

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 89 9 MAY 2013 PAGES 9405 TO 9499

HELD AT

CIVIC CENTRE, RUSTENBURG, NORTH WEST PROVINCE



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1 [PROCEEDINGS ON 9 MAY 2013]
 2 [09:40] CHAIRPERSON: The Commission resumes.
 3 Before I remind the Major-General he's still under oath, I
 4 understand there's something you wish to say, Mr Madlanga.
 5 MR MADLANGA SC: Thank you, Mr Chairman,
 6 commissioners. Mr Chairman will recall that when an
 7 announcement was made here in open Commission about the
 8 suicide of Mr Lungani Mabotyana, the Chairman referred to
 9 the need to establish from the evidence leaders whether
 10 counselling services are available for people who need such
 11 services. Mr Chairman, I just wish to announce for the
 12 benefit of the families and victims that such services are
 13 available and they have been available for quite a while.
 14 I'll just give an example which I believe the commissioners
 15 themselves are aware of and that is the example of Mr
 16 Magidiwana. There was an occasion when we were just about
 17 to adjourn, on a Friday I think it was, when he got
 18 distressed. Mr Mpofo approached me after we had adjourned
 19 and he said Mr Magidiwana would require the services of a
 20 counsellor and I arranged there and then with the
 21 secretariat of the Commission and I advised Mr Mpofo
 22 accordingly and throughout the weekend I kept enquiring
 23 whether everything was in place, I was in contact both with
 24 the secretary of the Commission, Mr Setati, and also with
 25 Mr Mpofo. So in short, the services are available and they

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1 have been for quite a while. Thank you, Mr Chairman.
 2 CHAIRPERSON: Mr Madlanga. I also
 3 understand that we have representatives of the African
 4 Commission of Human Rights here today. I've already had
 5 the opportunity of meeting them and I want to welcome them
 6 there and say we hope that they find their visit with us a
 7 source of enlightenment and information. We are very
 8 grateful for their presence because it emphasises once
 9 again that what we are doing here in this Commission is of
 10 importance not only to South Africa but to the whole
 11 African continent and indeed to, generally speaking,
 12 internationally as well. And so the interest that they are
 13 showing and their presence here today is a clear
 14 manifestation of that fact. Generaal-Majoor, u is nog
 15 steeds onder eed. Mr Mpofo, I take it you have further
 16 questions for the witness.
 17 MR MPOFU: I do.
 18 GENERAAL-MAJOOR CHARL ANNANDALE:
 19 (s.o.e.)
 20 MR MPOFU: Thank you, Chairperson. I do
 21 have questions but if I may just first address the issue
 22 that Mr Madlanga spoke about. I do confirm everything that
 23 Mr Madlanga said, particularly in respect of the Magidiwana
 24 incident after he showed some emotional distress on the
 25 witness chair. I do, however, Chair, want to distinguish

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1 that kind of assistance for which we are very grateful, to
 2 the general requests that were made of counselling, for two
 3 reasons. One, the assistance that would have been given to
 4 Magidiwana is obviously available to any other witness but
 5 we were more talking about the victims as such, whether or
 6 not they are witnesses, and we – so that's the first thing,
 7 that there should be some kind of generalised service
 8 offered by the government, I think, for those counselling
 9 services to be made available.
 10 The second reason is, of course, that one should
 11 try and do this pre-emptively, as we understand it was done
 12 with the police. So you don't have to wait for a
 13 Magidiwana to collapse or for someone to commit suicide
 14 because by then it will be too late and that's exactly
 15 really what we had said last year, that the services must
 16 be made available but insofar as this ad hoc assistance is
 17 concerned I must say that Mr Madlanga took our request
 18 seriously and it was acted upon very promptly.
 19 CHAIRPERSON: Mr Madlanga, do you wish to
 20 comment further in the light of the further remarks made by
 21 Mr Mpofo?
 22 MR MADLANGA SC: Mr Chairman, perhaps
 23 what's best is for Mr Mpofo, Mr Ntsebeza and perhaps any
 24 other interested party and the evidence leaders to engage
 25 with the Commission secretariat and see what arrangements

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1 can be put in place on the far reaches of the service.
 2 Thank you.
 3 CHAIRPERSON: Yes, thank you very much.
 4 I think that's an excellent suggestion. Mr Mpofo?
 5 MR MPOFU: Thank you, Chairperson. Good
 6 morning, General.
 7 MAJOR-GENERAL ANNANDALE: Good morning,
 8 sir.
 9 MR MPOFU: General, you remember that
 10 when we broke off yesterday we were busy with the issue of
 11 numbers. I just want to round off that issue so that we
 12 move on to something else. And you'll remember as well
 13 that I had made an example. My assertion was that if the
 14 top leadership of the police chain of command had diagnosed
 15 the problem in respect of the numbers differently, as it
 16 seems, that it – that alone might have contributed to an
 17 almost predictably disastrous result. Remember the example
 18 I made about the dental operation. You remember that?
 19 GENERAAL-MAJOOR ANNANDALE: Ek het dit
 20 onthou, Voorsitter, ek onthou dit.
 21 MR MPOFU: Okay, now what I'm going to do
 22 is, in the interests of time – because I'm still trying,
 23 committed to trying to finish with you, insofar as it is
 24 possible I'm going to try and finish the cross-examination.
 25 I just you need to work on, with me on trying to move this

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1 issue. You can accept that the parts that I'm going to
 2 quote for you are in the documentation. In other words,
 3 I'm not going to go and read the statement and so on. If
 4 I'm misreading something I'm sure Mr Semenya will
 5 definitely step in or if it's subsequently found that I
 6 read it wrongly, I'll be the first one to have it struck
 7 off from the record. Brigadier Calitz, as we've already
 8 established, says at paragraph 4 of his statement which is
 9 DD, that there were 3 000 men all armed with pangas and he
 10 describes the weapons. I think we've already covered that
 11 one. Lieutenant-Colonel, I think, Vermaak in his affidavit
 12 GGG17 remarked about 4 500 – no, no, GGG17 paragraph 4, he
 13 says there were 4 500 armed people or 4 500 people, the
 14 majority of whom were armed. Can you accept that? Would
 15 you accept that, General?

16 GENERAAL-MAJOOR ANNANDALE: Dit is – ek
 17 aanvaar dit so, Voorsitter.

18 MR MPOFU: Brigadier – General, I've an
 19 obsession with brigadier - Colonel Scot, what is Scott's
 20 rank?

21 GENERAAL-MAJOOR ANNANDALE: Luitenant-
 22 Kolonel.

23 MR MPOFU: Lieutenant-Colonel Scott says
 24 on paragraph 6 of his statement that there was a
 25 belligerent armed group numbering 3 000 and you say in your

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1 statement that on the 14th – I want to distinguish this
 2 specifically so that I don't mislead you – there were
 3 between 3 000 to 4 000 armed men on the koppie and the
 4 point I want to make is that there's no suggestion coming
 5 from you elsewhere that this number suddenly shrank or that
 6 the proportion of the armed people shrank by the 16th. We
 7 can also accept that that comes from your statement, it's
 8 paragraph 9 of your statement, would you accept that?

9 GENERAAL-MAJOOR ANNANDALE: Ek aanvaar
 10 dit so, Voorsitter.

11 MR MPOFU: And then in the opening
 12 statement of SAPS which is FFF9, it is said at paragraph 43
 13 that there were 3 500 belligerent protesters who were armed
 14 and resisting any effort to disarm them. Would you accept
 15 that?

16 GENERAAL-MAJOOR ANNANDALE: Ek aanvaar
 17 dit so, Voorsitter.

18 MR MPOFU: And then you and I, with the
 19 assistance of the Chairperson, reading from your evidence-
 20 in-chief and I think also from your statement, I think you
 21 accepted that on that evidence there would have been a
 22 minimum of about 900 people, plus-minus, obviously not all
 23 of them but that was our working number. Accept that?

24 GENERAAL-MAJOOR ANNANDALE: Dit is
 25 korrek.

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1 MR MPOFU: And then General Mzembe in his
 2 statement, I think it's paragraph 27, says that, "We never
 3 anticipated we would have to disarm over 1 000 people." Do
 4 you accept that as well?

5 GENERAAL-MAJOOR ANNANDALE: Ek aanvaar u
 6 haal dit so aan.

7 MR MPOFU: And I'm giving you all those
 8 numbers just to make one simple point which I alluded to
 9 yesterday, which is that it would seem from all this that
 10 there was confusion or significant differences about the
 11 basic assumptions which prevailed in order to launch the
 12 operation and – sorry for the long question – but that that
 13 is the kind of confusion that was almost calculated to have
 14 disastrous results. Would you like to comment on that?

15 MR SEMENYA SC: We'll have to wait until
 16 Mr Mpofo tells us what those assumptions are and how they
 17 were calculated –

18 MR MPOFU: Okay.

19 MR SEMENYA SC: - to result to what type
 20 of disastrous consequences.

21 MR MPOFU: Okay, thank you. I think the
 22 disastrous consequences are known to all, I'm not going to
 23 repeat that but the assumptions that I'm busy dealing with
 24 now are specifically related to this question of the size
 25 of the armed group.

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1 GENERAAL-MAJOOR ANNANDALE: Voorsitter,
 2 ek sal graag wil kommentaar lewer.

3 MR MPOFU: Thank you.

4 GENERAAL-MAJOOR ANNANDALE: Voorsitter,
 5 daar was dieselfde probleem interpretasie deur die
 6 bevelselement wat ontplooi was tydens Marikana. Die
 7 ontleding was dieselfde en die benadering was ooreengestem.

8 MR MAHLANGU: Ek is jammer, die
 9 ontleding?

10 GENERAAL-MAJOOR ANNANDALE: Was
 11 dieselfde.

12 MR MAHLANGU: The –

13 MAJOR-GENERAL ANNANDALE: Analysis.

14 MR MAHLANGU: Approach was the same.

15 MAJOR-GENERAL ANNANDALE: And the
 16 analysis.

17 MR MAHLANGU: And the analysis also the
 18 same.

19 GENERAAL-MAJOOR ANNANDALE: Voorsitter,
 20 dit was verwys is in elkeen van die persone wat Adv Mpofo
 21 na verwys het, hulle sal kom getuig oor hulle waarnemings
 22 tydens wat gebeur het tydens hierdie JOCOM vergaderings en
 23 ook die besprekings tydens die JOC. Voorsitter, ons almal
 24 was dit eens dat ons moet fokus op die kleiner groep van 3
 25 tot 400 en ons het 'n pertinente bekommernis gehad oor

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1 hulle gedrag, maar ook hoe hulle pertinent gewapen was.
 2 Voorsitter, dit het nie die groter groep uitgesluit nie in
 3 terme daarvan dat hulle, 'n groot persentasie van hulle ook
 4 gewapen was, maar meestal tradisionele wapens, pertinent
 5 verwysend na knopkieries, stokke en dan ook spiese.
 6 Voorsitter, daar was 'n duidelike onderskeid in die
 7 gedragspatrone tussen die groter groep en die kleiner
 8 groep. Hulle was meer los gegroepeer en versprei soos wat
 9 hulle op die koppie was, hulleself geplaas het.
 10 Voorsitter, en die groter groep het meer gereageer op die
 11 handelinge van die kleiner groep, so dit was die groep wat
 12 rondbeweeg het wat in 'n kohesie was met mekaar.
 13 [10:00] Voorsitter, wat ons dan verwag het is dat hierdie
 14 groter groep sou baie gemakliker uiteen gaan, alhoewel ons
 15 gerat was om enige groepering uiteen te dryf. Voorsitter,
 16 die plan het voorsiening gemaak om te deel met handelinge
 17 en sou dit beteken dat selfs uit die groter groep as daar
 18 dan groeperings van individue van die stakers ook swaar
 19 gewapen, sou daar ook met hulle gedeel geword het in terme
 20 van die beplanning vir uiteen dryf en dan ontwapen en
 21 arrestasie. As u my sal vergun wil ek net kortliks verwys
 22 na iets in Kolonel Vermaak se verklaring.
 23 MR MAHLANGU: If the Commission would
 24 allow me I'd like to make some reference to Colonel Scott's
 25 statement.

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1 CHAIRPERSON: He said Colonel Vermaak's
 2 statement.
 3 MR MAHLANGU: I'm sorry, Vermaak,
 4 Vermaak's statement.
 5 GENERAAL-MAJOOR ANNANDALE: Voorsitter,
 6 dieselfde paragraaf wat Adv Mpofo na verwys het is dan
 7 paragraaf 6. Ongelukkig is die bladsy nie genommer nie,
 8 maar dit is op die laaste bladsy van sy verklaring waar die
 9 beëdiging begin en hy tereg verwys na die 4 500 persone
 10 maar hy het ook gesê dat die meerderheid van die persone
 11 gewapen was met een of ander gevaarlike wapen of
 12 tradisionele wapen. Voorsitter, dan net twee lyntjies
 13 verder het hy ook dan pertinent verwys na die militante
 14 groep. Nou Voorsitter, my laaste opmerking is verwysend na
 15 wat Generaal Mpembe gesê het, soos aangehaal deur Adv
 16 Mpofo. Dit is tereg so dat, soos hy sê, ons het nie verwag
 17 om meer as 1 000 mense te ontwapen nie. Dit is 'n
 18 bevestiging van die kleiner groeie wat ons fokus op was en
 19 dan ook bevestig deur die sel kapasiteit wat daarvoor
 20 voorsiening gemaak is en die aantal opruktrokke wat ons
 21 gereël het vir vervoer van potensieel gearresterdes.
 22 MR MAHLANGU: And this was also confirmed
 23 by the number of transport, the trucks that we had arranged
 24 for this exercise.
 25 CHAIRPERSON: And the cell space or the

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1 cell capacity where the arrested persons were going to be
 2 detained.
 3 MR MAHLANGU: That's correct, Chair.
 4 MR MPOFU: Okay. Well, thank you for.
 5 That response took a long time but I understand I had put a
 6 lot of propositions to you, so let's just deal with it, let
 7 me just deal with the statement just for reference. I
 8 referred to paragraph 4 of Vermaak and that's because I was
 9 reading from his supplementary statement. You are correct,
 10 it's paragraph 6 on GGG17 but while we are there, do you
 11 agree that below the part that you read, Lieutenant-Colonel
 12 Vermaak refers to "ongeveer 3 000 aanvallers," in other
 13 words approximately 3 000 attackers that the police had to
 14 deal with?
 15 GENERAAL-MAJOOR ANNANDALE: Voorsitter,
 16 ek merk dit so op. Ek het probeer in konteks verduidelik
 17 die besprekings wat ons gehad het in die JOC en tydens
 18 JOCOM rondom ons benadering.
 19 MR MPOFU: General, just so that there's
 20 no confusion between us, I – the issue that, the simple
 21 issue I'm putting to you is the following. It's more, it's
 22 a planning issue maybe. Well, firstly let me put certain
 23 propositions or assumptions of my own to you. You must
 24 accept that there is evidence from one of my witnesses that
 25 people were free and did move from the so-called larger

