

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 51 21 FEBRUARY 2013 PAGES 5461 TO 5584

HELD AT

CIVIC CENTRE, RUSTENBURG, NORTH WEST PROVINCE



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1 [PROCEEDINGS ON 21 FEBRUARY 2013]
 2 [09:29] CHAIRPERSON: I'm happy to see that the
 3 power is restored, as is the water supply, so the toilets
 4 are now in working order. So the Commission can resume.
 5 Mr Semenya?
 6 MR SEMENYA SC: Chair and Commissioners,
 7 may I apologise on behalf of our team; I have not been
 8 around and I am part of the explanation for our late start
 9 today. We attempted to –
 10 CHAIRPERSON: We received the message
 11 that we shouldn't start until we were informed that you
 12 were ready because you had to take instructions on what
 13 happened yesterday. So I take it that's now all happened.
 14 MR SEMENYA SC: It has happened, Chair.
 15 CHAIRPERSON: So that's why we can start.
 16 MR SEMENYA SC: I'm indebted.
 17 CHAIRPERSON: Alright, that's fine.
 18 You're still under oath.
 19 SIPETE PHATSHA (CONTD.): Yes.
 20 CHAIRPERSON: Mr Mpofu, you're still busy
 21 with your witness.
 22 EXAMINATION BY MR MPOFU (CONTD.): Thank
 23 you, Chairperson. Good morning, Mr Phatsha.
 24 MR PHATSHA: Yes.
 25 MR MPOFU: Yes, unfortunately yesterday

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1 the power went off whilst you were in the middle of a
 2 sentence. So what I'll do is I'll just ask the question
 3 again and then we'll take it from there. Yes, and just to
 4 remind you, I had just asked you about the kind of weapons
 5 that you had been carrying on the 10th and the 11th on the
 6 one hand, which you said was a stick, and then you had said
 7 by the 16th you had the "incula" and the bush knife.
 8 MR PHATSHA: I remember.
 9 MR MPOFU: Yes, and now the question that
 10 I had asked you was what had happened in between those two
 11 dates which had made you to change the nature of weapons
 12 that you were carrying.
 13 MR PHATSHA: Can I answer?
 14 MR MPOFU: Yes, please.
 15 MR PHATSHA: It's because we were
 16 attacked by NUM.
 17 MR MPOFU: Yes, and so that I understand,
 18 but what did you intend to do with the weapons?
 19 MR PHATSHA: I wanted to use them to
 20 protect or defend myself in case NUM came and attacked us,
 21 like before.
 22 MR MPOFU: Okay, now the next question
 23 is, you've already testified that you lived in a shack.
 24 Where is that shack? What is the name of the township?
 25 MR PHATSHA: It's called Nkaneng.

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1 MR MPOFU: Okay, and the question I
 2 wanted to ask you is in relation to – you remember when I
 3 showed you certain positions in exhibit L, and one of them
 4 was a path?
 5 MR PHATSHA: I remember.
 6 MR MPOFU: Now which road or path did you
 7 use on the 16th on your way to the koppie?
 8 MR PHATSHA: We used the path that we
 9 usually take even when we go to Marikana.
 10 MR MPOFU: Yes, and which one is it?
 11 MR PHATSHA: It leads and moves in front
 12 of the kraal.
 13 MR MPOFU: Yes, is it the same on that
 14 you showed the Commission yesterday?
 15 MR PHATSHA: Yes.
 16 MR MPOFU: And on the other days when you
 17 were, you said you had been going to the koppie, which path
 18 did you use? And sorry, when I say "you," I mean you as in
 19 singular.
 20 MR PHATSHA: I was walking on that same
 21 path on the road on which we usually travel.
 22 MR MPOFU: Okay, now the next issue which
 23 I wanted to cover with you is, remember we had a discussion
 24 about your injuries?
 25 MR PHATSHA: I remember.

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1 MR MPOFU: Okay, now once again we are in
 2 possession of your full medical report, but we didn't want
 3 to burden the record. We've just attached to DDD4 a copy
 4 of your J88. It's at the back of DDD4. Are you there?
 5 Okay, and at least it's a doctor's handwriting that one can
 6 read. Under the clinical findings it says that there's a
 7 "Crushed type distal left foot injury," and then there's a
 8 question mark, "Close range shooting injury."
 9 CHAIRPERSON: The word is "shotgun"
 10 actually.
 11 MR MPOFU: Shotgun, yes, that's correct.
 12 Thank you, Chairperson. "Close range shotgun injury."
 13 CHAIRPERSON: Actually it's compound
 14 fracture –
 15 MR MPOFU: "Compound fracture, soft
 16 tissue loss. Distal left big toe and toe next to the big
 17 toe." That seems to be a kind of summarised version of
 18 your injuries. Is that consistent with your own
 19 experience?
 20 MR PHATSHA: That's correct.
 21 MR MPOFU: And can you also confirm that
 22 – and if it's necessary we will produce the documents, but
 23 generally speaking part of the treatment you received
 24 involved some kind of skin graft where a piece of your
 25 thigh was cut off to augment the lost tissue on your foot?

<p style="text-align: right;">Page 5465</p> <p>1 MR PHATSHA: That's correct.</p> <p>2 MR MPOFU: Has the injury completely</p> <p>3 healed now?</p> <p>4 MR PHATSHA: I'm not completely healed.</p> <p>5 MR MPOFU: Yes, and when was the first</p> <p>6 time that you were able to wear a shoe, even a soft shoe,</p> <p>7 on the side that was injured?</p> <p>8 MR PHATSHA: I started in December.</p> <p>9 MR MPOFU: Thank you, Chairperson, I have</p> <p>10 nothing further.</p> <p>11 CHAIRPERSON: Mr Madlanga, are you going</p> <p>12 to cross-examine first or are you reserving your cross-</p> <p>13 examination until one of your learned friends had cross-</p> <p>14 examined?</p> <p>15 MR MADLANGA SC: Mr Chairman, we reserve</p> <p>16 our cross-examination, but Mr Mojapelo will do it at the</p> <p>17 end of cross-examination. Thank you.</p> <p>18 CHAIRPERSON: Mr Semenya, I take it you</p> <p>19 wish to be the first cross-examiner from the parties. Is</p> <p>20 that correct?</p> <p>21 MR SEMENYA SC: Chair, I have, with your</p> <p>22 permission, asked Mr Tip to go before I do.</p> <p>23 CHAIRPERSON: Alright.</p> <p>24 MR SEMENYA SC: And Mr Motau next, and</p> <p>25 then I'll follow thereafter.</p>	<p style="text-align: right;">Page 5467</p> <p>1 available already, but we will investigate at teatime what</p> <p>2 the position is, and I think while Mr Tip is happy to</p> <p>3 proceed without –</p> <p>4 MR MPOFU: Yes, Chairperson, I thought it</p> <p>5 was to do with the witness. Sorry, sorry.</p> <p>6 CROSS-EXAMINATION BY MR TIP SC: Thank</p> <p>7 you. Mr Phatsha, as I follow your evidence first in the</p> <p>8 statement and your oral testimony here, you're unable to</p> <p>9 assist the Commission at all with any of the discussions</p> <p>10 and decisions taken at the meetings of the RDOs on 10</p> <p>11 August 2012 and 11 August 2012. Would I be correct?</p> <p>12 MR PHATSHA: That is so.</p> <p>13 MR TIP SC: And am I also correct in</p> <p>14 understanding that you are not able to say anything from</p> <p>15 your personal knowledge as to what happened at the NUM</p> <p>16 office on Saturday, 11 August 2012?</p> <p>17 MR PHATSHA: That is so.</p> <p>18 MR TIP SC: What I do want to put to you</p> <p>19 is that there is evidence before the Commission that what</p> <p>20 happened essentially on 11 August is that there was a very</p> <p>21 large march of strikers to the NUM office and they</p> <p>22 approached the NUM office with hostile intent.</p> <p>23 MR PHATSHA: I hear.</p> <p>24 MR TIP SC: And that it was a group that</p> <p>25 was armed with knobkieries and spears and, according to one</p>
<p style="text-align: right;">Page 5466</p> <p>1 CHAIRPERSON: Alright, so it's Tip, Motau</p> <p>2 –</p> <p>3 MR TIP SC: Thank you, Chair. The</p> <p>4 position is that we have not as yet received a copy of the</p> <p>5 statement that came under discussion yesterday, but</p> <p>6 nevertheless, in order not to waste further time today, I</p> <p>7 propose to deal with a couple of topics that I can deal</p> <p>8 with without that statement, I believe. If anything arises</p> <p>9 from it, once it has been produced then we'll raise it</p> <p>10 accordingly, if necessary. Mr Phatsha, as I understand</p> <p>11 your evidence –</p> <p>12 MR MPOFU: Sorry, Chairperson, I don't</p> <p>13 want to interrupt my learned colleague. I don't know which</p> <p>14 statement it is that he has not received.</p> <p>15 CHAIRPERSON: I take it he's referring to</p> <p>16 the statement that was discussed at the meeting we held</p> <p>17 before we started yesterday.</p> <p>18 MR MPOFU: Oh, okay. Sorry. I thought</p> <p>19 it was the statement of the witness.</p> <p>20 CHAIRPERSON: The redacted statement -</p> <p>21 MR MPOFU: Yes, thank you, Chairperson.</p> <p>22 CHAIRPERSON: - which is, as I</p> <p>23 understand, going to be made available.</p> <p>24 MR MPOFU: Yes.</p> <p>25 CHAIRPERSON: I assumed it had been made</p>	<p style="text-align: right;">Page 5468</p> <p>1 witness, some pangas.</p> <p>2 MR PHATSHA: No pangas were carried, and</p> <p>3 no sharp objects were carried.</p> <p>4 MR TIP SC: I'm not going to spend time</p> <p>5 debating that with you. I've put the essence of it, but –</p> <p>6 CHAIRPERSON: How do you know that? I</p> <p>7 understood you to say that you couldn't tell us anything</p> <p>8 about what happened at the NUM office on the 11th of August.</p> <p>9 MR PHATSHA: I saw them when they were</p> <p>10 returning and running, fleeing.</p> <p>11 MR TIP SC: Thank you, Chair. And it</p> <p>12 follows from that, Mr Phatsha, that you are not in a</p> <p>13 position to say anything about the composition of the group</p> <p>14 and what they were carrying whilst they were on the way to</p> <p>15 the NUM office, because you were not there and you didn't</p> <p>16 see them.</p> <p>17 MR PHATSHA: It is because I met them on</p> <p>18 my way there.</p> <p>19 MR TIP SC: Yes, you were on the way</p> <p>20 there; they were fleeing. Correct?</p> <p>21 MR PHATSHA: Yes.</p> <p>22 MR TIP SC: Yes, I'm going to move on.</p> <p>23 The fact is, Mr Phatsha, that the members of the NUM who</p> <p>24 were involved in this incident were in their office. They</p> <p>25 did not come out of the office in order to find strikers</p>

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1 somewhere to attack them. Do you agree?

2 CHAIRPERSON: Mr Tip, I don't understand

3 how you can expect him to answer that. He says he only

4 came in that vicinity after the main events were over, when

5 the people were, the strikers were coming away from the NUM

6 office. He doesn't know what happened before that. So I

7 don't think I can allow that question.

8 MR MPOFU: Sorry, Chairperson, apart from

9 that, that is not the evidence. The evidence is not that

10 they were in the office –

11 CHAIRPERSON: It's been disallowed, so

12 you don't have to deal with it further.

13 MR MPOFU: Well, Chairperson, in case if

14 it's put, or rephrased in a different way –

15 CHAIRPERSON: If it's rephrased in a

16 different way, you can deal with it, if he can ask the

17 witness a question that the witness will be in a answer,

18 but in as much as the witness wasn't there at the time the

19 events in the vicinity of the office took place, I'm not

20 sure he can ask any question about it. But anyway, I've

21 disallowed the question. The question is no longer going

22 to be answered, so you don't have to concern yourself with

23 it for the moment.

24 MR TIP SC: Chair, it was not a very well

25 formulated question. I propose to reformulate it, and the

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1 point is this, Mr Phatsha, you knew that there was a very

2 large group of strikers who went to the NUM office.

3 MR PHATSHA: That is so.

4 MR TIP SC: And you did not at any time

5 on that day find that there was a group of NUM persons who

6 were attacking strikers at the Wonderkop Stadium or

7 anywhere in that vicinity?

8 [09:49] MR PHATSHA: I never saw it.

9 MR TIP SC: And on the 12th of August did

10 you ever see any NUM members attacking strikers in the

11 vicinity of the koppie or anywhere else in Wonderkop or at

12 Lonmin generally?

13 MR PHATSHA: I was not there on that day.

14 MR TIP SC: You told us that you had gone

15 at least for a brief time to the koppie on all three days,

16 12, 13, 14. Is that right?

17 MR PHATSHA: Yes, I was just spending a

18 short time there and would leave after that.

19 MR TIP SC: Let me abbreviate it, Mr

20 Phatsha. From the 11th to the 16th of August you did not at

21 any time see any NUM members attacking strikers?

22 MR PHATSHA: Yes, I never saw them.

23 MR TIP SC: Now you went even briefly to

24 the koppie to find out what was happening about the strike

25 on Sunday, the 12th of August, correct?

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1 MR PHATSHA: I don't know anything about

2 that.

3 MR TIP SC: Well, let me again try and

4 abbreviate it. On the occasions that you went to the

5 koppie, any occasion, on the 12th, the 13th, the 14th, the

6 15th, the 16th, did you hear people talking about the fact

7 that on the Sunday, the 12th of August, two Lonmin security

8 personnel had been killed?

9 MR PHATSHA: I heard about that.

10 MR TIP SC: When did you hear about that?

11 MR PHATSHA: I heard about that on the

12 15th.

13 MR TIP SC: Did you also hear about the

14 fact that two people had been killed on the night of the

15 12th of August at the K4 Shaft?

16 MR HANABE: Where?

17 MR TIP SC: K4 Shaft.

18 MR HANABE: K4?

19 MR TIP SC: K4 Shaft.

20 MR PHATSHA: I never heard of that.

21 MR TIP SC: Did you hear about an

22 incident on the 13th of August, the Monday, at which two

23 police officers had died, two strikers, and one civilian?

24 MR PHATSHA: I heard.

25 MR TIP SC: And when did you hear that?

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1 MR PHATSHA: I heard about that on the

2 16th.

3 MR TIP SC: Did you hear, or perhaps even

4 see, that a man had been killed in the near vicinity of the

5 koppie on 14 August?

6 MR PHATSHA: I was not there.

7 MR TIP SC: And when you heard these

8 reports about the incidents that you did hear about, did

9 you understand that some of your fellow strikers had been

10 involved in those incidents?

11 MR PHATSHA: I never heard about that.

12 MR TIP SC: So when for instance you

13 heard that two Lonmin security men had been killed on

14 Sunday, the 12th, you had no idea about what had taken

15 place. Is that what you're saying?

16 MR PHATSHA: No.

17 MR TIP SC: You never heard that on that

18 Sunday morning another very large group of strikers had

19 been on their way to the NUM office when they were met by

20 some Lonmin security men?

21 MR PHATSHA: I never heard about that.

22 MR TIP SC: That concludes our questions,

23 Chair.

24 CHAIRPERSON: Thank you, Mr Tip. Mr

25 Motau, are you going to cross-examine on behalf of Lonmin?

<p style="text-align: right;">Page 5473</p> <p>1 CROSS-EXAMINATION BY MR MOTAU SC: Yes, 2 thank you, Chair and members of the Commission. Mr 3 Phatsha, as I understand your evidence, you say that you 4 only joined the strike on the 10th of August 2012. Is that 5 correct? 6 MR PHATSHA: That is so. 7 MR MOTAU SC: And I want to assume that 8 at the time when you joined the strike you must have come 9 to find out about other incidents which had taken place, 10 such as for example the demands which had been made by RDOs 11 at that stage. Correct? 12 MR PHATSHA: That is so. 13 MR MOTAU SC: Can I also assume that you, 14 or you did find out that on the 21st of June 2012 certain 15 RDOs marched to the offices of Mr Da Costa, where they had 16 a meeting with him? 17 MR PHATSHA: I know nothing about that. 18 MR MOTAU SC: You at the time of joining 19 the strike did not know that on the 21st of June a demand of 20 R12 500, after deduction, had been made by RDOs to Mr Da 21 Costa? 22 CHAIRPERSON: I don't think he worked at 23 Karee. Remember his evidence yesterday was he worked at 24 the Eastern Platinum, at a shaft known as the Bob Shaft, 25 and so the –</p>	<p style="text-align: right;">Page 5475</p> <p>1 that for the first time? 2 MR PHATSHA: I heard about it for the 3 first time on the 10th. 4 MR MOTAU SC: And can I then assume from 5 your answer that you have no idea, or you had no idea at 6 least as at the 10th of August, about any interactions which 7 had taken place between the RDOs and Mr Da Costa? 8 MR PHATSHA: I knew nothing about that. 9 MR MOTAU SC: And can I also assume that 10 when you joined the strike on the 10th of August, you were 11 aware that the strike was an unlawful strike? 12 MR PHATSHA: Yes, I knew that it was 13 unprotected. 14 MR MOTAU SC: And you were also aware 15 that management's position was that all demands should be 16 addressed through the collective bargaining structures? 17 MR PHATSHA: That is so. 18 MR MOTAU SC: And as I understood your 19 evidence, you stated that from 1982 to around December 2012 20 you were a member of NUM. Is that correct? 21 MR PHATSHA: That is so. 22 MR MOTAU SC: And at the time when you 23 joined the strike as at the 10th of August, you were aware 24 that the RDOs had taken a position that they do not, or 25 they did not want to involve any unions. Is that correct?</p>
<p style="text-align: right;">Page 5474</p> <p>1 MR MOTAU SC: Chair, I'm asking – 2 CHAIRPERSON: It might be helpful to 3 approach the matter on that basis. But what you're talking 4 about happened at Karee. We don't even know if he knows of 5 Mr Da Costa, who Mr Da Costa is. You remember he's one of 6 the people in charge of the Karee Shaft. 7 MR MOTAU SC: Chair, I'm fully aware of 8 that fact. What I'm probing with the witness is as at the 9 time when he joined the strike on the 10th of August – 10 CHAIRPERSON: I understand – 11 MR MOTAU SC: - which facts did he come 12 to know. 13 CHAIRPERSON: No, I understand. I'm just 14 saying to you, you might be able to cross-examine him in a 15 more focused way if you start with the fact that first the 16 facts that you put to him happened at Karee. Mr Da Costa 17 is at Karee; he's not at Karee. You can take it from 18 there. You might get to the point you're trying to get to 19 quicker. 20 MR MOTAU SC: Thank you, Chair. Mr 21 Phatsha, you did come to find out that there was a demand 22 of R12 500, after deductions, which was put, or demanded by 23 the RDOs. Am I correct? 24 MR PHATSHA: That is so. 25 MR MOTAU SC: When did you find out about</p>	<p style="text-align: right;">Page 5476</p> <p>1 MR PHATSHA: That is so. 2 MR MOTAU SC: And you were aware at the 3 time when you joined the strike that the NUM had made its 4 position clear that it was not in support of the strike. 5 Correct? 6 MR PHATSHA: I had already heard about 7 that. 8 MR MOTAU SC: And you also found out, did 9 you not, that the NUM was making a concerted effort to 10 assist people who wanted to go to work, to be able to do 11 so? 12 MR PHATSHA: I heard about that. 13 MR MOTAU SC: And surely all of the 14 actions of the NUM at the time must have made the strikers 15 to be very unhappy. Correct? 16 MR PHATSHA: They never liked it. 17 MR MOTAU SC: And the reason is obvious 18 why they did not. It is because the strikers viewed the 19 conduct of NUM as aimed to weaken the strike and ensure 20 that it does not succeed. Correct? 21 MR PHATSHA: That is so. 22 MR MOTAU SC: Mr Mabuyakhulu told the 23 Commission that as at the 9th of August there was a rumour 24 that members of NUM were seen driving around in a Quantum 25 and they were shooting at the strikers. Did you get to</p>

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1 find out about that as well?

