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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 121 22 AUGUST 2013 PAGES 12416 TO 12547



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Page 12416

1 [PROCEEDINGS ON 22 AUGUST 2013]
 2 [10:11] CHAIRPERSON: The Commission resumes. We
 3 resumed late this morning; we had intended, you will
 4 recall, to start at half past 9 this morning, but
 5 unfortunately the aeroplane on which, or the flight on
 6 which one of the Commissioners was returning to Pretoria
 7 was delayed and so that's why we're starting late. I
 8 apologise for that. It's something that was unforeseeable.
 9 Major-General, before you continue with your evidence, I
 10 understand that Mr Budlender is going to report to us the
 11 results of a meeting that was held yesterday of the parties
 12 who are currently present before the Commission.
 13 MR BUDLENDER SC: Chair, thank you. Yes,
 14 it's correct that yesterday we had a meeting of the legal
 15 representatives of all of the parties who are currently
 16 before the Commission. We had a very constructive meeting.
 17 There was strong support for enabling the Commission to do
 18 what it needs to do within a reasonable time period, and
 19 the parties committed to cooperating to make that possible.
 20 We think, and I think I speak for everyone, or
 21 virtually everyone who was there, that this is a watershed
 22 moment for the Commission. It's now a year since the
 23 events of August 2012, and there is a need, we believe, for
 24 decisive steps forward to ensure that the Commission is
 25 enabled to perform its very important function and to

Page 12417

1 complete it within a reasonable time.
 2 If one takes a step back, Chair, where we are at
 3 the moment is that we have had the evidence tendered by
 4 AMCU; we have had the evidence tendered by the NUM; we've
 5 had a significant amount of evidence tendered by the South
 6 African Police Service. We are currently in the midst of
 7 the –
 8 CHAIRPERSON: I'm sorry to interrupt.
 9 We've also had evidence tendered by some of the non-
 10 unionised miners, or some of the injured miners.
 11 MR BUDLENDER SC: Yes, yes, I –
 12 CHAIRPERSON: Full statements have been
 13 filed in respect of the two others who it was intended
 14 would be called.
 15 MR BUDLENDER SC: Yes. Yes, we've had –
 16 I omitted that; we have had four witnesses in fact tendered
 17 by the representatives of the injured and arrested persons,
 18 and we have had evidence tendered by the South African
 19 Police Service. We have had evidence from the
 20 investigators. We have had evidence from the overall
 21 command structure of the police. We are currently hearing
 22 the evidence of the overall commander of what happened
 23 during that week.
 24 The next person we will have evidence from is the
 25 key planner in the operations of that week. We will

Page 12418

1 shortly thereafter have evidence from the operational
 2 commander, namely the person who was in charge of the
 3 operations on the ground. There have been questions raised
 4 as to where are the people who were on the ground. Well,
 5 we will have the evidence from the person who was in charge
 6 on the ground of what was going on, and there will be a
 7 number of other witnesses from the police. We still have
 8 to have evidence from, expert evidence from witnesses as to
 9 the planning and implementation of the operation by the
 10 police. We still have to have evidence from Lonmin, and
 11 there are certain other witnesses that are still to come.
 12 The evidence leaders have listed, and have
 13 distributed to the parties a list of those people who we
 14 consider still are required to give oral evidence. We have
 15 identified 31 further witnesses. The parties have been
 16 invited to identify any further people who they consider
 17 should give oral evidence, and they have listed another 22.
 18 That's a total of 53. We may be able to cut that back to
 19 some extent. We hope that it will be possibly to do so,
 20 but there is still a substantial number of witnesses to
 21 come.
 22 As the Commissioners are aware, more chiefly than
 23 the rest of us, I'm sure, the current position is that the
 24 term of the Commission ends on the 31st of October of this
 25 year. It's not yet known whether the President will extend

Page 12419

1 that date, but assuming that he will, the evidence leaders
 2 make the statement, which is not a prediction, it's a
 3 statement we believe of fact, that at the current rate of
 4 progress we will not – given the amount of evidence that is
 5 still to be led, we will not complete the task within any
 6 time limit which we reasonably anticipate the President may
 7 provide us an extension.
 8 The reports in the electronic and print media
 9 over the last week have shown what we know to be true, that
 10 the public of South Africa want answers as to what happened
 11 during that week. They want to know what happened. They
 12 want to know why it happened. They want to know who was
 13 responsible, and they want to know who should be held
 14 accountable, and they depend and rely upon this Commission
 15 to give them those answers. It's a matter of the greatest
 16 public interest, we submit, that those answers should be
 17 provided without any unnecessary delay and within a time
 18 which makes the answers relevant, that they're no longer
 19 simply a matter of history.
 20 So that I think fairly reflects the views of all
 21 of the parties who met yesterday and the parties discussed
 22 and reached agreement as to how the work should be taken
 23 forward in order to make it possible for the Commission to
 24 conclude its work within a reasonable time, and it was
 25 agreed that the evidence leaders would make an application

<p style="text-align: right;">Page 12420</p> <p>1 to the Commission on that basis for rulings as to the 2 procedure going forward, to enable the Commission to 3 perform its critical function, to complete it within a 4 reasonable time, and so we have an application and I'd like 5 to move that now, Chair. Copies will be distributed. If I 6 can take the members of the Commission through our 7 application –</p> <p>8 CHAIRPERSON: Have copies been made 9 available to representatives of the press?</p> <p>10 MR BUDLENDER SC: I've just asked that 11 that be done right now, Chair.</p> <p>12 CHAIRPERSON: When I said the press, I 13 obviously meant the electronic media as well.</p> <p>14 MR BUDLENDER SC: The media. The press 15 and non-press media. Can I ask whether the media have been 16 given copies? Chair, then if I can proceed; this is an 17 application which the evidence leaders make –</p> <p>18 CHAIRPERSON: I'm sorry, Mr Budlender, I 19 see the television cameras are working. Perhaps a copy 20 could be given to the cameraman so that he can actually 21 cause the text to be available on the television screens 22 for a short while so that those who are watching on 23 television can also have an opportunity to –</p> <p>24 MR BUDLENDER SC: Yes, that would be 25 helpful. Mr Wesley will attempt to arrange that, Chair, if</p>	<p style="text-align: right;">Page 12422</p> <p>1 be responsible for ensuring that each witness is properly 2 cross-examined. In the ordinary course this will be done 3 by one of the evidence leaders. The evidence leaders may 4 nominate the legal representatives of one of the interested 5 parties to conduct a specified part or all of the cross- 6 examination. I may interject to say that this seems to us 7 to be consistent with what is contemplated in the 8 regulations, that there is cross-examination only with the 9 consent of the Commission. I'm sorry, I didn't stop to 10 allow interpretation.</p> <p>11 Third, we propose, as provided in the 12 regulations, that any party which wishes to cross-examine a 13 witness may apply to the Commission for leave to cross- 14 examine. We propose that any such application should 15 indicate the reasons why the party wishes to cross-examine, 16 for example in order to put the version of that party. It 17 should indicate the matters on which the party wishes to 18 cross-examine. It should indicate the documentary or other 19 evidence on which it intends to rely during the proposed 20 cross-examination, and it should indicate the anticipated 21 length of the cross-examination.</p> <p>22 Chair, the fourth proposal deals with the fact 23 that although we all hope that it will still be possible 24 for all interested parties to be represented before you, 25 it's possible that that may not be the situation and the</p>
<p style="text-align: right;">Page 12421</p> <p>1 he has a copy.</p> <p>2 CHAIRPERSON: The simultaneous 3 translation is apparently not yet working, but I take it – 4 I don't know whether everything you say has to be 5 interpreted, but certainly it's desirable, I think, that 6 this also be interpreted. If the cameraman needs a copy, 7 he can have mine for the time being. While you're reading 8 it in English, it could perhaps be televised at the same 9 time. We wouldn't presume to give instructions to the 10 cameraman, but I take it he'll see favourably what I've now 11 said and then the interpreter can then interpret it into 12 Xhosa.</p> <p>13 MR BUDLENDER SC: Shall I proceed, Chair? 14 Chair, as members know, we are presently busy with the 15 evidence of Major-General Mpembe and the proposal that we 16 make for a ruling is for a ruling which will apply in 17 respect of witnesses who follow on General Mpembe, and we 18 ask the Commission rule that until further notice the 19 procedure in respect of witnesses who follow on Major- 20 General Mpembe will be as follows: first, a witness who is 21 called to testify will give evidence-in-chief by confirming 22 a written statement which sets out in detail the evidence 23 of the witness, and by then giving short oral evidence 24 referring only to the main points of that evidence. 25 Second, we propose that the evidence leaders will</p>	<p style="text-align: right;">Page 12423</p> <p>1 proposed fourth ruling is the following; that if any 2 interested party is not represented before the Commission, 3 the evidence leaders will seek to ensure that where 4 relevant the version of that party is put to a witness who 5 gives evidence. I could perhaps add that the parties all 6 accept and the evidence leaders accept that if any party is 7 not represented, the evidence leaders will have a 8 particular burden to ensure that the case of that party is 9 properly placed before the Commission.</p> <p>10 Fifthly, we propose that you rule that where 11 appropriate, evidence may be submitted by affidavit and not 12 by oral evidence.</p> <p>13 Chair, these proposed rulings are the result of a 14 cooperative effort by the parties who are before you. It 15 involves all of the parties giving some ground in order to 16 enable the Commission to perform its very important task in 17 time, within a reasonable time. It also involves the 18 evidence leaders taking on a greater burden than they have 19 had to shoulder thus far. It's the view of the evidence 20 leaders, based on the consensus which was arrived at 21 yesterday's meeting, that if these rulings are adopted, it 22 will be possible with very hard work for the Commission to 23 complete its work within a reasonable period and to report 24 to the public of South Africa within the sort of time which 25 the public expect and require of us, and it shouldn't be</p>

Page 12424

1 necessary to add it, but perhaps I should in case I'm
2 misunderstood; the report is of course in the formal sense
3 a report to the President, and it's directed to the
4 President in two capacities, I suggest. First in his
5 capacity as head of the National Executive, and secondly he
6 will receive it in his capacity as President on behalf of
7 the public, and I'm sure will make it available to the
8 public. Thank you, Chair.

9 CHAIRPERSON: Thank you, Mr Budlender.
10 Do any of the parties wish to make any comments in relation
11 to what Mr Budlender has said? Ms Le Roux?

12 MS LE ROUX: Thank you, Chair. As Mr
13 Budlender reported, the parties met yesterday and there was
14 consensus within the room that a decisive procedural change
15 needs to be made in order to enable the Commission to
16 fulfil its terms of reference –

17 CHAIRPERSON: I'm sorry, Ms Le Roux –

18 MS LE ROUX: Yes.

19 CHAIRPERSON: Mr Tokota makes the point
20 that I should ask you to indicate for which party you are
21 speaking, or on behalf of which party you are speaking.

22 MS LE ROUX: Thank you, Chair, for the
23 South African Human Rights Commission. As Mr Budlender
24 indicated, all the parties that met yesterday are firmly in
25 agreement that a decisive procedural change would enable

Page 12425

1 the Commission to fulfil its terms of reference in a
2 reasonable period of time, and at reasonable cost, and the
3 looming October deadline is one reason why this change is
4 necessary at the moment.

5 [10:31] But there are two further reasons that I would
6 like to highlight. The first is that in terms of the
7 regulations that govern the work of the Commission this
8 shift to a more inquisitorial process led by the team of
9 evidence leaders is entirely appropriate. The right of the
10 parties before you to confront witnesses through cross-
11 examination is not eliminated, it merely happens with the
12 leave of the Commission where a particular issue has been
13 identified that requires that cross-examination.

14 So the South African Human Rights Commission
15 submits that this procedural change is needed for those
16 reasons. It's also needed to address the impact on the
17 fairness and inclusiveness of this process for so long as
18 there are five important parties who cannot participate at
19 the moment. As the Constitutional Court recognised in its
20 judgment, the fairness of this process and therefore the
21 purpose of the Commission should not be comprised because
22 parties' interests are not protected here. For that reason
23 the South African Human Rights Commission again calls for
24 the parties involved to come to a decision to provide
25 funding so that all parties can return and participate in

Page 12426

1 the Commission's process. And the procedural change
2 proposed today, while it will not eliminate the unfairness
3 that arises from the fact that important parties cannot
4 participate and have chosen not to participate in the
5 Commission's processes, such a move would mitigate the
6 unfairness that arises.

7 The South African Human Rights Commission
8 therefore calls on the Commission to not only reconsider
9 the process that has been followed to date and adopt the
10 proposal of the evidence leaders, but also calls on all the
11 parties that remain as participants in the Commission to
12 co-operate fully with the evidence leaders so that the new
13 more inquisitorial process can ensure that the Commission
14 fulfils its important work.

15 Finally, given the recent delays in the
16 proceedings of the Commission the South African Human
17 Rights Commission also called on the President to extend
18 the October 2013 deadline in order to enable the Commission
19 to fulfil its important work. Thank you, Chair.

20 CHAIRPERSON: [Inaudible, microphone
21 off].

22 MR NGALWANA: Yes, I did indeed, Chair,
23 thank you. Thank you. I see the resemblance must be
24 striking. Chair, members of the Commission, it's a welcome
25 development. We just wish to make some recommendations in

Page 12427

1 relation to paragraph 4 and in relation to the introductory
2 part which is the unnumbered second paragraph. Let me
3 start with paragraph 4. The suggestion, well it's not a
4 suggestion, it plainly says that a party who's not
5 interested, sorry who's not represented before the
6 Commission may have his version presented at the instance
7 or by the evidence leaders here. There's nothing, though
8 that says what happens if another interested party wishes
9 to cross-examine that witness. So you can't have a version
10 of a non-represented witness presented and that witness is
11 not subjected to cross-examination in the event of another
12 party wishing to cross-examine that witness. I'll make an
13 example, Chair, there's a witness Nzuzza and Booi and other
14 witnesses, who are Mr Mpofu's clients, who made and
15 submitted statements here. It would be patently unfair if
16 for example SAPS were not allowed to cross-examine those
17 people. So I would suggest the following wording and this
18 is just rough, perhaps it can be done more clinically
19 later. We would add that at the end of paragraph 4
20 something to the following effect, "Where this is done, the
21 witness in question may on reasonable notice be called for
22 cross-examination at the instance of the party reasonably
23 seeking to cross-examine such a witness."

24 CHAIRPERSON: I don't think "witness" is
25 the right word in the context of 4, it's party really.

Page 12428

1 Yes, I didn't mean to interrupt you, I would have thought
2 that the matter's already provided for, to some extent at
3 least, in the Regulations because the way it would work, I
4 would imagine, is that if there's a version of a party
5 who's not represented were put in this fashion another
6 party wishes to cross-examine the party whose version is
7 being put, would be entitled to apply for the witness
8 concerned, the potential witness concerned, to be
9 subpoenaed to give evidence. And in that way the obvious
10 prejudice which otherwise results to the party who is
11 attacked in a version put in the manner suggested in the
12 rule would be eliminated. But that, I think, is really the
13 gist of the suggestion you make. We will consider the
14 application, we won't make the ruling today, we'll think
15 about it and if other parties have suggestions as to
16 improvements we will also consider those. But the point
17 you make is clearly a valid one and will have to be
18 addressed.

19 MR NGALWANA: Yes, the Chairperson is,
20 with respect, quite correct with regards what the
21 regulations say, we just thought it might, for the sake of
22 completion, if you like do a belt and braces job by
23 including it here, in this -

24 CHAIRPERSON: No, certainly we will
25 consider and I'd be grateful if you could perhaps give us,

Page 12429

1 slightly reformulated, the gist of your proposal so that we
2 can consider it and perhaps give it to the other parties
3 too so they can think about it also. But it sounds, if I
4 may say so, prima facie, to be an excellent suggestion
5 which should certainly be very carefully considered. Both
6 Mr Budlender and Ms Le Roux stressed the importance of
7 consideration to fairness continuing to operate and if what
8 you suggest were not done then there would actually be a
9 potential unfairness to the party who is attacked, as it
10 were, in the version put in the manner envisaged in sub-
11 ruling 4.

12 MR NGALWANA: With regards to the second
13 unnumbered paragraph, Chair, perhaps this is just a matter
14 of style but we thought we should err on caution's side.
15 As the Chairperson and other members know the word "until
16 further notice" seems to us to have very elastic meaning.
17 We know what subject to, for example, connotes because that
18 has been the body of case law that it decided what subject
19 to, means. So we would rather suggest that instead of
20 "until further notice" we use, we say "the Commission rules
21 that subject to such reasonable objection as may from time
22 to time arise, on which the Commission may rule the
23 procedure in respect of the witnesses who follow or the
24 present witness, Major-General Mpembe will be as follows."
25 So that leaves - it doesn't leave the reconsideration of

Page 12430

1 what has been agreed upon simply to "further notice" but
2 rather to "such reasonable objection." As from case to
3 case these things - we don't have a crystal ball to see
4 what difficulties may arise. One doesn't say that one
5 would raise an objection just for the sake of raising an
6 objection and that is why the final decision is left to the
7 Commission to decide whether such objection is so
8 reasonable as to warrant a reconsideration of the
9 paragraphs that then follow. We'll suggest that wording to
10 the evidence leaders, then it can be considered in due
11 course.

12 CHAIRPERSON: I suggested to you that you
13 give us a draft in respect of your proposed amendment to
14 sub-ruling 4 and in your draft please incorporate your
15 proposals in respect of the second unnumbered paragraph so
16 we can also give consideration to that. Anything further
17 you wish to say?

18 MR NGALWANA: I'm told there's nothing
19 more, Chairperson, thank you.

20 CHAIRPERSON: Thank you. Do any of the
21 other parties wish to make statements or recommendations or
22 submissions in respect of the proposed rulings? There
23 don't appear to be any other contributions. Is there
24 anything you wish to say by way of a reply to the points
25 made, Mr Budlender?

Page 12431

1 MR BUDLENDER: Chair, just very briefly,
2 clearly the rulings should ensure that there's no untested
3 evidence placed before the Commission, that's really what
4 the first matter goes to and we would accept that.
5 Secondly the intention of that word maybe of the phrase in
6 paragraph 2 was to convey that this is a procedural ruling,
7 like all procedural rulings it's subject to amendment from
8 time to time in the discretion of the commissioners and
9 we'll adjust accordingly to reflect that.

10 CHAIRPERSON: May I suggest that you and
11 Mr Ngalwana get together and possibly produce a draft in
12 relation to the amendments you wish us to consider. We'd
13 like to think about the proposals that have been made and
14 in particular in the light of the amendments suggested
15 and we won't make the ruling today but we will make it as
16 soon as we reasonably can in ordinary circumstances. Thank
17 you. We now then proceed with the hearing of the evidence
18 of the Major-General. Major-General, you're still under
19 oath. Before you proceed with your cross-examination, Mr
20 Gumbi, Advocate Hemraj wishes just to make a correction to
21 something which she said on Tuesday.

22 COMMISSIONER HEMRAJ: Mr Gumbi, I put to
23 you that Lieutenant Baloyi was in possession of a firearm
24 and 15 rounds, that's actually incorrect because the
25 documents you've handed in show 30 rounds. I just wanted

Page 12432

1 to correct that on the record.

2 MR GUMBI: Yes, Commissioner, we noted

3 that, we are going to take instruction on that. I was

4 going to correct that point.

5 CHAIRPERSON: Yes, we started late for

6 the reasons which I mentioned, so we'll take our tea

7 adjournment at 11:15 but I don't know whether you need as

8 long as that, Mr Gumbi, for the rest of your cross-

9 examination, but please proceed with your cross-

10 examination.

11 MR GUMBI: Thank you very much,

12 Chairperson and the Commissioners. Good morning, General.

13 MAJOR-GENERAL MPEMBE: Good morning,

14 Advocate.

15 MR GUMBI: General, before we adjourned

16 on Tuesday we were still busy dealing with this point that

17 you briefed the commanders that now the police they were

18 escorting protesters from the railway line to their way to

19 the koppie, do you remember that?

20 MAJOR-GENERAL MPEMBE: I do remember,

21 Advocate.

22 MR GUMBI: So on that particular aspect,

23 if I can take it from there, did you personally observe the

24 commanders briefing the other police that the police now

25 they were escorting the miners from the railway line to the

Page 12433

1 koppie?

2 MAJOR-GENERAL MPEMBE: Chairperson, I

3 request that the question be repeated.

4 MR GUMBI: So I'm saying you, as an

5 Operational Commander, did you observe the commanders

6 briefing their members that now the decision has been taken

7 the police are escorting miners from the railway line to

8 the koppie?

9 MAJOR-GENERAL MPEMBE: I did indicate

10 that the commanders did not report all, or I did not even

11 see them but what I know is that I did brief the

12 commanders, I did expect that the commanders should brief

13 their members because there were different commanders with

14 different units. And there was also time that could have

15 been done.

16 COMMISSIONER HEMRAJ: So is that you did

17 not see it happen or it did not happen?

18 MAJOR-GENERAL MPEMBE: I did not see it

19 happen because I was also busy communicating to the

20 protesters.

21 MR GUMBI: Okay, so the police line that

22 is exhibit HHH16.1 and exhibit HHH16.2, I've made the

23 referrals before we adjourned, the instruction to form that

24 police line, was it your instruction, did you instruct

25 commanders that the police must form the police line behind

Page 12434

1 these marchers?

2 MAJOR-GENERAL MPEMBE: I did say the

3 police should escort and then we should escort them in a

4 manner that the distance is reasonable and that we do not

5 antagonise the protesters. But I did not precisely say how

6 but I did say that we should escort them.

7 MR GUMBI: Okay, so the police Nyalas

8 that they were there, that they were going to be used to

9 escort these marchers, any instruction to inform the

10 commanders the position of the police Nyalas while

11 escorting the marchers?

12 [10:51] MAJOR-GENERAL MPEMBE: There were key

13 areas which I indicated before that we should check in

14 terms of the marchers not to enter with regard to that

15 sensitivity, that is the informal settlement and also the

16 shaft on the left-hand side. Then I did indicate that the

17 vehicles can be utilised, particularly the armoured

18 vehicles, the Nyalas.

19 MR GUMBI: But my question, did you

20 instruct the commanders where to position their Nyalas

21 while escorting the marchers?

22 MAJOR-GENERAL MPEMBE: Chairperson, I

23 didn't say here or there, but I says they should be put in

24 such a manner that we do protect the areas that are

25 sensitive and in terms of the earlier briefing that I give

Page 12435

1 them, why the sensitivity of those areas.

2 MR GUMBI: So will I be correct, General,

3 that it was up to their decision how are they going to

4 position those Nyalas while escorting the protesters? It

5 was up to them, the commanders?

6 MAJOR-GENERAL MPEMBE: Correct,

7 Chairperson.

8 MR GUMBI: So instruction not to go near

9 the informal settlement, did you inform the police

10 officers, all of them, that they must try as much as they

11 can to prevent the marchers from going to a nearby

12 settlement?

13 MR NGALWANA: Chairperson, members of the

14 Commission, I did caution my learned friend this morning

15 about traversing ground that's already been traversed by Mr

16 Madlanga in cross-examination. The Chairperson will recall

17 a ruling that he made not so long ago that the Chairperson

18 will not allow re-cross-examination on matters that have

19 already been traversed. I was very patient on Tuesday; I

20 didn't raise these objections, but I did caution my learned

21 friend this morning that I shall not do as I did on –

22 CHAIRPERSON: Mr Gumbi, what do you say

23 about the point that's being raised?

24 MR GUMBI: If my learned friend –

25 CHAIRPERSON: It's not necessary for you

Page 12436

1 to cover ground that's already been covered by Mr Madlanga,
2 or anybody else for that matter.

3 MR GUMBI: I am fully aware about that,
4 Chairperson. If my learned colleagues can refer me from
5 the record wherein Mr Madlanga asked this witness that did
6 he give any instruction to commanders not to go, to prevent
7 informal settlement if the protesters go to informal
8 settlement, then I will be happy.

9 MR NGALWANA: Is my learned friend
10 disputing that Mr Madlanga covered this ground?

11 MR GUMBI: I'm inviting my learned
12 colleagues to show me from the record.

13 CHAIRPERSON: No, that's a simple point.
14 Either you say no, Mr Madlanga never asked the question,
15 therefore I'm entitled to ask it, or you say yes, he did
16 ask it, but I'm approaching it from a different angle, or
17 something in that line, but it doesn't help to answer an
18 objection by putting the other side to the proof of an
19 allegation. Either it was raised already, or it wasn't.
20 If you say it wasn't raised then you can carry on, in which
21 case Mr Ngalwana will have to show that you're wrong, but
22 he's entitled to ask do you say that this has been asked
23 already, or do you not. What's your answer to that?

24 MR GUMBI: As far as I know, I haven't
25 seen that question. I'm open if my learned colleagues can

Page 12437

1 show me from the record.

2 CHAIRPERSON: I must confess, I don't
3 recall it being put as crisply as Mr Gumbi is putting it,
4 so I propose to allow him to put it. Anyway it will
5 probably be quicker just to let – it's a simple question,
6 which I hope will elicit a simple answer, so let's carry on
7 for the moment.

8 MR GUMBI: Thanks very much, Chair –

9 MR NGALWANA: I can do it. Page 11729 of
10 the transcript, Chair. I think it's day 111 or 109 – 109,
11 I think it is.

12 CHAIRPERSON: I haven't got the
13 transcript in front of me. Read the passage quickly to me.

14 MR NGALWANA: "Is it correct also that
15 there was no briefing whatsoever with regard to how the
16 police were to prevent protesters from entering the
17 informal settlement close to the railway line? Is that
18 correct or not?" and Major-General Mpeembe answered the
19 question, and I'm sure that's not the only passage in which
20 this issue is raised. I will find others.

21 CHAIRPERSON: Mr Gumbi, let's get clarity
22 on this. It's quite clear that the General said it was
23 asked and answered in relation to the absence of briefing
24 on the point, but does your question relate to that, or do
25 you suggest that at some stage after the briefings took

Page 12438

1 place there was suddenly a new command issued by the
2 General, dealing with the point? Because that point I
3 think wasn't dealt with in the cross-examination, but what
4 exactly is your point?

5 MR GUMBI: Chairperson, I am going to put
6 my client's version after this particular point of
7 instruction, so I don't want to –

8 CHAIRPERSON: Explain to me what exactly
9 does your question relate to? You know, let's not waste
10 time unnecessarily on the point. What exactly are you
11 asking the witness in relation to this point? Are you
12 dealing with what happened at the briefing stage, or are
13 you dealing with something that happened subsequently while
14 the people were already marching away and police were
15 following?

16 MR GUMBI: I'm dealing with the
17 situation, you still remember, Chairperson, that the
18 General testified that they escorted the protesters, they
19 followed the protesters. So while they were following the
20 protesters, then all of a sudden the protesters changed the
21 direction and they go to the squatter camp. Fair enough,
22 we understand that. I'm dealing with this aspect that
23 while they were escorting them, was there any instruction
24 issued to any commanders and the members to say if the
25 protesters divert from their route and go to a nearby

Page 12439

1 squatter camp, what measures that ought to be put into
2 place. That's the aspect I'm canvassing with the witness.

3 CHAIRPERSON: Mr Ngalwana, is there
4 anything you wish to say further? I'm proposing to allow
5 him to ask the question. I think it will actually save
6 time in the end, but the point you make about avoiding
7 repetition is a good one, which I trust will be borne in
8 mind in what follows. Please proceed, Mr Gumbi.

9 MR GUMBI: Thanks very much.

10 CHAIRPERSON: The questions you're asking
11 are far more specific than the question Mr Madlanga asked,
12 and this is quite a crucial part of the case, so I'll allow
13 you to carry on, but please be careful not to repeat what's
14 been done already.

15 MR GUMBI: I've noted that, Chairperson.
16 Thank you very much. General, you heard my question, or
17 must I repeat it?

18 MAJOR-GENERAL MPEEMBE: Chairperson, I did
19 brief the members and after that I did not brief the
20 members, the commanders again, and I anticipated that the
21 commanders will brief the members.

22 MR GUMBI: So if I understand your
23 answer, you briefed the commanders, then you were expecting
24 the commanders to brief their members?

25 MAJOR-GENERAL MPEEMBE: I've said it many

<p style="text-align: right;">Page 12440</p> <p>1 times, Chairperson.</p> <p>2 CHAIRPERSON: He's said that a number of</p> <p>3 times already.</p> <p>4 MR GUMBI: Thanks very much, Chairperson.</p> <p>5 CHAIRPERSON: That's clearly repetition.</p> <p>6 MR GUMBI: Yes. Let us focus now,</p> <p>7 General, while you are following these marchers, forming a</p> <p>8 police line behind them, let us focus on the marchers</p> <p>9 themselves now. Did you inform them that now the police</p> <p>10 have acceded to their demand, now you are escorting them on</p> <p>11 their way to the koppie?</p> <p>12 MAJOR-GENERAL MPEMBE: Chairperson, I did</p> <p>13 answer on Tuesday that there was no time to tell them</p> <p>14 because they moved when I was still going to count, but I</p> <p>15 did inform them that we are going to the mountain after I</p> <p>16 have addressed them, and it was also in the video, and</p> <p>17 several marchers and protesters did indicate that we should</p> <p>18 escort them.</p> <p>19 MR GUMBI: The Nyalas that you were using</p> <p>20 on that day, General, while escorting these miners on their</p> <p>21 way to the koppie, I wanted to check, because Brigadier</p> <p>22 Mkhwanazi had testified about the issues of tactical</p> <p>23 communication, were they mounted with loudhailers that can</p> <p>24 be used to convey any information to the miners?</p> <p>25 MAJOR-GENERAL MPEMBE: Chairperson, that</p>	<p style="text-align: right;">Page 12442</p> <p>1 officer, so if he could not understand or any other thing,</p> <p>2 because he was also a section commander, he could have come</p> <p>3 to me personally as an officer to say, General, can you</p> <p>4 explain, maybe I did not understand what Colonel Tsiloane</p> <p>5 is saying, I could have done that. But in general terms in</p> <p>6 any operation of such big magnitude you brief the</p> <p>7 commanders; the commanders do brief their members, because</p> <p>8 in that respect their role and responsibilities is not the</p> <p>9 same.</p> <p>10 MR GUMBI: Furthermore it is his version</p> <p>11 that when you made a decision as an operational commander</p> <p>12 you also instruct the members personally, you don't</p> <p>13 delegate to unit commanders. You instruct the members</p> <p>14 themselves that how are they going to escort the</p> <p>15 protesters, the formation, the platoon formation and the</p> <p>16 techniques, whatever that they are going to be used while</p> <p>17 escorting, you don't delegate that. You do that as an</p> <p>18 operational commander.</p> <p>19 MAJOR-GENERAL MPEMBE: Chairperson, in</p> <p>20 any police operation the members and the commanders they do</p> <p>21 have a discretion to exercise. You cannot instruct the</p> <p>22 members because the situation changes from time to time.</p> <p>23 So you do also allow the commanders and the members</p> <p>24 themselves to utilise their discretion in accordance with</p> <p>25 the training, but there was a clear indication of how the</p>
<p style="text-align: right;">Page 12441</p> <p>1 maybe I can be given chance to go and check whether they</p> <p>2 were mounted because that I expect it should have been done</p> <p>3 by the commanders on the ground, but when I speak to the</p> <p>4 protesters, the protesters did hear what I was talking to</p> <p>5 and they also understand in terms of what I was talking</p> <p>6 about and they could hear me.</p> <p>7 MR GUMBI: You know I'm asking this</p> <p>8 question, General, because according to Lieutenant Baloyi,</p> <p>9 who's an experienced POP member, his version is that if the</p> <p>10 decision is made to escort miners from the railway line</p> <p>11 towards the koppie, it is important first of all, the</p> <p>12 operational commander himself, he mustn't delegate his</p> <p>13 responsibility to unit commanders. The operational</p> <p>14 commander must inform the members clearly that now the</p> <p>15 decision has been made, the police now are escorting the</p> <p>16 miners from the railway line towards the koppie. What is</p> <p>17 your comment on that?</p> <p>18 MAJOR-GENERAL MPEMBE: Chairperson, I did</p> <p>19 indicate with the vast number of the place and the bigger</p> <p>20 operations, the different units that were there, I did</p> <p>21 expect that commanders will brief their own commanders, and</p> <p>22 in this case I did expect Lieutenant-Colonel Tsiloane, and</p> <p>23 Lieutenant-Colonel Tsiloane was always near me when I was</p> <p>24 briefing and when I was talking, so I expected that it</p> <p>25 should happen. But Chairperson, Lieutenant Baloyi is an</p>	<p style="text-align: right;">Page 12443</p> <p>1 escorting has to take place and how the safety measures</p> <p>2 should be applied in terms of while we are escorting the</p> <p>3 protesters.</p> <p>4 CHAIRPERSON: The Standing Order is clear</p> <p>5 though that where force is to be used, even non-lethal</p> <p>6 force, that order has to come from the operational</p> <p>7 commander. The Standing Order doesn't envisage anybody</p> <p>8 who's junior or subordinate to the operational commander</p> <p>9 exercising a discretion to authorise the use of force.</p> <p>10 Isn't that correct?</p> <p>11 MAJOR-GENERAL MPEMBE: Correct,</p> <p>12 Chairperson.</p> <p>13 MR GUMBI: And it is his contention</p> <p>14 that –</p> <p>15 CHAIRPERSON: I think the interpreter</p> <p>16 must get a chance to interpret, Mr Gumbi.</p> <p>17 MR GUMBI: Yes, I do apologise,</p> <p>18 Chairperson. I was not aware that today we are using an</p> <p>19 interpreter.</p> <p>20 MR MAHLANGU: Do I have to interpret</p> <p>21 everything?</p> <p>22 CHAIRPERSON: The people in the</p> <p>23 auditorium would like the, what is the evidence to be</p> <p>24 interpreted. The simultaneous translation facilities are</p> <p>25 not yet in operation. There are a lot of people watching</p>