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1 group which is really many other groups, but that's another
 2 debate, to the smaller group, in your parlance. Two, you
 3 must work on the assumption that you and I agreed yesterday
 4 that the size of the targeted group is important, it's not
 5 irrelevant. And the third proposition I want to put to you
 6 is just something I'm making up but I'm sure you'll
 7 understand. Let's assume that you were – the so-called
 8 smaller groups that you were going to have after the
 9 teargas and all that, would be groups of 50, a manageable
 10 group. Sorry, let me just round it up, I know it's a long
 11 question. The only issue really I'm putting to you is that
 12 it is one thing, if there were 300 people then you would be
 13 dealing with six such groups of 50. If you are going for
 14 3 000 people you are dealing with 60, six zero, of such
 15 smaller groups. In other words, you are planning for the
 16 one scenario and for the, and for the other is completely
 17 different and obviously you'll make the necessary
 18 variations if it's 1 000 and so on. That's the only simple
 19 point I'm making and you can agree with it or not and then
 20 we'll just move on, that that is a significant factor on
 21 the part of those who are planning the operation.
 22 CHAIRPERSON: Before that question is
 23 interpreted, Mr Semenya has his light on. Do you want to
 24 say something, Mr Semenya?
 25 MR SEMENYA SC: Chairperson, directly to

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1 the question you raised many days ago, the manageable group
2 was a group of 10 or less, it's not numbers like Mr Mpofo
3 is asking the witness to assume.
4 CHAIRPERSON: That's true. That is true,
5 Mr Mpofo, but of course in a way it strengthens your point
6 because if there were 3 000 people and there were groups of
7 10 you'd then have 300 groups but Mr Semanya is correct,
8 what the witness talked about was a manageable group of
9 about 10. In fact, he thought they would probably only
10 have about 170 at that stage so there'd be 17 groups, but
11 he conceded there might have been 300 in which case there'd
12 be –
13 MR MPOFU: More.
14 CHAIRPERSON: - 30 groups, yes. Your
15 point of course is that if the 3 000 were involved in that
16 exercise, you would have 300 groups but it is important,
17 though, to get it right.
18 MR MPOFU: I appreciate – I'm indebted to
19 my learned colleague and sorry, if you can still remember
20 that long question, can you try and respond?
21 CHAIRPERSON: It has to be interpreted
22 first.
23 GENERAAL-MAJOOR ANNANDALE: Voorsitter,
24 en te aanvaar dat ons ons beplanning gedoen het gegewe die
25 omstandighede, die terugvoer wat ons gekry het en die

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1 waarneming van die situasie. Ons fokus was gewees op
2 pertinent die kleiner groep. Ons het nooit verwag om sulke
3 groot getalle te arresteer nie en ons sou nie daarmee
4 gedeel het sou dit so uitgedraai het nie. Dit was vir ons
5 duidelik gewees dat die leierskapelement was vervat in
6 hierdie kleiner groep en sou ons dan slaag om 'n groot
7 persentasie in die groep te arresteer, selfs soveel as 170
8 maar dit kan selfs baie minder wees, dan sou ons die kern
9 en kohesie van hierdie groep opgebreek het.
10 MR MAHLANGU: Then we would have broken
11 the coherent, the back of the –
12 CHAIRPERSON: I think he used the word
13 "kern" which probably means core in this context.
14 MR MAHLANGU: Would have broken the core
15 of this group.
16 GENERAAL-MAJOOR ANNANDALE: Die
17 ondervraging en informasie wat ons dan sou bekom het van
18 die gearresterdes sou ons dan toegelaat het om oor te gaan
19 na die volgende fases, fase 5 en potensieel fase 6 van die
20 beplanning, wat dan pertinent die intelligensie-gedrewe
21 operasie sou wees en dan ook kordonering en deursoeking.
22 MR MAHLANGU: Which would have been the
23 intelligence action, co-ordination and search.
24 CHAIRPERSON: I think he said cordoning.
25 MR MAHLANGU: Cordoning.

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1 CHAIRPERSON: Stage 6 is the cordoning,
2 cordoning off really and searching of the hostels.
3 GENERAAL-MAJOOR ANNANDALE: Voorsitter,
4 sou dit –
5 MR MPOFU: Oh, sorry.
6 GENERAAL-MAJOOR ANNANDALE: Ekskuus, as
7 ek net – amper klaar. Sou dit in praktyk beteken het dat
8 daar ander groeperings was en ons het nie die kapasiteit
9 gehad het om hulle dan te omsingel in kleiner groepies nie,
10 sou openbare orde polisiëring net eenvoudig voortgegaan het
11 om hulle te bly opbreek en uiteen te dryf.
12 MR MPOFU: Okay, well, before we move on
13 to something else I would like you to accept that I – the
14 issue I'm raising with you has got nothing to do with the
15 issue of arrest. I accept what you say, that you did not
16 intend to arrest 3 000 people and in fact you didn't. The
17 issue I'm talking to you about regards the resources that
18 you would have had to deploy, not in the business of arrest
19 but in the business of encircling into the so-called
20 smaller groups of 10 or whatever, and disarming. It's
21 that, that I am talking about. So if you accept that,
22 we'll move on but I just want you to know that there is
23 that distinction.
24 [10:20] GENERAAL-MAJOOR ANNANDALE: Voorsitter,
25 ek kan net daarop kommentaar lewer dat ons gevoel het dat

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1 ons genoegsame hulpbronne ontplooi het om pertinent dan
2 daardie aksies uit te voer, gegewe die fokus.
3 MR MPOFU: Maybe I should be more
4 specific. The point that I'm going to argue is that had
5 you, had everybody been of the same mind that the targeted
6 group was 300, it might not have been necessary for you –
7 you specifically – for example to feel the need to deploy
8 the paramilitary forces. I know our differences on that,
9 but to bring as many machine guns, to bring as many dogs
10 and as many specialised units as if it was the smaller
11 group. That's the kind of argument that I'm going to
12 advance. In other words, you would have been probably
13 over-deployed, if there's such a term, for the operation,
14 if it's the one type or the other.
15 GENERAAL-MAJOOR ANNANDALE: Voorsitter,
16 ek gaan nie kommentaar lewer op die paramilitêre nie, ek
17 dink ons het al dit holrug gery. Die ontplooiing wat daar
18 was, was ontplooiing goedgekeur deur die bevelselement van
19 die optrede. Die pertinente – ekskuus, mnr Booï – die
20 pertinente eenheid wat ek as individu voorgestel het was
21 die ontplooiing van die spesiale taakmag en daar was
22 toegestem deur, tot sodanige ontplooiing. Elke ander
23 eenheid was of direk ontplooi deur die provinsie self of op
24 versoek van die provinsie. Voorsitter, en die lede was nie
25 ontplooi met masjiengewere nie. Daar is 'n pertinente

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1 verskil tussen R5-aanvalsgewere en masjiengewere, soos Adv
 2 Mpofu na verwys. Voorsitter, ek het ook verwys dat dit
 3 standaard uitreiking is vir alle operasionele eenhede en is
 4 tot die beskikking van alle eenhede. Voorsitter, en dan
 5 die verhouding tussen die ontplooiing van die lede en dan
 6 die bedreiging wat ons gehad het –
 7 MR MAHLANGU: Mr Chairperson, the
 8 relationship between the deployment of the members and the
 9 situation with which we were faced –
 10 CHAIRPERSON: No, I think he said
 11 bedreiging, which means threat.
 12 MR MAHLANGU: The threat, the threat that
 13 we –
 14 CHAIRPERSON: I think he means the threat
 15 that we faced, the bedreiging.
 16 MR MAHLANGU: Yes.
 17 GENERAAL-MAJOOR ANNANDALE: Sou die
 18 verhouding selfs net op die 400, sou dit waarskynlik 'n
 19 geskikte verhouding gewees het, maar die openbare orde lede
 20 sou dan waarskynlik minder gewees het omdat hulle taking
 21 was om dan te fokus ook potensieel op die uiteendrywing van
 22 ook die groter groep.
 23 CHAIRPERSON: Sorry, I know you – carry
 24 on Mr Booi, I want to ask a question but when you've
 25 finished interpreting. Just remind me, I think you've told

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1 us this already but just to – what was the maximum capacity
 2 you had for arrested people, regard being had to the
 3 transport facilities you had and the number of vehicles and
 4 so on and the holding capacity of the cells?
 5 GENERAAL-MAJOOR ANNANDALE: Voorsitter,
 6 die waarnemende cluster bevelvoerder Brigadier Seboloke het
 7 aangedui dat daar 170 beddens beskikbaar is en dan was daar
 8 ses trokke vir vervoer, wat in lyn is met sodanige getalle.
 9 CHAIRPERSON: So basically – I suppose I
 10 must give Mr Booi, the interpreters, a chance to interpret
 11 this first. So basically you planned then to arrest a
 12 maximum of about 170 people, would that be right?
 13 GENERAAL-MAJOOR ANNANDALE: Voorsitter,
 14 dit is korrek, ons het ver wag dat dit nie meer as dit sou
 15 wees nie.
 16 CHAIRPERSON: So if the small group, as
 17 you call it, the militant group, also called the warrior
 18 group sometimes, consisted of 400 people, you anticipated
 19 that about 230 of those, more than half would not be
 20 arrested, would presumably be dispersed, is that right?
 21 GENERAAL-MAJOOR ANNANDALE: Voorsitter
 22 ja, ons het ver wag dat selfs 'n groot persentasie van
 23 hierdie groep sou self uiteen gaan en wapens neerlê.
 24 CHAIRPERSON: What would have happened if
 25 they had been dispersed, taking their weapons with them?

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1 GENERAAL-MAJOOR ANNANDALE: Voorsitter,
 2 dan is ons net bly om daardie groeperings op te breek sodat
 3 hulle nie in groot groepe nie, sodat hulle in verskillende
 4 rigtings uiteen gaan, maar dit is nie die ideale situasie
 5 nie want hulle sal net weer elders gaan hergroepeer en dit
 6 was juis ons bekommernis, die hergroepering later aan. Dit
 7 gee dan – as daar dan hergroeperings gewees het dan is dit
 8 dieselfde, dan sou openbare orde hulle weer moes opbreek
 9 totdat ons begin met die intelligensie-gedrewe en dan
 10 pertinente arrestasies ook in sodanige hergroeperings.
 11 CHAIRPERSON: Thank you. I'm sorry to
 12 have interrupted you, Mr Mpofu, but I wanted clarity on
 13 that point in my own mind before you carried on.
 14 MR MPOFU: Thank you, Chairperson. No,
 15 that was helpful, Chairperson. Brigadier, or rather
 16 General, I'm going to move on, simply to say that once
 17 again I'm not concerned with the arrests and that I accept
 18 your correction. I stand corrected on the differences
 19 between automatic rifles and machine guns. I don't know, I
 20 don't know the difference but I meant automatic rifles, R1s
 21 and R5s. Alright, now yesterday there was what I would
 22 call a startling proposition which was made and admittedly
 23 it was not made by the SAPS counsel, in which case I would
 24 have even been more startled, that breaches of the
 25 regulatory framework which includes the Constitution, the

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1 legislative measures and the standing orders, that it is
 2 considered though that such breaches could occur and that
 3 they would be irrelevant to the outcome. Can I accept that
 4 you don't go along with that? And the reason why I'm
 5 saying that is that there was a, I think Brigadier Moolman
 6 who was from the legal services and I'm assuming that his
 7 or her role was specifically –
 8 CHAIRPERSON: I think Brigadier Moolman
 9 is a lady.
 10 MR MPOFU: Yes, her role was specifically
 11 to ensure that the prescripts, as the National Commissioner
 12 calls it, would be followed because failing which, disaster
 13 might follow or would almost certainly follow. Do you
 14 agree with that summation?
 15 CHAIRPERSON: Mr Burger, I see you wish
 16 to say something.
 17 MR BURGER SC: I object to that question.
 18 It's quite irrelevant whether the witness agrees or
 19 disagrees with the proposition of, sounds like law, I'm not
 20 confident on that but it's irrelevant what this witness
 21 says on that.
 22 CHAIRPERSON: There may be something in
 23 what Mr Burger says. Maybe the way to approach it is to
 24 ask what role Brigadier Advocate Moolman – was she a
 25 Brigadier or, I don't know what her rank was.

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1 MR MPOFU: Brigadier I think, yes.
 2 CHAIRPERSON: What role Adv Moolman was
 3 playing at the JOCOM, that might help us.
 4 MR MPOFU: That's fine.
 5 CHAIRPERSON: I don't know if that can be
 6 objected to.
 7 MR MPOFU: I'm happy -
 8 CHAIRPERSON: Let's not take it too far
 9 but let's at least get the answer to that point.
 10 MR MPOFU: I'm happy with that, Chair. I
 11 won't repeat the preface but am I correct that the presence
 12 of Adv Moolman in the meetings, particularly the JOCOM
 13 meetings, was specifically to ensure that in carrying out
 14 the operation, the constitutional, legislative and
 15 regulatory prescripts would be followed? Sorry, let me
 16 just – to once again to try and save time, make an example.
 17 For example the Police Act prescribes that when cordoning
 18 off activities are going to take place, the Provincial
 19 Commissioner has to issue a particular certificate and in
 20 one of the minutes I think Adv Moolman reported that she
 21 was attending to that matter. I'm just – it's part of that
 22 question.
 23 GENERAAL-MAJOOR ANNANDALE: Voorsitter,
 24 ja, ek kan net teruggaan. Adv Moolman was reeds betrokke
 25 met my aankoms op die 13de. Sorry Chairperson, she's not a

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1 Brigadier.
 2 CHAIRPERSON: She's an advocate, which is
 3 either a higher or a lower rank.
 4 MAJOR-GENERAL ANNANDALE: She's a
 5 colonel.
 6 CHAIRPERSON: Oh, she's a colonel?
 7 MAJOR-GENERAL ANNANDALE: That's correct,
 8 yes. En soos ek dit verstaan was sy, het sy Generaal
 9 Mpembe vergesel tydens pertinente samesprekings,
 10 onderhandelings wat hy gehad het met Lonmin of die unies.
 11 CHAIRPERSON: Lonmin and the unions.
 12 MR MAHLANGU: Lonmin and unions.
 13 GENERAAL-MAJOOR ANNANDALE: Voorsitter,
 14 en dan die verwysing van Adv Mpofu is artikel 13(7) van die
 15 Polisiewet en sy het dan dit gefasiliteer, die uitreiking
 16 van sodanige kennisgewing of magtiging deur die Provinsiale
 17 Kommissaris.
 18 MR MPOFU: Okay, yes. No, thank you very
 19 much for –
 20 CHAIRPERSON: I haven't heard the answer.
 21 Maybe I wasn't listening properly. I still haven't heard
 22 what Colonel Moolman, now that we know her rank, Colonel
 23 Adv Moolman, was doing at the JOCOM at 1:30 on the 16th of
 24 August. What was her function? I think that might help
 25 us.

