

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 56 28 FEBRUARY 2013 PAGES 5962 TO 6080

HELD AT

CIVIC CENTRE, RUSTENBURG, NORTH WEST PROVINCE



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1 [PROCEEDINGS ON 28 FEBRUARY 2013]
 2 [09:56] CHAIRPERSON: The Commission resumes.
 3 Yes.
 4 MR NGALWANA: I'm indebted to the
 5 Commissioners for their indulgence, thank you Chair.
 6 CHAIRPERSON: Thank you. You're still
 7 under oath to give evidence, Mr Mpofu, I think you still
 8 have certain questions to ask as part of your examination
 9 in chief.
 10 MR MPOFU: Thank you very much
 11 Chairperson. Chairperson I'm going to try something that
 12 might save us time, if it works -
 13 CHAIRPERSON: Before you do that there's
 14 something I should have said that I didn't say, that I
 15 intended to say at the beginning and that is that I
 16 understand the families from Swaziland and Lesotho have
 17 already gone back home and the families from the Eastern
 18 Cape are going to be leaving at lunchtime today and they
 19 were coming back early in March. I just want to say that
 20 we wish them a safe journey, that's to those who have
 21 already left and also to those who are going to be leaving
 22 at lunchtime and we also them of course a safe journey back
 23 when they come back to hear further evidence in March.
 24 We can understand why it's necessary for them
 25 from time to time to go home to make sure that everything

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1 back home is in order and I'm sure it's a source of worry
 2 to them that they have be here all the time when things are
 3 happening back home which they can't really control
 4 properly. So we understand their situation, we also
 5 understand the need for them to be here as much as
 6 possible. It's important for the whole process and it's
 7 particularly important for them and the communities from
 8 which they come that they be here to see, certainly this
 9 stage of the proceedings what is happening, that the
 10 situation in respect of their loved ones who were killed is
 11 being thoroughly investigated. And I hope that they will
 12 always be conscious of the fact that we are doing our best
 13 to ascertain the truth of what happened in the interests of
 14 them and also generally the interests of our country.
 15 Perhaps that can be interpreted and then you can proceed,
 16 Mr Mpofu.
 17 MR MPOFU: Thank you, Chairperson. I
 18 have no doubt that those sentiments are shared by all my
 19 colleagues without exception, on the podium. Thank you.
 20 Chairperson, what I was proposing to do is to hopefully
 21 hoping to save time is to play - there are four sets of
 22 footages that I'm going to use and I wanted to do the three
 23 in combination and ask the questions. Hopefully it won't
 24 backfire and we have to replay another one.
 25 CHAIRPERSON: That sounds a sensible way

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1 of proceeding.
 2 MR MPOFU: Thank you, Chairperson. Can
 3 you do Item 6, 7 and 9 back to back?
 4 [VIDEO RECORDING PLAYED]
 5 MR MPOFU: The warning Chairperson
 6 please, sorry.
 7 CHAIRPERSON: Members of the family will
 8 remember that from time to time I've indicated to them that
 9 I had informed that material was going to be shown which
 10 involved their loved ones who were killed and it might
 11 cause them stress and actually pain to see the images that
 12 are going to be shown. So I understand this is again one
 13 of these situations where that's going to happen and so I
 14 ask those responsible for showing the footage not to do so
 15 until two minutes have elapsed after what I've just said
 16 has been interpreted.
 17 MS PILLAY: Chair, if I may just check
 18 with Mr Mpofu is this the Euro News Thursday, that -
 19 MR MPOFU: Number 6, is Euro News yes. I
 20 mean the first one.
 21 COMMISSIONER HEMRAJ: Chair this hasn't
 22 been marked as an exhibit yet.
 23 MR MPOFU: Okay.
 24 MS PILLAY: So I would ask that it be
 25 marked as EEE 3.3. 3.3 - 3.3. That's correct yes.

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1 MR MPOFU: Okay thanks. Can you start
 2 from the beginning and give us a bit of volume?
 3 [VIDEO RECORDING PLAYED]
 4 The next one, maybe Ms Pillay can assist us? And
 5 this one is the three way combo of Eye Witness News and
 6 Reuters I think and somebody else.
 7 MS PILLAY: Chair just for the benefit of
 8 the other parties EEE 3.3 the pathway is Saps External Hard
 9 drive\Videos\2012-08-16\Euro News Thursday. This new clip
 10 Chair hasn't been marked as an exhibit, it's EEE 3.4. It's
 11 Saps External Hard drive\Videos\2012-08-16\ENCA SA seeks to
 12 understand Marikana Massacre.
 13 MR MPOFU: Thank you, thanks.
 14 VIDEO SHOWN:
 15 MR MPOFU: I'm sorry. Can you please
 16 restart and -
 17 [VIDEO RECORDING PLAYED]
 18 Chairperson, hopefully this will be done again or
 19 maybe I'll deal with it in re-examination. Unfortunately
 20 the version that was played doesn't have a voiceover. The
 21 whole point about this video is that - the last one, is
 22 that they're showing exactly the same sequence from three
 23 different networks, but it's explained well in the
 24 voiceover but I'll leave it for now and if it -
 25 CHAIRPERSON: The voiceover I take it

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1 it's available somewhere it's just a question of finding
2 it.

3 MR MPOFU: Yes the person that we
4 consulted with had the voiceover but somehow it's not up
5 there so -

6 CHAIRPERSON: So at some stage it should
7 be available.

8 MR MPOFU: Thank you, Chairperson.

9 CHAIRPERSON: Do you need it for the
10 witness, Mr Mpofo?

11 MR MPOFU: No, no, no.

12 CHAIRPERSON: Alright, so you could even
13 carry on with the witness so that he can finish.

14 MR MPOFU: Absolutely.

15 CHAIRPERSON: At some stage you can
16 interpose this clip again with the voiceover.

17 MR MPOFU: Yes.

18 CHAIRPERSON: So it becomes part of the
19 record of the Commission and we all get the benefit of it.

20 MR MPOFU: Yes maybe in re-examination.

21 CHAIRPERSON: In or after that?

22 MR MPOFU: Thank Chairperson. Right good
23 morning, Mr Magidiwana.

24 MR MAGIDIWANA: Good morning.

25 MR MPOFU: I notice that you were not

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1 able to look at the visuals but previously you and I have
2 gone through these videos. Is that correct?

3 MR MAGIDIWANA: It is so.

4 MR MPOFU: Now the same as yesterday I'll
5 ask you some of the things that are clear from the video
6 and if I overdo it or lead you too much no doubt my learned
7 colleague from the police will point it out.

8 CHAIRPERSON: You'll try not to won't
9 you?

10 MR MPOFU: Of course, thank you, Chair.
11 At least I think on two of those videos one can observe the
12 teargas smoke in the vicinity of where your group is coming
13 from. Did you see that?

14 MR MAGIDIWANA: I saw it.

15 MR MPOFU: And then I think on all of
16 them before the shooting you see the police line which
17 almost I think forms a Y, let's call it that, with the road
18 to Nkaneng that you've testified about. Is that how you
19 observed it?

20 MR MAGIDIWANA: Yes, I saw it when we met
21 in that place.

22 MR NGALWANA: Chairperson, perhaps my
23 learned friend saw a path, I certainly didn't see a path
24 there.

25 MR MPOFU: Oh okay. Is it true that in

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1 front of the fence that is visible which has that solitary
2 shack there's a continuation of the path on the road to
3 Nkaneng that we have spoken about so many times.

4 MR MAGIDIWANA: Yes.

5 MR MPOFU: Alright. In any event the
6 real question I wanted to ask you is when those police were
7 queuing up were you able to hear the call of stretch it
8 out, stretch it out?

9 [10:16] MR MAGIDIWANA: When they called I saw
10 him at the time they were closing the gap on which we were
11 supposed - we were going to pass through and by then there
12 was an Nyala.

13 MR MPOFU: Yes, okay actually that was
14 the next issue I was going to deal with. There are two or
15 three Nyalas on one of the pictures. I think it's three.

16 Between the kraal, do you remember what I've described as
17 the 20 metre gap between the kraal and the fence that you
18 and I were there when we measured it?

19 MR MAGIDIWANA: Between the kraal and?
20 MR MPOFU: And the western side of the
21 fence that encloses that solitary shack.

22 MR MAGIDIWANA: Yes, I was there, it is
23 so.

24 MR MPOFU: And what you've just described
25 now is the fact that there were three Nyalas that were

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1 parked behind each other in that gap, closer to the fence.
2 Is that correct?

3 MR NGALWANA: Again Chairperson, sorry I
4 didn't see three Nyalas parked on the path.

5 CHAIRPERSON: As far as I heard I heard
6 Mr Mpofo say in the gap.

7 MR MPOFU: In the gap ja, not on the
8 road.

9 CHAIRPERSON: I heard the road down, that
10 there were three Nyalas parked behind each other in the gap
11 closer to the fence -

12 MR MPOFU: Closer to the fence.

13 CHAIRPERSON: He didn't say the pathway
14 if he'd said the path you would have been correct to
15 complain but they were in the gap I think so -

16 MR MPOFU: If it's possible we will play
17 these parts again.

18 MR NGALWANA: Perhaps Chairperson they
19 talk of a gap, a gap going where, I'm unclear.

20 MR MPOFU: Oh okay.

21 CHAIRPERSON: Now that you've raised the
22 point you can clarify it for him.

23 MR MPOFU: Thank you, Chairperson. It's
24 the same gap I've just asked the witness to lay the basis
25 of the question that when he and I went for an inspection I

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1 confirmed through the witness that we measured a gap that
 2 was about 20 metres.
 3 CHAIRPERSON: I actually want you to say
 4 what gap you're talking about.
 5 MR MPOFU: Oh yes.
 6 CHAIRPERSON: The gap between A and B -
 7 MR MPOFU: Fair enough thank you. It's
 8 the gap between the corner of the fences that encloses that
 9 solitary shack and the kraal.
 10 MR MAGIDIWANA: Yes. It is so.
 11 MR MPOFU: And once again I did say
 12 yesterday with Mr Phasha that measurement is an
 13 approximation because I used my own, it might be 19, it
 14 might be 22 but it's thereabouts. About 20.
 15 CHAIRPERSON: 20 Mpofo paces.
 16 MR MPOFU: 20 Mpofo paces, thank you,
 17 Chair.
 18 MR MPOFU: Right the point of what you
 19 have said about that is that, I don't know what the width
 20 of an Nyala is but the fact that there were these Nyalas
 21 parked in that gap would have reduced that 20 metre gap by
 22 whatever the width of an Nyala is.
 23 MR NGALWANA: Chairperson, I'm trying
 24 very hard to be tolerant and patient with my learned friend
 25 but he must again be reminded -

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1 CHAIRPERSON: Counsel mustn't be
 2 impatient, counsel if they have objections they must raise
 3 them with Chair, if the objections are justified they'll be
 4 upheld, if they're not they won't. Please tell us what
 5 your problem is and raise your objection and we'll deal
 6 with it once Mr Mpofo has had a chance to reply. Do me a
 7 favour, don't be impatient it doesn't help. Carry on with
 8 your objection.
 9 MR MPOFU: Thank you, Chairperson.
 10 MR NGALWANA: Yes I try very hard not to
 11 be impatient Chairperson thank you. My learned friend is
 12 asking a question that is suggestive of the answer, in fact
 13 he's testifying.
 14 CHAIRPERSON: He's put, was technically
 15 leading but the answer was self evident. If the vehicles
 16 were in the gap and the gap was approximately 20 metres, it
 17 follows the space available for the people who are walking
 18 there was not 20 metres but 20 metres minus the width of an
 19 Nyala. That was the question as I understood it, I can't
 20 see a problem with that. I know it suggests the answer but
 21 the answer is self evident so I disallow your objection.
 22 Carry on, Mr Mpofo.
 23 MR MPOFU: And all I want to establish is
 24 on your left hand side where these Nyalas, on your right
 25 hand side was the kraal and in front was the two of

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1 policemen holding machine guns, that's all.
 2 CHAIRPERSON: We haven't had an
 3 objection. I don't think they were machine guns, I think
 4 they were - they were certainly guns.
 5 MR MPOFU: Okay big guns.
 6 CHAIRPERSON: Perhaps they were shooting
 7 with sharp ammunition.
 8 MR MPOFU: Ja.
 9 CHAIRPERSON: But it wasn't machine guns.
 10 MR MPOFU: Ja fair enough.
 11 CHAIRPERSON: That's an objection you
 12 could have taken but you didn't. But never mind carry on
 13 Mr Mpofo.
 14 MR NGALWANA: I was bidding my time
 15 Chairperson.
 16 MR MPOFU: He's being patient. Thank you
 17 Chairperson. Yes I've been properly corrected. On the
 18 front was the formation that we explained earlier of these
 19 men carrying big guns and small guns. Is that the
 20 situation?
 21 MR MAGIDIWANA: It is so.
 22 MR MPOFU: Now as we saw in another
 23 footage yesterday you had already passed the gap where
 24 there were other policemen who had been shooting with big
 25 guns. Is that correct?

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1 MR MAGIDIWANA: Yes at that time it was
 2 when we had just appeared and when they were shooting. I
 3 even cried and said yo but still nevertheless I went
 4 through.
 5 MR MPOFU: Yes and when you went through
 6 you mean you went through the gap between the two Nyalas
 7 where these two people were shooting with big guns.
 8 MR MAGIDIWANA: Yes, that is the place.
 9 MR MPOFU: Thank you.
 10 MR NGALWANA: So that I'm not accused of
 11 not objecting when I should, that again is a suggestive
 12 question.
 13 CHAIRPERSON: It was a leading question.
 14 I thought it was common cause he was advancing towards the
 15 police and I thought he was going to be cross examined on
 16 why he advanced towards the police but if counsel thinks to
 17 leading and feels that point is a matter of controversy you
 18 must try to formulate the question in a way that's -
 19 MR MPOFU: I can.
 20 CHAIRPERSON: - that doesn't waste our
 21 time in having to deal with objections.
 22 MR MPOFU: Yes thank you, Chairperson, in
 23 fact I can do it very quickly through an alternative means.
 24 Can you go to L206? Alright in L206, we now know that the
 25 person who is marked number 1 as according to Mr Semanya

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1 and SAPS is Mr Noki but you identified that as yourself.
 2 Is that correct?
 3 MR NGALWANA: I'm not sure when or where
 4 my learned friend gets this, perhaps it may have been a
 5 private conversation, I certainly haven't heard Mr Semenya
 6 making that remark.
 7 MR MPOFU: Well we all did.
 8 CHAIRPERSON: I can't remember who
 9 identified him but it was suggested that it was Mr Noki and
 10 I think Mr Ntsebeza when he was cross-examining indicated
 11 that it was, after detailed cross examination that the
 12 assumption, to describe it that way, Mr Noki was erroneous
 13 and that this witness then came forward and said not it was
 14 he.
 15 MR MPOFU: Yes, that's correct.
 16 CHAIRPERSON: And I think perhaps you
 17 were wrong in blaming Mr Semenya, I can't remember who it
 18 was -
 19 MR MPOFU: It was certainly him.
 20 CHAIRPERSON: I think it was a joint
 21 erroneous assumption or a jointly made erroneous
 22 assumption. Never mind that, that was the assumption and
 23 it was put right so please carry on.
 24 MR MPOFU: Okay thank you, Chairperson.
 25 Then I'll blame it on Ntsebeza, he said it was Mr Semenya

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1 but it's okay Mr Chairman. Okay in any event the person on
 2 number 1 we know is you, it's you, Mr Magidiwana.
 3 MR MAGIDIWANA: Yes.
 4 MR MPOFU: Okay, I'm asking you the same
 5 question but I have to do it the long way because Mr
 6 Ngalwana prefers it that way. So the person, there's a
 7 policeman, at least it's written police and so I won't be
 8 accused of leading you, who is facing towards the direction
 9 of the protestors.
 10 MR MAGIDIWANA: It is so, there were two
 11 of them.
 12 MR MPOFU: Okay so you say although in
 13 the picture you see one policeman there were two of them in
 14 that particular space?
 15 MR MAGIDIWANA: It is so.
 16 MR MPOFU: And in front of that policeman
 17 can you see the back of an Nyala?
 18 MR MAGIDIWANA: I can see it.
 19 MR MPOFU: Between the – or rather what
 20 were the two policemen, one visible on the picture, the
 21 other one not visible on the picture, what were they doing?
 22 MR MAGIDIWANA: They were shooting.
 23 MR MPOFU: At whom?
 24 MR MAGIDIWANA: They were shooting at the
 25 workers.