Page 12444

1 this on television as well who are dependent, so we were
 2 told at the previous hearing, on the translation. So I
 3 think you should interpret it.
 4 MR MAHLANGU: Thanks, Chairperson.
 5 CHAIRPERSON: In the interest of everyone
 6 being able to follow what's happening.
 7 MR GUMBI: So according to Lieutenant
 8 Baloyi it is also again his version that on that day as a
 9 General any communication about the operation mustn't be
 10 delegated to any commander. The operational commander must
 11 make sure that all the members, including their commanders,
 12 they are on same par with him in regard to any operation
 13 that's about to be executed.
 14 CHAIRPERSON: Do you agree with that,
 15 Major-General?
 16 MAJOR-GENERAL MPEMBE: No, Chairperson.
 17 MR GUMBI: So you testified before this
 18 Commission, General, that there was a police line following
 19 these marchers on their way to the koppie. You still
 20 remember that? That's why I even referred you to exhibit
 21 HHH16.1 and HHH16.2.
 22 MAJOR-GENERAL MPEMBE: In terms of this
 23 16.2.
 24 MR GUMBI: Yes. Any instruction you
 25 issued to the police with regard to the distance between

Page 12445

1 the marchers and the police officers that day who were
 2 following those marchers on foot. Did you issue any
 3 instruction?
 4 MAJOR-GENERAL MPEMBE: Chairperson, the
 5 exhibit indicates that yes, I spoke about reasonable
 6 distance, and it is in that respect that I say the
 7 commanders in terms of how the role and responsibilities
 8 take place, they will determine what will be reasonable.
 9 MR GUMBI: Those police officers that
 10 they were in that police line, were you expecting them to
 11 follow the marchers from the railway line on their way to
 12 the koppie on foot?
 13 MAJOR-GENERAL MPEMBE: Chairperson, I
 14 expected that whenever any situation changes, the police
 15 official will change according to the circumstance, not to
 16 give them strict instructions because the situation will
 17 not be the same. Chairperson, I was not the operational
 18 commander in the JOC. I was also present with that at the
 19 scene itself. If there could have been any other changes
 20 that were necessary, I could have given that command, or,
 21 and the officers could have also indicated to me while I
 22 was there to give such a command in terms of how should we
 23 change.
 24 MR GUMBI: So it was up to them whether
 25 they made a decision to follow the miners from the railway

Page 12446

1 line until the koppie? You leave up to them to decide?
 2 MAJOR-GENERAL MPEMBE: Chairperson, I
 3 said it will be according to the circumstances, not
 4 according to the commanders.
 5 CHAIRPERSON: I understand that you gave
 6 the instruction that they be escorted. That was the
 7 instruction you gave and you never changed that
 8 instruction. Is that correct?
 9 MAJOR-GENERAL MPEMBE: Correct,
 10 Chairperson.
 11 [11:11] CHAIRPERSON: You didn't leave it to them
 12 to decide whether they'd escort them. You said they must
 13 be escorted. You told your men, the members, they must
 14 escort the strikers.
 15 MAJOR-GENERAL MPEMBE: Correct,
 16 Chairperson.
 17 CHAIRPERSON: To the koppie.
 18 MAJOR-GENERAL MPEMBE: Correct,
 19 Chairperson.
 20 MR GUMBI: How far is the koppie from the
 21 railway line, General?
 22 MAJOR-GENERAL MPEMBE: Chairperson, I did
 23 indicate to the Commission, maybe I can –
 24 CHAIRPERSON: That was debated before and
 25 he said he's not very good in distances and he doesn't

Page 12447

1 know, but it's obviously several kilometres, and if it's
 2 necessary we can I'm sure get some objective evidence on
 3 that point from a scale map or something, but I don't think
 4 we need waste time with him on that. He'd already said
 5 he's not good at distances, so let's not waste any
 6 further –
 7 MR GUMBI: I have noted that,
 8 Chairperson. Thanks very much.
 9 MR NGALWANA: Chair, it's also a question
 10 that Mr Madlanga asked pointedly.
 11 CHAIRPERSON: I said it had been dealt
 12 with already. You don't have to [inaudible] judgment that
 13 I give a ruling. Carry on, Mr Gumbi.
 14 MR GUMBI: Thanks very much, Chairperson.
 15 Can I focus now on Warrant-Officer Lepaaku, the late
 16 Warrant-Officer Lepaaku. Was he among –
 17 CHAIRPERSON: I see it's now quarter past
 18 11. You're obviously moving on to a new topic which hasn't
 19 been covered before, so let's take the tea adjournment at
 20 this stage, and try to be back by half past, please.
 21 [COMMISSION ADJOURNS COMMISSION RESUMES]
 22 [11:34] CHAIRPERSON: The Commission resumes.
 23 You're still under oath, Major-General. Mr Gumbi.
 24 MR GUMBI: Thanks very much, Chairperson.
 25 General, before I could even move onto another aspect a few

Page 12448

1 questions I wanted to ask you before I wrap up this point.
 2 The video footage of 15th was played before this Commission
 3 and we have a transcript here and in that way the footage -
 4 you appeared there, you give an ultimate accounting for the
 5 protesters to hand over their dangerous weapons. Do you
 6 remember that?
 7 MAJOR-GENERAL MPEMBE: Yes, Chairperson,
 8 I did see that.
 9 MR GUMBI: And it's common cause that
 10 after that also again the protesters proceeded with their
 11 march.
 12 MAJOR-GENERAL MPEMBE: Correct,
 13 Chairperson.
 14 MR GUMBI: So, I wanted to know, General,
 15 when did you make this decision? After they proceeded with
 16 their march or you made a decision to escort them before
 17 you could even count?
 18 MAJOR-GENERAL MPEMBE: Chairperson, I did
 19 answer this question many times to say that there was a
 20 time where I briefed the members where I made the decision
 21 and even I gave Lieutenant-Colonel Merafe to raise his
 22 concern with what I was deciding and then it was not done
 23 when the people were marching.
 24 CHAIRPERSON: I think this point's been
 25 covered already, Mr Gumbi.

Page 12449

1 MR GUMBI: Yes, I wanted to - so let us
 2 focus on Warrant Officer Lepaaku. Was he among those
 3 police officers that were following the miners on foot?
 4 MAJOR-GENERAL MPEMBE: Chairperson,
 5 Warrant Officer Lepaaku, if I still remember very well, he
 6 was in another Nyala, not the same Nyala with Lieutenant
 7 Baloyi but the Nyala that was on the right-hand side.
 8 MR GUMBI: I do have a pocket book here.
 9 I would like to invite your comment, General, of one of the
 10 police officers. I hope the Chairperson and the
 11 Commissioners you are in possession of that pocket book.
 12 CHAIRPERSON: We've got a number of
 13 pocket books. Tell us which one you're referring to now.
 14 Give it an exhibit number if Mr Ngalwana doesn't object.
 15 MR GUMBI: Yes, it's a pocket book by LM
 16 Mativa, NIU Pretoria, it's dated - it has an official stamp
 17 on the left-hand side, 10 August 2012.
 18 CHAIRPERSON: Mr Ngalwana, you did
 19 indicate that you might object to some of these documents.
 20 Are you objecting to this one?
 21 MR NGALWANA: I don't even have it,
 22 Chairperson.
 23 CHAIRPERSON: Sorry?
 24 MR NGALWANA: I don't even have it with
 25 me.

Page 12450

1 CHAIRPERSON: You don't have it? Mr
 2 Gumbi, I understood the documents were going to be made
 3 available to the parties beforehand, a day beforehand and -
 4 MR GUMBI: They were circulated,
 5 Chairperson.
 6 MR NGALWANA: I'm seeing it now for the
 7 first time, Chair.
 8 CHAIRPERSON: Well they were circulated
 9 this morning were they?
 10 MR GUMBI: Yes, Chairperson.
 11 CHAIRPERSON: Why weren't they circulated
 12 beforehand?
 13 MR GUMBI: I got yesterday then I send
 14 email to the evidence leaders.
 15 CHAIRPERSON: Oh I see. To whom did you
 16 send the email?
 17 MR GUMBI: Yesterday, Chairperson.
 18 CHAIRPERSON: To whom did you send the
 19 email?
 20 MR GUMBI: To Mrs Kameshni.
 21 MS PILLAY: Chair, I don't want to -
 22 CHAIRPERSON: I take it you're referring
 23 to Advocate Pillay.
 24 MR GUMBI: Advocate Pillay, yes.
 25 MS PILLAY: Chair, I downloaded the email

Page 12451

1 first thing this morning and circulated it immediately.
 2 CHAIRPERSON: What's your answer, Mr
 3 Ngalwana?
 4 MR NGALWANA: Perhaps I don't want to be
 5 harsh on my learned friend.
 6 CHAIRPERSON: Sorry, before you carry on,
 7 have you seen this pocket book before, before you're being
 8 asked about it now?
 9 MAJOR-GENERAL MPEMBE: Chairperson, when
 10 I went out I found them on the seat and then I asked the
 11 interpreter, he said that they are meant for you. Attorney
 12 came to me and he said can you look quickly, they are going
 13 ask you.
 14 CHAIRPERSON: So have you looked yet?
 15 MAJOR-GENERAL MPEMBE: I have not looked
 16 at that -
 17 CHAIRPERSON: You haven't looked at it?
 18 MAJOR-GENERAL MPEMBE: Yes.
 19 CHAIRPERSON: Very well, Mr Gumbi what
 20 I'm going to do, I'm sorry we have to waste time like this
 21 and I'm not saying this by way of blaming you, I understand
 22 how it arose. But the basic idea is the witness should get
 23 an opportunity to see the documents beforehand in order to
 24 be ready to give his evidence. So what I'm going to do is
 25 I'm going to adjourn. I'm going to give you an opportunity

Page 12452

1 to discuss with Mr Ngalwana what exactly the documents are
 2 that you were referring to, ascertain that the witness has
 3 had an opportunity to read them and we will then resume.
 4 I'm sorry we'll lose time in the process but we've got to
 5 be fair to the witness. I can understand where you're
 6 coming to with this point, it's a very important point for
 7 you and for the witness. So I think we must deal with it
 8 according to the rulings we've made and - so I'll adjourn
 9 now and when you are able to report to me that we can
 10 proceed in the manner I've instructed you to do so. But
 11 before we adjourn - in fact I thought I'd made it clear,
 12 but just in case I didn't, if I can make it clear again,
 13 all the documents that you're going to refer to, that
 14 you've given us copies of you must be satisfied that Mr
 15 Ngalwana knows about them and has copies, the witness knows
 16 about them and has copies and has an opportunity to read
 17 them. Okay?

18 [COMMISSION ADJOURNS COMMISSION RESUMES]
 19 [12:00] CHAIRPERSON: The Commission resumes. Mr
 20 Gumbi, I understand, you told me as I came in that
 21 everything is now in order; you're ready, and we can
 22 proceed without any further difficulty. Is that correct?
 23 MR GUMBI: Yes, Chairperson, but before I
 24 could even proceed, Chairperson, I've spoken to Mr Fischer
 25 of Human Rights Commission, he wanted to say something

Page 12453

1 before the Commission.
 2 CHAIRPERSON: Mr Fischer?
 3 MR FISCHER: Thank you, Chair. Chair, I
 4 thought it appropriate to explain the derivation of the
 5 pocketbooks that you have in front of you now. Chair, you
 6 recall that since January of this year the Human Rights
 7 Commission has been requesting sight of all the pocketbooks
 8 of members present on the 13th and 16th of August. In May
 9 or June of this year, I can't recall exactly when, the SAPS
 10 submitted seven pocketbook entries purporting to be all
 11 those that were relevant, but on the Commission's urging
 12 the Human Rights Commission was permitted to inspect all
 13 remaining pocketbooks. That inspection is still ongoing.
 14 So far the Human Rights Commission has reviewed around 350
 15 pocketbooks. There are around 200 outstanding that have
 16 yet to be provided by the SAPS. As such the Human Rights
 17 Commission has not completed its review of pocketbooks and
 18 is nowhere near completing that review. Those pocketbooks
 19 that are in front of the Commission today derive from the
 20 partial review that the Human Rights Commission has been
 21 able to do so far.
 22 Adv Gumbi approached the Human Rights Commission
 23 on Tuesday to ask whether there were any specific
 24 pocketbooks relating to the 13th that might be directly
 25 relevant to his line of cross-examination. The Human

Page 12454

1 Rights Commission's response was that we were not in a
 2 position yet to share the results of our review because it
 3 was ongoing and there was nothing complete to share, but
 4 that we were aware of a number of specific pocketbooks that
 5 we could share, and those are the pocketbooks that Adv
 6 Gumbi is going to refer to today. I thought it would be of
 7 assistance to explain how they have come before the
 8 Commission.
 9 CHAIRPERSON: - whether the pocketbooks
 10 that we have now been given were ones that you saw
 11 initially, the seven you saw initially, or are they among
 12 those that you saw later?
 13 MR FISCHER: Chair, they're all amongst
 14 those that were not disclosed by the SAPS.
 15 CHAIRPERSON: Mr Ngalwana, that's
 16 something I - not now, but I'd like an explanation on
 17 later. We will give it an exhibit number in due course. I
 18 think it's, Tsinyane is the one pocketbook that I have in
 19 my hand which certainly contains an entry which is
 20 relevant, and if the story originally was there were only
 21 seven that contained relevant entries and this was not one
 22 of them, that's something that calls for explanation.
 23 Don't give it now. Obviously I don't expect you to be able
 24 to give it now, and there may be other entries in the
 25 pocketbooks that weren't originally shown which were seen

Page 12455

1 later, which are relevant, which should have been disclosed
 2 initially when asked for, and the fact that they weren't
 3 prima facie is a serious matter which requires explanation.
 4 I don't expect you to give it now. You have to take
 5 instruction, but it must be quite clear that we expect the
 6 police to honour the commitment they made when the
 7 Commission was appointed, to give full cooperation, and
 8 that means disclosing all documents that are relevant, that
 9 are asked for. Right? Thank you. Carry on, Mr Gumbi.
 10 MR GUMBI: Thank you very much -
 11 CHAIRPERSON: Adv Hemraj reminds me that
 12 at some stage down the process that you were talking about,
 13 when Human Rights Commission raised the question with the
 14 Commission, I spoke to Adv Semanya, who immediately
 15 undertook to make all the pocketbooks available, and that,
 16 as far as I understand, that undertaking he gave has been
 17 honoured. My remarks to Mr Ngalwana relate to what you
 18 said, that prior to that when you asked for pocketbooks
 19 that were relevant, you were only given seven, and if what
 20 you say is correct, that there were other pocketbooks that
 21 contained relevant entries which were not shown, which
 22 should have been shown, that's the matter in respect of
 23 which I want an explanation. But anyway, obviously Mr
 24 Ngalwana can't deal with it now. He'll deal with it when
 25 he's taken instruction.

<p style="text-align: right;">Page 12456</p> <p>1 MR FISCHER: Chair, I should clarify one 2 point; the Human Rights Commission has been given access to 3 all the pocketbooks that are in the possession of the SAPS 4 legal team. The SAPS legal team are not in possession of 5 all the pocketbooks of the members on the day, and my 6 understanding is that they're doing everything in their 7 power to get access to all of those pocketbooks. So 8 there's no criticism at all about what the SAPS have done 9 with the pocketbooks that are in their possession. It's 10 also not quite right to – 11 CHAIRPERSON: This would be the SAPS 12 legal team? 13 MR FISCHER: SAPS legal team. 14 CHAIRPERSON: Yes, no my comments weren't 15 directed in any way at the SAPS legal team. I have no 16 doubt that Mr Semenya saw to it that the undertaking he 17 gave would be implemented, no difficulty, but if what you 18 say is correct, that initially when you asked for 19 pocketbooks that were relevant and you were only shown 20 seven, and there are obviously others that contain relevant 21 entries that weren't shown, that is something prima facie 22 which calls for explanation, but I'm sure Mr Ngalwana will 23 give it to us in due course. Can we now carry on with the 24 cross-examination? 25 MR GUMBI: Thanks very much, Chairperson.</p>	<p style="text-align: right;">Page 12458</p> <p>1 that are relevant, are these seven, and seven were given, 2 and it turns out there were others later, that's what I 3 want the explanation on. Of course the basic assumption on 4 which my query is based is the one I mentioned, that your 5 clients were asked for pocketbook entries that were 6 relevant and only produced seven. But anyway, that's a 7 matter you'll go into before you give the explanation in 8 due course. 9 MR NGALWANA: And that's not the issue I 10 was addressing myself on just now – 11 CHAIRPERSON: No, no, no, no, you were 12 dealing with a different question. You were dealing with 13 the authenticity point, which as you correctly say, you're 14 not going to cause any difficulties at this stage; you will 15 obviously wish it to be shown to you later that the 16 pocketbooks are correctly identified and the notes at the 17 top of them indicating the owner of the pocketbook are in 18 fact right, but we don't have to waste time on that in the 19 Commission here. 20 MR NGALWANA: And so as to make it clear, 21 Chair, that I haven't caught my learned friend by surprise, 22 I did discuss this issue with him before we resumed. 23 CHAIRPERSON: Are you now ready after 24 that – 25 MR GUMBI: Yes, Chairperson, I'm ready to</p>
<p style="text-align: right;">Page 12457</p> <p>1 General, before I could even – 2 MR NGALWANA: No, no, sorry, Chair, just 3 one observation, not about the discussion that has now just 4 preceded, but in relation to the copies of what purports to 5 be pocketbooks that are about to be put to the General in 6 cross-examination, I'm not going to stop, or object to my 7 learned friend cross-examining on them, but I want to place 8 it on record that there is no agreement that the documents 9 that are placed before the Commission and in cross- 10 examination to the witness are what they purport to be. We 11 gave them the originals of the pocketbooks, but there is no 12 telling that for example this NM Tsinyane, what is alleged 13 to be Tsinyane's pocketbook is indeed Tsinyane's 14 pocketbook. There is a way of presenting documentary 15 evidence. This is not it. You can't just write a name of 16 a person at the top right-hand corner of a page and say 17 that is what, it is what it purports to be. But subject to 18 that disclaimer, Chair, I'll allow him to – we're happy for 19 him to cross-examine, but once we have checked these things 20 we may well raise the point and – 21 CHAIRPERSON: Yes, I understand you've 22 reserved your position in that regard, and of course just 23 to be absolutely clear, what I was talking about earlier 24 was if it's correct that the response the Human Rights 25 Commission got was the only pocketbooks that are, entries</p>	<p style="text-align: right;">Page 12459</p> <p>1 proceed – 2 CHAIRPERSON: - preliminary discussion to 3 proceed with your – 4 MR GUMBI: Yes. 5 CHAIRPERSON: Now what's the first 6 document you're going to refer to? Is it the one that – 7 MR GUMBI: The first pocketbook I'm going 8 put to the witness, Chairperson, is that one of Mativa, LM, 9 NI Pretoria – 10 CHAIRPERSON: Right, so it's the 11 pocketbook of Mativa, and that will be exhibit HHH24, Adv 12 Pillay? 13 MS PILLAY: That's correct, Chair. 14 MR NGALWANA: Before we do that, Chair, 15 may I also enquire of my learned friend whether he's going 16 to call this person as a witness, so we can decide whether 17 we want to cross-examine him? 18 CHAIRPERSON: Well, he may decide to call 19 him or he may suggest that you should call him in the sense 20 he's produced a document in his handwriting which contains 21 certain statements and prima facie if you want the witness 22 to come and say he didn't say all those things, then maybe 23 you must call him. Remember, we're not bound by the strict 24 rules of evidence here. Mr Gumbi, you've heard the 25 question that you're being asked.</p>

<p style="text-align: right;">Page 12460</p> <p>1 MR GUMBI: Yes, I will take instruction 2 on that one, Chairperson. 3 CHAIRPERSON: Do you know what the rank 4 is of Mr Mativa? 5 MR GUMBI: It's written here CST, I think 6 he's a constable – 7 CHAIRPERSON: Thank you, alright. So 8 it's a pocketbook, I won't put in purportedly, but, 9 although Mr Ngalwana may want me to say that, but I will 10 describe it as the pocketbook of Constable Mativa. It's 11 actually an extract from, isn't it? Extract from the 12 pocketbook of Constable Mativa, but this is on the 13 understanding that you will establish that that is indeed 14 his pocketbook – 15 MR GUMBI: Yes, Chairperson. 16 CHAIRPERSON: Otherwise we may have to 17 change the description of the exhibit if it turns out that 18 that's not correct. 19 MR GUMBI: Yes, Chairperson. We have 20 another one, NM Tsinyane, it's written at the top there, 21 Chairperson. It's Tsinyane – 22 CHAIRPERSON: [Microphone off, inaudible] 23 so that's the next one. 24 MR GUMBI: Yes. 25 CHAIRPERSON: You want that to be HHH25?</p>	<p style="text-align: right;">Page 12462</p> <p>1 MR GUMBI: Yes. 2 CHAIRPERSON: Alright. 3 MR GUMBI: Then the last one is that one 4 written Captain Mahalenle. 5 CHAIRPERSON: So I'm sorry, I've now 6 finally caught up with you. What is 27 going to be? 7 MR GUMBI: Captain Mahalenle. 8 CHAIRPERSON: Oh, Captain. Ma-ha - 9 MR GUMBI: Yes, Chairperson. 10 CHAIRPERSON: Just to make sure that 11 we're all following, I've marked the – Adv Hemraj has 12 pointed out that the ones of the officers are diaries, and 13 I think it was explained to us previously in the course of 14 the evidence that officers have diaries and members of the 15 force who are not officers have pocketbooks. So exhibit 16 HHH24 is extract from the pocketbook of Constable Mativa. 17 MR GUMBI: Yes. 18 CHAIRPERSON: Exhibit HHH25, extract from 19 the diary of Captain Tsinyane. Exhibit HHH26, extract from 20 the diary of Lieutenant-Colonel Merafe, and exhibit HHH27, 21 extract from the diary of Captain Mahalenle. 22 MR GUMBI: Yes, thanks very much, 23 Chairperson. General, before we could even deal with this 24 aspect, you testified before this Commission that – or if 25 may I rephrase it. It's an evidence before this Commission</p>
<p style="text-align: right;">Page 12461</p> <p>1 MR GUMBI: HHH25. 2 CHAIRPERSON: [Microphone off, 3 inaudible]. 4 MR GUMBI: Yes, Chairperson. 5 CHAIRPERSON: Is he also a constable? 6 MR GUMBI: I'm not sure, it is not 7 written anywhere whether he's a constable or not. 8 CHAIRPERSON: [Microphone off, inaudible] 9 I'll describe it as the pocketbook of Constable Tsinyane. 10 If I'm wrong, we'll give him the necessary promotion when 11 the correct information is available. 12 MR GUMBI: Correct, Chairperson. 13 MS PILLAY: Chair, the document reflects 14 him as Captain Tsinyane. 15 MR GUMBI: Captain. 16 CHAIRPERSON: [Microphone off, inaudible] 17 captain. Are you just relying on those two for the moment? 18 MR GUMBI: Yes, Chairperson. If we can 19 maybe mark all of them, Chairperson, I think for a sake of 20 smooth progress. We have another one – 21 CHAIRPERSON: [Microphone off, inaudible] 22 MR GUMBI: We have another one written OJ 23 Merafe, Rustenburg POP. 24 CHAIRPERSON: That will be HHH26, extract 25 from pocketbook of – he's a Lieutenant-Colonel, isn't he?</p>	<p style="text-align: right;">Page 12463</p> <p>1 that the Warrant-Officer Monene before he was killed by 2 those marchers, he was inside the Nyala. He alighted from 3 the Nyala. 4 MAJOR-GENERAL MPEMBE: Chairperson, there 5 was a video that was shown there. Maybe it could be shown 6 again because that was also a video that was shown where 7 three members who alighted the Nyala. 8 CHAIRPERSON: We saw that video. Do we 9 have to see it again? 10 MAJOR-GENERAL MPEMBE: I'm just answering 11 the question. 12 CHAIRPERSON: Yes, yes. 13 MR GUMBI: Ja, but my question is saying 14 that before they were attacked they were inside the Nyala, 15 they alighted from the Nyala, then they were attacked by – 16 MAJOR-GENERAL MPEMBE: Chairperson, I do 17 not understand the question. 18 MR GUMBI: Let us deal with Lieutenant 19 Baloyi. You saw that video footage, you saw Lieutenant 20 Baloyi alighting from a Nyala before he was attacked. 21 MAJOR-GENERAL MPEMBE: I'm sorry, 22 Chairperson, should I answer Lieutenant Baloyi or Lepaaku? 23 I'm getting confused. 24 CHAIRPERSON: The problem is that you 25 have been referring in your introductory remarks to various</p>

Page 12464

1 people. Just before we took the adjournment you talked
 2 about Lepaaku. Now you're talking about Baloyi. You also
 3 talked about Monene too, I think.
 4 MR GUMBI: Yes, Chairperson.
 5 CHAIRPERSON: So I think in fairness to
 6 the witness, I think you should make it clear to him which
 7 particular person you were talking about so he can then
 8 concentrate on that person in his answer. And you talked
 9 now about Lieutenant Baloyi.
 10 MR GUMBI: I do apologise for that
 11 confusion, Chairperson. I understand it. Can I start with
 12 Lieutenant Baloyi?
 13 CHAIRPERSON: Yes.
 14 MR GUMBI: Then I'll move on to the other
 15 witnesses.
 16 CHAIRPERSON: Alright, it's your cross-
 17 examination. I won't tell you what to do.
 18 MR GUMBI: Yes.
 19 CHAIRPERSON: But as long as it's clear.
 20 You're now going to be asked questions about Lieutenant
 21 Baloyi and when he moves on to talk about somebody else
 22 he'll tell you he's talking about somebody else and who
 23 that person is. Okay?
 24 MR GUMBI: General, you saw the video
 25 footage that was played before this Commission. We saw the

Page 12465

1 Nyala, we saw Lieutenant Baloyi alighting from that Nyala.
 2 Thereafter he was attacked by marchers there. Do you
 3 confirm that.
 4 [12:20] MAJOR-GENERAL MPEMBE: Chairperson,
 5 Lieutenant Baloyi was not immediately attacked when he
 6 alerted the Nyala, but it's true that while they were still
 7 out and there were so many other actions that happened
 8 before the attack could take place. I'm not in a position
 9 to say yes or no, but the issue is when he alerted the
 10 Nyala, he was not immediately attacked. This is only what
 11 I wanted to indicate.
 12 CHAIRPERSON: In the statement he
 13 actually walked some distance from the Nyala and it was
 14 only when the attack started and he tried to get back to
 15 the Nyala, when he got to the Nyala, there were other
 16 people there ahead of him, but that's the statement that's
 17 before us that he's made. So certainly his own case
 18 doesn't seem to be that he alighted from the Nyala and was
 19 immediately attacked, isn't that right.
 20 MAJOR-GENERAL MPEMBE: I understand that.
 21 CHAIRPERSON: Am I correct?
 22 MAJOR-GENERAL MPEMBE: Yes.
 23 CHAIRPERSON: You just want confirmation
 24 of the fact that he was originally in an Nyala, he alighted
 25 from the Nyala and sometime thereafter, what exactly the

Page 12466

1 time is he's attacked. Is that all you want confirmation
 2 of? I take it you won't have problem with that, General,
 3 that correct, isn't it?
 4 MAJOR-GENERAL MPEMBE: Correct,
 5 Chairperson.
 6 MR GUMBI: The same apply with the late
 7 Warrant-Officers Monene and Lepaaku?
 8 MAJOR-GENERAL MPEMBE: Chairperson, I'm
 9 requesting again, with humbleness, Lieutenant Baloyi, I've
 10 said it many times, he was together with Warrant-Officer
 11 Monene. Warrant-Officer Lepaaku was not there. It's
 12 automatically in a different Nyala. May I deal with the
 13 issues of Lieutenant Baloyi and Warrant-Officer -
 14 CHAIRPERSON: Ja, you can do that, but I
 15 think the point being made is a simple one, that all three
 16 of those persons were in Nyalas. Lepaaku and Monene in
 17 one, is that right? Oh, sorry, I've got it right now.
 18 Baloyi - in fact, this is with the other question. Baloyi
 19 and Monene were in one Nyala and they both got out and they
 20 were subsequently attacked, and Lepaaku was in another
 21 Nyala and he also got out and was attacked as well, having
 22 alighted from another Nyala. That's correct, isn't it.
 23 MAJOR-GENERAL MPEMBE: Correct,
 24 Chairperson.
 25 CHAIRPERSON: Now, what the witness says,

Page 12467

1 he would appreciate if you firstly asked him about -
 2 consistently about one of the members before you move on to
 3 the other one, because it's a bit confusing. So if you'll
 4 - I think that's a reasonable request. So you've
 5 established the facts that you wanted, all three of them
 6 were in Nyalas, two in one and one in another, all three of
 7 them alighted, all three of them were thereafter attacked,
 8 presumably before they could get back to the Nyalas. Is
 9 that right?
 10 MR GUMBI: Yes, thanks very much,
 11 Chairperson, for explaining that.
 12 CHAIRPERSON: I don't think the General -
 13 MR GUMBI: Yes. Thanks, Chairperson, I
 14 appreciate that. That's my point. Then it is your
 15 evidence in this commission, General, that you did not
 16 instruct any of the members to alight from the Nyala?
 17 MAJOR-GENERAL MPEMBE: Correct,
 18 Chairperson.
 19 CHAIRPERSON: You didn't give them any
 20 instructions at all, as far as I understand, according to
 21 your evidence, is that correct?
 22 MAJOR-GENERAL MPEMBE: Chairperson?
 23 CHAIRPERSON: Once they went off in
 24 Nyalas, you didn't give them, as far as I understand your
 25 evidence, you didn't give them any instructions at all, is

Page 12468

1 that right?

2 MAJOR-GENERAL MPEMBE: Correct,

3 Chairperson.

4 MR GUMBI: Let us focus on this aspect of

5 issuing of instruction on the 13th August 2012 along the

6 railway line. I wanted to confront you with a version of

7 other police officers who were there, and some of the

8 versions they are extracted from pocketbook. Then I will

9 invite you, General, to comment on that one.

10 MAJOR-GENERAL MPEMBE: May I again

11 request that I need to be sure whether are we now on the

12 scene or I'm back at the railway line? Because now it's

13 really confusing me.

14 CHAIRPERSON: Yes. I think point raised

15 by the General is a valid one, are you going to talk to him

16 about the instructions he gave at the railway line?

17 Remember, where he told them to escort the people to the

18 koppie. Or are you going to talk to him about instructions

19 which you say he gave thereafter? I think he's entitled to

20 know the answer to that.

21 MR GUMBI: The instruction he gave before

22 there was this conflict between –

23 CHAIRPERSON: That's an ambiguous answer.

24 He gave instructions - it's common cause, at the railway

25 line when they started walking away.

Page 12469

1 MR GUMBI: Yes.

2 CHAIRPERSON: The instruction was let

3 them go, escort them. That's his evidence. But as I

4 understand it, the issue in debate is whether he gave

5 subsequent instructions as they were proceeding towards the

6 koppie. Is that correct?

7 MR GUMBI: Yes.

8 CHAIRPERSON: Right. Now, that's what

9 you want to ask him about. You're not asking about

10 instructions he gave when they set off from near the

11 railway line, you want to ask him about what happened

12 sometime thereafter. Is that correct?

13 MR GUMBI: Yes. If I do have a version,

14 I will put it to him.

15 CHAIRPERSON: Do you understand that,

16 General?

17 MAJOR-GENERAL MPEMBE: Correct,

18 Chairperson.

19 CHAIRPERSON: Now, you said something in

20 a pocketbook. Now, as we've seen, we've got three diaries

21 before us at the moment and one pocketbook. The only

22 pocketbook is exhibit HHH24.

23 MR GUMBI: Can I focus on HHH24,

24 Chairperson? The pocketbook from Constable Mativa LM is a

25 Pretoria NIU member. Can you go to page 4, General, of

Page 12470

1 that pocketbook? Can I read it on record what he said on

2 his pocketbook? At the bottom there where it starts,

3 "General instructed us to follow them, escort them to the

4 place where they were heading to. While escorting, then

5 the General again instructed Nyalas to block the group in

6 front. Then the group started to fight the police with the

7 pangas and the police die at the scene. Others were

8 injured." Have you read that, General?

9 MAJOR-GENERAL MPEMBE: I note, and I've

10 read it.

11 MR GUMBI: What is your comment on this

12 allegation by Constable Mativa?

13 MAJOR-GENERAL MPEMBE: Chairperson,

14 giving instruction, I don't know how the constable is

15 saying I gave the instruction, whether by radio or by what,

16 because at that time they were already escorting. And if

17 it's by radio, surely everybody could be saying we heard

18 the General giving the instruction.

19 CHAIRPERSON: The argument you're giving

20 us, the question is did you give such an instruction?

21 MAJOR-GENERAL MPEMBE: Chairperson, I

22 already said I never gave an instruction when the people

23 were going.

24 CHAIRPERSON: So you say the constable is

25 wrong in the entry he made in the pocketbook to which

Page 12471

1 counsel has referred to?

2 MAJOR-GENERAL MPEMBE: That's why I

3 wanted also to know to say how did I gave that instruction?

4 COMMISSIONER HEMRAJ: Chair, just for the

5 purposes of the record, Constable Mativa is a female

6 officer.

7 CHAIRPERSON: You raised a point which I

8 don't think Mr Gumbi can answer. If the constable comes,

9 you can ask her that, but you say you didn't give such an

10 instruction either by radio or otherwise, but I take it

11 implicitly what you're saying is that if you had given an

12 instruction to the Nyalas, you would have had to have given

13 it by radio, otherwise they wouldn't have heard it. Is

14 that right? Am I summarising your evidence correctly.

15 MAJOR-GENERAL MPEMBE: Yes, Chairperson.

16 I also wanted to add to say because at the time also and

17 the key word is - so if I did brief personally the

18 constable, the key word should have been briefing,

19 underlined, by Major-General Mpeembe, and this was precisely

20 the briefing. So that's why I'm saying the whole entry, I

21 don't know under what circumstances the entry was made.

22 Maybe if I may, it might also be brought to me in what

23 circumstances. And the time indicates 10 o'clock and maybe

24 you can go back to the videos to check at what time did I

25 address the officers, at what time did I address the

Page 12472

1 members at the railway line?

2 CHAIRPERSON: No, General, I did think we

3 need to waste time on that. I think that's a bad point.

4 There's general entry in the pocketbook starting at the top

5 of page 4 at 10 o'clock, and she's giving an account, as I

6 read it, or purporting to give an account to what happened

7 thereafter. The next entry is 21h00, you see. So she's

8 telling us what happened from 10 o'clock till 9 o'clock in

9 the evening. So that's not a good point you're making.