2 MR MPOFU: Chairperson, that is not the

3 evidence.

4 MR MOTAU SC: Oh, I'm sorry, the 10th, not

5 the 9th.

6 MR PHATSHA: I never heard about that.

7 MR MOTAU SC: And it is quite obvious

8 then that with the strikers being unhappy about what they

9 attributed to NUM, rightly or wrongly, they decided that

10 they must take certain steps to address the situation.

11 Correct?

12 MR PHATSHA: I don't know about that.

13 MR MOTAU SC: So you're telling the

14 Commission that the strikers were holding certain views

15 which they were attributing to NUM, rightly or wrongly,

16 which were aimed at defeating the strike, and they took no

17 decisions to address that situation. Is that what you want

18 the Commission to believe?

19 MR PHATSHA: That is so.

20 MR MOTAU SC: Right, when you joined the

21 strike, Mr Phatsha, you also associated yourself with the

22 decision that at least that the NUM, as your union at the

23 time, should not get involved. Correct?

24 [10:09] MR PHATSHA: That is so.

25 MR MOTAU SC: May I ask you to turn to

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1 exhibit BBB8? It's the statement of Mr Mabuyakhulu, in

2 paragraph 2 thereof.

3 CHAIRPERSON: Remember he can't read; he

4 just signed his name. So you may have to read it –

5 MR MOTAU SC: Yes, yes, I am mindful of

6 that –

7 CHAIRPERSON: Anyway, it will have to be

8 translated to him, I think, as well.

9 MR MOTAU SC: Do you have it, Sir?

10 MR PHATSHA: Yes.

11 MR MOTAU SC: You will see in paragraph 2

12 of the statement of Mr Mabuyakhulu he says that, "On the 9th

13 of August 2012 there was a meeting of all RDOs from Karee,

14 Rowland, and Eastern Companies. The meeting was held at

15 Wonderkop outside the stadium. In that meeting we

16 discussed the salaries of the RDOs," and as I understood

17 it, you were not present at that meeting. Correct?

18 MR PHATSHA: Yes, I was not there.

19 MR MOTAU SC: He proceeds to state that,

20 "In that meeting it was decided that no union should be

21 engaged in the wage negotiations. The reason for the

22 decision were that the RDOs belongs to different unions and

23 we wanted to negotiate only for the RDOs without involving

24 other employees, which the unions were not keen to do." Do

25 you see that?

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1 MR PHATSHA: That is so.

2 MR MOTAU SC: And you came to find out

3 about that decision that was reached at the meeting.

4 Correct?

5 MR PHATSHA: I never heard about it.

6 MR MOTAU SC: But you associate yourself

7 with that decision, and the reasons thereof are similar to

8 the ones that are stated by Mr Mabuyakhulu. Am I correct?

9 MR PHATSHA: That is so.

10 MR MOTAU SC: So if you read that

11 statement, you will see – or rather, if you read that

12 paragraph, you will see that Mr Mabuyakhulu says the

13 reasons why they did not want the unions to be involved, it

14 is because the unions were not keen on pursuing the matter

15 only on behalf of the RDOs, in other words to the exclusion

16 of the entire workforce. You see that?

17 MR PHATSHA: That is so.

18 MR MOTAU SC: So in other words, it is

19 not that the unions did not want to engage in negotiations,

20 but it is only the method by which the RDOs were proposing

21 that the unions were not in agreement with. Correct?

22 Unless you want to change.

23 MR PHATSHA: That is so.

24 MR MOTAU SC: So then, Sir, I want to put

25 it to you that if there's anyone who'll want to argue that

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1 there is a different reason other than what is articulated

2 in paragraph 2, and what you also say that you also

3 associate yourself with, that person will be incorrect. Do

4 you have a comment?

5 MR MPOFU: Chairperson, I'm sorry to do

6 this, but surely that question cannot be fair, when in that

7 –

8 CHAIRPERSON: I have difficulty

9 understanding it myself, so if I can say with my –

10 MR MPOFU: Yes, because in that paragraph

11 three reasons are –

12 CHAIRPERSON: If I could say with my, I

13 hope we regard it as my customary modesty –

14 MR MPOFU: Sorry, Chair.

15 CHAIRPERSON: If I can't understand it, I

16 would be surprised if the witness can understand it. So

17 perhaps the cross-examiner can rephrase the question in a

18 manner comprehensible to me and then there may also be a

19 chance that the witness will understand it before answering

20 it.

21 MR MOTAU SC: Okay, Chair, let me deal

22 with it differently. Sir, apart from the reasons which are

23 articulated by Mr Mabuyakhulu, which you say you associated

24 yourself with, are there any other reasons why you

25 personally did not want the NUM to be involved, as your

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1 then union, in the negotiations of your salary increase?

2 MR PHATSHA: The problem we had as RDO is

3 that if we forwarded our problems to the union, that in

4 fact they were not listening to us RDOs.

5 MR MOTAU SC: And is there any other

6 reason?

7 MR PHATSHA: There's no other reason.

8 MR MOTAU SC: You see, I find it very

9 difficult to reconcile your reason which you've just given

10 now with the earlier one that you had given, and let me

11 tell you why. In terms of the initial reason we agreed it

12 is not that the unions were refusing to engage on your

13 behalf, but they were only saying they were not keen to do

14 it only on behalf of the RDOs. In other words, they wanted

15 to include the entire workforce, and your evidence was you

16 did not agree with that approach. Are you able to clarify?

17 MR HANABE: He says he doesn't understand

18 very well.

19 MR MOTAU SC: Mr Phatsha, I read to you

20 part of paragraph 2 of Mr Mabuyakhulu's statement, which

21 says that the reason why RDOs wanted to exclude the unions,

22 it is because the unions were of the view that they should

23 – or rather, they were not keen to only negotiate on behalf

24 of the RDOs. You remember that?

25 MR PHATSHA: Yes.

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1 MS BARNES: Chair, I'm sorry to

2 interrupt, but perhaps my learned colleague should read the

3 entire paragraph to him, because that's not the only

4 reason. He's put it to the witness as though the first

5 reason he read is the only reason. There's another reason

6 given in paragraph 2.

7 MR MOTAU SC: Chairperson, with respect,

8 I mean people are going to have an opportunity to cross-

9 examine and if they want to re-examine and clarify the

10 evidence –

11 CHAIRPERSON: No, no, no, the objection

12 is taken that your cross-examination is unfair because you

13 suggested to the witness that a particular reason was the

14 only reason, whereas in fact the paragraph gives another

15 reason, at least one other reason, and in fact there are

16 three reasons, we think, but the suggestion is that the

17 question is unfair, and that's the objection. It doesn't

18 help to say I've asked an unfair question but never mind,

19 somebody else will have an opportunity to cross-examine

20 later and clear it up. That's not the way that things

21 work. So maybe you should put the whole paragraph to the

22 witness. I mean you say if you read the paragraph; you

23 know this witness can't read, so that, if I may say, is an

24 inappropriate way of introducing the question anyway, but

25 perhaps you should read the whole paragraph to him and then

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1 you'll be able to ask the question that you want to ask. I

2 can see what they are, but I take it the witness doesn't

3 get it. Read the whole paragraph and then ask the

4 questions, and I think you may find that Ms Barnes may not

5 persist in her objection.

6 MR MOTAU SC: Mr Phatsha, before I read

7 the entire paragraph, you will recall that I invited you to

8 state your own reasons, other than the ones you had already

9 agreed with. You recall? And your answer was that –

10 MR HANABE: He's asking me to repeat.

11 MR PHATSHA: I remember.

12 MR MOTAU SC: And your answer was that

13 the RDOs' demands were not being – or rather, whenever RDOs

14 were putting up their demands, they were not being listened

15 to. Remember that?

16 MR PHATSHA: That is so.

17 MR MOTAU SC: And I asked you that

18 personally do you have any other reasons for not wanting

19 the NUM to be included in the negotiations. You recall I

20 asked that? In other words, apart from the two reasons

21 that you and I discussed.

22 MR PHATSHA: I don't remember it.

23 MR MOTAU SC: Okay, other than the

24 reasons that we've discussed, and I will proceed to read

25 the remainder of the paragraph, but before I do so, other

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1 than the two reasons that we have discussed, is there any

2 other reason on your part which made you to not want the

3 NUM to negotiate on your behalf?

4 MR MPOFU: Chairperson, I'm sorry,

5 really. This is, I'm totally lost now. Firstly Mr –

6 CHAIRPERSON: I don't think you should be

7 lost at this point. He said you've given two reasons; he's

8 saying, was there another one.

9 MR MOTAU SC: That's all.

10 MR MPOFU: No, no, Chairperson –

11 CHAIRPERSON: And the witness can either

12 say yes, there was, or there wasn't.

13 MR MPOFU: No, Chair, with the greatest

14 respect, what has now happened is Mr Motau was asking the

15 questions as you put it to him, on the basis that there was

16 one reason and another one sought from the witness. The

17 actual situation is that Mr Motau had discussed two reasons

18 with the witness, and if he got a third one or didn't get

19 it – I don't want to pre-empt the answer – it would be a

20 third reason, because he himself had said to the witness

21 the issue of two different unions, and the witness said

22 yes, and then he spoke about the issue of RDOs versus the

23 workforce; that's two.

24 CHAIRPERSON: Yes.

25 MR MPOFU: Now if he wants a third reason

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1 then he must say it. He can't now ask questions on the
2 basis that there's one reason that has been canvassed.
3 CHAIRPERSON: Yes, Mr Motau, I think you
4 can reformulate the question in a way which avoids the
5 objection.
6 MR MOTAU SC: Alright. Sir, let's just
7 get around this. It's a very simple issue. Let's go back
8 to paragraph 2 and just identify the aspect of that
9 paragraph which you agreed with, and you associated
10 yourself with it. You said you agree with the resolution
11 that was reached at the meeting of the 9th of August 2012,
12 at which you were not present, where it was decided that no
13 union should be engaged in the wage negotiation, and you
14 said, "Correct." Right?
15 MR PHATSHA: That is so.
16 MR MOTAU SC: Then I discussed the
17 following reasons, which you agreed with, and you said you
18 associate yourself with, which is, which Mr Mabuyakhulu
19 puts as follows. "The reasons for the decision were that
20 the RDOs belonged to different unions and we wanted to
21 negotiate only for the RDOs, without involving other
22 employees." You see that?
23 MR PHATSHA: That is so.
24 MR MOTAU SC: And we agreed that you also
25 associated yourself with that reason. Correct?

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1 MR PHATSHA: That is so.
2 MR MOTAU SC: You also agreed that you
3 were aware that the unions were not keen to only negotiate
4 on behalf of the RDOs to the exclusion of the entire
5 workforce. Correct?
6 MR PHATSHA: I heard about that.
7 CHAIRPERSON: Mr Interpreter, in future
8 when he asks you to repeat something, would you please just
9 say "He's asking me to repeat it," and I think it's
10 important when the record is read later that there's
11 certain questions he answers without any difficulty; the
12 others where he asks the question to be repeated. They may
13 not be significant, but on the other hand those who read
14 the record later may think some of them are. So would you
15 please do that in future?
16 MR HANABE: I didn't hear, Commissioner.
17 You mean if he says I must repeat, must I also say –
18 CHAIRPERSON: Just say, "He asked me to
19 repeat it," and then you can repeat it. You don't have to,
20 I mean you obviously interpret to him, but you don't – you
21 see, the transcribers only transcribe what's said in
22 English, so that if a question is put in Xhosa, the witness
23 says "Please repeat it," and you then repeat it, the reader
24 of the transcript won't know that that's what happened. So
25 if you say, "He's asked me to repeat," then the reader will

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1 know that that's happening. So would you do that in
2 future, please?
3 MR HANABE: I will do that, Commissioner,
4 thank you.
5 MR MOTAU SC: Yes, and in addition to
6 that I then asked you for any additional reason and you
7 gave us the reason, you said it is because whenever RDOs
8 were putting up demands, they were not being listened to.
9 Remember you confirmed that part?
10 MR PHATSHA: Yes, it is like that.
11 [10:29] MR MOTAU SC: And then I asked you
12 whether other than those aspects that we have discussed,
13 are there any other reasons on your part which motivated
14 the decision for you not wanting NUM to negotiate on your
15 behalf?
16 MR PHATSHA: I don't have any other
17 reason.
18 MR MOTAU SC: Sir, what I'm then putting
19 to you is that the reason that was advanced by the unions –
20 and I hear, Mr Interpreter, you keep referring to one
21 union; that paragraph referred to unions and their
22 positions that was articulated, so the impression that I
23 gain from that part that I had read, being the position
24 that was held by the unions, is that they were not averse
25 to negotiating on your behalf, or on behalf of the RDOs,

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1 but the only point of difference was that they held the
2 view that negotiations should not only be held on behalf of
3 RDOs, to the exclusion of the entire workforce. What is
4 your comment?
5 MR PHATSHA: I hear that.
6 MR MOTAU SC: Do you have any comment?
7 MR PHATSHA: No.
8 MR MOTAU SC: And you will see later when
9 we deal with the eventual wage agreement that was signed,
10 that the various increases were given to the different
11 workforces and not only to the RDOs. You do know that.
12 Correct?
13 MR PHATSHA: I heard about it.
14 MR MOTAU SC: Let's just move to another
15 aspect. In respect of the march of the 11th of August to
16 the NUM offices, I understood your evidence to be that you
17 were not present at that march, but you only met with the
18 strikers when they were returning, and when they were
19 actually fleeing, after you had heard a gunshot. Is that
20 correct?
21 MR PHATSHA: That is so.
22 MR MOTAU SC: So which means you were not
23 present during the march. Correct?
24 MR PHATSHA: I was not present.
25 MR MOTAU SC: And can I just ask you to

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1 turn to your statement at paragraph 4, DDD1. You will see
 2 that paragraph 4 states the opposite of what you're telling
 3 us, because paragraph 4 says, "I was present during the
 4 march to the NUM offices on 11 August 2012, but was at the
 5 back and could not see what happened." So that clearly
 6 cannot be correct, because you were not present at that
 7 march; you only met them when they were coming back and
 8 fleeing. Correct?
 9 MR PHATSHA: That's where I am confused.
 10 MR MOTAU SC: Tell me where and I can see
 11 whether I can try to assist you.
 12 MR PHATSHA: I was still going on my way,
 13 I was on my way.
 14 MR MOTAU SC: No, no, I understand that.
 15 You've confirmed that is your evidence. The only point
 16 that I'm putting to you is that it then follows that
 17 paragraph 4 of your statement cannot be correct because it
 18 is in direct contradiction with what you are saying, and in
 19 fact you were repeating just now.
 20 MR PHATSHA: I cannot hear that. I don't
 21 understand.
 22 MR MOTAU SC: I'm not sure, Sir, are you
 23 saying you don't understand paragraph 4 of your statement?
 24 MR PHATSHA: The one that I said at a
 25 later stage.

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1 MR MOTAU SC: Okay, Mr Phatsha, let me
 2 just try and give you an opportunity to deal with this. I
 3 assume you are confused and you quite don't understand.
 4 There are two things that I'm discussing with you. You
 5 told the Commission you were not present at that march on
 6 the 11th, and you repeated and confirmed that evidence, that
 7 you only met the strikers as they were fleeing, after you
 8 heard a gunshot. Correct?
 9 MR PHATSHA: That is so.
 10 MR MOTAU SC: Then what I'm putting to
 11 you is, I accept that what you are saying is correct, for
 12 present purposes, and if I accept that, it then has to
 13 follow that paragraph 4 of your statement is incorrect
 14 because contrary to what you are stating, it says that you
 15 were there, you were present during the march to the NUM
 16 offices, and it also locates your position within that
 17 crowd. It says you were at the back. Now can I accept
 18 that paragraph 4 is incorrect?
 19 MR PHATSHA: Yes.
 20 MR MOTAU SC: Right, let's move on to
 21 another aspect. Something incorrect also happened during
 22 that march, and it is that a rumour was disseminated that
 23 two of your fellow strikers had been killed by NUM
 24 officials, because we know that that was not correct, or
 25 that is not correct.

