

RealTime Transcriptions

TRANSCRIPTION OF THE

COMMISSION OF INQUIRY

MARIKANA

BEFORE TRIBUNAL

THE HONOURABLE MR JUSTICE FARLAM (RETIRED) - CHAIRPERSON
MR TOKOTA SC
MS HEMRAJ SC

HELD ON

DAY 122 23 AUGUST 2013 PAGES 12548 TO 12592



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1 [PROCEEDINGS ON 23 AUGUST 2013]
 2 [09:35] CHAIRPERSON: The Commission commences
 3 I'm afraid later than we had anticipated we would because
 4 there have been a number of matters we've had to discuss in
 5 chambers. I understand, General, that you have been given
 6 an extensive reading list by one of the other parties who's
 7 going to cross-examine you, is that correct?
 8 MAJOR-GENERAL MPEMBE: Correct,
 9 Chairperson.
 10 CHAIRPERSON: But you haven't had an
 11 opportunity to read all the documents, is that so?
 12 MAJOR-GENERAL MPEMBE: Chairperson, I had
 13 the opportunities from yesterday. I only looked at one
 14 file, some of the documents are not in that file.
 15 CHAIRPERSON: How many files are there?
 16 MAJOR-GENERAL MPEMBE: I've been given
 17 two files.
 18 CHAIRPERSON: Two files and I understand
 19 quite a number of documents that you have to look at.
 20 MAJOR-GENERAL MPEMBE: Correct,
 21 Chairperson.
 22 CHAIRPERSON: Which we also haven't been
 23 given. So obviously when Mr Gumbi finishes, it sounds from
 24 what I've been told that it won't be fair if the cross-
 25 examination were then to move onto your cross-examination

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1 of those documents because you haven't had a chance to read
 2 them all as you've said. Is that correct?
 3 MAJOR-GENERAL MPEMBE: Yes, Chairperson,
 4 I did have a chance to read others but the majority I did
 5 not read and the others are not still in the file.
 6 CHAIRPERSON: Mr Ngalwana, what is your
 7 attitude then, do you propose that once the present cross-
 8 examination is finished, that on the assumption it finishes
 9 before 1 o'clock that we then adjourn until Monday to
 10 enable the witness and the three of us to read the
 11 documents that have been referred to?
 12 MR NGALWANA: Is that question directed
 13 at me, Chair, I'm not sure what are you look at?
 14 CHAIRPERSON: Yes, you're the counsel
 15 appearing for the witness aren't you?
 16 MR NGALWANA: Thank you, Chair. I have
 17 an additional reason for that proposition because as
 18 recently as yesterday I asked the representatives for the
 19 South African Human Rights Commission whether they're
 20 cross-examining or not and I wasn't given an assurance that
 21 they would do so. So I would have been surprised if there
 22 would have been a cross-examination from their part.
 23 CHAIRPERSON: - I don't know that we have
 24 to analyse that at the moment, but it is your attitude then
 25 that we should adjourn, on the assumption Mr Gumbi finishes

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1 before 1:00, we should adjourn then until Monday.
 2 MR NGALWANA: I'd concur with the -
 3 CHAIRPERSON: One's always encouraged to
 4 be concurred with by Counsel. Mr Gumbi, are you ready to
 5 continue with your cross-examination?
 6 MR GUMBI: Yes indeed, Chairperson.
 7 CHAIRPERSON: Major-General, I must then
 8 remind you you're still under oath.
 9 MR GUMBI: Good morning, General.
 10 MAJOR-GENERAL MPEMBE: Good morning,
 11 Advocate.
 12 CROSS-EXAMINATION BY MR GUMBI (CONTD):
 13 Chairperson, yesterday when we adjourned one of my
 14 colleagues brought to my attention that there's another
 15 statement that would have been placed on record. I liaised
 16 with the evidence leaders and they circulated that
 17 statement yesterday. So that will allow the witness to
 18 have a look at it. It is a statement of Famanda Daniel
 19 Makhubela, that is Warrant Officer Makhubela of POP
 20 Johannesburg.
 21 CHAIRPERSON: It will be exhibit HHH33.
 22 MR GUMBI: HHH33.
 23 CHAIRPERSON: Unless there's an objection
 24 from the police it will be exhibit HHH33. Is there an
 25 objection?

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1 MR NGALWANA: Not yet, Chair.
 2 CHAIRPERSON: I don't know what not yet -
 3 MR NGALWANA: No, no, Chairperson.
 4 CHAIRPERSON: Alright, well on that co-
 5 operative note you can proceed with your cross-examination.
 6 MR GUMBI: Thanks, Chairperson. General,
 7 are you in possession of that statement?
 8 MAJOR-GENERAL MPEMBE: Correct,
 9 Chairperson.
 10 MR GUMBI: Can you go to page 2,
 11 paragraph 7 at the top? Are you there, General?
 12 MAJOR-GENERAL MPEMBE: Correct,
 13 Chairperson.
 14 MR GUMBI: Can I read the content of it?
 15 The exhibit is HHH33.
 16 CHAIRPERSON: Do you have to read the
 17 whole document or is it -
 18 MR GUMBI: No, it's only paragraph 7.
 19 CHAIRPERSON: Paragraph 7?
 20 MR GUMBI: Yes.
 21 CHAIRPERSON: I think it sounds a good
 22 idea.
 23 MR GUMBI: I beg your pardon, Chair.
 24 CHAIRPERSON: It sounds a good idea.
 25 MR GUMBI: Yes, I can read it. "They