10 The point you make is that she, in relation to the

11 instruction, she says in her entry that you instructed the

12 Nyalas. She doesn't pretend that the instruction was given

13 to her, she says you instructed the Nyalas to block the

14 group at the front. You say you could only have given that

15 instruction – you say you didn't give the instruction, but

16 you say that if you had given it, you would have had to

17 have given it by radio otherwise the Nyalas wouldn't have

18 heard you, and then other people would have heard you as

19 well. That's your point, isn't it?

20 MAJOR-GENERAL MPEMBE: Correct,

21 Chairperson.

22 CHAIRPERSON: Alright, can we move on?

23 MAJOR-GENERAL MPEMBE: Chairperson, also

24 what I am indicating here is that she doesn't say she was

25 reported for me to have said that. She talks as if she

Page 12473

1 heard me giving her the Nyalas the instruction.

2 CHAIRPERSON: Ja, well of course, if you

3 had given it over the radio, she would have heard it,

4 wouldn't she?

5 MAJOR-GENERAL MPEMBE: Correct,

6 Chairperson.

7 CHAIRPERSON: Okay. Your point is that

8 she's not the only one who would have heard it, everyone

9 else would have heard it as well, but it's not a criticism

10 of her to say that she heard the instruction, if in fact

11 she's correct and you gave it to over the radio, but you

12 deny that, so there's the conflict between the two of you.

13 MR NGALWANA: Chair, may I be so bold as

14 to say that the Chair was criticising the explanation that

15 the witness was giving as regards the time period to which

16 the entry in the pocketbook relates. Of course, the Chair

17 himself doesn't know whether that relates to the events of

18 that day between 10:00 and 9 o'clock in the evening. May I

19 just, Chair, just round up the point? It seems to me the

20 proper way to arrive at precisely when this was done was

21 for the person who made the entries to tell us. The

22 chairperson cannot assume that it relates to entries from

23 10:00 to 9:00 in the evening.

24 CHAIRPERSON: Well, all those incidents

25 recorded there couldn't have taken place precisely at 10

Page 12474

1 o'clock. Some of them must have taken place, that's the

2 only point I was making. But anyway it helps for you and

3 me to have arguments, we must concentrate on the cross-

4 examiner and the witness, and if you have anything to say,

5 confine them to objections and we carry on.

6 MR GUMBI: Can I also refer to another

7 pocketbook, General? It was marked as exhibit HHH27 before

8 this commission.

9 CHAIRPERSON: Diary. I've explained to

10 you the evidence was – think one of the first witnesses

11 gave the evidence, Lieutenant-General Botha. Officers have

12 diaries, ordinary members have pocketbooks.

13 MR GUMBI: Yes, Sir.

14 CHAIRPERSON: And what you're now

15 referring to is the diary of Captain Mahalenle.

16 MR GUMBI: Yes, Chairperson, thank you.

17 Can you go to the page written 13 Monday, 13 August,

18 Monday? When you go down there at about 9 o'clock there.

19 I do understand the handwriting is not clear here, but I

20 can I read it to you, General?

21 CHAIRPERSON: It's not at 9 o'clock, I

22 think it's just opposite 9 o'clock on the page.

23 MR GUMBI: Yes, Chairperson, thank you.

24 Can I read what she said? "On escorting the miners to the

25 koppie, I'm sure, with their dangerous weapon, General

Page 12475

1 Mpeembe ordered that the group must be stopped and

2 disarmed." Then he is saying one CS gas was a shot with a

3 stun grenade followed by the –

4 CHAIRPERSON: Look at the word, one CS

5 Gas.

6 MR GUMBI: CS Gas, yes, Chairperson,

7 which shot with stoppage or followed or stun grenade – I'm

8 not clear about that – followed by the stun grenade.

9 MAJOR-GENERAL MPEMBE: Yes.

10 MR GUMBI: What is your comment, General,

11 on this version?

12 MAJOR-GENERAL MPEMBE: Chairperson, I did

13 give an answer to say I did not order anybody to use even a

14 CS Gas, it's on record. And I did not order that people

15 should be stopped and I also indicated in my statement,

16 supplementary statement, and where I had differences

17 Colonel Merafe. And I also spoke about situational

18 appropriateness to this commission.

19 CHAIRPERSON: You're repeating what you

20 said before. You gave that evidence. You denied that you

21 gave an order as the people were proceeding and you denied

22 that you gave any order of any kind, actually, as they were

23 proceeding. That's the evidence you gave. It's been put

24 to you now that the captain in his diary has recorded

25 something different and you were asked to comment and your

<p style="text-align: right;">Page 12476</p> <p>1 comment is, I take it, you persist in your denial. Is that 2 correct?</p> <p>3 MAJOR-GENERAL MPEMBE: Correct, 4 Chairperson, in line with my evidence.</p> <p>5 MR GUMBI: Can we move on, General, to 6 another one, to another diary? HHH25. It's Captain 7 Tsinyane. It's paragraph – can you go to the page written, 8 13, Monday? There is time written there, 12:20. Do you 9 see that, General?</p> <p>10 MAJOR-GENERAL MPEMBE: I don't see the 11 time. Maybe it's because of the photostating.</p> <p>12 CHAIRPERSON: Sorry, I think he's 13 referring the 12:20. Never mind the printed times, there's 14 a handwritten time 12:20, and that starts, "Arrival at the 15 place," and then it goes on. Do you see?</p> <p>16 MAJOR-GENERAL MPEMBE: Yes.</p> <p>17 CHAIRPERSON: And then five lines down at 18 the end of the line – or the five lines down we see, 19 "Started to move in the open veld."</p> <p>20 MAJOR-GENERAL MPEMBE: Yes.</p> <p>21 CHAIRPERSON: "General Mpeembe instructed 22 the members to stop them." That's the passage counsel is 23 referring to.</p> <p>24 MAJOR-GENERAL MPEMBE: Yes, I see it, 25 Chairperson.</p>	<p style="text-align: right;">Page 12478</p> <p>1 regard to the statement of Baloyi at page 3 of 5, in 2 paragraph 7, he doesn't say anything about the General 3 giving them orders to stop people, and shoot stun grenades. 4 In fact, he says "I advised the General that stun grenades 5 should be used to disperse them." He, Baloyi, and I have 6 dealt with this in-chief, and the General denied it. So 7 now, my learned friend is putting a totally different 8 version from someone else, so he needs to nail his colours 9 to the mast, with respect.</p> <p>10 CHAIRPERSON: Mr – I don't think your 11 point is correct, you are correct when you say that 12 Lieutenant Baloyi doesn't say that the General gave 13 instructions, but he also doesn't say he didn't give 14 instructions. He says that he was in an Nyala and he says 15 he got out of the Nyala and he says what happened 16 thereafter. If an order had been given as the Captain 17 alleged in his diary, it doesn't follow that Lieutenant 18 Baloyi would have heard it. That's the point, surely. The 19 interesting questions arise regarding the fact that we are 20 not bound by the sequence of evidence. Interesting 21 questions may arise later, as to whether he could be 22 expected to call the Captain or you should call the Captain 23 to explain the entry in the diary, but these are matters we 24 don't have to decide yet. I will allow him to proceed with 25 the question.</p>
<p style="text-align: right;">Page 12477</p> <p>1 CHAIRPERSON: I have difficulty in 2 reading the next sentence, but hopefully someone will read 3 it for me.</p> <p>4 MR GUMBI: Yes, can I read the sentence 5 again on record, Chairperson? Captain Tsinyane is saying 6 that General Mpeembe instructed the members to stop them. 7 What is your comment, General?</p> <p>8 [12:39] MAJOR-GENERAL MPEMBE: Chairperson, as 9 I've said, I did not instruct any member, but in the same 10 diary, at 11:50 I see the Captain says that myself and the 11 Provincial Commissioner, we personally briefed him, and I 12 don't remember me and myself, General Mbombo, briefing this 13 specific officer, only him.</p> <p>14 MR GUMBI: So in essence, General, you 15 deny that you issued instructions to stop the miners who 16 were marching?</p> <p>17 MAJOR-GENERAL MPEMBE: Correct, 18 Chairperson.</p> <p>19 MR GUMBI: Let's move again to another 20 diary –</p> <p>21 MR NGALWANA: Chair, with respect, I need 22 to know what version our learned friend is advancing, 23 because his own witness, Captain Baloyi says something 24 totally different to what he is putting to the witness, as 25 arising from what other officers have said. If you have</p>	<p style="text-align: right;">Page 12479</p> <p>1 MR NGALWANA: Yes, Chairperson, I must 2 also clarify this, by not putting the version of Baloyi, 3 with respect –</p> <p>4 CHAIRPERSON: I found in your favour, 5 don't deliver -</p> <p>6 MR NGALWANA: Chair, with respect, I am 7 making a totally different point. All I am saying, my 8 learned friend's witness and I shan't belabour the point, I 9 will bow by the Commission's ruling on this, I just want to 10 make this one last point, just to make sure that I am clear 11 and I am heard clearly, Chair, with respect, Captain Baloyi 12 says that he advised the General to shoot stun grenade. My 13 learned friend is putting a version from other officers 14 that says, the General ordered them to shoot CS gas and to 15 stop them, to stop the marchers. These are two conflicting 16 versions. He can't have his witness saying one thing, and 17 then put to the witness in cross-examination something that 18 is totally different from what his own witness says. 19 That's all I am saying.</p> <p>20 CHAIRPERSON: There's not a conflict. 21 What Baloyi says is, "before I went off in the Nyala, I 22 spoke to the General, and I said, look here, we should use 23 stun grenades. The General didn't agree. I then took a 24 stun grenade on my own." What is now being put is that 25 after the General had not agreed with Lieutenant Baloyi, at</p>

Page 12480

1 a later stage the General then apparently changed his mind.
 2 Now, counsel is leading up, I suspect, to another document
 3 that he gave us which is a report on mine unrest at Lonmin,
 4 Marikana, August 2012, the 141 page document. He is going
 5 to refer us I think to page 35, but let's wait for him to
 6 get there. But it's clear that what he is putting is not
 7 in conflict with his client's own version but it deals with
 8 something that happened after what his client described.
 9 Mr Gumbi, the point made by my colleague, Adv Tokota, is,
 10 the witness is consistently denying these statements, so I
 11 don't know if it helps us to just hammer them, I understand
 12 you must put the various statements in the diaries in the
 13 pocket book and so on, but it seems clear what the
 14 witnesses answer is. So I don't think it's necessary you
 15 have got to hammer every time, it looks as if he is just
 16 going to go on denying. Whether the denial is justified or
 17 not, is a matter we have to decide in due course but –
 18 MR GUMBI: Yes, Chairperson, I think
 19 maybe the best way is read on record all these extracts
 20 then we will allow the General to comment on –
 21 CHAIRPERSON: Give him a chance to
 22 comment.
 23 MR GUMBI: Yes.
 24 CHAIRPERSON: But just put them to him,
 25 you've put to him what you've done so far, carry on with

Page 12481

1 the other passages you rely on.
 2 MR GUMBI: Yes.
 3 CHAIRPERSON: Can give him a chance to
 4 answer generally. Eventually, you can take some time with
 5 the other document.
 6 MR GUMBI: Yes. You also have another
 7 diary, General, from Merafe, Rustenburg POP is written OJ
 8 Merafe Rustenburg POP, is HHH26. Are you in possession of
 9 that diary, General?
 10 MAJOR-GENERAL MPEMBE: I have it,
 11 Chairperson.
 12 MR GUMBI: Go to the page with the title
 13 13, Monday 2012.
 14 MAJOR-GENERAL MPEMBE: Yes, I am there,
 15 Chairperson.
 16 MR GUMBI: Go to the bottom of that page,
 17 I think the last paragraph. Merafe is saying, "Police
 18 tried to disarm them. They attacked us." Do you see that?
 19 Then we have again another document I will refer to you, I
 20 don't think, Chairperson, it has been entered as an
 21 exhibit, the Lonmin report compiled by –
 22 COMMISSIONER HEMRAJ: Mr Gumbi, there's
 23 nothing in this exhibit that refers to any order being
 24 given by the witness.
 25 MR GUMBI: Yes.

Page 12482

1 COMMISSIONER HEMRAJ: So what are you
 2 putting to him?
 3 MR GUMBI: Yes, thanks very much
 4 Commissioner. Thank you very much, if I can elaborate on
 5 that one. I think the witness had a certain question.
 6 General, Merafe is saying "Police tried to disarm them."
 7 Was there any instruction to disarm the protesters?
 8 CHAIRPERSON: He didn't say there was an
 9 instruction.
 10 MR GUMBI: Yes.
 11 CHAIRPERSON: He simply said what they
 12 were trying to do. The question arises, what were they up
 13 to? If, without an instruction from him, someone fired
 14 teargas and someone used a stun grenade, what were they
 15 trying to do? But the important point is, Merafe's diary
 16 doesn't indicate that this witness gave any instruction.
 17 MR GUMBI: Yes, Chairperson, and -
 18 CHAIRPERSON: Or even that anybody else
 19 gave an instruction.
 20 MR GUMBI: Yes.
 21 CHAIRPERSON: These people may have tried
 22 to do this on their own without an instruction.
 23 MR GUMBI: Yes, Chairperson.
 24 CHAIRPERSON: So I am not sure that that
 25 document helps you.

Page 12483

1 MR GUMBI: Yes, Chairperson if, may I
 2 rephrase my question because according to Merafe, police
 3 tried disarm. So –
 4 CHAIRPERSON: Sorry to interrupt, the
 5 other point is of course he tried to disarm them too by
 6 addressing them by the railway line. If he says, run two
 7 things together, they've attempted to disarm by speaking to
 8 them at the railway line. Thereafter there was this attack
 9 by some of the strikers on the police with the consequences
 10 that we know, that's the next important event which he
 11 records in his diary. I don't see how that helps you.
 12 MR GUMBI: Thank very much, Chairperson.
 13 CHAIRPERSON: It seems to be mutual,
 14 surely at best for –
 15 MR GUMBI: Yes. I am prepared, I can
 16 move to another –
 17 CHAIRPERSON: I suggest you move on to
 18 something -
 19 MR GUMBI: Again, can I refer you to
 20 another document, Chairperson, that's a report "Mine Unrest
 21 at Lonmin Marikana August 2012."
 22 CHAIRPERSON: It's a 141 page document.
 23 MR GUMBI: Yes, it's 141 –
 24 CHAIRPERSON: So that's we've got to give
 25 an exhibit number to.

<p style="text-align: right;">Page 12484</p> <p>1 MR GUMBI: Yes, we haven't given this one 2 an exhibit number. 3 CHAIRPERSON: Right, so that would be 4 HHH28, report, described as "Report Mine unrest at Lonmin 5 Marikana August 2012, exhibit HHH28. Have you seen this 6 document before? I know you only had a chance to read it 7 today, but have you seen this before? 8 MAJOR-GENERAL MPEMBE: I did read it, 9 Chairperson, yesterday. 10 CHAIRPERSON: But in August and September 11 last year, did you see this document? 12 MAJOR-GENERAL MPEMBE: I know the process 13 that bring about this document. 14 CHAIRPERSON: What is this document 15 actually? 16 MAJOR-GENERAL MPEMBE: Chairperson, as I 17 explained in my evidence, that it's a compilation of what 18 different people were saying from the different scenes, 19 what happened from 9th of August until the 16th of August, 20 when Colonel Visser was actually getting the information 21 from different people. I did testify on how that process 22 took place. 23 CHAIRPERSON: It does look, if one looks 24 at page 3, that Colonel Visser was somehow connected with 25 this document because his name appears at the top, with his</p>	<p style="text-align: right;">Page 12486</p> <p>1 protesters had been involved in looting shops owned by 2 foreigners and assaulting innocent bystanders who crossed 3 their paths. To protect the lives and properties of 4 innocent people the intention was to allow the protesters 5 to proceed to koppie 1 around the settlement." Now we come 6 to the paragraph you referred to. 7 MR GUMBI: Yes. 8 CHAIRPERSON: "To prevent them from 9 entering the settlement, the police used teargas and stun 10 grenades to disperse, discouraging them from their intended 11 path. Major General Mpembe issued a command for stun and 12 teargas after which Warrant Officer Kuhn fired a shotgun CS 13 rifle grenade." And then it continues, in the next 14 paragraph, "The group turned around and with their 15 dangerous weapons charged the members of the police behind 16 them," and then he goes on about the deaths and the – the 17 deaths of the two people, Monene and Lepaaku. That's the 18 passage that you – 19 MR GUMBI: Yes. 20 CHAIRPERSON: - are putting to the 21 witness. 22 MAJOR-GENERAL MPEMBE: Chairperson, I am 23 on record to this Commission to say that at Potchefstroom, 24 and I did not hide it, that members said I gave the 25 command. And Chairperson, it's on record to this</p>
<p style="text-align: right;">Page 12485</p> <p>1 telephone number and the – he is the person to whom 2 enquiries have to be directed according to page 3 of the 3 document. 4 MAJOR-GENERAL MPEMBE: Correct, 5 Chairperson. 6 CHAIRPERSON: It is - September. 7 MAJOR-GENERAL MPEMBE: Correct, 8 Chairperson. 9 MR GUMBI: Then can you go to page 35 of 10 that document. That sentence, I mean the third paragraph, 11 General, are you in possession of that paragraph? Can I 12 read it to you, General? 13 CHAIRPERSON: I think for the benefit of 14 those people who are sitting in the auditorium without the 15 document in front of them, and those who were watching on 16 television, if you just put that paragraph, it's not going 17 to make any sense. So perhaps I should put the three 18 paragraphs. Should I read them? "Major-General Mpembe 19 gave instructions to let the group proceed to koppie 1, but 20 the members of the police had to follow behind them and 21 prevent them from entering an informal settlement to the 22 left of their route to koppie 1 to prevent incidents of 23 looting and endangering innocent lives. On their way to 24 Koppie 1, some of the protesters changed direction towards 25 the informal settlement. Previous incidents indicated the</p>	<p style="text-align: right;">Page 12487</p> <p>1 Commission that Warrant Officer Kuhn who fired the shot, he 2 doesn't say it's General Mpembe who gave me the command. 3 MR GUMBI: But General, this is an SAPS 4 document. It was compiled after Potchefstroom meeting, 5 will you agree with me? It is dated 5 September 2012. 6 MAJOR-GENERAL MPEMBE: Chairperson, I 7 have already testified to that one. 8 CHAIRPERSON: It is an official report, 9 it may be, it may be just a draft of some kind, but what it 10 indicates is the compiler, Lieutenant-Colonel Visser, 11 sorry, Colonel, Colonel Visser appears to have accepted for 12 the purposes of his report, the statements made by the 13 persons to whom the witness referred, who alleged that he'd 14 given the command which he told us, he denied it at 15 Potchefstroom. But Colonel Visser accepted, at least 16 provisionally, the person incorporating this report. 17 MAJOR-GENERAL MPEMBE: Yes. 18 CHAIRPERSON: Obviously Colonel Visser 19 wasn't there, he didn't know what happened. So he had to 20 choose in compiling his report between what the Major- 21 General said on the one hand, and these other persons he's 22 referred to on the other. And he appears to have accepted 23 for whatever reason, and for whatever purpose, what they 24 said. Can one take it further than that? We don't even 25 know whether Lieutenant – sorry, I've done it again, one</p>

Page 12488

1 doesn't even know whether Colonel Visser accepted it, or
 2 simply recorded it as being what was said, but even if he
 3 did accept it, it doesn't matter, he's not the Commission,
 4 it's for us to decide which was correct. Maybe that the
 5 allegation is correct, it may not be. It's one of the
 6 matters we have to decide. But the fact that Colonel
 7 Visser put it in his report, it doesn't really add much to
 8 it, does it?
 9 MR GUMBI: Thanks very much, Chairperson.
 10 CHAIRPERSON: If you maybe ask another
 11 point, I suggest you do so at 01:30 after we've taken the
 12 lunch adjournment, unless you want to make a point now
 13 before we adjourn.
 14 [COMMISSION ADJOURNS COMMISSION RESUMES]
 15 [13:51] CHAIRPERSON: The Commission resumes.
 16 There were discussions that we had in chambers during the
 17 various matters, which delayed us, that's why we didn't
 18 come back at the time that I indicated and I apologise for
 19 that. You're still under oath, Major-General.
 20 WILLIAM MPEMBE: s.u.o.
 21 CHAIRPERSON: Mr Gumbi, do you have any
 22 more questions to ask the witness?
 23 MR GUMBI: Yes, Chairperson, on this
 24 topic. Chairperson, there are other few statements that I
 25 wanted to put to the General that are outstanding, and we

Page 12489

1 know the position of the General when he testified that he
 2 denied having issued any instruction.
 3 CHAIRPERSON: Mr Gumbi, we were given a
 4 number of statements.
 5 MR GUMBI: Yes.
 6 CHAIRPERSON: I just want to make sure
 7 that I've got them all. Let's mark them now.
 8 MR GUMBI: Yes, Chairperson.
 9 CHAIRPERSON: And if there are any points
 10 that are going to be raised by way of objection from the
 11 side of the SAPS, then we can deal with those as well
 12 before I mark them. Before we deal with the extra
 13 statements, we did deal earlier with exhibit HHH22, which
 14 is an SAPS15 document. It's marked on the police hard
 15 drive, for those who have the benefit of the police hard
 16 drive, 001020. Now when it was handed in there was a
 17 problem because the document, which is more accurately
 18 described as the rear side of the document, wasn't – or the
 19 reverse side, wasn't attached, and has that problem now
 20 been sorted out?
 21 MS PILLAY: Chair, we quickly established
 22 that the second page to that document is the rear side of
 23 what SAPS was referring to.
 24 MR GUMBI: Yes.
 25 CHAIRPERSON: It's always nice when

Page 12490

1 counsel describes documents elegantly. Now there are two
 2 more like that, which I don't think we marked. There's one
 3 more I've been handed which I don't think we've marked,
 4 which is from the Rustenburg POP. It's 001045. I have in
 5 my hand a copy of both the front side as well as the
 6 reverse side of this document. Do you persist in wanting
 7 to use that document?
 8 MR GUMBI: Not now, Chairperson, because
 9 what I wanted to do, I wanted to confirm with the SAPS
 10 those document, then I can make use of it.
 11 CHAIRPERSON: [Microphone off, inaudible]
 12 I have got three documents in my hand [inaudible] are both
 13 the statement of Constable Benjamin –
 14 MR MAHLANGU: Microphone.
 15 CHAIRPERSON: - and statement of
 16 [inaudible].
 17 MR MAHLANGU: Chair, not on record.
 18 CHAIRPERSON: Oh, yes, I'm not on record.
 19 I've got three statements in my hand that were given to me.
 20 MR GUMBI: Yes, Chair.
 21 CHAIRPERSON: I don't know whether – I'm
 22 sure there are other documents as well. One is a statement
 23 by Constable Benjamin.
 24 MR GUMBI: Yes, Chairperson.
 25 CHAIRPERSON: Another is a statement by

Page 12491

1 Constable, it looks like Mgyue –
 2 MR GUMBI: Mgyue, yes, Chairperson.
 3 CHAIRPERSON: It's M-G-U-Y-E. I'm not
 4 sure I'm pronouncing the name correctly.
 5 MR GUMBI: Yes, Chairperson.
 6 CHAIRPERSON: And the last is one by
 7 Constable, it looks like –
 8 MR GUMBI: Joseph Sexeweleya.
 9 CHAIRPERSON: Sexeweleya, thank you for
 10 now pronouncing it for me.
 11 MR GUMBI: Yes.
 12 CHAIRPERSON: Are those the three
 13 documents that you still want to refer to?
 14 MR GUMBI: Yes.
 15 CHAIRPERSON: Give me the order in which
 16 you want them and we'll mark them.
 17 MR GUMBI: Maybe if we can start with the
 18 statement of Constable Katlego Joseph Sexeweleya, we mark
 19 it –
 20 CHAIRPERSON: Right, we'll mark that one
 21 HHH29 and that's statement of Constable, how does he spell
 22 his name? His writing isn't too clear. It looks like S-E-
 23 X-E, is it? W-E-L-E-Y-A.
 24 MR GUMBI: L-E-Y-A, yes.
 25 CHAIRPERSON: Okay, that will be exhibit

Page 12492

1 HHH29. Then the next one?
 2 MR GUMBI: The next statement is that one
 3 of Constable Nkosana Shepeko Mguye.
 4 CHAIRPERSON: That is Mguye, Constable
 5 Mguye, is it?
 6 MR GUMBI: Yes.
 7 CHAIRPERSON: HHH30. Statement of
 8 Constable M-G-U-Y-E, and the next one HHH31, is –
 9 MR GUMBI: Statement of Constable Magume
 10 Benjamin.
 11 CHAIRPERSON: And that will be exhibit
 12 HHH31. They're all constables. Constable Benjamin.
 13 MR GUMBI: Yes.
 14 CHAIRPERSON: Alright, so we've got them
 15 in the order in which you –
 16 MR GUMBI: Yes, Chairperson –
 17 CHAIRPERSON: - wish to refer to them.
 18 MR GUMBI: We do have another one –
 19 CHAIRPERSON: Hang on a second. Hang on
 20 a second.
 21 MR GUMBI: Okay.
 22 CHAIRPERSON: Yes, the key passage in
 23 exhibit HHH29 appears to be at the foot page 1. Is that
 24 right? And the last line is missing on the photostat I've
 25 got.

Page 12493

1 MR GUMBI: Yes.
 2 CHAIRPERSON: I don't think anything
 3 turns on the missing line. Do we know what the missing
 4 line is?
 5 MR GUMBI: No, Chairperson.
 6 CHAIRPERSON: Alright, we then –
 7 MR GUMBI: The document was scanned, then
 8 I printed it from –
 9 CHAIRPERSON: And then in HHH30 it
 10 appears to be the top of page 2, the second to the fourth
 11 line, I think. Is that right?
 12 MR GUMBI: Yes.
 13 CHAIRPERSON: And HHH31 –
 14 MR GUMBI: Is on –
 15 CHAIRPERSON: - the key passage again
 16 appears to be –
 17 MR GUMBI: Second page.
 18 CHAIRPERSON: - well it's the last line
 19 on the first page.
 20 MR GUMBI: Yes.
 21 CHAIRPERSON: Followed by the first four
 22 lines on the second.
 23 MR GUMBI: Yes, Chairperson.
 24 CHAIRPERSON: Is that correct?
 25 MR GUMBI: Yes, Chairperson.

Page 12494

1 CHAIRPERSON: Are you going to put them
 2 as a whole to the witness or one by one?
 3 MR GUMBI: I'm going to read it one by
 4 one, then I will allow the witness to comment.
 5 CHAIRPERSON: Alright.
 6 CROSS-EXAMINATION BY MR GUMBI (CONTD.):
 7 Yes, let me start with the statement of, General, Constable
 8 Katlego Sexeweleya, that is HHH29. Are you in possession
 9 of that statement, General?
 10 MAJOR-GENERAL MPEMBE: Correct,
 11 Chairperson.
 12 MR GUMBI: Will you go at the bottom of
 13 that page? Can I read it for your benefit, General?
 14 MAJOR-GENERAL MPEMBE: Yes, Chairperson.
 15 CHAIRPERSON: I think the General could
 16 read it for himself but you could read it for the benefit
 17 of the people in the auditorium who don't have the document
 18 in front of them, and those who are watching on television.
 19 Can anyone help us with the last line on the foot of the
 20 first page?
 21 MR NGALWANA: That of course is a
 22 difficulty of presenting statements of people who are not
 23 here, Chair, because then the person who deposed to this
 24 statement would be able to say what's missing in that line.
 25 COMMISSIONER HEMRAJ: But is there not a

Page 12495

1 copy of this statement which shows what it contained in
 2 that last line?
 3 MR NGALWANA: It's an IPID statement,
 4 Chair, from what I understand, so it's not a question, it's
 5 not a statement that we took. So we received it like this.
 6 CHAIRPERSON: Yes, I see. We were given
 7 copies of the IPID statements, so do we know where the
 8 originals are?
 9 MR NGALWANA: We don't.
 10 CHAIRPERSON: Mr Gumbi, did you just get
 11 photocopies of IPID documents, or have you seen the
 12 original of the statement?
 13 MR GUMBI: No, I haven't seen the
 14 original. This document I retrieve it from the SAPS hard
 15 drive.
 16 CHAIRPERSON: Have you got the SAPS –
 17 MR GUMBI: - IPID hard drive.
 18 CHAIRPERSON: No, no, if it wasn't the
 19 SAPS – well, are the IPID statements on the SAPS hard
 20 drive, or is there –
 21 MR GUMBI: IPID –
 22 CHAIRPERSON: - a special IPID hard
 23 drive? Anyway, it doesn't matter.
 24 MR GUMBI: Yes.
 25 CHAIRPERSON: Anyway, this particular one

Page 12496

1 doesn't actually help us very much anyway, because the
 2 statement simply reads the, talks about how they were going
 3 off to the koppie, and then the instruction was given the
 4 disperse them with CS and with rubber bullets. CS was used
 5 and –

6 MR GUMBI: Yes.
 7 CHAIRPERSON: So it doesn't say who gave
 8 the instruction.
 9 MR GUMBI: Yes.
 10 CHAIRPERSON: So that's the first one.
 11 MR GUMBI: Yes.
 12 CHAIRPERSON: Then the second one is
 13 HHH30. That's Constable Mguye's statement.
 14 MR GUMBI: Yes, and it reads as follows,
 15 "While they were escorting instruction was given that they
 16 must disperse and disarm and one" –
 17 CHAIRPERSON: Sorry, they must be
 18 dispersed.
 19 MR GUMBI: Yes, "must be dispersed and
 20 disarmed, and one CS to be used. One CS was thrown to them
 21 and they started attacking the police." That is the
 22 statement of Constable Mguye. Then we have again another
 23 one of Constable Magume Benjamin, that is HHH31. If you
 24 can go at the bottom of that page, General, that is, should
 25 be paragraph 5, it reads as follows, "Then General Mpembe

Page 12497

1 gave order/instruction to escort them. As they were
 2 walking same police official went back to the cars. I was
 3 walking close to the General," and then the next page, "and
 4 he gave instruction to disarm the mineworkers who were on
 5 strike. He (General) instructed to use one CS and two
 6 rubber per person who was walking on the field or open
 7 space. Then one member fired a CS. It landed inside the
 8 group. Then they run towards the police official. Two of
 9 the participants came straight to me with pangas on their
 10 hands." If I may wrap up that point again, Chairperson,
 11 can I refer the Commission to another exhibit that was
 12 presented during the cross-examination by Mr Madlanga?
 13 MR NGALWANA: Well, before my learned
 14 friend goes there, HHH31, Chair, seems incomplete. So
 15 perhaps our learned friend can tell us what's contained in
 16 the other paragraph that may be there.
 17 MR GUMBI: Yes, we noted that,
 18 Chairperson, even when you go to the IPID file you don't
 19 find any page except these two pages as presented before
 20 this Commission.
 21 CHAIRPERSON: You want to refer to
 22 another document now?
 23 MR GUMBI: Yes, Chairperson, it's the –
 24 CHAIRPERSON: You can't do any better
 25 than the documents you've got from IPID, and the statement

Page 12498

1 ends, dealing with something else, namely the people going
 2 off to the shacks and it would appear that the – the
 3 grammar is not very good, but it appears that the deponent
 4 then withdrew to check those who'd been hacked.
 5 MR GUMBI: Yes.
 6 CHAIRPERSON: Anyway, you put the
 7 passage. You now want to put something else. Shouldn't
 8 you give the witness a chance now to deal with the passage
 9 that you've put? Otherwise things will get a bit out of
 10 hand.
 11 MR GUMBI: Yes, Chairperson. There's
 12 another one that is outstanding, if I can just sum up this
 13 point –
 14 CHAIRPERSON: Yes, I'm sorry, Mr Gumbi,
 15 there's something I should have put to you before you carry
 16 on to the point you're making, and that's in the
 17 penultimate paragraph of exhibit HHH31 the following
 18 appears, "When I was close to General Mpembe he screamed
 19 that we must shoot at the mineworkers who were chopping the
 20 police with pangas. That's when I shot two rubber rounds
 21 and they took the," it's looks like - is it rifle? - "from
 22 the police who was chopped and run away." So this is
 23 obviously while the attack is going on. Suggestion is that
 24 the General then gave an order that the miners who were
 25 hacking at a policeman with a panga, that they should be

Page 12499

1 shot and he then, the witness, the deponent then did shoot
 2 rubber rounds, two I think he said, and the person who was
 3 being attacked then had his rifle taken away and they then
 4 ran away. Now that of course is something that happened
 5 after the attack had started, but it does involve the
 6 witness. So perhaps – anyway, perhaps it would be helpful
 7 to get the witness's comment on the three statements you
 8 put to him –
 9 MR GUMBI: Yes.
 10 CHAIRPERSON: - before you move on to the
 11 next one.
 12 MR GUMBI: Thanks very much, Chairperson.
 13 Yes, can you comment, General? What is your comment?
 14 MAJOR-GENERAL MPEMBE: Chairperson, I
 15 will comment on, from each statement that was presented.
 16 The one of Joseph Sexeweleya, I don't know whether the
 17 member says that the instruction comes to me.
 18 CHAIRPERSON: Of course they don't. I
 19 mean what they, the ones who just say there was an
 20 instruction don't say who gave the instruction and you
 21 remember Kuhn himself says he got an instruction, but then
 22 he doesn't know who gave the instruction. He doesn't
 23 suggest it was you. So there are two questions; the one is
 24 whether instruction was given. I understood your evidence
 25 to be you never heard the instruction given. You didn't

Page 12500

1 give one and you never heard one being given, but
 2 presumably if someone did it without a radio right down the
 3 other end of the line near Kuhn, you wouldn't have
 4 necessarily heard it. Is that right?
 5 MAJOR-GENERAL MPEMBE: If it was given
 6 not on the radio, yes.
 7 CHAIRPERSON: Yes, you wouldn't
 8 necessarily have heard it, but of course one of the
 9 witnesses says, one of the deponents says you gave the
 10 instruction. Now you've already denied that.
 11 MAJOR-GENERAL MPEMBE: Yes, Chairperson,
 12 I'm also coming to that one because according to him –
 13 sorry, Chairperson, it disappeared here from the papers.
 14 He says I gave an instruction of, to use one CS, one rubber
 15 bullet per person.
 16 CHAIRPERSON: No, one CS and two rubbers
 17 per person.
 18 MAJOR-GENERAL MPEMBE: Yes, and it's very
 19 strange to me that how, what type of instruction I gave,
 20 but I respect the hearing of the member, but I did not give
 21 such an instruction to use –
 22 CHAIRPERSON: What's even funnier,
 23 actually, is that then only one person responded to this
 24 alleged instruction and fired one CS, but nobody else fired
 25 a CS. So if that instruction had in fact been given as

Page 12501

1 alleged, I would have expected a number of other members
 2 also to have fired off one CS and two rubbers, but which
 3 didn't happen, which makes me wonder whether there was an
 4 instruction at all. But that's something we don't have to
 5 debate with you. You just say you never heard the
 6 instruction, you didn't give it. That's your case, is it?
 7 MAJOR-GENERAL MPEMBE: Correct,
 8 Chairperson. Chairperson, I need to add, I did give
 9 evidence, I'm on record to say when the protesters attacked
 10 the police, the police did retreat and when they retreated
 11 I did scream to say we have move forward but I never said
 12 shoot or what.
 13 [14:10] CHAIRPERSON: So you also deny then the
 14 statement in the penultimate paragraph of exhibit HHH31
 15 that you screamed that they must shoot at the mineworkers
 16 because who were chopping the police with pangas, you deny
 17 that?
 18 MAJOR-GENERAL MPEMBE: I only say I
 19 screamed for them not to retreat but not to shoot because I
 20 didn't say to shoot.
 21 CHAIRPERSON: Do I assume that all the
 22 members there had teargas canisters in their possession?
 23 MAJOR-GENERAL MPEMBE: Correct,
 24 Chairperson. Members of POP.
 25 CHAIRPERSON: Yes, all the POP people.