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1 MR PHATSHA: I heard it said that two
 2 people died.
 3 MR MOTAU SC: Mr Phatsha, sorry, just
 4 before I continue with the information that you received
 5 that two people had died, I don't want to argue this point
 6 unfairly without giving you an opportunity to comment. I
 7 assume that you are unable to explain the reason why that
 8 paragraph 4, which says you were present at the march,
 9 found its way to your statement. In other words, you can't
 10 explain why there's a contradiction between what you say
 11 and what is stated there.
 12 CHAIRPERSON: It's only paragraph 4,
 13 sentence 1, isn't it?
 14 MR MOTAU SC: Yes, thank you, Chair, the
 15 first sentence of paragraph 4.
 16 MR PHATSHA: That is so.
 17 MR MOTAU SC: And I can also assume that
 18 given the fact that your statement was signed and was
 19 prepared by your legal representatives, they must have read
 20 it to you and you confirmed its correctness and accuracy
 21 before you signed it. Correct?
 22 MR PHATSHA: That is so.
 23 MR MOTAU SC: Right, Mr Phatsha, we'll
 24 deal with that issue in argument at a later stage. Let's
 25 then proceed with the second sentence of that paragraph.

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1 You stated that you heard that two of your fellow strikers
 2 were shot dead during that incident. We know now, or in
 3 fact we know that that information is incorrect. Do you
 4 also know that that information is incorrect?
 5 MR PHATSHA: I heard.
 6 MR MOTAU SC: So when did you find out
 7 for the first time that that information is in fact
 8 incorrect and that no two strikers were shot during that
 9 incident?
 10 CHAIRPERSON: Shot dead.
 11 MR MOTAU SC: Sorry, shot dead. I
 12 apologise, Chair.
 13 MR PHATSHA: I heard about it after some
 14 days.
 15 MR MOTAU SC: But are you able to help us
 16 with an estimation, more or less when was it?
 17 MR PHATSHA: I was already in the
 18 hospital when I heard about that.
 19 MR MOTAU SC: Okay, we know then that
 20 after that incident the strikers took a decision to gather
 21 at the koppie. Correct?
 22 MR HANABE: He says there's this thing
 23 that he doesn't understand very well, the koppie.
 24 MR MOTAU SC: Yes, Mr Interpreter, you
 25 have explained to him that by "the koppie" you mean

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1 "intabene," which is the same thing in Xhosa. Correct?

2 MR PHATSHA: That is so.

3 CHAIRPERSON: Explain to him which koppie

4 it is. There are lots of little hills in that area and if

5 you specified which koppie it is, then you might make some

6 progress with your cross-examination on this point.

7 MR MOTAU SC: Mr Phatsha, can I just ask

8 you, I did not check this aspect, at which koppie did the

9 strikers resolve to meet from the 12th until the 16th of

10 August?

11 MR PHATSHA: The main koppie.

12 MR MOTAU SC: And that would be the big

13 koppie, as we refer to it, Chairperson.

14 MR PHATSHA: Yes, the big koppie.

15 MR MOTAU SC: And you also indicated that

16 during the period of the 12th to the 16th you were part of

17 the crowd that was gathering at the koppie, albeit that on

18 certain days you were there for a few hours than others.

19 Correct?

20 MR PHATSHA: That is so.

21 MR MOTAU SC: Mr Phatsha, it was not your

22 evidence that the strikers during that period – and when I

23 say that period, it's the 12th to the 16th, so I don't have

24 to keep repeating that date, or those dates. It was not

25 your evidence that during that period the strikers received

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1 information that the NUM was planning to attack them at the

2 koppie where they were gathering, at the big koppie, that

3 is.

4 MR HANABE: You mean it was not his

5 information?

6 MR MOTAU SC: It was not his evidence.

7 MR PHATSHA: No.

8 MR MOTAU SC: And you also did not

9 receive information to the effect that the NUM was planning

10 to attack the strikers either at the koppie or anywhere

11 during – sorry, in and around the vicinity of Lonmin.

12 Correct?

13 MR PHATSHA: I never heard about that.

14 MR MOTAU SC: And in fact no attacks

15 occurred at the instigation of NUM as against the strikers

16 during that relevant period. Correct?

17 MR PHATSHA: That is so.

18 MR MOTAU SC: Now Sir, against that I

19 find it very difficult that you state that you were

20 carrying a butcher knife and a "incula" on the basis that

21 you wanted to protect yourself against an NUM attack, when

22 there was no evidence that such an attack was being planned

23 at all. And, if anything, you were moving freely. You

24 were saying you were moving, you'd go to your place of

25 residence, go to the koppie only for a few hours on certain

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1 days, and we know on the 15th you were there for longer. So

2 there was actually no threat, and thus I find it difficult

3 for you to justify why you were carrying dangerous weapons.

4 MR PHATSHA: I hear you.

5 [10:49] MR MOTAU SC: Are you able to explain why

6 in the face of that evidence did you continue to carry

7 dangerous weapons?

8 MR PHATSHA: The reason why we carried

9 weapons, it was because we were attacked by NUM.

10 MR MOTAU SC: Mr Phatsha, you've already

11 told us that and I've gone past that, because that was on

12 the 11th of August. The 12th, 13th, 14th, 15th, 16th, we've

13 confirmed through your evidence there was no information

14 that the NUM was either planning to attack the strikers, or

15 in fact there's also no evidence that NUM attacked the

16 strikers at all.

17 MR PHATSHA: I hear you.

18 MR MOTAU SC: What we are discussing, is

19 a justification beyond the 12th, after the march to the NUM

20 office had occurred, and with the facts that we've

21 established that you've known, what justification do you

22 still give for carrying dangerous weapons beyond that date?

23 MR PHATSHA: The reason which is fair is

24 that we were attacked by NUM, and there's no way you cannot

25 carry your weapons.

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1 MR MOTAU SC: You see, I'll tell you what

2 I find very strange, is that there's no more any attack by

3 NUM, there's no evidence that any information was received

4 that NUM was planning any attacks, and that during that

5 time there are confrontations with strikers and various

6 killings occur.

7 MR PHATSHA: I hear you.

8 MR MOTAU SC: And it seems to me, and I

9 want to put it to you that it appears that the strikers

10 decided to carry the weapons beyond the time when no threat

11 was posed, simply because you were on a mission to revenge

12 what was perceived as incorrect killings that occurred on

13 the 11th. Do you have a comment?

14 MR PHATSHA: That is not true.

15 MR MOTAU SC: Right, we'll deal with that

16 in argument. Sir, can I ask you then, can I invite you to

17 go back to Mr Mabuyakhulu's statement, paragraph 2. I'll

18 continue to read from the part where I have ended. Mr

19 Mabuyakhulu says, "The RDOs had complained to NUM since

20 2006/7, as stated by those who have been working for Lonmin

21 for some time. They reported that they had not received

22 any feedback from NUM negotiators." You see that?

23 MR PHATSHA: I hear.

24 MR MOTAU SC: Can I just ask, are you

25 part of the RDOs who had complained to NUM, as stated by Mr

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1 Mabayakhulu, and who received no feedback?
 2 MR PHATSHA: I was not present at that
 3 time.
 4 MR MOTAU SC: So can I then take it that
 5 I can exclude that as apart of your reason for motivating
 6 that the NUM should not negotiate on your behalf?
 7 MR PHATSHA: Yes.
 8 MR MOTAU SC: And perhaps one more thing
 9 that I need to deal with is the last sentence in that
 10 paragraph of Mr Mabayakhulu where he says, "NUM is the only
 11 union recognised by Lonmin to speak for everybody." You
 12 see that?
 13 MR PHATSHA: I hear.
 14 MR MOTAU SC: Can I also assume that it
 15 is not part of your evidence that management advised the
 16 strikers that NUM is the only union that's recognised to
 17 negotiate on behalf of all the employees?
 18 MR PHATSHA: I never heard about that.
 19 MR MOTAU SC: So I'll take it that your
 20 answer is yes.
 21 MR PHATSHA: I don't know.
 22 MR MOTAU SC: Okay, let's move on, Mr
 23 Phatsha, because if you did know, I'm sure you would take
 24 issue with what I'm saying.
 25 CHAIRPERSON: Mr Motau, when we reach a

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1 suitable stage to take the tea adjournment, I will do so,
 2 but you can tell me when a suitable stage has been reached.
 3 MR MOTAU SC: Yes, Chair, I think it's
 4 convenient, because I'm going to move on to events of
 5 another day.
 6 [COMMISSION ADJOURNS COMMISSION RESUMES]
 7 [11:25] CHAIRPERSON: The Commission resumes.
 8 You're still under oath.
 9 SIPETE PHATSHA (CONTD.):
 10 CHAIRPERSON: Mr Motau, you're still
 11 cross-examining.
 12 CROSS-EXAMINATION BY MR MOTAU SC (CONTD.):
 13 Thank you, Chair, and members of the Commission. Mr
 14 Phatsha, let's move on to another aspect. You told us that
 15 then as a result of what you term as the attack by NUM on
 16 the 11th, a decision was taken to gather at the koppie and
 17 for people to carry their weapons.
 18 MR PHATSHA: That is so.
 19 MR MOTAU SC: And you'll agree with me,
 20 it's not possible that every striker who was there on his
 21 own decided that he's going to carry weapons. A decision
 22 must have been taken which everybody complied with.
 23 Correct?
 24 MR PHATSHA: We agreed to carry weapons.
 25 MR MOTAU SC: Who is the person that made

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1 that proposal, or gave that instruction that people must
 2 carry their arms, the weapons?
 3 MR PHATSHA: Each and every person just
 4 thought that he should carry his own weapon.
 5 MR MOTAU SC: Without a decision having
 6 been taken?
 7 MR PHATSHA: No.
 8 MR MOTAU SC: So Mr Phatsha, what you're
 9 telling us is what then happened on the 12th, as pure
 10 coincidence everybody gathered at the koppie, everybody on
 11 their own decided that they're going to carry their
 12 weapons. Is that what you want the Commission to believe?
 13 MR PHATSHA: Each person made his own
 14 decision, or decided on himself that he will carry his own
 15 weapon.
 16 MR MOTAU SC: And I will argue that that
 17 is improbable. Someone must have communicated a decision,
 18 or a proposal must have been communicated, discussed, and
 19 agreed upon.
 20 MR PHATSHA: There's no such a person.
 21 MR MOTAU SC: Okay, you told us that the
 22 reasons for the decision to carry the weapons, at least on
 23 your part, was to protect yourself against a possible
 24 attack by the NUM. Correct?
 25 MR PHATSHA: That is so.

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1 MR MOTAU SC: And we have established it
 2 was based on an incorrect assumption that two people were
 3 shot dead on the 11th of August. Correct?
 4 CHAIRPERSON: Mr Interpreter, I
 5 understand he asked you to repeat the question again.
 6 Remember what we discussed before we adjourned?
 7 MR HANABE: Sorry, Commissioner. He
 8 asked me to repeat the question again, yes.
 9 MR MOTAU SC: Yes, and you have. Can I
 10 just get an answer from him?
 11 MR HANABE: He's asking me to repeat the
 12 question. Can you repeat the question?
 13 MR MOTAU SC: We know that that is
 14 because of the incorrect information that you had received
 15 that two strikers had been shot dead on the 11th of August
 16 2012. Correct?
 17 MR PHATSHA: I don't believe.
 18 MR MOTAU SC: What is it that you don't
 19 believe?
 20 MR PHATSHA: I don't understand. Can you
 21 repeat?
 22 MR MOTAU SC: Okay, let me ask the
 23 question differently. Mr Phatsha, the decision to carry
 24 the dangerous weapons, you told us was taken based on the
 25 information which you had received that two strikers were

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1 shot dead during the incident of the 11th of August 2012.
 2 Correct?
 3 MR PHATSHA: That is so.
 4 MR MOTAU SC: And let's assume for a
 5 second that what you had heard was in fact correct, you'll
 6 agree with me that the killing of human beings by others is
 7 unlawful, is against the law. Correct?
 8 MR PHATSHA: That is so.
 9 MR MOTAU SC: And the police are there to
 10 intervene and to protect individuals when they're faced
 11 with such circumstances. Correct?
 12 MR PHATSHA: Can you repeat?
 13 MR MOTAU SC: The police are there to
 14 intervene and to protect persons who are faced with a
 15 situation similar to the one that you were faced with on
 16 the 11th, on the assumption that that information was
 17 correct.
 18 MR PHATSHA: That is so.
 19 MR MOTAU SC: And in fact the most
 20 natural thing that one would expect of the strikers to have
 21 done, was to report the matter to the police and to ask for
 22 their intervention. Correct? And to protect them – sorry,
 23 can I just finish it – and to protect them against possible
 24 attacks that they were fearing.
 25 MR PHATSHA: No such decision was taken.

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1 MR MOTAU SC: Why not?
 2 MR PHATSHA: There's no reason.
 3 MR MOTAU SC: And you'll agree with me
 4 that the decision to arm yourselves with dangerous weapons
 5 and to protect yourselves against any possible attacks is
 6 unlawful because it amounts to taking the law into your own
 7 hands?
 8 MR PHATSHA: We were not taking our own
 9 decisions.
 10 MR MOTAU SC: But that's precisely what I
 11 said initially. Somebody was taking decisions on your
 12 behalf. Who is this person? Now that you've told us you
 13 were not taking your own decisions, who is that?
 14 MR PHATSHA: No-one took decisions for
 15 us.
 16 MR MOTAU SC: You just told us you did
 17 not take your own decisions. Do you want to withdraw that
 18 answer that you gave earlier?
 19 MR PHATSHA: We were not taking decisions
 20 on our own, our own decisions.
 21 MR MOTAU SC: That's exactly what I
 22 understood, and that's what I put to you earlier. When I
 23 asked you to give us the identity of the person, or the
 24 people who were taking decisions on your behalf, you turned
 25 back and you say no-one gave you, or took decisions on your

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1 behalf. So it can't be both. It's either you took your
 2 own decisions, which you now say you were not taking, and
 3 in that case I'm asking you to tell us who is the person or
 4 the people that were taking decisions on your behalf.
 5 MR PHATSHA: No-one was taking decisions
 6 for us.
 7 MR MOTAU SC: Mr Phatsha, this is a very
 8 serious matter. This Commission is a very serious event
 9 where we're trying to establish the truth as to what
 10 happened. So you can't have it both ways. Can I just ask
 11 you that we don't waste time, please? You told us you were
 12 not making decisions, you were not taking your own
 13 decisions. When I ask you to identify the person or the
 14 people who were taking decisions, you revert back and say
 15 nobody was taking those decisions. It cannot be both.
 16 It's either you were taking your own decision, or a person
 17 or certain persons were taking decisions on your behalf,
 18 which you were following. Which one is it of the two?
 19 MR PHATSHA: Hence I said no-one took
 20 decisions for us.
 21 MR MOTAU SC: So you took your own
 22 decisions?
 23 MR PHATSHA: That is so.
 24 MR MOTAU SC: Now why did you take the
 25 decision to arm yourself with dangerous weapons instead of

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1 reporting to the police, and even perhaps to Lonmin
 2 security, to protect you from these possible attacks that
 3 you were fearing?
 4 MR PHATSHA: Can you repeat the question?
 5 [Interpreter repeats question] I have some difficulties.
 6 MR MOTAU SC: Do you have a difficulty in
 7 answering the question? Because understanding it you do.
 8 MR PHATSHA: Yes.
 9 MR MOTAU SC: Tell us why are you finding
 10 it difficult to answer that question?
 11 MR PHATSHA: No plan was made to go to
 12 the police.
 13 MR MOTAU SC: And I'm asking you, why
 14 not?
 15 MR PHATSHA: I cannot answer that
 16 question.
 17 CHAIRPERSON: When did you for the first
 18 time have both these weapons with you, the bush knife and
 19 the sharpened iron rod? When did you have them with you
 20 first?
 21 MR PHATSHA: I started on the 15th.
 22 CHAIRPERSON: On the 15th?
 23 MR HANABE: Yes, Commissioner.
 24 MR MOTAU SC: Sir, you were saying –
 25 CHAIRPERSON: Sorry, can I just ask

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1 another question?

2 MR MOTAU SC: Ja.

3 CHAIRPERSON: Now did you know that from

4 the afternoon of the 14th the police were in the vicinity of

5 the koppie, engaging with representatives of the strikers?

6 MR PHATSHA: I was not aware.

7 CHAIRPERSON: When you went there on the

8 15th, did you see policemen standing there in front of the

9 koppie, police vehicles?

10 MR PHATSHA: There were police officers.

11 CHAIRPERSON: Now when you went there on

12 the morning of the 15th, did you take these two weapons with

13 you?

14 MR PHATSHA: Initially when I went there

15 I was not carrying any weapons, but I carried them at a

16 later stage.

17 CHAIRPERSON: Yes, I'm trying to find out

18 when the later stage was. Initially when you went to the

19 koppie you didn't take the weapons. Is it possible, did

20 you have the butcher knife with you the whole time?

21 MR PHATSHA: Yes, that's the only one I

22 was carrying.

23 CHAIRPERSON: I see, and then at a later

24 stage you decided to take the sharpened iron rod as well?

25 MR PHATSHA: Yes.

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1 CHAIRPERSON: Was that on the 15th?

2 MR PHATSHA: Yes.

3 CHAIRPERSON: How many times did you go

4 to the koppie on the 15th?

5 MR PHATSHA: I went there twice.

6 CHAIRPERSON: Twice. What time did you

7 go the first time?

8 MR PHATSHA: It was in the early morning,

9 between 4 and 5AM.

10 CHAIRPERSON: And then did you go back

11 home?

12 MR PHATSHA: Yes, I went back home.

13 CHAIRPERSON: What time did you go back

14 home?

15 MR PHATSHA: I don't remember the exact

16 time.

17 CHAIRPERSON: More or less.

18 MR PHATSHA: Between 8 and 9 o'clock.

19 CHAIRPERSON: And when did you go back to

20 the koppie?

21 MR PHATSHA: I went back there around

22 16:00 and 17:00.

23 CHAIRPERSON: I see, and when you went

24 the first time, did you take your bush knife with you? Or

25 your butcher knife with you?

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1 MR PHATSHA: Yes, I was carrying it.

2 CHAIRPERSON: Yes, and when you went the

3 second time, did you take your butcher knife and the

4 sharpened iron rod?

5 MR PHATSHA: Yes.

6 CHAIRPERSON: And when you went back on

7 the afternoon of the 15th, there were police present, were

8 there not? A whole lot of policemen and police vehicles,

9 and so on, in front of the koppie.