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1 then started to move from where they were gathering,
 2 sitting to the direction of the shack, then General gave
 3 the instruction to escort the strikers. As the strikers
 4 were moving in their formation the General gave us another
 5 instruction to block [stop them] as they were on their way
 6 to attack the non strikers." Do you see that, General?
 7 MAJOR-GENERAL MPEMBE: [No audible
 8 reply].
 9 MR GUMBI: General, you are on record
 10 that you didn't issue any instruction to go and block the
 11 miners, so I'm not going to pursue with this one. I wanted
 12 just to place it on record another statement. We know your
 13 answer.
 14 MAJOR-GENERAL MPEMBE: Sorry, Chair.
 15 MR GUMBI: Yes, General.
 16 CHAIRPERSON: [Inaudible, microphone
 17 off].
 18 MAJOR-GENERAL MPEMBE: Chairperson, I
 19 don't understand whether I should respond or whether it was
 20 only put on record but what I wanted to say is that the
 21 member said that I gave an instruction to escort but as I
 22 said before, I briefed the commanders, not the members
 23 themselves. Then he says "The General gave another
 24 instruction to block" as if I was also giving the
 25 instruction to him directly which, Chairperson, here for me

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1 to say they should actually check that they must not go to
 2 the informal settlement still stands and also to the shaft.
 3 But that I did not talk to the member directly, I did talk
 4 to the commanders.
 5 CHAIRPERSON: I take it the instruction
 6 you gave they must see to it that the strikers didn't go to
 7 the informal settlement or to the mineshaft, that was given
 8 at the time when you said they were to be escorted. That
 9 instruction you obviously gave to the commanders, I
 10 understand.
 11 MAJOR-GENERAL MPEMBE: Correct,
 12 Chairperson.
 13 CHAIRPERSON: It was given all in one,
 14 you said you must escort them and make sure they don't go
 15 to the settlement and they don't go to the mineshaft. Is
 16 that correct?
 17 MAJOR-GENERAL MPEMBE: Correct,
 18 Chairperson.
 19 CHAIRPERSON: So it's not correct then to
 20 say that you gave instruction to block or stop them as they
 21 were on their way to attack the non strikers, that's also
 22 not correct according to you, is that right?
 23 MAJOR-GENERAL MPEMBE: It is not correct
 24 yes, Chairperson.
 25 MR GUMBI: Thanks very much, Chairperson.

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1 General, can I refer you to the list of shooters of the 13th
 2 that is HHH23? Then I also again, next to you and show
 3 that you have a list of shooters of the 16th at scene 1 and
 4 scene 2, that is FFF35 and FFF8 be in possession of all
 5 those documents.
 6 MAJOR-GENERAL MPEMBE: Chairperson, I do
 7 have the list of the shooters on the 13th.
 8 MR GUMBI: Do you also have a list of
 9 shooters of the 16th at scene 1, FFF35 next to you and a
 10 list of shooters at scene 2, FFF8?
 11 MAJOR-GENERAL MPEMBE: Yes, Chairperson,
 12 I do have the list of shooters on scene 1 and scene 2 and
 13 on the 13th.
 14 MR GUMBI: General, when you analyse the
 15 list of shooters of the 13th and that one of the 16th at
 16 scene 1 and scene 2 you'll note that the list of shooters,
 17 some of the police officers that appear on the list of
 18 shooters on the 13th they also appear on the list of
 19 shooters on the 16th at scene 1 and scene 2 and I would like
 20 to demonstrate that to you. Can you go to the list of
 21 shooters HHH23 at scene 1 - the list of shooters of the 13th
 22 that is HHH23? Go to line number 17, entry number 17.
 23 MAJOR-GENERAL MPEMBE: Chairperson, is
 24 the list on the 13th?
 25 MR GUMBI: Yes, entry number 17. Do you

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1 see Warrant Officer Mogano of POP Umhlanga who discharged
 2 six stun grenades there? When you go to scene FFF35, the
 3 list of shooters of the 16th, that is scene 1, FFF35 and
 4 when you go there at page 19 and page 10 entry number 1999
 5 you will see Warrant Officer SF Mogano there also again
 6 appear on the list of shooters of the 16th. Do you see
 7 that?
 8 MAJOR-GENERAL MPEMBE: I just want to
 9 check the entry number.
 10 MR GUMBI: 1999, page 10 of FFF35.
 11 MR NGALWANA: It's actually entry 100,
 12 Chair, not 99. Well certainly on our version.
 13 MR GUMBI: Mine is entry number 1999.
 14 MAJOR-GENERAL MPEMBE: Yes, Chairperson,
 15 I see it's entry number 100 to this one that I have.
 16 MR GUMBI: I'll just point, there are so
 17 many, I don't know, Chairperson, whether I can go through
 18 all of them. There are six of them I managed to identify
 19 from the list of shooters on the 13th, 16th at scene 1 and
 20 scene 2.
 21 CHAIRPERSON: What exactly is the point
 22 that you're making? I understand that some of the POP
 23 people who fired, it looks in the case of Mogano, Warrant
 24 Officer Mogano he fired rubber rounds, it looks like -
 25 MR GUMBI: Yes.