Page 12502

1 MAJOR-GENERAL MPEMBE: Yes, POP people
 2 did have that.
 3 MR NGALWANA: Chair, the current of this
 4 cross-examination is rather confusing. Is my learned
 5 friend referring to HHH30, the first paragraph on page 2 to
 6 suggest that it is the General who gave the order or is he
 7 simply making a point that an order was given?
 8 CHAIRPERSON: We don't normally allow one
 9 counsel to ask questions of counsel who are busy cross-
 10 examining but I hope the fact that I'm allowing it this
 11 time isn't going to be quoted as a precedent in a couple of
 12 minutes. But it is a sensible question to be fair which
 13 was asked by Mr Ngalwana but I should have asked it before
 14 he did. But what is your answer to his query? What
 15 exactly are you putting? The first two statements that
 16 we're now dealing with, HHH29 and 30 simply say an
 17 instruction was given. The witness has already said he
 18 didn't hear an instruction and he didn't give one but if it
 19 was not given over the radio, if it was given by someone -
 20 he wouldn't have heard it. But the question that you're
 21 being asked is what exactly are you putting to the witness,
 22 was there an instruction are you saying, or are you asking
 23 pertinently whether he gave the instruction referred to by
 24 these two witnesses who made these two statements?
 25 MR GUMBI: I'm asking the witness,

Page 12503

1 Chairperson, whether he gave instruction in the light of
 2 all these statements.
 3 CHAIRPERSON: I think we got his answer.
 4 He persists in his denial.
 5 MR GUMBI: Yes, Chairperson.
 6 MAJOR-GENERAL MPEMBE: Chairperson, I
 7 need this to be on record. All the witnesses that were put
 8 to me as my colleagues, police officers by Advocate Gumbi
 9 since this morning, with respect, none of them indicated
 10 the briefing that I gave to show the tolerance, the degree
 11 of tolerance that they should have exhibited to the
 12 protesters. I did use a case to show how we could make a
 13 degree of tolerance but none of them did not say it. Some
 14 of them they say it in their statements but in their pocket
 15 books and those that I know I briefed them they did not
 16 indicate it in their diaries. Thanks, Chairperson.
 17 MR GUMBI: Can I refer you again,
 18 General, now I think the last statement, the statement that
 19 was taken by Captain Tupe and it's dated the 12th of
 20 December 2012. It was entered as an exhibit during the
 21 cross-examination by Justice Madlanga.
 22 CHAIRPERSON: He was not yet then.
 23 MR GUMBI: Yes he was not yet - yes it
 24 was exhibit HHH15.1 and that statement is dated 12 December
 25 2012, it was taken long time ago, after the Potchefstroom

Page 12504

1 meeting. And then when we check that statement, paragraph
 2 3 of that statement also again it deals with the issue of
 3 instruction for firing of teargas and redirecting the
 4 protesters. Though in that statement it did not mention
 5 you by name.
 6 CHAIRPERSON: I haven't got my copy with
 7 me here. Would you be kind enough to read the paragraph
 8 for me so I can follow the point you're making?
 9 MR GUMBI: Yes, Chairperson. I do
 10 apologise, it was on the list of - I included it on the
 11 list of the document I was going to refer to but I'll read
 12 it on record, Chairperson. Can I read the whole content of
 13 paragraph 3, General? "The participants refused to
 14 surrender their weapons and while General Mpeembe was still
 15 negotiating with them they stood up and started to move
 16 towards the koppie and General Mpeembe instructed us to
 17 follow and monitor them. While following and monitoring
 18 them the protesters changed their direction and went
 19 straight towards the informal settlement. Then instruction
 20 was given for firing of teargas to redirect them, not to
 21 pass through the informal settlement and they went through
 22 the tear smoke. Then stun grenades was used in order to
 23 disperse and disarm the participants. Immediately after
 24 the launching of stun grenades the participants started
 25 running towards the police and attacked them. Rubber shots

Page 12505

1 were fired but with no effect. The participants attacked
 2 the police and I saw four of them hack the police member
 3 with pangas and stab him, an arrow. I approached the
 4 participant and one of them grabbed the R5 rifle of the
 5 police officer and they ran away with it." What is your
 6 answer?
 7 MAJOR-GENERAL MPEMBE: Chairperson,
 8 Captain Tupe in his statement I don't see whether he says
 9 it's me who gave instructions to shoot the teargas.
 10 CHAIRPERSON: Captain Tupe is the one who
 11 accused you at Rustenburg of having issued the order.
 12 MAJOR-GENERAL MPEMBE: At Potchefstroom I
 13 did testify.
 14 CHAIRPERSON: I always say Rustenburg -
 15 MAJOR-GENERAL MPEMBE: At Potchefstroom,
 16 yes.
 17 CHAIRPERSON: What exactly did he say at
 18 Potchefstroom?
 19 MAJOR-GENERAL MPEMBE: At Potchefstroom
 20 he said and that's why the record was made by Colonel
 21 Visser that he heard me giving that order.
 22 CHAIRPERSON: Did he say he heard you
 23 giving that order?
 24 MAJOR-GENERAL MPEMBE: Yes.
 25 CHAIRPERSON: So when he comes and makes

Page 12506

1 a statement later on he doesn't say that?
 2 MAJOR-GENERAL MPEMBE: Yes.
 3 CHAIRPERSON: So we'll deal with him when
 4 - Advocate Hemraj says to me that I may have it wrong.
 5 That Tupe may have said at Potchefstroom that he heard, not
 6 you giving instruction, but he heard that it was said that
 7 you gave the instruction. If that's the case then of
 8 course what he states in his statement is perfectly
 9 consistent that he was repeating hearsay. But you were
 10 present at Potchefstroom, what did he say, as far as you
 11 can remember?
 12 MAJOR-GENERAL MPEMBE: Chairperson, I
 13 remember him saying that I did give an instruction.
 14 CHAIRPERSON: But you see the difference
 15 - the point being put to you is did he say that heard you
 16 giving the instruction or did he say that he heard someone
 17 else allege that you had given the instruction? Do you
 18 understand the difference?
 19 MAJOR-GENERAL MPEMBE: Chairperson, I
 20 just want to check what I said but I remember the issue of
 21 me giving an instruction came from Captain Tupe.
 22 CHAIRPERSON: Yes, yes I understand that
 23 but what I'm interested to know is did he repeat it as what
 24 we lawyers call hearsay? In other words he heard someone
 25 else allege, or did he say, based on his own observations

Page 12507

1 that he heard you give the instruction? Maybe we'll have
 2 to look at the record on that but as far as you can
 3 remember now, sitting here now what can you remember did
 4 the Captain say at Potchefstroom on this day?
 5 MAJOR-GENERAL MPEMBE: Chairperson,
 6 according to my observation and how I understand him is
 7 that I gave an instruction but I wanted to check when I
 8 testified because it was still in my mind basically when I
 9 -
 10 MR GUMBI: Thanks, Chairperson. I have
 11 another statement, General, I wanted you to refer to, the
 12 statement of Colonel Samuel Dioli.
 13 CHAIRPERSON: Sorry. Is this an exhibit
 14 or -
 15 MR GUMBI: It's not yet entered as an
 16 exhibit, Chairperson.
 17 CHAIRPERSON: Oh is this Dioli's -
 18 MR GUMBI: Statement.
 19 CHAIRPERSON: Colonel Dioli.
 20 MR GUMBI: Yes.
 21 CHAIRPERSON: Do you want that to be
 22 HHH32?
 23 MR GUMBI: Yes, Chairperson. Do you know
 24 Colonel Dioli, General?
 25 MAJOR-GENERAL MPEMBE: Correct,

<p style="text-align: right;">Page 12508</p> <p>1 Chairperson, I know General Dioli.</p> <p>2 MR GUMBI: My instruction is that Colonel</p> <p>3 Dioli he was one of the senior police officers who was</p> <p>4 there, he was a senior police officer who was there then</p> <p>5 Colonel was the second one.</p> <p>6 MAJOR-GENERAL MPEMBE: Correct,</p> <p>7 Chairperson.</p> <p>8 MR GUMBI: When you go to paragraph - to</p> <p>9 page 6 of his statement, paragraph 22. Are you on page 6,</p> <p>10 General?</p> <p>11 MAJOR-GENERAL MPEMBE: Correct,</p> <p>12 Chairperson, I can see paragraph 22.</p> <p>13 MR GUMBI: Colonel Dioli say in that</p> <p>14 paragraph 22, "I did not hear Major-General Mpeembe say that</p> <p>15 we must follow the protesters to the koppie." What is your</p> <p>16 comment, General, on this allegation by Colonel Dioli?</p> <p>17 CHAIRPERSON: Really how is this going to</p> <p>18 help us? Everybody else, well not everybody else but a lot</p> <p>19 of other people say that he did say that, that's what led</p> <p>20 to the trouble. That's why people disagreed with him and</p> <p>21 remonstrated with him and he persisted in what he'd said.</p> <p>22 Now all that Colonel Dioli says is he didn't hear it. He</p> <p>23 doesn't say it wasn't said but everybody else appears, well</p> <p>24 most of the other statements we've got, seem to say it was</p> <p>25 said. He did say follow them to the koppie. Is it an</p>	<p style="text-align: right;">Page 12510</p> <p>1 started moving forward towards the police and we allowed</p> <p>2 them to proceed he says, he goes on to say this, "When they</p> <p>3 were about 300 metres away from us the General told us to</p> <p>4 let them go and we would disarm them at the mountain. One</p> <p>5 senior Colonel," that's Merafe I think, "advised the</p> <p>6 General that we intended to disarm them because it was</p> <p>7 better to disarm them there because at the mountain they</p> <p>8 would outnumber us. The General told us to follow them. I</p> <p>9 advised the General that stun grenades should be used to</p> <p>10 disperse them." And then he goes on how he got to the</p> <p>11 Nyalas. So what he says is "The General told us to let</p> <p>12 them go and we would disarm them at the mountain" which</p> <p>13 obviously involves by necessary inference that they were to</p> <p>14 follow them to the mountain because that's where they were</p> <p>15 going to disarm them. But in the meanwhile they were to</p> <p>16 let them go. Now what exactly does your - does he still</p> <p>17 say that or does he say something else? I don't understand</p> <p>18 your question.</p> <p>19 MR GUMBI: Chairperson, I think on that</p> <p>20 particular aspect, I do have my client's version on that</p> <p>21 one but I think for sake of progress let me rather park</p> <p>22 this point. I will re-visit it then I can continue with</p> <p>23 the other aspect of cross-examination.</p> <p>24 CHAIRPERSON: Before you answer the point</p> <p>25 you want to take instruction?</p>
<p style="text-align: right;">Page 12509</p> <p>1 issue that he gave that instruction they must follow them</p> <p>2 to the koppie and if so what do you say about all the</p> <p>3 others who say he gave that instruction? That led to the</p> <p>4 dissatisfaction. Unless your instructions are that you're</p> <p>5 going to put to the General that he did not tell the</p> <p>6 members that they must escort the miners, strikers to the</p> <p>7 koppie.</p> <p>8 MR GUMBI: That's where I was heading,</p> <p>9 Chairperson. My client's version, that is Lieutenant</p> <p>10 Baloyi, General, is that indeed on that day you did not</p> <p>11 issue instruction that the police officers must escort the</p> <p>12 miners on their way on the koppie, you did not give a</p> <p>13 verbal instruction to that -</p> <p>14 MAJOR-GENERAL MPEMBE: Chairperson, I</p> <p>15 respect the views of Lieutenant Baloyi. HH3 is very clear</p> <p>16 in terms of why there was a disagreement between myself and</p> <p>17 Colonel Merafe, Lieutenant-Colonel Merafe and the majority</p> <p>18 of the members they were saying also we were escorting them</p> <p>19 to the mountain.</p> <p>20 CHAIRPERSON: I don't want to make your</p> <p>21 task more difficult than it is but I have difficulty in</p> <p>22 understanding what exactly you're putting to the witness.</p> <p>23 In the light of paragraph 7 of your client's statement,</p> <p>24 which is exhibit GGG16. Perhaps I should read it. Having</p> <p>25 said in paragraph 6 how the strikers started singing and</p>	<p style="text-align: right;">Page 12511</p> <p>1 MR GUMBI: Yes.</p> <p>2 CHAIRPERSON: That's fair enough. All</p> <p>3 right so you're going to move onto another point in the</p> <p>4 meanwhile.</p> <p>5 MR GUMBI: Yes, Chairperson.</p> <p>6 CHAIRPERSON: That's fine.</p> <p>7 [14:30] MR GUMBI: General, can I refer you to</p> <p>8 exhibit QQ13. Are you in possession of exhibit QQ13,</p> <p>9 General?</p> <p>10 MS PILLAY: Chair, I think Mr - there is</p> <p>11 no QQ13.</p> <p>12 MR GUMBI: The transcript of the 13th -</p> <p>13 MAJOR-GENERAL MPEMBE: I don't see it</p> <p>14 also.</p> <p>15 MS PILLAY: It's QQ3 probably.</p> <p>16 MR GUMBI: QQ3, I do apologise.</p> <p>17 MS PILLAY: Sorry, QQ2.</p> <p>18 MR GUMBI: It should be QQ2. I do</p> <p>19 apologise, Chairperson. Mine is written QQ13. I don't</p> <p>20 know how. Are you in possession of it, General?</p> <p>21 MAJOR-GENERAL MPEMBE: Chairperson, mine</p> <p>22 here which I've been given is written QQ3. I don't know</p> <p>23 whether it's the same. Maybe if the paragraph is written</p> <p>24 then we might -</p> <p>25 MR GUMBI: I don't know, maybe the SAPS</p>

Page 12512

1 assist. It's the transcript of the 13th, along the railway
2 line. Do you have it, General?

3 MAJOR-GENERAL MPEMBE: It has been given
4 to me just now, Chairperson.

5 MR GUMBI: Can you go to page 6 of that
6 document, line number 20.

7 MAJOR-GENERAL MPEMBE: Chairperson, I'm
8 just requesting the page number.

9 MR GUMBI: Mine is written page 6 at the
10 top. Page 6.

11 MAJOR-GENERAL MPEMBE: I am on page 6,
12 Chairperson.

13 MR GUMBI: Go to line 20; do you see the
14 written line 20?

15 MAJOR-GENERAL MPEMBE: I can see line 20,
16 Chairperson.

17 MR GUMBI: Can I read on record what is
18 reflected on those sentences. Line 20, one of the
19 policemen said, "Our member are going to die just for
20 shit." That's a policeman. I do apologise, Chairperson,
21 for using the word "shit." It's written here. It's not my
22 intention.

23 CHAIRPERSON: [Microphone off, inaudible]
24 your machine. Do you want to –

25 MR NGALWANA: Yes, thank you, Chair.

Page 12513

1 CHAIRPERSON: Do you want to give us a
2 more elegant rendering of that?

3 MR NGALWANA: No, Chair, perhaps our
4 learned friend is reading from a different document because
5 the page 6 that we have on page 20, on line 20, doesn't say
6 what he's reading.

7 MR GUMBI: Maybe, Chairperson, if you can
8 compare, because the one I'm having is written like that.
9 My instructing attorney is showing the General.

10 CHAIRPERSON: Mr Ngalwana is not
11 suggesting that you are not reading from a document that is
12 written like that, as you put it. He's suggesting you're
13 reading from the wrong document. That's his point. He
14 says that there's another document he's got, which is the
15 right one, which says something different. I think that's
16 the point.

17 MR NGALWANA: Chair, let me make it
18 clear. Thank you, Chair. Our learned friend has referred
19 us to QQ2. We've gone to QQ2.

20 CHAIRPERSON: I thought you said –

21 MR GUMBI: QQ2.

22 MS PILLAY: Chair, the exhibit is exhibit
23 RR2.

24 CHAIRPERSON: [Microphone off, inaudible]
25 I suggest we take the tea adjournment now, sort it out and

Page 12514

1 come back and we will save quite a lot of money. So we'll
2 take the tea adjournment now.

3 [COMMISSION ADJOURNS COMMISSION RESUMES]
4 [14:51] CHAIRPERSON: I didn't realise that the
5 General wasn't back with us. To be fair, the General may
6 have been called away or something. There may have been a
7 reason why he's not here. I should have checked that he
8 was back in the chamber before I returned. But here he
9 comes.

10 COMMISSIONER HEMRAJ: Mr Gumbi, can I
11 just ask you something? Yesterday before we adjourned you
12 introduced exhibit HHH23, but you haven't referred to it.
13 I'm just pointing that out to you.

14 MR GUMBI: Yes, I've noted that,
15 Commissioner. I'll revisit those documents I've
16 introduced.

17 CHAIRPERSON: Are you going to deal with
18 it? Are you going to revisit it?

19 MR GUMBI: I will revisit it.

20 CHAIRPERSON: Major-General, I'm sorry, I
21 came back from the chamber before being told that you were
22 here, so it's my fault. So don't apologise; I apologise to
23 you. You're still under oath. Let's carry on.

24 WILLIAM MPEMBE: s.u.o.
25 MR GUMBI: Yes, Chairperson, we did

Page 12515

1 manage to sort out the exhibit number of this document. It
2 is RR2, the correct one, and I hope my learned colleague –

3 CHAIRPERSON: That's the document with
4 the rather strong statement of reluctance to be killed, by
5 one of the policemen on the video.

6 MR GUMBI: Yes, Chairperson.

7 CHAIRPERSON: Now what's the point you're
8 making of it?

9 CROSS-EXAMINATION BY MR GUMBI (CONTD.):
10 Ja, I wanted to wrap up on this one before I could move to
11 my next topic, this topic. Yes, go to page 6, General.
12 I'm going to read what other police officers said on that
13 day. I see the General wanted to say something.

14 MAJOR-GENERAL MPEMBE: I don't have – I
15 still have those two, but I don't see RR here.

16 CHAIRPERSON: RR2 is what you –

17 MAJOR-GENERAL MPEMBE: RR2.

18 CHAIRPERSON: Well, if you haven't got
19 it, just listen quietly while it's read. It's on the
20 screen.

21 MR GUMBI: Yes.

22 MR NGALWANA: Chair, we object to the
23 introduction of this – well, not introduction, but
24 reference to this document for the purposes for which our
25 learned friend seems to want to refer to it. This document

Page 12516

1 was introduced, or was allowed, in fact initially Mr Mpofu
 2 wanted to use it in cross-examining the National
 3 Commissioner. There was an objection and Mr Mpofu withdrew
 4 it. Then Mr Ntsebeza wanted to cross-examine Mr Mathunjwa
 5 purely on the basis of what the song means, and that was
 6 the only basis on which this was allowed. There is no
 7 agreement about whether the content of what is said, the
 8 speeches that are made, are true reflection of what was
 9 said there.

10 MS PILLAY: Chair, just to correct one
 11 point; I think that it was initially introduced by Mr
 12 Ntsebeza during the cross-examination of Mr Mathunjwa, but
 13 it wasn't admitted for a limited purpose, and the document
 14 has been referred to since then.

15 CHAIRPERSON: Yes, is your complaint – I
 16 mean is this a document or a video?

17 MR NGALWANA: It was a video, Chair,
 18 which is now transcribed –

19 CHAIRPERSON: It's a transcript of a
 20 video, yes. Now is your complaint that what was said is
 21 not correctly translated? I mean the video is before us.
 22 It's not suggest it's hearsay in the sense that what was
 23 said is being tendered to prove the truth of what was said.
 24 What, as I understand it, is being tendered is to simply
 25 illustrate that that is what was said. Now do you complain

Page 12517

1 about the translation, or what's your objection?

2 MR NGALWANA: Well, we're complaining
 3 about the accuracy of what is purported to have been said
 4 there. In any event, we couldn't even hear –

5 CHAIRPERSON: No, no, no, I'm sorry. I'm
 6 sorry, you're not answering my question. This is a
 7 policeman apparently giving an explanation of what he
 8 thinks the members are going to die for. Now it's being
 9 tendered to prove that that's what they were going to die
 10 for. Am I correct, Mr Gumbi? You're just putting it in to
 11 show that that's what was said. I don't know where this
 12 point is going to take you. Perhaps you can take us into
 13 your confidence about that in a moment, but the first point
 14 is you want to establish that that is what was said, not to
 15 prove that what was said was true. Is that correct? Is
 16 that right?

17 MR GUMBI: That's correct, Chairperson,
 18 yes.

19 CHAIRPERSON: Now therefore you –

20 MR NGALWANA: Now we dispute that that
 21 was what was said, Chair. That's the simple point.

22 CHAIRPERSON: But didn't we hear it on
 23 the video?

24 MR NGALWANA: No, no-one can hear it.
 25 The National Commissioner –

Page 12518

1 CHAIRPERSON: Oh, the whole question is
 2 whether it was correctly transcribed. Alright, okay. We
 3 haven't seen the video. Now Mr Gumbi –

4 MR NGALWANA: We've seen the video. We
 5 can't hear it.

6 CHAIRPERSON: Absent the video having
 7 been heard by us personally, or agreement as to the
 8 accuracy of the transcription, then isn't Mr Ngalwana
 9 right? You know, you've already, as you've put it, parked
 10 one point to deal with later. Maybe this one must go to
 11 the same car park and you move on to the next one, and you
 12 could bring it back later if you can show by reference to
 13 the video that it indeed is what was said, and that the
 14 translation thereof is correct. That's something maybe you
 15 can sort out with your learned friend after we've
 16 adjourned, but let's not waste time with it at the moment.

17 MR GUMBI: Yes, Chairperson.

18 CHAIRPERSON: Get on to the next point
 19 and you can – I gather you're not going to finish by the
 20 end of today.

21 MR GUMBI: Yes, Chairperson.

22 CHAIRPERSON: So maybe you can greet us
 23 on the morrow with this point, duly sorted.

24 MR GUMBI: Yes, I can proceed to another
 25 point, then I can park again this one, then I will sort out

Page 12519

1 with my learned colleagues. General, it was your testimony
 2 before this Commission that later on after that incident
 3 you had a briefing with the National Commissioner.

4 MAJOR-GENERAL MPEMBE: Not immediately
 5 after, but at about 16, 18:00.

6 MR GUMBI: Yes, I agree with you. Then
 7 you made a statement about what happened on the 13th of
 8 August 2012, a handwritten one.

9 MAJOR-GENERAL MPEMBE: Chairperson, I did
 10 the statement, but not to the National Commissioner, but to
 11 Brigadier Van Zyl.

12 MR GUMBI: Can I refer to your statement
 13 that was entered here as an exhibit HHH13. That's a
 14 handwritten one that you signed on the 13th of August around
 15 6 o'clock.

16 MAJOR-GENERAL MPEMBE: I have it,
 17 Chairperson.

18 MR GUMBI: When you check paragraph 3
 19 until to, from paragraph – if I may say paragraph 4, not
 20 paragraph 3, will I be correct that in your statement
 21 nothing is indicated that members on that day fired teargas
 22 or used force without your instruction? Do you agree with
 23 me?

24 MAJOR-GENERAL MPEMBE: Chairperson, may I
 25 get the question clear?

<p style="text-align: right;">Page 12520</p> <p>1 MR GUMBI: From paragraph 3, from 2 paragraph 4 – or from any paragraph of your statement, can 3 you quote a sentence which says that members on the 13th of 4 August 2012 fired teargas, stun grenade, without your 5 instruction, or used force without your instruction? 6 MAJOR-GENERAL MPEMBE: Chairperson, in 7 paragraph 4 it states that the teargas was used, but I've 8 been consistent to say that I did not give the instruction. 9 It's true that the statement, in my statement I didn't say 10 that members did use a teargas without my instruction. 11 MR GUMBI: Will I be correct, General, 12 that this incident was still fresh in your memory? Why you 13 did not point out that members on the 13th of August 2012 14 fired or discharged their ammunition without your 15 instruction as an operational commander? 16 MAJOR-GENERAL MPEMBE: Chairperson, I did 17 testify when I was asked by the then Adv Madlanga, that the 18 purpose of this statement, it was for the case. It was not 19 for me to explain all, any other matters according to 20 Brigadier Van Zyl. 21 MR GUMBI: When you briefed the National 22 Commissioner - before we can go to the issue of briefing 23 the National Commissioner, you and me – if may I rephrase 24 it, Chairperson. Will you agree with me, General, that the 25 firing of teargas, stun grenade without your instruction as</p>	<p style="text-align: right;">Page 12522</p> <p>1 didn't issue instruction, teargas, stun grenade were fired. 2 As a result of that there was a conflict between the police 3 and the protesters. These are common causes. As a result 4 of that, two police officers were killed and one was 5 injured. Those are the facts before this Commission, 6 unless my learned colleague – 7 CHAIRPERSON: What is your question? 8 What's your question? 9 MR GUMBI: I was putting a – 10 CHAIRPERSON: What's your question? 11 MR GUMBI: I was putting a proposition to 12 say two police officers – I was putting a proposition to a 13 witness, Chairperson, that police officers on that day, 14 they fired stun grenade or teargas without General's 15 instruction, and he denied that. Then my proposition was, 16 as a result of that there was a conflict between the police 17 and the marchers and two police officers were killed and 18 one was injured. It's there. That's the proposition I was 19 putting – 20 CHAIRPERSON: You know counsel don't just 21 put propositions to witnesses; they ask them questions. 22 Now what exactly is the question you put? 23 MR GUMBI: Yes, if – 24 CHAIRPERSON: I was re-reading his 25 evidence yesterday and there's a passage long ago when I</p>
<p style="text-align: right;">Page 12521</p> <p>1 an operational commander, is contrary to Standing Order 2 262, read together with other police documents dealing with 3 crowd management of the SAPS? 4 MAJOR-GENERAL MPEMBE: Chairperson, 5 Standing Order 262, paragraph 11(5), it was deliberated 6 much more and I also did indicate that in big operations 7 section commanders, and it was made clear by the honourable 8 Chairperson to say that according to the Standing Order it 9 should be given by the command, and I did agree. 10 MR GUMBI: And in our case it's 11 criminally worse because as a result of that there was a 12 conflict between the police and the protesters, and 13 Warrant-Officer Lepaaku, Warrant-Officer Monene, and 14 Lieutenant Baloyi, the two were killed and Lieutenant 15 Baloyi survived that killing; he was injured. Would you 16 agree with me? 17 MR NGALWANA: Chair, this is an unfair 18 question to the witness. Firstly, my learned friend cannot 19 draw a link between the lack of instruction being given and 20 the death of people. That's the first thing. The second 21 thing is what he's asking the witness to say is something 22 about which this Commission is here to determine. It's a 23 totally unacceptable question, Chair, with respect. 24 MR GUMBI: Chairperson, it's common cause 25 that on that day, as the General is contending that he</p>	<p style="text-align: right;">Page 12523</p> <p>1 used the expression "vonk," the spark that caused the 2 trouble was the teargas and the stun grenade, and he agreed 3 with that, but that's not relevant on question of 4 culpability and so on, but what is the question you're 5 putting to him? I mean – 6 MR GUMBI: That was – 7 CHAIRPERSON: What's the answer you want 8 from him? 9 MR GUMBI: Yes, that's a proposition; I 10 was going to ask my question again. 11 CHAIRPERSON: Well, ask your question. 12 MR GUMBI: Yes, let me do that, 13 Chairperson. When you briefed the National Commissioner, 14 General, did you inform the National Commissioner that on 15 that day you as the operational commander, members under 16 your command fired teargas, stun grenade, without your 17 instruction? Did you inform the National Commissioner? 18 MAJOR-GENERAL MPEMBE: Chairperson, what 19 I informed the National Commissioner is that the teargas 20 was used by Warrant-Officer Kuhn, who said that he heard an 21 instruction, and I did indicate that he does not know which 22 instruction, who gave the instruction, but I did not give 23 him the instruction. 24 MR GUMBI: But the National Commissioner 25 testified before this Commission; she did not testify to</p>

Page 12524

1 that effect that you informed her that –

2 CHAIRPERSON: Was she asked anything

3 about it? Did she deal with the topic of the details of

4 the instruction, or information she received from the

5 witness?

6 MR GUMBI: Yes, Chairperson, she didn't

7 go to that extent –

8 CHAIRPERSON: Well, how can you then put

9 the point you're putting to the witness? I mean if she'd

10 been asked the question and given an answer which conflicts

11 with what he now says, that's something you can put, but

12 the point wasn't raised with her at all. A lot of other

13 points were raised with her, which she had some difficulty

14 in dealing with because then she didn't, she wasn't there

15 at the time, but she wasn't asked that question, which is

16 something she could have been asked because it dealt with

17 something that was said to her, or allegedly said to her,

18 when she came to Marikana. Now absent evidence of that

19 kind from her, or any questions in that regard addressed to

20 her, how can you put the point you've now put to the

21 witness? That's certainly not correct.

22 MR GUMBI: Fair enough, Chairperson. I'm

23 happy to move to another point again. General Mbombo, did

24 you inform her about this?

25 MAJOR-GENERAL MPEMBE: Chairperson, I

Page 12525

1 testified that I phoned General Mbombo while I was still on

2 the scene and she was on her way to Potch and she came

3 back, and I did inform her exactly as I've said now.

4 MR GUMBI: And then General Annandale who

5 testified before this Commission again, he testified that

6 you relayed to him about what happened on the 13th of August

7 2012. Did you inform him about this, that the police fired

8 teargas, stun grenade, without an instruction?

9 MAJOR-GENERAL MPEMBE: I informed him the

10 same as I informed the National Commissioner, Chairperson.

11 MR GUMBI: You further testified here,

12 General, that you had a debriefing that afternoon on the

13 13th of August 2012.

14 [15:10] MAJOR-GENERAL MPEMBE: Chairperson, I'm

15 requesting that may I be referred to the script where I

16 said we had, because I know how –

17 CHAIRPERSON: Wait, wait, wait, before

18 you carry on with that, there's something I want to raise

19 with Mr Gumbi. You remember when Adv Jele was cross-

20 examining, there was a bit of a confusion because the word

21 "debriefing" is ambiguous. It can either relate to a

22 debriefing in the sense of getting the person's story of

23 what happened, which is a factual debriefing, and the other

24 debriefing is a sort of therapeutic debriefing where a

25 psychologists or a councillor or someone of that kind –

Page 12526

1 MR GUMBI: Yes.

2 CHAIRPERSON: - talks to a person who's

3 had a traumatic experience and tries to help them through

4 it. Now those documents that were put before us indicated

5 the people had had a debriefing and it turned out, the

6 point that was trying to be made was it was a factual

7 debriefing, and in the end the point, it appeared because

8 it was a therapeutic debriefing. Now when you asked the

9 witness, "Did you have a debriefing," you must make clear

10 which of the two you refer to. But let me ask the

11 question. On that day, the 13th, did you speak to a

12 councillor or a psychologist? Did you receive what one can

13 call therapeutic debriefing to help you to deal with the

14 traumatic experience that you'd gone through witnessing

15 this attack upon your police members? Did you have that

16 kind of briefing?

17 MAJOR-GENERAL MPEMBE: Correct,

18 Chairperson, and also members were there where they also

19 went through that.

20 CHAIRPERSON: Alright, now –

21 MR GUMBI: Yes, Chairperson, I was

22 referring to the debriefing with members, factual

23 debriefing with members, report-back. Did you have factual

24 debriefing with members, or report-back from the members

25 that afternoon, General?

Page 12527

1 MAJOR-GENERAL MPEMBE: Chairperson, I did

2 indicate that what happened on that day is that the members

3 themselves, they spoke to their commanders. We only met

4 with the commanders of those members, but not with the

5 members themselves.

6 CHAIRPERSON: Does that mean that you

7 didn't have a factual debriefing (if one can use that

8 expression) yourself?

9 MAJOR-GENERAL MPEMBE: Correct,

10 Chairperson.

11 CHAIRPERSON: What you did, we know, is

12 you made a short statement at about 6 o'clock that evening,

13 which is filed in the case dockets, which is exhibit HHH13,

14 and which you gave a short summary of what happened, and

15 then later on you made fuller statements. Is that correct?

16 MAJOR-GENERAL MPEMBE: Correct,

17 Chairperson.

18 MR GUMBI: So the debriefing you had with

19 commanders involved all the commanders of those units.

20 Would I be correct? Who were there along the railway line.

21 CHAIRPERSON: I didn't understand him to

22 say he had a debriefing. He said the opposite. He said

23 the commanders had sessions with their members.

24 MR GUMBI: Yes, yes.

25 CHAIRPERSON: He said he himself didn't

Page 12528

1 have a debriefing. He said he wrote a short statement to
 2 put in the docket and then on a subsequent occasion, or
 3 subsequent occasions, he made further statements, but
 4 that's as far as his evidence goes, as I understand. Am I
 5 right?

6 MAJOR-GENERAL MPEMBE: Correct,
 7 Chairperson, and meeting with the commanders, it was
 8 already on the 14th, Chairperson knows that I did meet the
 9 commanders at that time, but not on the 13th.