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1 MR MPOFU: Yes and when you say you had
 2 already - then when that happened, your evidence of that
 3 you then passed, what did you mean? You passed and I
 4 suggested to you, that's when the objection came, that you
 5 were passing a gap. It was a gap between what and what?
 6 MR MAGIDIWANA: I passed between the
 7 Nyala and the kraal and went ahead but I didn't go directly
 8 to them but I walked next to them.
 9 MR MPOFU: Yes and for the sake of
 10 completion, I just want you to tell the Commission what is
 11 on your right hand side? You can see some kind of a tree
 12 and wood, what is that? On your right hand side, in other
 13 words the other side not the side of the two policemen?
 14 No, I didn't ask what he was holding. I'm saying what is
 15 it that is on his right hand side, ja the structure that is
 16 on his right hand side.
 17 MR MAGIDIWANA: It is the tree that is in
 18 the kraal.
 19 MR MPOFU: Okay thanks. If you go to 207
 20 how many Nyalas do you see there?
 21 MR MAGIDIWANA: Two of them.
 22 MR MPOFU: And can you still see that
 23 tree that you are talking about?
 24 MR MAGIDIWANA: I can see it.
 25 MR MPOFU: Thank you, that is the gap,

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1 Chairperson. Okay.
 2 CHAIRPERSON: Just so I understand you,
 3 you say that's the gap. Do you mean the gap is between the
 4 fence which is immediately in front of the tree and the
 5 Nyala which we see on the photograph? Or have I
 6 misunderstood?
 7 MR MPOFU: No you have and it's my fault
 8 completely. The gap I'm talking about now is the one that
 9 Mr Ngalwana is objecting about. It's the gap between the
 10 two Nyalas. Remember I was saying the policemen were
 11 shooting between the gap and Mr Ngalwana objected. I just
 12 trying to explain what gap I was talking about between the
 13 two Nyalas. Thank you. So in evidence of that that you
 14 successfully passed the gap between those two Nyalas
 15 through which the two policemen had been shooting at the
 16 protesters. Correct?
 17 MR MAGIDIWANA: I couldn't have passed
 18 through that gap.
 19 MR MPOFU: No I'm not saying passing
 20 through, you have passed it, in other words you were no
 21 longer in that gap. You are ahead of it.
 22 MR MAGIDIWANA: Yes, I didn't go directly
 23 to that gap but I passed it yes.
 24 [10:36] MR MPOFU: Thank you very much. Okay
 25 that's fine that's the same point. That's the long way as

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1 it were. Thank you. Excuse me Chair. Thank you, thank
 2 you Chairperson. Right, now you remember the evidence
 3 yesterday that – I'm taking you to something else that we
 4 dealt with yesterday. Maybe let me put it this way, when
 5 you were blocked the first time by that Nyala from
 6 proceeding on the road, were those Nyalas in the position
 7 that we've just discussed now? Or rather did you see them
 8 individual rushing into that space?
 9 MR MAGIDIWANA: I saw them.
 10 MR MPOFU: It's my fault, I have to
 11 confess, what –
 12 CHAIRPERSON: What we want to know is
 13 where did you see them at that point?
 14 MR NGALWANA: When, yes.
 15 MR MPOFU: I had two questions, it's my
 16 fault, and he answered the second one. Maybe I should just
 17 ask the first one separately. Okay, we know that you saw
 18 them rushing in. The first question was when you were
 19 blocked -
 20 CHAIRPERSON: I didn't hear him say
 21 rushing in. I heard him say he saw the Nyalas –
 22 MR MPOFU: Yes.
 23 CHAIRPERSON: The issue, of course, is
 24 whether they were rushing in or were they already. Perhaps
 25 you can ask that in a neutral way so that –

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1 MR MPOFU: Yes. Okay, let's start again.
 2 I'll do it question by question. When your group was
 3 blocked by the Nyala that was against the kraal, did you
 4 see any Nyalas that were in the position of the Nyalas?
 5 MR NGALWANA: Chairperson, I'm sorry, I
 6 don't know if my learned friend saw a Nyala blocking the
 7 way next to the kraal. Perhaps he should make these things
 8 clear. I don't know what he's talking about.
 9 MR MPOFU: You know, Chairperson, I'm
 10 sorry, I think we'll going to have to do the footage again
 11 for the benefit not only of my learned friend, but maybe
 12 even the witness. As I say, I did them back to back to try
 13 and save time, but I can see that it's –
 14 MR MAGIDIWANA: The Nyalas were at a
 15 distance, but they came closer at the time, they were
 16 closing the space for us.
 17 MR MPOFU: Okay, I'm just making a
 18 request to play the – just, at least once more.
 19 MR NGALWANA: It might be useful for my
 20 learned friend to ask the question as the footage is being
 21 played, so that we don't all have to delve into our memory
 22 banks. Some of us have shorter memories than others.
 23 MR MPOFU: Ja, no, that's what I call the
 24 long way. I was trying to truncate the cross-examination.
 25 Thank you.

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1 CHAIRPERSON: - to cross-examination, I
 2 welcome you enthusiastically, but sometimes the shortest
 3 way is the longest way around, so maybe we must take it
 4 slowly and –
 5 MR MPOFU: Thank you, Chairperson.
 6 ARBITRATOR: Make sure there are no
 7 further difficulties.
 8 MR MPOFU: And for the record, I am doing
 9 the examination-in-chief, not the cross-examination.
 10 CHAIRPERSON: - examination?
 11 MR MPOFU: No, I said.
 12 CHAIRPERSON: Oh, you did. No it was a
 13 lapse of lingua.
 14 [VIDEO RECORDING SHOWN]
 15 MR MPOFU: Okay, can you just rewind a
 16 little bit, until you can see the three Nyalas. Okay,
 17 forward a bit. Yes, thank you. Now, just one question
 18 there Mr – oh, Mr Magidiwana, okay, I won't ask them to
 19 bring it back, but on that frame that was showing before
 20 this, were you able to see three Nyalas behind the fence
 21 of the shack?
 22 MR MAGIDIWANA: I know those Nyalas.
 23 MR MPOFU: Thank you.
 24 [VIDEO RECORDING SHOWN]
 25 MR MPOFU: Okay, can you again just

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1 rewind a little bit until we can see the people lying on
 2 the road? Well, Chairperson, I'll show from other
 3 pictures that it is a road. Ja, maybe I should have said
 4 near the road. The only point about this is, Mr
 5 Magidiwana, that person there on that frame with a green
 6 thing, who's that? Oh, I'm so sorry, there are two people
 7 with green things in this particular picture. Not the one
 8 with the green thing over his head, the other one.
 9 MR MAGIDIWANA: That's me, the person who
 10 is wearing that tracksuit.
 11 MR MPOFU: And the other one in the green
 12 thing over the head?
 13 MR MAGIDIWANA: It's Mambush.
 14 CHAIRPERSON: Let's just absolutely
 15 clear. The person who is lying next to the E-News Logo is
 16 the witness.
 17 MR MPOFU: Is the witness, thank you,
 18 Chair.
 19 CHAIRPERSON: And the person on the other
 20 side of the policeman, between the policeman and the Africa
 21 – ECNA – sorry, ENCA logo is Mambush.
 22 MR MPOFU: Mr Noki, yes. Thank you.
 23 Okay, now we're going to go to Exhibit L, we're now moving
 24 to Exhibit L, Mr Magidiwana, I'm going to ask you a few
 25 questions on Exhibit L. Can we start at Exhibit L, slide

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1 191, and actually, if you just open the book wide, we'll
2 deal with 191 and 193 almost at the same time, which is the
3 other picture next to it.
4 Alright, firstly, can you see at the bottom –
5 okay, I'm sorry, when I say the bottom now, I'm speaking as
6 if I'm on the koppie, near the kraal, which is on the left-
7 hand side of the photo, you see the measurement there
8 between the kraal and the five – the line of five Nyalas,
9 which we have previously described as the foot of a
10 horseshoe, that is marked 50 metres.
11 MR MAGIDIWANA: I can see.
12 MR MPOFU: Now, when you – let's start,
13 when you went home to have lunch, where were the police
14 vehicles, or how were they positioned?
15 MR MAGIDIWANA: They were parked or
16 stopped in a manner in which they are.
17 MR MPOFU: Yes. And we know that when
18 the barbed wire was being pulled, and we know that from
19 picture 197. Picture 197, which is the same picture as
20 191, really, that it was in the same position. Now the
21 question I want to ask you is this, can you – which is a
22 question I posed to Mr Phasha, can you see that on the road
23 that runs in front of the kraal, that there were people
24 there?
25 MR MAGIDIWANA: I see them.

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1 MR MPOFU: Okay, now where did those
2 people come from, what were they doing, which way were they
3 going?
4 MR NGALWANA: How will he know that,
5 Chairperson?
6 CHAIRPERSON: If the witness was present
7 on the scene, he might be able to tell us something about
8 it, he may not, but he may be able to. Isn't it, if he's
9 just looking at the picture, he's giving us his
10 recollection, we hope, of what he saw at the time. So I
11 disallow the objection, please proceed.
12 MR MAGIDIWANA: They were running towards
13 Nkaneng.
14 MR NGALWANA: May I get an indication,
15 Chairperson, at what stage he realises this, because –
16 CHAIRPERSON: You can ask that in cross-
17 examination when you get an opportunity. Carry on, Mr
18 Mpofo?
19 MR MPOFU: Thank you, Chairperson. And
20 where did they come from?
21 MR MAGIDIWANA: From the koppie.
22 MR MPOFU: Thank you. In fact, I'm
23 surprised by this, because –
24 CHAIRPERSON: No, no, Mr Mpofo, don't
25 comment, just ask questions please.

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1 MR MPOFU: No, I am going to ask a
2 question.
3 CHAIRPERSON: Well, ask a question, don't
4 say you're surprised.
5 MR MPOFU: Okay, well, I am, but I won't
6 say it. Okay. If you look at the police version, which is
7 on 193, you see the white arrow which is pointing almost to
8 place where you shot?
9 MR MAGIDIWANA: I see it.
10 MR MPOFU: Yes, the police version is
11 that those were protestors and organised group remain with
12 others on the koppies, while a number of protestors are
13 departing. Okay, but I'm sure they'll tell us where they
14 were departing to. Okay, anyway, if you – I'm sorry,
15 Mr Magidiwana, if you go back to 191, you can see that we
16 have a view there of both koppie 1 and 2, Correct.
17 [10:56] MR MAGIDIWANA: It is so.
18 MR MPOFU: Now once again, I know it's
19 difficult to read aerial photos but the people who are - or
20 rather let me say that the crowd or the groups - I must
21 apologise for my attorney, Sir.
22 CHAIRPERSON: - should apologise, please
23 carry on.
24 MR MPOFU: Thank you, Chairperson. What
25 I'm asking specifically in relation to the crowd that is

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1 gathered in front of koppie two on that picture, according
2 to your observation is that crowd, in terms of the numbers,
3 the same as it was just before the dragging of the barbed
4 wire?
5 MR MAGIDIWANA: It was no longer the same
6 number of the people.
7 MR MPOFU: Which one is the higher
8 number, which one is the lower number?
9 MR MAGIDIWANA: Can you repeat?
10 CHAIRPERSON: Simple question. Before
11 the barbed wire was deployed were there more people at that
12 spot than afterwards or were there less people there, fewer
13 people there before the barbed wire was deployed?
14 MR MAGIDIWANA: There were many people.
15 CHAIRPERSON: What Mr Mpofo wants to know
16 from you is he's referred to a crowd, it was koppie two -
17 MR MPOFU: It was koppie two yes.
18 CHAIRPERSON: And you said that when you
19 compare the number who were there before the barbed wire
20 was deployed with the number who were there after the
21 barbed wire was deployed, the number's different. So the
22 question is before the barbed wire was deployed were there
23 more people there and than there were later or were there
24 fewer people there than was the case later?
25 MR MAGIDIWANA: Many people remained.

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1 CHAIRPERSON: Yes, I understand many
 2 people remained but actually did some leave? In other
 3 words were there fewer there after the barbed wire was
 4 deployed than there had been previously or what happened?
 5 MR MAGIDIWANA: There are people who
 6 left.
 7 MR MPOFU: Thank you.
 8 CHAIRPERSON: Well that seems - that's
 9 satisfying to ascertain what the position was. When we
 10 reach a suitable time to take the adjournment let me know.
 11 MR MPOFU: Chairperson, let's do it now.
 12 I've finished that combo of pictures so I'll move to
 13 another picture. Thank you. No, no I haven't, no I have.
 14 Thank you ,Chairperson.
 15 CHAIRPERSON: Now we've obtained
 16 certainty on that point we'll take the tea adjournment.
 17 [COMMISSION ADJOURNS COMMISSION RESUMES]
 18 [11:21] MR MPOFU: Okay, Chairperson I –
 19 CHAIRPERSON: When the witness is back at
 20 the witness table we will resumes. I understand he has got
 21 problems with mobility.
 22 MR MPOFU: Mobility, yes.
 23 CHAIRPERSON: I should actually have
 24 checked that he was here before I came in.
 25 MR MPOFU: Thank you, sorry Chairperson.

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1 I am told he is in the bathroom, Chairperson.
 2 CHAIRPERSON: We had better – we will
 3 take a short adjournment and we will stay in the wings of
 4 the stage.
 5 MR MPOFU: Thank you, Chairperson.
 6 CHAIRPERSON: And when he is available we
 7 will start.
 8 MR MPOFU: Thank you very much,
 9 Chairperson.
 10 [COMMISSION ADJOURNS COMMISSION RESUMES]
 11 [11:23] CHAIRPERSON: The commission will now
 12 resume. Mr Magidiwana, you're still under oath. Mr Mpofo,
 13 I take you you're approaching the end of your examination?
 14 MR MPOFU: I am, Chairperson.
 15 MR MAGIDIWANA: Yes.
 16 MR MPOFU: Right now could we move to
 17 picture number 200, exhibit L Chairperson, slide 200.
 18 Alright you, this picture according to the police is the,
 19 is what they call the second approach which we know was
 20 blocked by Nyala number 4 against, which came against the
 21 small kraal. Can you see the picture?
 22 MR MAGIDIWANA: I see it.
 23 MR MPOFU: Firstly, ja. Firstly can you
 24 confirm that while the other Nyalas, if you follow the
 25 yellow line were deploying the barbed wire in a straight

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1 line, that one sort deviated from that straight line
 2 towards the crawl.
 3 MR MAGIDIWANA: It is so.
 4 MR MPOFU: Alright. Now all I want you
 5 to check, it is visible on the picture but from someone who
 6 has been there and if, if we do ask to have another
 7 inspection then we'll deal with it at that time. But the
 8 path that that group is following according to that arrow,
 9 do you know whether or not there is another rural footpath
 10 thing, it would be exaggerating to call it a road, but
 11 another path that leads towards the kraal as well?
 12 MR MAGIDIWANA: There is no other road
 13 except, or the other path except that very one we used when
 14 we went around the kraal.
 15 MR MPOFU: Okay so are those people
 16 walking just on the veldt or on the path?
 17 MR MAGIDIWANA: They were walking on a
 18 narrow path.
 19 MR MPOFU: Thank you. Now can you
 20 explain to the commission how it came about that, okay
 21 sorry I have to do this, if you go to 197. That is where
 22 the police say the first approach happened, in other words
 23 where the group was trying to outpace the Nyala. You see
 24 that?
 25 MR MAGIDIWANA: Can you repeat.

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1 MR MPOFU: If you look at 197 where the
 2 arrow is, or at least where the two, the yellow dotted
 3 arrow meets the orange arrow, is where the police say that
 4 the first approach was and by first approach they mean
 5 where the, where the protestors were trying to outpace the
 6 Nyala or the barbed wire Nyala.
 7 MR MAGIDIWANA: To outpace the Nyala.
 8 MR MPOFU: I'm just using that as a
 9 reference, I don't want you to do anything about it. Okay
 10 if you accept that evidence of the police, what I wanted to
 11 know, let's go to 200 again. Between the time when the
 12 protestors were trying to get in front of the Nyala and
 13 this photo where you are now as you said on the small road,
 14 what happened, how did you get to that position?
 15 MR MAGIDIWANA: As we were walking then
 16 the Nyala increased the speed and went to close there at
 17 the crawl.
 18 MR MPOFU: Alright and if you go to 205.
 19 Now where that orange arrow starts is the position that you
 20 were in, or more or less the position you were in, in the
 21 photo 200. What happened between that position and the
 22 position that you see at the end of the arrow in photo 205,
 23 which is behind the kraal?
 24 MR MAGIDIWANA: The water cannon was
 25 spraying on water to the people.