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1 CHAIRPERSON: - because the - according
 2 to exhibit HHH23, he fired six rounds with his shotgun
 3 which I presume is rubber rounds but I haven't got the
 4 other document in front of me. What did he fire at scene
 5 1, also rubber rounds?
 6 MR GUMBI: Yes. Maybe if I can go to my
 7 next question.
 8 CHAIRPERSON: Anyway what is the point
 9 that you're making, I don't understand where you're going
 10 to with it.
 11 MR GUMBI: Yes, yes I was going to ask
 12 the next question, Chairperson, based on that. You
 13 testified, General, that some of shooters they discharged
 14 their firearm without your instruction, so I wanted to
 15 check with you because when you compare these two lists
 16 you'll see some of those people who fired without your
 17 instruction appearing on the list of shooters on the 16th at
 18 scene 1 and scene 2. I wanted to check with you, General,
 19 as to why these members they were further deployed on the
 20 16th whereas on the 13th of August 2012 they fired without
 21 your instruction?
 22 CHAIRPERSON: I'm sorry, before you carry
 23 on, I understood his evidence to be that the initial use of
 24 force or even less than lethal force required an
 25 instruction in terms of the standing order and he never

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1 gave such an instruction, that's his case. But thereafter
 2 when the attack started and some of the strikers were
 3 attacking the police the police then reacted in self-
 4 defence or private defence and I think it's clear from the
 5 documents that we've seen that an officer or a member of
 6 the force doesn't require a prior instruction to act in
 7 self-defence or private defence. The principles of self-
 8 defence and private defence override the requirement that
 9 force can only be used with authority of the operational
 10 commanders. Now if it's clear that the rounds that were
 11 fired by the people, Warrant Officer Mogano for example,
 12 according to exhibit HHH23, if he fired those in
 13 circumstances not amounting to self-defence or private
 14 defence then your point would be a valid one. But surely
 15 you've got to establish that first before you can proceed
 16 to the point that you are now making. There's nothing on
 17 the documents before us which indicate that he did not act
 18 either to defend himself or to defend someone else when he
 19 fired off those rubber rounds. So isn't that a logical
 20 step you've got to take before you can put the question
 21 that you've just asked? Now I'm sorry but I'm losing the
 22 paper battle, can you tell me do we have Officer Mogano's
 23 statement? You see the reason I ask you that is - I don't
 24 think we have it but the statement you've just handed in of
 25 Warrant Officer Makhubela, we take that as an example. He

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1 is reflected also as having fired off six rounds with his
 2 shotgun which I take it were rubber rounds. That appears
 3 from exhibit HHH23 against line 14. Now if you look at
 4 Warrant Officer Makhubela's statement which you've given us
 5 as HHH33, if you look in paragraph 8, the paragraph which
 6 follows on the one you read, he then says that he then used
 7 his shotgun. He shot off six rubbers, as he calls them,
 8 which is the figure which we have on exhibit HHH23. He
 9 says he fired six rubbers to the strikers but they kept on
 10 charging. So it's quite clear, from what he says in his
 11 statement at least, that the six rubber rounds that he
 12 fired were fired in circumstances of either self or private
 13 defence. Is there any reason for us to assume without more
 14 that Warrant Officer Mogano was in a different situation?
 15 MR GUMBI: Yes, Chairperson, I said -
 16 CHAIRPERSON: My problem, Mr -
 17 MR GUMBI: Yes, I accept that on the 13th
 18 -
 19 CHAIRPERSON: If it is correct, if he is
 20 correct that the rubber rounds fired off by Warrant Officer
 21 Mogano were fired in circumstances where he would have
 22 required an instruction and in the light of the witness's
 23 statement that he didn't give an instruction then your
 24 question arises well why was he allowed to be on scene 1 on
 25 the 16th?

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1 [09:54] I understand that's your question, but of course
 2 the premise on which the question must rest is the one I
 3 put to you. You've got to establish first surely, before
 4 you can ask the question otherwise we'd have an objection
 5 which would be upheld on the police on that point. Is that
 6 right?
 7 MR GUMBI: Yes, Chairperson, I understand
 8 that.
 9 CHAIRPERSON: There's another point, did
 10 you deploy Warrant Officer Mogano and Mkabela and the
 11 others referred to by counsel, on the 16th? Were you
 12 responsible for deploying them?
 13 MAJOR-GENERAL MPEMBE: No, Chairperson,
 14 but I can also state that immediately after the incident of
 15 the 13th, I went and said to all the commanders and in
 16 particular Brigadier Calitz, to say he must go and ask
 17 every member on the 14th early in the morning, any member
 18 who could not be able to be deployed, as we also need
 19 members, and also he must check with the psychologist and
 20 the social workers that debriefed the members on the
 21 previous day, those who were involved in the incident of
 22 the 13th. Chairperson, only one member came to me, that is
 23 Dioli. He said, "General, I can't continue and he was
 24 immediately released."
 25 Chairperson, Brigadier Calitz came to me and he said to me,

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1 "General, all members said they can continue with work.
 2 Nothing, they've been debriefed and everything will go
 3 well.
 4 CHAIRPERSON: It wasn't an objection that
 5 was realised in the end, but that wasn't Brigadier Calitz'
 6 fault.
 7 MAJOR-GENERAL MPEMBE: Correct,
 8 Chairperson, and as a commander, and in the case of
 9 Brigadier Calitz, without the absence of the psychologist
 10 or social worker or even a doctor, there's no ways that we
 11 can say the member is not fit for work.
 12 COMMISSIONER HEMRAJ: General, who would
 13 have been responsible for deploying the members on the 16th?
 14 MAJOR-GENERAL MPEMBE: Normally when the
 15 parade starts, Chairperson, during the parade when the
 16 members their writing their SAP15, that commander deploys
 17 the members who are fit for work. First of all, they
 18 declare that we are free from injuries and we are fit
 19 mentally to work. So if that member at that time says to
 20 that commander, "I am not fit for work for one, two, three,
 21 four," then the commander normally comes to me and say,
 22 "General, this member is not fit that work and he gets -
 23 now, if nothing has been reported to that commander, so the
 24 members will be deployed. That's why I'm saying normally
 25 then it will be that commander because he's the one that