10 MR GUMBI: Yes, General, can I refer you
 11 to another document, SAPS document dealing with crowd
 12 management for platoon commanders, briefing and debriefing.
 13 It's contained in one of my documents, while we are dealing
 14 with this aspect.

15 MS PILLAY: Chair, the document is GGG25.

16 MR GUMBI: Yes, thank you very much.

17 CHAIRPERSON: Thank you.

18 MR GUMBI: Are you in possession of that
 19 document, General? GGG25.

20 MAJOR-GENERAL MPEMBE: Chairperson, I do
 21 have it.

22 CHAIRPERSON: What page are you referring
 23 to?

24 MR GUMBI: Can you go to page 8, General?
 25 Yes, tactic documentation, paragraph 12. When you read

Page 12529

1 paragraph 12 of that document, it's saying that, "After
 2 every debriefing session a brief report should be compiled
 3 by the platoon commander and filed together with
 4 preparation order for the period of five years." Do you
 5 see that?

6 MAJOR-GENERAL MPEMBE: Yes, Chairperson,
 7 I can see it.

8 MR GUMBI: So do we have a debriefing
 9 report from commanders who were involved on the 13th, that
 10 was filed to you, in fact, General?

11 MAJOR-GENERAL MPEMBE: Chairperson, I
 12 don't understand the question properly because I did
 13 testify that the incident of the 13th, the operation was
 14 still on because the people were still at the koppie. I
 15 don't know whether that was seen as a separate operation.
 16 Here also what is confusing me, it's a platoon commander,
 17 and I was not a platoon commander. It was a completely
 18 different situation.

19 CHAIRPERSON: Mr Gumbi, as far as I can
 20 recall this point was dealt with before. It was dealt with
 21 when General Annandale was in the box - was at the witness
 22 table, sorry - and the point made was that they decided not
 23 to have a debriefing. This is what they do when they were
 24 debriefing, decided not to have a debriefing despite the
 25 fact that the Standing Order says they should, because they

Page 12530

1 thought the matter would be dealt with before the
 2 Commission, and what they had instead was the meeting at
 3 Potch where they tried to sort out the facts and work out
 4 their presentation. The decision was taken not to have a
 5 debriefing, as I understand it - if I'm wrong, I'll be
 6 corrected - and I seem to remember that Mr White actually
 7 said he could understand it in the circumstances, and the
 8 matter was left there, really. But the decision not to
 9 have a debriefing was not taken in any event by this
 10 witness. So any way, let's clarify it. Am I correct in
 11 thinking there wasn't a debriefing; a decision was taken
 12 not to have a debriefing because the day after the 16th it
 13 was already announced that a commission was going to be
 14 appointed?

15 MAJOR-GENERAL MPEMBE: Correct,
 16 Chairperson.

17 CHAIRPERSON: But the decision not to
 18 have a debriefing but rather prepare for the Commission and
 19 to cooperate fully with the Commission was not taken by
 20 you, I take it was taken by the National Commissioner
 21 herself. Is that right? Perhaps the Provincial
 22 Commissioner, but it wasn't taken by you. Am I right?

23 MAJOR-GENERAL MPEMBE: Chairperson, it
 24 was not by me, but it was the discussion amongst the
 25 officers and the decision was taken there, but also, and

Page 12531

1 when the Provincial Commissioner asked me the reasons as
 2 overall commander I did also agree on what was discussed
 3 amongst myself, General Annandale, General Naidoo, and the
 4 Provincial Commissioner herself.

5 MR GUMBI: So this decision you are
 6 talking about, General, I wanted to be clear on it, was it
 7 taken on the 13th, or was it taken after the 13th?

8 CHAIRPERSON: He said it was taken after
 9 the event, was it? When was the decision taken not to have
 10 a debriefing but rather wait for the Commission? Was that
 11 taken after the 16th?

12 MAJOR-GENERAL MPEMBE: Ja, after the 16th
 13 when the Commission was announced, but Advocate,
 14 Chairperson, the Advocate asked me about why I did not
 15 debrief the people on the 13th, I think he said -

16 MR GUMBI: Yes.

17 MAJOR-GENERAL MPEMBE: And I've said it
 18 several times that we did not see the 13th as a separate
 19 operation from that one of the 16th.

20 CHAIRPERSON: And to be fair, you had a
 21 number of other things to deal with from the 13th onwards.
 22 There wasn't time, I would assume - I don't want to put
 23 words in your mouth, but I would have thought you had a
 24 serious crisis on your hands that you had to deal with and
 25 only when that was over would you have had time and

Page 12532

1 opportunity to do a debriefing as envisaged in this
 2 document and the other documents. Is that correct?
 3 MAJOR-GENERAL MPEMBE: Correct,
 4 Chairperson.
 5 CHAIRPERSON: And by that time it was
 6 announced that there's going to be a commission, and so the
 7 other decision was taken that you referred to. Is that
 8 right?
 9 MAJOR-GENERAL MPEMBE: Correct,
 10 Chairperson.
 11 CHAIRPERSON: Mr Gumbi, I don't want to
 12 stop you, but it does sound, you know, as if this point
 13 isn't going to take us anywhere, but maybe you've got
 14 better points that you could raise.
 15 MR GUMBI: Yes, if I can ask one or two
 16 questions on this one before I can proceed, Chairperson.
 17 General, the IPID, was it investigating already on the 13th?
 18 MAJOR-GENERAL MPEMBE: Correct,
 19 Chairperson, I did indicate that the IPID was called to
 20 attend the scene on the 13th.
 21 MR GUMBI: According to your knowledge is
 22 there any statement, written statement filed by all members
 23 of the units who were there as from the 13th to the IPID?
 24 CHAIRPERSON: I don't understand what
 25 you're talking about, Mr Gumbi. You've already put in a

Page 12533

1 couple of statements that were actually IPID statements
 2 made by members of the police service who were present on
 3 the 13th. So we know that IPID people did an investigation,
 4 they took some statements at least which you put before us.
 5 What's your question? Do you want to know whether they
 6 questions every one of the policemen or women who were on
 7 the scene, or –
 8 MR GUMBI: Yes, Chairperson –
 9 CHAIRPERSON: - what exactly do you want
 10 to know?
 11 MR GUMBI: Because some of the statements
 12 they are not dated. That's why –
 13 CHAIRPERSON: The?
 14 MR GUMBI: Some of the statements they
 15 are not dated, so that's why I wanted to –
 16 CHAIRPERSON: Oh well, they're not dated,
 17 but I mean that's not the witness's fault.
 18 MR GUMBI: The ones with the –
 19 CHAIRPERSON: That's not the witness's
 20 fault.
 21 MR GUMBI: Yes.
 22 CHAIRPERSON: That's a matter you could
 23 ask, if ever it became necessary, of the IPID people, but
 24 subject to what people may say, I'm not disposed to embark
 25 upon an inquiry as to the adequacy or otherwise of the IPID

Page 12534

1 investigation. I think we've got enough other matters to
 2 look at, but what exactly is the point you're trying to
 3 make? You must forgive my inability to understand.
 4 MR GUMBI: No, fair enough, Chairperson.
 5 I wanted to check with the witness whether he's aware is
 6 there any written statement that was made on the 13th,
 7 because according to our analysis of the statements we
 8 have, some of them they are not dated. We are not sure
 9 whether they were taken exactly on the 13th or maybe they
 10 were taken after the 14th.
 11 CHAIRPERSON: You understand the question
 12 relates to whether you know whether any of the IPID
 13 statements were taken, I take it the period is the 13th to
 14 the 16th. Is that what you want to know, Mr Gumbi?
 15 MR GUMBI: Yes.
 16 CHAIRPERSON: Do you know the answer to
 17 that? Were you involved in any way with the IPID
 18 investigation?
 19 MAJOR-GENERAL MPEMBE: No, Chairperson,
 20 the only thing that I know is that I must only inform IPID
 21 when a police official has discharged a firearm; that I
 22 did, and I did make sure that they know that they should
 23 attend the scene, and what I know is only that IPID work
 24 independently from SAPS.
 25 CHAIRPERSON: Did IPID interview you?

Page 12535

1 MAJOR-GENERAL MPEMBE: No, Chairperson.
 2 CHAIRPERSON: Mr Gumbi, I am informed by
 3 someone who knows about these matters that what often
 4 happens with an IPID investigation is they take a statement
 5 and then the last page is the attestation section. In
 6 other words it's a roneoed form, the attestation part, and
 7 on that they put the dates and what we've been given are
 8 some of the IPID statements minus that last roneoed
 9 attestation page upon which the date appears. So if it's
 10 relevant for you to ascertain the dates upon which
 11 particular statements were made, I suggest you address an
 12 enquiry to IPID, possibly through the evidence leaders or
 13 directly yourself, to ascertain where the originals are and
 14 whether the particular statements that you're interested
 15 in, whether the attestation certificates are available,
 16 which will give the dates that you want. But let's not
 17 spend any more time on it now. Make those enquiries. You
 18 may draw a blank, alternatively you may hit the jackpot,
 19 but whether you will or not is a matter we don't know the
 20 answer to at the moment.
 21 MR GUMBI: Yes, I understand,
 22 Chairperson. I will engage the evidence leaders after I've
 23 received instructions.
 24 CHAIRPERSON: [Microphone off, inaudible]
 25 particular you are interested in the dates are.

Page 12536

1 MR GUMBI: Yes, Chairperson, I will do
 2 that. Let us move on, General. While you were at
 3 Potchefstroom, preparing for this Commission, and while you
 4 were in the process of preparing exhibit L that was
 5 presented before this Commission –
 6 CHAIRPERSON: Hang on a second. That
 7 makes an assumption which may not be accurate. Are you
 8 suggesting that this witness was involved in preparing
 9 exhibit L?
 10 MR GUMBI: If I can –
 11 CHAIRPERSON: Because I – you know, you
 12 made it as a statement, as I understand, so it may not be
 13 right. Maybe you should ask him, because my impression is
 14 that responsibility for the contents, the accuracy, or in
 15 some cases possibly the inaccuracy of statements made in
 16 exhibit L doesn't rest with this witness, but possibly with
 17 others.
 18 MR GUMBI: Yes, Chairperson. If I can
 19 ask –
 20 CHAIRPERSON: So perhaps ask the question
 21 directly first.
 22 MR GUMBI: - a direct question, let us
 23 start with the Potchefstroom meeting, General. At
 24 Potchefstroom while you were there, preparing for this
 25 Commission, did you inform all the officials who were there

Page 12537

1 that members fired without your instruction, there at
 2 Potchefstroom?
 3 CHAIRPERSON: Now Mr Gumbi, he's already
 4 said that. I don't know whether everybody was in the room,
 5 but he's told us on several occasions that he said that
 6 shots were fired, the teargas that was fired without his
 7 instruction, and then we've heard there was a debate.
 8 Someone said they heard he had given the instruction. Kuhn
 9 was the man who'd fired it, was there; he said he heard an
 10 instruction. He didn't know who it was from. That all
 11 happened at Potchefstroom, and his statement that he didn't
 12 give the instruction was made there. As I say, whether
 13 everybody was there is another matter, but certainly he's
 14 told us several times what happened on that occasion. I
 15 think you're really repeating a matter that's been dealt
 16 with in detail already. If there's a new angle on it that
 17 you want to raise, I won't stop you, but don't just repeat
 18 points we know already.
 19 MR GUMBI: Thank you very much,
 20 Chairperson. General, can I refer you to SAPS opening
 21 statement presented before this Commission?
 22 CHAIRPERSON: The opening statement is an
 23 exhibit.
 24 MR GUMBI: It is an exhibit, yes
 25 Chairperson.

Page 12538

1 CHAIRPERSON: Perhaps we can be told what
 2 the exhibit number is, and then –
 3 MR GUMBI: FFF9, Chairperson.
 4 CHAIRPERSON: What's the point you want
 5 to make about that? Because I take it it's not suggested
 6 that this witness had a hand in the opening statement, or
 7 is it? Did you have anything to do with the content of the
 8 opening statement of the SAPS before the Commission?
 9 MAJOR-GENERAL MPEMBE: No, Chairperson.
 10 [15:30] MR GUMBI: But it was contained on the
 11 document I gave to you for reading. You did have an
 12 opportunity to read through it, General?
 13 MAJOR-GENERAL MPEMBE: It's correct,
 14 Chairperson, but when Advocate gives me the document I
 15 cannot deny to study it.
 16 CHAIRPERSON: I know the [inaudible] is
 17 difficult for you. I could understand there may be some
 18 factual averment in the opening statement which in all
 19 probability must have emanated from this witness, but
 20 clearly that's something you can ask him about, but you
 21 can't ask him general questions about the opening
 22 statement; that's just wasting time. But is there some
 23 particular paragraph that you want to rely on that you say
 24 he must be the original informant upon whose information
 25 that statement was based and you want to question him about

Page 12539

1 that? If that's what you want to do, carry on.
 2 MR GUMBI: That's what I wanted to do,
 3 Chairperson. That's why I referred this witness – I was
 4 going to refer to the paragraph that I wanted to rely on.
 5 I was not going to use the whole document.
 6 CHAIRPERSON: Tell him what the paragraph
 7 is and let's get on with it.
 8 MR GUMBI: Go to paragraph 44.2. Maybe
 9 if you can take it from paragraph 44.1 and to paragraph
 10 44.2, dealing with the incident of the 13th of August 2012.
 11 For ease of reference, General, can I read it for you,
 12 paragraph 44.1 and 44.2, if the Chairperson will allow me.
 13 CHAIRPERSON: I haven't got my copy here,
 14 so I'd be very grateful if you'd read it out. Oh, they
 15 found it for us on the – they put it on the screen, but for
 16 the benefit of those who can't read the screen, "By the
 17 time shooting occurred around the kraal on the afternoon of
 18 Thursday, 16 August" - is this the passage you want? –
 19 "numerous attempts by senior officers, including General
 20 Mpeembe and Lieutenant-Colonel McIntosh had already been
 21 made since Monday, 13 August 2012, to persuade protesters
 22 to disarm. They had refused and proceeded to the koppie,
 23 killing two police officers and severely injuring another
 24 on their way there. They had also robbed the police
 25 officers they'd killed and injured of two pistols and an R5

Page 12540

1 rifle and shotgun, a police two-way radio and ammunition.”

2 You want to read sub-para 2 as well?

3 MR GUMBI: 44.2.

4 CHAIRPERSON: “Teargas, stun grenades and

5 rubber bullets had been used to disperse them and stop them

6 going into a residential informal settlement. None of

7 these measures deterred them. That was Monday, 13 August

8 2012.”

9 MR GUMBI: Yes, General, do you see that

10 in that two paragraphs the Chairperson read to you, is

11 nothing that is indicated that members fired teargas

12 without any instruction?

13 MAJOR-GENERAL MPEMBE: I can see,

14 Chairperson.

15 MR GUMBI: Same applies when you go to –

16 CHAIRPERSON: Sorry, Mr Gumbi. He’s

17 already told us (as we discussed already) several times,

18 that when he was at Potchefstroom he told the people

19 concerned who were drafting exhibit L that he didn’t give

20 instructions for the teargas and stun grenades. For some

21 reason or other the persons who drafted L and those who

22 drafted the opening statement didn’t consider that

23 statement he made material enough to include. I’m not sure

24 that - that may be a ground of criticism. There may be all

25 sorts of things that will flow from that, but I’m not sure

Page 12541

1 that this witness can be held responsible for the omission

2 of that fact because he wasn’t a party to that, was he?

3 MR GUMBI: Yes, Chairperson.

4 CHAIRPERSON: And it may or may not be

5 correct to say, presumably it may be argued before us, that

6 the complete picture wasn’t put before us because that fact

7 wasn’t disclosed, but we’re not busy with that at the

8 moment and it’s not his fault, if someone is to blame for

9 that, I don’t say anyone is to blame, but if someone is to

10 blame it’s not the gentleman sitting at the witness table

11 at the moment, is it?

12 MR GUMBI: I do understand, Chairperson,

13 and can I move again to another aspect on this one, but I

14 wanted to refer the witness to exhibit L, then I will

15 establish whether he knows the contents of exhibit L.

16 CHAIRPERSON: So now you’d better tell us

17 again what slide in L you’re referring to because –

18 MR GUMBI: I’ll focus on the incident of

19 the 13th, that’s slide number 47. Are you in possession of

20 exhibit L, General?

21 MAJOR-GENERAL MPEMBE: No, Chairperson.

22 CHAIRPERSON: [Microphone off, inaudible]

23 on the screen above you.

24 MAJOR-GENERAL MPEMBE: I will look it at

25 the screen, Chairperson.

Page 12542

1 MR GUMBI: Can I read it to you, the SAPS

2 perspective of what happened on the 13th. “On their way to

3 the koppie some of the protesters changed direction towards

4 the village. To prevent them from entering” –

5 CHAIRPERSON: For the benefit of those

6 who are going to read the record later, you’re quoting

7 slide 47, aren’t you?

8 MR GUMBI: Yes, slide 47, the first

9 bullet, saying that, “On their way to the koppie some of

10 the protesters changed their direction towards the village.

11 To prevent them from entering the village, police used

12 teargas and stun grenade to disperse the protesters,

13 discouraging them from their intended path. With their

14 dangerous weapons a group of protesters turned around and

15 charged at the members behind them. Two of the members of

16 the police who died at the scene were retreating and firing

17 at the protesters with shotgun rubber bullets, until they

18 were overpowered and hacked to death.” Will you agree with

19 me, General, summing up this point, that it’s nothing that

20 is suggested that members fired without your instruction

21 here?

22 CHAIRPERSON: Mr Gumbi, we can read that

23 for ourselves. Isn’t this the same point as the one we

24 discussed a few minutes ago? He wasn’t responsible for

25 compiling L. If the fact that no instruction was given is

Page 12543

1 relevant, and its omission is unfortunate and may give rise

2 to discussion, it’s not discussion that involves him

3 because he told that to the people at Potchefstroom. They

4 chose not to put it here. It’s a question they could be

5 asked about, but not him, surely. We can understand if he

6 hadn’t said anything at Rustenburg – sorry, at

7 Potchefstroom. You could then say well by implication he

8 was admitting that he did give an instruction or there was

9 no problem of a lack of instruction. But in the light of

10 his evidence repeated over and over again that he didn’t

11 give the instruction, then the fact that the people who

12 drafted this document chose not to mention what he had said

13 is not a matter you can take up with him. It’s not his

14 fault, is it?

15 MR GUMBI: I would be happy, Chairperson,

16 if we can do that by establishing to the witness whether he

17 contributed during the drafting of this document. I think

18 it will be –

19 CHAIRPERSON: L was produced I think by,

20 I think the evidence is, was it Colonel Visser and Colonel

21 Scott? They were the people who did it in the end, as far

22 as I can recall. Based upon what had been said by the

23 various participants at Potchefstroom. He was one of those

24 participants. He said, “I didn’t give the instruction.”

25 So how could you take it any further? I don’t want to stop

Page 12544

1 you if there's some point I'm overlooking, but as I see it,
 2 there's no point in trying to beat him about the head on
 3 this point because he's not responsible for the omission,
 4 is he?
 5 MR GUMBI: I understand, Chairperson. I
 6 wanted to establish from him whether he contributed on this
 7 document. Maybe if I can get the answer from the witness.
 8 CHAIRPERSON: Did you have any hand in –
 9 play any role in the actual drafting of this document,
 10 exhibit L?
 11 MAJOR-GENERAL MPEMBE: Chairperson, I
 12 only participate and I also told them that I did not give
 13 the instruction, but I was not responsible to ultimately
 14 draw exhibit L and bring it to the Commission.
 15 MR GUMBI: Chairperson, with your leave,
 16 I see it's almost 20 to 4 and I think –
 17 CHAIRPERSON: We're proposing to go on
 18 till 4 o'clock because we did lose a bit of time on other
 19 matters, and it is, as we've heard, we've got serious
 20 problems in trying to finish our work in the time allotted
 21 to us, so I'm loath to adjourn now, unless you could tell
 22 me there's a reason why you need an adjournment now, you
 23 want to take instructions, you're not able to proceed,
 24 something of that kind. I won't view such a request
 25 unsympathetically, but time is a precious resource for us.

Page 12545

1 MR GUMBI: There are few instructions I
 2 wanted to take, Chairperson, then so that when I proceed
 3 with my cross-examination then I'm sure what I'm going to –
 4 CHAIRPERSON: Nothing else you can deal
 5 with now?
 6 MR GUMBI: I saw it was almost 20 to 4
 7 o'clock and –
 8 CHAIRPERSON: Well, I know, but I was
 9 proposing to go till 4 o'clock.
 10 MR GUMBI: I propose to adjourn now so
 11 that I will –
 12 CHAIRPERSON: Well, you'll adjourn now.
 13 I see. Shall we carry on without you?
 14 MR GUMBI: Yes, we can carry on tomorrow.
 15 CHAIRPERSON: No, no, no, you didn't hear
 16 me. So you're going to adjourn now. Shall we carry on
 17 without you?
 18 MR GUMBI: No.
 19 CHAIRPERSON: Who decides on adjournment
 20 in this Commission; you or me? If you've got a good reason
 21 for an adjournment, give it to me and I'll give you the
 22 adjournment. But don't arrogate to yourself powers of
 23 adjournment that you haven't got.
 24 MR GUMBI: Thank you, Chairperson. Yes,
 25 I propose adjournment now, then so that I can take further

Page 12546

1 instruction, if I –
 2 CHAIRPERSON: - further instructions?
 3 MR GUMBI: Yes, Chairperson.
 4 CHAIRPERSON: Alright, we will start
 5 again tomorrow at 9 o'clock, I hope, and for the benefit of
 6 those who've forgotten our sitting times on Fridays, we
 7 normally adjourn at 1 o'clock. So we'd like to carry on
 8 till 1 o'clock tomorrow, starting at 9, and do you
 9 anticipate that you'll be finished with your cross-
 10 examination –
 11 MR GUMBI: Tomorrow.
 12 CHAIRPERSON: - by 1 o'clock tomorrow?
 13 MR GUMBI: Yes, Chairperson.
 14 CHAIRPERSON: If not before.
 15 MR GUMBI: Yes, Chairperson, it can be
 16 before.
 17 CHAIRPERSON: Obviously it depends upon
 18 what we call injury time and points that arise and so
 19 forth.
 20 MR GUMBI: Yes.
 21 CHAIRPERSON: Dealing with such
 22 objections as may be raised and so forth, but as you see
 23 it, we should finish your cross-examination by then?
 24 MR GUMBI: Yes, Chairperson.
 25 CHAIRPERSON: Alright. Thank you, Mr

Page 12547

1 Gumbi. We'll see you on the morrow 9 o'clock.
 2 MR GUMBI: Yes, Chairperson.
 3 CHAIRPERSON: We take the adjournment.
 4 [COMMISSION ADJOURNED]
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able 12418:18 12444:6 12452:9 12453:21 12454:23 12494:24 12544:23	Advocate 12431:20 12432:14,21 12450:23,24 12503:8 12506:4 12531:13,14 12538:14	amendments 12431:12 12431:14	12422:13 12428:7 12466:6	12429:9 12463:14,15 12463:20 12465:2,5 12465:10,19 12466:1 12466:20,21 12467:7 12481:18 12499:3 12501:9 12504:25 12505:1
absence 12437:23	aeroplane 12416:5	ammunition 12520:14 12540:1	appointed 12455:7 12530:14	12466:10,19 12466:1 12466:20,21 12467:7 12481:18 12499:3 12501:9 12504:25 12505:1
absent 12518:6 12524:18	affidavit 12423:11	amount 12417:5 12419:4	approach 12453:22 12505:3	attacking 12496:21
absolutely 12457:23	Africa 12419:10 12423:24	analysis 12534:7	approaching 12436:16	attempt 12420:25
acceded 12440:10	African 12417:6,18 12424:23 12425:14 12425:23 12426:7,16	angle 12436:16 12537:16	appropriate 12423:11 12425:9 12453:4	attempted 12483:7
accept 12423:6,6 12431:4 12488:3	afternoon 12525:12 12526:25 12539:17	announced 12530:13 12531:13 12532:6	appropriateness 12475:18	attempts 12539:19
accepted 12487:11,15 12487:22 12488:1	ago 12435:17 12503:25 12522:25 12542:24	answer 12436:17,23 12437:6 12439:23 12440:13 12448:19 12451:2 12463:22 12464:8 12468:20,23 12471:8 12475:13 12480:14 12481:4 12502:14 12503:3 12505:6 12510:24 12523:7 12524:10 12534:16 12535:20 12544:7	areas 12434:13,24 12435:1	attend 12532:20 12534:23
access 12456:2,7	agree 12444:14 12479:23 12487:5 12519:6,22 12520:24 12521:9,16 12531:2 12542:18	answered 12437:18,23	aren't 12542:7	attestation 12535:5,6,9 12535:15
account 12472:5,6	agreed 12419:25 12430:1 12479:25 12523:2	answering 12463:10 12517:6	argued 12541:5	attorney 12451:11 12513:9
accountable 12419:14	agreement 12419:22 12424:25 12457:8 12516:7 12518:7	answers 12419:10,15 12419:16,18	argument 12470:19	auditorium 12443:23 12485:14 12494:17
accounting 12448:4	ahead 12465:16	antagonise 12434:5	arguments 12474:3	August 12416:1,23 12449:17 12453:8 12468:5 12474:17 12480:4 12483:21 12484:5,10,19,19 12519:8,14 12520:4 12520:13 12525:6,13 12539:10,18,21 12540:7
accuracy 12517:3 12518:8 12536:14	alerted 12465:6,9	anticipate 12419:6 12546:9	arises 12426:3,6 12482:12	authenticity 12458:13
accurate 12536:7	alight 12467:16	anticipated 12422:20 12439:20	arising 12477:25	authorise 12443:9
accurately 12489:17	alighted 12463:2,7,15 12465:18,24 12466:22 12467:7	anybody 12436:2 12443:7 12475:13 12482:18	armoured 12434:17	automatically 12466:12
accused 12505:11	alighting 12463:20 12465:1	anyway 12437:4 12455:23 12458:6 12474:2 12495:23,25 12496:1 12498:6 12499:6	arose 12451:22	available 12420:9,21 12424:7 12450:3 12455:15 12461:11 12535:15
actions 12465:7	allegation 12436:19 12470:12 12488:5 12508:16	apologise 12416:8 12443:17 12464:10 12488:18 12504:10 12511:16,19 12512:20 12514:22 12514:22	arrange 12420:25	avertment 12538:18
actual 12544:9	allege 12506:17,25	apology 12437:4 12455:23 12458:6 12474:2 12495:23,25 12496:1 12498:6 12499:6	arrested 12417:17	avoiding 12439:6
add 12423:5 12424:1 12427:19 12471:16 12488:7 12501:8	alleged 12457:12 12478:17 12487:13 12500:24 12501:1	apologise 12416:8 12443:17 12464:10 12488:18 12504:10 12511:16,19 12512:20 12514:22 12514:22	Arrival 12476:14	aware 12418:22 12436:3 12443:18 12454:4 12534:5
address 12425:16 12471:25,25 12535:11	allegedly 12524:17	apologise 12416:8 12443:17 12464:10 12488:18 12504:10 12511:16,19 12512:20 12514:22 12514:22	arrive 12473:20	
addressed 12428:18 12440:16 12524:19	allotted 12544:20	apologise 12416:8 12443:17 12464:10 12488:18 12504:10 12511:16,19 12512:20 12514:22 12514:22	arrived 12423:20	B
addressing 12458:10 12483:6	allow 12422:10 12435:18 12437:4 12439:4,12 12442:23 12457:18 12478:24 12480:20 12486:4 12494:4 12502:8 12539:12	apologise 12416:8 12443:17 12464:10 12488:18 12504:10 12511:16,19 12512:20 12514:22 12514:22	arrogate 12545:22	back 12417:2 12418:18 12447:20 12465:14 12467:8 12468:12 12471:24 12488:18 12497:2 12514:1,5,8 12514:21 12518:12 12525:3
adequacy 12533:25	alleged 12457:12 12478:17 12487:13 12500:24 12501:1	apologise 12416:8 12443:17 12464:10 12488:18 12504:10 12511:16,19 12512:20 12514:22 12514:22	arrow 12505:3	bad 12472:3
adjoin 12451:25 12452:8,11 12488:13 12544:21 12545:10 12545:12,16 12546:7	allegedly 12524:17	apologise 12416:8 12443:17 12464:10 12488:18 12504:10 12511:16,19 12512:20 12514:22 12514:22	ascertain 12452:2 12535:10,13	ball 12430:3
adjourned 12432:15 12433:23 12514:11 12518:16 12547:4	allotted 12544:20	apologise 12416:8 12443:17 12464:10 12488:18 12504:10 12511:16,19 12512:20 12514:22 12514:22	asked 12420:10 12436:5,14,22 12437:23 12439:11 12447:10 12451:8,10 12455:2,9,18 12456:18 12458:5 12459:25 12464:20 12467:1 12475:25 12502:13,13,21 12520:17 12524:2,10 12524:15,16 12526:8 12531:1,14 12543:5	Baloyi 12431:23 12441:8,25 12444:8 12449:7 12463:19,20 12463:22 12464:2,9 12464:12,21 12465:1 12465:5 12466:9,13 12466:18,18 12477:23 12478:1,5 12478:12,18 12479:2 12479:11,21,25 12509:10,15 12521:14,15
adjournment 12432:7 12447:19 12464:1 12488:12 12513:25 12514:2 12544:22 12545:19,21,22,23,25 12547:3	allowed 12427:16 12510:1 12516:1,6	apologise 12416:8 12443:17 12464:10 12488:18 12504:10 12511:16,19 12512:20 12514:22 12514:22	asked 12420:10 12436:5,14,22 12437:23 12439:11 12447:10 12451:8,10 12455:2,9,18 12456:18 12458:5 12459:25 12464:20 12467:1 12475:25 12502:13,13,21 12520:17 12524:2,10 12524:15,16 12526:8 12531:1,14 12543:5	based 12423:20 12458:4 12506:25
ADJOURNS 12447:21 12452:18 12488:14 12514:3	allowing 12502:10	apologise 12416:8 12443:17 12464:10 12488:18 12504:10 12511:16,19 12512:20 12514:22 12514:22	asked 12420:10 12436:5,14,22 12437:23 12439:11 12447:10 12451:8,10 12455:2,9,18 12456:18 12458:5 12459:25 12464:20 12467:1 12475:25 12502:13,13,21 12520:17 12524:2,10 12524:15,16 12526:8 12531:1,14 12543:5	
adjust 12431:9	alright 12460:7 12462:2 12464:16 12472:22 12492:14 12493:6 12494:5 12518:2 12526:20 12546:4,25	apologise 12416:8 12443:17 12464:10 12488:18 12504:10 12511:16,19 12512:20 12514:22 12514:22	asked 12420:10 12436:5,14,22 12437:23 12439:11 12447:10 12451:8,10 12455:2,9,18 12456:18 12458:5 12459:25 12464:20 12467:1 12475:25 12502:13,13,21 12520:17 12524:2,10 12524:15,16 12526:8 12531:1,14 12543:5	
admitted 12516:13	ambiguously 12535:18	apologise 12416:8 12443:17 12464:10 12488:18 12504:10 12511:16,19 12512:20 12514:22 12514:22	asked 12420:10 12436:5,14,22 12437:23 12439:11 12447:10 12451:8,10 12455:2,9,18 12456:18 12458:5 12459:25 12464:20 12467:1 12475:25 12502:13,13,21 12520:17 12524:2,10 12524:15,16 12526:8 12531:1,14 12543:5	
admitting 12543:8	ambiguous 12468:23 12525:21	apologise 12416:8 12443:17 12464:10 12488:18 12504:10 12511:16,19 12512:20 12514:22 12514:22	asked 12420:10 12436:5,14,22 12437:23 12439:11 12447:10 12451:8,10 12455:2,9,18 12456:18 12458:5 12459:25 12464:20 12467:1 12475:25 12502:13,13,21 12520:17 12524:2,10 12524:15,16 12526:8 12531:1,14 12543:5	
adopt 12426:9	AMCU 12417:4	apologise 12416:8 12443:17 12464:10 12488:18 12504:10 12511:16,19 12512:20 12514:22 12514:22	asked 12420:10 12436:5,14,22 12437:23 12439:11 12447:10 12451:8,10 12455:2,9,18 12456:18 12458:5 12459:25 12464:20 12467:1 12475:25 12502:13,13,21 12520:17 12524:2,10 12524:15,16 12526:8 12531:1,14 12543:5	
adopted 12423:21	amendment 12430:13 12431:7	apologise 12416:8 12443:17 12464:10 12488:18 12504:10 12511:16,19 12512:20 12514:22 12514:22	asked 12420:10 12436:5,14,22 12437:23 12439:11 12447:10 12451:8,10 12455:2,9,18 12456:18 12458:5 12459:25 12464:20 12467:1 12475:25 12502:13,13,21 12520:17 12524:2,10 12524:15,16 12526:8 12531:1,14 12543:5	
Adv 12453:22 12454:5 12455:11,14 12459:11 12462:11 12480:9 12520:17 12525:19		apologise 12416:8 12443:17 12464:10 12488:18 12504:10 12511:16,19 12512:20 12514:22 12514:22	asked 12420:10 12436:5,14,22 12437:23 12439:11 12447:10 12451:8,10 12455:2,9,18 12456:18 12458:5 12459:25 12464:20 12467:1 12475:25 12502:13,13,21 12520:17 12524:2,10 12524:15,16 12526:8 12531:1,14 12543:5	
advancing 12477:22		apologise 12416:8 12443:17 12464:10 12488:18 12504:10 12511:16,19 12512:20 12514:22 12514:22	asked 12420:10 12436:5,14,22 12437:23 12439:11 12447:10 12451:8,10 12455:2,9,18 12456:18 12458:5 12459:25 12464:20 12467:1 12475:25 12502:13,13,21 12520:17 12524:2,10 12524:15,16 12526:8 12531:1,14 12543:5	
advised 12478:4 12479:12 12510:5,9		apologise 12416:8 12443:17 12464:10 12488:18 12504:10 12511:16,19 12512:20 12514:22 12514:22	asked 12420:10 12436:5,14,22 12437:23 12439:11 12447:10 12451:8,10 12455:2,9,18 12456:18 12458:5 12459:25 12464:20 12467:1 12475:25 12502:13,13,21 12520:17 12524:2,10 12524:15,16 12526:8 12531:1,14 12543:5	