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1 MR MPOFU: Yes.
 2 CHAIRPERSON: Because it might, depending
 3 upon what happens, lead to other enquiries. Can you answer
 4 that question, Major-General? What was Adv Moolman
 5 supposed to be doing? What was she there for at 1:30 on
 6 the 16th of August at the JOCOM?
 7 GENERAAL-MAJOOR ANNANDALE: Voorsitter,
 8 sy was reeds van die 14de af, was sy 'n verteenwoordiger van
 9 die JOC, verteenwoordiging van die regsafdeling van die
 10 polisie en dan uiteraard om regsadvies te gee, sou dit
 11 nodig wees.
 12 [10:39] CHAIRPERSON: Mr Burger was right, it was
 13 a dwaalspoor after all but never mind, carry on.
 14 MR MPOFU: Thank you, Chairperson. No,
 15 thank you very much, General. That assurance will make me
 16 sleep better at night to know that the police did think
 17 that it was relevant that they should follow the prescripts
 18 but you've also assisted me on something else because one
 19 of the - which I'm now addressing the Chairperson - one of
 20 the witnesses about the 13th kept on referring to a white
 21 woman with whom General Mpembe was conferring and I always
 22 assumed it was Brigadier Pretorius but now it's clear that
 23 it must have been Adv Moolman. Thank you, right. And
 24 while we are there, do you know, do you know from your
 25 attendance of the meetings whether Brigadier Pretorius now

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1 supported the plan or not?
 2 GENERAAL-MAJOOR ANNANDALE: Voorsitter,
 3 ek het geen rede om te glo dat sy dit nie ondersteun het
 4 nie. Dit was nie pertinent soos in elkeen teken af nie,
 5 maar tydens JOCOM vergaderings het almal 'n inset gehad en
 6 uiteraard as daar sou besware gewees het sou dit geopper
 7 gewees het.
 8 MR MPOFU: Okay. Okay, thank you. No,
 9 I'm happy with that. Now can we move on to something else
 10 completely different and just in terms of what the National
 11 Commissioner would say, walking together, so that we walk
 12 together, I'm just going to give you a context of where I'm
 13 going just so that we can walk together. In addition to
 14 the opening statement that I asked you to read when we
 15 started, one of the broad trust issues that we're going to
 16 argue at the end of the case is that there were at least
 17 three significant turning points or milestones leading up
 18 to the disaster of the 16th and they are signified, they are
 19 signified by events which occurred on the odd numbered
 20 days, those odd numbered days being the 11th, the 13th and
 21 the 15th and that the disaster which occurred on the 16th
 22 was a mere culmination or almost inevitable culmination of
 23 those milestones. Now, I'm telling you this because I'm
 24 going to talk to you about one of those. The other two do
 25 not concern you but for the sake of completion, what

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1 happened on the 11th was a shootout between the NUM and some
 2 of the protesters and it's a matter that we have dealt –
 3 CHAIRPERSON: No – no, Mr Mpofo, I don't
 4 think you mean that. The evidence doesn't indicate a
 5 shootout.
 6 MR MPOFU: Yes.
 7 CHAIRPERSON: That implies shots were
 8 fired from both sides.
 9 MR MPOFU: From both – yes.
 10 CHAIRPERSON: That's not the evidence.
 11 The evidence is that there were shots fired from the NUM
 12 side, there's no evidence of shots being fired from the
 13 side of the strikers.
 14 MR MPOFU: Yes.
 15 CHAIRPERSON: Unless of course I missed
 16 it or unless you now make an admission that we didn't have
 17 before, but I doubt that. Let's get it straight -
 18 MR MPOFU: Thank you -
 19 CHAIRPERSON: - there was an engagement
 20 between the NUM people, some NUM people who were standing
 21 near their office –
 22 MR MPOFU: Offices, yes.
 23 CHAIRPERSON: - and about 3 000 strikers
 24 who were marching to the NUM office for reasons which will
 25 be, is one of the matter we'll have to decide at the end of

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1 it all.
 2 MR MPOFU: Thank you.
 3 CHAIRPERSON: But there were only shots
 4 fired from the NUM side.
 5 MR MPOFU: Yes.
 6 CHAIRPERSON: There were weapons
 7 apparently in the possession of some of the strikers but
 8 they weren't firearms. If they were, they certainly
 9 weren't used.
 10 MR MPOFU: Yes.
 11 CHAIRPERSON: Is that right?
 12 MR MPOFU: That's right, Chairperson.
 13 CHAIRPERSON: So let's get it clear.
 14 MR MPOFU: Thank you, Chair, and as the
 15 Chairperson would say that since that's a point in my
 16 favour I will not contest it. Yes, there –
 17 CHAIRPERSON: [Inaudible] point you will
 18 contest it, even if it's in your favour.
 19 MR MPOFU: Thank you, of course. But in
 20 any event, the point I was making is that I'm just defining
 21 the three milestones. That's one of the milestones and
 22 it's exactly as the Chairperson has amplified it and it has
 23 nothing to do with you, it's been dealt with. The
 24 milestone of the 13th, which is what I'm going to talk to
 25 you about, is what we touched on yesterday, which was the

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1 killing of the policemen in particular.
 2 CHAIRPERSON: The witness wasn't present.
 3 The witness heard about it later –
 4 MR MPOFU: I know.
 5 CHAIRPERSON: So I hope when you deal
 6 with it we'll hear, or deal so very lightly –
 7 MR MPOFU: Oh yes, ja, no, not who shot
 8 who and all that, ja.
 9 CHAIRPERSON: Well, he doesn't know any
 10 of that.
 11 MR MPOFU: Yes, I accept that.
 12 CHAIRPERSON: Alright, and the third
 13 milestone?
 14 MR MPOFU: The third milestone, as I said
 15 it's the odd numbered days – 11, 13, 15. The third
 16 milestone is what happened on the 15th of August which we
 17 will submit was considerable political pressure put to bear
 18 which resulted in the so-called D-day pronouncement but
 19 once again that third milestone is not something you
 20 yourself need to be concerned with. We'll deal with that
 21 with other witnesses. I just wanted to put it in context.
 22 Now, let's come to the 13th. Fortunately we've already
 23 dealt with the first part of – do you remember the debate
 24 you and I had about the fact that the killing of the police
 25 is what triggered your presence and other people and what I

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1 call the frenzy and so on and you said what you have to say
 2 about that and I'm just situating it so that I can lead to
 3 the next bit, remember that.
 4 GENERAAL-MAJOR ANNANDALE: Ek gaan dit
 5 nie vergeet nie, Voorsitter.
 6 MR MPOFU: Thank you. Now, I'm taking
 7 that matter further and I'm saying the flip side of that
 8 coin is that the actions of the 16th on the part of the
 9 police were, among others, motivated by a sense of revenge
 10 for their fellow policemen.
 11 CHAIRPERSON: Mr Mpofo, you haven't asked
 12 a question yet so there's –
 13 MR MPOFU: I haven't, Chair.
 14 CHAIRPERSON: - no objection yet but may
 15 I ask you this, I just want to understand the proposition
 16 you're going to put. Are you suggesting that the whole
 17 operation was designed to exact revenge for what happened
 18 on the 13th?
 19 MR MPOFU: No.
 20 CHAIRPERSON: Or are you simply referring
 21 to the attitude of certain members of the service who
 22 participated and acted as they did – of course according to
 23 your submissions – out of a desire to exact revenge for
 24 what happened before? In other words, it's not a general
 25 revenge operation.

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1 MR MPOFU: No.

2 CHAIRPERSON: It's only particular

3 individuals who did things they wouldn't otherwise have

4 done because of considerations of revenge. Is that your

5 case?

6 MR MPOFU: Yes, it's the second one,

7 Chairperson.

8 CHAIRPERSON: Okay.

9 MR MPOFU: Most definitely, thank you,

10 Chairperson. If I put it too widely, more widely or wider

11 than that, then it was not my intention.

12 CHAIRPERSON: Okay, no, you've made that

13 clear – are you going to tell us who these individuals are?

14 MR MPOFU: I will proceed to do so.

15 Well, firstly I don't know their names but I'm going to

16 tell you that the support for what I've just said will be

17 based on some of the actions that were taken and

18 particularly the nature in which they were taken. Are you

19 aware that some of the policemen, or at least one – I don't

20 know if it's one or two, I think it's one, let's say one to

21 be safe – that there was somebody after the shooting who

22 could be heard saying, "We'll shoot you." Would you accept

23 that that is something that we observed from the videos and

24 if that is correct, would you agree with me that that is

25 not the way a policeman should behave if, even if they were

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1 acting in self-defence which, as you know, we don't accept?

2 COMMISSIONER HEMRAJ: Mr Mpofo, what is

3 this a reference to? Is it a scene on a video –

4 MR MPOFU: It is and it's already

5 accepted. It was –

6 COMMISSIONER HEMRAJ: When was that?

7 You'll refresh our memories?

8 MR MPOFU: Well, it actually happened on

9 many of them. I think it's a threesome – I'll get the

10 reference, Commissioner, before or during tea.

11 CHAIRPERSON: [Inaudible] – you said you

12 want to tell the General where you were walking to and you

13 had hoped he would accompany you on the journey.

14 MR MPOFU: He has.

15 CHAIRPERSON: Well, I want to know

16 whether we should allow him to go any further on this

17 journey. If you're asking his opinion as to whether the

18 behaviour of particular policemen was appropriate, I don't

19 I should, would allow that question because it's for us to

20 decide whether it's appropriate. The only – if he's

21 threatening to shoot people in circumstances where he

22 doesn't have the right to do so, then that would be totally

23 inappropriate, an illegal action. We don't need the

24 General to tell us that and I think it would be a waste of

25 time, frankly, to elicit his views on it. I think I know

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1 where you're going to but this witness is not here as an

2 expert, as I understand it, on proper police behaviour and

3 particular not to answer to self-evident propositions like

4 is it appropriate for a policeman to shoot someone in

5 circumstances where he's not acting in self-defence. The

6 answer to that obviously is no, but do we have to have the

7 question put and the answer given –

8 MR MPOFU: No, Chairperson –

9 CHAIRPERSON: That's my problem, you

10 understand.

11 MR MPOFU: Yes.

12 CHAIRPERSON: I'm trying to limit things.

13 I don't want to stop you from asking legitimate questions

14 but I don't want you to ask questions to which the answers

15 are self-evident and in any event might not be admissible

16 in terms of the ordinary principles.

17 MR MPOFU: Yes. No, Chairperson, I think

18 maybe the misunderstanding is that you assume that I'm

19 asking this for the sake, for its own sake, as it were.

20 And that's a very –

21 CHAIRPERSON: You're asking for – I'm

22 sorry, I'm not suggesting you're asking questions for their

23 own sake. I understand you're asking questions because you

24 think they will assist the Commission and you can found the

25 arguments on the answers and I understand that.

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1 MR MPOFU: Yes.

2 CHAIRPERSON: But I've got a job, as I

3 understand, to exclude answers (a) that are self-evident

4 and (b) that irre – that are inadmissible.

5 MR MPOFU: No, thank you, Chairperson.

6 No, no, I think we're talking at cross-purposes. I didn't

7 mean in that sense. All I'm saying is that the reason why

8 I did that long, let's walk together speech, was exactly

9 because I'm asking this specifically in relation to the

10 proposition that people were acting, motivated by vengeance

11 and all I'm doing now is to point out to the specific

12 indiciae that we will propose support that statement. So

13 it's not as if I'm examining whether policeman A or

14 policeman B –

15 CHAIRPERSON: You see, I can understand

16 that but this is a witness who wasn't on the scene. This

17 is a witness who was in the JOC. I would have thought that

18 these questions, insofar as they may provide relevant

19 answers, could more properly be asked to people who were on

20 the scene rather than someone who was in the JOC and is

21 dependent upon either reports he received or videos that he

22 saw and we saw also.