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1 MR MPOFU: Right and what would happen to
 2 the crowd when the water cannon was splashing on it?
 3 MR MAGIDIWANA: People were moving away
 4 from that place, retreating and running away.
 5 MR MPOFU: Okay and, okay, no that's
 6 fine. Thank you. Thank you. Okay we've dealt with 206,
 7 so we'll be very brief but quickly lets go to 206. The
 8 police's version is that the person marked number 4 was
 9 holding a gun, that yellow ring is depicting it and the,
 10 whatever it is, you don't have to worry about that, the
 11 question I'm asking you is did you see any of the
 12 protestors holding a gun on that day?
 13 MR MAGIDIWANA: No, I never saw that.
 14 MR MPOFU: And you've testified earlier
 15 that, it's not clear on this picture but it's clearer on
 16 the computer pictures, that you can see that your mouth is
 17 open and you say you were screaming or crying, howl, things
 18 like that.
 19 MR MAGIDIWANA: I was screaming, crying.
 20 MR MPOFU: Why?
 21 MR MAGIDIWANA: I saw a police holding a
 22 firearm and shooting.
 23 MR MPOFU: Yes but why did you cry,
 24 didn't you think the bullets will not penetrate your body?
 25 MR MAGIDIWANA: I knew that the bullets

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1 would penetrate.
 2 MR MPOFU: Alright thank you and then, if
 3 you go to picture 208. Yes and this is just for
 4 referencing, it's positions that we've established before
 5 but at least we can do it without the E news logo. The
 6 person who is number one, who is that?
 7 MR MAGIDIWANA: It's me.
 8 MR MPOFU: And, yes behind your right
 9 hand are you able to see a piece of the towel that you were
 10 holding, the red towel?
 11 MR MAGIDIWANA: I see it.
 12 MR MPOFU: And the person number 3 is
 13 Mambush, correct?
 14 MR MAGIDIWANA: It is so.
 15 MR MPOFU: Okay. Alright -
 16 CHAIRPERSON: Do you know who 2 and 4 are
 17 because we also see them, I take it they're correctly
 18 marked, one can also see them from the front as it were in
 19 slide 206? 206 - think they are standing up, one can see
 20 the sides of their faces I think.
 21 MR MPOFU: Yes.
 22 CHAIRPERSON: Well one can see 4, no one
 23 can see 4 from the front.
 24 MR MPOFU: Absolutely.
 25 CHAIRPERSON: And one can see 2 from the

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1 side, that's on 206, slide 206 and then on slide 208 we see
 2 all four lying down, you and number 1 as you said, 3 is Mr
 3 Noki but do you know who 2 and 4 are?
 4 MR MAGIDIWANA: I don't know everyone who
 5 is there.
 6 MR MPOFU: Yes the -
 7 CHAIRPERSON: That's not an exact answer
 8 to the question. Do you know who number 4 is?
 9 MR MAGIDIWANA: Which one is that?
 10 CHAIRPERSON: Number 4, can you see
 11 there's a marker there. There's a blue arrow and at the
 12 top of the blue arrow there's a blue circle and there's a
 13 four, a white four in the middle of it. That gives you the
 14 person lying down and if you go back to 206 you'll see the
 15 same numbers, I think, are indicating the same people, this
 16 time standing up. So, but the purpose of my question if
 17 you could look at 2 and 4 lying on the ground on slide 208
 18 and then if the operator would very kindly show us slide
 19 206 you'll see 2 and 4 marked again. Could you do that for
 20 us please.
 21 MR MAGIDIWANA: Oh okay. The one I know
 22 is the one with number 2 and the arrow is pointing, the one
 23 who is stout.
 24 CHAIRPERSON: Yes, what's his name?
 25 MR MAGIDIWANA: The only name I know of

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1 him is that of Pie.
 2 CHAIRPERSON: Pi or P-I-E or P-A-A-I?
 3 MR MAGIDIWANA: Bhe.
 4 CHAIRPERSON: Oh BHE.
 5 MR MAGIDIWANA: B-H-A-Y
 6 CHAIRPERSON: B-H-A-Y, oh I see. That's
 7 a clan name isn't?
 8 MR MAGIDIWANA: I think so but I don't
 9 know.
 10 CHAIRPERSON: I see alright.
 11 MR MPOFU: Yes. Yes it is and that's
 12 gentleman is actually Mr Ntenetya, but I suppose you don't
 13 know his name? Chairperson?
 14 CHAIRPERSON: Spell it.
 15 MR MPOFU: Oh, N-T-E-N-E-T-Y-A.
 16 CHAIRPERSON: I think he was mentioned in
 17 the evidence earlier.
 18 MR MPOFU: He was identified Chair as
 19 body number F from scene 1.
 20 CHAIRPERSON: I take it from what you've
 21 told us that you can't, you don't recognise number 4, is
 22 that right?
 23 MR MAGIDIWANA: No I don't know him.
 24 CHAIRPERSON: Thank you. Please proceed
 25 Mr Mpofo.

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1 [11:43] MR MPOFU: Thank you, thank you very much
 2 Chairperson. Sorry Chairperson, and as it happens any way
 3 while we are here we might as well just dispose of an
 4 issue, we can't, we need footage, but can you just for the
 5 purpose of this, I'll deal with this later, Mr Ntenetya who
 6 is number 2, would you agree with me that his head - He's
 7 facing to the north and his feet towards yourself - towards
 8 the south.
 9 MR MAGIDIWANA: I agree.
 10 MR MPOFU: Yes, okay, later I'll show a
 11 position which I will ask you at that time about. Alright,
 12 could we go to the last footage, please? And sorry, it's
 13 quite long, if I can guide you where to pause it, and most
 14 of it is not -
 15 CHAIRPERSON: Do we need a warning of any
 16 kind.
 17 MR MPOFU: Oh yes, yes.
 18 CHAIRPERSON: Perhaps you can give the
 19 warning this time.
 20 MR MPOFU: Yes, thank you, Chairperson.
 21 MS PILLAY: Chair, if I may just find
 22 out, is the last video the LCLC video?
 23 MR MPOFU: Yes, yes.
 24 MS PILLAY: Right, that's Exhibit P.
 25 MR MPOFU: P, alright. Okay, ja, before

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1 we do that, Mr Magidiwana, you remember yesterday you
 2 testified that when you were seen moving on the video after
 3 the shooting, that you had been asked to take off you
 4 towel. In what form was your towel before that - you have
 5 to do that, how did you wear your towel, let me put it that
 6 way?
 7 MR MAGIDIWANA: I had tied it around my
 8 upper body.
 9 MR MPOFU: Yes, and after that command
 10 was given, what did you do with it?
 11 MR MAGIDIWANA: I untied it.
 12 MR MPOFU: And after that it can be seen
 13 behind you and where your green top is no longer covered by
 14 anything.
 15 MR MAGIDIWANA: Yes.
 16 MR MPOFU: Alright. And when you were
 17 taken to hospital, did you take your red towel with you?
 18 MR MAGIDIWANA: Never - I never.
 19 MR MPOFU: Okay, thank you. Alright, you
 20 can start the footage and stop at 12:40, or let's say
 21 12:20, so that we build up towards it.
 22 [VIDEO RECORDING SHOWN]
 23 CHAIRPERSON: I don't think that's your
 24 client, Mr Mpofu, is it? Didn't he have an Uzzi T-shirt
 25 on?

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1 MR MPOFU: No, that's exactly the point,
 2 Chairperson. Shall we take a break?
 3 CHAIRPERSON: I can see that your client
 4 is very distressed and moved, and I can understand that,
 5 because he is seeing his - I suppose I can call them
 6 comrades, his comrades lying dead on the field there.
 7 Perhaps it would be advisable for us to take a short
 8 adjournment -
 9 MR MPOFU: Early lunch -
 10 CHAIRPERSON: - to enable him to compose
 11 himself, and perhaps when he's ready to proceed, you can
 12 tell us.
 13 MR MPOFU: A few minutes, thank you,
 14 Chairperson.
 15 [COMMISSION ADJOURNS COMMISSION RESUMES]
 16 [12:14] CHAIRPERSON: The Commission will now
 17 resume. Mr Magidiwana, are you feeling better now? Would
 18 you like to continue?
 19 MR MAGIDIWANA: I am fine now.
 20 CHAIRPERSON: You are still under oath.
 21 Mr Mpofu. I understand, you told me during the adjournment
 22 that you are near the end of your examination-in-chief.
 23 MR MPOFU: That is correct, Chairperson.
 24 CHAIRPERSON: So please proceed.
 25 MR MPOFU: Thank you, Chairperson. What

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1 I've done, Chairperson, is to arrange that the people out
 2 there will show just the strictly relevant portions of
 3 that, of what I am going to ask about, which is a couple of
 4 questions, and I've gone up and discussed it with them. Mr
 5 Magidiwana, can you just attempt to look at these portions
 6 without some of those gruesome pictures.
 7 [VIDEO RECORDING SHOWN]
 8 MR MPOFU: Okay. That's the next -
 9 CHAIRPERSON: If what you want us to see
 10 is readily visible, you can, I take it there won't be
 11 objections, you can then by way of a leading question, say,
 12 we see whatever we see, and he can then confirm it if
 13 necessary. If it's likely to be controversial obviously
 14 you won't do that. If that's all you need at this stage,
 15 and that's the way I suggest you proceed at this point.
 16 MR MPOFU: Let me cover the first two in
 17 that fashion. Thank you very much. Mr Magidiwana, you
 18 remember this footage is - was taken by the LCRC around the
 19 kraal area, and this would be the LCRC video that, one of
 20 the videos that covers scene 1, which is the events that
 21 happened near the kraal. Now, one or two questions I want
 22 to ask you, the police version is that the manner in which
 23 the people there were dressed, among other things, was to
 24 prevent, or rather to soften the blows from rubber bullets.
 25 Now what I wanted to ask you firstly is, your own dress,

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1 why did you dress up in the sweater?
 2 MR MAGIDIWANA: It was cold.
 3 MR MPOFU: Okay, and then you saw in the
 4 footage that has just been played now, we saw two pairs of
 5 sandals that looked like they've been abandoned, and I just
 6 wanted to – if the people were dressed for war, as it was
 7 suggested –
 8 CHAIRPERSON: You don't have to give the
 9 commentary, you can just ask him to identify, that's for
 10 argument.
 11 MR MPOFU: Yes, did you identify the two
 12 pairs of sandals, one bluish and white, and the other one
 13 brown?
 14 MR MAGIDIWANA: I saw them.
 15 MR MPOFU: Okay. And then the still
 16 picture, the last still picture that was shown, oh, yes,
 17 thank you very much, the last still picture that was shown
 18 is of an opening at the back of the kraal, where yesterday
 19 I think we saw somebody jumping from that, but this was
 20 just to show you the opening itself at the back of the
 21 kraal which is visible on the video. Did you see that?
 22 MR MAGIDIWANA: I saw it.
 23 MR MPOFU: And then I think earlier, yes,
 24 that's the one that is there now.
 25 MR MAGIDIWANA: Yes.

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1 MR MPOFU: And I think there's one more –
 2 CHAIRPERSON: Slide showing a towel.
 3 MR MPOFU: I am sorry, Chairperson?
 4 CHAIRPERSON: Wasn't there a slide
 5 showing a towel, also a slide showing it looks an area of
 6 blood on the ground.
 7 MR MPOFU: Yes.
 8 CHAIRPERSON: I thought those were the
 9 other two you were going to show us, but if I am wrong, you
 10 will correct me.
 11 MR MPOFU: No, there's one more, Chair,
 12 can you go to, I think it's 12:30 or 12:40 thereabout.
 13 Yes, thank you. Now on that one, obviously at that stage,
 14 I am sure when the police come to testify they'll tell us
 15 this is the stage at which the injured people have been
 16 removed and the deceased are remaining behind, and the only
 17 issue here, is you can see your towel still remaining near
 18 the place where you were lying. Can you identify it,
 19 please?
 20 MR MAGIDIWANA: I can see it.
 21 MR MPOFU: And actually, yes, on this
 22 frame now, you can see the feet of Mr Ntenetya and you can
 23 still see Mr Noki, correct?
 24 MR MAGIDIWANA: I see them.
 25 MR MPOFU: Right. Having spent the day

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1 on the 16th at the koppie, we know that people were carrying
 2 weapons, can you tell the Commission what the majority of
 3 the weapons that you observed were?
 4 MR MAGIDIWANA: I saw sticks.
 5 MR MPOFU: And also during some of the
 6 earlier footage, something that I omitted to ask you, did
 7 you observe the police dragging or pulling the body of the
 8 person in the green shirt, but the one that is not yours,
 9 with the yellow markings.
 10 MR MAGIDIWANA: I saw it.
 11 MR MPOFU: And finally, Mr Magidiwana, or
 12 no, I take that back, during the time that Mr Mathunjwa was
 13 addressing in one of the earlier videos, were you able to
 14 observe the journalists that were walking around close to
 15 the protesters?
 16 MR MAGIDIWANA: They were all over the
 17 place and even in our midst.
 18 MR MPOFU: Thank you. Chairperson, just
 19 one more question, I am looking for – oh, yes. Can you go
 20 to the – 18:57 or 18:50, just one more.
 21 CHAIRPERSON: Have we seen this clip
 22 before, or is it going to have to be given an exhibit
 23 number? Currently identified by means of its, by reference
 24 to its earlier exhibit number.
 25 MR MPOFU: This footage, did it have an

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1 exhibit number?
 2 MS PILLAY: This is still part of Captain
 3 Henderson's video, exhibit P.
 4 MR MPOFU: Okay. Yes, that is part of
 5 the video of scene 1, and this is where there is a pile of
 6 arms, or of – yes, traditional weapons and other weapons
 7 and in this photo, were you able to identify your stick,
 8 the stick that you had been carrying.
 9 MR MAGIDIWANA: I can see it.
 10 CHAIRPERSON: That we now can see. Can
 11 you describe it for us, or indicate precisely which one it
 12 is?
 13 MR MPOFU: Well, first describe what it
 14 is as the Chairperson says, and then Mr Mahlangu will also
 15 help us to point it out.
 16 MR MAGIDIWANA: It's black in colour. On
 17 the top, it's goldish and almost red.
 18 MR MPOFU: That piece of colour on the
 19 knob itself.
 20 MR MAGIDIWANA: Yes, it is so.
 21 MR MPOFU: And is that the stick that Mr
 22 Mahlangu is pointing at?
 23 MR MAGIDIWANA: It is the one.
 24 MR MPOFU: Thank you.
 25 CHAIRPERSON: Shown to us on this

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1 particular clip, more or less the centre of the clip,
 2 running from left to right, firstly one can see the knob
 3 which is a goldish, a reddish gold colour, and then going
 4 towards the right, there is a dark blackish stick.
 5 MR MPOFU: Thank you, Chairperson.
 6 CHAIRPERSON: Is that an accurate
 7 description.
 8 MR MPOFU: That's very accurate, thanks.
 9 Right, now really finally now, the – you've testified
 10 earlier that you've repeatedly said that you were going
 11 towards the informal settlement which is in Nkaneng, and I
 12 just want to say that, to read you something that Mr X is
 13 going to say, and you'll tell us if it accords with what
 14 you have been saying. Mr X is going to say that "on the
 15 16th, while we were there, there came police hippos and they
 16 surrounded us with wire." Paragraph 26, Chairperson. "By
 17 then we were singing . Thereafter came another police
 18 vehicles and started to spray us with water. We started
 19 moving to the direction of the eastern side on the
 20 direction Nkaneng Squatter Camp." Is that in line with
 21 what your intentions were?
 22 MR MAGIDIWANA: Yes, I am agreeing the
 23 version of X. Where is that X?
 24 MR MPOFU: Well, that question will be
 25 answered, thank you very much, Chairperson. We will meet

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1 Mr X one day, thank you, Chairperson. No further
 2 questions. Oh, yes, my attorney, no, Chairperson, I can
 3 tell, we've seen Mr X today, but we will let you know
 4 later, thank you.
 5 CHAIRPERSON: Are the evidence, do the
 6 evidence leaders wish to cross-examine first or do you wish
 7 to stand back for one of the parties?
 8 MR MADLANGA SC: Ms Lupuwana, who will do
 9 the cross-examination will do it last, Mr Chairman, thank
 10 you.
 11 CHAIRPERSON: Mr Ngalwana, I take it you
 12 wish to be the first cross-examiner?
 13 MR NGALWANA: Yes, I wouldn't mind that,
 14 Chairperson, thank you.
 15 CHAIRPERSON: Please proceed.
 16 MR NGALWANA: Thank you, Chairperson and
 17 members of the Commission. [African language].
 18 CHAIRPERSON: Mr Ngalwana, you are
 19 departing from the normal procedure. Do wish to ask your
 20 questions in IsiXhosa?
 21 MR NGALWANA: I thought of doing that,
 22 Chairperson, but I thought it may take too long a time, but
 23 certainly the first part of my –
 24 CHAIRPERSON: Okay, the reason I asked
 25 you is the following. We can either have your – you can

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1 either put your questions in IsiXhosa and have the
 2 interpreter immediately interpret it. We then have the
 3 answer in IsiXhosa from the witness, which would then be
 4 interpreted, or if you wish, you could ask your question in
 5 IsiXhosa, we will have the answer in IsiXhosa, and the
 6 interpreter could then interpret both. I can understand
 7 there may be from your point of view advantages in
 8 following one procedure rather than the other, but would
 9 you indicate which you prefer?
 10 MR NGALWANA: I can indicate now,
 11 Chairperson. I will cross-examine in English but the first
 12 fore will be in Xhosa, but that will be more
 13 conversational.
 14 CHAIRPERSON: I understand that. I am
 15 talking about the first fore, how do you want the
 16 interpreter to operate? Do you want the interpreter to
 17 interpret your first IsiXhosa question immediately or do
 18 you want him to interpret it after the witness has answered
 19 in IsiXhosa?
 20 [12:34] MR NGALWANA: Well perhaps it's best that
 21 he interprets my question and then interprets his answer.
 22 CHAIRPERSON: Please proceed.
 23 MR NGALWANA: Or rather my comment.
 24 MR MAGIDIWANA: Sir, I must start by
 25 saying that I regret what has befallen you, what happened

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1 to you. I'm saying that personally as Vuyani Ngalwana.
 2 What is your clan name?
 3 MR MAGIDIWANA: My clan name is Mlungu.
 4 MR NGALWANA: Can you explain further?
 5 MR MAGIDIWANA: No I will not be able to
 6 unpack my clan name.
 7 MR NGALWANA: I heard you saying that you
 8 are a Chiefs fan, I am an Orlando Pirates fan. Can I start
 9 at the tail end of your examination in chief. You
 10 testified that the reason you were dressed in the manner
 11 that you were, in a tracksuit top was that it was a cold
 12 day on the 16th August, correct?
 13 MR MAGIDIWANA: Yes.
 14 MR NGALWANA: If I were to tell you that
 15 that was in fact a hot day, would you dispute it?
 16 MR MAGIDIWANA: Yes.
 17 MR NGALWANA: So when Reverend Seoka in
 18 his evidence said it was a hot day, would he have been
 19 mistaken?
 20 MR MAGIDIWANA: He must be able to tell
 21 the difference because in the early morning it is cold and
 22 during day-light it is hot and late in the afternoon then
 23 it gets colder again.
 24 MR NGALWANA: But you were right at the
 25 koppie on the 16th, according to your evidence, correct me