10 MR PHATSHA: That is correct.

11 [11:45] CHAIRPERSON: So why did you take the

12 iron rod at that stage?

13 MR PHATSHA: Those are the object I carry

14 when I want to defend myself whenever there is a fight.

15 CHAIRPERSON: Did you expect that there

16 would be a fight?

17 MR PHATSHA: That's not what I expected.

18 CHAIRPERSON: I see, but you thought

19 there might be a fight, so just in case there was going to

20 be a fight, you had your two weapons with you. Is that

21 correct?

22 MR PHATSHA: That is so.

23 CHAIRPERSON: Who did you think the fight

24 might be with?

25 MR PHATSHA: We didn't forecast on the

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1 person with whom we would be involved in a fight. There

2 was no specific person.

3 CHAIRPERSON: I understood you to say at

4 one stage that you had these weapons with you because you

5 were afraid you might be attacked by NUM. Did I understand

6 you correctly?

7 MR PHATSHA: That is so.

8 CHAIRPERSON: So therefore, is it fair to

9 assume that you had these weapons to protect yourself

10 against a possible attack by NUM, NUM people?

11 MR PHATSHA: That is so.

12 CHAIRPERSON: Now how could you fear an

13 attack by NUM if the police were there in fairly large

14 numbers and there were police vehicles there as well? What

15 chance would NUM have had to attack you in those

16 circumstances?

17 MR PHATSHA: [African language]

18 CHAIRPERSON: Did he ask for the question

19 to be repeated?

20 MR PHATSHA: About the issue of defending

21 ourselves.

22 MR MOTAU SC: Sorry, Chair, I'm not

23 Xhosa-speaking, but I think there's one word which the

24 interpreter missed. As opposed to saying "attack," he said

25 "protect," and that's what the witness is asking. He

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1 doesn't understand how does protection, or the need to
 2 protect come in. So if the interpreter can repeat the
 3 question, substitute "protect" with "attack."
 4 CHAIRPERSON: Alright. Can you repeat
 5 the question as amended by Mr Motau?
 6 MR HANABE: Yes. Yes, Commissioner.
 7 MR PHATSHA: We didn't expect to be
 8 attacked just because the police were there.
 9 CHAIRPERSON: Why did you take the
 10 weapons then?
 11 MR PHATSHA: We carried those weapons
 12 because we didn't know as to whether after the police had
 13 left we were perhaps going to be attacked.
 14 CHAIRPERSON: Yes, Mr Motau.
 15 MR MOTAU SC: Did you receive information
 16 that the police were going to leave?
 17 MR PHATSHA: I never heard that.
 18 MR MOTAU SC: Did you ask them how long
 19 did they intend to be there for?
 20 MR PHATSHA: I never asked.
 21 MR MOTAU SC: You'll agree that there's
 22 no basis for you to say you carried the weapons on the
 23 assumption that the police were going to leave and you were
 24 worried about what was going to happen after they leave,
 25 not having established those facts?

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1 MR PHATSHA: I cannot hear. [Interpreter
 2 repeats question] Because we didn't know the time as to
 3 which the police, as to when the police were going to
 4 leave.
 5 MR MOTAU SC: But we've already
 6 established you did not ask them when they were going to
 7 leave.
 8 MR HANABE: He asked me to repeat.
 9 MR PHATSHA: We never asked them.
 10 CHAIRPERSON: Wouldn't you ask the police
 11 to stay to protect you if you feared there might be an
 12 attack by NUM?
 13 MR PHATSHA: No such thought crossed my
 14 mind, our minds.
 15 MR MOTAU SC: Sir, you'll agree that
 16 generally police presence, especially in the large numbers
 17 that they were in on the 15th, and coupled with the fact
 18 that there were vehicles, indicates a sign of safety, or
 19 protection at least, on their part, and you have no reason
 20 to fear any attack under those circumstances?
 21 MR PHATSHA: Can I answer? There was
 22 fear, we had fear because we didn't expect the police to be
 23 there for good. We know that at some stage they would have
 24 to leave.
 25 MR MOTAU SC: But the evidence is that at

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1 that stage the police presence was being increased. More
 2 and more police were arriving at the koppie, and you thus
 3 could not have been entitled to assume that they were going
 4 to leave, but if anything was that they're increasing their
 5 presence with a view to staying.
 6 MR PHATSHA: We were not aware as to
 7 whether they were going to remain or stay there.
 8 MR MOTAU SC: Do you agree that your
 9 decision not to ask the police to either stay or to even
 10 establish from them about the intended duration of their
 11 stay, was a mistake on your part?
 12 MR PHATSHA: Yes.
 13 MR MOTAU SC: Do you also agree that
 14 another mistake that you made was after the NUM incident on
 15 the 11th, the decision to take the arms instead of getting
 16 the police and possibly Lonmin security to protect you
 17 against the attack that you were fearing? Do you agree
 18 that that was another mistake that you made?
 19 MR PHATSHA: We never informed them.
 20 MR MOTAU SC: Do you agree, looking back,
 21 that that was a mistake on your part? In other words, you
 22 should not have carried dangerous weapons, but instead you
 23 should have contacted the police, even possibly Lonmin
 24 security, in order to put a plan to protect you.
 25 MR PHATSHA: No such plan was made.

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1 MR MOTAU SC: I know that, Sir. I'm
 2 asking that with hindsight, do you agree that that was a
 3 mistake on your part?
 4 MR PHATSHA: Can you repeat?
 5 [Interpreter repeats question] There was no time to go to
 6 the police.
 7 MR MOTAU SC: But we agreed that there
 8 was no information that NUM was planning to attack you at
 9 the koppie.
 10 MR PHATSHA: I never heard about such
 11 thing.
 12 MR MOTAU SC: And we know that no such
 13 attacks occurred between the 12th to the 16th of August. So
 14 there was an opportunity for you to contact the police,
 15 instead of taking arms and taking the law into your hands.
 16 MR PHATSHA: No such a plan was made.
 17 MR MOTAU SC: And hence I'm saying, do
 18 you then agree – if you're not prepared to agree you can
 19 say that and I can move on to another aspect. Do you now
 20 agree, with hindsight, with all the facts that you now
 21 know, that it was a mistake or an error on your part to
 22 take the law into your own hands by taking dangerous
 23 weapons, instead of involving the police and possibly
 24 Lonmin security to devise a plan to protect you against
 25 this fear of a NUM attack?

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1 MR PHATSHA: I don't agree with you.
 2 MR MOTAU SC: So if you could be given
 3 another chance to replay the scene, go back to the 11th,
 4 there is this incident; you go to the 12th, there is no
 5 incident; the 13th, no incident; 14th, no incident, up until
 6 the 16th; you are saying you would not have asked for the
 7 police to protect you, but you'd instead do it all over
 8 again? You would go and get your dangerous weapons instead
 9 of involving the police, or asking them to protect you?
 10 You would not do that?
 11 MR PHATSHA: We had never made such a
 12 plan.
 13 MR MOTAU SC: Sir, I know that you did
 14 not have the plan at that time. I'm asking a different
 15 question. I'm saying assume this had not happened and it
 16 was to happen again, knowing what you know with all the
 17 facts that I've put to you, you still would not decide to
 18 ask the police for protection, but you would instead take
 19 the law into your own hands and you'd take your dangerous
 20 weapons?
 21 MR PHATSHA: We were already carrying the
 22 weapons.
 23 MR MOTAU SC: Mr Phatsha, do you
 24 understand my question? And I'm going to repeat it.
 25 MR PHATSHA: Repeat.

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1 MR MOTAU SC: Assume that today is the
 2 12th of August 2012. Do you understand that?
 3 MR PHATSHA: Mmm.
 4 MR MOTAU SC: And that the NUM incident
 5 had occurred yesterday, being the previous day. We now
 6 know that there was no information that the NUM was going
 7 to attack you at the koppie on the 12th up until the 16th,
 8 and we know that the NUM did not attack you on the 12th to
 9 the 16th. So why, if today was the 12th of August, knowing
 10 that you do have the time to report this incident to the
 11 police - there is no immediate threat - why would you not
 12 take a decision today, if it were the 12th, to report the
 13 matter to the police and ask them to intervene and protect
 14 you?
 15 MR PHATSHA: No, there was never such a
 16 plan.
 17 MR MOTAU SC: Sir, I'll take it that you
 18 understand the question and you're clearly evading it, and
 19 I'm going to move on to another aspect.
 20 MR PHATSHA: I'm not evading anything.
 21 MR MOTAU SC: Do you want me to give you
 22 another opportunity to answer it? Have you thought about
 23 it?
 24 MR PHATSHA: Repeat the question.
 25 MR MOTAU SC: I'm not going to repeat the

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1 question. You understand the question. You said you're
 2 not evading it. Do you have the answer?
 3 MR PHATSHA: What is the question?
 4 CHAIRPERSON: Mr Motau, I think you've
 5 given the witness ample opportunity to answer the question.
 6 I don't know whether there's any point in going through it
 7 anymore, but it's your cross-examination, not mine.
 8 MR MOTAU SC: Thank you. Thank you,
 9 Chairperson. Sir, let's move on to another aspect. You
 10 see, there's another aspect of your evidence which is
 11 troubling me, and it is the following. You said that
 12 between the 12th and the morning of the 15th, you were only
 13 carrying your butcher knife and you were not carrying the
 14 sharpened iron, or the "incula."
 15 MR PHATSHA: That is so.
 16 MR MOTAU SC: And we know that you were
 17 not attacked during that time, and there was no threat that
 18 you were going to be attacked.
 19 MR PHATSHA: We were not aware as to
 20 whether we were not going to be attacked.
 21 MR MOTAU SC: You were also not aware
 22 that you were going to be attacked. So you knew both.
 23 MR PHATSHA: Can you repeat?
 24 MR MOTAU SC: Okay, you were at least
 25 between those dates, between the 12th and the morning of the

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1 15th of August, you had no information that you were going
 2 to be attacked by the NUM.
 3 [12:05] MR PHATSHA: We never heard about that.
 4 MR MOTAU SC: Now I find it very strange
 5 that the 12th up until the morning of the 15th goes by
 6 peacefully with no incident, and on the 15th there's a large
 7 police presence at the koppie, and your response to it is
 8 to increase your weapons by carrying an additional
 9 dangerous weapon, which you carry for the first time after
 10 the police are on site. Are you able to explain that?
 11 MR PHATSHA: I said the reason was that
 12 we were, or had been attacked by NUM.
 13 MR MOTAU SC: But that happened on the
 14 11th and we've established it did not happen between the
 15 12th and the 15th, and you had no information that it was
 16 going to happen. So that surely can't be the justification
 17 for doing that. Are you able to answer or comment as to
 18 what was the reason?
 19 MR PHATSHA: What was the reason for us
 20 to be attacked?
 21 MR MOTAU SC: So is that the answer?
 22 CHAIRPERSON: It sounds like a question.
 23 MR PHATSHA: I have to ask the question
 24 because questions are only posed to me. I'm the only one
 25 who's being asked questions.

<p style="text-align: right;">Page 5517</p> <p>1 MR MOTAU SC: Mr Phatsha, when you are a 2 witness and you give evidence, there is a particular 3 discipline that you are expected to submit yourself to, and 4 that discipline is that the cross-examiner will ask you 5 questions and that your responsibility, or your duty is to 6 answer those questions. 7 CHAIRPERSON: I don't think we should be 8 too technical. Let's hear the answer. 9 MR PHATSHA: Why is it happening like 10 that? 11 CHAIRPERSON: I don't think we need be 12 too technical. Sometimes a question can be an answer. 13 "Why did you carry a gun?" "Why did they attack me?" The 14 answer is, well I was carrying a gun because they attacked 15 me for no obvious reason. So this is a man who's got sub 16 A, so to expect him to have the understanding of courtroom 17 procedure which you have after all your years you studied 18 at university, is possibly making too big an assumption. 19 So I'll allow him to ask the odd question if it seems to be 20 kind of an answer to the question that you asked. But can 21 I just ask a couple of questions dealing with a slightly 22 collateral matter to clear the ground a bit, before you 23 carry on? When did you start carrying the butcher knife? 24 MR PHATSHA: I carried it on the 15th. 25 CHAIRPERSON: So you didn't carry it</p>	<p style="text-align: right;">Page 5519</p> <p>1 CHAIRPERSON: For the first time on the 2 15th? 3 MR PHATSHA: Yes, it was for the first 4 time that I carried my own on the 15th. 5 CHAIRPERSON: Had you not noticed before 6 then that the other strikers on the koppie were carrying 7 weapons? You went there repeatedly. 8 MR PHATSHA: They were carrying them. 9 CHAIRPERSON: And why when you went back 10 to the koppie on the second occasion on the 15th do you now 11 carry another dangerous weapon apart from the butcher 12 knife, namely the sharpened iron rod? What was the 13 necessity for doubling up on the weapons you were carrying? 14 MR PHATSHA: It was just out of, I mean 15 from myself, I just decided to carry them. 16 CHAIRPERSON: Yes, but why? 17 MR PHATSHA: There was no reason for 18 that. 19 CHAIRPERSON: Thank you. 20 MR MOTAU SC: I'm indebted to the 21 Chairperson. Mr Phatsha, can I just ask that we move to 22 another aspect? On the morning of the 15th of August there 23 was a briefing meeting by General Mpenbe, which was 24 attended by among others the – or it was on the afternoon, 25 sorry, of the 15th – which was attended among others by the</p>
<p style="text-align: right;">Page 5518</p> <p>1 before the 15th? 2 MR PHATSHA: I never carried it. 3 CHAIRPERSON: So when you went to the 4 koppie on the days you went before the 15th, did you not 5 have a weapon at all? 6 MR PHATSHA: I would only carry a stick. 7 CHAIRPERSON: So you only had a stick up 8 until the 15th? 9 MR PHATSHA: Yes. 10 CHAIRPERSON: When did you know that 11 people from NUM had attacked the strikers on the morning of 12 the 11th? Did you know that on that day, the 11th, when you 13 heard the gunshots and you saw the people running away? 14 MR PHATSHA: I hear it on the 11th. 15 CHAIRPERSON: So from the 11th until the 16 morning of the 15th you didn't consider it necessary to 17 carry a dangerous weapon when you went to the koppie? 18 MR PHATSHA: The others carried them, but 19 I never had intentions of carrying them. 20 CHAIRPERSON: What changed on the morning 21 of the 15th when you took a butcher knife with you to the 22 koppie when you went the first time? 23 MR PHATSHA: It's because I noticed that 24 the other workers who were there were carrying weapons and 25 I also carried mine.</p>	<p style="text-align: right;">Page 5520</p> <p>1 president of NUM and the president of AMCU, and I just want 2 to refer you to exhibit OO4, which is the transcript of 3 that briefing meeting. We had indicated that we're going 4 to be referring to exhibit OO4. Can I just ask you to turn 5 to page 27, from line 17, against the name, Mr Mokwena, 6 where the following is said by Mr Mokwena. You will see on 7 the previous page he, Mr Mokwena says in line 30, "Our 8 position, General, is as Lonmin," and then he proceeds to 9 articulate Lonmin's position. He says, "Management, our 10 position is as follows. We are willing to engage our 11 employees within the structures that are known, in a very 12 safe environment where there are no weapons, not on a 13 mountain." 14 MR PHATSHA: Can you repeat? I didn't 15 hear. 16 CHAIRPERSON: He hasn't posed the 17 question yet. I think that was just the first half. You 18 haven't asked the question yet, have you? 19 MR MOTAU SC: I haven't, Chairperson. 20 CHAIRPERSON: Yes, well I was wondering 21 how this witness can be expected to answer a question based 22 on that if he wasn't there and presumably what was said at 23 the meeting wasn't repeated by a loudhailer at the koppie, 24 but anyway, I hope there's a question he can answer at the 25 end of it all.</p>

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1 MR MOTAU SC: Yes, if the Chairperson
 2 could just bear with me.
 3 MR PHATSHA: I heard.
 4 MR MOTAU SC: "So we are willing to meet
 5 our employees through their structures, through their
 6 leaders, to discuss any issue, not when they are armed, not
 7 when they are actually outside the Lonmin property. So
 8 when the workers are back, disarmed, tomorrow, tonight,
 9 through their leaders we will meet them. That is our
 10 position. We are not against meeting, discussing issues
 11 with employees through the right structures. We are
 12 prepared to do that." Sir, you do know that Lonmin's
 13 position was consistent throughout that it is willing to
 14 engage with its employees through the proper collective
 15 bargaining structures, correct?
 16 MR PHATSHA: We expected the management
 17 and the unions to talk to us.
 18 MR MOTAU SC: But that is precisely the
 19 point, that Lonmin's position was it is willing to engage
 20 the employees through proper collective bargaining
 21 structures, where your unions would have been present to
 22 articulate your demands.
 23 CHAIRPERSON: Did you know that?
 24 MR PHATSHA: No.
 25 MR MOTAU SC: You never got hold of any

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1 of the internal communiqué that were issued by various
 2 officials of Lonmin –
 3 CHAIRPERSON: No, he can't read.
 4 MR MOTAU SC: Chairperson, I am mindful
 5 of that fact. I will actually deal with that issue to
 6 cover that aspect, if I may just ask the Chairperson to
 7 bear with me. I'm almost done. Sir, we do know - and in
 8 fact you can clarify if you never became aware of that fact
 9 - that among other things Mr Da Costa addressed the
 10 protesters with regard to their demand of 12.5, advised
 11 them that they had adopted an incorrect procedure, and he
 12 addressed them in Fanagalo, and advising that the proper
 13 way to raise these issues is through collective bargaining
 14 structures. Did you get to know of that fact?
 15 MR PHATSHA: It's at the time I arrived
 16 late.
 17 MR MOTAU SC: So at no stage was that
 18 information shared with you that Lonmin says this is the
 19 method by which the process of engagement should occur?
 20 You're hearing that for the first time from me today?
 21 CHAIRPERSON: It sounds to me you and the
 22 witness may be at cross purposes. You were, as I
 23 understood it, telling him, or putting to him what Mr Da
 24 Costa said to a group of Karee RDOs in July. He says he
 25 arrived late at the meeting, which I suspect means he's

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1 talking about one of the meetings in August, because you
 2 remember, he works for Eastern Platinum, he doesn't work
 3 for Karee. So if you're talking past each other then the
 4 answers you are going to get from him are going to be
 5 meaningless, and in any event, it's probably not fair to
 6 ask him questions when there's clearly a misunderstanding.
 7 So I think you should clarify that first before you carry
 8 on.
 9 MR MOTAU SC: Yes, Chair, I take the
 10 point. Mr Phatsha, let me ask the question differently.
 11 Did you at any stage prior to and including the 16th get to
 12 find out that Lonmin's position was that it is willing to
 13 engage, but only through proper structures?
 14 MR PHATSHA: I never heard about such a
 15 thing.
 16 CHAIRPERSON: No, I'm not sure if the
 17 question is correct in any event, because we do know that
 18 Lonmin did engage outside the structures with the RDOs when
 19 they made them the offer, or unilaterally gave them the
 20 allowance of 750. So that was in fact the unions'
 21 complaint that they were outside the structure, so I'm not
 22 sure that the question put as absolutely as you did, is
 23 correct in accordance with the facts as we understand them.
 24 MR MOTAU SC: Chairperson, if I can just
 25 correct that. Lonmin's position is an engagement with the

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1 RDOs resulted in an allowance which was paid, which is –
 2 may I – and the Chairperson will recall that at the, I
 3 think on the 23rd of July when the decision was made to pay
 4 the allowance, there was a communiqué which was issued,
 5 which made it very clear that that has got nothing to do
 6 with wage negotiations; it's an issue that deals with an
 7 allowance, which is at the discretion of management. So
 8 even with effect from the date when the announcement was
 9 made of the payment, the communication by Lonmin was always
 10 negotiations should happen within structures. So I'm
 11 merely testing whether this witness at some or other stage
 12 became aware that that was Lonmin's position, or he's only
 13 finding out from me for the first time today. That's the
 14 only issue, Chair.
 15 [12:25] CHAIRPERSON: Alright, put the question
 16 to him and let's see what answer we get.
 17 MR MOTAU SC: Sir, at any stage between
 18 the 10th of August when you joined the strike, or even
 19 earlier, up until the 16th of August, did you or did you not
 20 hear that Lonmin's position was that all wage negotiations
 21 should be done through proper collective bargaining
 22 structures?
 23 MR PHATSHA: I never heard about that.
 24 MR MOTAU SC: And if you had heard it,
 25 would it have made a difference to your approach?