23 MR MPOFU: That's fine, I'll move on to a

24 related, but not the same subject. The – can you yourself

25 tell us why, why you did not mention the death threat made

<p style="text-align: right;">Page 9437</p> <p>1 to General Mpembe by other policemen in your statement? 2 GENERAAL-MAJOOR ANNANDALE: Voorsitter, 3 dit was nie aspekte wat ek self waargeneem het nie. Dit 4 was oorgedra deur een persoon aan my sonder identifikasie 5 van spesifieke individue en ook dat dit reeds oorgedra was 6 aan die spesifieke gesag in die provinsie, die Provinsiale 7 Kommissaris. 8 MR MAHLANGU: And that this had been 9 carried over to the specific authority, the – 10 CHAIRPERSON: Specific authority in the 11 province, namely the Provincial Commissioner. 12 MR MAHLANGU: Namely the Provincial 13 Commissioner. 14 GENERAAL-MAJOOR ANNANDALE: Voorsitter, 15 en net so het ek nie gaan die ander detail soos oorgedra 16 aan my – want dit is net eenvoudig oorgedra deur Kolonel 17 Vermaak, hoe dit gebeur het dat stun grenades gegooi, wie 18 het gas gegooi, wat was die teenreaksie van die polisie. 19 Ek het ook nie daarop in my verklaring uitgebrei nie. 20 MR MPOFU: Okay. Now, just one question 21 in relation to the revenge issue that we just spoke about 22 and I'll confine that to something that you, that concerns 23 you. I'll leave out the other examples. You basically 24 ordered that the briefings that we spoke about the other 25 day should occur at both levels, at the levels of</p>	<p style="text-align: right;">Page 9439</p> <p>1 Colonel Scott was sent to the forward holding areas to give 2 the instructions was because – I think we've heard this 3 evidence before – a police radio had been seized by the 4 strikers on the 13th and if the radio had been used it was 5 feared, I don't know with what justification in fact, but 6 it was feared that that might, that message might have been 7 intercepted by the strikers using the radio they'd taken. 8 Have I got it right? 9 GENERAAL-MAJOOR ANNANDALE: Voorsitter, 10 dis reg, ook na aanleiding van 'n voorvalleboekinskrywing 11 wat ek dink gemaak is op die 13de – 12 MR MAHLANGU: Yes, Mr Chairperson, also 13 as a result of an entry that was made in a pocket book. 14 GENERAAL-MAJOOR ANNANDALE: Nie 'n pocket 15 book, occurrence book. 16 MR MAHLANGU: In the occurrence book, Mr 17 Chairperson. 18 GENERAAL-MAJOOR ANNANDALE: Waar daar, ek 19 dink dit was 'n sersant, gesê het dat hy het 'n persoon wat 20 hy vermoed 'n siviele persoon is, het hy gehoor op die 21 radio praat en dit was duidelik dit is nie 'n 22 polisiebeampte nie in terme van die taalgebruik. 23 CHAIRPERSON: And he assumed it was one 24 of the strikers who had got hold of a police radio, I think 25 that's what you said.</p>
<p style="text-align: right;">Page 9438</p> <p>1 commanders and at the levels of the operational staff, for 2 lack of a better word. 3 GENERAAL-MAJOOR ANNANDALE: Voorsitter, 4 daar is ook in Generaal Mpembe se verklaring daarna verwys 5 dat dit 'n bespreking was. Dit was die verantwoordelikheid 6 van die oorhoofse bevelvoerder om toe te sien dat die 7 vlakke van toeligting plaasvind. 8 MR MAHLANGU: It's also mentioned, Mr 9 Chairperson, also in General Mpembe's statement that these 10 are steps – 11 CHAIRPERSON: No, he said there was a 12 discussion – 13 MR MAHLANGU: A discussion between – 14 CHAIRPERSON: Well, so that the levels of 15 authority would know what they had to do, I think is what 16 he said. 17 MR MAHLANGU: The special JOCOM – 18 CHAIRPERSON: Repeat it again if I got it 19 wrong. 20 GENERAAL-MAJOOR ANNANDALE: En die redes 21 vir die taking van Kolonel Scott om deur te gaan persoonlik 22 was bespreek en dit was so voorgestel en so goedgekeur. 23 [10:59] CHAIRPERSON: I think the point is – I 24 think we're going to take the adjournment in a moment but I 25 think the point was, just to get it clear, the reason that</p>	<p style="text-align: right;">Page 9440</p> <p>1 GENERAAL-MAJOOR ANNANDALE: Ja, ek weet 2 die voorvalleboek, ek kan – as u wil kan ek dit net opsoek. 3 CHAIRPERSON: Mr Mpofo, it looks as if 4 you've got one more question. 5 MR MPOFU: I've just negotiated silently 6 with you, Chairperson, for one more question so that we 7 round off this issue. The question is, and I can accept 8 that the message as it goes down might grow legs, so to 9 speak, that at least in one of those briefings, the third 10 tier briefings, one of the things that was said to the 11 policemen before they went to the ground was that these 12 people are dangerous and certain things were specifically 13 mentioned, including the fact that they had killed, 14 attacked and killed policemen. Now what I want to know is 15 whether that is what he had instructed you, as you filtered 16 the message down, he had instructed it to be communicated 17 down the road or would that have been at the initiative of 18 that specific commander? 19 GENERAAL-MAJOOR ANNANDALE: Voorsitter, 20 ek is nie bewus van die geval wat u na verwys nie. Ek 21 aanvaar dit is iewers sodanig vermeld. 22 CHAIRPERSON: I'm not aware of it either 23 but if it's been dealt with in evidence and I missed it, 24 can you give me the reference or is it something that's 25 going to come?</p>

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1 MR MPOFU: It's going to come, Chair.

2 CHAIRPERSON: I see, alright.

3 MR MPOFU: And General, sorry, I don't

4 want to waste more time, if you are not aware I suppose

5 that's an answer because what I was asking you was whether

6 that was a message that was filtering down but by saying

7 you're not aware of it, are you suggesting that you – you

8 yourself did not send such a message, apart from the fact

9 that you don't know who I'm talking about?

10 MAJOR-GENERAL ANNANDALE: The message as

11 in be careful, these people are dangerous or –

12 MR MPOFU: They've killed policemen and

13 so on, that didn't come from you? In other words, it is

14 not a message that came from the top, it's a message that,

15 if I'm correct in what I'm saying, it's a message that was

16 at the initiative of that particular commander and not from

17 you. That's all I'm referring to.

18 GENERAAL-MAJOOR ANNANDALE: In terme van

19 die betrokke bewoording –

20 CHAIRPERSON: Was it part of your

21 instructions, it was to go down that the persons concerned

22 were to be reminded that the strikers, or some of them, had

23 killed policemen on the 13th? I think that's basically the

24 point that Mr Mpofo is putting.

25 GENERAAL-MAJOOR ANNANDALE: Voorsitter,

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1 nee, nie my instruksies soos u nou na verwys het nie, maar

2 dit was altyd deel van die strategie van die polisie en ek

3 dink die woord wat daar na verwys was, the members must

4 also be vigil or they must either be vigil or circumspect

5 in terms of approaching suspects. So dit was, dit is

6 vermeld in die beplanning iewers.

7 MR MAHLANGU: That was mentioned in the

8 plan, some of the words that were used in the plan.

9 CHAIRPERSON: [Indistinct] vigilance in

10 approaching the suspects –

11 MR MPOFU: That's correct.

12 CHAIRPERSON: - was part of the general

13 strategy.

14 MR MPOFU: Thank you, Chairperson.

15 CHAIRPERSON: Can we –

16 MR MPOFU: Can we take the break,

17 Chairperson?

18 CHAIRPERSON: Yes, thank you for giving

19 us your – we'll now take the tea adjournment.

20 [COMMISSION ADJOURNS COMMISSION RESUMES]

21 [11:26] CHAIRPERSON: The Commission will resume.

22 Generaal-Majoor, u is nog steeds onder eed. Mr Mpofo?

23 GENERAAL-MAJOOR CHARL ANNANDALE:

24 (s.o.e.)

25 CROSS-EXAMINATION BY MR MPOFU (CONTD):

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1 Thank you. Thank you, Chairperson. General, just so that

2 we – and for the benefit of my colleagues – the identity of

3 the specific person I was talking about is not a secret,

4 it's Captain Kidd, K-I-D-D, but you've already answered my

5 question. I just wanted to round off that and the contents

6 of his particular briefing are contained in the IPID

7 statement of his troops, as it were.

8 CHAIRPERSON: He doesn't agree that these

9 were paramilitary units, so he won't agree they were

10 troops.

11 MR MPOFU: Yes. I mean it in the nicest

12 possible way. Now, just one little aspect before we move

13 to the next topic. Is it correct that one of the criteria

14 for membership of the NIU in particular is that one should

15 not have a criminal, a pending criminal case? You know

16 that there are differences, in some instances you must not

17 have a criminal record and in other cases you mustn't have

18 a criminal case, in others you mustn't have even a

19 departmental inquiry. Is it correct that in the case of

20 the NIU you're not allowed to enter that unit if you have

21 even a pending disciplinary inquiry or a criminal case

22 pending?

23 MR SEMENYA SC: Chair, is it eligibility

24 or membership?

25 MR MPOFU: Eligibility. Well, both,

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1 both.

2 CHAIRPERSON: I take it that the point is

3 that it's a disqualification –

4 MR MPOFU: Yes.

5 CHAIRPERSON: - even to go forward for

6 training with a view to be appointed to the NIU -

7 MR MPOFU: Absolutely, yes.

8 CHAIRPERSON: - if you've got a pending,

9 either a criminal case or a disciplinary case too, I think.

10 MR MPOFU: That's correct.

11 CHAIRPERSON: That's what you're putting.

12 MR MPOFU: Yes.

13 CHAIRPERSON: Let's see if your

14 information is correct.

15 MR MPOFU: Thank you, Chair.

16 CHAIRPERSON: Is that so, Major-General?

17 GENERAAL-MAJOOR ANNANDALE: Voorsitter,

18 ek probeer nou kyk, ek is nie seker of dit insluit

19 "pending" en of dit net is, 'n reeds kriminele saak nie.

20 MR MPOFU: Okay, now you've got me

21 because I don't have it in front of me. I notice the head

22 –

23 CHAIRPERSON: The document I think is

24 exhibit Q. Unfortunately our copy is out of reach but

25 they'll go and fetch it.

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1 GENERAAL-MAJOOR ANNANDALE: Voorsitter,
 2 ek het dit beskikbaar, ek kan dit voorhou. Voorsitter, dit
 3 is op 'n blad wat sê "Draft directive, recruitment and
 4 selection."
 5 CHAIRPERSON: Yes, it is actually. Draft
 6 directive, recruitment and selection, prerequisite for
 7 applicant. Have you got it in front of you, Mr Mpofu?
 8 MR MPOFU: No, I've got – no, Chair.
 9 CHAIRPERSON: One of the things is not
 10 being found guilty during a departmental/criminal hearing.
 11 Another one no criminal record, another one no pending
 12 cases, departmental and/or criminal. So the point you put
 13 is correct, borne out by the documents which we've referred
 14 to.
 15 GENERAAL-MAJOOR ANNANDALE: Voorsitter,
 16 behalwe as ek net kan meld, dit het "draft," dis 'n konsep
 17 direkief en ek is nie seker wat die bestaande beginsels is
 18 en of dit presies dieselfde is en of dit anders is nie.
 19 MR MPOFU: Okay, I accept that. Assuming
 20 that it applies now as we speak, would it make you
 21 uncomfortable to know that there is somebody now in the
 22 NIU, or at least one of two people who has been fingered,
 23 although there's no conclusion, of having executed somebody
 24 allegedly or having said that these people, they have to
 25 die or words to that effect? Isn't that –

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1 CHAIRPERSON: Sorry, is the suggestion
 2 that this happened before the 16th of August or is it –
 3 MR MPOFU: On the 16th, on the 16th.
 4 CHAIRPERSON: No – no –
 5 MR MPOFU: But the threats is happening
 6 now.
 7 CHAIRPERSON: Yes, no. No, we're busy
 8 with the question whether there is a pending case, either
 9 criminal or departmental, against someone who is in the NIU
 10 and you say there is at least one person and you've
 11 described the circumstances.
 12 MR MPOFU: Yes.
 13 CHAIRPERSON: Now I want to know from
 14 you, is that something that arose after or possibly even in
 15 consequence of what happened on the 16th? In other words,
 16 the person concerned wasn't disqualified –
 17 MR MPOFU: Oh, yes.
 18 CHAIRPERSON: - if the directive is
 19 still, was already in force, that person wasn't
 20 disqualified from being there on the 16th. The pending
 21 charge, if it is indeed pending because it's an interesting
 22 question as to what that is but if it was pending, if it's
 23 pending did that only arise after the 16th –
 24 MR MPOFU: Yes, no –
 25 CHAIRPERSON: - in which case I'm not

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1 sure of the relevance of the question but anyway, but I'll
 2 let you ask it in the absence of any objection from
 3 anybody.
 4 MR MPOFU: Yes. No, no, Chairperson,
 5 I'll explain the relevance just now. I think that
 6 distinction that the Chairperson has made is very
 7 important. The point I'm making is not so much that that
 8 person should not have been there on the 16th. The point
 9 I'm making is that that person should be there now because
 10 on the 16th they did something which warranted a
 11 departmental inquiry. That's –
 12 CHAIRPERSON: Forgive me if I ask you
 13 this, what is the relevance of whether the person should be
 14 there now?
 15 MR MPOFU: Well, it's the same relevant
 16 that Mr – one of the evidence leaders put the NIU, I think
 17 it was Mr Madlanga, put the NIU – that's the case that I'm
 18 talking about – for a considerable amount of time to the
 19 previous witness.
 20 CHAIRPERSON: Yes, no, but what's the
 21 relevance of it?
 22 MR MPOFU: No –
 23 CHAIRPERSON: If the relevance is that if
 24 there's a lax attitude now to the enforcement of this rule,
 25 if it is a rule, that might be indicative of a similar lax

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1 attitude in the past but that's a bit speculative, isn't
 2 it? And what does pending mean? The mere fact that
 3 someone has been fingered, as you put it, doesn't mean a
 4 charge is pending, does it, unless those responsible for
 5 initiating departmental or criminal steps have, as it were,
 6 accepted the charge and done something about it. So
 7 there's a bit of a vagueness there as well, so –
 8 MR MPOFU: Ja –
 9 CHAIRPERSON: I don't want to waste too
 10 much time on what may be a bit of a red herring.
 11 MR MPOFU: Ja, well, if it was – that's
 12 the only point I'm making, Chairperson. If it is a red
 13 herring it won't start being a red herring today, it would
 14 have been a red herring when it was canvassed by Mr
 15 Madlanga with the National Commissioner, which was the
 16 point that, what's his name, Myburgh or whatever, you know
 17 the person I'm talking about. This is exactly the same
 18 point so if it was a red herring, it was a red herring last
 19 month. It won't start –
 20 CHAIRPERSON: I don't remember the point
 21 being put quite in the question whether the person should
 22 be in NIU but I seem to remember the point was made from
 23 another angle.
 24 MR MPOFU: That steps had been taken.
 25 CHAIRPERSON: Ja.

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1 MR MPOFU: Yes, which is exactly where
 2 I'm going.
 3 CHAIRPERSON: But if Mr Madlanga got away
 4 with some irrelevancy, that's no reason why mistakes should
 5 be repeated, is it?
 6 MR MPOFU: Ja, well, it would suggest –
 7 I'm arguing the exact opposite, that if he was allowed to
 8 go with it, it must have been relevant.
 9 CHAIRPERSON: So -
 10 MR MPOFU: Yes. It's not a big point -
 11 CHAIRPERSON: Anyway, let's not waste
 12 time on it.
 13 MR MPOFU: Yes.
 14 CHAIRPERSON: What's the point you want
 15 to make, quickly? Let's get that over with.
 16 MR MPOFU: Yes, thank you Chairperson.
 17 The point I want to make, General, is this, that the – and
 18 we'll take it step by step – it's either as the Chairperson
 19 correctly points out, there is a departmental investigation
 20 in which case that person should not be in the unit, or
 21 there is not departmental investigation when there should
 22 be one, in which case that person should still not be in
 23 the unit because it's a disqualifying factor.
 24 MR BURGER SC: No, I object to this.
 25 This is really debating an irrelevant question from the

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1 wrong side. It doesn't advance one thing we're doing
 2 today, this question. I object to it, Chair.
 3 CHAIRPERSON: I'm inclined to think
 4 there's something in that. If there had been something
 5 before the 16th then it could be raised pertinently but it
 6 seems a little bit, tangential collateral that doesn't
 7 justify the time that's spent on it.
 8 MR MPOFU: Well –
 9 CHAIRPERSON: I'm already - sorry, I have
 10 to give you a chance to reply but that's my prima facie
 11 view.
 12 MR MPOFU: It's alright, Chairperson,
 13 I'll leave it, subject to say that if the matter has
 14 suddenly lost its relevance then I'll leave it at that,
 15 Chair.
 16 CHAIRPERSON: Alright.
 17 MR MPOFU: Okay.
 18 CHAIRPERSON: I suggest you move on to
 19 your next relevant point, Mr Mpofo.
 20 MR TIP SC: Well, the point seems to have
 21 evaporated but the basis of it needs to be cleared. The
 22 portion that has been read out deals with applicants who
 23 wish to become members of the NIU.
 24 CHAIRPERSON: But if a person isn't
 25 qualified to be a member of the NIU because of something,