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1 inspected the members when they stand the parade to check
 2 that they've got the necessary equipment and that they are
 3 fit for work.
 4 CHAIRPERSON: Mr Gumbi, I asked you
 5 whether we had Warrant Officer Mogano's statement, I
 6 understand it's not been handed in as an exhibit, do you
 7 have a copy? Because that will tell us the answer to the
 8 question that you - that I debated with you, whether the
 9 rubber rounds that he appears to have fired were fired in
 10 circumstances which would have required a prior instruction
 11 from the operational commander, or whether they were fired
 12 in circumstances which would have required a prior
 13 instruction from the operational commander, or whether they
 14 were fired in circumstances of self or private defence, in
 15 which case no such instruction would have been required.
 16 So if the former, then you can of course proceed with the
 17 question you want to ask, but if the latter, then it would
 18 fall away, would it not? Am I correct?
 19 MR GUMBI: Yes, I don't have it with me
 20 now, Chairperson.
 21 MS PILLAY: Chair, we do have a
 22 statement of Mogano and we can make copies of it.
 23 MR GUMBI: If I can have a look at it
 24 quickly, Chairperson?
 25 CHAIRPERSON: Mr Gumbi, so you're going

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1 to get that statement, as you've heard, in due course. The
 2 point that's been raised by my two colleagues is that, in
 3 relation to the further question, the deployment of these
 4 people who were involved in the incident of the 13th,
 5 inasmuch as this witness says he wasn't responsible for
 6 that deployment, others were. Those are the people to whom
 7 you must address that question, if you're minded to persist
 8 in it, but I don't think there's any point in you asking
 9 him about it.
 10 MR GUMBI: Yes, Chairperson. General,
 11 between the 13th and the 16th further deployment of those
 12 members who participated on the 13th of August incident,
 13 maybe did you enquire from Brigadier Calitz whether he
 14 conveyed the message to operational commanders that those
 15 members who were involved in that operation of the 13th,
 16 some of them they discharged their ammunition without your
 17 instruction?
 18 MAJOR-GENERAL MPEMBE: Chairperson, I've
 19 already said that I said to Brigadier Calitz that those
 20 members that they feel that they are not fit to work and
 21 they should actually inform us and then those that we have
 22 letters from the social workers and psychologist that
 23 debriefed them, they should not be deployed. He already
 24 gave me a feedback to say, "General, all members are saying
 25 that they are fit for work, and secondly is that we do not

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1 have any letter from a psychologist, from a doctor, or a
 2 social worker.
 3 COMMISSIONER HEMRAJ: Mr Gumbi, your
 4 question is not whether they were mentally fit to be able
 5 to work, your question actually relates to because they had
 6 fired ammunition on the 13th without being ordered to do so
 7 -
 8 MR GUMBI: Instructed by -
 9 COMMISSIONER HEMRAJ: - instructed to do
 10 so, why were they than further deployed on the 16th. That
 11 is your question.
 12 MR GUMBI: Yes, my question, if I can put
 13 it in simple terms, on the 13th of August, General, members
 14 fired without instruction. Between the 13th and the 16th,
 15 did you inform Brigadier Calitz to inform the operational
 16 commanders of those members, that their members on the 13th
 17 fired without your instruction before that deployment?
 18 CHAIRPERSON: Haven't you got to address
 19 the point that I put to you, that I can understand someone
 20 who fires without instruction in circumstances where he
 21 needed instruction.
 22 MR GUMBI: Yes.
 23 CHAIRPERSON: So that prima facie he's
 24 guilty of some kind of disciplinary breach and that should
 25 be dealt with, that he shouldn't be allowed to operate, as

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1 it were, and for that to have been dealt with.

2 MR GUMBI: Yes, Chairperson.

3 CHAIRPERSON: But the premise of the

4 question has got to be that they fired in circumstances,

5 without instruction, in circumstances where they needed

6 instruction. Now, if they had fired in circumstances of

7 self-defence or private defence, they wouldn't have needed

8 instruction, would they?

9 MR GUMBI: Yes, I understand that part.

10 CHAIRPERSON: Right, so we've got to know

11 whether anybody who fired without instruction when

12 instruction was needed, was permitted to participate in the

13 events of the 16th. That's basically your question, but

14 you've first got to establish that the person concerned did

15 so having fired without instruction in circumstances where

16 he needed instruction, and unless we know that the question

17 falls away. But then there's a further problem that this

18 witness wasn't responsible for deploying people on the 16th,

19 as he says. So he's not the person you should ask the

20 question of if there is a basis for asking it, isn't that

21 correct?

22 MR GUMBI: Ja, but he was an overall

23 commander.

24 CHAIRPERSON: Sure, he was overall

25 commander, but the overall commander – sorry, I'm

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1 interrupting the interpreter. Let him finish first and

2 then I'll put – well, I was going to say something, but I

3 see the General has raised his hand, he wants to say

4 something. Let's hear first what he has to say.

5 MAJOR-GENERAL MPEMBE: Chairperson, when

6 I was asked by the advocate representing the Monene family,

7 when he said, "General, why didn't you give, or did you

8 give an instruction for the members on the 13th to use their

9 sharp ammunition?" I said, "No," and he said, "Why didn't

10 give the instruction?" And I said in the case of self-

11 defence normally members know that they are not supposed to

12 wait for the instruction and the same question is asked

13 again today and my answer remains the same that I did not

14 give an instruction on the 13th and Brigadier Calitz was

15 informed and he knew that the members did shoot under the

16 circumstances of private defence. I also testified to this

17 Commission that he was also one of the people that attended

18 the scene of crime on that day with Brigadier Van Zyl.

19 MR GUMBI: Now, I'll move on,

20 Chairperson. General, when you were at Potchefstroom busy

21 preparing for this Commission, I wanted to check with you

22 all the operational commanders who's units were involved in

23 that operation of the 13th, were they invited to the

24 Potchefstroom meeting for preparation of this Commission?

25 CHAIRPERSON: There was only one

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1 operational commander and that was the witness. You mean

2 other officers who was junior to him who were commanding

3 some of the members on the scene?