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1 MR PHATSHA: I have no idea.

2 MR MOTAU SC: Right, Sir, we do know that

3 from your evidence you state that you were present at the

4 koppie on the 15th when Mr Zokwana came to address the

5 strikers. Correct?

6 MR PHATSHA: I was present.

7 MR MOTAU SC: And you'll agree with me

8 that the presence of Mr Zokwana at the koppie presented an

9 opportunity to engage, in other words to advise your union

10 that you were a member, that there is this problem and you

11 ask that they should intervene and address your demand?

12 MR PHATSHA: Can you repeat?

13 [Interpreter repeats question] What happened was that Mr

14 Zokwana addressed us from the Nyala.

15 MR MOTAU SC: And?

16 MR PHATSHA: Without even greeting, he

17 just told the workers to go back to work.

18 MR MOTAU SC: I'm trying to understand

19 what point are you making, so I don't want to interrupt

20 you. Just proceed and make your point so that I can ask

21 you a question.

22 MR PHATSHA: He said after that that if

23 we don't want to go back to work, the police will do their

24 job.

25 MR MOTAU SC: Are you done and can I ask

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1 the question?

2 MR PHATSHA: I'm done.

3 MR MOTAU SC: Sir, Mr Zokwana gave

4 evidence and stated that on the 15th he was given

5 instructions by the police in terms of the manner in which

6 he was going to address the strikers, that is he had to do

7 it from within the Nyala. You did hear that evidence? I

8 assume you were present.

9 MR PHATSHA: Can you repeat? I didn't

10 hear. [Interpreter repeats question] I don't know

11 anything about that.

12 MR MOTAU SC: And he proceeded to tell

13 the Commission that he was not well received at the koppie

14 on that day by the strikers.

15 MR PHATSHA: I know nothing about that.

16 MR MOTAU SC: And in his own words he

17 told the Commission that when he arrived at the koppie it

18 was clear that the group, meaning the protesters, were not

19 prepared to listen to him.

20 MR PHATSHA: Such a thing never happened.

21 MR MOTAU SC: Because he told us that

22 when he arrived at the koppie, once people noticed it was

23 him, they were singing songs, "We hate NUM. How will we

24 kill NUM? How will we kill Zokwana? We hate Zokwana."

25 MR PHATSHA: I never heard about such a

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1 thing.

2 MR MOTAU SC: So your evidence is that if

3 such a song was sung, given the fact that you were there,

4 you never heard such a song being sung?

5 MR PHATSHA: I never heard it.

6 MR MOTAU SC: Mr Phatsha, I want to put

7 it to you that you are being incorrect and you're not being

8 honest, because video clips were even played of that

9 incident and the song is very clear and loud and it's

10 words, or lyrics, are also very clear.

11 MR MPOFU: Sorry, Chairperson, I don't

12 think that's the evidence. I think that's a misleading

13 question.

14 CHAIRPERSON: [Inaudible].

15 MR MPOFU: Well, in all ways, in the

16 sense that there's no such video evidence. If it was

17 played then I think only Mr Motau saw it, of the song being

18 played with Mr Zokwana being there. But just –

19 CHAIRPERSON: - actually if Mr Mpofo is

20 correct. The video machine was working the next day when

21 Mr Mathunjwa went, and that's OO9. But I'm not aware of it

22 – Ms Pillay will help us, I'm sure – I'm not aware of a

23 video clip of Mr Zokwana's address, unless it was led and

24 I've forgotten it. Ms Pillay, can you help us on this?

25 MS PILLAY: Chair, I would just need to

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1 go through Mr Chaskalson's compilation to make sure that –

2 I seem to recall seeing it, but I just need to be sure

3 about it.

4 CHAIRPERSON: Adv Hemraj reminds me that

5 she thinks that there was one because it was taken from

6 inside the Nyala, and I seem to remember seeing that. One

7 couldn't see very much. It was taken from behind Mr

8 Zokwana actually. But anyway –

9 MS PILLAY: That's correct, Chair. I

10 think it was part of Mr Chaskalson's compilation.

11 CHAIRPERSON: Yes. Mr Motau, can you

12 perhaps move on and deal with something else? During the

13 lunch adjournment, which we'll be taking in 25 minutes, if

14 you're still busy, the matter can be checked and you can

15 deal with it after lunch, and if you've finished your

16 cross-examination before that, you can stop your cross-

17 examination and reserve the right to come back and ask

18 about that. That seems a sensible way to deal with it. I

19 must confess initially I couldn't, I wasn't, I didn't think

20 such a video did exist, but now that I'm reminded about a

21 video being taken from inside the Nyala, I think there was

22 one. But anyway, let's not have to rely on my, obviously

23 imperfect memory on the point.

24 MS BARNES: There's a video of Mr

25 Mathunjwa in the Nyala, but there's no footage – and we've

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1 been through all of it – of Mr Zokwana in a Nyala.
 2 CHAIRPERSON: Right, well anyway, I'm not
 3 challenging what you say, Ms Barnes. Let's have a check
 4 during the lunch hour and Mr Motau can come back and deal
 5 with the matter after that.
 6 MR MPOFU: Chairperson, I'm happy with
 7 that arrangement. Mr Motau will check and if he finds
 8 anything, after lunch he can revisit.
 9 CHAIRPERSON: Right, okay. So let's
 10 carry on with your cross-examination, Mr Motau. Have you
 11 got other points?
 12 MR MOTAU SC: Thank you, Chair, I will
 13 come back to that issue on the terms that the Chair has
 14 proposed. If I finish my cross-examination before lunch
 15 I'll reserve the right to view the video material and to
 16 come back to it, should it be necessary. Sir, let's then
 17 proceed. In Mr Zokwana's words when he was telling the
 18 Commission about what happened at the koppie, he says after
 19 having said that he was not well received and that people
 20 were not prepared to listen to him, he says he nevertheless
 21 tried to address the crowd, and he says he told the
 22 strikers that the strike was unprotected and that for the
 23 sake of peace they should put down their weapons, leave the
 24 koppie and return to their homes, and that their demands
 25 would then be addressed. Having been present at the

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1 koppie, are you able to comment on that evidence that was
 2 given by Mr Zokwana?
 3 MR PHATSHA: Nothing.
 4 MR MOTAU SC: And when Mr Zokwana gave
 5 that evidence, he was not challenged that in fact that
 6 evidence is incorrect. It is in paragraph 22 of his
 7 witness statement. You don't need to get to it, but what
 8 I'm putting to you emanates from paragraph 22 of Mr
 9 Zokwana's statement, and that evidence was not challenged.
 10 Do you know why that evidence was not challenged?
 11 MS BARNES: Chair, it was challenged in
 12 my cross-examination. I put the statement of Mr Boye to Mr
 13 Zokwana in my cross-examination and challenged his version
 14 in his statement about what he had said on that day.
 15 MR MPOFU: And in mine.
 16 MR MOTAU SC: Chair, I'm not going to
 17 waste time on this issue. We'll deal with it when the, at
 18 the relevant point. If the transcript does bear out what
 19 I'm putting to the witness, we will argue it from that
 20 point, and if the record bears out the version advanced
 21 from the ultra left –
 22 CHAIRPERSON: I think if the transcript
 23 bears out what Ms Barnes and Mr Mpofo say, then you won't
 24 argue the point.
 25 MR MOTAU SC: Yes.

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1 CHAIRPERSON: That seems a sensible
 2 approach. Shall we carry on to the next point?
 3 MR MOTAU SC: Absolutely, Chair. Sir,
 4 may I just ask you to go to exhibit OO15, it's the
 5 statement of Mr Barnard Mokwena. I apologise, if the Chair
 6 can just bear with me. Sir, can I just ask you to turn to
 7 page 11 of that statement, paragraph 7.6? Do you have it?
 8 MR PHATSHA: Yes.
 9 MR MOTAU SC: Mr Mokwena says the
 10 following in his statement. He says, "In response to a
 11 question from Mathunjwa during the meeting," and I will
 12 show you that this is during the meeting of the 15th, he
 13 says, "In response to a question from Mathunjwa during the
 14 meeting as to what management wanted him to convey to the
 15 strikers, I told Mathunjwa that we wanted him to tell the
 16 strikers that Lonmin would listen to their grievances after
 17 they had disarmed, dispersed, and returned to work, but
 18 that any engagement would be within the existing collective
 19 bargaining structures." Now can I ask whether at the time
 20 when you were at the koppie when Mr Mathunjwa addressed
 21 you, did he ever convey this as being management's
 22 position?
 23 MR PHATSHA: I never heard about that.
 24 MR MOTAU SC: Let me then just move to
 25 another aspect. Will you agree with me that the – in fact,

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1 before I ask you this question, maybe let me try and
 2 establish this. Have you ever been involved or exposed to
 3 a process of wage negotiations? And I'm asking, given the
 4 fact that you were a member of NUM from around 1982 to
 5 December 2012.
 6 MR PHATSHA: Never.
 7 MR MOTAU SC: So you would not know what
 8 processes are involved, the give and take, the taking of
 9 mandates, the question of plenary and caucus and so forth,
 10 you wouldn't know all of that?
 11 MR PHATSHA: No.
 12 MR MOTAU SC: And I also take it then
 13 that you wouldn't be able to comment on Lonmin's view as to
 14 why it did not want to negotiate in an environment which it
 15 viewed as volatile, given the killings that had occurred
 16 and the carrying of dangerous weapons, because you yourself
 17 do not know how the process of negotiations is undertaken.
 18 Correct?
 19 MR PHATSHA: That is so.
 20 MR MOTAU SC: And lastly, in respect of
 21 the final wage agreement that was reached, and there's no
 22 need for me to refer to it but I take it that you do know
 23 that the ultimate increase that was given was given not
 24 only to the RDOs, but it was given to other workers as
 25 well, such as the general workers for example. Correct?

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1 MR PHATSHA: I heard about that.
 2 MR MOTAU SC: And you also know that it
 3 was not only the RDOs in Karee who got an increase, but
 4 that the increase was given to RDOs across the shafts in
 5 accordance with the different scales. Correct?
 6 [12:45] MR PHATSHA: No.
 7 MR MOTAU SC: So is it your evidence that
 8 only the RDOs in Karee got an increase arising out of the
 9 wage agreement?
 10 MR HANABE: He refers, before I
 11 interpreted, Commissioner, to something he refers to as
 12 "spanela." I would like to get an opportunity to ask him
 13 what he means by that. but the RDOs who have no "spanela,"
 14 he says that they would receive 700 increase, and the
 15 others would receive, who had no "spanela," R500, but we
 16 never received such an increase. He has explained it. He
 17 says that the person he refers to as "spanela" is the
 18 assistant to the person who uses the machine to drill.
 19 CHAIRPERSON: The original offer was 750
 20 for those who operated without assistants, 500 for rock
 21 drillers who operated with assistants, and then the
 22 assistants themselves would then get 250. That was the
 23 original offer that was made in July, and as far as I
 24 remember the agreement that was ultimately signed, it
 25 contained that, over and above the extra amounts that were

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1 payable, because people's grades and categories were
 2 changed and there were further increases as well. But you
 3 say that that was not in fact paid, despite the fact that
 4 it's in the agreement? Is that what you're saying?
 5 MR PHATSHA: We never received that
 6 money.
 7 CHAIRPERSON: Well, when the Lonmin
 8 witnesses give evidence your counsel will ask them about
 9 that. I suggest we should move on to something else at
 10 this point.
 11 MR PHATSHA: Alright.
 12 MR MOTAU SC: And in fact, just to
 13 conclude, in terms of the agreement that was reached all
 14 rock drill operators, not only the ones in Karee - that's
 15 the point I'm making - all rock drill operators were
 16 promoted from artisan grade A4 to B1. In other words they
 17 were promoted to a higher grade. I don't have to give you
 18 the logistics. Do you agree?
 19 MR PHATSHA: We have not seen such a
 20 thing.
 21 MR MOTAU SC: Sir, I'm asking you in
 22 terms of the agreement that was eventually concluded. Do
 23 you know that that is the agreement that was concluded -
 24 CHAIRPERSON: I don't know if it's going
 25 to help - at best he can, he may say he knows that was the

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1 agreement. He says it's not been implemented, but the
 2 agreement is before is. Whether it's not been complied
 3 with is a matter which Mr Mpofu and the, I take it Ms
 4 Barnes and Ms Lewis will take up at the appropriate time
 5 with the witnesses led on behalf of your client. Let's not
 6 spend time on it now.
 7 MR MOTAU SC: Chair, subject to viewing
 8 the video and also getting the statement that was discussed
 9 yesterday, which we have not as yet received, we reserve
 10 our right to proceed with cross-examination at an
 11 appropriate stage.
 12 CHAIRPERSON: I'll allow you to conclude
 13 your cross-examination on that basis. We'll now take the
 14 lunch adjournment and resume at half past 1.
 15 [COMMISSION ADJOURNS COMMISSION RESUMES]
 16 [13:52] CHAIRPERSON: The Commission resumes. Mr
 17 Motau, have you got any further cross-examination now, in
 18 the light of the investigations that were going to be done
 19 during the lunch adjournment?
 20 MR MOTAU SC: No, Chair. We'll allow our
 21 learned friend Mr Semenya to proceed -
 22 CHAIRPERSON: I'm sure he'll appreciate
 23 your generosity. Mr Semenya, are you ready to cross-
 24 examine? You're still under oath.
 25 SIPETE PHATSHA (CONTD.): Yes.

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1 CROSS-EXAMINATION BY MR SEMENYA SC: Mr
 2 Phatsha, you had a "incula," as you call it.
 3 MR PHATSHA: Yes.
 4 MR SEMENYA SC: And a panga?
 5 MR PHATSHA: That's correct.
 6 MR SEMENYA SC: Can I ask that we play
 7 slide 121 on exhibit L, for Lima. Do you see that slide?
 8 MR PHATSHA: Yes, I see it.
 9 MR SEMENYA SC: Please identify what
 10 appears at the bottom right corner.
 11 MR PHATSHA: A panga, bush knife, and
 12 assegai.
 13 MR SEMENYA SC: That's what you would
 14 have been holding on the day?
 15 MR PHATSHA: It was an "incula," a sharp-
 16 pointed iron, the size of an assegai.
 17 MR SEMENYA SC: With that you can kill,
 18 right?
 19 MR PHATSHA: Yes, you can kill.
 20 MR SEMENYA SC: And if that person is a
 21 police officer, he will die as well, nè?
 22 MR PHATSHA: Yes, you die.
 23 MR SEMENYA SC: Identify the one which is
 24 at the bottom left.
 25 MR PHATSHA: That's not very clear.

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1 MR SEMENYA SC: You can get closer.
 2 CHAIRPERSON: Would you like to get out
 3 of your chair and stand in front of, close up to the
 4 screen, and then come back and give us your answer? Is
 5 there anything else contained on the screen, before he
 6 resumes his seat, perhaps you can indicate that now, or if
 7 –
 8 MR SEMENYA SC: Yes, I intend to have him
 9 identify all of those weapons on that slide. Mr
 10 Interpreter, can you ask him to make sure he identifies
 11 each of those weapons appearing on the slide, on the
 12 section of that slide?
 13 CHAIRPERSON: There are five photographs
 14 on the slide and I think what Mr Semenya wants him to do is
 15 to look closely at each of the five slides. Perhaps he can
 16 go back and look at it, and then Mr Semenya can continue
 17 with his cross-examination.
 18 MR PHATSHA: I can see this on the
 19 exhibit L.
 20 MR SEMENYA SC: Alright, describe the one
 21 at the bottom left.
 22 MR PHATSHA: I wasn't carrying an
 23 assegai.
 24 MR SEMENYA SC: Can you describe what you
 25 see at the bottom left of exhibit L?