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1 the same kind of thing happens while he is a member of the
 2 NIU, surely he should at least be suspended or not allowed
 3 to function as a member of the NIU.
 4 MR TIP SC: But that becomes –
 5 CHAIRPERSON: It's a matter of common
 6 sense I would have thought.
 7 MR TIP SC: That becomes a matter for the
 8 proper application of labour law principles. One can't
 9 apply this particular provision to it.
 10 CHAIRPERSON: We're not, fortunately,
 11 concerned with labour law principles.
 12 MR TIP SC: No, but –
 13 CHAIRPERSON: Anyway, okay –
 14 MR TIP SC: - Mr Mpofo is putting it on a
 15 basis, I'm really just adding a correction.
 16 CHAIRPERSON: Yes -
 17 MR MPOFU: Chairperson, I'm not –
 18 CHAIRPERSON: I've already agreed it's an
 19 irrelevant point but he just wanted to add a further aspect
 20 to it. Don't do it again, Mr Tip. Let's carry on, Mr
 21 Mpofo. Move on to your next relevant point, please.
 22 MR MPOFU: Thank you, Chairperson. I'm
 23 just going to ask you something which, I hope you will take
 24 it in the correct spirit. You and some of the players in
 25 this episode joined the police – you, for example, joined

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1 the police in 1982 during the apartheid era, correct?
 2 GENERAAL-MAJOOR ANNANDALE: Ek het
 3 aangesluit by die polisie, Voorsitter, in 1982, dis korrek.
 4 MR MPOFU: And that applies to various
 5 others of your colleagues like Vermaak, Calitz, Mbombo and
 6 – to mention a few, correct?
 7 GENERAAL-MAJOOR ANNANDALE: Voorsitter,
 8 daar is letterlik –
 9 CHAIRPERSON: It's a question to ask the
 10 National Commissioner, of course, if that's, if that has
 11 any relevance.
 12 MR MPOFU: Most definitely. No, it
 13 certainly doesn't. In fact, let me rather not comment on
 14 that, Chair. Now there is a view shared by some of the
 15 people I represent that maybe some of the people who made
 16 decisions in respect to the massacre as they perceive it,
 17 had not unlearned the way of doing things which prevailed
 18 when these massacres were the order of the day. Can you
 19 just tell us –
 20 CHAIRPERSON: No, no, Mr Mpofo, I don't
 21 think it's correct to say that these massacres were the
 22 order of the day. That's a very broad statement which
 23 you'd have difficulty, I think -
 24 MR MPOFU: Okay, I'll –
 25 CHAIRPERSON: I understand, I think, what

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1 you're trying to say but I think you're exaggerating by
2 putting it that way.

3 MR MPOFU: Okay, ja, alright. Well, I'll
4 give you one example. Are you aware in 1982 – or no, not
5 in any particular year – you are aware of what was called
6 the Trojan Horse massacre where the police went into a
7 truck pretending, hiding, and then when people started
8 stoning it they suddenly came out and shot and killed
9 people? It happened in the Western Cape. You may or may
10 not be aware but that is the type of conduct I'm talking
11 about.

12 COMMISSIONER HEMRAJ: You're not
13 suggesting, Mr Mpofo, that there's any similarity with that
14 incident and the Marikana incident, are you?

15 MR MPOFU: No, I'm not.

16 CHAIRPERSON: Mr Mpofo, I think I know
17 what you're trying to say but I've got the feeling that
18 you're putting it far too widely.

19 MR MPOFU: I haven't said it, Chair.

20 CHAIRPERSON: No, you talk about going on
21 a walk. I think I can see the direction, the route you're
22 following. You're talking, you're really talking about a
23 mindset that wasn't unlearned and what is common cause, I
24 think, certainly of those who have read the National
25 Planning Commission's report, was that the police force was

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1 militarised – in fact was a force before '94. There was a
2 mindset that went with that. It was, a decision was taken
3 specifically to depart from that mindset, that's why the
4 police force became a police service. Military ranks were
5 done away with and the force then was demilitarised. One
6 of the points raised with this witness as well, raised with
7 this witness and with the National Commissioner, was that
8 the Commission has recommended, the Planning Commission,
9 that the police be demilitarised again on more or less with
10 immediate effect, and the suggestion is in the report that
11 from 2000 the police once again became militarised or to
12 some extent – it's not put quite as strongly as that but
13 that's what they say and that that was formalised by the
14 reintroduction of military ranks in 2010. Now, what I
15 suspect you are suggesting is that that old mindset has
16 come back, either because it came back from 2000 onwards or
17 it was always there because people hadn't unlearned the
18 lessons of the past. I take it that's the point you're
19 making, am I right?

20 MR MPOFU: Yes, Chairperson, it is, save
21 to say that what you've said applies to the post-apartheid
22 era which also applies to my question. Maybe, and as you
23 are correctly saying, I was putting it too wide. I was
24 doing a direct contrast between the apartheid mentality
25 itself, of which the witness, the witness –

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1 CHAIRPERSON: I'm not sure – I'm sorry to
2 interrupt you – I'm not sure if the apartheid mentality,
3 apartheid means something else.

4 MR MPOFU: Pre-'94, let's –

5 CHAIRPERSON: Pre-'94 but there was so,
6 as you said, a military approach before '94. That was done
7 away with. The Planning Commission complained it's come
8 back and should be done away with again. Now, you want to
9 ask the question of this witness about the mindset of those
10 like himself who joined the force before '94 basically, is
11 that right?

12 MR MPOFU: Correct, that's it.

13 CHAIRPERSON: Now perhaps you can find a
14 way of putting that question crisply –

15 MR MPOFU: Ja.

16 CHAIRPERSON: And in a way which elicits
17 a helpful answer.

18 MR MPOFU: Thank you, Chairperson. Okay,
19 I won't make the example again. You are aware that pre-
20 1994, apart from the occasional massacre and officials made
21 one, one example, that there are people who held the view
22 that the mentality of the police was that of – I can't put
23 it better than skiet and what the – I think it's called
24 skiet-en-donner, as opposed to what is prescribed in the
25 prescripts that we have been talking about. You are aware

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1 of that, the division of opinion among the citizens of how
2 the police used to behave.

3 CHAIRPERSON: Put the question.

4 MR MPOFU: Okay, are you aware of that?

5 GENERAAL-MAJOOR ANNANDALE: Voorsitter,
6 daar is net een manier wat ek hierdie vraag kan antwoord.

7 MR MPOFU: Sorry, before you do, I don't
8 want to cut you –

9 CHAIRPERSON: No, he's entitled to
10 answer. Let him answer the question.

11 MR MPOFU: I'm not, I'm helping him.

12 CHAIRPERSON: No, I think he'd like to
13 give the answer of his own – let him carry on.

14 [11:46] GENERAAL-MAJOOR ANNANDALE: Voorsitter,
15 ek en al my kollegas wie voor '94 aangesluit het dien nou
16 al meer as 19 jaar in hierdie demokrasie. Ekself dien al
17 langer in hierdie demokrasie as wat ek gedien het in die
18 vorige bestel.

19 MR MAHLANGU: I personally served in this
20 democracy –

21 CHAIRPERSON: Longer than in the
22 previous, under the previous dispensation.

23 GENERAAL-MAJOOR ANNANDALE: Voorsitter,
24 in die vorige bestel het ek gefunksioneer binne my eie
25 waardesisteem, waardes aan my geleer deur my ouers en

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1 pertinent gebaseer op die beginsel van respek. Die waardes
2 het my geleer om binne enige sisteem te funksioneer.
3 Voorsitter, en dit was een van die redes hoekom ek by die
4 Suid-Afrikaanse Polisie destyds aangesluit het.

5 MR MAHLANGU: Chairperson, that was the
6 reason, firstly, why I joined the police in –

7 CHAIRPERSON: One of the reasons why I
8 joined the police then.

9 MR MAHLANGU: Then, yes.

10 GENERAAL-MAJOOR ANNANDALE: Om agter die
11 skerms my rol te speel in terme van regverdigheid.

12 CHAIRPERSON: My role in terms of justice
13 behind the scenes, justice and fairness behind the scenes,
14 I think it is.

15 MR MAHLANGU: Thank you, Chair.

16 GENERAAL-MAJOOR ANNANDALE: Sommige
17 persone het hulle regverdigheid uitgespeel op die openbare
18 verhoog.

19 MR MAHLANGU: Some people have played on
20 the open stage, their values.

21 CHAIRPERSON: Their role of fairness, I
22 suppose, and justice.

23 MR MAHLANGU: Their role of?

24 CHAIRPERSON: Fairness and justice.

25 MR MAHLANGU: Fairness on an open stage.

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1 GENERAAL-MAJOOR ANNANDALE: En ek myne in
2 'n klein aspek om regverdige dienslewering of deur my
3 dienslewering regverdigheid te bevorder.

4 MR MAHLANGU: Mine was to exercise this
5 in the proper administration of –

6 CHAIRPERSON: I think it was to advance
7 the cause of justice and fairness in the performance of my
8 duties.

9 MR MAHLANGU: In the performance of my
10 duties, yes, to –

11 GENERAAL-MAJOOR ANNANDALE: Voorsitter,
12 ek het verder die beginsel van verdraagsaamheid, was verder
13 bevestig deur 'n aantal pertinente mense.

14 CHAIRPERSON: He says the principle of
15 tolerance was further confirmed by a number of particular
16 people.

17 MR MAHLANGU: Thank you, Chair.

18 GENERAAL-MAJOOR ANNANDALE: Voorsitter,
19 en niemand minder as oud-President Mandela, Aartsbiskop
20 Tutu en die Dalai Lama.

21 MR BOOI: Dali?

22 CHAIRPERSON: Dalai Lama.

23 MR MPOFU: Thank you, Chairperson, I
24 didn't know that I was elevated.

25 GENERAAL-MAJOOR ANNANDALE: Ek is amper

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1 klaar, Voorsitter. Om dit direk terug te bring na
2 Marikana, daar is geen so 'n benadering deur enige persoon
3 wat ek interaksie gehad het, was dit te bespeur nie,
4 geensins nie.

5 MR MAHLANGU: It wasn't seen from any
6 part, person with whom I had anything to do that this was –

7 CHAIRPERSON: No such approach was
8 detected on the part of anybody with whom I came into
9 contact at Marikana, I think that's –

10 MR MAHLANGU: Yes, that is correct,
11 Chair.

12 GENERAAL-MAJOOR ANNANDALE: So
13 Voorsitter, nee, daar was nie 'n benadering van skop, skiet
14 en - ek weet nie of ek die woord kan gebruik nie.

15 MR MPOFU: Thank you, General. If you've
16 finished, thanks. The reason I'm asking you this, General,
17 and it's relevant to what we are about here, is that the
18 feeling as it manifests in the people I represent – and
19 this is my own suspicion – among other things, comes from
20 the statement that was made by Mr Mathunjwa on his second
21 visit to the koppie where he said those people must leave
22 that place, they're going to be killed because the life of
23 a black person is cheap. And what I'm saying to you is
24 that kind of mentality, whether Mr Mathunjwa was right or
25 wrong – he was right because the people were killed but

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1 that kind of statement that he made would have been in
2 conformity with the thinking, not just of the police but
3 with the pre-'94 thinking. Would you at least, we agree on
4 that?

5 CHAIRPERSON: I don't know that we can
6 expect this witness to give an answer on behalf of the
7 whole country, it's –

8 MR MPOFU: Then he can give it on behalf
9 of himself.

10 CHAIRPERSON: Sorry?

11 MR MPOFU: Then he can give it on behalf
12 of himself, Chairperson.

13 CHAIRPERSON: Well, I understood him
14 already to have said something along those lines, that that
15 wasn't his approach at all but anyway, let him, let's just
16 give him the chance to answer that question –

17 MR BURGER SC: Then I object to the
18 question on the basis of relevancy. This witness has now
19 taken time to take us carefully through his state of mind,
20 to explain to us in his own mother tongue why the phrase
21 used by my learned friend, who doesn't speak that language,
22 was ill-chosen and inappropriate. To ask this witness now
23 to again pontificate on what is a suspicion by my learned
24 friend, is wasting time. I object to it.

25 CHAIRPERSON: I think it's now on his own

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1 attitude and I think I know what he's going to say and I
 2 think I should give him the opportunity, the witness the
 3 opportunity to state unequivocally for Mr Mpofo's benefit,
 4 and his clients', where he stands.

5 MR MPOFU: Thank you, Chairperson.

6 GENERAAL-MAJOOR ANNANDALE: Voorsitter,
 7 ek weet nie waarom het Mr Mathunjwa daardie waarneming
 8 gemaak nie. Dit was vir seker nie my mentaliteit nie en ek
 9 het ook nie sodanige mentaliteit bespeur by enige van my
 10 kollegas nie.

11 MR MPOFU: Yes. Now, thank you, General,
 12 and I accept that as far as you are concerned but would you
 13 be in a position to enlighten the Commission as to whether
 14 that mentality of old, whether there are remnants of it
 15 which may have contributed to the massacre?

16 CHAIRPERSON: I understood he's answered
 17 that already. He said that he did not detect any traces of
 18 that mentality on the part of –

19 MR MPOFU: On the day. I'm talking
 20 generally.

21 CHAIRPERSON: No – no, I'm not –

22 MR MPOFU: Sorry.

23 CHAIRPERSON: - on the part of any of his
 24 colleagues at Marikana. So let's assume for the sake of
 25 argument where you're getting at, that he knows some of his

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1 colleagues who weren't at Marikana who may have, at some
 2 stage, have had that attitude, it wouldn't be relevant to
 3 what we're busy with because we're busy with what happened
 4 at Marikana. So I don't propose we should have a wide-
 5 ranging discussion as to the mentality of some or other
 6 members of the South African Police force who are not in
 7 any way connected with the events with which we are
 8 concerned. So I'm not prepared to allow that question.

9 MR MPOFU: Are you able or not able to
 10 say whether or not the attitude articulated by Mr Mathunjwa
 11 that black life is cheap, contributed in any way to the
 12 massacre on the 16th of August?

13 MR SEMENYA SC: Chair, the witness has in
 14 many ways disavowed that completely and said, I don't know
 15 where Mr Mathunjwa's perceptions stem from and he can't
 16 talk about it.

17 CHAIRPERSON: Mr Mpofo? The point made
 18 is that the witness has, in effect, answered it already.

19 MR MPOFU: Ja –

20 CHAIRPERSON: You may wish to take it up
 21 possibly with other people and then the –

22 MR MPOFU: I will, Chairperson.

23 CHAIRPERSON: - applicability of the
 24 question to that particular witness can be discussed, but I
 25 think in the light of what this witness has said already,

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1 there's no further point in –

2 MR MPOFU: That's fine, Chairperson. I
 3 know it's an uncomfortable subject but its relevance will
 4 become clearer maybe with other witnesses. Are you aware
 5 of an attitude that before 1994 the police would use
 6 maximum force even in situations where it was uncalled for?