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1 if I'm wrong at around lunchtime.
 2 MR MAGIDIWANA: I arrived in the early
 3 morning.
 4 MR NGALWANA: And then you left, you
 5 said, to go and have lunch.
 6 MR MAGIDIWANA: It is so.
 7 MR NGALWANA: During that time it was
 8 hot.
 9 MR MAGIDIWANA: It was hot.
 10 MR NGALWANA: So as you are waiting for
 11 Mr Mathunjwa to address the crowd, it was hot?
 12 MR MAGIDIWANA: Yes.
 13 MR NGALWANA: You say you were not an
 14 RDO, correct?
 15 MR MAGIDIWANA: It is so.
 16 MR NGALWANA: You in fact say you were at
 17 the general tramming and transport department.
 18 MR MAGIDIWANA: It is so.
 19 MR NGALWANA: And what did you do as
 20 general tramming and transport person?
 21 MR MAGIDIWANA: I'm sitting in winch and
 22 motor, what he calls motor. The one that is blowing the
 23 air.
 24 MR NGALWANA: I take it, and I understand
 25 this is common cause, that the strike that engulfed

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1 Marikana at that time, it was principally an RDO strike,
 2 correct?
 3 MR MAGIDIWANA: It affected all the
 4 Lonmin employees.
 5 MR NGALWANA: Now in your statement you
 6 say it was an RDO strike and that the RDOs appealed, you
 7 say the RDOs appealed to other workers to join the strike.
 8 MR MAGIDIWANA: It is so.
 9 MR NGALWANA: Particularly in paragraph 4
 10 of your statement, you say you got wind of the fact that
 11 the RDOs had taken a decision to go on strike.
 12 MR MAGIDIWANA: Can you repeat?
 13 MR NGALWANA: It's a very simple question
 14 really.
 15 CHAIRPERSON: If he says repeat, just
 16 repeat. It goes on record, emphasis can be drawn to the
 17 fact that he asked for repetition and it was repeat. It
 18 doesn't help to get involved in an argument.
 19 MR NGALWANA: In your statement you say
 20 the RDOs decided to go on strike.
 21 MR MAGIDIWANA: Never.
 22 MR NGALWANA: I heard that the RDOs had
 23 decided to go on strike.
 24 MR MAGIDIWANA: Yes.
 25 MR NGALWANA: And that they also appealed

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1 to other workers, presumably who were not RDOs to join the
 2 strike.
 3 MR MAGIDIWANA: Yes.
 4 MR NGALWANA: So the strike was an RDO
 5 initiative?
 6 MR MAGIDIWANA: It is so.
 7 MR NGALWANA: It was principally an RDO
 8 strike.
 9 MR MAGIDIWANA: It was the workers'
 10 strike.
 11 MR NGALWANA: No, I said it was
 12 principally the RDO's strike.
 13 MR MAGIDIWANA: Can you repeat?
 14 MR NGALWANA: It was a strike initiated
 15 by the RDOs, the RDOs appealed to other members, look at
 16 me, please, when I ask the question, not at your lawyer.
 17 It was the RDOs who initiated.
 18 MR MAGIDIWANA: I am looking at you, Sir.
 19 MR NGALWANA: It was the RDOs who
 20 initiated the strike, it was the RDOs who appealed to other
 21 employees to join the strike, therefore it was an RDO
 22 initiative and principally an RDO strike.
 23 MR MAGIDIWANA: I don't know about that
 24 one.
 25 MR NGALWANA: So it's an RDO but it's

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1 supported by other workers who are not RDOs.
 2 MR MAGIDIWANA: Can you repeat? It was
 3 an RDO strike which was supported by other employees who
 4 were not RDOs, just like you. It eventually was then a
 5 workers strike.
 6 CHAIRPERSON: What were the workers
 7 striking for?
 8 MR MAGIDIWANA: Money was demanded.
 9 CHAIRPERSON: Wasn't R12 500 a month
 10 demanded?
 11 MR MAGIDIWANA: It is so.
 12 CHAIRPERSON: Who wanted R12 500? Did
 13 you want R12 500 yourself?
 14 MR MAGIDIWANA: I also want money.
 15 CHAIRPERSON: No, no, I didn't ask you
 16 whether you want money, I said were you striking for
 17 R12 500 per month for yourself, who were not employed as an
 18 RDO?
 19 MR MAGIDIWANA: It is so.
 20 CHAIRPERSON: Sorry, so were the non-RDO
 21 people striking so that R12 500 could be paid to the RDOs?
 22 What were they striking for?
 23 MR MAGIDIWANA: That the workers could
 24 earn R12 500.
 25 CHAIRPERSON: Even workers who weren't

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1 RDOs?

2 MR MAGIDIWANA: It is so.

3 MR NGALWANA: Is that is indeed so – look

4 at me, Mr Magidiwana, not your lawyer, look at me and the

5 Commissioner.

6 MR MPOFU SC: Chairperson, I don't know

7 if this is strictly necessary from Mr Ngalwana to make

8 snide remarks.

9 CHAIRPERSON: I must confess, I always

10 thought a witness could look at the audience if he wants

11 to, as long as he listens to the question and answers the

12 question.

13 MR MPOFU SC: Thank you, Chairperson.

14 CHAIRPERSON: The insinuation, of course,

15 is he's looking at his lawyer because his lawyer will help

16 him. But if you do try to help him you'll get into

17 trouble. But I haven't seen you trying to do that so I

18 think that he can look where he likes.

19 MR MPOFU SC: Ja, and that's exactly the

20 point, Chairperson, it's not an insinuation against the

21 witness, it's more against me.

22 CHAIRPERSON: He can even look at me, I

23 can assure you I won't try to help him.

24 MR MPOFU SC: And Chairperson, what I

25 really want to say is if Mr Ngalwana wants to prevent what

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1 the Chairperson spoke about –

2 CHAIRPERSON: I've upheld your objection,

3 you don't have to give a concurring judgment.

4 MR MPOFU SC: No, Chairperson, it will

5 happen again. All I'm saying is Mr Ngalwana's not entitled

6 to ask the witness to look at him. He might say he must

7 not look at me but he can look wherever he wants.

8 CHAIRPERSON: He can even look at you if

9 he wants to, as long as you don't give a sign indicating

10 what the answer should be, which I'm sure being the

11 counsel, he won't do. So I suggest we carry on without

12 wasting further time on this point.

13 MR NGALWANA: You worked as a general

14 tramming or in the general tramming and transport division

15 and you say you were striking for R12 500, is that correct?

16 MR MAGIDIWANA: Do you want me to explain

17 or just to say it, what do you want me to do?

18 MR NGALWANA: I want you to confirm

19 whether or not you as a general tramming and transport

20 worker were striking for R12 500 a month.

21 MR MAGIDIWANA: Yes.

22 MR NGALWANA: If that is indeed so, did

23 you tell your lawyers that?

24 MR MAGIDIWANA: Can you please repeat?

25 MR NGALWANA: Did you inform your

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1 counsels that you personally were striking in order to get

2 R12 500?

3 MR MAGIDIWANA: Do you mean you yourself,

4 as you are there, you don't know that the workers were

5 striking to earn R12 500?

6 CHAIRPERSON: - answer to the question.

7 Don't waste time, play the fool, answer questions directly

8 that you've been asked.

9 MR NGALWANA: I'm sure you've had

10 sufficient time to formulate an answer now, Mr Magidiwana.

11 I'll ask you again, did you tell your lawyers that you as

12 Mr Msoxolo Magidiwana joined the strike in order to get

13 R12 500, you personally, as a general tramming and

14 transport worker?

15 MR MAGIDIWANA: Yes.

16 CHAIRPERSON: Can I ask you a question

17 about that, as a general tramming and transport worker,

18 were you earning the same as the RDOs or less?

19 MR MAGIDIWANA: They were earning a bit

20 more.

21 CHAIRPERSON: So did you now want to earn

22 the same as the RDOs were going to earn? If they wanted

23 R12 500, were you striking so that you would be paid the

24 same as the RDOs were getting, even though previously you

25 were getting less than they were?

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1 MR MAGIDIWANA: The only difference that

2 would be in the salaries would only be the tax because

3 after they had been taxed then they would have more salary

4 than mine.

5 MR NGALWANA: Why did it take you so long

6 to answer a question of whether or not you had told your

7 lawyers about the reasons for striking?

8 MR MAGIDIWANA: No.

9 MR NGALWANA: Why did you take so long –

10 MR MAGIDIWANA: Because what you are

11 asking also shocks me because as you are there you also

12 know that the employees at Lonmin demanded R12 500 wage.

13 MR NGALWANA: You are still not answering

14 my question.

15 CHAIRPERSON: But you can - tell counsel

16 what he knows or didn't know, you're not here to tell us

17 what he knew, you're here to tell us what you knew and what

18 happened to you. So you haven't answered the question.

19 I'll give counsel an opportunity to repeat the question and

20 let's see if you can answer it this time.

21 MR NGALWANA: Why did it take you so long

22 to answer a simple question of whether or not you've told

23 your lawyers about your reason for striking?

24 [12:54] MR MAGIDIWANA: Because your question had

25 confused me.

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1 MR NGALWANA: What particular aspect of
 2 the question confused you?
 3 MR MAGIDIWANA: It is what you asked.
 4 MR NGALWANA: Which particular aspect of
 5 that?
 6 CHAIRPERSON: There is only one aspect in
 7 the question - did you tell your lawyers. I mean, I don't
 8 see how he can split it up into different aspects. The
 9 question is, was, did you tell your lawyers. You took some
 10 time to answer the question. The question that counsel
 11 wants to know, why did you take such a long time. You say
 12 it confused you. He says well, what was it about the
 13 question that confused you. I can understand if it had a
 14 number of different bits to it, you might have been
 15 confused by one part rather than another, but this is, it
 16 was a straightforward question – did you tell your lawyer.
 17 Your answer was either yes or no. Now you took a long time
 18 before you gave your answer. Counsel wants to know why did
 19 you take a long time.
 20 MR MAGIDIWANA: I was still thinking
 21 about it.
 22 MR NGALWANA: About whether or not you
 23 had told your lawyers?
 24 MR MAGIDIWANA: It is so.
 25 MR NGALWANA: Right, now perhaps – we're

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1 nearing lunch. I just want to take us back, maybe
 2 something for you to chew on over lunch, and I trust the
 3 Commissioners will give me some indulgence because I think
 4 this is a very important aspect to cover with this witness.
 5 CHAIRPERSON: I think you should just ask
 6 the question and then talk to him about what he's going to
 7 eat for lunch. Carry on with the question.
 8 MR NGALWANA: Thank you, Chair. Mr
 9 Magidiwana, this is a commission of inquiry; it's not a
 10 criminal trial. The Commissioners are expected to find out
 11 what happened, the facts, the truth, and they are not here
 12 to make a determination about who is guilty and who is not
 13 guilty. So there is no accused or defendant here. All the
 14 parties, all counsel are effectively on the same side, and
 15 that is the side of assisting the Commission to get to the
 16 truth of what happened between the 9th of August and the
 17 16th of August 2012. You have taken an oath to assist the
 18 Commission in that regard. You are not an enemy of Lonmin,
 19 NUM, the police, neither are they an enemy of you. So if
 20 you do not tell the Commission the truth, the Commission
 21 will not be able to perform the functions for which the
 22 President had appointed it, and that is quite apart from
 23 the fact that if you fail to tell the truth and you are
 24 discovered, you would have committed a criminal offence. I
 25 ask you to consider that over lunch and we will resume as

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1 soon as the Chairperson considers it an appropriate time to
 2 adjourn for lunch.
 3 CHAIRPERSON: It is an appropriate time
 4 to take the adjournment. I just want to say, before we
 5 adjourn, that what counsel has put to you is correct. Our
 6 sole function in this Commission is to find the truth in
 7 respect of a number of matters that the President has
 8 referred to us. Anything you say cannot be used against
 9 you if you were subsequently to be charged. What you say
 10 here can't be used against you. The only prosecution that
 11 could flow from what you say here is if you don't tell us
 12 the truth, and if the prosecution authorities are satisfied
 13 that what you've told us was untrue, and you knew it was
 14 untrue, you can be prosecuted for committing perjury, but
 15 nothing that you say here, apart from that, a possible
 16 perjury charge, nothing you say here can be used against
 17 you in any subsequent criminal proceedings. So that is put
 18 in the regulations which govern the Commission in order to
 19 assist the Commission in its task of trying to ascertain
 20 the truth. You understand that?
 21 MR MAGIDIWANA: I understand you.
 22 CHAIRPERSON: Right, we'll now take the
 23 adjournment till half past 1.
 24 [COMMISSION ADJOURNS COMMISSION RESUMES]
 25 [13:42] CHAIRPERSON: The Commission will resume.

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1 Mr Magidiwana, you're still under oath. Mr Ngalwana, I can
 2 see you've still got some questions to ask in cross-
 3 examination.
 4 MZOXOLO MAGIDIWANA: s.u.o.
 5 MR NGALWANA: Thank you, Commissioner.
 6 MR MPOFU: Sorry, Chairperson, sorry, Mr
 7 Ngalwana. I just wanted to place something on the record.
 8 We have prepared a collage of photos from some of the videos
 9 that were played. We will submit them to Ms Pillay and
 10 maybe seek to submit them by way of admission from SAPS, so
 11 that –
 12 CHAIRPERSON: That sounds a very sensible
 13 suggestion and it would certainly make our task easier.
 14 MR MPOFU: Thanks, Chair.
 15 CHAIRPERSON: Thank you very much for
 16 that. I'd thought I'd indicated to you, you could resume
 17 your cross-examination?
 18 CROSS-EXAMINATION BY MR NGALWANA (CONTD.):
 19 Thank you, Chair. Mr Magidiwana, your statement, your
 20 witness statement, I think exhibit EEE1, you've read it,
 21 haven't you?
 22 MR MAGIDIWANA: Yes.
 23 MR NGALWANA: I take it everything that
 24 is contained in the statement is as you told your lawyers?
 25 MR MAGIDIWANA: It is so.

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1 MR NGALWANA: And that nothing contained
2 in that statement was without your saying so to your
3 lawyers.
4 MR MAGIDIWANA: Yes, there is none.
5 MR NGALWANA: And there's nothing that
6 your witness would leave out that you told them?
7 MR HANABE: There is nothing that?
8 MR NGALWANA: There is nothing that you
9 told your legal team that they would leave out of the
10 statement.
11 CHAIRPERSON: Mr Ngalwana, I don't
12 understand how he can answer that question. Maybe if you
13 get the chance to cross-examine Mr Mpfu you can ask him
14 that, but I don't know whether he can say what his lawyers
15 would or would not have done. I don't think that's an
16 appropriate question.
17 MR NGALWANA: I take it after you had –
18 did you write the statement yourself? Maybe let me start
19 that way.
20 MR MAGIDIWANA: I am the one who made the
21 statement, but didn't reduce it in writing.
22 MR NGALWANA: And so if there's anything
23 that you wanted added in the statement, everything you
24 wanted to be contained in the statement, I take it you'll
25 tell your lawyers to do so?