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1 MR PHATSHA: It's somebody that is
 2 licking his spear with his tongue.
 3 MR SEMENYA SC: And the weapon appearing
 4 middle of that slide, middle left of that slide?
 5 MR PHATSHA: It's a bush knife, panga.
 6 MR SEMENYA SC: That's what you would
 7 have had on the day?
 8 MR PHATSHA: No, mine was an iron road,
 9 unlike what appears on the slide.
 10 MR SEMENYA SC: I thought you had a bush
 11 knife as well.
 12 MR PHATSHA: Yes, I also had a bush
 13 knife.
 14 MR SEMENYA SC: Similar to the one
 15 appearing here?
 16 MR PHATSHA: Yes.
 17 MR SEMENYA SC: The one at the top
 18 corner, left?
 19 MR PHATSHA: I see a person wearing a
 20 blanket.
 21 MR SEMENYA SC: Ja, a blanket is not a
 22 weapon. We're trying to identify weapons now.
 23 MR PHATSHA: There are no weapons there.
 24 MR SEMENYA SC: Do you want to try again?
 25 MR PHATSHA: Are you referring to the

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1 person on the extreme right?
 2 MR SEMENYA SC: Can you see him?
 3 MR PHATSHA: Yes, I see this one pointing
 4 at the person who's kneeling, who's on his knees, on the
 5 right-hand side.
 6 MR SEMENYA SC: What's in his right arm?
 7 MR PHATSHA: He has a butcher knife.
 8 MR SEMENYA SC: And centre of that?
 9 MR PHATSHA: There are assegais.
 10 MR SEMENYA SC: No, centre. Centre top.
 11 MR PHATSHA: There are also sticks.
 12 MR SEMENYA SC: I see a bush knife. Do
 13 you see it?
 14 MR PHATSHA: Yes, that's a butcher knife.
 15 MR SEMENYA SC: And the top right is a
 16 spear?
 17 MR PHATSHA: It's an assegai.
 18 MR SEMENYA SC: Now the evidence will be
 19 these are visuals of the 15th of August 2012, at the koppie.
 20 You saw that?
 21 MR PHATSHA: Yes, I did. I saw them.
 22 MR SEMENYA SC: And it was clear to you
 23 that the protesters would use them if they wanted to,
 24 right?
 25 MR PHATSHA: Yes.

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1 MR SEMENYA SC: And you made peace with
 2 the fact that they will be doing for all of you?
 3 MR PHATSHA: Just repeat the question,
 4 Sir.
 5 MR SEMENYA SC: You were part of those
 6 who'd use your weapons when you decided to.
 7 MR PHATSHA: Yes.
 8 MR SEMENYA SC: Okay, can I ask you to
 9 look at slide 172 on the same exhibit?
 10 MR PHATSHA: I see it, Sir.
 11 MR SEMENYA SC: That visual is also of
 12 the 16th at the koppie; you saw people holding those
 13 weapons?
 14 MR PHATSHA: I did see them, yes.
 15 MR SEMENYA SC: You were part of that
 16 group, right?
 17 MR PHATSHA: Yes.
 18 MR SEMENYA SC: Let me ask you to look at
 19 173 slide of the same exhibit.
 20 MR PHATSHA: I see it.
 21 MR SEMENYA SC: That's a "incula" there,
 22 right?
 23 MR PHATSHA: No, that's an assegai.
 24 MR SEMENYA SC: Oh, there are two
 25 assegais?

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1 MR PHATSHA: Yes, it's two assegais.
 2 MR SEMENYA SC: On the 16th he was there.
 3 Did you see that as well?
 4 MR PHATSHA: Yes, I was there, I saw it.
 5 MR SEMENYA SC: Can I invite you to have
 6 a look at slide 167?
 7 MR PHATSHA: I can see it.
 8 MR SEMENYA SC: You do recognise Mambush,
 9 don't you?
 10 MR PHATSHA: Yes, I do.
 11 MR SEMENYA SC: He was your leader,
 12 wasn't he?
 13 MR PHATSHA: Yes, he was elected as one
 14 of the people to represent us.
 15 MR SEMENYA SC: And he was leading the
 16 group, not only in representations. Am I right?
 17 MR PHATSHA: That I don't know.
 18 MR SEMENYA SC: Sorry, I –
 19 MR PHATSHA: That I don't know.
 20 MR SEMENYA SC: You don't know that he
 21 was leading the group?
 22 MR PHATSHA: He was elected to be one of
 23 the people who were going to talk at the Nyala when the
 24 people arrives.
 25 MR SEMENYA SC: Was Mambush not one of

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1 the leaders of the group? I'm not talking about talking.
 2 MR PHATSHA: That I do not really know.
 3 CHAIRPERSON: According to the caption of
 4 that slide, which reads, "Protester 5 addresses the crowd,"
 5 it appears that he is depicted on that slide as addressing
 6 the crowd.
 7 MR MAHLANGU: As a person?
 8 CHAIRPERSON: As a person who is
 9 addressing the crowd, speaking to the crowd. Did you see
 10 and hear him addressing the crowd?
 11 MR PHATSHA: Yes, he was talking. We
 12 talked to the people.
 13 CHAIRPERSON: He was addressing the
 14 crowd, was he?
 15 MR PHATSHA: Talking to the workers.
 16 CHAIRPERSON: To the protesters, the
 17 strikers.
 18 MR PHATSHA: Yes.
 19 MR SEMENYA SC: Including you.
 20 MR PHATSHA: Yes.
 21 MR SEMENYA SC: And on slide 169 of that
 22 same exhibit –
 23 MR PHATSHA: I am looking at that slide,
 24 yes.
 25 MR SEMENYA SC: That's the president of

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1 AMCU, Mr Mathunjwa. Right?
 2 MR PHATSHA: Yes.
 3 MR SEMENYA SC: Addressing the crowd in
 4 which you were part?
 5 MR PHATSHA: That's correct.
 6 MR SEMENYA SC: Pleading with you to
 7 disarm.
 8 MR PHATSHA: He said we should move away
 9 from that place and proceed to our places of residence.
 10 MR SEMENYA SC: Pleading with you to
 11 disarm. Right?
 12 MR PHATSHA: Yes.
 13 MR SEMENYA SC: Which request you did not
 14 follow as a group. Am I right?
 15 MR PHATSHA: We were still waiting for
 16 the employer.
 17 MR SEMENYA SC: Which request you did not
 18 follow, all of you. Right?
 19 MR PHATSHA: We did not put down our
 20 weapons.
 21 MR SEMENYA SC: Despite his request?
 22 MR PHATSHA: We said to him we wanted the
 23 employer.
 24 MR SEMENYA SC: Despite his request?
 25 MR PHATSHA: It did not happen.

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1 MR SEMENYA SC: Can I now invite you to
 2 look at the slide 119 of that exhibit?
 3 MR PHATSHA: I see it, Sir.
 4 MR SEMENYA SC: Do you want to get closer
 5 to see whether you can even find yourself there?
 6 MR PHATSHA: I would not be able to
 7 identify myself because I'm right in the middle, quite far.
 8 MR SEMENYA SC: You're sure about that,
 9 at least.
 10 MR PHATSHA: Yes.
 11 MR SEMENYA SC: So at least I am correct
 12 to say you are part of the core group which is with Mr
 13 Noki, right?
 14 MR PHATSHA: No, I'm not there.
 15 MR SEMENYA SC: We've just agreed you are
 16 in the middle, man.
 17 MR PHATSHA: Yes, I said I was in the
 18 middle, but not in the front group, a bit to the middle at
 19 the back.
 20 MR SEMENYA SC: This is the same group
 21 where Mr Noki is, right?
 22 MR PHATSHA: Who is Noki, by the way?
 23 MR SEMENYA SC: Sorry, Mr Mambush.
 24 MR PHATSHA: Yes, Mambush was in the
 25 front. I'm not denying that.

<p style="text-align: right;">Page 5545</p> <p>1 MR SEMENYA SC: And if you look at that 2 slide, you will see there are others protesters who are 3 high up on the koppie. Do you see that? 4 MR PHATSHA: Yes, there are those people. 5 MR SEMENYA SC: They are not the ones who 6 are squatting with these bush knives and pangas and spears. 7 Am I right? 8 MR PHATSHA: I don't think there was any 9 difference between the people and what we were doing there. 10 MR SEMENYA SC: Do you want to look 11 closer to that frame? 12 [14:12] MR MAHLANGU: The question is, he should 13 go closer? 14 MR SEMENYA SC: Can you go – at the front 15 and at the centre, as you say, and there's another group of 16 people up the koppie who are not squatting like you. 17 MR MPOFU: Chairperson – 18 MR PHATSHA: I don't see clearly. 19 MR MPOFU: Sorry, I think that question 20 is distinctly unfair insofar as the words "you are 21 squatting" is now used, when the witness has clearly said 22 he was not in that group. 23 CHAIRPERSON: Of course he can come back 24 and say I've looked at it – 25 MR MPOFU: It's not the answer that will</p>	<p style="text-align: right;">Page 5547</p> <p>1 CHAIRPERSON: Go up close to the – 2 MR PHATSHA: I was at the back, Mr 3 Chairperson. 4 CHAIRPERSON: Go up close to the slide 5 and indicate, if you can, in general terms where you were. 6 MR PHATSHA: That is what I'm saying, Mr 7 Chairperson, that it's difficult for me to go and estimate 8 that I could have been here, when I wasn't actually there. 9 CHAIRPERSON: Are you saying that you are 10 nowhere on that slide, anywhere? 11 MR PHATSHA: I'm not there. 12 CHAIRPERSON: You were standing at a spot 13 which was not photographed at all when that photograph was 14 taken? 15 MR PHATSHA: I was right at the back, 16 far. 17 MR SEMENYA SC: Of the people who are 18 squatting there? 19 MR PHATSHA: Yes. 20 MR SEMENYA SC: You were at the back of 21 the group? 22 MR MPOFU: No, no, no, no. Chairperson – 23 CHAIRPERSON: No, as I understand it, 24 simply a question - I think he should be given an 25 opportunity to answer the question without getting any</p>
<p style="text-align: right;">Page 5546</p> <p>1 be, it's the question that I'm questioning. You can't say 2 to somebody you are doing something, when he said he was 3 not there in that group. 4 MR SEMENYA SC: He said he was there. 5 CHAIRPERSON: He said he was in the 6 middle of the group, as I understood it. But anyway, let's 7 see whether Mr Semenya – 8 MR MPOFU: I'm sorry, Chairperson, he 9 said he was at the back – 10 CHAIRPERSON: Let's see whether Mr 11 Semenya can deal with the matter in a way which avoids your 12 objection. 13 MR SEMENYA SC: I'll ask it again. If 14 you can with your finger just show us where more or less 15 you are there? 16 MR PHATSHA: I find it difficult that I 17 would point with a finger amongst so many people. 18 MR SEMENYA SC: No, you're just giving us 19 a general idea, nothing specific. 20 MR PHATSHA: Making that kind of an 21 estimate wouldn't be right because I have said I wasn't 22 there. 23 MR SEMENYA SC: You were not there at all 24 now, you say? 25 MR PHATSHA: No, I wasn't there.</p>	<p style="text-align: right;">Page 5548</p> <p>1 assistance – 2 MR MPOFU: No, Chairperson – 3 CHAIRPERSON: - from any objection that 4 may be raised. 5 MR MPOFU: But can I at least make my 6 objection? All I'm saying is the interpretation of the 7 question and what Mr Semenya has put are two different 8 things. What Mr Semenya is putting is that he says he was 9 at the back. I don't want to suggest what he means by 10 that, but Mr Semenya's question suggests that he was at the 11 back of the front group, something like that, but the way 12 that it was interpreted is to say he was further back from 13 the people at the front, which is a completely different 14 thing. Mr Semenya is putting a different proposition, 15 which is that he was still part of the front group, but at 16 the back of it. If that could just be clarified. Thank 17 you, Chairperson. 18 MR MAHLANGU: May I please explain here, 19 Mr Chairperson, that Mr Mpofo is mistaken there because the 20 word used by the witness was "kude." In Xhosa that is far, 21 and that is how I interpreted. 22 CHAIRPERSON: Alright, but anyway, before 23 we carry on with the questions, would you be kind enough to 24 stand up, go and have a look at the screen and tell us 25 whether you can see yourself there or see the spot that you</p>

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1 were, even if it was far away from the front, and if you
2 can see the spot more or less where you were, then put your
3 finger there.
4 MR PHATSHA: As I'm thinking, at the
5 place where I'm pointing, at the back.
6 CHAIRPERSON: As he's pointing at the
7 back of the photograph, more or less under the letter W
8 where it appears on the top of the slide, placing himself
9 somewhere there. Can you see where that –
10 MR SEMENYA SC: It's alright, Chair. You
11 were squatting, were you not?
12 MR PHATSHA: No, not me.
13 MR SEMENYA SC: Did you see those who
14 were squatting?
15 MR PHATSHA: Yes, they were squatting.
16 MR SEMENYA SC: Alright, any particular
17 reason you were not squatting?
18 MR PHATSHA: Because I was at the back.
19 MR SEMENYA SC: Or the formation was that
20 the front ones squat, the back ones don't?
21 MR PHATSHA: Those at the back were
22 standing on their feet.
23 MR SEMENYA SC: Okay, so when you say in
24 your statement you were part of the front group - you
25 recall that?

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1 MR PHATSHA: I did not say that.
2 MR SEMENYA SC: No, no, no, hang on.
3 I'll put to you in context. You recall there was a time
4 when you were with the group that was going around the
5 kraal?
6 MR PHATSHA: In what way? If that could
7 be explained.
8 MR SEMENYA SC: Do you ever on that day
9 of the 16th recall being with a crowd that went around the
10 kraal?
11 MR PHATSHA: The reason we proceeded
12 towards the kraal was when they were boxing us up in this
13 barbed wire.
14 MR SEMENYA SC: Ja, at that time you were
15 part of the front group. Am I right?
16 MR PHATSHA: I wasn't in front.
17 MR SEMENYA SC: You were not part of the
18 people who were in the front?
19 MR PHATSHA: I was not in front.
20 MR SEMENYA SC: But part of those who
21 were in front?
22 MR PHATSHA: Yes, I was in the group,
23 yes, but not right in front.
24 MR SEMENYA SC: Now let me share with you
25 what that group represents there, Mr Phatsha. If we go to

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1 slide number 192 on exhibit L –
2 MR PHATSHA: I see 191.
3 MR MAHLANGU: I've just shown him 192.
4 MR SEMENYA SC: That's Mambush there.
5 Correct?
6 MR PHATSHA: The blanket looks similar to
7 his, but I don't know if it's him.
8 MR SEMENYA SC: Okay, trust me, that's
9 Mambush.
10 MR PHATSHA: I hear that from you.
11 MR SEMENYA SC: Let me tell you what the
12 evidence will say. Mambush is telling the police there
13 that, "We must sign a paper so that the world can see how
14 we will kill one another today."
15 MR PHATSHA: I hear that from you, Sir.
16 MR SEMENYA SC: Now that you hear it from
17 me, it is a declaration of war. Right?
18 MR PHATSHA: I don't know if that was the
19 position.
20 MR SEMENYA SC: I don't understand your
21 answer. Somebody who says, "We must sign a paper today so
22 that the world can see how we will kill one another today,"
23 I'm saying to you that's a declaration of war.
24 MR PHATSHA: I did not hear that.
25 MR SEMENYA SC: Somebody who uses those

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1 words is declaring war.
2 MR PHATSHA: Yes, he was talking, but I
3 did not hear him saying anything about the paper that was
4 to be made.
5 CHAIRPERSON: Will you agree that if he
6 did say, if he did say, "We must sign a paper so that the
7 world can see how we will kill one another today," that
8 would have been a declaration of war?
9 MR PHATSHA: That is what I'm saying, Mr
10 Chairperson, that I did not hear him say so.
11 CHAIRPERSON: I'm asking you something
12 else. If he said it – I know you say you didn't hear him,
13 but will you agree that if that's what he said, he was
14 effectively declaring war?
15 MR PHATSHA: He would know what he meant
16 by that.
17 MR SEMENYA SC: Okay, he will know, but
18 he will be talking about the people with the pangas and the
19 bush knives and the spears who are going to be killing one
20 another today.
21 MR PHATSHA: That's what I'm saying, Mr
22 Chairperson, that he should know exactly what he meant by
23 so saying. I do not know.
24 MR SEMENYA SC: Yes, I'm saying even you
25 were part of that group, so if I'm totally wrong you'll be