4 MR GUMBI: Subordinate units –

5 subordinate commanders on the 13th.

6 CHAIRPERSON: Do you understand the

7 question? All the subordinate commanders who were

8 subordinate to you who were there at the scene on the 13th,

9 were they at Potchefstroom? That's the question.

10 MAJOR-GENERAL MPEMBE: Chairperson, it's

11 going to be very difficult for me to answer this question,

12 but I will explain. Firstly, I said that, when I started

13 to giving evidence, I indicated the deputies that they are

14 there for the provincial commissioner. And specifically I

15 indicated the role of Deputy Provincial Commissioner

16 Naidoo. Chairperson, in this case and the relevancy is,

17 the whole Potchefstroom was under his command and control

18 and it is only one call up instruction that I was requested

19 to sign, which has about three captains and more junior

20 members. And in that day, it's because Major-General

21 Naidoo was not present when I signed that call up. So in

22 that sense and in the light of my explanation, it's not

23 going to be easy to say in terms of this unit these are the

24 people, unless we go through the call ups and we check the

25 units.

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1 CHAIRPERSON: Mr Gumbi, the point I want

2 to make is, we have an exhibit before us which sets out the

3 attendance list at Potchefstroom. Perhaps you could put

4 that, I don't even necessarily need to ask him, but you, if

5 you put to him, he will then be able to tell you whether

6 everybody who was in a position of command on the 13th was

7 there at Potchefstroom. For example, was Colonel Dioli, I

8 haven't got the document in front of me, was Colonel Dioli

9 there, do you know?

10 MR GUMBI: Yes, maybe if I confine myself

11 to Warrant Officer Lepaaku? Can I refer to SAP15, the

12 report by commander. According to the SAP13, the late

13 Warrant Officer Lepaaku, his commander was Lieutenant

14 Khutu, and, Chairperson, I don't think it has been entered

15 as an exhibit, the SAP15 for Warrant Officer Lepaaku.

16 CHAIRPERSON: - we have to burden the

17 record whether this is something that's in the document

18 that's important, but if the witness will accept that he

19 was indeed Warrant Officer Lepaaku's commander, then we

20 don't have to put another document in.

21 MR GUMBI: Okay.

22 CHAIRPERSON: Is that correct, what's

23 been put to you. Who was Warrant Officer Lepaaku's

24 commanding officer? Do you know?

25 MAJOR-GENERAL MPEMBE: Chairperson,

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1 according to the SAPS15, Lieutenant Khutu he's written on
 2 top, but Lieutenant Khutu works under Lieutenant-Colonel
 3 Merafe, who's a unit commander, and Lieutenant Merafe I can
 4 say, without contradicting myself, that he was at
 5 Potchefstroom.
 6 MR GUMBI: Yes, I have noted that Merafe
 7 was there at the Potchefstroom meeting. So there was no
 8 need for Lieutenant Khutu to be there?
 9 MAJOR-GENERAL MPEMBE: Chairperson,
 10 that's not what I'm saying. I said I was not the
 11 responsible person to choose who should come and I only
 12 signed one call up instruction, which has got certain
 13 captains and the rest were the non-commissioned officers.
 14 CHAIRPERSON: Mr Gumbi, is it your case
 15 that the Captain Khutu wasn't at Potchefstroom?
 16 MR GUMBI: Yes, Chairperson. When you
 17 analyse – it's according to the witness –
 18 CHAIRPERSON: No, it's your case. The
 19 witness has explained of course that he in turn was subject
 20 to Lieutenant-Colonel Merafe who was there. Now, what do
 21 you want make of the absence of Captain Khutu? Did
 22 something follow from that that's important for you case?
 23 If so, put it to the witness and let's get his response.
 24 MR GUMBI: Yes, I wanted to check with
 25 you, General, on that aspect whether Merafe was the one who

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1 presented the incident – who made a presentation of the
 2 incident of the 13th of August 2012?
 3 MAJOR-GENERAL MPEMBE: Chairperson, I
 4 said that all officers that were there, including Colonel
 5 Merafe, we were divided, as I have testified. It was
 6 myself, Lieutenant-Colonel Merafe, Captain Tupe and others
 7 officers that were there. It is not only Colonel Merafe
 8 that was there representing and talking about the incident
 9 of the 13th.
 10 But, Chairperson, it will be correct to say that
 11 if there was any specific issue which has to relate to the
 12 Rustenburg public order policing and which was supposed to
 13 be relayed to that meeting, General Merafe was the
 14 responsible person to do that.
 15 [10:14] MR GUMBI: Thank you very much,
 16 Chairperson. I can proceed. General, in conclusion of my
 17 cross-examination - Chairperson, with your leave can I seek
 18 maybe short a adjournment, I want to take further
 19 instructions.
 20 CHAIRPERSON: If you remember yesterday
 21 you were going to take instructions in any event on the
 22 questions put to you relating to a passage in your client's
 23 statement. Well your client, Lieutenant Baloyi's
 24 statement. I don't know if you'd had an opportunity to
 25 take those instructions yet. How do long do you need?