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1 MR MAGIDIWANA: Can you repeat?
2 MR NGALWANA: [Repeats question in Xhosa]
3 MR HANABE: If there is anything
4 important that you wanted your counsel to add it on the
5 statement, you were going to tell them about that?
6 MR MAGIDIWANA: Yes.
7 MR NGALWANA: After all, it's your story
8 and you want it heard.
9 MR MAGIDIWANA: It is so.
10 MR NGALWANA: In full.
11 MR MAGIDIWANA: It is so.
12 MR NGALWANA: You said before lunch that
13 you went on strike for R12 500 as a general tramming and
14 transport worker.
15 MR MAGIDIWANA: Yes.
16 MR NGALWANA: You said you told your
17 lawyers this?
18 MR MAGIDIWANA: I said yes.
19 MR NGALWANA: You've just confirmed that
20 if you thought things were important, you would have them
21 in the statement written by your lawyers.
22 MR MAGIDIWANA: Can you repeat?
23 MR NGALWANA: [Repeats question in Xhosa]
24 MR HANABE: You just told us that if
25 there is something important to you, you will let your

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1 attorneys know about it so that they can add it in your
2 statement.
3 MR MAGIDIWANA: Yes.
4 MR NGALWANA: Why is the fact that you
5 went on strike for 12 500 not contained in your statement?
6 MR MAGIDIWANA: I answered the question
7 in the manner in which you were asking, but I'm saying, all
8 I'm saying is the workers demanded R12 500. I also am not
9 excluding myself.
10 MR NGALWANA: Yes, for now we're talking
11 about you, the person that is Mr Mzoxolo Magidiwana, the
12 general tramming and transport worker. Will you answer my
13 question now?
14 MR MAGIDIWANA: I will answer it.
15 MR NGALWANA: Go ahead.
16 MR MAGIDIWANA: It's because I thought
17 that they also had written it down.
18 MR NGALWANA: I asked you whether you
19 read your statement; you said yes.
20 MR MAGIDIWANA: It is so.
21 MR NGALWANA: So it's not quite correct
22 to say that you thought they'd written it in the statement,
23 is it?
24 MR MAGIDIWANA: How?
25 MR NGALWANA: The fact that you said you

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1 went on strike for 12 500 and that you said you told your
2 lawyers that, and you said you read your statement after
3 your lawyers had drafted the statement, and that if it is
4 important to you, you would insist that it be put on the
5 statement, and that you read the statement after it had
6 been drafted for you, that fact that you had struck for 12
7 500 was not in the statement. It therefore cannot be true
8 that you thought it was in the statement. Let me say it
9 bit by bit, sorry. You said – it's going to be repetitive.
10 You said you went on strike for 12 500.
11 MR MAGIDIWANA: It is so.
12 MR NGALWANA: Clearly that's an important
13 fact to you.
14 MR MAGIDIWANA: Money.
15 CHAIRPERSON: Before the next question is
16 asked, someone's cell phone is on and it's got a whistling
17 ringtone, so whoever has got a cell phone with a whistling
18 ringtone, I seriously advise you to have it turned off,
19 otherwise I may have to have you ejected from the
20 auditorium. Mr Ngalwana, inasmuch as this is a collateral
21 point that relates to credibility, it may be that you'll
22 soon reach the stage where you've got enough on record and
23 you can move on to something else.
24 MR NGALWANA: Thank you, Chair. Let me
25 just finish this line. You said you went on strike for R12

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1 500 as a general tramming and transport worker.
 2 MR MAGIDIWANA: Yes.
 3 MR NGALWANA: Clearly that is an
 4 important fact for you.
 5 MR MAGIDIWANA: Yes.
 6 MR NGALWANA: That is why you told your
 7 lawyers, you say, about it.
 8 MR MAGIDIWANA: Yes.
 9 MR NGALWANA: And your lawyers prepared
 10 your statement on the basis of what you told them.
 11 MR MAGIDIWANA: Yes.
 12 MR NGALWANA: And they gave you the
 13 statement to read.
 14 MR MAGIDIWANA: Yes.
 15 MR NGALWANA: And so you satisfied
 16 yourself that the statement reflects that which you told
 17 your lawyers.
 18 MR MAGIDIWANA: Yes, I was satisfied.
 19 MR NGALWANA: So then it is not correct,
 20 you are not correct when you say that you were not aware
 21 that the issue of striking for 12 500 was not included in
 22 the statement.
 23 MR MAGIDIWANA: How must be the truth?
 24 MR NGALWANA: No, I have to wrap this up.
 25 I shall argue, or we shall argue, depending on who does the

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1 argument in this relation, that your answer certainly in
 2 this respect is unsatisfactory. Would you care to comment?
 3 MR MAGIDIWANA: Yes.
 4 MR NGALWANA: Go ahead.
 5 MR MAGIDIWANA: Because when the
 6 statement was being read to me, the thing in fact I was
 7 mainly focussing on, it was the manner in which I was
 8 injured, though I had mentioned the issue of money, but I
 9 was not focussing on that. What I was focussing on was the
 10 extent of my injuries.
 11 MR NGALWANA: When did this happen? In
 12 other words, at what time was the statement now being read
 13 to you that you were not focussing on the 12 500, but on
 14 your injuries?
 15 MR MAGIDIWANA: I consulted with counsels
 16 at the time I was already injured.
 17 CHAIRPERSON: I see your statement is
 18 dated the 3rd of December. Now was the statement written
 19 out and read to you round about the 3rd of December, or was
 20 it a substantial time before then?
 21 MR MAGIDIWANA: It was on that day.
 22 CHAIRPERSON: There you have your answer.
 23 I would have thought that you've probably got enough on
 24 record to argue the point you want to argue. You've given
 25 the witness an opportunity to deal with it. He's dealt

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1 with it as best he can, and I think perhaps you can move on
 2 to the next point now.
 3 MR NGALWANA: Thank you, Chair, I'll just
 4 ask one last question. Are you saying there's no other
 5 occasion at which your lawyers gave you an opportunity to
 6 go through your statement, other than the date of the
 7 statement?
 8 MR MAGIDIWANA: There was no other
 9 occasion.
 10 MR NGALWANA: How about yesterday and
 11 Wednesday here in this Commission while you were sitting
 12 there? Was the statement not read out to you?
 13 MR MAGIDIWANA: It was read to me.
 14 MR NGALWANA: Yet another opportunity for
 15 you to raise the issue, that the issue of 12 500 demand by
 16 me is not in the statement. Correct?
 17 MR MAGIDIWANA: Yes, I had the
 18 opportunity, but what I expected was to be asked about the
 19 extent of my injuries.
 20 CHAIRPERSON: I take it you were still
 21 focussing on the events actually on the 16th and the
 22 injuries you sustained and what happened thereafter. Is
 23 that correct?
 24 MR MAGIDIWANA: It is so.
 25 CHAIRPERSON: I think you've taken this

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1 point as far as you can go. I suggest you move on, please.
 2 MR NGALWANA: Yes, thank you, Chair. You
 3 were asked by your counsel whether you supported the
 4 actions of the RDOs. I think that's the – I'm quoting him
 5 verbatim. He'll correct me if I'm wrong. You were asked
 6 whether you supported the actions of the RDOs. Do you
 7 remember what your answer was?
 8 MR MAGIDIWANA: Yes.
 9 MR NGALWANA: You said, "I supported it
 10 because they work very hard."
 11 MR MAGIDIWANA: It is so.
 12 MR NGALWANA: You are aware by now that
 13 the RDO strike was an illegal strike?
 14 MR MAGIDIWANA: I heard about it.
 15 MR NGALWANA: Yes, you are aware now
 16 sitting there, that it wasn't legal?
 17 MR MAGIDIWANA: I heard about it.
 18 MR NGALWANA: You must have known at the
 19 time you supported it that it was not a legal strike.
 20 MR MAGIDIWANA: Can I answer?
 21 MR NGALWANA: That's what I'm waiting
 22 for.
 23 MR MAGIDIWANA: Maybe it is so.
 24 MR NGALWANA: I'll take that as a yes.
 25 MR BIZOS SC: Chairperson, I'm sorry to

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1 interrupt, but we as lawyers refer to it as an unprotected
 2 strike. It's not illegal and it is not an offence to go on
 3 an unprotected strike, and I think that our learned friend
 4 is taking advantage of the witness, trying to say that what
 5 he said is an admission that it was an illegal strike. I'm
 6 sorry to intervene, but I –

7 CHAIRPERSON: I hear the point that you
 8 make. It's possibly a point I should have made myself, but
 9 in any event, we wouldn't have been bound by his answer and
 10 merely because he admitted it was an illegal strike
 11 wouldn't lead us to a finding that it was an illegal
 12 strike.

13 [14:02] MR BIZOS SC: I was sure of my ground,
 14 but I couldn't resist to raise –

15 CHAIRPERSON: Yes, the point made is
 16 correct here. People do speak loosely of an illegal
 17 strike, but the proper expression is unprotected, and to
 18 avoid further confusion and debate, I suggest you stick
 19 with that terminology. Mr Bizos is quite right to raise
 20 it. I should have raised it earlier.

21 MR NGALWANA: Thank you, Chairperson. -
 22 I appreciate what my learned friend has just - You did know
 23 at the time that the strike by the – the unlawful strike,
 24 in other words, it was not in accordance with the law?
 25 CHAIRPERSON: No, that terminology is

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1 loose. Unlawful, illegal, they mean roughly the same
 2 thing, it's unprotected strike. The better point would be
 3 to put to him did he know what the consequences of him
 4 participating in an unprotected strike were. He may have
 5 been aware, he may not. Maybe it's a line to follow, but I
 6 don't think it helps to split hairs and use unlawful rather
 7 than illegal. It's quite far from the matter that we're
 8 dealing with at the moment. I suggest you -

9 MR NGALWANA: Thank you, Chairperson.
 10 You are aware of the actions of RDOs during the 9th of
 11 August to the 16th of August, are you not?

12 MR MAGIDIWANA: I am not aware, because
 13 other things I saw them on TV.

14 MR NGALWANA: Yes, I'm not suggesting you
 15 were there present. I'm saying you were aware of the
 16 striking employer's actions during that period, whether you
 17 were there or not.

18 MR MAGIDIWANA: I said what happened on
 19 the 10th, 11th up until the 16th, I have no knowledge about
 20 those events. Others, I saw them on TV.

21 MR NGALWANA: Having seen them on TV, you
 22 then became aware of them?

23 MR MAGIDIWANA: Yes, but not everything,
 24 because they don't show everything on TV, they show only
 25 the bits and pieces of it and then they go to something

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1 else.

2 MR NGALWANA: May I take you to Exhibit
 3 L, that's the police presentation, and open to slide 28.
 4 You see that's burnt vehicle?

5 MR MAGIDIWANA: I can see it.

6 MR NGALWANA: Chairperson, I'm about to
 7 refer to other slides which may cause some consternation
 8 with members of the family, perhaps if any of them are
 9 here, a requisite warning should be sounded.

10 CHAIRPERSON: Yes, thank you for telling
 11 me. We are now going to see some slides which will depict
 12 scenes showing some of the people who are deceased, in
 13 circumstances which are likely to cause a great deal of
 14 distress and unhappiness to their next of kin and loved
 15 ones, so those people who feel that they may be distressed
 16 at seeing these video clips are invited to leave the
 17 auditorium at this stage, and I ask that the clips not be
 18 shown until two minutes have elapsed after what I'm now
 19 saying is interpreted.

20 MR NGALWANA: And that goes in particular
 21 for the families of the mine security guards. May I
 22 proceed, Chairperson, or are we waiting for two minutes to
 23 elapse?

24 CHAIRPERSON: I think so, yes. I think
 25 everyone who wants to go has gone.

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1 MR NGALWANA: Thank you, Chairperson. Mr
 2 Magidiwana, may I ask you to turn to slide 29 of Exhibit L?
 3 It is the version of the police, and I believe this is
 4 common cause, subject to any objections that there may be,
 5 that that person was hacked and stabbed to death by the
 6 striking workers.

7 Slide 30, that is one the security guards hacked
 8 and stabbed to death by striking workers.

9 Slide 31, that is one of the mine security guards
 10 hacked, stabbed and burnt by striking workers.

11 Slide 32, that is one of the security guard
 12 hacked to death and burnt with the vehicle in which he was
 13 by striking workers.

14 Slide 33, A protestor takes a shotgun away from
 15 one of the deceased mine security guards and runs away with
 16 it.

17 Slide 38, Vehicles – I think they're Lonmin
 18 vehicles, that were burnt by striking workers.

19 MR MPOFU: Chairperson, I suppose now I
 20 have to object. This case, as far as I know, are still
 21 being investigated. So maybe, Mr Ngalwana, at least, can
 22 use the words allegedly, unless if he knows something we
 23 don't know.

24 MR NGALWANA: Chairperson, I have said
 25 this is the version of the police. May I proceed,

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1 Chairperson.
 2 Slide 39, It is the version of the police that
 3 those mine workers who did not participate in the strike
 4 were killed.
 5 CHAIRPERSON: It is the version of the
 6 police that these persons who were killed were mineworkers
 7 who did not participate in the strike. The way you put it,
 8 it sounds as if every mine worker who didn't participate in
 9 the strike was killed. That's not a correct way of putting
 10 it, but the way I put it I think is more accurate. I
 11 presume that's actually what you intended. Now, if the
 12 interpreter interprets that, then we can get an answer.
 13 MR NGALWANA: Quite right, thank you,
 14 Chairperson.
 15 MR MPOFU: I'm sorry, Chairperson,
 16 besides that's not even the version of the police. The
 17 version of the police is that two protestors were killed
 18 and one of the mineworkers was killed. It's not known
 19 whether he was a protestor or a non-participant.
 20 CHAIRPERSON: My understanding is that
 21 what was put – what the police version is, as set out in
 22 respect of slide 37, that at the K4 plant on the evening of
 23 the 12th of August, five employees, who were presumably
 24 reporting for work, were assaulted. Two of these assaults
 25 were fatal, So two were killed and three were injured.

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1 That's the police version, as I understand it. I don't
 2 think the question was wrongly phrased. That's why I take
 3 it we've got two dead bodies in slide 39.
 4 MR NGALWANA: These were the action –
 5 MR MPOFU: No, I'm sorry, Chairperson, I
 6 don't want to disturb. If you go to slide 61, the version
 7 of the police is that on –
 8 CHAIRPERSON: 40. Slide 61 is a sort of
 9 story up to the end of the 13th.
 10 MR MPOFU: Yes.
 11 CHAIRPERSON: But then it does say on
 12 Sunday protestors killed two of the mine security guards
 13 and two of the mine's employees, and that is a
 14 recapitulation of what appears against the last bullet in
 15 slide 40. Remember we're talking at the moment about the
 16 Sunday, the 12th. 61, of course, is on the page dealing
 17 with Monday, the 13th, but it contains a summary of what had
 18 happened up to then. So I think the question is in order.
 19 MR MPOFU: We're still on the topic, yes.
 20 MR NGALWANA: The pictures that have just
 21 been shown to you, depicts the actions of the striking
 22 workers. In answer to your counsel's question whether you
 23 supported the actions of the RDOs, you said yes. Is that
 24 the sort of action you supported?
 25 MR MPOFU: No, Chairperson, honestly,

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1 that is not – firstly, that's not the question I put to the
 2 witness. I asked a question specifically about the action,
 3 in other words, the industrial action that was taken by the
 4 –
 5 CHAIRPERSON: Did you relate it to, did
 6 you support the strike?
 7 MR NGALWANA: Yes.
 8 CHAIRPERSON: The answer was yes, but
 9 anyway, perhaps counsel can reformulate the question in a
 10 way which meets your objection. Now that these points have
 11 been put to him, you're entitled to ask him do you support,
 12 or did you support these events –
 13 MR MPOFU: Of course, but he mustn't
 14 relate to the question I asked.
 15 CHAIRPERSON: No, I've already upheld you
 16 on that point, Sir.
 17 MR MPOFU: Thank you.
 18 CHAIRPERSON: Don't get excited. See
 19 perhaps reformulate the question and put it to the witness
 20 again and let's see if we can get his answer this time.
 21 MR NGALWANA: I'll come back to that
 22 issue, Chairperson.
 23 CHAIRPERSON: You've asked a question,
 24 let's deal with it now. What counsel wants to know from
 25 you, you've been shown pictures which depict events which

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1 took place at Lonmin and at the Karee shaft, which the
 2 police say were things that were done by the strikers, or
 3 some of the strikers, and what counsel wants to know from
 4 you is, do you support those acts that are depicted on
 5 those slides that you were shown?
 6 MR MAGIDIWANA: No, killing a person
 7 cannot be supported.
 8 CHAIRPERSON: So when you said that you
 9 supported the action of the strikers, what exactly did you
 10 mean? What were you supporting?
 11 MR MAGIDIWANA: It was a wage demand.
 12 MR NGALWANA: You say you got wind of the
 13 fact that the RDOs were to embark on a strike.
 14 MR MAGIDIWANA: Yes.
 15 MR NGALWANA: You say you heard you got
 16 wind of this on the 10th or the 11th of August?
 17 MR MAGIDIWANA: Yes.
 18 MR NGALWANA: From whom did you hear –
 19 get wind of this?
 20 MR MAGIDIWANA: I overheard it from
 21 people who were talking amongst each other.
 22 MR NGALWANA: You don't know their names?
 23 MR MAGIDIWANA: I don't know them.
 24 MR NGALWANA: You say the RDOs appealed
 25 to other workers who were not RDOs to join the strike?

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1 MR MAGIDIWANA: Yes, I heard.
 2 MR NGALWANA: In your evidence here, you
 3 say they asked people to join the strike.
 4 MR MAGIDIWANA: It is so.
 5 MR NGALWANA: Are you able to assist the
 6 Commission in ascertaining what form of appeal or request
 7 it took, in other words in what way did the RDOs request or
 8 appeal to other workers, for RDOs to join the strike?
 9 [14:22] MR MAGIDIWANA: I said what I heard, I
 10 heard it say the employees are not supposed to go to work,
 11 that the RDOs were on strike for a wage demand of R12 500.
 12 It was then that I decided that I will not go to work, I
 13 will just stay at home. You can continue then, Sir.
 14 MR NGALWANA: From that I can take it,
 15 you are unable to assist the Commission in saying how the
 16 RDOs sought to appeal to other workers not to go to work.
 17 MR MAGIDIWANA: The people that were
 18 saying those things, I did not see any violence in them.
 19 They were just talking amongst each other.
 20 MR NGALWANA: This having been an
 21 unprotected strike, you must accept that the only effective
 22 means to, as it were, appeal people to join a strike, will
 23 be an unconventional one. If you are not clear, I can
 24 rephrase it. You must accept that to support a strike, or
 25 to get people to support a strike that is unprotected, an

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1 effective means would be to use means that are equally
 2 unprotected, at law. Correct?
 3 MR MAGIDIWANA: In what you are saying,
 4 there is a difference, because those people who were
 5 talking, there was no violence in them, but all they were
 6 doing was to voice out their grievance. All they wanted
 7 was money.
 8 MR NGALWANA: Yes, it must have been
 9 painful for them to work hard, and be paid a pittance.
 10 MR MAGIDIWANA: Can I answer? That was
 11 painful, Sir.
 12 MR NGALWANA: So it makes sense that they
 13 would have been bitter about the fact that they would be
 14 working so hard and be paid so little?
 15 MR MAGIDIWANA: When you look at it that
 16 way, is it then nice? Or it is nice then, I am sorry, when
 17 we see it that way.
 18 MR NGALWANA: I think what the, if I may,
 19 I think what the interpreter means is perhaps to say, it's
 20 good of me to appreciate that fact.
 21 MR HANABE: Yes, that is the right
 22 translation, thank you very much.
 23 MR NGALWANA: But the person's opinion
 24 that I am interested in is yours, not mine.
 25 MR MAGIDIWANA: I said that it's painful.