7 GENERAAL-MAJOOR ANNANDALE: Voorsitter,
 8 ek het dan pertinent net dink aan Sharpeville. Ek het nie
 9 ander voorbeelde wat ek nou my vinger op kan lê nie wat –

10 MR MPOFU: Okay, no, that I'll accept but
 11 there are several other examples in Langa and Soweto and
 12 Alexander and the Trojan Horse that I –

13 CHAIRPERSON: The witness says he can
 14 only remember one. You may have a better memory than he
 15 has.

16 MR MPOFU: I do and that's why I'm
 17 reminding him, Chairperson. I'm reminding him that there
 18 were many others.

19 GENERAAL-MAJOOR ANNANDALE: Voorsitter,
 20 ek betwyfel nie dat daar ander as nie, ek het pertinent die
 21 een wat ek kon oproep.

22 MR MPOFU: Yes, what's the answer?

23 GENERAAL-MAJOOR ANNANDALE: Voorsitter,
 24 ek het geantwoord dat pertinent het ek opgeroep in my
 25 geheue Sharpeville.

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1 MR MPOFU: Well, as an example of what I
 2 was saying of where maximum force was used. Okay, now do
 3 you know that in the new dispensation the use of maximum
 4 force was outlawed and that it is no longer allowed?

5 GENERAAL-MAJOOR ANNANDALE: Voorsitter,
 6 ek is nie bewus dat maksimum geweld iewers vervat was in
 7 wetgewing, dat dit herroep is nie. Die beginsel in the
 8 polisie is 'n beginsel van minimum geweld.

9 MR MPOFU: Yes, no, that's fair enough.
 10 Two sides of the same coin. Maybe I should put the
 11 question, therefore, as follows. Do you know that it is
 12 now legislated that only minimum force may be used by the
 13 police, which is the same thing as saying maximum force may
 14 not be used?

15 GENERAAL-MAJOOR ANNANDALE: Voorsitter,
 16 ek het verwys dat die enigste beginsel is dié van minimum
 17 geweld en die polisie benadering is ook dan in wetgewing
 18 vervat.

19 MR MPOFU: I'm sorry, General, maybe my
 20 question is not clear so I'm taking responsibility for
 21 that. I accept, as we all know, that there's references
 22 for example in 262 of the use of minimum force and so on –

23 CHAIRPERSON: I think the witness is –
 24 sorry to interrupt you – I think the witness is probably
 25 alluding to section 13, amongst others, to section 13(3)(b)

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1 of the Police Service Act –

2 MR MPOFU: That’s exactly what I’m

3 talking about.

4 CHAIRPERSON: Where it says, “Where a

5 person” – sorry. Please turn those cell phones off. I’ve

6 spoken about that before. If a cell phone goes off again

7 I’ll ask the person who has it to leave the room. Section

8 13(3)(b) of the Act –

9 MR MPOFU: (b).

10 CHAIRPERSON: 13(3)(b) -

11 MR MPOFU: Yes.

12 CHAIRPERSON: - of the Police Service Act

13 states, “Where a member who performs an official duty is

14 authorised by law to use force, he or she may use only the

15 minimum force which is reasonable in the circumstances.”

16 That’s the section that the witness –

17 MR MPOFU: That’s the section that I’m on

18 about, Chairperson. You’ve heard what the Chairperson read

19 out, section 13(3)(b) of the Police Act. Now, what I want

20 or what I’m saying to you and it’s a subtle distinction

21 between what you have just said, is that that section

22 effectively prescribes that only minimum force can be used

23 and by implication it outlaws the use of maximum force by

24 the South African Police post-apartheid.

25 [12:06] CHAIRPERSON: I’m not sure that the

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1 statement, the question is correct in suggesting that

2 minimum force necessarily excludes maximum force. You –

3 can I just finish?

4 MR MPOFU: Okay.

5 CHAIRPERSON: There can be a situation,

6 for example, in a cash in transit heist situation where you

7 have the robbers armed with automatic rifles, assault

8 rifles, where it’s necessary for the STF or whoever deals

9 with the situation to fire, to shoot back and shoot to kill

10 to prevent the deaths of part of, the victims of the cash

11 in heist robbery.

12 MR MPOFU: Sure.

13 CHAIRPERSON: That would be a case where

14 there’s, where minimum force happens to coincide with

15 maximum force.

16 MR MPOFU: Ja.

17 CHAIRPERSON: Not because it’s maximum

18 force but because the minimum, even the minimum takes you

19 right up to the ceiling.

20 MR MPOFU: Thank you –

21 CHAIRPERSON: That’s why it’s not correct

22 to say that minimum force necessarily excludes maximum

23 force because one can consider, conceive of rare situations

24 where the minimum force is the same as maximum force, but

25 the general proposition is that minimum force –

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1 MR MPOFU: Only minimum force can be used

2 –

3 CHAIRPERSON: That’s right. So I didn’t

4 like the way you phrased your question, so if you can

5 perhaps rephrase it to convey the point you want to convey

6 I’ll allow you to put the question.

7 MR MPOFU: Ja. Chairperson no, maybe

8 before you allow me, let me just contest the proposition

9 and I think the Chairperson has almost answered his own

10 concern. In those situations, Chairperson, if the threat

11 was so heightened that a lot of force had to be used, that

12 would still be minimum force in those circumstances. So it

13 doesn’t detract from the fact that minimum force is

14 prescribed and if the force was used there, it would not be

15 maximum force, it would be minimum force which is high, as

16 it were. It’s semantics but it’s a very important

17 distinction.

18 CHAIRPERSON: It can’t go any higher then

19 it also happens to be maximum –

20 MR MPOFU: Well, that would be a

21 coincidence but it would be minimum force.

22 CHAIRPERSON: No, it would be minimum

23 force, yes, of course.

24 MR MPOFU: Okay, General, do we now –

25 well, I’m sure we do agree that only minimum force is

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1 allowed in the new South Africa?

2 GENERAAL-MAJOR ANNANDALE: Voorsitter,

3 ek het dit nie betwis nie.

4 MR MPOFU: Alright.

5 CHAIRPERSON: Mr Mpofo, can I put this to

6 you? I think you are now engaging on a debate which will

7 be relevant in this Commission because we’ve already

8 received submissions dealing with this point about, the

9 suggestion is that the police are now adopting a policy of

10 minimum - maximum force and departing from the prescripts

11 of section 13(3)(b) and it’s dealt with in extenso in

12 exhibit FFF14.

13 MR MPOFU: Yes.

14 CHAIRPERSON: I don’t know that it’s

15 appropriate for this debate to be had with this witness at

16 this stage, but certainly it’s a relevant matter that we’re

17 concerned about and obviously we’ll have to deal with.

18 MR MPOFU: Okay.

19 CHAIRPERSON: But I don’t see how it

20 helps to debate it with –

21 MR MPOFU: Well –

22 CHAIRPERSON: So if I allow you to debate

23 it with him, you’ll debate it with every policeman who

24 comes –

25 MR MPOFU: No.

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1 CHAIRPERSON: And we'll be here for
 2 longer than the Saville Commission was in Northern Ireland
 3 and I don't want to allow that.
 4 MR MPOFU: No, Chairperson, with the
 5 greatest respect. Actually I was going to leave the
 6 subject, now I'm going to pursue it. The reason why I'm
 7 asking this witness about that is because he, General
 8 Annandale, according to the National Commissioner is one of
 9 the people who briefed her about the happenings in Marikana
 10 and he, among others or in his presence, told the National
 11 Commissioner that maximum force was used. So this has got
 12 nothing to do with the entire police force. I'm talking
 13 about someone –
 14 CHAIRPERSON: Where – I know what the
 15 National Commissioner said, it's been put before us.
 16 MR MPOFU: Yes, but –
 17 CHAIRPERSON: I'm not aware of any
 18 evidence – if it is, you must draw it to my attention – I'm
 19 not aware of any evidence where she said that those actual
 20 words, the verba ipsissima as we say, were used by this
 21 witness in briefing her.
 22 MR MPOFU: No, no, nobody is suggesting
 23 that. All I'm saying is that she has given evidence that
 24 the contents of her statement to brief the President and
 25 the statement she made on the 17th was as a result of the

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1 information she got from the commanders who briefed her, of
 2 which this witness was one and that – of course the witness
 3 might say it was not me, it was Calitz or whatever, I
 4 don't, that's not where I am. All I'm saying is that as a
 5 result of a briefing that he, among other people, gave
 6 which the National Commissioner says informed her
 7 statement, it was said that maximum force had been used on
 8 the 16th of August, which is against the law.
 9 CHAIRPERSON: Well –
 10 MR SEMENYA SC: Chair –
 11 CHAIRPERSON: It's a further question
 12 that arises and that is a point made by the author of the
 13 book which is FFF14 that the phrase "maximum force" may
 14 also be ambiguous and that "by maximum force" may simply
 15 have been meant lethal force, but when the National
 16 Commissioner comes back and you proceed with your cross-
 17 examination of her, you can ask her about it but –
 18 MR MPOFU: Chairperson, I'm sorry, I know
 19 Mr Semenya wants to say something – just so that he
 20 responds to everything, that's exactly the problem I'm pre-
 21 empting, Chairperson, because if I do that with the
 22 National Commissioner, she's going to ask the commanders.
 23 The commander is here now and he'll be gone, so I have to
 24 ask him and then I will ask her. You can be sure that I
 25 will ask her as well but I don't want her to say, you

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1 should have asked Annandale and then Annandale by then will
 2 be gone.
 3 CHAIRPERSON: Mr Semenya, you want to say
 4 something? It looks as if he simply wants to ask, did you
 5 tell the National Commissioner that maximum force was used?
 6 If that's his question and did she get that phrase, which
 7 she did use, did she get it from you? If he asks that
 8 question I don't see how – how I can disallow him.
 9 MR SEMENYA SC: Well, Chair, the
 10 objection is a different one.
 11 CHAIRPERSON: In what respect?
 12 MR SEMENYA SC: The transcript tells us
 13 that the National Commissioner in her own words says, "I
 14 used that word as a connotation of a contrast between
 15 minimum force and maximum force." She did not use it as a
 16 word of art as we now know it. She gave direct evidence
 17 about what she meant by that expression.
 18 CHAIRPERSON: If he's only going to ask
 19 the one question, did she get that phrase from the witness,
 20 I'll allow him to ask the question but I won't allow him to
 21 go any further. Yes, Mr Mpofo?
 22 MR MPOFU: No, Chairperson, with the
 23 greatest respect, can I respond to what Mr Semenya has just
 24 said?
 25 CHAIRPERSON: Yes, you can respond.

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1 MR MPOFU: Thank you. What Mr Semenya
 2 has just said makes it even worse, Chairperson. If indeed
 3 the National Commissioner used that phrase in contrast to
 4 minimum force, then it means she did so consciously.
 5 CHAIRPERSON: Mr Mpofo, I'm not sure
 6 that, with respect to Mr Semenya, his quotation is exactly
 7 correct but in any event what the National Commissioner
 8 said and what she meant is a matter to take up with her.
 9 It's no good taking it up with this witness but what I've
 10 said is I'll allow you to ask her whether she got the
 11 phrase from you, i.e. from General Annandale. You can ask
 12 that question. Let's hear what his answer is.
 13 MR MPOFU: No, I'll leave it,
 14 Chairperson. I'll move to something else.
 15 CHAIRPERSON: Mr Mpofo, you say when she
 16 gives her evidence –
 17 MR MPOFU: No, it's okay.
 18 CHAIRPERSON: - the Major-General will
 19 have gone and you can't ask him, so if you won't ask him, I
 20 will. Did you give that expression to, did you use that
 21 expression "maximum force" in the briefing you gave or that
 22 you were involved in giving to the National Commissioner?
 23 GENERAAL-MAJOOR ANNANDALE: Nee,
 24 Voorsitter.
 25 CHAIRPERSON: Right.

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1 MR MPOFU: Do you accept that the 34
2 people who were killed in, rather on the 16th of August,
3 were killed by the police, correct?
4 GENERAAL-MAJOOR ANNANDALE: Voorsitter,
5 ek het geen rede om te glo dat dit 'n ander rede is nie.
6 Ek dink daar is 30 persone, dink ek, op die dag en ek weet
7 daar is vier wat na die tyd in die hospitaal is, maar ek
8 het geen rede om dit nie te glo nie.
9 MR MPOFU: And of course you are aware
10 that the version of the police is that those people were
11 killed in self-defence. The question is –
12 CHAIRPERSON: Self or private defence.
13 MR MPOFU: Self or private defence, yes,
14 to be technical. The question I want to ask you is whether
15 you'd agree with the proposition that for someone to be
16 able to justify or testify about whether a particular
17 situation amounted to self-defence or not, that person
18 would either have had to be present or involved in the
19 fight, as it were – in or during the fight.
20 CHAIRPERSON: Mr Semenya, you've got your
21 microphone turned on?
22 MR SEMENYA SC: Chair, that's completely
23 incorrect. I've read the judgments of judges on self-
24 defence, whether it was or was not present, who were not
25 themselves involved.