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1 MR GUMBI: Five minutes, Chair.
 2 CHAIRPERSON: Okay.
 3 MR GUMBI: Yes, Chair.
 4 [COMMISSION ADJOURNS COMMISSION RESUMES]
 5 [10:39] CHAIRPERSON: The commission resumes. It
 6 took a bit longer than we thought but, because we got a
 7 message that Mr Gumbi needed more time but I'm informed
 8 he's now ready to continue. Major-General, you're still
 9 under oath.
 10 MR GUMBI: Thank you very much,
 11 Chairperson. Towards our conclusion of your cross-
 12 examination, General, we are going to put some of the
 13 points we are going to argue at the end of this commission.
 14 First of all, General, we will argue that on the 13th August
 15 2012 before that conflict between the police officers and
 16 those marchers who were armed, we will argue that there was
 17 confusion among the police officers themselves. There was
 18 no clear line of communication between you, your
 19 subordinate commanders and all the members that were there.
 20 Would you like to comment?
 21 MAJOR-GENERAL MPEMBE: Chairperson, I
 22 will disagree with the statement put by Advocate Gumbi
 23 based on the following reasons. Firstly, the line of
 24 command was very clear. There was a line of
 25 communications, each unit has got a commander and they did

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1 understand who was the overall commander. Chairperson, in
 2 any organisation like South African Police Service we do
 3 have participant management. For me to allow the
 4 commanders to view their, because there were members of the
 5 POP like in the case of Lieutenant-General Merafe it was in
 6 the line of participant management. To me, Chairperson, I
 7 didn't see it as a conflict between myself and my juniors,
 8 I saw it as an input that I need to take into account and I
 9 gave the reasons why I could not agree with him.
 10 MR GUMBI: We'll further argue that even
 11 after you made a decision to escort those miners, you had
 12 tactical information available, you will have used that
 13 information to communicate your instruction to members and
 14 to the marchers who were marching from the railway line
 15 towards the koppie and on that day that didn't happen.
 16 CHAIRPERSON: You say you will argue
 17 this, is there any evidence to that effect? It's one thing
 18 to say we argue it but are you putting your version, is
 19 this what your client's going to say? You're not putting
 20 it for the moment on the basis that's what my client's
 21 going to say, you're putting it on the basis what you're
 22 going to argue at the end of the case. But that's not
 23 enough. You can't just argue it out of the air, it's got
 24 to be based on something. Now are you saying that that's
 25 what your client is going to say?

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1 MR GUMBI: Yes, it's based on our
 2 instruction from our client, Mr -
 3 CHAIRPERSON: Then you must put it on the
 4 basis that these are my instructions and this is what my
 5 client will say.
 6 MR GUMBI: Yes, thank you very much,
 7 Chairperson. Our instruction is that after you made a
 8 decision, after those marchers reached the police line near
 9 the big rock, our instruction is that you had Nyalas
 10 mounted with loud-hailers and you will have used those
 11 Nyalas to communicate your decision to members and police
 12 radios to communicate your decision to members that now the
 13 police they were escorting those miners on their way to the
 14 koppie. And you have used that to inform also again the
 15 marchers that they are being escorted to the koppie.
 16 MR NGALWANA: Chair, I'm being
 17 inordinately patient. I don't understand that proposition
 18 at all. Our instructions are - I'm now trying to para -
 19 what my learned friend says, seems to be saying is our
 20 instructions are that you had loud-hailers mounted on the
 21 Nyalas and you would have used them. I don't understand
 22 whether -
 23 CHAIRPERSON: Quite right. Yes, I don't
 24 think to say you would have done it, what's relevant is
 25 whether he did it. Is it your case, will your client

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1 testify that there were loud-hailers on the Nyalas and the
 2 Major-General used them or one of them in order to
 3 communicate with the members of the force and the strikers?
 4 To say that he would have done it isn't enough. Are you
 5 making a positive statement that that is what he did?
 6 MR GUMBI: Our vision is that he should
 7 have used that technical information to convey instruction
 8 to members and to inform the marchers and it didn't happen
 9 like that.
 10 CHAIRPERSON: Are you saying he didn't do
 11 it?
 12 MR GUMBI: Yes.
 13 CHAIRPERSON: So it's a criticism that
 14 you're going to raise against him that he didn't do it?
 15 MR GUMBI: Yes.
 16 CHAIRPERSON: Is that your case? I see.
 17 MR GUMBI: What is your comment?
 18 MAJOR-GENERAL MPEMBE: Chairperson, I am
 19 still not agreeing with what has been put as a proposition
 20 or argument. Firstly, going back to TT5, I did testify
 21 that the SMS that was sent by Brigadier Engelbrecht to me
 22 it was not the same as it is written there in the TT5,
 23 which in this case it is being relied that I could have
 24 utilised it for tactical actions. And I can supply this
 25 commission with that SMS. Those that were two SMSs that

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1 were sent to me by Brigadier Engelbrecht. Chairperson, I
 2 did testify that in regard to paragraph 6 of the DT5, that
 3 information I got it from the briefing which was in the JOC
 4 by Brigadier Calitz but not by Brigadier Engelbrecht as is
 5 stated in the TT5.
 6 CHAIRPERSON: Yes, you told us that
 7 yesterday. But you said you did get the information but
 8 not directly from Brigadier Engelbrecht from Brigadier
 9 Calitz. You told us that, yes.
 10 MAJOR-GENERAL MPEMBE: Chairperson, I did
 11 testify to this commission to say the time of my arrival
 12 and the time to make sure that the people, it was a very,
 13 very short and it was during the - in terms of saying I
 14 could have sit down and plan, that I said it when I was -
 15 CHAIRPERSON: You told us that before, we
 16 have that, you don't have to -
 17 MAJOR-GENERAL MPEMBE: Chairperson, I'm
 18 humbly requesting that I should be provided with any policy
 19 that says that on that day you should have used a loud-
 20 hailer. I can only see that I know it says you must speak
 21 in a loud voice whereby the protesters they should know
 22 you, they should hear you and understand you, and I did
 23 that. I did brief the commanders, the commanders knew
 24 exactly what was expected from them.
 25 CHAIRPERSON: Your point and the