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1 MR NGALWANA: And so if, painful as it
 2 is, you go on strike, which means you are not earning a
 3 salary, you earn even less, in fact you go from earning
 4 less to earning nothing, because you are on strike, while
 5 there are other people who are going to work. It would
 6 tend to shall we say, reduce your chances of success in
 7 getting what you want, if other people are not joining the
 8 strike, correct?
 9 MR MAGIDIWANA: I never heard it said
 10 that there are people who are not going to work, what I
 11 heard was – I mean, who were going to work, what I heard
 12 was that people were not going to work.
 13 MR NGALWANA: You are not seriously
 14 telling this Commission that everyone was going to work,
 15 during that period.
 16 CHAIRPERSON: I understand it's precisely
 17 the opposite. Perhaps the answer could be repeated,
 18 because I think you've misheard it. Could you repeat the
 19 answer that the witness gave?
 20 MR HANABE: If he can repeat again,
 21 Commissioner.
 22 MR MAGIDIWANA: I never heard that there
 23 was someone who was going to work, no one was going to
 24 work, every person had stayed away from work.
 25 MR NGALWANA: And so I say to you, you

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1 seriously are not suggesting that everyone at the mine was
 2 not going to work.
 3 MR HANABE: If I may ask, Commissioner, I
 4 am just pleading, I am asking just personally, it's a
 5 personal request, I feel very exhausted, if I can just be
 6 swapped with Mr Mahlangu.
 7 CHAIRPERSON: Alright, Mr Mahlangu, I see
 8 is standing up, so he will relieve you.
 9 MR HANABE: Yes.
 10 CHAIRPERSON: When he gets tired, you
 11 will relieve him.
 12 MR HANABE: Thank you.
 13 MR NGALWANA: I take it the interpreter
 14 will taken as having been sworn in, Chair. I can continue?
 15 MR MAHLANGU: I am a sworn interpreter.
 16 CHAIRPERSON: Well, if he hasn't been, we
 17 are in big trouble because he's been interpreting since the
 18 beginning of the hearing. But I understood he was sworn
 19 in, but ex abundante cautela as they say in IsiXhosa. Let's
 20 just check. Mr Mahlangu, you were sworn in as an
 21 interpreter, many years ago, I believe?
 22 MS MAHLANGU: The first oath that I took
 23 was 48 years ago. The second one was when I took the oath
 24 as an interpreter of this commission.
 25 CHAIRPERSON: In Kempton Park.

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1 MR MAHLANGU: That's correct.
 2 CHAIRPERSON: In October or September I
 3 think it was.
 4 MR MAHLANGU: It was in the beginning of
 5 October.
 6 CHAIRPERSON: And you still regard
 7 yourself as bound by the oath you took?
 8 MR MAHLANGU: Very much so.
 9 CHAIRPERSON: Are you happy now?
 10 MR NGALWANA: It was a facetious remark,
 11 not worthy of counsel.
 12 CHAIRPERSON: I didn't.
 13 MR NGALWANA: Mr Magidiwana, you are not
 14 suggesting that everyone at the mine stayed away from work,
 15 are you?
 16 MR MAGIDIWANA: I say, I am not saying
 17 so.
 18 MR NGALWANA: I just want to get it
 19 clear, you are not saying everyone was on strike.
 20 MR MAGIDIWANA: I am saying, that I sat
 21 in my house, because nobody said there were people that
 22 were going to work, so I remained in my house as well.
 23 MR NGALWANA: So you are saying everyone
 24 was on strike.
 25 MR MAGIDIWANA: I saw everybody to have

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1 been on strike. There were no buses going up and down.
 2 MR NGALWANA: If that is indeed so, why
 3 would the RDOs appeal to other workers to join the strike?
 4 MR MAGIDIWANA: Just repeat the question.
 5 MR NGALWANA: If everyone was on strike,
 6 why would the RDOs appeal to other workers who were not
 7 RDOs to join the strike?
 8 MR MAGIDIWANA: I think this thing
 9 started going to the operators, when we, as generals, came
 10 from work, we were then told that everybody at Lonmin will
 11 not go to work because we wanted money. What we actually
 12 wanted was money.
 13 MR NGALWANA: Mr Magidiwana, you said
 14 everyone was on strike. Yet you say the RDOs appealed to
 15 other workers to join the strike. Why would the RDOs
 16 appeal on everyone to join the strike if everyone was on
 17 strike?
 18 MR MAGIDIWANA: Everybody had been told
 19 not to go work, people did not go to work, everybody wanted
 20 what the RDOs were demanding, money.
 21 MR NGALWANA: Now, if you say everyone
 22 stayed at home, in other words, didn't go to work, that is
 23 your evidence, correct?
 24 MR MAGIDIWANA: They were not speaking of
 25 specific people, they were saying everyone that's employed

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1 by Lonmin.
 2 MR NGALWANA: Yes, I am talking more
 3 about a more nuanced evidence, you say everyone, you didn't
 4 know of anyone who went to work.
 5 MR MAGIDIWANA: I haven't heard of
 6 anyone.
 7 MR NGALWANA: How do you reconcile that
 8 evidence with your statement at which you say, some of the
 9 workers told you that they had been stopped from going to
 10 work.
 11 MR MAGIDIWANA: No, this does not say
 12 that.
 13 MR NGALWANA: Well, let's read it into
 14 the record. You say in paragraph 4, I will read the entire
 15 paragraph just in case we are told we are not reading
 16 things in context. You say, "On or about the 10th or 11th
 17 of August 2012, I got wind of the fact that the rock drill
 18 operators, RDOs, had taken a decision to go on strike."
 19 You then continue, you say "They also appealed to other
 20 workers, who were not RDOs to join the strike."
 21 MR MAGIDIWANA: That is correct.
 22 MR NGALWANA: Then you say, "Some of the
 23 workers told me that they had been stopped from going to
 24 work." So it is not correct, is it, for you to now –
 25 MR MAGIDIWANA: That they were told not

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1 to go to work?
 2 MR NGALWANA: Were stopped from going to
 3 work. Your words, not mine. So when you say, let me help
 4 you, you don't know of anyone who went to work.
 5 MR MAGIDIWANA: I am still saying that.
 6 MR NGALWANA: It is a lie because you
 7 know of people who were stopped while going to work.
 8 CHAIRPERSON: It's not customary for
 9 counsel to put to the witnesses they are telling lies, it's
 10 not, sometimes you do it in extreme circumstances but not
 11 what we expect, and good counsel never do it.
 12 MR NGALWANA: I'll take the reprimand,
 13 Chair, thank you. It is untrue, incorrect for you to say
 14 that you know of no one who went to work because in your
 15 statement you said you knew of people who told that they
 16 had been stopped from going to work.
 17 MR MAGIDIWANA: Can I respond to that?
 18 It is so, I did not personally hear it that there were
 19 people that were stopped from getting to work.
 20 MR NGALWANA: Are you done, is that the
 21 complete answer?
 22 MR MAGIDIWANA: Yes.
 23 MR NGALWANA: Well, you put it higher
 24 than simply hearsay in your statement. You say in fact
 25 people told you that they themselves had been stopped. So

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1 it is incorrect, it is untrue when you say that you knew of
 2 no one who went to work, when in your own statement, you
 3 say people told you that they stopped from going to work.
 4 MR MAGIDIWANA: I did not hear people
 5 saying that they had been stopped from going to work.
 6 [14:42] CHAIRPERSON: That must mean that the
 7 statement in the third sentence of paragraph 4 of your
 8 affidavit is incorrect. Sorry, it's not an affidavit; it's
 9 a statement, but anyway, the statement in the third
 10 sentence of paragraph 4 of your written statement is
 11 incorrect.
 12 MR MAGIDIWANA: It then means it's not
 13 truthful.
 14 CHAIRPERSON: But you've already told us
 15 that your statement was read to you, you were satisfied
 16 with it. Isn't that so? You signed it.
 17 MR MAGIDIWANA: Yes, Sir.
 18 CHAIRPERSON: Signed it?
 19 MR MAGIDIWANA: I signed it, yes.
 20 CHAIRPERSON: And when it was being read
 21 to you, didn't you notice that that statement, third
 22 sentence of para 4 was incorrect?
 23 MR MAGIDIWANA: I was not aware of it.
 24 CHAIRPERSON: Please proceed.
 25 MR NGALWANA: Thank you, Chair. Again I

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1 shall argue that in this respect you have shown yourself to
 2 be an unreliable witness, and that your evidence in this
 3 regard, and perhaps in others, should be treated with great
 4 caution. I am going to play a short clip and –
 5 CHAIRPERSON: Should we give any warnings
 6 before the clip is shown?
 7 MR NGALWANA: No, Chairperson.
 8 CHAIRPERSON: Good.
 9 MR NGALWANA: And I just want you to
 10 identify yourself in that crowd. Is that you?
 11 CHAIRPERSON: There are a number of
 12 people in the frame at the moment. Are you one of the
 13 people that we can see there in that part of the clip?
 14 MR NGALWANA: Can I phrase it this way,
 15 Chairperson? Are you the one adorned in a red - is it
 16 maroon or red? - towel or blanket? I think that's a
 17 better picture. Perhaps if we can see -
 18 MR MAGIDIWANA: I'm not very sure.
 19 MR NGALWANA: May I ask, Chairperson,
 20 because this is an important thing for him to know, whether
 21 he's –
 22 CHAIRPERSON: I've got to ask you to
 23 identify the clip, so let's get that on record first before
 24 we proceed. Do you know what the clip is, or does Ms
 25 Pillay know? Have we seen it before?

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1 MR NGALWANA: I don't believe it's been
 2 played before, Chairperson, so it will be a new clip.
 3 CHAIRPERSON: Alright, will you please
 4 identify it and then Ms Pillay will hopefully give us the
 5 next exhibit number.
 6 MR NGALWANA: May I ask that the exhibit
 7 number be given and then I shall give a definition of it
 8 afterwards?
 9 CHAIRPERSON: That's fine. What is the
 10 next –
 11 MS PILLAY: Chair, if I may request that
 12 we first get the description because there are clips of
 13 this very nature that are exhibits already, so we won't
 14 duplicate those exhibits. I think there are four exhibits
 15 already with the similar footage, so it will be useful if
 16 Mr Ngalwana could tell us what the name is of the, the
 17 description of the clip.
 18 CHAIRPERSON: Well, isn't it possible – I
 19 don't want to waste time – isn't it possible we carry on
 20 and then in the tea adjournment or something we can,
 21 perhaps tomorrow morning, we can identify, put it then on
 22 record, and we will give it a number in the meanwhile and
 23 if it turns out you've got it already, we will – in fact,
 24 anyway, this particular section, perhaps even a hardcopy of
 25 this frame could in any event be produced, would suffice.

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1 So let's give it an – what's the next exhibit number?
 2 MS PILLAY: It would be EEE4, Chair.
 3 CHAIRPERSON: Thank you, Ms Pillay. So
 4 it's a video clip showing what SAPS allege is the witness,
 5 right? Is it a clip taken on the 16th?
 6 MR NGALWANA: That's the detail I wish to
 7 give after we've asked a few questions, Chair.
 8 CHAIRPERSON: Alright, okay. So let's
 9 carry on in the meanwhile and we'll sort it out later,
 10 otherwise we waste time.
 11 MR NGALWANA: Chairperson, inconvenient
 12 as it might be for the witness, and I'm sympathetic, it may
 13 very well be that it may be necessary for him to go closer
 14 to the image in order for him to see.
 15 CHAIRPERSON: Can you perhaps move on to
 16 another point, unless this is vital in a carefully
 17 calibrated cross-examination, if you can move on to another
 18 point and during the tea adjournment he could then look at
 19 it when he walks past, because as you can see, he has
 20 difficulty moving and it will be better if he looks at it
 21 during the tea adjournment. So if you can move on to
 22 another point it will be helpful.
 23 MR NGALWANA: Mr Magidiwana, in your
 24 statement – please correct me if I'm wrong – you seem to
 25 give the impression that you arrive at the koppie on the –

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1 let me just see, ja – on the 16th of August, and you say you
2 first went to the kraals to check on your cow.
3 MR MAGIDIWANA: That is correct.
4 MR NGALWANA: You then proceeded to join
5 the crowd on the koppie.
6 MR MAGIDIWANA: Yes.
7 MR NGALWANA: I take it, according to
8 your evidence, that that was the first time that you went
9 to the koppie?
10 MR MAGIDIWANA: Yes.
11 MR NGALWANA: No, I didn't say
12 "indiyamkela." I take it as a more nuanced, what you are
13 saying is that the 16th was the first time you went to the
14 koppie, not that I accept it.
15 MR MAGIDIWANA: That's what I'm saying,
16 yes.
17 MR NGALWANA: This was your first year of
18 work. Correct?
19 MR MAGIDIWANA: Yes.
20 MR NGALWANA: Lonmin must have been
21 paying you handsomely if you can afford to buy a cow in
22 your first year of work, not so?
23 MR MAHLANGU: He's laughing at it.
24 MR NGALWANA: Would you care to comment?
25 MR MAGIDIWANA: It wasn't paying me well.

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1 MR NGALWANA: At which kraal did you keep
2 this cow?
3 MR MAGIDIWANA: The one with the shack.
4 MR NGALWANA: Can I take it, because I
5 just want to understand, was it the kraal next to which
6 scene 1 happened?
7 MR MAGIDIWANA: That's the kraal, yes.
8 MR NGALWANA: Just for clarity, can I
9 take you to slide 194? In which of those two kraals was
10 your cow?
11 MR MAGIDIWANA: There are three kraals
12 there. There's the one kraal that is surrounded by fence.
13 MR NGALWANA: So the kraal to which you
14 refer is not shown in that slide. Is that what you say?
15 MR MAGIDIWANA: No, it's not appearing on
16 this photo, on this slide.
17 MR NGALWANA: Now on the 16th you go there
18 on the koppie.
19 MR MAGIDIWANA: That's right.
20 MR NGALWANA: In the morning, I take it.
21 MR MAGIDIWANA: Yes, the morning.
22 MR NGALWANA: Okay, well Xhosa being a
23 pregnant language, "ekuseni" as I understand it, is very
24 early morning. "Khusasa" is morning -
25 MR MAGIDIWANA: That's exactly what I

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1 mean, very early morning.
2 MR NGALWANA: What time would that be
3 roughly?
4 MR MAGIDIWANA: It could have been about
5 6.
6 MR NGALWANA: You go to the koppie at
7 about 6 in the morning to listen to? Perhaps let me – I'm
8 sorry, you can answer if you want, but I want to rephrase
9 the question. But if you want to answer it as put to you,
10 you may go ahead.
11 MR MAGIDIWANA: I decided to go, I went
12 to the kraal. I decided to go to the kraal first. When I
13 went out of the kraal, I realised there were people over
14 there and I decided to let me go to those people.
15 MR NGALWANA: Why? Why did you go to the
16 kraal? Sorry, I meant the mountain, or the koppie.
17 MR MAGIDIWANA: The reason was I had
18 heard that there would be a leader coming to the mountain
19 with a report and I was interested in this report.
20 MR NGALWANA: And you say you heard about
21 this on the previous day?
22 MR MAGIDIWANA: The 15th.
23 MR NGALWANA: From one of the workers,
24 you say.
25 MR MAGIDIWANA: Yes.

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1 MR NGALWANA: I think you called him
2 Lucky.
3 MR MAHLANGU: Come again, Sir.
4 MR NGALWANA: You called him Lucky.
5 MR MAGIDIWANA: Lucky.
6 MR NGALWANA: Do you know his full name?
7 MR MAGIDIWANA: I only know him as Lucky.
8 MR NGALWANA: Was he an RDO?
9 MR MAGIDIWANA: It's a person that I used
10 to meet in the soccer matches. I don't know which side he
11 works.
12 MR NGALWANA: Where does he tell you
13 this?
14 MR MAGIDIWANA: He was going past my
15 house.
16 MR NGALWANA: So you were at your house?
17 MR MAGIDIWANA: I was outside.
18 MR NGALWANA: Just outside your house?
19 MR MAGIDIWANA: Yes, in the yard.
20 MR NGALWANA: And we're now talking about
21 Wednesday, the 15th?
22 MR MAGIDIWANA: Yes.
23 MR NGALWANA: So lucky tells you that
24 there's going to be a report-back from a leader of the
25 union, at the koppie.