<p>12538:25 12543:22 basic 12451:22 12458:3 basically 12507:8 basis 12420:1 12516:5 12516:6 beat 12544:2 behalf 12424:6,21 belabour 12479:8 believe 12416:23 12419:3 belt 12428:22 benefit 12485:13 12489:15 12494:13 12494:16 12539:16 12542:5 12546:5 Benjamin 12490:13,23 12492:10,12 12496:23 best 12480:19 12483:14 better 12497:24 12510:7 12532:14 12541:16 big 12442:6 12521:6 bigger 12441:19 bit 12467:3 12498:9 12525:20 12544:18 blame 12541:8,9,10 blaming 12451:21 blank 12535:18 block 12470:5 12472:13 body 12429:18 bold 12473:13 Booi 12427:13 book 12449:8,11,15 12451:7 12480:13 books 12449:13 12503:15 borne 12439:7 Botha 12474:11 bottom 12470:2 12481:16 12494:12 12496:24 bound 12459:23 12478:20 bow 12479:9 box 12529:21 braces 12428:22 brief 12433:11,12 12439:19,19,21,24 12441:21 12442:6,7 12471:17 12529:2 briefed 12432:17 12439:23 12448:20 12477:11 12503:15 12520:21 12523:13 briefing 12432:24 12433:6 12434:25 12437:15,23 12438:12 12441:24 12471:18,20 12477:12 12503:10 12519:3 12520:22 12526:16 12528:12 briefings 12437:25 briefly 12431:1</p>	<p>Brigadier 12440:21 12519:11 12520:20 bring 12484:13 12518:12 12544:14 brought 12471:22 Budlender 12416:10,13 12417:11,15 12420:10,14,18,24 12421:13 12424:9,11 12424:13,23 12429:6 12430:25 12431:1 bullet 12500:15 12542:9 bullets 12496:4 12540:5 12542:17 burden 12423:8,18 busy 12421:14 12432:16 12433:19 12502:9 12541:7 bystanders 12486:2</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>call 12459:16,18,19,23 12478:22,22 12506:24 12526:13 12546:18 called 12417:14 12421:21 12426:17 12427:21 12514:6 12532:19 calls 12425:23 12426:8 12426:10 12454:22 12456:22 cameraman 12420:20 12421:6,10 cameras 12420:19 camp 12438:21 12439:1 canisters 12501:22 canvassing 12439:2 can't 12453:9 12455:24 12457:15 12479:16 12497:24 12518:5 12538:21 12539:16 capacities 12424:4 capacity 12424:5,6 captain 12461:14,15,17 12462:4,7,8,19,21 12474:15 12475:24 12476:6 12477:5,10 12477:23 12478:16 12478:22,22 12479:11 12503:19 12505:8,10 12506:21 12507:4 car 12518:11 careful 12439:13 carefully 12429:5 carry 12436:20 12437:6 12439:13 12447:13 12451:6 12455:9 12456:23 12474:5 12480:25 12498:15 12514:23 12525:18 12539:1 12545:13,14,16</p>	<p>12546:7 cars 12497:2 case 12423:8 12424:1 12429:18 12430:2,3 12436:21 12439:12 12441:22 12452:12 12465:17 12501:6 12503:12 12506:7 12520:18 12521:10 12527:13 cases 12536:15 caught 12458:21 12462:6 cause 12420:21 12448:9 12458:14 12468:24 12521:24 caused 12523:1 causes 12522:3 caution 12435:14,20 caution's 12429:14 certain 12418:11 12459:21 12482:5 certainly 12421:5 12428:24 12429:5 12454:19 12465:17 12524:21 12537:13 certificates 12535:15 Chair 12416:13 12417:2 12420:5,11 12420:16,25 12421:13,14 12422:22 12423:13 12424:8,12,22 12426:19,22,24 12427:13 12429:13 12431:1 12437:8,10 12447:9 12450:7,21 12450:25 12453:3,3,5 12454:13 12456:1 12457:2,18 12458:21 12459:13,14 12461:13 12471:4 12473:13,14,16,19 12477:21 12479:6,11 12489:21 12490:17 12490:20 12494:23 12495:4 12497:14 12502:3 12511:10 12512:25 12513:3,17 12513:18,22 12515:22 12516:10 12516:17 12517:21 12521:17,23 12528:15 chamber 12514:8,21 chambers 12488:16 chance 12441:1 12443:16 12480:21 12481:3 12484:6 12498:8 change 12424:14,25 12425:3,15 12426:1 12445:15,23 12460:17 changed 12438:20 12446:7 12480:1</p>	<p>12485:24 12504:18 12542:3,10 changes 12442:22 12445:14,19 charge 12418:2,5 charged 12486:15 12542:15 check 12434:13 12440:21 12441:1 12471:24 12498:4 12504:1 12506:20 12507:7 12519:18 12534:5 checked 12457:19 12514:7 chiefly 12418:22 choose 12487:20 chopped 12498:22 chopping 12498:19 12501:16 chose 12543:4,12 chosen 12426:4 circulated 12450:4,8,11 12451:1 circumstance 12445:15 circumstances 12431:16 12446:3 12471:21,23 12530:7 clarify 12456:1 12479:2 12530:10 clarity 12437:21 clear 12437:22 12442:25 12443:4 12452:11,12 12455:5 12457:23 12458:20 12464:6,19 12474:19 12475:8 12479:10 12480:6,13 12491:22 12509:15 12513:18 12519:25 12521:7 12526:9 12531:6 clearly 12428:17 12431:2 12440:5 12441:14 12479:11 12538:20 client 12480:8 clients 12427:14 12458:5 client's 12438:6 12480:7 client's 12509:9,23 12510:20 clinically 12427:18 close 12437:17 12497:3 12498:18 colleague 12480:9 12515:2 12522:6 colleagues 12436:4,12 12436:25 12503:8 12519:1 Colonel 12442:4 12475:17 12484:20 12484:24 12487:11 12487:11,15,18 12488:1,6 12505:20 12507:12,19,24</p>	<p>12508:2,5,13,16,22 12509:17 12510:5 12543:20,20 colours 12478:8 come 12418:11,21 12425:24 12442:2 12443:6 12454:7 12459:22 12486:5 12488:18 12514:1 comes 12471:8 12499:17 12505:25 12514:9 coming 12452:6 12500:12 command 12417:21 12438:1 12445:20,22 12486:11,25 12487:2 12487:14 12521:9 12523:16 commander 12417:22 12418:2 12433:5 12441:12,14 12442:2 12442:11,18 12443:7 12443:8 12444:10,10 12445:18 12520:15 12521:1 12523:15 12529:3,16,17 12531:2 commanders 12432:17 12432:24 12433:5,10 12433:12,12,13,25 12434:10,20 12435:5 12436:6 12438:24 12439:20,21,23,24 12441:3,13,21,21 12442:7,7,13,20,23 12444:11 12445:7 12446:4 12521:7 12527:3,4,19,19,23 12528:7,9,12 12529:9 comment 12441:17 12449:9 12468:9 12470:11 12475:10 12475:25 12476:1 12477:7 12480:20,22 12494:4 12499:7,13 12499:13,15 12508:16 comments 12424:10 12456:14 Commissioner 12431:22 12432:2 12433:16 12471:4 12477:11 12481:22 12482:4 12494:25 12514:10,15 12516:3 12517:25 12519:3,10 12520:22,23 12523:13,14,17,19,24 12525:10 12530:20 12530:22 12531:1,4 commissioners 12416:6 12418:22 12431:8 12432:12 12449:11 Commission's 12453:11 12454:1</p>
---	--	---	---	--

<p>12479:9 Commission's 12426:1 12426:5 commitment 12455:6 committed 12416:19 COMMISSIONER 12482:1 common 12448:9 12468:24 12521:24 12522:3 communicating 12433:19 communication 12440:23 12444:9 compare 12513:8 compilation 12484:17 compiled 12481:21 12487:4 12529:2 compiler 12487:10 compiling 12487:20 12542:25 complain 12516:25 complaining 12517:2 complaint 12516:15,20 complete 12417:1 12419:5 12420:3 12423:23 12454:3 12541:6 completed 12453:17 completely 12529:17 completing 12453:18 completion 12428:22 comprised 12425:21 concentrate 12464:8 12474:3 concern 12448:22 concerned 12428:8,8 12540:19 conclude 12419:24 conduct 12422:5 confess 12437:2 confidence 12517:13 confine 12474:5 confirm 12465:3 12490:9 confirmation 12465:23 12466:1 confirming 12421:21 conflict 12468:22 12473:12 12479:20 12480:7 12521:12 12522:2,16 conflicting 12479:15 conflicts 12524:10 confront 12425:10 12468:6 confused 12463:23 confusing 12467:3 12468:13 12502:4 12529:16 confusion 12464:11 12525:20 connected 12484:24 connotes 12429:17 consensus 12423:20 12424:14</p>	<p>consent 12422:9 consequences 12483:9 consider 12418:14,16 12428:13,16,25 12429:2 12431:12 12540:22 consideration 12429:7 12430:16 considered 12429:5 12430:10 consistent 12422:7 12506:9 12520:8 consistently 12467:2 12480:10 constable 12460:6,10 12460:12 12461:5,7,9 12462:16 12469:24 12470:12,14,24 12471:5,8,18 12490:13,23 12491:1 12491:7,18,21 12492:3,4,8,9,12 12494:7 12496:13,22 12496:23 constables 12492:12 Constitutional 12425:19 constructive 12416:16 contain 12456:20 contained 12454:21 12455:21 12495:1 12497:15 12528:13 12538:10 contains 12454:19 12459:20 CONTD 12494:6 12515:9 contemplated 12422:7 contending 12521:25 content 12504:12 12516:7 12538:7 contention 12443:13 contents 12536:14 12541:15 context 12427:25 continue 12416:9 12510:22 continues 12486:13 continuing 12429:7 contrary 12521:1 contributed 12543:17 12544:6 contributions 12430:23 convey 12431:6 12440:24 cooperate 12530:19 cooperating 12416:19 cooperation 12455:7 cooperative 12423:14 copies 12420:5,8,16 12452:14,15,16 12457:4 12495:7 copy 12420:19 12421:1 12421:6 12490:5 12495:1 12504:6 12539:13</p>	<p>corner 12457:16 corrected 12530:6 correction 12431:20 correctly 12458:13,16 12471:14 12491:4 12516:21 12518:2 cost 12425:2 couldn't 12473:25 12517:4 councillor 12525:25 12526:12 counsel 12471:1 12476:22 12480:2 12490:1 12502:9,9 12522:20 count 12440:14 12448:17 couple 12502:11 12533:1 course 12422:2 12424:2 12430:11 12454:17 12456:23 12457:22 12458:3,8 12462:13 12473:2,16 12480:17 12483:5 12494:21 12499:4,18 12500:8 12506:8 Court 12425:19 cover 12436:1 covered 12436:1,10 12447:19 12448:25 co-operate 12426:12 criminally 12521:11 crisis 12531:24 crisply 12437:3 critical 12420:3 criticising 12473:14 criticism 12456:8 12473:9 12540:24 cross 12422:5,13 12425:10 12432:8,9 12457:9 12464:16 12474:3 12502:9 12525:19 12546:9 crossed 12486:2 cross-examination 12422:8,20,21 12425:13 12427:11 12427:22 12431:19 12435:16 12438:3 12453:25 12456:24 12457:6 12479:17 12494:6 12497:12 12502:4 12503:21 12510:23 12515:9 12516:12 12545:3 12546:23 cross-examine 12422:12,15,18 12427:9,12,16,23 12428:6 12457:19 12459:17 12516:4 cross-examined 12422:2 cross-examining 12457:7 12516:2</p>	<p>crowd 12521:3 12528:11 crucial 12439:12 crystal 12430:3 CS 12475:2,4,6,14 12479:14 12486:12 12496:4,4,20,20 12497:5,7 12500:14 12500:16,24,25 12501:2 CST 12460:5 culpability 12523:4 current 12418:23 12419:3 12502:3 currently 12416:12,15 12417:6,21 cut 12418:18</p> <hr/> <p style="text-align: center;">D</p> <p>dangerous 12448:5 12474:25 12486:15 12542:14 date 12419:1 12426:9 12535:9 dated 12449:16 12487:5 12503:19,24 12533:12,15,16 12534:8 dates 12535:7,10,16,25 day 12437:10 12440:20 12444:8 12445:1 12450:3 12456:5 12473:18 12507:4 12509:10 12515:13 12519:21 12521:25 12522:13 12523:15 12526:11 12527:2 12530:12 deadline 12425:3 12426:18 deal 12452:7 12455:24 12455:24 12462:23 12463:18 12466:12 12489:11,12,13 12498:8 12506:3 12514:17 12518:10 12524:3 12526:13 12531:21,24 12545:4 dealing 12432:16 12438:2,12,13,16,22 12458:12,12 12498:1 12502:16 12521:2 12524:14 12528:11 12528:13 12539:10 12546:21 deals 12422:22 12480:7 12504:2 dealt 12438:3 12447:11 12478:6 12524:16 12529:20,20 12530:1 12537:15 death 12521:20 12542:18 deaths 12486:16,17 debate 12469:4 12501:5 12537:7</p>	<p>debated 12446:24 debrief 12531:15 debriefing 12525:12,21 12525:22,23,24,24 12526:5,7,8,9,13,22 12526:23,24 12527:7 12527:18,22 12528:1 12528:12 12529:2,8 12529:23,24,24 12530:5,9,11,12,18 12531:10 12532:1 December 12503:20,24 decide 12430:7 12446:1 12446:12 12459:16 12459:18 12478:24 12480:17 12488:4,6 decided 12429:18 12529:22,24 decides 12545:19 deciding 12448:22 decision 12425:24 12430:6 12433:6 12435:3 12441:10,15 12442:11 12445:25 12448:15,16,20 12530:4,8,11,17,25 12531:5,9 12532:7 decisive 12416:24 12424:14,25 degree 12503:10,13 delay 12419:17 delayed 12416:7 12488:17 delays 12426:15 delegate 12441:12 12442:13,17 delegated 12444:10 deliberated 12521:5 deliver 12479:5 demand 12440:10 denial 12476:1 12480:16 12503:4 denied 12475:20,21 12478:6 12487:14 12489:2 12500:10 12522:15 deny 12473:12 12477:15 12501:13 12501:16 12538:15 denying 12480:10,16 depend 12419:14 dependent 12444:1 depends 12546:17 deponent 12498:3 12499:1 deponents 12500:9 deposed 12494:23 derivation 12453:4 derive 12453:19 describe 12460:10 12461:9 described 12480:8 12484:4 12489:18 describes 12490:1 description 12460:17 desirable 12421:5</p>
--	---	---	---	---

<p>despite 12529:24 detail 12421:22 12537:16 details 12524:3 determine 12445:8 12521:22 deterred 12540:7 development 12426:25 diaries 12462:12,14 12469:20 12474:12 12480:12 12503:16 diary 12462:19,20,21 12474:9,15 12475:24 12476:6 12477:10,20 12478:17,23 12481:7 12481:9 12482:15 12483:11 didn't 12422:9 12434:23 12435:20 12446:11 12459:22 12467:19,24,25 12471:9 12472:15 12478:13 12479:23 12482:8 12487:19 12488:17 12499:25 12501:3,6 12514:4 12517:22 12520:9 12522:1 12524:6,14 12527:7,21,25 12537:10,11 12540:19,22 12543:10,24 12545:15 die 12470:7 12512:19 12517:8,9 died 12542:16 difference 12506:14,18 differences 12475:16 different 12433:13,14 12436:16 12441:20 12458:12 12466:12 12475:25 12477:24 12478:7 12479:7,18 12484:18,18,21 12513:4,15 12529:18 difficult 12509:21 12538:17 difficulties 12430:4 12458:14 difficulty 12452:22 12456:17 12477:1 12494:22 12509:21 12524:13 Dioli 12507:12,19,24 12508:1,3,13,16,22 Dioli's 12507:17 direct 12536:22 directed 12424:3 12456:15 12485:2 direction 12438:21 12485:24 12504:18 12542:3,10 directly 12453:24 12535:13 12536:21 disagreed 12508:20 disagreement 12509:16</p>	<p>disappeared 12500:13 disarm 12481:18 12482:6,7 12483:3,5 12483:7 12496:16 12497:4 12504:23 12510:4,6,7,12,15 12539:22 disarmed 12475:2 12496:20 discharged 12520:14 12534:21 disclaimer 12457:18 disclosed 12454:14 12455:1 12541:7 disclosing 12455:8 discouraging 12486:10 12542:13 discretion 12431:8 12442:21,24 12443:9 discuss 12452:1 12458:22 discussed 12419:21 12531:2 12540:17 12542:24 discussion 12457:3 12459:2 12530:24 12543:2,2 discussions 12488:16 disperse 12478:5 12486:10 12496:4,16 12504:23 12510:10 12540:5 12542:12 dispersed 12496:18,19 disposed 12533:24 dispute 12517:20 disputing 12436:10 dissatisfaction 12509:4 distance 12434:4 12444:25 12445:6 12465:13 distances 12446:25 12447:5 distributed 12418:13 12420:5 divert 12438:25 docket 12528:2 dockets 12527:13 document 12459:6,20 12461:13 12480:2,4 12481:5,19 12482:25 12483:20,22 12484:6 12484:11,13,14,25 12485:3,10,15 12487:4 12489:14,17 12489:18,22 12490:6 12490:7,10 12493:7 12494:17 12495:14 12497:22 12504:11 12512:6 12513:4,11 12513:13,14 12515:1 12515:3,24,25 12516:13,16 12528:11,11,15,19 12529:1 12532:2 12538:11,14 12539:5 12543:12,17 12544:7</p>	<p>12544:9 documentary 12422:18 12457:14 documentation 12528:25 documents 12431:25 12449:19 12450:2 12451:23 12452:1,13 12455:8 12457:8 12490:1,12,22 12491:13 12495:11 12497:25 12514:15 12521:2 12526:4 12528:13 12532:2 doesn't 12436:17 12443:7 12446:25 12465:18 12472:12 12472:24 12473:17 12478:2,12,13,17 12482:16 12487:2 12488:1,3,7 12495:23 12496:1,7 12499:22 12499:22 12513:5 12536:16 doing 12456:6 don't 12421:4 12437:2 12438:7 12442:12,17 12447:3,12 12454:23 12454:23 12455:4 12458:18 12467:12 12470:14 12471:8,21 12476:10 12477:12 12478:10,24 12479:5 12480:11,14 12481:20 12483:11 12487:24 12490:2,3 12490:21 12493:2 12494:17 12495:9 12497:18 12499:16 12499:18,20 12501:4 12511:13,19,22,25 12514:22 12515:14 12515:15 12517:11 12522:20 12529:12 12529:15 12531:22 12532:11,24 12535:19 12537:4,17 12541:9 12543:25 12545:22 doubt 12456:16 downloaded 12450:25 draft 12430:13,14 12431:11 12487:9 drafted 12540:21,22 12543:12 drafting 12540:19 12543:17 12544:9 draw 12521:19 12535:18 12544:14 drive 12489:15,16 12495:15,17,20,23 due 12430:10 12454:17 12456:23 12458:8 12480:17 duly 12518:23</p>	<p style="text-align: center;">E</p> <p>earlier 12434:25 12457:23 12489:13 ease 12539:11 effect 12427:20 12505:1 12524:1 effort 12423:14 either 12436:14,19 12471:10 12525:21 elaborate 12482:4 elastic 12429:16 electronic 12419:8 12420:13 elegant 12513:2 elegantly 12490:1 elicit 12437:6 eliminate 12426:2 eliminated 12425:11 12428:12 email 12450:14,16,19 12450:25 emanated 12538:19 embark 12533:24 enable 12420:2 12423:16 12424:15 12424:25 12426:18 enabled 12416:25 enabling 12416:17 endangering 12485:23 ends 12418:24 12498:1 engage 12535:22 English 12421:8 enquire 12459:15 enquiries 12485:2 12535:17 enquiry 12535:12 ensure 12416:24 12423:3,8 12426:13 12431:2 ensuring 12422:1 enter 12434:14 entered 12481:20 12503:20 12507:15 12519:13 entering 12437:16 12485:21 12486:9 12542:4,11 entirely 12425:9 entitled 12428:7 12436:15,22 12468:19 entries 12453:10 12454:21,24 12455:21 12456:21 12457:25 12458:5 12473:21,22 entry 12454:19 12470:25 12471:20 12471:21 12472:4,7 12472:11 12473:16 12478:23 envisage 12443:7 envisaged 12429:10 12532:1 err 12429:14</p>	<p>escort 12434:3,3,6,9 12440:18 12441:10 12442:14 12446:12 12446:14 12448:16 12468:17 12469:3 12470:3 12497:1 12509:6,11 escorted 12438:18 12446:6,13 escorting 12432:18,25 12433:7 12434:11,21 12435:4 12438:23 12440:10,20 12441:15 12442:17 12443:1,2 12470:4,16 12474:24 12496:15 12509:18 essence 12477:14 establish 12460:13 12517:14 12541:15 12544:6 established 12467:5 12489:21 establishing 12543:16 evening 12472:9 12473:18,23 12527:12 event 12427:11 12483:10 12517:4 12530:9 12531:9 events 12416:23 12473:17 Eventually 12481:4 everybody 12470:17 12508:18,18,23 12537:4,13 evidence 12416:9 12417:3,4,5,9,18,19 12417:20,22,24 12418:1,5,8,8,10,12 12418:14,17 12419:1 12419:4,25 12420:17 12421:15,22,23,24,25 12422:3,3,19 12423:3 12423:5,6,7,11,12,18 12423:19 12425:9 12426:10,12 12427:7 12428:9 12430:10 12431:3,17 12443:23 12447:2 12450:14 12451:24 12457:15 12459:24 12462:14 12462:25 12467:15 12467:21,25 12469:3 12471:14 12474:10 12474:11 12475:20 12475:23 12476:4 12478:20 12484:17 12499:24 12501:9 12522:25 12524:18 12528:4 12535:12,22 12543:10,20 evidence-in-chief 12421:21 exactly 12438:4,8,10 12452:1 12453:9</p>
--	---	---	--	--

<p>12465:25 12502:15 12502:21 12505:17 12509:22 12510:16 12522:22 12525:3 12533:9 12534:2,9 examination 12422:6 12425:11 12432:9,10 12457:10 12464:17 12546:10 examine 12422:14 examiner 12474:4 examining 12502:10 12525:20 example 12422:16 12427:13,16 12429:17 12457:12 excellent 12429:4 executed 12444:13 Executive 12424:5 exercise 12442:21 exercising 12443:9 exhibit 12433:22,22 12444:20 12445:5 12449:14 12454:17 12459:11 12460:17 12462:15,18,19,20 12469:22 12474:7 12481:21,23 12483:25 12484:2,5 12489:13 12491:25 12492:11,23 12497:11 12498:17 12501:14 12503:20 12503:24 12507:13 12507:16 12509:24 12511:8,8 12513:22 12513:22 12514:12 12515:1 12519:13 12527:13 12536:4,9 12536:16 12537:23 12537:24 12538:2 12540:19 12541:14 12541:15,20 12544:10,14 exhibited 12503:11 expect 12423:25 12433:12 12441:2,21 12441:22 12454:23 12455:4,5 expected 12441:24 12445:14 12478:22 12501:1 expecting 12439:23 12445:10 experience 12526:3,14 experienced 12441:9 expert 12418:8 explain 12438:8 12442:4 12453:4 12454:7 12478:23 12520:19 explained 12462:13 12474:9 12484:17 explaining 12467:11 explanation 12454:16 12454:22 12455:3,23</p>	<p>12456:22 12458:3,7 12473:14 12517:7 expression 12523:1 12527:8 extend 12418:25 12426:17 extension 12419:7 extent 12418:19 12428:2 12524:7 extra 12489:12 extract 12460:11,11 12461:24 12462:16 12462:18,19,21 extracted 12468:8 extracts 12480:19</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>facie 12429:4 12455:3 12456:21 12459:21 facilities 12443:24 fact 12417:16 12419:3 12422:22 12426:3 12452:11 12455:2 12458:18 12465:24 12466:18 12473:10 12478:4,19 12488:6 12500:25 12502:10 12516:1 12529:10,25 12541:2,6 12542:25 12543:11 facts 12467:5 12522:5 12530:3 factual 12525:23 12526:6,22,23 12527:7 12538:18 fair 12438:21 12452:5 12502:12 12511:2 12514:5 12524:22 12531:20 12534:4 fairly 12419:20 fairness 12425:17,20 12429:7 12464:5 far 12423:19 12436:24 12439:11 12446:20 12453:14,21 12455:16 12467:20 12467:24 12480:25 12506:10 12507:2 12528:4 12529:19 12543:21 fashion 12428:5 fault 12514:22 12533:17,20 12541:8 12543:14 favour 12479:4 favourably 12421:10 female 12471:5 FFF9 12538:3 field 12497:6 Fifthly 12423:10 fight 12470:6 file 12497:18 filed 12417:13 12527:13 12529:3,10 12532:22 final 12430:6</p>	<p>finally 12426:15 12462:6 find 12437:20 12497:19 fine 12511:6 finish 12518:19 12544:20 12546:23 finished 12546:9 firearm 12431:23 12534:21 fired 12482:13 12486:12 12487:1 12497:7 12500:24,24 12501:2 12505:1 12519:21 12520:4,14 12522:1,14 12523:16 12525:7 12537:1,6,6 12537:9 12540:11 12542:20 firing 12504:3,20 12520:25 12542:16 firmly 12424:24 first 12421:20 12424:4 12425:6 12431:4 12441:11 12450:7 12451:1 12459:5,7 12474:10 12493:19 12493:21 12494:20 12496:10 12502:5,15 12517:13 12521:20 12536:21 12542:8 firstly 12467:1 12521:18 Fischer 12452:24 12453:2,3 12454:13 12456:1,13 five 12425:18 12476:17 12476:18 12529:4 flight 12416:5 flow 12540:25 focus 12440:6,8 12447:15 12449:2 12468:4 12469:23 12541:18 follow 12421:17,19 12429:23 12430:9 12444:6 12445:11,25 12470:3 12478:17 12485:20 12504:8,17 12508:15,25 12509:1 12510:8,14 followed 12426:9 12438:19 12475:3,7,8 12493:21 following 12423:1 12427:17,20 12438:15,19 12440:7 12444:18 12445:2 12449:3 12462:11 12498:17 12504:17 follows 12421:20 12429:24 12439:8 12496:14,25 foot 12445:2,12 12449:3 12492:23 12494:19 footage 12448:2,3</p>	<p>12463:19 12464:25 force 12443:5,6,9 12462:15 12519:22 12520:5 foreigners 12486:2 forgive 12534:3 forgotten 12546:6 form 12433:23,25 12535:6 formal 12424:2 formation 12442:15,15 forming 12440:7 forth 12546:19,22 forward 12416:24 12419:23 12420:2 12501:11 12510:1 found 12451:10 12479:4 12539:15 four 12417:16 12493:21 12505:2 fourth 12422:22 12423:1 12493:10 fresh 12520:12 Fridays 12546:6 friend 12435:14,21,24 12436:9 12451:5 12457:7 12458:21 12459:15 12477:22 12478:7 12479:13 12497:14,15 12502:5 12513:4,18 12515:25 12518:15 12521:18 friend's 12479:8 front 12437:13 12453:5 12453:19 12470:6 12472:14 12485:15 12490:5 12494:18 fulfil 12424:16 12425:1 12426:19 fulfils 12426:14 full 12417:12 12455:7 fuller 12527:15 fully 12426:12 12436:3 12530:19 function 12416:25 12420:3 funding 12425:25 funnier 12500:22 further 12418:15,16 12421:18 12425:5 12429:16,20 12430:1 12430:16 12439:4 12447:6 12452:22 12487:24 12525:11 12528:3 12543:25 12545:25 12546:2 Furthermore 12442:10</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>gas 12475:2,5,6,14 12479:14 gather 12518:19 generally 12481:4 General's 12522:14 gentleman 12541:10 getting 12463:23</p>	<p>12484:20 12525:22 GGG16 12509:24 GGG25 12528:15,19 gist 12428:13 12429:1 give 12418:14,17 12419:15 12421:9,21 12428:9,25 12429:2 12430:13,16 12434:25 12436:6 12445:16,22 12447:13 12448:4 12449:14 12451:24 12451:25 12454:17 12454:23,24 12455:4 12455:7 12456:23 12458:7 12461:10 12467:19,24,25 12470:20 12471:9 12472:6,15 12475:13 12478:13 12480:21 12481:3 12483:24 12491:15 12498:8 12500:1,20 12501:6,8 12502:18 12506:13 12507:1 12509:12 12513:1 12520:8 12523:22 12535:16 12537:12 12540:19 12543:1,8,11,24 12544:12 12545:21 12545:21 given 12419:4 12420:16,20 12426:15 12441:1 12445:20 12452:14 12454:10 12455:19 12456:2 12458:1 12471:11,12 12472:12,14,16,17 12473:3 12478:16 12481:24 12484:1 12487:14 12489:3 12490:19 12495:6 12496:3,15 12499:24 12499:25 12500:1,5 12500:25 12502:7,17 12502:19,19 12504:20 12506:17 12511:22 12512:3 12521:9,19 12524:10 12535:7 12537:8 12542:25 gives 12423:5 12538:14 giving 12421:23 12423:15 12470:14 12470:18,19 12472:5 12473:1,15 12478:3 12505:21,23 12506:6 12506:16,21 12517:7 go 12435:8 12436:6,7 12438:21,25 12441:1 12458:7 12469:3,25 12471:24 12474:17 12474:18 12476:7 12480:16 12481:12 12481:16 12485:9</p>
--	--	--	---	--

12494:12 12496:24 12497:18 12508:8 12510:4,12,16 12512:5,13 12515:11 12518:10 12520:22 12524:7 12528:24 12539:8 12540:15 12544:17 12545:9 goes 12431:4 12476:15 12486:16 12497:14 12510:2,10 12528:4 going 12416:10 12418:6 12420:2 12432:3,4 12434:8 12435:3,11 12438:5 12440:14,15 12442:14,16 12450:2 12451:12,20,24,25,25 12452:13 12454:6 12457:6 12458:14 12459:6,7,15 12462:6 12464:20 12468:15 12468:18 12470:23 12480:4,16 12485:16 12489:10 12494:1,3 12496:2 12498:1,23 12502:11 12504:11 12508:17 12509:5 12510:15 12511:3 12512:19 12514:17 12514:18 12515:12 12517:8,9,12 12518:19 12523:10 12530:13 12532:6,13 12539:4,5 12540:6 12542:6 12545:3,16 good 12432:12,13 12439:7 12446:25 12447:5 12472:9 12498:3 12545:20 govern 12425:7 grabbed 12505:4 grammar 12498:3 grateful 12428:25 12539:14 greater 12423:18 greatest 12419:15 greet 12518:22 grenade 12475:3,7,8 12479:12,24 12482:14 12486:13 12520:4,25 12522:1 12522:14 12523:2,16 12525:8 12542:12 grenades 12478:3,4 12479:23 12486:10 12504:22,24 12510:9 12540:4,20 ground 12418:3,4,6 12423:15 12435:15 12436:1,10 12441:3 12540:24 group 12470:5,6 12472:14 12475:1 12485:19 12486:14 12497:8 12542:14	H	12500:1,4,8 12501:5 12502:20 12505:21 12505:22 12506:5,6 12506:15,16,24 12507:1 12518:7 12523:20 12537:7,8,9 12544:19 hearing 12417:21 12431:17 12444:2 12500:20 hearsay 12506:9,24 12516:22 held 12416:11 12419:13 12541:1 help 12436:17 12494:19 12496:1 12508:18 12526:3,13 helpful 12420:25 12499:6 helps 12474:2 12480:11 12482:25 12483:11 Hemraj 12431:20,22 12433:16 12455:11 12462:11 12471:4 12481:22 12482:1 12494:25 12506:4 12514:10 he'd 12447:4 12487:13 he'll 12421:10 12455:24 12464:22 he's 12436:22 12440:2 12446:25 12447:5 12455:25 12459:15 12459:20 12460:6 12461:7,25 12464:22 12465:17 12466:1 12468:19 12476:12 12487:21 12488:3 12513:6,12,14 12514:7 12521:21 12534:5 12537:3,5,13 12540:16 12544:3 HHH13 12519:13 12527:13 HHH15.1 12503:24 HHH16.1 12433:22 12444:21 HHH16.2 12433:22 12444:21 HHH22 12489:13 HHH23 12514:12 HHH24 12459:11 12462:16 12469:22 12469:23 HHH25 12460:25 12461:1 12462:18 12476:6 HHH26 12461:24 12462:19 12481:8 HHH27 12462:20 12474:7 HHH28 12484:4,5 HHH29 12491:21 12492:1,23 12494:8 12502:16 HHH30 12492:7	12493:9 12496:13 12502:5 HHH31 12492:8,12 12493:13 12496:23 12497:14 12498:17 12501:14 HHH32 12507:22 HH3 12509:15 hide 12486:24 highlight 12425:6 history 12419:19 hit 12535:18 honour 12455:6 honourable 12521:7 honoured 12455:17 hope 12418:19 12422:23 12437:6 12449:10 12502:10 12515:2 12546:5 hopefully 12477:2 Human 12424:23 12425:14,23 12426:7 12426:16 12452:25 12453:6,12,14,16,20 12453:22,25 12455:13 12456:2 12457:24 humbleness 12466:9	12539:10 12541:18 incidents 12473:24 12485:22,25 include 12540:23 included 12504:10 including 12428:23 12444:11 12539:19 inclusiveness 12425:17 incomplete 12497:14 incorporate 12430:14 incorporating 12487:16 incorrect 12431:24 independently 12534:24 indicate 12422:15,17 12422:18,20 12424:20 12433:9 12434:16 12440:17 12441:19 12446:23 12449:19 12465:11 12482:16 12503:16 12521:6 12523:21 12527:2 12532:19 indicated 12424:24 12434:13 12445:21 12475:15 12485:25 12488:18 12503:9 12519:21 12526:4 12540:11 indicates 12445:5 12471:23 12487:10 indicating 12458:17 12472:24 indication 12442:25 inference 12510:13 inform 12434:9 12435:9 12440:9,15 12441:14 12523:14 12523:17 12524:24 12525:3,7 12534:20 12536:25 informal 12434:15 12435:9 12436:7,7 12437:17 12485:21 12485:25 12504:19 12504:21 12540:6 informant 12538:24 information 12440:24 12461:11 12484:20 12524:4 12538:24 informed 12523:19 12524:1 12525:9,10 12535:2 initially 12454:11,11 12455:2 12456:18 12516:1,11 injured 12417:10,17 12470:8 12521:15 12522:5,18 12539:25 injuring 12539:23 injury 12546:18 innocent 12485:23 12486:2,4 inquiry 12533:25 inquisitorial 12425:8
	I			
		idea 12451:22 identified 12418:15 12425:13 12458:16 identify 12418:16 illustrate 12516:25 imagine 12428:4 immediately 12451:1 12455:14 12465:5,10 12465:19 12504:23 12519:4 impact 12425:16 implementation 12418:9 implemented 12456:17 implication 12543:7 implicitly 12471:11 importance 12429:6 important 12416:25 12423:16 12425:18 12426:3,14,19 12441:11 12452:6 12482:15 12483:10 impression 12536:13 improvements 12428:16 inability 12534:3 inaccuracy 12536:15 inaudible 12426:20 12447:12 12460:22 12461:3,8,16,21 12490:11,12,16 12512:23 12513:24 12535:24 12538:16 12541:22 incident 12519:2 12520:12 12529:13		