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1 CHAIRPERSON: Judges don't testify, the
2 judges make findings based on the testimony before them
3 given by people who were present, saw what happened. So I
4 don't know, with respect, if your objection helps us but Mr
5 Mpofo –
6 MR MPOFU: Yes, Chairperson, I don't
7 think –
8 CHAIRPERSON: I don't know where you're
9 going to, so I'm reluctant to stop you at this stage –
10 MR MPOFU: Well, Chairperson, I'm glad
11 you are reluctant because self-defence is an important
12 aspect of this case. Once I mention it, I think the – ja.
13 CHAIRPERSON: Of course, of course it is
14 but you were asking about who can testify about it and so –
15 MR MPOFU: Ja.
16 CHAIRPERSON: And this witness – anyway,
17 but carry on.
18 MR MPOFU: Thank you, Chairperson.
19 COMMISSIONER HEMRAJ: Mr Mpofo, are you
20 referring to someone who testifies first-hand or someone to
21 whom a report has been made?
22 MR MPOFU: No, I'll ask the question
23 again. Thank you, I think that's a useful qualification,
24 Commissioner. Would you – okay, let me start by saying
25 this, your assertion, your assertions or those of the high

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1 command of the police on the question of self-defence would
2 be third-hand in the sense that they would have been told
3 by the shooters to their commanders who then told you about
4 them, and so they are third-hand and not first-hand as the
5 Commissioner has correctly indicated. Would you accept
6 that as a fact?
7 GENERAAL-MAJOOR ANNANDALE: Voorsitter,
8 dis reg. Ek het getuig dat dit, soos oorgedra deur die
9 bevelvoerders.
10 MR MPOFU: Sorry, I can't find the
11 particular slide now but I'm sure you'll remember. In the
12 presentation of the plan and in the prescripts as such it
13 is said that the killing of another person would only be
14 justified if it is done on command or in self-defence. Are
15 we together on that?
16 COMMISSIONER HEMRAJ: Are you referring
17 to the slide in exhibit L, Mr Mpofo?
18 MR MPOFU: It's SS2, I think. I'm not
19 sure which slide. I was hoping the witness would just, as
20 a matter of experience, answer that but I'll find it.
21 CHAIRPERSON: SS2 is the standing order
22 and the standing order in 3(d) – well, in 3 he talks about
23 minimum force and so force –
24 MR MPOFU: Chairperson, I might – it
25 probably is SS3, I don't want to lead you through the

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1 garden path. It's –
2 CHAIRPERSON: You don't want to lead me
3 up the garden path?
4 MR MPOFU: Up the garden path.
5 CHAIRPERSON: No, I'm sure you don't.
6 SS3, is it?
7 MR MPOFU: Okay.
8 CHAIRPERSON: SS3 has got three separate
9 plans but what we have in the top right hand corner is the
10 overall page number of the police hard drive, so that might
11 be a helpful way to find it.
12 MR MADLANGA SC: Is Mr Mpofo perhaps
13 looking for point 7 of SS3?
14 MR MPOFU: Point 7 on the front?
15 MR MADLANGA SC: 1878.
16 MR MPOFU: Mine is not –
17 GENERAAL-MAJOOR ANNANDALE: Voorsitter,
18 as ek kan help, dit is in – it's contained in the
19 contingency planning I think, both the one on the 10th –
20 MR MPOFU: Yes.
21 MAJOR-GENERAL ANNANDALE: As well as the
22 one on the 13th. Mr Madlanga referred to the one, on the
23 other one it's also on page 1668, also paragraph 7.
24 MR MPOFU: Ja. Sorry, I'm sorry to do
25 this, Chairperson, it appears about five times but let's

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1 use the one that Mr Madlanga – it appears about five times
 2 on SS3. It's on the page, the pages are not very clear,
 3 it's 1867, 8, ja. In other words, it's the document at the
 4 front and it's point 7. At the top it says
 5 "Implementation." It's the second document, it's called
 6 "South African Police Service, Rustenburg POP Amended
 7 Contingency Plan, Strike by employees of Lonmin" and so on.
 8 Are we together, General?
 9 GENERAAL-MAJOOR ANNANDALE: Ek is. I am.
 10 MR MPOFU: Okay.
 11 CHAIRPERSON: The place that we found is
 12 1726, which is the contingency plan, I think, of the 16th,
 13 isn't it?
 14 MR MPOFU: Yes.
 15 CHAIRPERSON: But the operative one that
 16 was applicable on the 16th and there paragraph 7 says, "Use
 17 of force: only on command or self-defence," is that what
 18 you're referring to?
 19 MR MPOFU: That's it, correct. Thank
 20 you, Chair.
 21 CHAIRPERSON: Alright, we've now found
 22 it, now what are we going to do with it now that we've
 23 found it?
 24 MR MPOFU: Well, we'll just repeat the
 25 question which I'm sure has been forgotten now, which is,

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1 the use of – that section postulates a situation where,
 2 like the current one where people were killed, doesn't it,
 3 among other things? It might postulate other things as
 4 well.
 5 GENERAAL-MAJOOR ANNANDALE: Verskoon tog,
 6 Voorsitter, ek is nie duidelik, die vraag nie?
 7 MR MPOFU: Okay. No, I'm saying that the
 8 portion that we have read would have been applicable in the
 9 Marikana situation.
 10 [12:25] CHAIRPERSON: The plan referred to is the
 11 plan that was drawn up for the Marikana operation. It went
 12 through various editions culminating in the one of the 16th,
 13 so it was clearly applicable to Marikana and as you said,
 14 envisages the use of force which could either lead to death
 15 on the part of the victim or injury of some sort. Okay,
 16 now where do we go from there? What's the next question,
 17 in other words?
 18 MR MPOFU: Right. The next question is,
 19 would you agree with me that that section postulates
 20 mutually exclusive routes through which the use of force
 21 postulated therein can be employed? In other words, it can
 22 either be on command from somebody or in self-defence.
 23 MR BURGER SC: Then I don't understand
 24 the question because that's what the clause says, so it's a
 25 meaningless question.

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1 MR MPOFU: No, Mr Burger must hold his
 2 horses. The question, there are so many postulate – when
 3 we say this thing is this or that, you could mean, it can –
 4 it's and/or, or that both situations can be postulated.
 5 I'm asking a specific question. If he listens he'll
 6 understand, that does it postulate mutually exclusive
 7 situations. It's not necessarily so from a reading from
 8 the sentence semantically. It's something very serious
 9 that I'm asking, so I would appreciate if my cross-
 10 examination is not unnecessarily interrupted.
 11 CHAIRPERSON: Mr Mpofo, let's – to use a
 12 phrase that Mr Madlanga likes us to use – let's cut to the
 13 chase.
 14 MR MPOFU: Yes, thank you, Chairperson.
 15 CHAIRPERSON: Major-General, in that plan
 16 for the 16th it is said that force can be used only on
 17 command or in self-defence, which means self-defence or
 18 private defence. I take it that it's one or the other,
 19 although you could have a situation presumably where you
 20 are ordered to defend yourself, so you do use force on
 21 command, you're also defending yourself but if it's not a
 22 self or private defence situation per se then you can only
 23 use force if you have a command. Is that what it means?
 24 GENERAAL-MAJOOR ANNANDALE: Voorsitter,
 25 in die konteks van openbare orde beplanning verwys die

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1 "only on command" –
 2 MR MAHLANGU: In the context of public
 3 order, Mr Chairperson, it refers to command or on command
 4 or in self-defence.
 5 GENERAAL-MAJOOR ANNANDALE: Nee, nee –
 6 MR MAHLANGU: I'm sorry.
 7 CHAIRPERSON: I don't think – I think he
 8 used the word, the English words "only on command."
 9 MR MAHLANGU: Only on command in terms of
 10 public order policing.
 11 GENERAAL-MAJOOR ANNANDALE: Voorsitter,
 12 en dan die frase is verwysend na die gebruik van offensiewe
 13 aksies, so elkeen van die offensiewe aksies, hetsy dit die
 14 gebruik is van waterkannonne of skokgranate of CS-gas. As
 15 ek reg is, het dit sy oorsprong in die Wet op die Reëling
 16 van Byeenkomste, ek dink artikel 9 waarskynlik wat dan
 17 verwys na die gebruik van geweld.
 18 CHAIRPERSON: It also obviously refers to
 19 standing order 262, paragraph 11.5 and 7, 11.5 being,
 20 "Force may only be used on the command or instruction of
 21 the C-JOC or operational commander, if appointed. Members
 22 may never act individually without receiving a command from
 23 their commander." And 7 says, "Common law principles of
 24 self-defence or private defence are not affected by this
 25 order." So it looks to me, if I may say so, as if this

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1 paragraph of the plan is in effect referring to standing
 2 order 262, paragraphs 11.5 and 7, would that be correct?
 3 GENERAAL-MAJOOR ANNANDALE: Voorsitter
 4 ja, wat sy oorsprong uit die staande orde uit die Wet, in
 5 die Wet sê dit daarso pertinent dit moet iemand wees met
 6 die rang van adjudant-offisier of hoër, so dis nie net
 7 beperk tot oorhoofse of operasionele nie, dit is – en ek
 8 belowe ek maak nou klaar, Voorsitter, so die “command”
 9 gedeelte was verwysend na die openbare orde gedeelte.
 10 MR MAHLANGU: The command here refers to
 11 the –
 12 CHAIRPERSON: The public order part.
 13 MR MAHLANGU: The public order –
 14 CHAIRPERSON: Part.
 15 MR MAHLANGU: Part.
 16 GENERAAL-MAJOOR ANNANDALE: En dan die
 17 “self-defence” is verwysend na, in staande orde 262, die
 18 gemeenregtelike beginsels van –
 19 MR MAHLANGU: The self-defence refers to
 20 the standing order where it refers to public or private
 21 defence.
 22 CHAIRPERSON: The common law principles
 23 of self or private defence.
 24 MR MAHLANGU: Private and self-defence,
 25 yes.

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1 MR MPOFU: General, I'm sorry, this is a
 2 very important aspect. I'm going to repeat my question or
 3 even simplify it. Maybe I made it difficult by using terms
 4 like “mutually exclusive.” What I'm putting to you or what
 5 I'm asking you is the following. From all the things that
 6 have been discussed now, including what the Chair has said
 7 to you, would I be entitled to assume that a situation
 8 where the police have killed people such as in this
 9 situation of Marikana, was either as a result of a command
 10 being given or in self-defence. In other words, if it was
 11 on command then it cannot be self-defence. That's what I
 12 meant by mutually exclusive but I'm trying to simplify it.
 13 CHAIRPERSON: Mr Mpofu, I'm sorry – Mr
 14 Semenya?
 15 MR SEMENYA SC: As far as the version of
 16 the South African Police Service is concerned, nobody was
 17 killed on command.
 18 MR MPOFU: Ja –
 19 CHAIRPERSON: What he's really saying to
 20 you, Mr Mpofu, is that the question isn't relevant to this
 21 inquiry because it's not contended, it's not in issue that
 22 anybody was killed as a result of a command by a superior
 23 officer or a superior –
 24 MR MPOFU: Well, I'm making it an issue
 25 then, Chairperson, if it's not.

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1 CHAIRPERSON: He says, he says look,
 2 we're not relying on commands by our people, so the
 3 Commission doesn't have to worry about that because we're
 4 not suggesting it. Any investigation as to whether
 5 commands were given and so on, he is saying if I understand
 6 him correctly, isn't directly relevant.
 7 MR MPOFU: Alright, then I'll lay the
 8 basis.
 9 CHAIRPERSON: And you will remember that
 10 the videos didn't, there was no audible command given
 11 before the shots were fired.
 12 MR MPOFU: Well –
 13 CHAIRPERSON: I think that's the basis –
 14 MR MPOFU: Well, there are commands, you
 15 will agree, people that formed the basic line and also – I
 16 will come, don't worry Chairperson –
 17 CHAIRPERSON: Commissioner Hemraj –
 18 MR MPOFU: After two we're going to deal
 19 with, one way or the other.
 20 CHAIRPERSON: Unless of course it's part
 21 of your case, the point she makes is this – which I'm happy
 22 to take on board – unless it's part of your case that
 23 people were killed as a result of commands, in which case
 24 clearly it becomes relevant.
 25 MR MPOFU: Thank you, Chairperson. Maybe

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1 let's, as the Chairperson would like to say, cut to the
 2 chase.
 3 MR BURGER SC: Sorry Chair, I'm lost
 4 here. Can I just follow the debate? Is it part of my
 5 learned friend's case that people were killed on command?
 6 We're now here for very many months. I would be greatly
 7 surprised if that's part of his case and we didn't know it
 8 but if it is, were they to know that.
 9 MR MPOFU: Well, I think if we listen
 10 we'll know it sooner than if we just dabble into my cross-
 11 examination.
 12 CHAIRPERSON: Mr Mpofu, let's do this in
 13 an orderly fashion –
 14 MR MPOFU: I said we'll cut to the chase,
 15 Chairperson.
 16 CHAIRPERSON: Mr Mpofu, Mr Mpofu, let's
 17 take it slowly together. The question that is raised, is
 18 that part of your case? And I look now at your statement
 19 that you handed in, GGG18, do we find it there? You say
 20 that there are a number of points in paragraph 9 and you
 21 say that it's clear or on a proper analysis it should be
 22 clear that your case is that people died, were killed as a
 23 result of commands. If that's your case, then fine.
 24 MR MPOFU: Well, Chairperson, with the
 25 greatest respect –

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1 CHAIRPERSON: The suggestion is it's a
 2 new thing that we just heard now, but what do you say about
 3 that?
 4 MR MPOFU: Chairperson, two things. One,
 5 if you look at 9.4 of my opening statement we say one of
 6 the 10 things that we're going to show in this case is that
 7 the claims of self-defence are baseless. That's what I'm
 8 busy with now. If that is not enough, then go to paragraph
 9 8 where we say, "Due, inter alia, to ongoing consultations,
 10 lack of resources and other impediments, these broad themes
 11 are not at this stage exhaustive and will, in all
 12 probability, be augmented in due course. So if 9.4 needs
 13 to be amplified, I would think that what I'm busy with is
 14 sufficiently covered in 9.4 but if Mr Burger wants to –
 15 CHAIRPERSON: No, no, Mr Mpofo, I think
 16 we're talking at cross-purposes. The question at the
 17 moment, as I understand it is, is it your case that people
 18 were killed in circumstances where there was a command –
 19 MR MPOFU: Yes.
 20 CHAIRPERSON: - to be killed. You see
 21 whether – self-defence could be baseless simply because the
 22 person who shot wasn't acting in self-defence or wasn't
 23 reasonable in the circumstances to shoot.
 24 MR MPOFU: It could be.
 25 CHAIRPERSON: That would be a basis why

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1 self-defence is baseless, but it's a different situation
 2 where someone shoots because they – he was ordered to
 3 shoot, there was a command. And what is being put is, is
 4 it your case that there was such a command?
 5 MR MPOFU: Yes.
 6 CHAIRPERSON: Do I understand you to say
 7 yes?
 8 MR MPOFU: Yes, Chairperson, on – I'm
 9 saying more than yes. I'm saying yes and it is subsumed in
 10 what is stated in 9.4. Yes, I agree, it doesn't
 11 necessarily fall – none of these points have been
 12 elaborated upon. All I'm saying is that that part of my
 13 case is not, or rather is consonant with what is stated in
 14 9.4.
 15 CHAIRPERSON: Now the next question would
 16 be, are you able to tell us who gave the commands which we
 17 should investigate which form the causae causante, as it
 18 were, of the killings.
 19 MR MPOFU: Yes, that's what I was busy
 20 with before I was rudely interrupted.
 21 CHAIRPERSON: No, no, you haven't told us
 22 who gave the command.
 23 MR MPOFU: Well, I was – that's my next
 24 question, Chairperson.
 25 CHAIRPERSON: Alright –

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1 MR MPOFU: If I'm allowed to speak.
 2 CHAIRPERSON: Alright. And is this
 3 covered at all by the affidavits that have been filed in
 4 respect of the evidence that's going to be led?
 5 MR MPOFU: Yes, Chairperson.
 6 CHAIRPERSON: Can you refer us to it?
 7 MR MPOFU: Yes, Chairperson.
 8 CHAIRPERSON: Well, do so please.
 9 MR MPOFU: General Annandale, can you go
 10 to GGG17?
 11 CHAIRPERSON: GGG17 being the statement
 12 of Lieutenant-Colonel Vermaak.
 13 MR MPOFU: Okay, I'm going to deal with
 14 this in two sections. We'll start with the 13th, the 13th.
 15 Sorry, paragraph 7 Chairperson, sorry. Maybe you'll help
 16 us with the translation, I'll read it in Afrikaans. This
 17 is the statement of –
 18 CHAIRPERSON: Lieutenant-Colonel Vermaak.
 19 MR MPOFU: Lieutenant-Colonel Vermaak,
 20 ja. It says – sorry Chairperson, just give me one second.
 21 He's dealing with the 16th, I made a mistake. That refers
 22 to the 13th, ja, it's dealing with the 16th. "Die groep het
 23 terugbeweeg en weer hergroepeer aan die anderkant van die
 24 kraal en die polisiemanne weer om ongeveer" -
 25 CHAIRPERSON: Mr Mpofo, forgive my being

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1 difficult. May I suggest you just tell me which paragraphs
 2 you want and I'll translate them into English, or try to?
 3 MR MPOFU: I'll be indebted to the
 4 Chairperson. It's paragraph 7, it starts with "Die groep."
 5 CHAIRPERSON: Alright, do you want me to
 6 start reading and you tell me when to stop? The group
 7 moved back, moved back and then regrouped on the other side
 8 of the kraal, photograph 1516, and the police – and
 9 attacked the policemen again at about 15:55. It was clear
 10 out of the air, it was clearly observed out of the air that
 11 the group would not surrender. Brigadier Calitz again gave
 12 the members the order to mount an operation. It almost
 13 appeared as if the members did not hear. Because of the
 14 incident on the Monday, the 13th of August, where the two
 15 police members were chopped – well, I say that, that's
 16 correct – were chopped to death under the helicopter, I
 17 realised that the members would have to act to defend
 18 themselves. I again repeat Brigadier Calitz's order from
 19 the helicopter, on which I saw that the members were
 20 acting.
 21 MR MPOFU: Ja.
 22 CHAIRPERSON: Groups, brackets
 23 (attackers), photograph 1517, ran away in the direction of
 24 these, the shacks or squatters' houses neighbouring on the
 25 scene at 15:56. Must I go on? Must I go on, Mr Mpofo?