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1 MR MAGIDIWANA: Yes, the morning.
 2 MR NGALWANA: And so you wake up in the
 3 morning, you go to the kraal to check out your new cow, and
 4 then you proceed to the koppie?
 5 MR MAGIDIWANA: Yes, I decided on that
 6 day that I must personally go there to hear myself.
 7 MR NGALWANA: Around 6 in the morning?
 8 MR MAGIDIWANA: That is right. The
 9 reason I woke up so early was that the cattle usually go
 10 out of the kraal in the morning, so I went to see the –
 11 MR NGALWANA: At what time did Mr
 12 Mathunjwa arrive at the koppie?
 13 MR MAGIDIWANA: He arrived quite [as he
 14 puts it, "ekuseni"] still early morning. I wasn't aware of
 15 the time. 10 or 11.
 16 MR NGALWANA: And he addressed the crowd
 17 –
 18 CHAIRPERSON: I think what you meant to
 19 ask was what time was he due to arrive.
 20 MR NGALWANA: Well as the Chairperson
 21 pleases. I was going to ask both questions.
 22 MR MAGIDIWANA: It was said he would
 23 arrive in the morning, but the time wasn't mentioned.
 24 MR NGALWANA: So he arrived in the –
 25 CHAIRPERSON: At this point we'll take

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1 the adjournment.
 2 [COMMISSION ADJOURNS COMMISSION RESUMES]
 3 [15:17] CHAIRPERSON: The Commission will resume.
 4 Mr Magidiwana, you're still under oath.
 5 MZOLOLO MAGIDIWANA (CONTD.): Yes.
 6 CHAIRPERSON: And Mr Ngalwana, you're
 7 still cross-examining. I understand that during the
 8 adjournment – well, let's get it from him. Is it correct
 9 that during the adjournment you had a look at the screen
 10 and in fact I think you were brought a computer and shown a
 11 picture on the computer as well? Is that correct?
 12 MR MAGIDIWANA: I did, Sir.
 13 CHAIRPERSON: You can now carry on, Mr
 14 Ngalwana.
 15 MR NGALWANA: Yes, Chair, I'll finish the
 16 other question later, but I wanted to go back to this
 17 slide, or footage. I wanted Mr Duncan Scott to - and I was
 18 busy talking to my learned friend Mr Mpofo about it, but
 19 had to rush to my seat – to perhaps show at closer range
 20 the Commissioners, because it may not be clear at a
 21 distance, on computer and then put it on the, as we've done
 22 with the witness, so that the Commissioners can see on
 23 computer the image, whether it is that of the witness or
 24 not, and then we play it on the –
 25 CHAIRPERSON: Is there a computer that's

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1 available for us to look at?
 2 MR NGALWANA: Yes.
 3 CHAIRPERSON: And has counsel seen it as
 4 well? They've of course got -
 5 MR MPOFU: Ja, Chairperson –
 6 CHAIRPERSON: - hard drives and things on
 7 their own computers.
 8 MR MPOFU: Yes, Chairperson, maybe it can
 9 be emailed or sent to us. That's why I was asking, when
 10 the Commissioners came in I was actually asking Mr Ngalwana
 11 whether this is part of the discovered documents, because
 12 then we can find it for ourselves if it is. I actually am
 13 the one who made the suggestion of doing it on computer
 14 because the resolution on the screens is just not helpful.
 15 CHAIRPERSON: I understand. Now the
 16 question is, do we take the point further now and are we
 17 shown the computer which shows this clearly, or do we leave
 18 it over till tomorrow? Because it looks to me, being my
 19 usual pessimistic self, that Mr Ngalwana probably won't be
 20 able to finish his cross-examination today.
 21 MR MPOFU: Yes, I would tend to agree
 22 with that, Chair, in which case then if they can send it,
 23 if it's discovered they can identify it. If it's not, they
 24 can send it to us and then it can be dealt with tomorrow.
 25 CHAIRPERSON: Alternatively, if the

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1 computer is here we can, I suppose, you'd always be able to
 2 do re-examination tomorrow. Perhaps we could look at it
 3 now while it's fresh in our memories.
 4 MR NGALWANA: Yes, thank you,
 5 Chairperson. Mr Duncan Scott is on his way down, it should
 6 take a matter of seconds to be here, but in the meantime
 7 let me continue with my other line of questioning –
 8 CHAIRPERSON: Yes, carry on with your
 9 other line. Mr Ntsebeza has raised his hand, but if it
 10 relates to this point, let Mr Ngalwana carry on with his
 11 other point for the moment and when we get to this point
 12 you can then turn your machine on again and speak –
 13 MR NTSEBEZA SC: Now that he's carrying
 14 on with another point, Chair, I'm okay.
 15 CROSS-EXAMINATION BY MR NGALWANA (CONTD.):
 16 Mr Magidiwana, so you arrive at the koppie on the 16th in
 17 the morning and Mr Mathunjwa arrives at some stage in the
 18 morning, but not "ekuseni."
 19 MR MAGIDIWANA: That is so.
 20 MR NGALWANA: Sorry, Chairperson, I've
 21 asked one question in that line. Now Colonel Duncan Scott
 22 is here –
 23 CHAIRPERSON: Let's look at the computer.
 24 When I came in I noticed you were showing something,
 25 Colonel, to the witness. So he's seen it, is that right?

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1 Right. You're not under oath, so you can just nod your
2 head. Now can you bring it to us here so that we can look
3 at it? This is not the same picture as that one. The
4 picture on the screen, you're showing us a picture on the
5 computer. The picture shown on the screen has in the
6 middle of the front row a gentleman with a yellow upper
7 garment, because his arms are in front of him with the
8 yellow sleeves. So that's not the document you showed us
9 now. We've now seen on the computer the clip which is on
10 the screen in front of us, which will be identified
11 presumably later. Perhaps it should be seen by – can you
12 quickly show it to counsel? Mr Ntsebeza particularly I
13 think would like to see it, because he's raising his hand.

14 MR MPOFU: Chairperson, in the meantime,
15 my question remains unanswered, whether this is part of the
16 documentation. Ms Pillay says she doesn't know. Is it
17 part of the discovered documents?

18 CHAIRPERSON: It's got to be part of the
19 SAPS –

20 MR NGALWANA: Yes.

21 CHAIRPERSON: - documentation because the
22 Colonel has got it on his computer. If it's on the
23 Colonel's computer and it's not part of the SAPS
24 documentation, then I would want to know why it wasn't
25 given, but I suspect it was given, to be fair. Alright, so

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1 the answer to your question is probably yes.

2 MR MPOFU: Okay, maybe I'll get a
3 definite answer later. Thank you, Chairperson. Yes,
4 sorry, Colonel.

5 CHAIRPERSON: Colonel, can you also show
6 it, please, to Mr Burger and Mr Tip and the other counsel,
7 Mr Bizos and so?

8 MR NGALWANA: I can give my learned
9 friend a definite answer now, Chairperson. Our
10 instructions –

11 CHAIRPERSON: Well, he's not – I think,
12 Mr Burger, would you like to see it? No. Any of the other
13 counsel like to – no?

14 MR BUDLENDER SC: Chair, we haven't seen
15 it –

16 MR BIZOS SC: It's part of the –

17 MR BUDLENDER SC: Oh, sorry.

18 MR BIZOS SC: We don't want to see it.

19 CHAIRPERSON: They don't want to see it.
20 Alright, okay, thank you, Colonel. Mr Ntsebeza wants to
21 say something. You want to see it?

22 MR NTSEBEZA SC: Thank you, Chair. I
23 just want it to be established whether this material is
24 material that was given to the evidence leaders for
25 purposes of it reaching all the parties so that when this

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1 is referred to, we will have had an opportunity to consult
2 on the basis thereof and/or to make whatever –

3 CHAIRPERSON: Right, okay.

4 MR NTSEBEZA SC: Speaking for myself, I
5 would like to know that all the material of this nature
6 that gets referred to is either with at least the evidence
7 leaders, but has not inadvertently been distributed to all
8 of the parties, or it is material that comes now, because
9 if the material is going to be discovered on the hoof, then
10 we are going to run into problems.

11 CHAIRPERSON: I agree. Alright, let's
12 first ask Mr Ngalwana to give us the information he wants
13 to give us, and then let's ask Ms Pillay if she distributed
14 it to everybody. Mr Ngalwana?

15 MR NGALWANA: My instructions, Chair, as
16 I recall, was that this footage is part of the video thing
17 in the police external hard drive.

18 CHAIRPERSON: So that's the answer to
19 that one. Now the next question is addressed to Ms Pillay.
20 Can you answer it?

21 MS PILLAY: Chair, that's what we've been
22 trying to establish, what the description is of the
23 particular shot, because once we know which video it
24 belongs to, we will be able to tell the parties where to
25 find it on the SAPS external hard drive.

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1 CHAIRPERSON: Mr Ntsebeza wants to know
2 something else. He says, is this a video which the SAPS
3 made available to the evidence leaders, but which the
4 evidence leaders inadvertently failed to send to the
5 parties? That's his question.

6 MS PILLAY: If it is part of the SAPS
7 external hard drive, then all the parties have had it
8 historically, Chair.

9 CHAIRPERSON: The position at the moment
10 is Mr Ngalwana says it's part of the SAPS hard drive and Ms
11 Pillay says that in that event it's been sent to all the
12 parties, but Mr Budlender is raising his hand, I don't know
13 whether he wants to say something.

14 MR BUDLENDER SC: Chair, isn't there a
15 short answer, if our colleagues can tell us where it is on
16 the SAPS hard drive then we'll be able to find, to see it
17 or not see it, as the case may be. We're similarly in the
18 dark.

19 MR NTSEBEZA SC: Maybe you want to say it
20 was taken on the 13th and therefore, you know, there is
21 something discrepant in the statement. If that is so, well
22 I can understand, but they can approach the Chair on that
23 basis.

24 CHAIRPERSON: Perhaps Mr Ngalwana can
25 tell us now where is it on the SAPS hard drive? Do you

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1 know?

2 MR NGALWANA: Well, I shall do so as soon

3 as I've posed the questions to the witness, Chair. I see

4 it won't be long –

5 CHAIRPERSON: Okay, let him carry on with

6 his questions.

7 MR BUDLENDER SC: Chair, can I just say

8 also, we haven't seen it yet, but we'll ask to see it in

9 due course, if necessary.

10 MR NGALWANA: And this is not the only

11 footage; we have about five of the footages. I will take

12 this as the first footage. Mr Magidiwana, I take it you

13 have now been shown the various videos during the tea

14 adjournment.

15 MR MAGIDIWANA: Yes.

16 MR NGALWANA: How many were you shown?

17 MR MAGIDIWANA: Two.

18 MR NGALWANA: Is the one that is

19 currently on view one of them?

20 MR MAGIDIWANA: Yes, Sir.

21 MR NGALWANA: Are you now able to tell

22 the Commission whether or not that is you in that red

23 blanket, or towel?

24 MR MAGIDIWANA: What confuses me is the

25 blanket.

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1 MR NGALWANA: Yes, but when you look at

2 the image on the face.

3 MR MAGIDIWANA: The clothing that the

4 person is wearing looks like mine, but I'm not sure, it's

5 not very clear, the photo is not very clear.

6 MR NGALWANA: So if the –

7 CHAIRPERSON: Sorry, what do you say

8 looks like yours?

9 MR MAGIDIWANA: The person, what the

10 person is wearing.

11 CHAIRPERSON: I see. What about the

12 face? The face the person is wearing, does that look like

13 yours too?

14 MR MAGIDIWANA: The face is not clear.

15 MR NGALWANA: So you say the clothing of

16 the person seems like what you were wearing on that day.

17 Correct me if I'm wrong.

18 MR MPOFU: Sorry, on what day is Mr

19 Ngalwana referring to? He can't just say "on that day."

20 MR NGALWANA: Well –

21 CHAIRPERSON: Yes, you've got to indicate

22 what day it is.

23 MR NGALWANA: Let me ask it differently.

24 When you say the clothing that the person in the image is

25 wearing are the clothes you were wearing, on whatever day,

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1 it is then reasonable to presume that that may be you?

2 MR MAGIDIWANA: I'm not sure.

3 MR NGALWANA: In other words, you can't

4 rule out that that may be you? It's a possibility?

5 MR MAGIDIWANA: Possibly.

6 MR NGALWANA: If I can ask for us to show

7 the next footage –

8 CHAIRPERSON: Again I take it that all

9 the pictures you are going to show were part of the SAPS

10 hard drive, were made available to the evidence leaders,

11 and according to Ms Pillay were sent to all the parties?

12 MR NGALWANA: Those are my instructions,

13 Chairperson. May I ask that we play the next video

14 footage?

15 [VIDEO RECORDING PLAYED]

16 MR NGALWANA: Mr Magidiwana, were you

17 shown that footage during the tea adjournment?

18 MR MAGIDIWANA: Yes, there was another

19 footage I was shown here during the time.

20 CHAIRPERSON: The question is, was that

21 the clip that you were shown? Or one of the two clips you

22 were shown during the tea adjournment.

23 MR MAGIDIWANA: I saw two clips, yes.

24 CHAIRPERSON: The question is, is that

25 clip, the one we can see now, one of the clips that you saw

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1 during the tea adjournment?

2 MR MAGIDIWANA: The gentleman who was

3 here in front of me, this is one of the clips he showed me.

4 MR NGALWANA: This is not a trick

5 question. Have you been able to identify yourself in that

6 clip?

7 MR MAGIDIWANA: This one is not at all

8 clear, more unclear than the other one.

9 MR NGALWANA: May I ask that we –

10 CHAIRPERSON: Sorry, can you perhaps tell

11 us which person whom we can see on the screen is alleged by

12 your clients to be the witness?

13 MR NGALWANA: May I ask the operators to

14 put the cursor where the witness is alleged to be?

15 CHAIRPERSON: The cursor has been put on

16 the face of a gentleman on the extreme right-hand side of

17 the clip, when in fact if one looks at the extreme right-

18 hand side there seem to be two faces, one gentleman with

19 what looks like a light-coloured top in the bottom corner,

20 and then immediately above him is the face of a gentleman,

21 which is pointed to by the cursor.

22 MR MAHLANGU: Whilst the Chairperson was

23 saying this, the witness responded. He said "It looks like

24 it is me."

25 MR NGALWANA: I take it that you've

Page 6062

1 identified that as being yourself?

2 CHAIRPERSON: He didn't say that. He

3 said "It looks like me." That's not quite the same. It's

4 almost there, but not entirely so.

5 MR NGALWANA: That's why I'm asking a

6 follow-up question, Chair.

7 MR MAGIDIWANA: I am saying it looks like

8 it is me.

9 MR NGALWANA: Is there any aspect that's

10 unclear that makes you not sure that it is you?

11 MR MAGIDIWANA: Yes.

12 MR NGALWANA: What is it?

13 MR MAGIDIWANA: The photo is not very

14 clear.

15 [15:37] MR NGALWANA: In the previous picture,

16 you've identified the clothing as resembling your clothing.

17 MR MAGIDIWANA: Yes.

18 MR NGALWANA: But you couldn't clearly

19 identify the face.

20 MR MAGIDIWANA: Yes.

21 MR NGALWANA: In this picture the face is

22 clearer than the previous picture, by comparison.

23 MR MAGIDIWANA: Yes, it's much more

24 clearer.

25 MR NGALWANA: And yet you still are

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1 unclear as regards to whether that is you or not. You say

2 it could be?

3 MR MAGIDIWANA: Yes.

4 CHAIRPERSON: May I ask whether it's

5 possible for the operators to zoom in on that face and give

6 us a larger version? The reason I asked the question was I

7 think above the head of the gentleman in front one can see

8 what looks like a little bit of the clothing of the person

9 and it looks red actually to me, but anyway, but if it can

10 be enlarged we would be able to say with greater certainty

11 what we see there.

12 MR NGALWANA: Yes. Perhaps this will

13 become controversial, Chairperson. It thought it was going

14 to be the most simplest thing to do. We may with available

15 technology, I hope, be able to enlarge it and present it as

16 a still photograph.

17 CHAIRPERSON: Yes, I see. That obviously

18 can't be done now; that could only be done by tomorrow at

19 the earliest, so let's carry on in the meanwhile with your

20 next point.

21 MS PILLAY: Sorry, Chair, for the

22 purposes of the record, we may need to mark the shot as an

23 exhibit, because that's what we did with the previous shot.

24 CHAIRPERSON: I understand that Mr

25 Ngalwana can't give us that detail at the moment, but he

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1 will give it to us later, but we have now got a larger

2 picture and it appears that gentleman is wearing what looks

3 like one thing that's green and one thing that's red. If

4 one looks at the top, his top around the neck, his top

5 piece, if one can call it that, appears to be green, and in

6 front of him there's something that's red. That will also

7 become more apparent, I take, on the hardcopy we're going

8 to get.

9 MR MAHLANGU: May I explain something?

10 The witness wants to say something.

11 MR MAGIDIWANA: It is now clearer to me.

12 When I'm looking at it, it definitely looks like me. It

13 seems that it is me.

14 MR NGALWANA: Mr Magidiwana, is it or is

15 it not you?

16 MR MAGIDIWANA: It seems it is me.

17 MR NGALWANA: You prefixed that answer a

18 moment ago by saying "ikatlile ngoko," which means it is

19 clear now.

20 MR MPOFU: The picture. The witness said

21 "ikatlile ngoko," which means it is clearer now, and in the

22 same sentence said, "ingati indim(?)," which means it seems

23 like it is me.

24 MR MAHLANGU: And that is how I

25 interpreted it, Mr Chair.

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1 MR NGALWANA: That is precisely the

2 seeming, shall I elevate it to the standard of a paradox or

3 an oxymoron, Chairperson –

4 CHAIRPERSON: Well, let's not go into

5 those Greek, grammatical terms, but it could be your

6 double. Have you got a twin? Have you got an identical

7 twin?

8 MR MAGIDIWANA: I have a brother.

9 CHAIRPERSON: Well, is he your twin?

10 MR MAGIDIWANA: No, but we look the same.

11 CHAIRPERSON: I see, and was he at Lonmin

12 in August last year?