12426:13 inside 12463:2,14 12497:7 inspect 12453:12 inspection 12453:13 instance 12427:6,22 instruct 12433:24 12434:20 12442:12 12442:13,21 12467:16 12477:9 instructed 12452:10 12470:3,5 12472:11 12472:13 12476:21 12477:6 12497:5 12504:16 instructing 12513:9 instructions 12421:9 12445:16 12467:20 12467:25 12468:16 12468:18,24 12469:5 12469:10 12477:15 12478:13,14 12485:19 12505:9 12509:4 12535:23 12540:20 12544:23 12545:1 12546:2 intended 12416:3 12417:13 12486:10 12510:6 12542:13 intends 12422:19 intention 12431:5 12486:4 12512:22 interest 12419:16 12444:5 interested 12422:4,24 12423:2 12427:5,8 12506:23 12535:14 12535:25 interesting 12478:19 12478:20 interests 12425:22 interject 12422:6 interpret 12421:11 12443:16,20 12444:3 interpretation 12422:10 interpreted 12421:5,6 12443:24 interpreter 12421:11 12443:15,19 12451:11 interrupt 12417:8 12428:1 12483:4 interview 12534:25 introduced 12514:12 12514:16 12516:1,11 introduction 12515:23 12515:23 introductory 12427:1 12463:25 investigating 12532:17 investigation 12533:3 12534:1,18 12535:4 investigators 12417:20 invite 12449:9 12468:9 invited 12418:16	inviting 12436:11 involve 12499:5 involved 12425:24 12486:1 12527:19 12529:9 12534:17 12536:8 involves 12423:15,17 12510:13 12543:2 in-chief 12478:6 IPID 12495:3,7,11,17 12495:19,21,22 12497:18,25 12532:17,19,23 12533:1,3,23,25 12534:12,17,20,23,25 12535:4,8,12 isn't 12443:10 12460:11 12461:25 12465:19 12466:3,22 12472:19 12491:22 12518:8 12532:13 12542:23 issue 12425:12 12437:20 12445:2 12458:9,22 12465:9 12469:4 12504:2 12506:20 12509:1,11 12520:22 12522:1 issued 12438:1,24 12444:25 12477:15 12486:11 12489:2 12505:11 issues 12440:22 12466:13 issuing 12468:5 I'd 12420:4 12454:16 12539:14 I'll 12439:12 12457:18 12461:9 12464:14 12514:15 12530:5 12541:18 12545:21 I'm 12417:8 12418:23 12420:18 12422:9 12424:1,7,17 12436:11,15,16,25 12437:19 12438:16 12438:22 12439:2,4 12441:7 12447:2 12456:22 12457:6 12458:25 12459:7 12461:6,10 12462:5 12463:10,21,23 12465:8 12466:8 12468:12 12471:20 12474:25 12475:7 12490:18,21 12491:3 12491:4 12494:3 12498:14 12500:12 12501:9 12512:7 12513:8 12514:13,20 12515:12 12517:5,5 12524:22 12525:14 12530:5 12533:24 12540:23,25 12544:1 12544:21 12545:3,3 I've 12420:10 12421:10	12439:15,25 12452:24 12462:5,11 12466:9,17 12470:9 12474:9 12477:9 12487:25 12489:7 12490:3,19 12492:24 12511:22 12514:14 12514:15 12520:7 12525:3 12531:17 12535:22 <hr/> J Ja 12463:13 12466:14 12473:2 12515:10 12531:12 jackpot 12535:18 January 12453:6 Jele 12525:19 job 12428:22 JOC 12445:18 Joseph 12491:8,18 12499:16 judgment 12425:20 12447:12 June 12453:9 junior 12443:8 Justice 12503:21 justified 12480:16 <hr/> K Kameshni 12450:20 Katlego 12491:18 12494:8 key 12417:25 12434:12 12471:17,18 12492:22 12493:15 killed 12463:1 12515:4 12521:14 12522:4,17 12539:25 killing 12521:15 12539:23 kilometres 12447:1 kind 12475:22 12487:9 12504:7 12524:19 12525:25 12526:16 12544:24 know 12419:9,11,12,12 12419:13 12421:4,14 12429:15,17 12432:7 12433:11 12436:24 12438:9 12441:7 12447:1 12448:14 12460:3 12468:20 12470:14 12471:3,21 12473:17 12477:22 12480:11 12483:10 12484:6,12 12487:19 12487:25 12488:1 12489:1 12490:21 12493:3 12495:7 12499:16,22 12503:15 12506:23 12507:23 12508:1 12511:20,22,25 12517:11 12518:9 12522:20 12523:21	12525:16 12527:11 12529:15 12532:12 12533:3,5,10 12534:12,14,16,20,22 12534:23 12535:19 12536:11 12537:4,10 12537:18 12538:16 12545:8 knowledge 12532:21 known 12418:25 knows 12452:15,15 12528:8 12535:3 12541:15 koppie 12432:19 12433:1,8 12440:11 12440:21 12441:11 12441:16 12444:19 12445:12 12446:1,17 12446:20 12468:18 12469:6 12474:25 12485:19,22,24 12486:5 12496:3 12504:16 12508:15 12508:25 12509:2,7 12509:12 12529:14 12539:22 12542:3,9 kraal 12539:17 Kuhn 12486:12 12487:1 12499:21 12500:3 12523:20 12537:8 <hr/> L L 12536:4,9,16 12540:19,21 12541:14,15,17,20 12542:25 12543:19 12544:10,14 lack 12521:19 12543:9 landed 12497:7 late 12416:3,7 12432:5 12447:15 12466:6 launching 12504:24 law 12429:18 lawyers 12506:24 Le 12424:11,12,17,18 12424:22 12429:6 leaders 12418:12 12419:1,25 12420:17 12421:25 12422:3,3 12423:3,6,7,18,20 12425:9 12426:10,12 12427:7 12430:10 12450:14 12535:12 12535:22 leading 12480:2 learned 12435:14,20,24 12436:4,9,11,25 12451:5 12457:7 12458:21 12459:15 12477:22 12478:7 12479:8,13 12497:13 12497:15 12502:4 12513:4,18 12515:2 12515:25 12518:15 12519:1 12521:18	12522:6 leave 12422:13 12425:12 12429:25 12446:1,11 12544:15 leaves 12429:25 led 12419:5 12425:8 12508:19 12509:3 left 12430:6 12485:22 12530:8 left-hand 12434:16 12449:17 legal 12416:14 12422:4 12456:4,4,12,13,15 length 12422:21 Lepaaku 12447:15,16 12449:2,5 12463:22 12464:2 12466:7,11 12466:16,20 12486:17 12521:13 let's 12437:6,21 12438:9 12447:5,19 12477:19 12480:5 12489:7 12514:23 12518:16 12530:10 12535:16 12539:7 Lieutenant 12431:23 12441:8,25 12444:7 12449:6 12463:18,19 12463:22 12464:9,12 12464:20 12465:1,5 12466:9,13 12478:12 12478:17 12479:25 12487:25 12509:9,15 12521:14,14 Lieutenant-Colonel 12441:22,23 12448:21 12461:25 12462:20 12487:10 12509:17 12539:20 Lieutenant-General 12474:11 light 12431:14 12503:1 12509:23 12543:9 limit 12419:6 limited 12516:13 line 12432:18,25 12433:7,21,24,25 12436:17 12437:17 12440:8 12441:10,16 12444:18 12445:10 12445:11 12446:1,21 12453:25 12468:6,12 12468:16,25 12469:11 12472:1 12476:4,18 12483:6,8 12492:24 12493:3,4 12493:11,18 12494:19,24 12495:2 12500:3 12512:2,6,13 12512:14,15,18 12513:5 12527:20 lines 12476:17,18 12493:22 link 12521:19 list 12418:13 12504:10 12504:11
---	---	--	--	---

<p>listed 12418:12,17 listen 12515:19 lives 12485:23 12486:3 LM 12449:15 12459:8 12469:24 loath 12544:21 long 12425:17 12432:8 12435:17 12464:19 12503:25 12522:25 longer 12419:18 Lonmin 12418:10 12480:3 12481:21 12483:21 12484:4 look 12451:12 12475:4 12479:22 12484:23 12507:2 12534:2 12541:24 looked 12451:14,15,17 looks 12480:15 12484:23 12491:1,7 12491:22 12498:21 looming 12425:3 looting 12485:23 12486:1 lose 12452:4 12544:18 lot 12443:25 12508:18 12514:1 12524:12 loudhailers 12440:23 lunch 12488:12 L-E-Y-A 12491:24</p> <hr/> <p style="text-align: center;">M</p> <p>machine 12512:24 Madlanga 12435:16 12436:1,5,10,14 12439:11 12447:10 12497:12 12503:21 12520:17 magnitude 12442:6 Magume 12492:9 12496:23 Mahalenle 12462:4,7 12462:21 12474:15 MAHLANGU 12443:20 12444:4 12490:14,17 main 12421:24 Major 12421:19 12486:11 12487:20 majority 12509:17 making 12472:9 12474:2 12479:7 12498:16 12502:7 12504:8 12515:8 man 12537:9 manage 12515:1 management 12521:3 12528:12 manner 12428:11 12429:10 12434:4,24 12452:10 map 12447:3 march 12448:11,16 marchers 12434:1,9,11 12434:14,21 12435:11 12440:7,8</p>	<p>12440:17 12444:19 12445:1,2,11 12463:2 12465:2 12479:15 12522:17 marching 12438:14 12448:23 12477:16 Marikana 12480:4 12483:21 12484:5 12524:18 mark 12461:19 12489:7,12 12491:16 12491:18,20 marked 12462:11 12474:7 12489:14 12490:2,3 mast 12478:9 material 12540:23 Mathunjwa 12516:4,12 Mativa 12449:16 12459:8,11 12460:4 12460:10,12 12462:16 12469:24 12470:12 12471:5 matter 12419:15,19 12429:13 12431:4 12436:2 12455:3,22 12458:7 12480:17 12488:3 12495:23 12530:1,8 12533:22 12535:19 12537:13 12537:15 12543:13 matters 12422:17 12435:18 12478:23 12488:6,17 12520:19 12534:1 12535:3 12544:19 matter's 12428:2 Ma-ha 12462:8 Mbombo 12477:12 12524:23 12525:1 McIntosh 12539:20 mean 12428:1 12485:10 12499:19 12516:16,21 12523:5 12524:9 12527:6 12533:17 meaning 12429:16 means 12429:19 12455:8 12516:5 meant 12420:13 12451:11 measures 12439:1 12443:1 12540:7 media 12419:8 12420:13,14,15,15 meet 12528:8 meeting 12416:11,14 12416:16 12423:21 12487:4 12504:1 12528:7 12530:2 12536:23 member 12441:9 12469:25 12477:9 12497:7 12499:17 12500:20 12505:2 12512:19</p>	<p>members 12420:6 12421:14 12426:24 12429:15 12433:6,13 12435:13 12438:24 12439:19,20,21,24 12441:14 12442:7,12 12442:13,20,22,23 12444:11 12446:13 12448:20 12453:8 12456:5 12462:14 12463:7 12467:2,16 12472:1 12474:12 12476:22 12477:6 12485:20 12486:15 12486:24 12501:1,22 12501:24 12509:6,18 12517:8 12519:21 12520:3,10,13 12523:15 12526:15 12526:18,22,23,24,24 12527:2,4,5,23 12532:22 12533:2 12537:1 12540:11 12542:15,15,20 memory 12520:12 men 12446:13 mention 12504:4 12543:12 mentioned 12432:6 12458:4 Merafe 12448:21 12461:23 12462:20 12475:17 12481:7,8 12481:17 12482:6 12483:2 12509:17,17 12510:5 Merafe's 12482:15 merely 12425:11 met 12419:21 12424:13 12424:24 12527:3 metres 12510:3 Mguye 12491:1,2 12492:3,4,5 12496:22 Mguye's 12496:13 microphone 12426:20 12460:22 12461:2,8 12461:16,21 12490:11,14 12512:23 12513:24 12535:24 12541:22 midst 12417:6 mind 12439:8 12476:13 12480:1 12507:8 mine 12421:7 12480:3 12483:20 12484:4 12511:19,21 12512:9 miners 12417:10,10 12432:25 12433:7 12440:20,24 12441:10,16 12445:25 12449:3 12474:24 12477:15 12498:24 12509:6,12 mineworkers 12497:4 12498:19 12501:15 minus 12535:8</p>	<p>minutes 12502:12 12542:24 missing 12492:24 12493:3,3 12494:24 misunderstood 12424:2 mitigate 12426:5 Mkhwanazi 12440:22 moment 12416:22 12417:3 12425:4,19 12437:7 12461:17 12469:21 12517:13 12518:16 12535:20 12541:8,11 Monday 12474:17,18 12476:8 12481:13 12539:21 12540:7 Monene 12463:1 12464:3 12466:7,11 12466:16,19 12486:17 12521:13 money 12514:1 monitor 12504:17 monitoring 12504:17 morning 12416:3,4 12432:12,13 12435:14,21 12450:9 12451:1 12503:9 morrow 12518:23 12547:1 mountain 12440:15 12509:19 12510:4,7 12510:12,14 mounted 12440:23 12441:2 mouth 12531:23 move 12420:5 12426:5 12447:25 12464:14 12467:2 12472:22 12476:5,19 12477:19 12483:16,17 12499:10 12501:11 12504:15 12511:3 12515:10 12518:11 12524:23 12536:2 12541:13 moved 12440:14 moves 12464:21 moving 12447:18 12510:1 Mpofu 12516:1,3 Mpofu's 12427:14 mustn't 12441:12 12444:9 mutual 12483:13 M-G-U-Y-E 12491:3 12492:8</p> <hr/> <p style="text-align: center;">N</p> <p>Naidoo 12531:3 nail 12478:8 name 12457:15 12484:25 12491:4,22 12504:5 National 12424:5 12516:2 12517:25</p>	<p>12519:3,10 12520:21 12520:23 12523:13 12523:14,17,19,24 12525:10 12530:20 near 12435:8 12441:23 12453:18 12469:10 12500:3 nearby 12435:11 12438:25 necessarily 12500:4,8 necessary 12424:1 12425:4 12435:25 12445:20 12447:2 12461:10 12480:14 12510:13 12533:23 need 12416:23 12432:7 12447:4 12468:11 12472:3 12477:21 12501:8 12503:7 12544:22 needed 12425:15,16 needs 12416:18 12421:6 12424:15 12478:8 negotiating 12504:15 never 12436:14 12446:7 12470:22 12476:13 12499:25 12500:1 12501:5,11 new 12426:12 12438:1 12447:18 12537:16 Ngalwana 12426:22 12428:19 12429:12 12430:18 12431:11 12435:13 12436:9,21 12437:9,14 12439:3 12447:9 12449:14,18 12449:21,24 12450:6 12451:3,4 12452:1,15 12454:15 12455:17 12455:24 12456:22 12457:2 12458:9,20 12459:14 12460:9 12473:13 12477:21 12479:1,6 12494:21 12495:3,9 12497:13 12502:3,13 12512:25 12513:3,10,17 12515:22 12516:17 12517:2,20,24 12518:4,8 12521:17 NI 12459:9 nice 12489:25 NIU 12449:16 12469:25 Nkosana 12492:3 NM 12457:12 12460:20 nominate 12422:4 non 12417:9 non-lethal 12443:5 non-press 12420:15 non-represented 12427:10 normally 12502:8 12546:7 note 12470:9</p>
--	---	---	---	---

<p>noted 12432:2 12439:15 12447:7 12497:17 12514:14 notes 12458:16 notice 12421:18 12427:21 12429:16 12429:20 12430:1 no-one 12517:24 Ntsebeza 12516:4,12 NUM 12417:4 number 12418:7,20 12440:2 12441:19 12449:12,14 12454:4 12454:17 12483:25 12484:2 12485:1 12489:4 12501:1 12512:6,8 12515:1 12531:21 12538:2 12541:19 numerous 12539:19 Nyala 12449:6,6,7 12463:2,3,7,14,15,20 12465:1,1,6,10,13,15 12465:15,18,24,25 12466:12,19,21,22 12467:16 12478:14 12478:15 12479:21 Nyalas 12434:7,10,18 12434:20 12435:4 12440:19 12466:16 12467:6,8,24 12470:5 12471:12 12472:12 12472:13,17 12473:1 12510:11 Nzuzza 12427:13</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>oath 12431:19 12447:23 12488:19 12514:23 object 12449:14,19 12457:6 12515:22 objecting 12449:20 objection 12429:21 12430:2,5,6,7 12436:18 12489:10 12516:3 12517:1 objections 12435:20 12474:5 12546:22 objective 12447:2 observation 12457:3 12507:6 observations 12506:25 observe 12432:23 12433:5 obvious 12428:9 obviously 12420:13 12447:1,18 12454:23 12455:23 12456:20 12458:15 12487:18 12498:23 12510:13 12546:17 occasion 12528:2 12537:14 occasions 12528:3 12537:5</p>	<p>occurred 12539:17 October 12418:24 12425:3 12426:18 officer 12442:1,3 12449:2,5 12471:6 12477:13 12486:12 12487:1 12505:5 12508:4 officers 12435:10 12445:1,9,21 12449:3 12449:10 12462:12 12462:14,15 12468:7 12471:25 12474:11 12477:25 12479:13 12503:8 12508:3 12509:11 12515:12 12522:4,12,13,17 12530:25 12539:19 12539:23,25 official 12445:15 12449:16 12487:8 12497:2,8 12534:21 officials 12536:25 Oh 12450:15 12462:8 12466:17 12490:18 12507:17 12518:1 12533:16 12539:14 OJ 12461:22 12481:7 okay 12433:21 12434:7 12452:17 12464:23 12473:7 12491:25 12492:21 12518:2 omission 12541:1 12543:1 12544:3 omitted 12417:16 once 12457:19 12467:23 ones 12454:10 12462:12 12499:19 12533:18 ongoing 12453:13 12454:3 onwards 12531:21 open 12436:25 12476:19 12497:6 opening 12537:20,22 12538:6,8,18,21 12540:22 operate 12429:7 operation 12418:9 12442:6,20 12443:25 12444:9,12 12529:13 12529:15 12531:19 operational 12418:1 12433:5 12441:12,13 12442:11,18 12443:6 12443:8 12444:10 12445:17 12520:15 12521:1 12523:15 operations 12417:25 12418:3 12441:20 12521:6 opportunity 12420:23 12451:23,25 12452:3 12452:16 12532:1 12538:12</p>	<p>opposite 12474:22 12527:22 oral 12418:14,17 12421:23 12423:12 order 12419:23 12422:16 12423:15 12424:15 12426:18 12443:4,6,7 12451:23 12452:21 12475:13 12475:14,21,22 12478:16 12481:23 12491:15 12492:15 12498:24 12502:6,7 12504:22 12505:11 12505:21,23 12521:1 12521:5,8 12529:4,25 ordered 12475:1 12479:14 orders 12478:3 order/instruction 12497:1 ordinary 12422:2 12431:16 12474:12 original 12495:12,14 12538:24 originally 12454:20,25 12465:24 originals 12457:11 12495:8 12535:13 ought 12439:1 outnumber 12510:8 outstanding 12453:15 12488:25 12498:12 overall 12417:20,22 12531:2 overlooking 12544:1 overpowered 12542:18 owned 12486:1 owner 12458:17 o'clock 12471:23 12472:5,8,8 12473:18 12474:1,18,21,22 12519:15 12527:12 12544:18 12545:7,9 12546:5,7,8,12 12547:1</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>page 12437:9 12457:16 12469:25 12472:5 12474:17,22 12476:7 12478:1 12480:4,5 12481:12,16 12483:22 12484:24 12485:2,9 12489:22 12492:23 12493:10 12493:17,19 12494:13,20 12496:24 12497:3,19 12502:5 12508:9,9 12512:5,8,9,10,11 12513:5,5 12515:11 12528:22,24 12535:5 12535:9 pages 12497:19 panga 12498:25</p>	<p>pangas 12470:7 12497:9 12498:20 12501:16 12505:3 papers 12500:13 par 12444:12 paragraph 12427:1,2,3 12427:19 12429:13 12430:15 12431:6 12476:7 12478:2 12481:17 12485:10 12485:11,16 12486:6 12486:14 12496:25 12497:16 12498:17 12501:14 12502:5 12504:1,7,13 12508:8 12508:9,12,14 12509:23,25 12511:23 12519:18 12519:19,19,20 12520:1,2,2,7 12521:5 12528:25 12529:1 12538:23 12539:4,6,8,9,9,12 paragraphs 12430:9 12485:18 12540:10 park 12510:21 12518:11,25 parked 12518:9 part 12422:5 12427:2 12439:12 12535:6 partial 12453:20 participant 12505:4 participants 12426:11 12497:9 12504:13,23 12504:24 12505:1 12543:23,24 participate 12425:18 12425:25 12426:4,4 12544:12 particular 12423:8 12425:12 12432:22 12438:6 12464:7 12495:25 12510:20 12535:11,14,25 12538:23 particularly 12431:14 12434:17 parties 12416:11,15,19 12418:13,15 12419:21,21 12422:5 12422:24 12423:5,14 12423:15 12424:10 12424:13,24 12425:10,18,22,24,25 12426:3,11 12428:15 12429:2 12430:21 12450:3 party 12422:12,15,16 12422:17 12423:2,4,6 12423:8 12424:20,21 12427:4,8,12,22,25 12428:4,6,6,10 12429:9 12541:2 pass 12504:21 passage 12437:13,19 12476:22 12486:18</p>	<p>12492:22 12493:15 12498:7,8 12522:25 12539:18 passages 12481:1 patently 12427:15 path 12486:11 12542:13 paths 12486:3 patient 12435:19 penultimate 12498:17 12501:14 people 12418:4,13,16 12427:17 12438:14 12443:22,25 12448:23 12464:1 12465:16 12468:17 12470:22 12472:18 12475:14,21 12478:3 12482:21 12484:18 12484:21 12485:14 12486:4,17 12494:17 12494:22 12498:1 12501:25 12502:1 12508:19,20 12521:20 12526:5 12529:14 12531:15 12533:3,23,24 12540:18 12543:3,11 12543:21 perfectly 12506:8 perform 12416:25 12420:3 12423:16 period 12416:18 12423:23 12425:2 12473:15 12529:4 12534:13 permitted 12453:12 persist 12476:1 12490:6 persisted 12508:21 persists 12503:4 person 12417:24 12418:2,5 12457:16 12459:16 12464:7,8 12464:23 12473:21 12485:1 12487:16 12494:23 12497:6 12499:2 12500:15,17 12500:23 12526:2 personally 12432:23 12442:3,12 12471:17 12477:11 12518:7 persons 12417:17 12466:16 12487:13 12487:21 12540:21 person's 12525:22 perspective 12542:2 persuade 12539:21 pertinently 12502:23 phoned 12525:1 photocopies 12495:11 photostat 12492:24 photostatting 12476:11 phrase 12431:5 picture 12541:6 Pillay 12450:21,23,24</p>
--	--	--	---	--

<p>12450:25 12459:12 12459:13 12461:13 12489:21 12511:10 12511:15,17 12513:22 12516:10 12528:15 pistols 12539:25 place 12438:1 12439:2 12441:19 12443:1 12445:8 12457:7 12465:8 12470:4 12473:25 12474:1 12476:15 12484:22 placed 12423:9 12431:3 12457:9 plainly 12427:4 planner 12417:25 planning 12418:9 platoon 12442:15 12528:12 12529:3,16 12529:17 play 12544:9 played 12448:2 12464:25 please 12430:14 12432:9 12439:8,13 12447:20 pocket 12449:8,11,13 12449:15 12451:7 12480:13 12503:14 pocketbook 12453:10 12454:18 12457:13 12457:14 12458:5,17 12459:7,11 12460:8 12460:10,12,14 12461:9,25 12462:16 12468:8 12469:20,21 12469:22,24 12470:1 12470:2,25 12472:4 12473:16 12474:7 pocketbooks 12453:5,7 12453:13,15,17,18,24 12454:4,5,9,25 12455:15,18,20 12456:3,5,7,9,19 12457:5,11,25 12458:16 12462:15 12474:12 pointed 12462:12 pointedly 12447:10 pointing 12514:13 points 12421:24 12430:24 12489:9 12524:13 12532:14 12537:18 12546:18 point's 12448:24 policeman 12498:25 12512:20 12517:7 policemen 12512:19 12515:5 12533:6 POP 12441:9 12461:23 12481:7,8 12490:4 12501:24,25 12502:1 position 12418:23 12434:10,20 12435:4 12454:2 12457:22</p>	<p>12465:8 12489:1 possession 12431:23 12449:11 12456:3,4,9 12481:8 12485:11 12494:8 12501:22 12511:8,20 12528:18 12541:19 possible 12416:19 12419:23 12422:23 12422:25 12423:22 possibly 12418:19 12431:11 12535:12 12536:15,16 Potch 12525:2 12530:3 Potchefstroom 12486:23 12487:4,15 12503:25 12505:12 12505:15,18,19 12506:5,10 12507:4 12536:3,23,24 12537:2,11 12540:18 12543:3,7,23 potential 12428:8 12429:9 power 12456:7 powers 12545:22 preceded 12457:4 precedent 12502:11 precious 12544:25 precisely 12434:5 12471:19 12473:20 12473:25 prediction 12419:2 prejudice 12428:10 preliminary 12459:2 preparation 12529:4 prepare 12530:18 prepared 12483:15 preparing 12536:3,4,8 12536:24 present 12416:12 12429:24 12445:18 12453:8 12506:10 12533:2 presentation 12530:4 presented 12427:6,10 12497:12,19 12499:15 12536:5 12537:21 presenting 12457:14 12494:22 presently 12421:14 President 12418:25 12419:6 12424:3,4,6 12426:17 press 12420:9,12,14 presumably 12467:8 12500:2 12541:5 presume 12421:9 pretend 12472:12 Pretoria 12416:6 12449:16 12459:9 12469:25 prevent 12435:11 12436:6 12437:16 12485:21,22 12486:8</p>	<p>12542:4,11 previous 12444:2 12485:25 previously 12462:13 prima 12429:4 12455:3 12456:21 12459:21 print 12419:8 printed 12476:13 12493:8 prior 12455:18 probability 12538:19 probably 12437:5 12511:15 problem 12463:24 12466:2 12489:17,19 12543:9 problems 12544:20 procedural 12424:14 12424:25 12425:15 12426:1 12431:6,7 procedure 12420:2 12421:19 12429:23 proceed 12420:16 12421:13 12431:17 12431:19 12432:9 12439:8 12452:10,22 12452:24 12459:1,3 12478:24 12485:19 12486:5 12510:2 12518:24 12532:16 12544:23 12545:2 proceeded 12448:10,15 12539:22 proceeding 12469:5 12475:21,23 proceedings 12416:1 12426:16 process 12425:8,17,20 12426:1,9,13 12452:4 12455:12 12484:12 12484:21 12536:4 processes 12426:5 produce 12431:11 produced 12458:6 12459:20 12543:19 progress 12419:4 12461:20 12510:21 promotion 12461:10 pronouncing 12491:4 12491:10 proof 12436:18 proper 12473:20 properly 12422:1 12423:9 12529:12 properties 12486:3 proposal 12421:15 12422:22 12426:10 12429:1 proposals 12430:15 12431:13 propose 12421:25 12422:11,14 12423:10 12437:4 12545:10,25 proposed 12422:19 12423:1,13 12426:2</p>	<p>12430:13,22 proposing 12439:4 12544:17 12545:9 proposition 12522:11 12522:12,15,18 12523:9 propositions 12522:21 protect 12434:24 12486:3 protected 12425:22 protesters 12432:18 12433:20 12434:5 12435:4 12436:7 12437:16 12438:18 12438:19,20,20,25 12440:17 12441:4,4 12442:15 12443:3 12448:5,10 12482:7 12485:24 12486:1,4 12501:9 12503:12 12504:4,18 12508:15 12521:12 12522:3 12539:21 12542:3,10 12542:12,14,17 prove 12516:23 12517:9,15 provide 12419:7 12425:24 provided 12419:17 12422:11 12428:2 12453:16 Provincial 12477:11 12530:21 12531:1,4 provisionally 12487:16 psychologist 12526:12 psychologists 12525:25 public 12419:10,16 12423:24,25 12424:7 12424:8 purely 12516:5 purport 12457:10 purported 12517:3 purportedly 12460:8 purporting 12453:10 12472:6 purports 12457:4,17 purpose 12425:21 12487:23 12516:13 12520:18 purposes 12471:5 12487:12 12515:24 put 12422:16 12423:4 12428:5,7,11 12429:10 12431:22 12434:23 12437:3,4 12438:5 12439:1 12457:5 12459:8 12460:8 12469:14 12475:23 12479:17 12479:24 12480:12 12480:24,25 12485:16,17 12488:7 12488:25 12494:1 12498:6,7,9,15 12499:8 12503:7 12506:15 12509:5</p>	<p>12513:12 12518:9 12522:21,22 12524:8 12524:11,20,20 12526:4 12528:2 12531:22 12532:25 12533:4 12535:7 12539:15 12541:6 12543:4 putting 12436:18 12437:3 12477:24 12478:7 12479:2,13 12480:6 12482:2 12486:20 12502:15 12502:21 12509:22 12517:10 12522:9,11 12522:12,19 12523:5 12524:9</p> <hr/> <p style="text-align: center;">Q</p> <p>QQ13 12511:8,8,11,19 QQ2 12511:17,18 12513:19,19,21 QQ3 12511:15,16,22 quarter 12447:17 query 12458:4 12502:14 question 12427:21 12433:3 12434:19 12436:14,25 12437:5 12437:19,24 12438:9 12439:5,11,16 12441:8 12447:9 12448:19 12455:13 12458:12 12459:25 12463:11,13,17 12466:18 12470:20 12478:25 12482:5,12 12483:2 12495:4 12502:12,20 12510:18 12517:6 12518:1 12519:25 12521:18,23 12522:7 12522:8,10,22 12523:3,4,10,11 12524:10,15 12526:11 12529:12 12533:5 12534:11 12536:20,22 12538:25 12543:4 questions 12418:3 12439:10 12448:1 12464:20 12478:19 12478:21 12488:22 12499:23 12502:9 12522:21 12524:19 12532:16 12533:6 12538:21 quicker 12437:5 quickly 12437:13 12451:12 12489:21 quietly 12515:19 quite 12428:20 12437:22 12439:12 12455:5 12456:10 12514:1 quote 12520:3</p>
--	--	---	---	---

quoted 12502:11	12545:20	12449:13 12450:22	repeating 12475:19	resumed 12416:3
quoting 12542:6	reasonable 12416:18	12452:2 12463:25	12506:9 12537:15	12458:22
R	12417:1 12419:24	12474:15 12476:13	repetition 12439:7	resumes 12416:2
radio 12470:15,17	12420:4 12423:17,23	12476:23 12489:23	12440:5	12447:21,22
12471:10,13	12425:2,2 12427:21	12502:5 12526:22	rephrase 12462:25	12452:18,19
12472:17 12473:3,11	12429:21 12430:2,8	12528:22 12541:17	12483:2 12520:23	12488:14,15 12514:3
12500:2,6 12502:19	12434:4 12445:5,8	refers 12481:23	reply 12430:24	retreat 12501:10,19
12540:1	12467:4	reflect 12431:9	report 12416:10	retreated 12501:10
railway 12432:18,25	reasonably 12419:6	reflected 12512:18	12423:23 12424:2,3	retreating 12542:16
12433:7 12437:17	12427:22 12431:16	reflection 12516:8	12433:10 12452:9	retrieve 12495:14
12441:10,16	reasons 12422:15	reflects 12419:20	12480:3 12481:21	return 12425:25
12445:11,25	12425:5,16 12432:6	12461:13	12483:20 12484:4,4	returned 12514:8
12446:21 12468:6,12	12531:1	reformulated 12429:1	12487:8,12,16,20	returning 12416:6
12468:16,24	recall 12416:4	refused 12504:13	12488:7 12529:2,9	reverse 12489:19
12469:11 12472:1	12435:16 12437:3	12539:22	reported 12424:13	12490:6
12483:6,8 12512:1	12453:6,9 12529:20	regard 12434:14	12472:25	review 12453:17,18,20
12527:20	12543:22	12437:15 12444:12	reports 12419:8	12454:2
raise 12430:5 12435:20	receive 12424:6	12444:25 12457:22	report-back 12526:23	reviewed 12453:14
12448:21 12457:20	12526:12	12478:1 12524:19	12526:24	revisit 12514:15,18,19
12525:18 12532:14	received 12495:5	regarding 12478:19	representatives	re-cross-examination
12537:17	12524:4 12535:23	regards 12428:20	12416:15 12417:17	12435:18
raised 12418:3	recognised 12425:19	12429:12 12473:15	12420:9 12422:4	re-reading 12522:24
12435:23 12436:19	recommendations	regulations 12422:8,12	represented 12422:24	re-visit 12510:22
12436:20 12437:20	12426:25 12430:21	12425:7 12428:3,21	12423:2,7 12427:5	rifle 12486:13
12455:13 12468:14	reconsider 12426:8	relate 12437:24	12428:5	12498:21 12499:3
12471:7 12489:10	reconsideration	12438:9 12455:17	request 12433:3	12505:4 12540:1
12524:12,13	12429:25 12430:8	12525:21	12467:4 12468:11	right 12420:11 12425:9
12546:22	record 12432:1	relates 12473:16,17,22	12544:24	12427:25 12455:9
raising 12430:5	12436:5,12 12437:1	12534:12	requesting 12453:7	12456:10 12458:18
ran 12499:4 12505:5	12457:8 12470:1	relating 12453:24	12466:9 12512:8	12459:10 12465:19
rank 12460:3	12471:5 12475:14	relation 12424:10	12525:15	12466:17,17 12467:9
rate 12419:3	12477:5 12480:19	12427:1,1 12431:12	require 12423:25	12468:1 12469:8
reached 12419:22	12486:23,25	12437:23 12438:11	required 12418:14	12471:14 12484:3
read 12437:13 12452:3	12490:17,18 12501:9	12457:4 12472:10	requires 12425:13	12491:20 12492:24
12452:16 12470:1,8	12503:7 12504:12	relayed 12525:6	12455:3	12493:11 12500:2,4
12470:10 12472:6	12505:20 12507:2	relevant 12419:18	resemblance 12426:23	12511:3 12513:15
12474:20,24 12477:2	12512:17 12542:6	12423:4 12453:11,25	reserved 12457:22	12517:16 12518:9
12477:4 12480:19	recorded 12473:25	12454:20,21 12455:1	residential 12540:6	12528:5 12530:21,22
12484:6,8 12485:12	12475:24 12488:2	12455:8,19,21	resource 12544:25	12532:8 12536:13
12485:18 12494:3,13	records 12483:11	12456:19,20 12458:1	respect 12417:13	Rights 12424:23
12494:16,16 12504:7	redirect 12504:20	12458:6 12523:3	12421:17,19	12425:14,23 12426:7
12504:11,12	redirecting 12504:3	12535:10 12543:1	12428:20 12429:23	12426:17 12452:25
12509:24 12512:17	refer 12436:4 12452:13	reluctance 12515:4	12430:13,15,22	12453:6,12,14,16,20
12515:12,19 12521:2	12454:6 12459:6	rely 12419:14 12422:19	12442:8 12445:6	12453:22 12454:1
12528:25 12538:12	12474:6 12480:5	12481:1 12538:23	12455:22 12477:21	12455:13 12456:2
12539:11,14,16	12481:19 12483:19	12539:4	12478:9 12479:3,6,11	12457:24
12540:2,10 12542:1,6	12491:13 12492:17	relying 12461:17	12500:20 12503:9	right-hand 12449:7
12542:22	12497:11,21	remain 12426:11	12509:15 12521:23	12457:16
reading 12421:7	12503:17 12504:11	remaining 12453:13	responded 12500:23	rise 12543:1
12477:2 12513:4,6,11	12507:11 12511:7	remarks 12455:17	response 12454:1	robbed 12539:24
12513:13 12538:11	12515:25 12519:12	12463:25	12457:24	role 12442:8 12445:7
reads 12496:2,14,25	12526:10 12528:10	remember 12432:19,20	responsibilities	12544:9
ready 12451:24	12537:20 12539:4	12438:17 12444:20	12442:8 12445:7	roneoed 12535:6,8
12452:21 12458:23	12541:14	12448:6 12449:5	responsibility 12441:13	room 12424:14
12458:25	reference 12424:16	12459:23 12468:17	12536:14	12537:4
realise 12514:4	12425:1 12515:24	12477:12 12499:21	responsible 12419:13	rough 12427:18
really 12427:25	12518:12 12539:11	12506:11,13,20	12422:1 12541:1	round 12473:19
12428:12 12431:3	referrals 12433:23	12507:3,3 12525:19	12542:24 12544:3,13	rounds 12431:24,25
12468:13 12488:7	referred 12444:20	12530:6	rest 12418:23 12432:8	12498:20 12499:2
12508:17 12530:8	12471:1 12486:6	reminds 12455:11	12536:16	route 12438:25
12537:15	12487:13,22	remonstrated 12508:21	result 12423:13	12485:22
rear 12489:18,22	12502:23 12513:18	rendering 12513:2	12521:11 12522:2,3	Roux 12424:11,12,17
reason 12425:3,22	12514:12 12516:14	repeat 12439:13,17	12522:16	12424:18,22 12429:6
12487:23 12514:7	12525:15 12532:7	12506:23 12537:17	results 12416:11	RR 12515:15
12540:21 12544:22	12539:3	repeated 12433:3	12428:10 12454:2	RR2 12513:23 12515:2
	referring 12421:24	12543:10	resume 12452:3	12515:16,17