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1 MR MPOFU: Sorry, Chairperson. No, I was
 2 just fascinated by that, Chairperson. No, that's enough,
 3 Chair.
 4 CHAIRPERSON: It was a rough translation,
 5 I'm sure Mr Madlanga and the professional interpreters can
 6 do better but anyway, I did my best.
 7 MR MPOFU: I agree with the
 8 interpretation. I wouldn't have done better.
 9 MR MAHLANGU: Thanks for assisting,
 10 Chairperson.
 11 MR MPOFU: Now –
 12 MR BURGER SC: No, but I still don't know
 13 the answer to the question –
 14 CHAIRPERSON: Mr Booii has now got to
 15 translate it into isiXhosa.
 16 MR MPOFU: Yes.
 17 CHAIRPERSON: Mr Burger?
 18 MR BURGER SC: No, I still don't know the
 19 question to my answer, whether –
 20 CHAIRPERSON: You don't know the question
 21 to your answer? One doesn't normally get questions to
 22 one's answers.
 23 MR BURGER SC: Even I'm getting muddled
 24 with this. Chair, no, the serious question is whether it's
 25 part of my learned friend's case that there was an

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1 instruction to shoot. He gives two reasons for that. The
 2 first reason is patently wrong, it's not covered by 9.4.
 3 It's on a simple reason not covered. The second question
 4 then arises is, where in the statements filed by him is it
 5 covered? Well, we know it's not covered by that. His
 6 resort is to paragraph 7 of this statement. There is no
 7 instruction to shoot in paragraph 7, so what is the basis
 8 for this? Is this putting up issues by kite flying or what
 9 is happening here?
 10 MR MPOFU: Chairperson, first of all I
 11 don't know what business Mr Burger has in this matter –
 12 CHAIRPERSON: No, Mr Mpofu –
 13 MR MPOFU: He is making –
 14 CHAIRPERSON: Mr Mpofu –
 15 MR MPOFU: Can I respond to the
 16 objection, if it's an objection -
 17 CHAIRPERSON: Mr Burger is a party, his
 18 client is a party to these proceedings. They are concerned
 19 they should not be unduly extended by irrelevant points.
 20 Every drop of water that's needlessly wasted is something
 21 that could be used profitably if it remained in the bucket.
 22 MR MPOFU: Well –
 23 [12:45] CHAIRPERSON: So that's his objection, as
 24 I – that gives him locus standi to take the point. Now the
 25 point he raises is this, you say your case is that the

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1 shootings took place on command or orders. The question
 2 was where do you get that from? Is that in one of your
 3 statements? You say it is in statements. Obviously you're
 4 entitled to rely on statements filed by other parties,
 5 you're entitled to do that. So you say you'll find it in
 6 GGG17. So you were asked where, you said para 7. I read
 7 the first half of the thing in English to save time. I
 8 didn't see and you yourself conceded that my translation
 9 was correct – I didn't see anyone giving any orders to
 10 anybody to shoot.
 11 MR MPOFU: Chairperson –
 12 CHAIRPERSON: No –
 13 MR MPOFU: Let's stop this. If we're
 14 going to tell the witness the answers then let's stop this.
 15 I've not asked a single question. All I have done is to
 16 read the paragraph. Let me ask the witness questions and
 17 extract what I can in cross-examination before anybody
 18 suggests the answers of what they saw or did not see. This
 19 is a very crucial aspect of the case, Chairperson –
 20 CHAIRPERSON: Alright.
 21 MR MPOFU: I take the strongest possible
 22 exception to being interrupted in this way on such a
 23 crucial issue of when the people were killed in self-
 24 defence, so-called.
 25 CHAIRPERSON: Mr Mpofu, Mr Mpofu, please.

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1 Important questions must obviously be dealt with
 2 thoroughly. No-one, I will not allow anyone to stop you
 3 from doing that. The difficulty that we had was put to
 4 you, about whether this was an issue and what your case
 5 was, but if it's somehow covered by the passages I read
 6 then please ask the question you want to ask.
 7 MR MPOFU: General, before we come to the
 8 questions that arise from the passage that was generously
 9 translated by the Chairperson, I just want to ask you one
 10 more thing. Is it correct that in police parlance or
 11 police language an order or an instruction to engage would
 12 also involve shooting at people? That's the kind of
 13 language – since I'm not a policeman I just wanted you to
 14 assist us.
 15 GENERAAL-MAJOOR ANNANDALE: Nee,
 16 Voorsitter.
 17 MR MPOFU: Okay. So if, or rather if
 18 somebody comes here and says that in police language in a
 19 situation – I mean let's not make it too theoretical – in a
 20 situation that we had on the 16th just before the shootout –
 21 no, sorry, there I go again, before the shooting occurred
 22 that they heard somebody saying, "engage, engage" in the
 23 context of this, you wouldn't agree with that person that
 24 that might amount to an order to shoot?
 25 COMMISSIONER HEMRAJ: Mr Mpofu, is this a

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1 hypothetical question or is there going to be such
 2 evidence?
 3 MR MPOFU: There will be.
 4 MR BURGER SC: Then I object to it, we
 5 don't have a statement to that effect. I seriously object
 6 to this line of questioning, this is kite flying. My
 7 learned friend doesn't have a version on this and he's
 8 testing a non-existent version by calling it hypothetical.
 9 He is not, in month 8, entitled to do that, sir. I object
 10 to this line.
 11 MR MPOFU: Well, Mr Burger I think has a
 12 problem with listening. I have said no. The question was
 13 -
 14 CHAIRPERSON: Please don't make personal
 15 comments. I won't allow him to make personal comments
 16 about you and I won't allow you to make personal comments
 17 about him.
 18 MR MPOFU: Well then -
 19 CHAIRPERSON: Concentrate on the merits.
 20 MR MPOFU: Well, then Chairperson, thank
 21 you. Then I'll rely on you to correct him. He says I said
 22 it's a hypothetical question. Commissioner Hemraj just
 23 asked me, Mr Mpofo is this a hypothetical question or is
 24 there another basis and I said the exact opposite of what
 25 Mr Burger is saying. So I don't understand what he's doing

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1 now. He's just interrupting my cross-examination yet
 2 again.
 3 CHAIRPERSON: Let's take it slowly. You
 4 said it wasn't a hypothetical question -
 5 MR MPOFU: And -
 6 CHAIRPERSON: No - no. That then raised
 7 a point that it's not covered by any statements that you've
 8 filed. Your answer, as I understood so far, is to say that
 9 it is covered by statements filed by other parties and
 10 that's why you referred to this statement. If I'm not
 11 understanding you correctly, please tell me.
 12 MR MPOFU: No, you are understanding me
 13 correctly, Chairperson.
 14 CHAIRPERSON: Alright, well, I'm pleased
 15 about that. Now, then the - Mr Burger's point is that this
 16 statement does bear out what you say because it's not a
 17 statement which reveals that anyone says that an order was
 18 given to shoot.
 19 MR MPOFU: To engage.
 20 CHAIRPERSON: To engage.
 21 MR MPOFU: Yes. Thank you, Chairperson.
 22 CHAIRPERSON: That's the objection, you
 23 see.
 24 MR MPOFU: Yes. No, it's fine.
 25 Chairperson -

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1 CHAIRPERSON: So what's your answer to
 2 that?
 3 MR MPOFU: My answer is that the
 4 statement I'm referring to was filed by none other than Mr
 5 Burger. It is the statement, which I'm sure is an exhibit
 6 yet, of - what's his name - Dirk Cornelius Botes, which is
 7 filed by Lonmin or by Mr Burger where he says that he
 8 heard, I think it was Brigadier Calitz saying three times,
 9 "engage, engage, engage." And I'll check with Ms Pillay,
 10 if that statement is not an exhibit then I'll ask for your
 11 indulgence, Chairperson, and forgiveness because -
 12 CHAIRPERSON: Okay, okay, I don't
 13 remember that statement and I know what I said about
 14 statements must be filed the day before they are relied on
 15 but in this particular instance I won't enforce that
 16 against you.
 17 MR MPOFU: Oh.
 18 CHAIRPERSON: The witness has said -
 19 sorry - the witness has said that the order "engage"
 20 doesn't mean what you say it means but anyway, let's just
 21 get clarity on it. What does the order "engage" mean in a
 22 context such as that to which Mr Mpofo has referred?
 23 GENERAAL-MAJOOR ANNANDALE: Voorsitter,
 24 as Brigadier Calitz dit gebruik het sal hy sekerlik moet
 25 verwys in watter konteks. Ek het verwys in my getuienis,

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1 as ek reg kan onthou, dat ek op 'n latere stadium dink ek
 2 het ek gehoor van die shopper van Protea Coin wat Generaal
 3 Mpmembe in was, dat dit gesê was, "Do not, do not engage
 4 unless the target engaged you." Dit is wat ek kan onthou.
 5 Ek weet nie van die "engage, engage, engage" nie.
 6 CHAIRPERSON: The problem is that
 7 apparently that's in a statement that neither you nor I
 8 have seen but I'm afraid that what I'm going to suggest is
 9 going to mean that Mr Mpofo's promise to try to finish by
 10 the end of today isn't going to be kept but it won't be his
 11 fault, it'll be because of my intervention. What I suggest
 12 we do is, this statement of Mr Botes to which he's referred
 13 where that passage appears should be produced. You should
 14 have - I presume you'll get it Monday morning. You would
 15 have had to come back Monday anyway because other people
 16 have got to ask you questions. You can look at it, study
 17 the relevant passage - perhaps Mr Mpofo will be kind enough
 18 to mark it or indicate clearly to you -
 19 MR MPOFU: 57.
 20 CHAIRPERSON: - what the passage is. If
 21 there are any other passages in any other statements that
 22 he relies on in support of what he says, obviously I'd
 23 expect those to be given as well and we can then proceed
 24 with this point.
 25 MR MPOFU: Yes, Chair.

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1 CHAIRPERSON: Is that a satisfactory
 2 approach?
 3 MR MPOFU: 100% Chairperson, subject – I
 4 just want to say two things. One is my apology to
 5 Brigadier Calitz, just so that it's not suggested that I'm
 6 directly saying, it may or may not have been him. What the
 7 statement says is, "From my observation this group was
 8 heading from the koppie in the direction of the kraal where
 9 a group of police officers, including members of the task
 10 team, had moved to. I just heard the words on the SAPS
 11 radio communications system, 'engage, engage, engage.'" So
 12 insofar as I suggested that it was Calitz, it may or may
 13 not be him. I just didn't want his name to be used in
 14 vain.
 15 CHAIRPERSON: We'll get the statements,
 16 they'll be distributed to those who haven't got them,
 17 including the commissioners, and you will then continue
 18 with that point.
 19 MR MPOFU: Yes.
 20 CHAIRPERSON: Next week, Monday morning
 21 10 o'clock.
 22 MR MPOFU: I will, Chairperson. If the
 23 Chairperson can just allow me one question so that on
 24 Monday we start at a logical point. One, I promise.
 25 COMMISSIONER HEMRAJ: Can I just seek

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1 dit dan nou gebruik van skokgranate of haelgeweer, rubber
 2 was, dit was my waarneming.
 3 CHAIRPERSON: On that note we will
 4 adjourn until 10 o'clock on Monday morning.
 5 MR MPOFU: Thank you, Chairperson.
 6 [COMMISSION ADJOURNED]
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1 clarity on one thing, Mr Mpofu? I don't know if I recorded
 2 this question of yours correctly which says, if a policeman
 3 comes and says that he heard the words "engage, engage,
 4 engage." Was that incorrect?
 5 MR MPOFU: No, I said if a person.
 6 COMMISSIONER HEMRAJ: If any person.
 7 MR MPOFU: Any person yes, thank you.
 8 CHAIRPERSON: [Inaudible] at 1 o'clock
 9 because people have told me that they have to leave at one
 10 in order to catch aeroplanes and so on, so provided your
 11 question and answer doesn't take us beyond 1 o'clock I'll
 12 allow it, but not otherwise.
 13 MR MPOFU: Thank you, Chairperson. I
 14 promise. Well, I am only promising – in the quotation, as
 15 it were, that you remember, you said you didn't know about
 16 this and for obvious reasons you didn't but in the one that
 17 you say you knew about which said, "If the target – don't
 18 engage unless the target engages you," what do you think
 19 that means, that meant, the word "engage?"
 20 GENERAAL-MAJOOR ANNANDALE: Voorsitter
 21 ja, dis suiwer my eie opinie en my eie interpretasie die
 22 tyd, ek was bewus dat Brigadier Calitz besig was met
 23 uiteendryfaksie, synde dat hy in die voorste linie van
 24 openbare orde lede was. Dit was my waarneming dat dit
 25 waarskynlik een van die stappe was van uiteen dryf, hetsy

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