13 MR MAGIDIWANA: Yes, he also works.

14 CHAIRPERSON: What's his name?

15 MR MAGIDIWANA: Mzolisi is his name.

16 CHAIRPERSON: I see. Where does he live?

17 MR MAGIDIWANA: He stays at Nkaneng.

18 CHAIRPERSON: Where is he now?

19 MR MAGIDIWANA: He's around.

20 CHAIRPERSON: Has he got a green T-shirt

21 and a red blanket?

22 MR MAGIDIWANA: No.

23 MR NGALWANA: Mr Magidiwana, it is pretty

24 clear that that is you in that picture, and any denial of

25 that fact by you -

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1 MR MAGIDIWANA: I wouldn't say any other
2 thing, if you say so, Sir.
3 MR NGALWANA: And any denial by you that
4 that is you is an untruth.
5 MR MAGIDIWANA: You say if I deny then
6 I'm not telling the truth?
7 MR NGALWANA: Correct.
8 MR MAGIDIWANA: I am saying, Chair, I'm
9 not very certain.
10 MR NGALWANA: We've established that you
11 don't have an identical twin. We've established that
12 whoever you have as a brother doesn't have a red blanket
13 and a green top.
14 MR MAGIDIWANA: Yes.
15 MR NGALWANA: And therefore that can only
16 be you. That can only be you.
17 MR MAHLANGU: That can only be you on the
18 picture.
19 MR MAGIDIWANA: If it is so, Sir, whereas
20 you say it.
21 CHAIRPERSON: You've probably extracted
22 as much by way of admission out of him that you could
23 reasonably expect. I don't think you need try to drive the
24 screw in any further. It's gone in as far as it will go.
25 I suggest you move on to the next point.

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1 MR NGALWANA: Let me put this proposition
2 to you, and perhaps give you a final chance to confirm to
3 this Commission that the 16th of August 2012 was not the
4 first time that you visited the koppie. You had in fact
5 been to the koppie previously.
6 MR MAGIDIWANA: I don't remember going
7 there.
8 MR NGALWANA: Sorry, what's your answer?
9 You do not remember?
10 MR MAGIDIWANA: Yes, that's my answer.
11 MR NGALWANA: So if you do not remember,
12 you then cannot deny when you are told categorically that
13 you were there prior to the 16th?
14 CHAIRPERSON: It's a rather vague
15 question. He works there. He might have – "Have you been
16 there previously?" is far too vague a suggestion, but if
17 you want to limit it to the period from the 9th to the 15th,
18 you can do so, but just to say vaguely "You've been there
19 previously," takes us no further.
20 MR MAGIDIWANA: If counsel could explain
21 to me when exactly.
22 MR NGALWANA: You had been at the
23 gathering of the protesters, or the striking workers, on
24 the koppie before the 16th of August 2012.
25 MR MAGIDIWANA: The day I am certain of

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1 is the day on which I have explained, Chair. I don't know
2 of any other day.
3 MR NGALWANA: You were in fact at the
4 koppie at the gathering of protesters on the 15th, which was
5 a Wednesday, 15th of August 2012.
6 MR MAGIDIWANA: What if I say I didn't
7 go?
8 MR NGALWANA: Well, that would be an
9 untruth, I put it to you.
10 MR MAGIDIWANA: Explain then in your own
11 words, Sir.
12 MR NGALWANA: The picture that's on the
13 screen now is part of a video that was taken on the 15th of
14 August 2012.
15 MR MAGIDIWANA: No, no, I wasn't there,
16 Sir.
17 MR NGALWANA: And so was the previous
18 video, EEE4.
19 MR MAGIDIWANA: But on the 15th, no I did
20 not go there.
21 MR NGALWANA: So it would be your word
22 against objective evidence.
23 MR MPOFU: Sorry, Chairperson –
24 MR NGALWANA: Do you wish to comment?
25 MR MPOFU: I'm sorry, Mr Ngalwana. I

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1 think in the light of this controversy and the fact that
2 this presentation is not yet evidence, maybe Mr Ngalwana
3 should preface it by saying there will be evidence which
4 will establish the date. I'm sure it will be at some time
5 when the police come. It's just that, because this is not
6 yet –
7 CHAIRPERSON: That seems a fair
8 suggestion.
9 MR NGALWANA: May I ask, Chair, that this
10 footage be given EEE5? Because we already have EEE4. We
11 have now given it a description, that is a video that was
12 taken on the 15th of August 2012.
13 CHAIRPERSON: Well, the point made is
14 that we haven't heard that evidence yet, so what you can
15 legitimately say is that you will lead evidence to indicate
16 that this video was taken on the 15th of August.
17 MR NGALWANA: Yes, we shall certainly do
18 that.
19 CHAIRPERSON: And it's now been given an
20 exhibit number. Your case is it shows this witness there,
21 therefore his evidence that he wasn't there on the 15th
22 isn't correct. That you've already put. I don't know –
23 MR MPOFU: Yes, Chairperson, yes, I'd go
24 along with that. In other words if it is then established
25 that it was the 15th, then this evidence – ja.

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1 CHAIRPERSON: And then the next point is,
 2 if you can tell us where it is on the SAPS pathway, it will
 3 make it easier for Mr Mpfu and his assistants to find it
 4 on the hard drive. If you haven't got that at your
 5 fingertips at the moment you can communicate it to him
 6 perhaps electronically shortly after we adjourn so that he
 7 can look at the SAPS hard drive this evening.

8 MR NGALWANA: Subject to correction by
 9 those more knowledgeable about matters electronic, I could
 10 find it on the videos, the SAPS has a number of sub-files,
 11 the SAPS external hard drive, and under videos, if one
 12 clicks under videos, will go to dates and from those dates
 13 it starts at 9, 10, 11, 12, and at 15, you'll click there,
 14 it's one of those videos. I'm not sure which specific one
 15 it is.

16 CHAIRPERSON: Well, if you find which one
 17 it is specifically, send that electronically to Mr Mpfu
 18 and then he will be –

19 MS PILLAY: Chair, if I may just indicate
 20 for Mr Ngalwana's benefit that BB1 to BB6 are seven clips
 21 from 15th of August on the SAPS hard drive. So it would be
 22 useful if he could have a look at those and indicate which
 23 one of them is the video that he's referring to, the clip
 24 that he's referring to.

25 MR NGALWANA: I'm indebted to the ever

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1 efficient Ms Pillay.

2 CHAIRPERSON: So if that point has now
 3 been disposed of, we can move on to the next point. You
 4 put to the witness that he was there on the 15th; his
 5 evidence that he wasn't is untrue. I don't know whether
 6 you want to ask anything more about that at this stage,
 7 whether you want to move on to something else.

8 MR NGALWANA: Yes, I'll move on to
 9 something else, Chairperson. We now find ourselves on the
 10 16th of August 2012. Mr Mathunjwa arrives. We've
 11 established you arrived early in the morning. Mr Mathunjwa
 12 arrived at some time during the course of the morning, and
 13 then he addressed the crowd.

14 MR MAGIDIWANA: If you'll repeat the
 15 question, Sir.

16 MR NGALWANA: I'll move on. What did Mr
 17 Mathunjwa address you on that morning of the 16th of August
 18 2012?

19 MR MAGIDIWANA: Is it the morning or was
 20 it on a certain visit?

21 MR NGALWANA: No, I'm still on the first
 22 visit.

23 MR MAGIDIWANA: He said, "Workers, I'm
 24 from there. The employer did not give me, I was not given
 25 any attention because the big organisation is not there.

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1 We, the smaller organisations, are not being given any
 2 attention." He said, "I will go back there again. This is
 3 the message that I brought to you. Wait for me here; I
 4 will be back," he said. He then left. This is all I
 5 heard.

6 MR NGALWANA: What did you then do?
 7 MR MAGIDIWANA: I then went home to have
 8 a meal. That was when he left the morning.

9 MR NGALWANA: He came back in the
 10 afternoon.

11 MR MAGIDIWANA: I came back.
 12 MR NGALWANA: No, Mr Mathunjwa.
 13 MR MAGIDIWANA: Mr Mathunjwa yes, he did
 14 come back.

15 MR NGALWANA: And addressed you again.
 16 MR MAGIDIWANA: Yes, he did.
 17 MR NGALWANA: What was the gist of what
 18 he addressed you on?

19 MR MAGIDIWANA: He said to us, "Workers,
 20 the situation is bad. The decision has already been made
 21 about you that you are going to be killed. Move away from
 22 the place where you are because the situation is not
 23 encouraging, not good." The workers then responded by
 24 saying, "We are not moving from where we are without the
 25 employer coming, because what we want is money. Let him

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1 come with a response. We're waiting for him to come and
 2 tell us when he's going to give us the money, and
 3 after he had said that we would then go back, go back to
 4 work. We are not fighting."

5 [15:57] MR NGALWANA: So in light of what Mr
 6 Mathunjwa tells you, on your version, he says you must
 7 leave the koppie because you're going to be killed.

8 MR MAGIDIWANA: That is so. He said so.
 9 MR NGALWANA: Presumably he doesn't say
 10 by whom.

11 CHAIRPERSON: What was the answer to that
 12 question? Did Mr Mathunjwa say who was going to kill you?
 13 MR MAGIDIWANA: He said, "A decision has
 14 already been made by the employer about you that the police
 15 are going to kill you."

16 MR MAHLANGU: If I may just make certain.
 17 MR MAGIDIWANA: That the police had been
 18 sent to come and kill them.

19 MR NGALWANA: Are you sure about that?
 20 MR MAGIDIWANA: Yes, I am.
 21 MR NGALWANA: You do know that the
 22 address of Mr Mathunjwa has been reduced to writing? It's
 23 been transcribed.

24 MR MPOFU: Chair, maybe Mr Ngalwana can
 25 give us the reference?

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1 CHAIRPERSON: As far as I remember one of
2 them is reduced to writing.
3 MR MPOFU: The first one.
4 CHAIRPERSON: Yes, right. I thought the
5 evidence was the second one wasn't reduced to writing.
6 MR MPOFU: Well, it wasn't, but maybe the
7 police have another video.
8 CHAIRPERSON: Well perhaps – Mr Mpofo
9 wants to know have you got the reference to a recording of
10 the second address by Mr Mathunjwa on the 16th.
11 MR NGALWANA: Chairperson, I shall check
12 over the adjournment.
13 CHAIRPERSON: I see it's now 2 minutes to
14 4. Is this the second or the first? We have an exhibit
15 which is OO9, which Mr Tokoto draws to my attention, and on
16 page 12, I think it's the first address because it starts
17 with introductions of people to the people on the hill, but
18 at page 12 – and this witness, you will recall, says he
19 heard both addresses – I'm sorry, I'm wrong, it's page 13,
20 about a third of the way down, almost halfway, there's a
21 word underlined, sympathetic. "We showed you that we are a
22 sympathetic union," the word "friendly" having been taken
23 out, and then it goes on, "We, the union, want to free the
24 nation of God. I mean, comrade, let us not give Satan the
25 chance to see the bloodshed because the decision has been

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1 taken. The side has been taken, comrade; that is why we
2 are here amongst you without police escorting us," and so
3 forth. So what the witness says appears to be borne out by
4 page 13 of the transcript of the first address, which is
5 exhibit OO9.
6 MR MPOFU: Yes, Chairperson, the only
7 difficulty of course is that the question that is asked by
8 Mr Ngalwana pertained to the second address, and if –
9 CHAIRPERSON: Yes, fair enough –
10 MR MPOFU: Yes.
11 CHAIRPERSON: But he says it was recorded
12 and –
13 MR MPOFU: Oh, yes.
14 CHAIRPERSON: What you and I were
15 debating, Mr Mpofo, was our recollection is it wasn't
16 recorded, the second one –
17 MR MPOFU: Yes.
18 CHAIRPERSON: But only the first one was.
19 MR MPOFU: That's correct.
20 CHAIRPERSON: And then Mr Tokoto drew my
21 attention to the fact that in the first one there was a
22 reference –
23 MR MPOFU: He might have said the same
24 thing.
25 CHAIRPERSON: - which is what I've read.

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1 MR MPOFU: Thank you, Chairperson.
2 CHAIRPERSON: Anyway, we've now clarified
3 that, so perhaps Mr Ngalwana would just like to deal with
4 this point and then we'll take the adjournment till
5 tomorrow.
6 MR MPOFU: All I want to say,
7 Chairperson, is that if Mr Ngalwana said he'll check
8 obviously overnight; if he does then find the recording of
9 the second one, can he please distribute it to us?
10 CHAIRPERSON: Yes, well that – yes, I
11 think that follows because it hasn't been distributed. We
12 were under the impression there wasn't one and if one has
13 since been discovered, obviously it must be disclosed, and
14 I'm quite sure that if it hadn't been disclosed it was
15 because of a misapprehension and the belief that it had
16 been discovered. But anyway, the point you make is that if
17 there is such a thing and they've got it, they must send
18 it.
19 MR MPOFU: Thank you.
20 CHAIRPERSON: But Mr Ngalwana, let's not
21 get involved in that housekeeping aspect; let's deal with
22 the point you're busy with now as to what Mr Mathunjwa said
23 and whether he said to the people on the hill, "A decision
24 has been taken and you're going to be killed by the
25 police."

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1 MR NGALWANA: I may have made a mistake,
2 Chairperson, but I'll check overnight as regards whether
3 this relates to the second address or the first. I have
4 the excerpt which the Chairperson has just read. I don't
5 see anywhere – well, let me put it to the witness. Could I
6 ask you, Mr Magidiwana, to turn to – mine is not paginated,
7 unfortunately, Chairperson – to the page, I think you said
8 it's page 13, and go to the lines beginning, I suppose the
9 best way to start is where is Chairperson started, where it
10 says, "We showed you that we are sympathetic union."
11 CHAIRPERSON: Yes, in the left-hand
12 column of course is the original isiXhosa –
13 MR NGALWANA: Yes.
14 CHAIRPERSON: - version of what Mr
15 Mathunjwa said. I don't know whether he spoke isiXhosa or
16 isiZulu, but he certainly spoke an Nguni language. It's
17 the penultimate page, what some people call the second-last
18 page.
19 MR NGALWANA: Has the witness found the
20 passage? Mr Magidiwana, have you found –
21 MR MAHLANGU: The one we have is not
22 numbered. It's the second but last page?
23 CHAIRPERSON: Yes.
24 MR MAHLANGU: We have got the second –
25 CHAIRPERSON: - very last page.

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1 MR MAHLANGU: Yes.

2 CHAIRPERSON: And if you look down the

3 right-hand column, about a third of the way down you'll see

4 the word "sympathetic" underlined. So it's the only

5 underlined – no, well there are two underlined words in

6 that whole column, but it's the second one. So if you see

7 the word "sympathetic" underlined, you'll then be pretty

8 close to the passage we're talking about, and then on the

9 other side of the page in the first column you've got the

10 original Nguni words, I don't know if it's isiXhosa or

11 isiZulu, but –

12 MR MAHLANGU: On the left-hand side it's

13 in Zulu.

14 CHAIRPERSON: It is Zulu, because I see

15 the translation of, the word translated by "God" is

16 "uThixo," which I understand is a Zulu word. Is that

17 correct?

18 MR MPOFU: "uNkulunkulu." That's a Xhosa

19 word. Chairperson, you're quite correct.

20 CHAIRPERSON: Ja, alright.

21 MR MPOFU: So it's a mixture, but it's Mr

22 Mathunjwa's attempt at Xhosa, which is good enough. It's

23 Zulu/Xhosa.

24 MR MAHLANGU: That I can confirm. He was

25 actually addressing them in Zulu, but it had a very big

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1 mixture of Xhosa. He was actually attempting to speak to

2 them in Xhosa. We see the word "sympathetic" and then

3 "friendly" cancelled.

4 MR NGALWANA: As I take it, your evidence

5 is that Mr Mathunjwa said that the employer would send the

6 police to kill you. Do I understand you correctly?

7 MR MAGIDIWANA: That is what he said,

8 yes.

9 MR NGALWANA: For the sake of time I'm

10 going to read to you the Xhosa version, because while the

11 Nguni version –

12 CHAIRPERSON: Well, it's past 4. Perhaps

13 you'd like to do that tomorrow morning. Of course you will

14 remember, you know, in order to keep things focussed, this

15 witness has been talking about what Mr Mathunjwa said on

16 the second occasion. So as far as we know, as far as we

17 were told, what was said on the second occasion wasn't

18 recorded, but he did say something along those lines on the

19 first occasion, which means he may well have said something

20 like that on the second occasion as well. If of course the

21 police discover something that they previously didn't know

22 about, namely a recording of the second address, that will

23 be very helpful. But we must remember the issue is

24 firstly, was the second address recorded. If so, what does

25 it say? If it wasn't, this is what was said on the first

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1 occasion, which may throw some light on what Mr Mathunjwa

2 said on the second occasion. Those are the issues, and of

3 course what this witness heard, what he remembers, what he

4 understood and how he behaved in the light of what he heard

5 or thought he heard. But anyway, these are the matters

6 that will fruitfully, I would imagine, stand over until

7 tomorrow.

8 MR NGALWANA: I can clear up the

9 situation now, Chairperson. As I understand it, there was

10 no recordal of the second address. So I'm dealing with the

11 –

12 CHAIRPERSON: So that's now been sorted

13 out. That we now know. So on that point Mr Mpofo and I

14 were correct in our memory. We will adjourn until 9:30

15 tomorrow. I have already stated we will sit until 1

16 tomorrow so that people can make their arrangements

17 accordingly. The Commission will adjourn.

18 [COMMISSION ADJOURNED]

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