  8 CHAIRPERSON: And my colleagues and I are  9 not going to sit here and make a decision as to which  10 version, if there are conflicting versions of what  11 happened, is correct. It’s not a matter of any moment at  12 all. The only question is the question presently under  13 discussion, whether five witnesses – or it would seem at  14 this, as far as Monday is concerned or Tuesday, two  15 witnesses – who propose to be called by AMCU and/or Mr  16 Mpfu’s clients, should be called on that day either by Ms  17 Barnes or Mr Mpfu – called, called is the wrong word – be  18 led in-chief by Ms Barnes or Mr Mpfu or whether, if they  19 decline to do so, whether I should ask you to do so.  20 That’s the only question, as I understand it, at the moment  21 before us and the discussions you had or didn’t have with  22 your learned friends are of no moment at all as far as I'm  23 concerned.  24 MR MADLANGA SC: Chair, I was actually –  25 that is why even in the opening I said I was loath. I was</p>
<p style="text-align: right;">Page 1145</p> <p>1 hope I understood him correctly – the case of SAPS, he  2 accepts and for the reason that I indicated, he says it  3 would be disjointed. I submit that that’s actually a  4 mischaracterisation of what I said. It’s not merely being  5 disjointed. It is actually that we would not be in a  6 position to meet the case of SAPS at this stage - not just  7 that how we try to meet it would be disjointed, we will not  8 be in a position to meet it.</p> <p>9 Then also the Chairman dealt with the question of  10 prejudice. SAPS never, never claimed any prejudice. In  11 fact, to my surprise in one of his submissions Mr Semenya,  12 my learned friend, actually made a point that – or rather  13 gave me to understand that SAPS would actually be going  14 ahead with its case any minute now. So it seems they are  15 not at all claiming any prejudice with regard to when to  16 start. In fact, it seems they are ready to start right –  17 not claiming any prejudice, so that should not come into  18 the equation. It is more the practicality that I'm  19 referring to. That is the reason why we say SAPS should  20 not go first.</p> <p>21 And then lastly, if the spirit of co-operation  22 which one would expect to lead to Mr Mpfu and Ms Barnes  23 leading their witnesses, if that will not prevail, as a  24 fall-back position, Mr Chairman and commissioners, we would  25 welcome the engagement with our colleagues to see which</p>	<p style="text-align: right;">Page 1147</p> <p>1 actually going to say, and I'm not going to say anything  2 further on that, because knew exactly such a dispute of  3 fact between advocates – ja, it would’ve been impossible  4 and indeed not even necessary for you to pronounce on,  5 Chair. Thank you. I accept that, Chair, that indeed is  6 the issue that is – to my learned colleagues call the, or  7 rather lead the witnesses in-chief or do we do so? As to  8 what will happen, Chair, will be informed by the  9 engagement, if ultimately that is what eventuates.  10 MS BARNES: Chair, might I make a final  11 point if Mr Madlanga is finished?  12 CHAIRPERSON: If it’s a final point, yes.  13 MS BARNES: Thank you, Chair. I'm just  14 concerned that something is not clear, Chair, and this is  15 that the SAPS documents that we are still going through,  16 relate fundamentally to these witnesses and to their  17 evidence and the reason that the evidence leaders are not  18 in a position to cross-examine the SAPS witnesses is  19 exactly the same reason that we are not in a position to  20 lead our witnesses. It is, with respect, exactly the same  21 reason. We are entitled to sit with our witnesses and go  22 through all the available material with them and lead them  23 only when we have done that. To require us to lead these  24 witnesses now in circumstances when we have not been able  25 to do that and we will not be able to do that by Monday, is</p>

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1 fundamentally unfair. And with respect, if it is  
 2 unworkable for the evidence leaders to now lead the  
 3 evidence of SAPS because they haven't gone all through,  
 4 gone through all the documents, it is equally unworkable,  
 5 with respect, for us to be expected to lead our witnesses  
 6 in exactly the same circumstances.

7 MR MPOFU: May I, Chair? Thank you,  
 8 Chair. Chair, just two quick things. I think we're  
 9 getting closer together. Certainly the one witness that I  
 10 referred to that Mr Madlanga and I had spoken about who  
 11 would be available next week and we will then consult and  
 12 see if we can find another one or two from the five. But I  
 13 just want to say this, Chair, just as a warning because we  
 14 might sit here next week and be in the same position. What  
 15 it looks like is happening here is just avoiding having a  
 16 postponement at all costs and the issue is that if the –  
 17 let's say those two witnesses are called on Monday, and  
 18 then what? Because if SAPS is ready, if Mr Madlanga is now  
 19 saying SAPS is ready to go and he's still reluctant to have  
 20 them coming here, then I predict that we will be in exactly  
 21 the same position, whether one or two witnesses is called  
 22 next week.

23 So I don't think we must just fill the space just  
 24 to have warm bodies here, if it's not going to add any  
 25 value to the work of the Commission and it might even

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1 remotely prejudice some of our clients.