<p style="text-align: right;">Page 5553</p> <p>1 able to say I'm wrong.</p> <p>2 MR PHATSHA: Yes, it's true I was there,</p> <p>3 but coming to this question about the paper, I don't know</p> <p>4 anything.</p> <p>5 MR SEMENYA SC: No, let's leave the paper</p> <p>6 alone. Mambush would be saying when he says "we," he would</p> <p>7 be referring to those wielding pangas, bush knives,</p> <p>8 "inculas," etcetera. Correct?</p> <p>9 MR PHATSHA: He's the person who's</p> <p>10 supposed to respond to that question, not me.</p> <p>11 MR SEMENYA SC: Alright, help us, because</p> <p>12 we were not there. Who else conceivably could Mambush be</p> <p>13 referring to if he said so?</p> <p>14 MR PHATSHA: I don't think that that</p> <p>15 should be put to me to respond to because it was Mambush</p> <p>16 who was saying these words. He's the person to respond to</p> <p>17 that question.</p> <p>18 MR SEMENYA SC: No, Mr Phatsha, I'll show</p> <p>19 you, you and Mambush are one and the same people. You're</p> <p>20 moving in a group, but we'll get to that later.</p> <p>21 MR PHATSHA: No, it's not so.</p> <p>22 MR SEMENYA SC: Okay, you say Mambush was</p> <p>23 not referring to the panga-wielding people, the bush knife-</p> <p>24 wielding people, the "incula"-wielding people, when he</p> <p>25 said, "We are going to kill each other." Correct?</p>	<p style="text-align: right;">Page 5555</p> <p>1 circle?</p> <p>2 MR PHATSHA: It's not clear to me, Sir.</p> <p>3 MR SEMENYA SC: Well, I'll cut it short.</p> <p>4 You can accept we are saying it is a firearm.</p> <p>5 MR PHATSHA: If you say so, yes.</p> <p>6 MR SEMENYA SC: Do you see there is a</p> <p>7 police officer there?</p> <p>8 MR PHATSHA: I'm looking at him.</p> <p>9 MR SEMENYA SC: And I wanted to answer</p> <p>10 your question, who was going to be killed. So we've</p> <p>11 established now the police are going to be killed. Is that</p> <p>12 right?</p> <p>13 CHAIRPERSON: He hasn't answered your</p> <p>14 question yet. You put the question, but he hadn't answered</p> <p>15 it yet, then you say you've established what he hadn't</p> <p>16 answered. I think you must give him a chance to answer the</p> <p>17 question.</p> <p>18 MR PHATSHA: Should I respond?</p> <p>19 MR SEMENYA SC: Yes.</p> <p>20 [14:32] MR PHATSHA: I personally did not have</p> <p>21 any intent that people should be killed there.</p> <p>22 MR SEMENYA SC: Now let's talk about</p> <p>23 number 4 for now.</p> <p>24 MR PHATSHA: Number 4 has to himself</p> <p>25 answer the question, and not me on his behalf.</p>
<p style="text-align: right;">Page 5554</p> <p>1 MR PHATSHA: What was he then speaking</p> <p>2 about?</p> <p>3 MR SEMENYA SC: He was talking about the</p> <p>4 killing that was going to happen shortly.</p> <p>5 MR PHATSHA: What was going to kill those</p> <p>6 people?</p> <p>7 MR SEMENYA SC: Can I answer your</p> <p>8 question? Go to slide 119 – sorry, 174. Sorry, let me</p> <p>9 just correct myself. Let's go to slide 206, I'll show you,</p> <p>10 of exhibit L.</p> <p>11 MR PHATSHA: I'm looking at 206, yes.</p> <p>12 MR SEMENYA SC: You can see Mambush</p> <p>13 there, can you?</p> <p>14 MR PHATSHA: Yes, I can see him.</p> <p>15 MR SEMENYA SC: You see the person marked</p> <p>16 number 4 there has got a firearm?</p> <p>17 MR PHATSHA: I'm not seeing it clearly.</p> <p>18 MR SEMENYA SC: Do you want us to play</p> <p>19 the video?</p> <p>20 CHAIRPERSON: I think you should look at</p> <p>21 the, you see that yellow circle below the hand of the</p> <p>22 person marked number 4?</p> <p>23 MR PHATSHA: I see the yellow circle,</p> <p>24 yes, Sir.</p> <p>25 CHAIRPERSON: What's in the yellow</p>	<p style="text-align: right;">Page 5556</p> <p>1 MR SEMENYA SC: You see number 4 and</p> <p>2 Mambush?</p> <p>3 MR PHATSHA: I'm looking at them, yes.</p> <p>4 MR SEMENYA SC: They are acting in</p> <p>5 concert.</p> <p>6 MR PHATSHA: They would know whether they</p> <p>7 are acting in concert. I don't know anything.</p> <p>8 MR SEMENYA SC: Can I at least say you</p> <p>9 were running with them?</p> <p>10 MR MAHLANGU: That he was running with</p> <p>11 them?</p> <p>12 MR SEMENYA SC: Running with them.</p> <p>13 MR PHATSHA: At the back, yes.</p> <p>14 MR SEMENYA SC: Running with them?</p> <p>15 MR PHATSHA: That's so.</p> <p>16 MR SEMENYA SC: Carrying your weapons?</p> <p>17 MR PHATSHA: That's correct.</p> <p>18 MR SEMENYA SC: They too carrying</p> <p>19 weapons?</p> <p>20 MR PHATSHA: That's so.</p> <p>21 MR SEMENYA SC: Some of them firearms?</p> <p>22 MR PHATSHA: I did not see anybody with a</p> <p>23 firearm.</p> <p>24 MR SEMENYA SC: Facing the police.</p> <p>25 MR PHATSHA: Nobody was facing in the</p>

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1 direction of the police.

2 MR SEMENYA SC: Do you want to think that

3 one through?

4 MR PHATSHA: There's no other way in

5 which I can think. I'm saying nobody ran towards the

6 police.

7 MR SEMENYA SC: Okay, we'll deal with

8 that a little more extensive a little later. Can I invite

9 you to look at –

10 CHAIRPERSON: Just look at number 4. Is

11 he not facing the policeman whose back we can see in the

12 slide?

13 MR PHATSHA: I would not know which side

14 he was looking at.

15 CHAIRPERSON: Isn't he looking straight

16 ahead, and isn't the policeman straight ahead of him?

17 MR MPOFU: Chairperson, I'm sorry, I

18 don't think that's fair, because there could have been a

19 lion behind the policeman. How do we know what he was

20 looking at?

21 CHAIRPERSON: I don't think that we need

22 stop for a moment. Let's get the answer from the witness

23 to my question.

24 MR PHATSHA: What do I have to respond

25 to, Sir?

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1 CHAIRPERSON: Man number 4 is looking

2 straight, looking ahead, and ahead of him is a policeman,

3 whose back we can see. Would you agree, is that what you

4 see, or don't you see that?

5 MR PHATSHA: I don't see the policeman as

6 being right in front of him. He's on the side.

7 MR SEMENYA SC: Chair, maybe we should

8 play the clip so that we shouldn't have this debate with

9 this witness.

10 MS LEWIS: Chair, I'm sorry, I'm not sure

11 which clip is proposed to be shown. If it's a video of the

12 shooting, could the warning be given to the family members?

13 CHAIRPERSON: I think he wants the clip

14 which is slide 206, but if in the process of seeing that

15 clip there will be bodies of deceased people which will

16 cause unhappiness and sadness and distress to members of

17 their family, then they'll be advised to leave, but let's

18 first find out whether they're on the clip that Mr Semanya

19 wants to have shown.

20 MR SEMENYA SC: No, Chair, I don't want

21 the visuals beyond this point of the individual shooting.

22 MS LEWIS: Chair, I'm sorry, even if it's

23 just the clip of the shooting, could that warning be given?

24 Because I did notice that some of the family members got

25 quite distressed yesterday.

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1 CHAIRPERSON: We're going to be shown a

2 clip which includes footage of people being shot in the

3 shooting that took place at scene 1 on the 16th of August.

4 I take it there are members of the families of people who

5 were killed at scene 1 on the 16th of August present in the

6 auditorium. I will ask those who are going to show us the

7 video not to do so until two minutes have elapsed so that

8 anyone who feels that he or she might be distressed and

9 very badly upset by seeing what we are going to see, will

10 get an opportunity to leave the auditorium.

11 MS PILLAY: Chair, if I may just indicate

12 that there is no video attached to this particular slide of

13 exhibit L, so I'm not sure if Mr Semanya would like us to

14 show one of the videos from the CC collection, or one of

15 the clips from Mr Budlender's compilation of videos.

16 CHAIRPERSON: Mr Semanya, you heard the

17 question. What's the answer?

18 MR SEMENYA SC: I cannot be particularly

19 specific, Ms Pillay, but the one depicting that frame. I'm

20 told it is Mr Budlender's collection that would have it.

21 MS PILLAY: Chair, could we just ask the

22 technicians to look at AAA, exhibit AAA, the Al Jazeera

23 footage on exhibit AAA?

24 CHAIRPERSON: If it will take some time,

25 we could take the tea adjournment now, I suppose, a little

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1 bit earlier than usual, just so we don't lose time at this

2 stage. It looks as if they're ready to show it.

3 MR SEMENYA SC: Perhaps, Chair, your

4 earlier suggestion –

5 [VIDEO RECORDING PLAYED]

6 MR SEMENYA SC: No, that's not the one,

7 Chair.

8 CHAIRPERSON: Well, I suggest that we

9 take the tea adjournment at this stage. While we are

10 having our tea you can find it. The Commission will

11 adjourn.

12 [COMMISSION ADJOURNS COMMISSION RESUMES]

13 [15:13] CHAIRPERSON: The Commission resumes.

14 Before we carry on with the cross-examination, there's a

15 housekeeping matter that I want to deal with. I prefer to

16 have dealt with it chambers, but it's just been reported to

17 me, and that is Mr Semanya and Mr Madlanga are required

18 before the Judicial Services Commission tomorrow and so Mr

19 Semanya can't continue with his cross-examination beyond

20 the end of today. I don't want to waste a day, so the

21 question is whether those who's not yet cross-examined are

22 willing to cross-examine tomorrow, on the clear

23 understanding that they would wish to reserve their right

24 to ask further questions after Mr Semanya has finished his

25 cross-examination. Can those who have not yet had an

1 opportunity to cross-examine please indicate whether that
2 would be acceptable?

3 MS BARNES: Chair, the difficulty that we
4 face is that we in fact consulted with Mr Phatsha prior to
5 his giving evidence. I didn't do so personally, but my
6 colleague Adv De Vos did. Now if we'd had the statement
7 that we'd seen today with us at that time – we consulted
8 with him last week, I think it was Wednesday last week – we
9 would have asked certain questions of him that we didn't
10 ask because we didn't have a statement, and this is
11 precisely why we were so concerned about the statement. So
12 what I would be seeking to request is permission from Mr
13 Mpfu's team and from the Commission to consult with Mr
14 Phatsha at some stage on the contents of the statement, and
15 then cross-examine him only after that.

16 CHAIRPERSON: We will consider that
17 question in a moment. Ms Lewis, are you in a similar
18 gondola?

19 MS LEWIS: Mr Chair, I'm effectively in
20 the same position as Ms Barnes, and I would be seeking
21 similar indulgences from Mr Mpfu and from the Commission.

22 CHAIRPERSON: Is there anyone else who
23 would be in a position to continue tomorrow?

24 MR BUDLENDER SC: Chair, from our side Mr
25 Mojapelo will be doing the cross-examination. He estimates

1 some assistance. The request for consultations we'll grant
2 now, after today. So if maybe my learned colleagues on
3 this side would be able to then do their cross-examination
4 tomorrow if they are granted that opportunity, because I
5 don't, speaking for myself, I don't think that there'll be
6 as much connection between this witness and the statement,
7 but there might be something that I've missed. In that
8 case that would then fill the gap. We are not keen on the
9 issue of interposing, not so much because the other witness
10 is not ready, but because we don't want this witness to
11 have a long break in between the instalments of cross-
12 examination.

13 CHAIRPERSON: Of course that is the
14 problem. If the other witness only gives evidence-in-chief
15 tomorrow, and Mr Semanya were to then resume his cross-
16 examination on Monday, there wouldn't be a big gap. I
17 mean, you'd have the same problem if we just adjourned at
18 the end of the day until Monday. So that doesn't sound
19 like a good point, with respect. I can imagine Mr – well,
20 I wouldn't put words in Mr Semanya's mouth. What's your
21 attitude to Ms Barnes and Ms Lewis having a consultation
22 with this witness while he's still under cross-examination
23 by you?

24 MR SEMENYA SC: It won't hurt us, Chair.

25 CHAIRPERSON: Alright, if we start at

1 that he won't be longer than an hour, and depending on what
2 the rest of Mr Semanya's cross-examination is, he might
3 even be shorter than that because the matters he wants to
4 cover may well be covered by Mr Semanya. So we had in mind
5 that we should wait until Mr Semanya's completed, but if
6 it's of assistance, Mr Mojapelo is ready to proceed
7 tomorrow morning, but it will not consume very much time.

8 Chair, may I make a suggestion in that regard as to the way
9 forward, as to whether it wouldn't be, given the various
10 difficulties, whether it wouldn't be the most expeditious
11 thing for the next witness to be interposed tomorrow
12 morning, let him give his evidence tomorrow? We've all got
13 statements by him. It's not as though there's any
14 surprises. He's seen what the cross-examination is going
15 to be about, and I can't see why it can't be interposed.

16 CHAIRPERSON: How long would he be in
17 chief? You see if he's going to be the whole day in chief,
18 remember it's the shortish day tomorrow because we stop at
19 3, so if he's going to give evidence only in chief, that
20 wouldn't cause a major problem, though I can understand the
21 cross-examination can and things might be different. So
22 perhaps we can carry on in the meanwhile and consider the
23 matter at the end of the day, and then if I can just come
24 back and announce what we're going to do. Mr Mpfu?

25 MR MPOFU: Yes, Chair, if I may be of

1 half past 9 tomorrow and then I don't know how long the
2 consultation would take, but I take it, it wouldn't take up
3 the whole morning, so you could start consulting fairly
4 early, as soon as possible tomorrow morning, then that
5 would be the answer then is you consult and then cross-
6 examine this witness, and Mr Mojapelo also would be on. If
7 that's acceptable? That seems a practical way forward and
8 we don't waste a day.

9 MS BARNES: Chair, the difficulty is we
10 still don't have complete clarity on a lot of the names in
11 the statement. The nicknames that are referred to, it's
12 not clear to us precisely who the identity of those people
13 are. It's also not just Mr Phatsha that we need to consult
14 with having regard to the statement, but we need to consult
15 with certain other AMCU members in relation to a lot of
16 broad allegations that are made in the statement, and we
17 really, we need to get proper instructions in relation to
18 the statement as a whole, which we don't have, and it will
19 be difficult to cross-examine this witness if we haven't
20 done so.

21 CHAIRPERSON: That's why I suggested that
22 you do all the other cross-examination, as it were,
23 tomorrow, clearly with the reservation of your rights in
24 respect of matters that arise from Mr Semanya's, or may
25 arise from Mr Semanya's cross-examination on Monday, and

<p style="text-align: right;">Page 5565</p> <p>1 then of course these other matters. You might not be ready 2 to cross-examine, if you wish to cross-examine on these 3 other matters by Monday anyway. 4 MS BARNES: The matters, excluding the 5 matters arising from the statement, we can certainly do. 6 We're ready to do that. 7 CHAIRPERSON: So that sounds the 8 practical way forward. 9 MS BARNES: That would be in order. 10 CHAIRPERSON: Then we don't waste a day. 11 Alright, so that problem has been satisfactorily solved. 12 MS BARNES: Just if we might point out, 13 Chair, that my cross-examination and Ms Lewis's on the 14 other matters won't be lengthy. 15 CHAIRPERSON: Well, we've heard the – I'm 16 not reflecting on what you say, but we've had experience up 17 to now of what we thought to be very brief cross- 18 examination, through the fault of nobody really took a bit 19 longer than had been expected. So life has – 20 MS BARNES: Not me, I'm sure. 21 CHAIRPERSON: No, I'm not reflecting on 22 you. Life has been full of surprises as far as this 23 Commission is concerned, and we don't believe that the 24 surprises have ended. Mr Phatsha, you're still under oath. 25 SIPETE PHATSHA (CONTD.): Yes, Sir.</p>	<p style="text-align: right;">Page 5567</p> <p>1 she wants to come here, will be left here. They will not 2 enter that Hippo," and the crowd laughs there, and then he 3 continues, "We will finish them here. They must leave 4 here." Did you hear that over the loudhailer? 5 MR PHATSHA: I did not hear that. 6 MR SEMENYA SC: Even over the loudhailer? 7 MR PHATSHA: I did not hear it, Mr 8 Chairperson, because I've got a difficulty in hearing. My 9 ears have that difficulty. 10 MR SEMENYA SC: Did you hear Mr Mathunjwa 11 over the loudhailer? 12 MR PHATSHA: I heard him. He uses the 13 word "little, bietjie." 14 MR SEMENYA SC: Alright, I'm saying that 15 the protester here says the police are going to be 16 finished, meaning that they are going to be killed. 17 MR PHATSHA: Something that disturbs me, 18 to be given a statement by another person, which statement 19 is not mine. 20 MR SEMENYA SC: Ja, I'm saying you accept 21 that he's saying that the police are going to be killed, 22 the day you were at the koppie with him? 23 MR PHATSHA: I did not hear that. 24 MR SEMENYA SC: And he must have been 25 referring to the group with which you were a part.</p>
<p style="text-align: right;">Page 5566</p> <p>1 CHAIRPERSON: Mr Semenya, you have the 2 rest of the day to cross-examine and then resume on Monday. 3 CROSS-EXAMINATION BY MR SEMENYA SC (CONTD.): 4 Thank you, Chair. Might we play the slide that we had 5 arranged during the interval? 6 MS PILLAY: Chair, for the purposes of 7 the record, the slide is AAA7. We have it as AAA7. 8 CHAIRPERSON: Oh, as exhibit – 9 MS PILLAY: Exhibit AAA7, yes. 10 CHAIRPERSON: Thank you very much. 11 [VIDEO RECORDING PLAYED] 12 MR SEMENYA SC: Chair, perhaps if I just 13 proceed, it's unfortunately the Al Jazeera clip we are 14 looking for, but might I just proceed with the cross- 15 examination. Can I invite us to look at exhibit CC18? 16 This is the transcript of a protester otherwise indicated 17 on slide 169 of exhibit L. Now Mr Phatsha, on the day 18 there on the koppie, on the 16th, I want to read to you what 19 one of the protesters says through the loudhailer. It 20 reads, "These police, if they claim that they have safety, 21 they must go and apply safety to that white man, or the 22 white boss who sent them here. They must leave us here and 23 bring this white man, or the white boss. We do not leave 24 this place without what we want. They must leave 25 immediately. A police officer from the homeland, if he or</p>	<p style="text-align: right;">Page 5568</p> <p>1 MR PHATSHA: I'm hearing it now. 2 MR SEMENYA SC: No, but you were part of 3 that group, were you not? 4 MR PHATSHA: I was there. 5 MR SEMENYA SC: Armed, like they were. 6 MR PHATSHA: Because I was amongst them, 7 yes. 8 MR SEMENYA SC: And he's expressing what 9 you, as a part of the group, were going to do that day. 10 MR PHATSHA: There was nothing we were 11 going to do. 12 MR SEMENYA SC: With your arms? 13 MR PHATSHA: We also carry arms there at 14 home when we're going to some feast, some celebration. 15 MR SEMENYA SC: The type that we're 16 discussing this morning with you? 17 MR PHATSHA: Yes. 18 MR SEMENYA SC: Speaking about killing 19 people? 20 MR PHATSHA: No. 21 MR SEMENYA SC: Now let's talk about 22 where the police are going to be finished today, that - 23 MR PHATSHA: I did not hear that. 24 MR MPOFU: Chair, maybe, it's not an 25 objection, it might just assist Mr Semenya. The evidence</p>

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1 is that if this, whatever they're talking about now,
2 happened in the morning. The evidence of this witness is
3 that he was not there when Mr Mathunjwa did his first
4 address, but for the second address. So we'll go around
5 this forever if that is not cleared up.