<p>rubber 12496:4 12497:6 12498:20 12499:2 12500:14 12504:25 12540:5 12542:17 rubbers 12500:16 12501:2 rule 12421:18 12423:10 12428:12 12429:22 rules 12429:20 12459:24 ruling 12421:16,16 12423:1 12428:14 12429:11 12431:6,15 12435:17 12447:13 12479:9 rulings 12420:1 12423:13,21 12430:22 12431:2,7 12452:8 run 12483:6 12497:8 12498:22 running 12504:25 Rustenburg 12461:23 12481:7,8 12490:4 12505:11,14 12543:6 R5 12505:4 12539:25</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>safety 12443:1 sake 12428:21 12430:5 12461:19 12510:21 Samuel 12507:12 SAPS 12427:16 12453:9,16 12454:14 12456:3,4,8,11,13,15 12487:3 12489:11,23 12490:9 12495:14,16 12495:19,19 12511:25 12521:3 12528:11 12534:24 12537:20 12538:8 12542:1 SAPS15 12489:14 satisfied 12452:14 save 12439:5 12514:1 saw 12454:10,11,12 12456:16 12463:8,19 12463:19 12464:24 12464:25 12465:1 12505:2 12545:6 saying 12433:4 12442:5 12451:21 12463:13 12470:15,17 12471:11,20 12475:2 12477:5 12479:7,16 12479:19 12481:17 12482:6 12484:18 12502:22 12506:13 12509:18 12529:1 12542:9 says 12427:4,8 12434:23 12466:25 12472:11,13 12477:10,23 12478:4 12478:14,14,15</p>	<p>12479:12,14,18,21 12483:6 12499:17,21 12500:9,9,14 12505:8 12506:4 12508:22 12510:2,11 12513:14 12513:15 12520:3 12524:11 12529:25 SC 12416:13 12417:11 12417:15 12420:10 12420:14,24 12421:13 scale 12447:3 scanned 12493:7 scene 12445:19 12468:12 12470:7 12525:2 12532:20 12533:7 12534:23 12542:16 scenes 12484:18 Scott 12543:21 scream 12501:11 screamed 12498:18 12501:15,19 screen 12515:20 12539:15,16 12541:23,25 screens 12420:21 script 12525:15 seat 12451:10 second 12421:25 12427:2 12429:12 12430:15 12489:22 12492:19,20 12493:10,17,22 12496:12 12508:5 12521:20 12536:6 secondly 12424:5 12431:5 section 12442:2 12521:7 12535:5 see 12420:19 12421:10 12426:23 12430:3 12433:11,17,18 12447:17 12448:8 12450:15 12451:23 12463:9 12472:7 12476:9,10,15,18,24 12477:10 12481:18 12483:11 12484:11 12495:6 12505:8 12506:14 12508:12 12511:13 12512:13 12512:15 12515:13 12515:15 12529:5,7 12531:18 12540:9,13 12544:1,16 12545:13 12546:22 12547:1 seeing 12450:6 seek 12423:3 seeking 12427:23 seen 12436:25 12451:7 12454:25 12469:20 12484:5,7 12495:11 12495:13 12518:3,4 12529:15 Semenya 12455:14</p>	<p>12456:16 send 12450:13,16,18 senior 12508:3,4 12510:5 12539:19 sense 12424:2 12459:19 12485:17 12516:22 12525:22 sensible 12502:12 sensitive 12434:25 sensitivity 12434:15 12435:1 sentence 12477:2,4 12485:10 12520:3 sentences 12512:18 separate 12529:15 12531:18 September 12484:10 12485:6 12487:5 sequence 12478:20 serious 12455:3 12531:24 12544:19 service 12417:6,19 12533:2 session 12529:2 sessions 12527:23 set 12469:10 sets 12421:22 settlement 12434:15 12435:9,12 12436:7,8 12437:17 12485:21 12485:25 12486:5,9 12504:19,21 12540:6 seven 12453:10 12454:11,21 12455:19 12456:20 12458:1,1,6 severely 12539:23 Sexweleya 12491:8,9 12491:18 12494:8 12499:16 shacks 12498:2 shaft 12434:16 shan't 12479:8 share 12454:2,3,5 Shepeko 12492:3 she'd 12524:9 she's 12472:5,7 12473:8,11 shift 12425:8 shit 12512:20,21 shoot 12478:3 12479:12,14 12498:19 12499:1 12501:12,15,19,20 12505:9 shooting 12539:17 shops 12486:1 short 12420:22 12421:23 12527:12 12527:14 12528:1 shortly 12418:1 shot 12475:2,7 12487:1 12498:20 12499:1 shotgun 12486:12 12540:1 12542:17 shots 12504:25 12537:6</p>	<p>shoulder 12423:19 shouldn't 12423:25 12498:7 show 12431:25 12436:12,21 12437:1 12503:10,12 12517:11 12518:12 showing 12513:9 shown 12419:9 12454:25 12455:21 12455:22 12456:19 12456:21 12458:15 12463:5,5,6 shows 12495:1 side 12429:14 12434:16 12436:18 12449:7,17 12489:11,18,19,22 12490:5,6 sight 12453:7 signed 12519:14 significant 12417:5 simple 12436:13 12437:5,6 12466:15 12517:21 simply 12419:19 12430:1 12482:11 12488:2 12496:2 12502:7,16 12516:24 simultaneous 12421:2 12443:24 singing 12509:25 Sir 12474:13 sitting 12485:14 12507:3 12541:10 12546:6 situation 12422:25 12438:17 12442:22 12445:14,16 12529:18 situational 12475:17 slide 12541:17,19 12542:7,8 slightly 12429:1 smoke 12504:22 smooth 12461:20 somebody 12464:21,22 song 12516:5 soon 12431:16 sorry 12417:8 12420:18 12422:9 12424:17 12427:5 12449:23 12451:6,20 12452:4 12457:2 12462:5 12463:21 12466:17 12476:12 12483:4 12487:11,25 12496:17 12498:14 12500:13 12507:13 12511:17 12514:20 12517:5,6 12529:22 12540:16 12543:6 sort 12423:24 12513:25 12515:1 12518:15,25 12525:24 12530:3 sorted 12489:20 12518:23</p>	<p>sorts 12540:25 sound 12532:12 sounds 12429:3 South 12417:5,18 12419:10 12423:24 12424:23 12425:14 12425:23 12426:7,16 space 12497:7 spark 12523:1 speak 12416:20 12441:3 12526:11 speaking 12424:21,21 12483:7 special 12495:22 specific 12439:11 12453:23 12454:4 12477:13 specified 12422:5 speeches 12516:8 spell 12491:21 spend 12535:17 spoke 12445:5 12455:14 12475:17 12479:22 12527:3 spoken 12452:24 squatter 12438:21 12439:1 stab 12505:3 stage 12437:25 12438:12 12447:20 12455:12 12458:14 12480:1 stamp 12449:16 Standing 12443:4,7 12521:1,5,8 12529:25 start 12416:4 12427:3 12464:11 12491:17 12494:7 12536:23 12546:4 started 12432:5 12465:14 12468:25 12470:6 12476:19 12496:21 12499:5 12504:15,24 12509:25 12510:1 starting 12416:7 12472:4 12546:8 starts 12470:2 12476:14 statement 12419:2,3 12421:22 12465:12 12465:16 12475:15 12475:16 12478:1 12490:13,15,22,25 12491:18,21 12492:2 12492:7,9 12494:7,9 12494:24 12495:1,3,5 12495:12 12496:2,13 12496:22 12497:25 12499:15 12501:14 12503:18,18,24 12504:1,2,4 12505:8 12506:1,8 12507:11 12507:12,18 12508:9 12509:23 12515:4 12519:7,10,12,20</p>
---	--	--	--	--

12520:2,9,9,18 12527:12 12528:1 12532:22,22 12534:6 12535:4 12536:12 12537:11,21,22 12538:6,8,18,22,25 12540:22,23 statements 12417:12 12427:15 12430:21 12459:21 12480:10 12480:12 12487:12 12488:24 12489:4,13 12490:19 12494:22 12495:7,19 12499:7 12502:15,24 12503:2 12503:14 12508:24 12527:15 12528:3 12533:1,1,4,11,14 12534:7,13 12535:8 12535:11,14 12536:15 states 12506:8 12520:7 step 12417:2 steps 12416:24 stood 12504:15 stop 12422:9 12457:6 12476:22 12477:6,15 12478:3 12479:15,15 12532:12 12537:17 12540:5 12543:25 stoppage 12475:7 stopped 12475:1,15 story 12454:20 12525:22 straight 12497:9 12504:19 strange 12500:19 stressed 12429:6 strict 12445:16 12459:23 strike 12497:5 strikers 12446:14 12483:9 12509:6,25 striking 12426:24 strong 12416:17 12515:4 structure 12417:21 study 12538:15 stun 12475:3,7,8 12478:3,4 12479:12 12479:23,24 12482:14 12486:9,11 12504:22,24 12510:9 12520:4,25 12522:1 12522:14 12523:2,16 12525:8 12540:4,20 12542:12 style 12429:14 sub 12429:10 subject 12429:17,18,21 12431:7 12457:17 12533:24 subjected 12427:11 submissions 12430:22 submit 12419:16 submits 12425:15	submitted 12423:11 12427:15 12453:10 subordinate 12443:8 subpoenaed 12428:9 subsequent 12469:5 12528:2,3 subsequently 12438:13 12466:20 substantial 12418:20 sub-para 12540:2 sub-ruling 12430:14 sudden 12438:20 suddenly 12438:1 suggest 12424:4 12427:17 12429:8,19 12430:9 12431:10 12437:25 12459:19 12483:17 12488:11 12499:23 12502:6 12513:25 12516:22 12535:11 suggested 12428:11 12430:12 12431:14 12538:5 12542:20 suggesting 12513:11,12 12536:8 suggestion 12427:3,4 12428:13 12429:4 12498:23 suggestions 12428:15 sum 12498:12 summarising 12471:14 summary 12527:14 summing 12542:19 supplementary 12475:16 support 12416:17 sure 12418:23 12424:7 12437:19 12444:11 12447:2 12456:22 12461:6 12462:10 12468:11 12474:25 12479:10 12482:24 12489:6 12490:22 12491:4 12534:8,22 12540:23,25 12545:3 surely 12470:17 12478:18 12483:14 12543:5 surprise 12458:21 surrender 12504:14 survived 12521:15 suspect 12480:2 S-E 12491:22 s.u.o 12488:20 12514:24	12450:22 12455:4 12460:1 12465:8 12466:2 12471:10 12476:1 12481:4 12487:24 12510:25 12513:25 12514:2 12517:12,12 12530:20 12532:13 12534:13 12535:4 12538:5 12539:9 12543:13,25 12544:23 12545:2,25 12547:3 taken 12419:22 12433:6 12455:25 12473:25 12474:1 12488:11 12499:3 12503:19,25 12530:4 12530:9,11,19,20,22 12530:25 12531:7,7,8 12531:9,11 12532:7 12534:9,10,13 takes 12417:2 talk 12464:21 12468:15 12468:18 talked 12464:1,3,8 talking 12441:4,5,24 12455:12 12457:23 12464:2,7,22 12531:6 12532:25 talks 12472:25 12496:2 12526:2 task 12419:5 12423:16 12509:21 tea 12432:6 12447:19 12513:25 12514:2 team 12425:8 12456:4 12456:4,12,13,15 tear 12504:22 teargas 12482:14 12486:9,12 12501:22 12504:3,20 12505:9 12519:21 12520:4,7 12520:10,25 12522:1 12522:14 12523:2,16 12523:19 12525:8 12537:6 12540:4,11 12540:20 12542:12 techniques 12442:16 telephone 12485:1 televised 12421:8 television 12420:19,21 12420:23 12444:1 12485:16 12494:18 tell 12440:13 12449:13 12464:17,22 12473:21 12497:15 12509:5 12539:6 12541:16 12544:21 telling 12457:12 12472:8 tendered 12417:3,4,5,9 12417:16,18 12516:23,24 12517:9 term 12418:24 terms 12424:16	12425:1,6 12434:14 12434:25 12441:5 12442:5 12443:2 12444:22 12445:7,22 12509:16 testified 12438:18 12440:22 12444:17 12462:24 12487:7 12489:1 12507:8 12523:25 12525:1,5,5 12525:11 testify 12421:21 12484:21 12505:13 12520:17 12523:25 12529:13 testimony 12519:1 text 12420:21 thank 12416:13 12424:8,9,12,22 12426:19,23,23 12430:19,20 12431:16 12432:11 12439:16 12453:3 12455:9,10 12460:7 12474:16,23 12482:4 12483:12 12491:9 12512:25 12513:18 12528:16,17 12537:19 12545:24 12546:25 thanks 12437:8 12439:9 12440:4 12444:4 12447:8,14 12447:24 12456:25 12462:22 12467:10 12467:13 12482:3 12488:9 12499:12 12503:16 12507:10 therapeutic 12525:24 12526:8,13 thereof 12518:14 there's 12456:8 12472:4 12473:12 12476:13 12479:20 12481:22 12490:2 12498:11,15 12513:14 12522:25 12525:18 12532:6 12537:16 12544:1,2 12544:22 they'd 12446:12 12539:25 they're 12419:18 12454:13 12456:6 12492:12 12533:16 they've 12483:7 thing 12442:1 12451:1 12479:16 12521:20 12521:21 12534:20 things 12430:3 12457:19 12459:22 12483:7 12498:9 12531:21 12540:25 think 12416:20,20 12419:20 12421:5 12427:24 12428:12	12428:14 12429:3 12431:13 12437:10 12437:11 12438:3 12439:5 12443:15 12444:3 12447:3 12448:24 12452:7 12454:18 12460:5 12461:19 12462:13 12464:3,5,6 12466:15 12467:4,12 12468:14 12468:19 12471:8 12472:2,3 12474:10 12474:22 12476:12 12478:10 12480:5,14 12480:18 12481:17 12481:20 12482:5 12485:13 12490:2,3 12492:2,11 12494:15 12499:2 12503:3,18 12510:5,19,21 12511:10 12513:15 12516:11 12531:15 12534:1 12537:15 12543:17,19,20 12544:16 thinking 12530:11 thinks 12517:8 third 12422:11 12485:10 thought 12428:1,21 12429:14 12452:11 12453:4 12454:6 12513:20 12530:1 12531:23 three 12463:7 12466:15 12467:5,6,7 12469:20 12485:17 12490:12 12490:19 12491:12 12499:7 thrown 12496:20 Thursday 12539:18 till 12472:8 12544:18 12545:9 12546:8 time 12416:18 12417:1 12419:6,17,24 12420:4 12421:7,9 12423:17,17,24 12425:2 12429:21,22 12431:8,8 12433:14 12438:10 12439:6 12440:13 12442:22 12442:22 12447:4 12448:20 12450:7 12451:20 12452:4 12458:18 12466:1 12470:16 12471:16 12471:23,24,25 12472:3 12473:15 12476:8,11,14 12480:15 12481:4 12488:18 12502:11 12503:25 12518:16 12524:15 12528:9 12531:22,25 12532:5 12535:17 12538:22 12539:17 12544:18
--	--	---	---	--

T

table 12529:22
12541:10
tactic 12528:25
tactical 12440:22
take 12420:6 12421:3
12421:10 12432:3,6
12432:23 12443:1
12445:8 12447:19

<p>12544:20,25 12546:18 times 12440:1,3 12448:19 12466:10 12476:13 12531:18 12537:14 12540:17 12546:6 title 12481:12 today 12426:2 12428:14 12431:15 12443:18 12453:19 12454:6 12484:7 12518:20 Tokota 12424:19 12480:9 told 12430:18 12444:2 12446:13 12452:20 12468:17 12487:14 12510:3,8,11 12514:21 12537:5,14 12538:1 12540:17,18 12543:3 12544:12 tolerance 12503:10,11 12503:13 tomorrow 12545:14 12546:5,8,11,12 top 12457:16 12458:17 12460:20 12472:4 12484:25 12493:10 12512:10 topic 12447:18 12488:24 12515:11 12515:11 12524:3 total 12418:18 totally 12477:24 12478:7 12479:7,18 12521:23 training 12442:25 transcribed 12516:18 12518:2 transcript 12437:10,13 12448:3 12511:12 12512:1 12516:19 transcription 12518:8 translated 12516:21 translation 12421:3 12443:24 12444:2 12517:1 12518:14 traumatic 12526:3,14 traversed 12435:15,19 traversing 12435:15 tried 12465:14 12481:18 12482:6,21 12483:3,5 12530:3 tries 12526:3 trouble 12508:20 12523:2 true 12419:9 12465:6 12516:8 12517:15 12520:9 trust 12439:7 truth 12516:23 try 12435:10 12447:20 trying 12482:12,15 12526:6 12534:2 12544:2,20</p>	<p>Tsiloane 12441:22,23 12442:4 Tsinyane 12454:18 12457:12 12460:20 12460:21 12461:9,14 12462:19 12476:7 12477:5 Tsinyane's 12457:13 12457:13 Tuesday 12431:21 12432:16 12435:19 12440:13 12453:23 Tupe 12503:19 12505:8 12505:10 12506:5,21 turned 12486:14 12526:5 12542:14 turns 12458:2 12460:17 12493:3 two 12417:13 12424:4 12425:5 12461:17 12467:6 12473:12 12479:15 12483:6 12486:17 12490:1 12497:5,8,19 12498:20 12499:2,23 12500:16 12501:2 12502:15,24,24 12515:15 12521:14 12522:4,12,17 12526:10 12532:15 12539:23,25 12540:10 12542:15 two-way 12540:1 type 12500:19</p> <hr/> <p style="text-align: center;">U</p> <p>ultimate 12448:4 ultimately 12544:13 unacceptable 12521:23 underlined 12471:19 understand 12416:10 12438:22 12439:22 12441:5 12442:1,4 12446:5 12451:21 12452:5,20 12455:16 12457:21 12463:17 12464:11 12465:20 12467:20,24 12469:4 12469:15 12474:19 12480:11 12495:4 12506:18,22 12507:6 12510:17 12516:24 12527:21 12528:4 12529:12 12530:5,7 12532:24 12534:3,11 12535:21 12536:12 12538:17 12541:12 12543:5 12544:5 understanding 12456:6 12460:13 12509:22 understood 12450:2 12499:24 undertaking 12455:16 12456:16 undertook 12455:15 unfair 12427:15</p>	<p>12521:17 unfairness 12426:2,6 12429:9 unforeseeable 12416:8 unfortunate 12543:1 unfortunately 12416:5 unionised 12417:10 unit 12441:13 12442:13 units 12433:14 12441:20 12527:19 12532:23 unnecessarily 12438:10 unnecessary 12419:17 unnumbered 12427:2 12429:13 12430:15 unrest 12480:3 12483:20 12484:4 unsympathetically 12544:25 untested 12431:2 urging 12453:11 use 12429:20 12443:9 12475:13 12479:22 12490:7,10 12497:5 12500:14,21 12503:12 12516:2 12520:10 12527:7 12539:5 utilise 12442:24 utilised 12434:17</p> <hr/> <p style="text-align: center;">V</p> <p>valid 12428:17 12468:15 Van 12519:11 12520:20 various 12463:25 12480:12 12488:17 12543:23 vast 12441:19 vehicles 12434:17,18 veld 12476:19 verbal 12509:13 version 12422:16 12423:4 12427:6,9 12428:4,6,11 12429:10 12438:6 12441:9 12442:10 12444:8 12468:6 12469:13 12475:11 12477:22 12478:8 12479:2,13 12480:7 12509:9 12510:20 versions 12468:8 12479:16 video 12440:16 12448:2 12463:5,6,8 12463:19 12464:24 12515:5 12516:16,17 12516:20,21 12517:23 12518:3,4,6 12518:13 videos 12471:24 view 12423:19 12544:24 views 12419:20</p>	<p>12509:15 village 12542:4,10,11 virtually 12416:21 Visser 12484:20,24 12487:10,11,15,18 12488:1,7 12505:21 12543:20 vonk 12523:1</p> <hr/> <p style="text-align: center;">W</p> <p>wait 12480:5 12525:17 12525:17,17 12531:10 walked 12465:13 walking 12468:25 12497:2,3,6 want 12419:10,11,12 12419:12,13 12438:7 12450:21 12451:4 12455:23 12457:7 12458:3 12459:17,21 12460:9,25 12465:23 12466:1 12469:9,11 12479:9 12488:12 12489:6 12491:13,16 12497:21 12498:7 12506:20 12507:21 12509:20 12510:25 12512:24 12513:1 12515:25 12517:14 12523:7 12525:18 12531:22 12532:11 12533:5,9 12534:14 12535:16 12537:17 12538:4,23,25 12539:1,18 12540:2 12543:25 12544:23 wanted 12431:25 12440:21 12448:1,14 12449:1 12452:25 12465:11 12467:5 12468:6 12471:3,16 12488:25 12490:9,9 12507:7,11 12515:10 12515:13 12516:2,4 12531:6 12533:15 12534:5 12539:2,4 12541:14 12544:6 12545:2 wanting 12490:6 warrant 12430:8 12449:2,5 12486:12 12487:1 Warrant-Officer 12447:15,16 12463:1 12466:10,11,13 12521:13,13 12523:20 Warrant-Officers 12466:7 wasn't 12436:19,20 12438:3 12487:19 12489:18,19 12495:18 12514:5 12516:13 12524:12 12524:14,15</p>	<p>12530:11,22 12531:22 12541:2,6,7 12542:24 wasn't 12508:23 waste 12438:9 12447:4 12447:5 12451:20 12458:18 12472:3 12518:16 wasting 12538:22 watching 12420:22 12443:25 12485:15 12494:18 watershed 12416:21 way 12428:3,9 12430:24 12432:18 12440:11,21 12444:19 12445:11 12448:3 12451:21 12456:15 12457:14 12473:20 12480:19 12485:23 12489:10 12509:12 12525:2 12530:10 12534:17 12539:24 12542:2,9 weapon 12474:25 weapons 12448:5 12486:15 12504:14 12542:14 week 12417:23,25 12419:9,11 welcome 12426:24 went 12451:10 12467:23 12479:21 12497:2 12504:18,21 12526:19 weren't 12454:25 12455:2 12456:14,21 weren't 12450:11 Wesley 12420:25 we'd 12546:7 we'll 12461:10 12491:16,20 12514:1 12547:1 we're 12416:7 12457:18 12459:23 12462:11 12517:2 12517:7 12544:17 we've 12417:4,9,15 12469:20,20 12483:24 12488:11 12490:3 12492:14 12513:19 12518:4,15 12534:1 12535:7 12537:7 12544:19,19 we'll 12428:14 12430:9 12431:9 12432:6 12452:4 12506:3 12507:1 we're 12502:16 we've 12449:12 12452:4,8 12508:24 whatsoever 12437:15 what's 12436:23 12439:13 12444:6 12459:5 12494:24 12497:15 12500:22</p>
--	---	--	--	---

<p>12515:7 12517:1 12522:8,10 12523:7 12533:5 12538:4 White 12530:6 who'd 12498:4 12537:9 who's 12441:9 12443:8 12526:2 who've 12546:6 WILLIAM 12488:20 12514:24 wish 12424:10 12426:25 12430:17 12430:21,24 12431:12 12439:4 12458:15 12492:17 wishes 12422:12,15,17 12427:8 12428:6 12431:20 wishing 12427:12 withdrew 12498:4 12516:3 witness 12421:20,23 12422:1,13 12423:4 12427:9,10,10,12,13 12427:21,23,24 12428:7,8 12429:24 12436:5 12438:11 12439:2 12451:22 12452:2,5,7,15 12457:10 12459:8,16 12459:21 12464:6 12466:25 12473:15 12474:4 12477:23,24 12479:8,16,17,18 12480:10 12481:24 12482:5,16 12486:21 12487:13 12488:22 12494:2,4 12498:8 12499:1,6 12502:17 12502:21,25 12509:22 12521:18 12521:21 12522:13 12524:5,9,21 12526:9 12529:21 12530:10 12534:5 12536:8,16 12538:6,19 12539:3 12541:1,10,14 12543:16 12544:7 witnesses 12417:16 12418:7,8,11,15,20 12421:17,19 12425:10 12427:14 12429:23 12464:15 12474:10 12480:14 12500:9 12502:24 12503:7 12522:21 witnessing 12526:14 witness's 12499:7 12533:17,19 women 12533:6 wonder 12501:3 won't 12460:8 12464:17 12466:2 12537:17 12544:24 word 12427:25 12429:15 12431:5</p>	<p>12471:17,18 12475:4 12512:21 12525:20 wording 12427:17 12430:9 words 12506:24 12531:23 12535:6 work 12419:22,24 12423:22,23 12425:7 12426:14,19 12428:3 12530:3 12534:23 12544:20 working 12420:19 12421:3 worse 12521:11 wouldn't 12421:9 12471:13 12472:17 12473:4 12500:3,7 wouldn't 12502:20 wrap 12448:1 12497:10 12515:10 write 12457:15 writing 12491:22 written 12421:22 12460:5,20 12461:7 12461:22 12462:4 12474:17 12476:7,8 12481:7 12511:19,22 12511:23 12512:9,14 12512:21 12513:8,12 12532:22 12534:6 wrong 12436:21 12461:10 12470:25 12506:4 12513:13 12530:5 wrote 12528:1 W-E-L-E-Y-A 12491:23</p> <hr/> <p style="text-align: center;">X</p> <p>Xhosa 12421:12 X-E 12491:23</p> <hr/> <p style="text-align: center;">Y</p> <p>year 12416:22 12418:25 12453:6,9 12484:11 years 12529:4 yesterday 12416:11,14 12419:21 12424:13 12424:24 12450:13 12450:17 12484:9 12514:11 12522:25 yesterday's 12423:21 you'd 12526:14 12539:14 12541:16 you'll 12458:7 12467:3 12545:12 12546:9 you're 12421:7 12436:21 12439:10 12447:18 12452:21 12458:13 12459:6,25 12464:2,20 12469:9 12470:19 12471:11 12472:9 12474:14 12475:19 12488:19 12498:16 12513:12</p>	<p>12514:23 12515:7 12517:6,10 12518:19 12523:4 12524:9 12532:25 12534:2 12535:14 12537:15 12541:17 12542:6 12544:23 12545:16 you've 12457:21 12459:24 12467:4 12480:25,25 12497:25 12498:9 12500:10 12518:9,9 12524:20 12532:13 12532:25 12545:20</p> <hr/> <p style="text-align: center;">Z</p> <p>Zyl 12519:11 12520:20</p> <hr/> <p style="text-align: center;">0</p> <p>001020 12489:16 001045 12490:4 01:30 12488:11</p> <hr/> <p style="text-align: center;">1</p> <p>1 12485:19,22,24 12486:5 12492:23 12546:7,8,12 10 12449:17 12471:23 12472:5,8 12473:25 10:00 12473:18,23 10:11 12416:2 10:31 12425:5 10:51 12434:12 109 12437:10,10 11 12447:18 11(5) 12521:5 11:11 12446:11 11:15 12432:7 11:34 12447:22 11:50 12477:10 111 12437:10 11729 12437:9 12 12503:24 12528:25 12529:1 12th 12503:19 12:00 12452:19 12:20 12465:4 12476:8 12476:13,14 12:39 12477:8 13 12474:17,17 12476:8 12481:13 12539:21 12540:7 13th 12453:8,24 12468:5 12511:12 12512:1 12519:7,14 12520:3,13 12525:6 12525:13 12526:11 12528:9 12529:9,13 12531:7,7,15,18,21 12532:17,20,23 12533:3 12534:6,9,13 12539:10 12541:19 12542:2 13:51 12488:15 14th 12528:8 12534:10 14:10 12501:13</p>	<p>14:30 12511:7 14:51 12514:4 141 12480:4 12483:22 12483:23 15 12431:24 15th 12448:2 15:10 12525:14 15:30 12538:10 16 12519:5 12539:18 16th 12453:8 12484:19 12530:12 12531:11 12531:12,19 12534:14 16.2 12444:23 18:00 12519:5</p> <hr/> <p style="text-align: center;">2</p> <p>2 12431:6 12493:10 12502:5 12540:2 20 12512:6,13,14,15,18 12513:5,5 12544:16 12545:6 200 12453:15 2012 12416:23 12449:17 12468:5 12480:4 12481:13 12483:21 12484:5 12487:5 12503:20,25 12519:8 12520:4,13 12525:7,13 12539:10 12539:21 12540:8 2013 12416:1 12426:18 21h00 12472:7 22 12416:1 12418:17 12508:9,12,14 262 12521:2,5 27 12462:6</p> <hr/> <p style="text-align: center;">3</p> <p>3 12478:1 12484:24 12485:2 12504:2,13 12519:18,20 12520:1 30 12431:25 12502:16 300 12510:3 31 12418:15 31st 12418:24 35 12480:5 12485:9 350 12453:14</p> <hr/> <p style="text-align: center;">4</p> <p>4 12427:1,3,19,25 12429:11 12430:14 12469:25 12472:5 12519:19 12520:2,7 12544:16,18 12545:6 12545:9 44.1 12539:9,12 44.2 12539:8,10,12 12540:3 47 12541:19 12542:7,8</p> <hr/> <p style="text-align: center;">5</p> <p>5 12478:1 12487:5 12496:25 53 12418:18</p>	<p style="text-align: center;">6</p> <p>6 12508:9,9 12509:25 12512:5,9,10,11 12513:5 12515:11 12519:15 12527:12</p> <hr/> <p style="text-align: center;">7</p> <p>7 12478:2 12509:23</p> <hr/> <p style="text-align: center;">8</p> <p>8 12528:24</p> <hr/> <p style="text-align: center;">9</p> <p>9 12416:4 12472:8 12473:18 12474:18 12474:21,22 12546:5 12546:8 12547:1 9th 12484:19 9:00 12473:23</p>
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