2 CHAIRPERSON: Yes, thank you, Mr Mpofo.  
 3 Mr Madlanga, you've heard those two comments. I asked you,  
 4 you will recall, whether the material you're still waiting  
 5 for relates to these two witnesses and you said it doesn't.  
 6 So Ms Barnes, I think, misunderstood that exchange because  
 7 she was talking about the material you've already got  
 8 that's being worked through, but Mr Mpofo has struck what I  
 9 hope I can describe as a more constructive and positive  
 10 note. He seems to suggest that it may well be possible for  
 11 the two of you to come to some kind of understanding, at  
 12 least as to two witnesses who can give evidence from  
 13 Monday. I understand that you raise this matter now  
 14 because you didn't want further time to be lost later.  
 15 Now, we're not sitting tomorrow unfortunately but that will  
 16 afford you and Mr Mpofo and I take it Ms Barnes, the  
 17 opportunity to discuss this matter fully and see whether  
 18 the positive suggestions which Mr Mpofo has made can be  
 19 turned into something concrete in the form of two witnesses  
 20 who will be able to give evidence, without being exposed to  
 21 prejudice, on Monday or possibly even Tuesday if Monday is  
 22 too soon. So I don't propose giving – you've asked me to  
 23 give a direction or a directive – I don't propose giving it  
 24 now. I hope that on Thursday morning, and I want to say  
 25 I've been asked to start at 10 o'clock on Thursday for

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1 practical reasons, but I hope that at 10 o'clock on  
 2 Thursday you'll have something positive and constructive to  
 3 tell me, so I don't have to give a directive. Because  
 4 obviously the last thing we want to do is to prejudice Mr  
 5 Mpofo's clients as witnesses in giving the evidence and one  
 6 doesn't want them to be caught unawares by material which  
 7 they otherwise would've had an opportunity to see if they'd  
 8 given evidence later, that's obviously important. But I  
 9 would hope that it's possible to get them ready – after  
 10 all, they don't have to be told what to say, they're going  
 11 to give evidence of the truth but what is appropriate, of  
 12 course, is the should be warned about material that other  
 13 people have which may be put to them so that they can deal  
 14 with it satisfactorily. That's the main point, but I hope  
 15 that by Thursday morning 10 o'clock it won't be necessary  
 16 for me to give a directive. And I see we've only got about  
 17 seven minutes left, so unless the Colonel can tell me that  
 18 the events of the 13th of August can be dealt with in seven  
 19 minutes, I'm afraid we'll have to take the adjournment now.  
 20 What is the story about that, Colonel?

21 LT-COL VISSER: Mr Chair, we've got three  
 22 slides left of the 12th and then we can break.

23 CHAIRPERSON: Let's see those three  
 24 slides and then we'll take the adjournment and if we  
 25 haven't seen them all by half past three, we'll break off

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1 in mid-slide.

2 LT-COL VISSER: Just to quickly refresh,  
 3 we were busy with Sunday evening, the incident where two  
 4 mine employees were killed.

5 MR MADLANGA SC: Excuse me. Mr Chairman,  
 6 the second name is Mr Julius Langa. Before we took the  
 7 lunch adjournment –

8 CHAIRPERSON: Remind me of the first  
 9 name?

10 MR MADLANGA SC: It's Mr Mabebe.

11 CHAIRPERSON: Mr Mabebe and Mr Julius  
 12 Langa?

13 MR MADLANGA SC: Yes.

14 CHAIRPERSON: Those are the two.

15 MR MADLANGA SC: Yes.

16 CHAIRPERSON: So if there's any relative  
 17 or friend of either of those persons, who feels that he or  
 18 she may be distressed by seeing these slides then they have  
 19 a minute to leave the auditorium.

20 LT-COL VISSER: Okay, then I'm  
 21 proceeding. The incident happened in the evening where the  
 22 K4 plant was infiltrated. Nine vehicles were burnt,  
 23 there's pictures of four of them. Two people were fatally  
 24 wounded by protestors. The next slide. Mr Mabebe died in  
 25 the hospital, that is to the left, and to the right, Mr

1 Langa’s body was found the next day but it was also linked  
 2 back to the incident.  
 3 Summarising the events of Monday – of Sunday the  
 4 12th, owing to an escalation of the number of incidents and  
 5 violence, additional members were deployed in the area.  
 6 Despite these additional members and patrolling the area,  
 7 there were two separate incidents on the mine’s property  
 8 where several persons were killed and property was damaged.  
 9 Again on the Sunday it was reported that protestors were  
 10 involved in a ritual of some sort.  
 11 [15:25] Due to the escalation of violence and the  
 12 incidents a joint operational centre was established that  
 13 evening to co-ordinate policing in the area. At the end of  
 14 Sunday the casualties were as follows. Wounded 10 persons,  
 15 two of them on Friday, three of them on Saturday, five of  
 16 them on Sunday. At the end of Sunday, four deaths, two  
 17 mine security guards and two of the mine employees. Thank  
 18 you, Mr Chair.  
 19 CHAIRPERSON: Is that the end of the  
 20 presentation insofar as it relates to the 12th August?  
 21 LT-COL VISSER: The end of Sunday, yes,  
 22 thank you Mr Chair.  
 23 CHAIRPERSON: We will continue with the  
 24 presentation on Thursday morning, I hope at ten past – I  
 25 hope at five past 10 – but the Commission will adjourn

1 until 10 o'clock on Thursday morning.  
 2 [COMMISSION ADJOURNED]  
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