6 MR PHATSHA: It's true what my counsel is
7 saying.

8 MR SEMENYA SC: Ja, it's true that my
9 questions are directed at what I'd call the group of
10 Mambush. You were part of the group of Mambush. Correct?

11 MR PHATSHA: I was there, though I was at
12 the back.

13 MR SEMENYA SC: Ja, the group of Mambush
14 is saying that the police are going to be finished that
15 day.

16 [15:33] MR PHATSHA: I'm hearing that from you.

17 MR SEMENYA SC: And you must have been
18 saying with the weapons which the group was carrying, the
19 Mambush group.

20 MR PHATSHA: Finished off in what way?

21 MR SEMENYA SC: With spears and the
22 "incula" you're having, as well as the bush knife.

23 MR PHATSHA: There were no such
24 intentions, Mr Chairperson. We were only interested in the
25 money.

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1 MR SEMENYA SC: The word "makarapa" is
2 familiar to you, is it not?

3 MR PHATSHA: The "makarapa" that I know
4 is the hat that I use in the mines and no other kind of
5 "makarapa." "Makarapa" is actually the hat, the one used
6 for the stones, the rocks not to fall on our head.

7 MR SEMENYA SC: Do you know anything
8 about "muti"?

9 MR PHATSHA: Yes. The word "muti" also
10 refers to something, a branch, a stick.

11 MR SEMENYA SC: "Muti." "Intelezi,
12 Baba."

13 MR PHATSHA: Oh, "intelezi," oh yes, that
14 I know.

15 MR SEMENYA SC: Okay, I want us to look
16 at some slides on exhibit L. If you go slide 97 of exhibit
17 L, 97 – 87, rather.

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

19 MR SEMENYA SC: That slide depicts naked
20 men. Can you see it?

21 MR PHATSHA: I'm seeing it.

22 MR SEMENYA SC: Is that a usual sight to
23 you?

24 MR PHATSHA: When people have been
25 sleeping in the veld, they usually wash.

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1 MR SEMENYA SC: And those that sleep in
2 the house, they usually wash too.

3 MR PHATSHA: Yes.

4 MR SEMENYA SC: Is it usual that they
5 would stand like that and wash?

6 MR PHATSHA: Anyone knows how he washes.

7 CHAIRPERSON: According to the top of the
8 slide it was taken at 23 minutes past 3 in the afternoon.
9 Sorry, it was amended later to 16:21, 21 minutes past 4 in
10 the afternoon.

11 MR PHATSHA: I did not have a watch, Mr
12 Chairperson.

13 CHAIRPERSON: Yes, but the point is that
14 if people had been sleeping out in the veld, got up in the
15 morning and got washed, they're not likely to have waited
16 until 21 minutes past 4 in the afternoon before they did
17 that.

18 MR PHATSHA: That I would not be able to
19 explain.

20 CHAIRPERSON: It looks, doesn't it, as if
21 it's not people who had been sleeping in the veld and being
22 washed, it's something else.

23 MR PHATSHA: I wouldn't know.

24 MR SEMENYA SC: The evidence that they
25 were using "muti," would it be consistent with your

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1 understanding of that picture?

2 MR PHATSHA: I did not see any "muti,"
3 any "yeza" being used.

4 MR SEMENYA SC: Have you seen that being
5 used in your entire life?

6 MR PHATSHA: A person only believes in
7 that which he believes in.

8 MR SEMENYA SC: You believe in "muti?"

9 MR PHATSHA: No, no, I don't believe,
10 because I'm a person who prays.

11 MR SEMENYA SC: Okay, we'll get back to
12 that a little later. Can I explore with you, Mr Phatsha,
13 the events of the 16th, and can I focus your attention to
14 the time the first Nyala pulls the barbed wire. You saw
15 that happen?

16 MR PHATSHA: Yes, I saw it.

17 MR SEMENYA SC: You are still with the
18 group of Noki, of Mambush?

19 MR PHATSHA: At the back, yes.

20 MR SEMENYA SC: Of the Mambush group?

21 MR PHATSHA: Yes.

22 MR SEMENYA SC: And there were a lot of
23 people on the big koppie, right?

24 MR PHATSHA: Yes, there were many people.
25 Everybody had come out.

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1 MR SEMENYA SC: And when that happened
 2 the majority of them, did you see them running away?
 3 MR PHATSHA: People did run away, that
 4 was including me.
 5 MR MAHLANGU: The answer was, "People did
 6 run away, including myself."
 7 MR SEMENYA SC: Okay. Did you see the
 8 ones who were running away from the police?
 9 MR PHATSHA: Yes.
 10 MR SEMENYA SC: And they were safe by
 11 doing that, correct?
 12 MR PHATSHA: No, they were not safe
 13 because they were shot whilst they were running away, as
 14 they were running.
 15 MR SEMENYA SC: No, no, no, I'm trying to
 16 focus you at the time the first Nyala pulls the wire. Did
 17 you see people running away in the direction away from the
 18 police line?
 19 MR PHATSHA: No, people did not run away
 20 immediately. They stood there and looked, they were
 21 looking at where is that wire being taken to.
 22 MR SEMENYA SC: Can I ask you to look at
 23 slide 215? Just to orientate ourselves –
 24 MR PHATSHA: Yes, I'm looking at it. I'm
 25 looking at 215.

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1 MR SEMENYA SC: If you look at that
 2 frame, are you able to understand what it depicts?
 3 MR PHATSHA: What I'm looking at is that
 4 everybody was running, running away.
 5 MR SEMENYA SC: Okay, can I ask us to
 6 look at slide 200 then?
 7 MR PHATSHA: I'm looking at it, Sir.
 8 MR SEMENYA SC: When the first Nyala
 9 pulled the trailer, the majority of the people moved to the
 10 right of that frame, the 2000-odd people moved in that
 11 direction. Do you see?
 12 MR PHATSHA: They were running away from,
 13 backwards, in an endeavour to save themselves.
 14 MR SEMENYA SC: So they were running away
 15 from those white cars?
 16 MR PHATSHA: Just repeat the question.
 17 [Interpreter repeats question] They were running away when
 18 they started seeing the pulling of the barbed wire.
 19 MR SEMENYA SC: But the 2000 people did
 20 not run towards the barbed wire. Am I right?
 21 MR PHATSHA: That I would not know.
 22 MR SEMENYA SC: You did not see that
 23 happen?
 24 MR PHATSHA: I saw that happening, but I
 25 did not count the number of people.

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1 MR SEMENYA SC: And you saw that they
 2 were running away from the police, correct?
 3 MR PHATSHA: The police were on the other
 4 side of the barbed wire, and they were on the other side.
 5 MR SEMENYA SC: Running away from the
 6 barbed wire?
 7 MR PHATSHA: Just as the closing up was
 8 conducted, when we started running towards the settlement,
 9 it was closed.
 10 MR SEMENYA SC: No, Mr Phatsha, I'm
 11 asking you, at that time the barbed wire is deployed, a
 12 large group of people who were in the koppie ran away from
 13 the barbed wire.
 14 MR PHATSHA: That is correct.
 15 MR SEMENYA SC: You did not run away from
 16 the barbed wire?
 17 MR PHATSHA: I was running in the
 18 direction that leads to the shack settlement.
 19 MR SEMENYA SC: You ran in the direction
 20 of the wire that was being deployed. Is that factually
 21 correct?
 22 MR PHATSHA: Yes.
 23 MR SEMENYA SC: When you had an
 24 opportunity, like the large group of people, to run away
 25 from the barbed wire?

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1 MR PHATSHA: A person runs to a place
 2 where he knows he would be safe.
 3 MR SEMENYA SC: And even when that was
 4 closed, you did not run away from the barbed wire together
 5 with Mambush group. Am I right?
 6 MR PHATSHA: We were running away,
 7 running towards the shack settlement, then it was closed.
 8 We then turned and ran towards the kraal.
 9 MR SEMENYA SC: I know that's what you
 10 did. Just have a look at that slide. Do you see the cars
 11 that are dotted there?
 12 MR MAHLANGU: Cars?
 13 MR SEMENYA SC: The cars that are dotted
 14 on that slide.
 15 MR PHATSHA: I'm looking at them, yes.
 16 MR SEMENYA SC: Can you see the right
 17 side of that slide, where there is a yellow circle? You
 18 see that half circle in yellow?
 19 MR PHATSHA: Yes, I'm looking at it.
 20 MR SEMENYA SC: Can you see to the right
 21 of that circle, half circle?
 22 MR PHATSHA: I see, yes.
 23 MR SEMENYA SC: There was an ample
 24 opportunity for the Mambush group to run away from those
 25 cars. Am I right?

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1 MR PHATSHA: But we were going towards
2 the shack settlement.

3 MR SEMENYA SC: Just answer the question.
4 You had an opportunity, together with the Mambush group, to
5 go away from those cars?

6 MR PHATSHA: I have said a person runs in
7 the direction in which he feels he would be safe.

8 MR SEMENYA SC: Yes, I'm trying to show
9 you how safe you could be if you elected to go to the right
10 of that semi-circle, away from the police cars.

11 MR PHATSHA: We did not see it that way,
12 that it would be safe for us to run in that direction,
13 where we were actually running towards in the safety of the
14 shack settlement.

15 MR SEMENYA SC: Okay, Mr Phatsha. You
16 did not discuss to run in one direction and agree to run in
17 one direction. Am I right?

18 MR PHATSHA: No, there was no such a
19 discussion.

20 MR SEMENYA SC: So you ran as it was
21 dictated by your own conscience and judgment?

22 MR PHATSHA: That is so, yes.

23 MR SEMENYA SC: Now let's talk about you.
24 Let's leave the Mambush group now. If you wanted to, you
25 could have run to the veld, away from the cars.

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1 MR PHATSHA: I ran, and as I was running,
2 this was in the direction of my shack.

3 MR SEMENYA SC: So you had a choice to go
4 that direction, but elected not to?

5 [15:53] MR PHATSHA: Towards my shack, yes.

6 MR SEMENYA SC: You had an election to
7 put your bush knife on the ground, without running. Am I
8 right?

9 MR PHATSHA: I ran away together with my
10 instruments.

11 MR SEMENYA SC: Just listen to the
12 question. You had an opportunity to just put your bush
13 knife on the ground and leave it there?

14 MR PHATSHA: It did not occur to me to do
15 that.

16 MR SEMENYA SC: And the reason it didn't
17 is because you wanted to use it.

18 MR PHATSHA: I don't believe in the
19 manner in which I was running that I would have wanted to
20 use it.

21 MR SEMENYA SC: Why don't you drop it
22 then?

23 MR PHATSHA: I couldn't throw my weapons
24 away.

25 MR SEMENYA SC: Why?

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1 MR PHATSHA: Because I had no other
2 intentions whatsoever.

3 MR SEMENYA SC: Okay, let's start. Do
4 you accept that's a dangerous weapon you're having?

5 MR PHATSHA: I agree, yes.

6 MR SEMENYA SC: You agree that it was
7 illegal to have it?

8 MR PHATSHA: It was illegal yes, but I
9 had them.

10 MR SEMENYA SC: And do you agree that you
11 were asked by your own leader to leave that weapon there?

12 MR PHATSHA: Which leader is that one of
13 ours?

14 MR SEMENYA SC: President Mathunjwa.

15 MR PHATSHA: We were waiting there for
16 the employer.

17 MR SEMENYA SC: No, Mr Phatsha, please.
18 When they pulled the barbed wire, knowing that you have a
19 dangerous weapon, illegal in this country to do, the police
20 having asked you to disarm, you had an opportunity to put
21 it on the ground and go home, "enkukwili."

22 MR PHATSHA: I didn't hear any policeman
23 coming there to ask us to put down our arms.

24 MR SEMENYA SC: You could have put your
25 bush knife and your panga on the ground and walked to your

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1 home.

2 MR PHATSHA: I did not have such a plan.

3 MR SEMENYA SC: Yes, but you could have
4 if you intended no harm to anybody.

5 MR PHATSHA: I had no intentions of
6 causing anybody injuries.

7 MR SEMENYA SC: Where did you buy your
8 panga?

9 MR PHATSHA: They are bought from the
10 shops.

11 MR SEMENYA SC: When did you buy this
12 panga?

13 MR PHATSHA: It's a long, long time ago
14 that I bought it. I also use it to cut branches and such
15 for building my kraal.

16 MR SEMENYA SC: The bush knife?

17 MR PHATSHA: A bush knife is not a knife.

18 MR SEMENYA SC: You also had that from a
19 very long, long, long time?

20 MR PHATSHA: I've had it for a very long
21 time, yes. I use it for going to the forest to cut
22 branches and trees.

23 MR SEMENYA SC: At Lonmin?

24 MR PHATSHA: That question confuses me
25 now.

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1 CHAIRPERSON: Why does it confuse you?
 2 MR PHATSHA: Because he's asking me here
 3 at Lonmin.
 4 CHAIRPERSON: Is there a forest near
 5 Lonmin that you go walking in, cutting trees?
 6 MR PHATSHA: There are trees around
 7 there, yes.
 8 CHAIRPERSON: Is there a forest there
 9 that you go walking and cutting branches?
 10 MR PHATSHA: There are several trees
 11 there which are there and there, forming some sort of a
 12 plantation, some forest.
 13 MR SEMENYA SC: Would it be a convenient
 14 stage to adjourn?
 15 CHAIRPERSON: Sorry?
 16 MR SEMENYA SC: Would it be a convenient
 17 stage for the adjournment?
 18 CHAIRPERSON: Okay, very well. I
 19 understand that you, as I've indicated already, will not be
 20 with us tomorrow. You'll be performing other services in
 21 another place, but you'll be back on Monday to continue
 22 with the cross-examination yourself?
 23 MR SEMENYA SC: I'm indebted, Chair.
 24 MS JELE: Chairperson, if I may, my
 25 sincere apologies. Before the Commission adjourns, might I

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1 signal that the Human Rights Commission has made a formal
 2 application, copies of which have been emailed to all of
 3 the parties. I have a few hard copies with me. I just
 4 wanted to alert the parties to the fact that this
 5 application has been made and the application, I would
 6 submit, speaks for itself. It's in relation to the
 7 procedural concerns the Human Rights Commission has been
 8 raising for quite some time now.
 9 CHAIRPERSON: Have you discussed it with
 10 the evidence leaders as to when it's appropriate for the
 11 application to be moved?
 12 MS JELE: We discussed with the evidence
 13 leaders as to what the next step would be best. As regards
 14 the times, we assumed that we would provide the papers to
 15 give a sense of what the issues were, and that it would
 16 follow that a time would then be hopefully organised sooner
 17 rather than later for the application to be heard.
 18 CHAIRPERSON: Alright. Well, thank you.
 19 You've signalled that the application is to be brought, and
 20 you have hard copies for us. So those who want –
 21 MS JELE: As many as I could muster
 22 during the course of the day, but all parties should have
 23 received on Ms Pillay's list of emails a copy, including
 24 the evidence leaders naturally.
 25 CHAIRPERSON: Thank you for alerting us.

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1 Mr Mpofo, you turned your microphone on.
 2 MR MPOFU: Yes, Chair. I was actually
 3 turning it for a different reason, but now that the issue
 4 of applications has been mentioned, I also wanted to
 5 indicate that between this witness and the next one, we
 6 intend to bring another application, which we have
 7 discussed in chambers, that I'm just indicating the timing
 8 of that application might be between the two witnesses, but
 9 Chair, apart from that, I just wanted to bring a
 10 housekeeping matter before we adjourn, which regards the
 11 subpoenaed people yesterday, the names, just for the
 12 record.
 13 CHAIRPERSON: I'm grateful that you
 14 mentioned this. Would you please put their names on record
 15 and then record what happened after we adjourned yesterday,
 16 so it's on record.
 17 MR MPOFU: Yes, thank you, Chairperson.
 18 I'll start with the names of the six subpoenaed people.
 19 It's Mr Vusi Mohale, 2, Mlambisa Thokotokwana, 3 is Lungani
 20 Mabotyana, 4 is Tembisile Ntakana, 5 is Lebogang Mokone,
 21 number 6 is Tembinkosi Mtjo. The six individuals concerned
 22 had been warned to reappear yesterday and it was our
 23 intention with the evidence leaders to deal with the matter
 24 after lunch, but unfortunately the electricity blackout
 25 came and what we then did was to bring them to the

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1 Commissioners in chambers, with the evidence leader Mr
 2 Mojapelo, at which point they were by agreement warned to
 3 reappear on the 11th of March, Chairperson. I just wanted
 4 to place - and we then agreed that it would be placed on
 5 the record.
 6 CHAIRPERSON: Thank you for that. Very
 7 well, the Commission will now adjourn until 9:30 tomorrow
 8 morning.
 9 [COMMISSION ADJOURNED]
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<p style="text-align: center;">A</p> <p>AAA 5559:22,22,23 AAA7 5566:7,7,9 abbreviate 5470:19 5471:4 able 5465:6 5467:14 5474:14 5476:10 5481:16 5483:1 5492:15 5495:5 5516:10,17 5530:1 5532:13 5544:6 5553:1 5563:3 5571:18 5574:2 absolutely 5523:22 5531:3 accept 5490:11,12,17 5555:4 5567:20 5579:4 acceptable 5561:2 5564:7 accuracy 5491:20 acting 5556:4,7 actions 5476:14 actual 5484:17 addition 5487:5 additional 5487:6 5516:8 address 5477:10,17 5525:4,11 5526:6 5527:23 5529:21 5569:4,4 addressed 5475:16 5522:9,12 5525:14 5529:25 5531:20 addresses 5542:4 addressing 5542:5,9,10 5542:13 5543:3 adjourn 5560:11 5581:14 5583:10 5584:7 adjourned 5500:6 5563:17 5583:15 5584:9 adjournment 5498:1 5528:13 5535:14,19 5559:25 5560:9 5581:17 adjourns 5498:6 5535:15 5560:12 5581:25 adopted 5522:11 Adv 5528:4 5561:6 advanced 5487:19 5530:20 advise 5525:9 advised 5497:15 5522:10 5558:17 advising 5522:12 afraid 5508:5 African 5508:17 afternoon 5505:4 5507:7 5519:24 5571:8,10,16 ago 5580:13 agree 5469:1 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