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1 criticism if it is mounted against you will not be
 2 justified, that's your answer, is it?
 3 MAJOR-GENERAL MPEMBE: That's correct,
 4 ja.
 5 CHAIRPERSON: Okay, Mr Gumbi, what's your
 6 next point?
 7 MR GUMBI: Without going into details or
 8 quoting in detail SAPS policy on crowd management, we'll
 9 argue at the end of this commission that when you read the
 10 SAPS policy on crowd management read together with standing
 11 order 262 and other policies, you as an overall commander
 12 on that, as an operational commander on that date you were
 13 responsible for all the action taken on that day.
 14 MAJOR-GENERAL MPEMBE: Chairperson, it is
 15 correct in terms of the standing order 262, that as an
 16 overall commander, not as an operational commander, as an
 17 overall commander, I'm responsible for all actions.
 18 Notwithstanding the fact that that standing order does not
 19 overrule that in SAPS we do have an organogram. And in
 20 that organogram we do have other commanders that are
 21 supposed to assist me in managing the operation, which they
 22 do have the role and responsibilities. And as they are
 23 public servants they are also responsible to account for
 24 their actions. Chairperson, I did give an account of what
 25 has happened as an overall commander and also as an

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1 operational commander on that and I asked the commission to
 2 judge me on those actions.
 3 CHAIRPERSON: There's another aspect, of
 4 course. You say you didn't give the instruction that it is
 5 alleged you gave. You also say that at Potchefstroom when
 6 you asked the various commanders, no one admitted having
 7 given that instruction either. Whether they're entitled to
 8 is a matter we don't have to consider. So on the evidence
 9 before us at the moment, if what you said is correct that
 10 you didn't give the instruction, it means that Kuhn acted
 11 without authority, he in effect changed the plan which you
 12 had indicated, taken the situation, as it were, into his
 13 own hands, if that's correct, either he did that on his own
 14 initiative or he did that because someone without authority
 15 gave him an instruction. You can't be held responsible for
 16 what amounts to insubordinate rebellious actions by persons
 17 who are subordinate to you, is that correct?
 18 MAJOR-GENERAL MPEMBE: Correct,
 19 Chairperson.
 20 CHAIRPERSON: Obviously if you gave the
 21 instruction that you are alleged to have given, which you
 22 deny, and the consequences were as we've seen, then you
 23 would be responsible. But your case is that you didn't
 24 give that instruction, is that right?
 25 MAJOR-GENERAL MPEMBE: Correct

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1 Chairperson.
 2 MR GUMBI: We'll further argue that the
 3 application of this principle situational appropriateness
 4 was very flawed on that day in question and you are
 5 responsible.
 6 CHAIRPERSON: I take it he would agree
 7 with you, if you are correct in saying that he applied the
 8 principle of situational appropriateness incorrectly, but
 9 his case, as I understand it is that he applied it
 10 correctly. So you'll have to give details as to why you
 11 say he applied the principle incorrectly for him to be able
 12 to answer the criticism you're now addressing.
 13 MR GUMBI: We'll argue that first of all
 14 the situational appropriateness principle is applied in
 15 order to de-escalate the violence, you will agree with me,
 16 that's what we'll argue?
 17 CHAIRPERSON: Does it have to be to de-
 18 escalate the violence or does it have to also, or could it
 19 also be used in a situation where the intention is that the
 20 situation should not get worse? You don't necessarily have
 21 to de-escalate it, you can also in certain circumstances, I
 22 would imagine, apply the principle that the situation stays
 23 as it is, it doesn't get out of hand.
 24 MR GUMBI: Yes, that's our argument.
 25 CHAIRPERSON: Alright. Now what do you

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1 say he should have done? Before he answers the question,
 2 shouldn't you in fairness suggest to him what he should
 3 have done, what would have been a correct application of
 4 the principle of situational appropriateness? Because I
 5 don't think he can shadow-box with the general assertions
 6 you've made so far unless you state in terms what he should
 7 have done, which you say would have been a correct
 8 application of the principle of situational
 9 appropriateness?
 10 MR GUMBI: Some of them I've already
 11 indicated. The line of communication, the confusion on
 12 that day between the members themselves, some of the
 13 factors.
 14 CHAIRPERSON: I think he's answered that.
 15 And what else? Is there some other one that he hasn't
 16 answered yet?
 17 MR GUMBI: Another one the issues of
 18 safety of the members while escorting the miners from the
 19 railway lines to the koppie. One of the issues we'll argue
 20 that they ought to have been prioritised by you as an
 21 operational commander there.
 22 CHAIRPERSON: - to prioritise their
 23 safety. What could he have done to have prioritised the
 24 security of the members as they were escorting the strikers
 25 in the direction that they were moving?

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1 MR GUMBI: To order them to remain inside
 2 the Nyalas while escorting them.
 3 CHAIRPERSON: I think you put that to him
 4 already and he's answered that already, has he not?
 5 MR GUMBI: And we'll further argue –
 6 MR NGALWANA: Before my learned friend
 7 proceeds with what they're going to argue, I take it, he
 8 keeps saying we are going to argue, I take it what he's
 9 saying in effect is that our version by Captain Baloi will
 10 be this, so that if he comes here we can test that version.
 11 CHAIRPERSON: At the moment he's just
 12 saying the argument he's going to put up based upon the
 13 material before us at the moment, why he says the principle
 14 was inappropriately applied, but if he doesn't get to his
 15 client's version, I shall ask him about that directly. But
 16 let him carry on for the moment what he's busy with, but
 17 the point you're making won't be overlooked. Carry on, Mr
 18 Gumbi.
 19 MR NGALWANA: Can I just say this, Chair,
 20 and I don't want to belabour the point, is much of what he
 21 said he's going to argue, he's laid no factual foundation
 22 for it at all. There's no evidence of what he's saying
 23 he's going to argue. I'm just putting him on notice on
 24 that, but thank you, Chair.
 25 CHAIRPERSON: I'm sure he'll take notice

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1 of what you said.

2 [10:59] MR GUMBI: I have noted what my learned
3 colleague has just said, and we'll argue, General,
4 furthermore that all these statements we put before this
5 Commission including diaries of the 13th of August 2012
6 indicates clearly that on day there was an instruction,
7 whether it was given by you, by anyone among the police
8 officers to disperse those marchers. As a result of that
9 there was a conflict between the miners and the police and
10 the late Warrant Officer Lepaaku was killed and Lieutenant
11 Baloyi was severely injured after that.

12 CHAIRPERSON: - to that, General?

13 MAJOR-GENERAL MPEMBE: Chairperson, there
14 are so many propositions but I don't know whether I'll
15 cover them but I'll try to -

16 CHAIRPERSON: The basic point is we've
17 got all these statements in the pocket books and the
18 diaries and so on and some of them are more specific than
19 others but the suggestion is that they show that you did
20 give the instruction, you've already said you didn't give
21 the instruction. It could, of course, be argued that
22 they're also capable of showing something else. That there
23 was a conspiracy by certain persons who had seen the law
24 being taken into their own hands by some of their
25 colleagues, falsely to allege that you were responsible for

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1 what went wrong. That's something we've got to look at.
2 You can't help us in one way or the other, you deny that
3 you gave the instruction, we obviously have to consider
4 whether you did or you didn't. But if you didn't the
5 opposite applies, a number of persons got together, decided
6 to make false entries in their pocket books and in their
7 diaries in order falsely to implicate you. That's the
8 other inference isn't it?

9 MAJOR-GENERAL MPEMBE: Chairperson, as it
10 has already been said I did not give the instruction. I
11 did also testify that there was a disagreement between me
12 and Colonel Merafe in particular.

13 CHAIRPERSON: You don't have to repeat
14 the evidence, we're aware of what you said in - yes, Mr
15 Gumbi.

16 MR GUMBI: Yes, we'll further argue that
17 on that day, especially the content of exhibit TT5, Police
18 Intelligence information. That information was not
19 conveyed to members before you intervened or before you
20 confronted those marchers along the railway line.

21 CHAIRPERSON: Are you saying it should
22 have been?

23 MR GUMBI: - been conveyed to the
24 members.

25 CHAIRPERSON: What do you say about that,

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1 did you have to convey that information to the members?
2 MAJOR-GENERAL MPEMBE: Chairperson, what
3 I said is that members were briefed about the situation at
4 Marikana.

5 CHAIRPERSON: Did you convey that
6 information to the commanders whom you briefed?

7 MAJOR-GENERAL MPEMBE: Yes, Chairperson.

8 CHAIRPERSON: Whether they conveyed it to
9 the people subordinate to them is a matter you can't
10 answer.

11 MAJOR-GENERAL MPEMBE: Correct,
12 Chairperson.

13 MR GUMBI: And lastly, our instructions
14 furthermore, General, is on that day in question you
15 listened - you ignored advice from Merafe who was an
16 experienced operational POP commander and you listened to
17 Lieutenant Dioli who was a member of visible policing.

18 CHAIRPERSON: Are you referring to
19 Colonel Dioli?

20 MR GUMBI: Yes.

21 CHAIRPERSON: The complaint is that you
22 took advice from the wrong person, you should have followed
23 Merafe's advice and not Dioli's advice. What do you say
24 about that? Would there have been less bloodshed or more
25 bloodshed or the same amount of bloodshed if you'd followed

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1 Merafe's advice?

2 MAJOR-GENERAL MPEMBE: Chairperson,
3 precisely so that actually what happened - I think there
4 could have been more bloodshed. I need to state that I did
5 not state in my statement that Colonel Dioli advised me or
6 I spoke to him. And secondly Colonel Dioli did not say he
7 advised me in his statement. I don't where the statement
8 is coming from.

9 MR GUMBI: It's our instruction, General.

10 CHAIRPERSON: Sorry, is it your case -

11 MR GUMBI: Instruction from our client.

12 CHAIRPERSON: I know, instructions but
13 are you going to lead evidence? Instructions are one thing
14 but evidence is another. Are you going to lead evidence
15 and also from whom to the effect that the witness followed
16 Colonel Dioli's advice and not Colonel Merafe's?

17 MR GUMBI: Our client will come and
18 testify to that -

19 CHAIRPERSON: Who's going to give that
20 evidence?

21 MR GUMBI: Lieutenant Baloyi.

22 CHAIRPERSON: I see, alright, thanks.

23 Colonel Dioli doesn't mention any advice in his statement
24 which is exhibit HHH32 but your client you say will testify
25 as to what the advice was. Can you tell us what it is so

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1 the witness can deal with it?

2 MR GUMBI: This is our instruction as far

3 as Dioli is concerned to say he never listened to Merafe

4 who was an experienced operational commander, instead he

5 listened to Captain Dioli who was not a POP member.

6 CHAIRPERSON: You've made the point about

7 what Dioli's background was, he was a colonel anyway.

8 MR GUMBI: Yes.

9 CHAIRPERSON: But what advice did Dioli

10 give? The witness is entitled to know what your witness

11 will say in regard to that issue.

12 MR GUMBI: The advice to block the

13 protesters because it was impossible for them to disarm

14 them at the mountain.

15 CHAIRPERSON: What do you say about that,

16 General? Did you get any advice from Colonel Dioli at all?

17 MAJOR-GENERAL MPEMBE: No, Chairperson.

18 MR GUMBI: Thank you very much,

19 Chairperson, I don't have any further cross-examination.

20 CHAIRPERSON: [Inaudible, microphone

21 off].

22 MR GUMBI: Yes, Chairperson.

23 CHAIRPERSON: In Captain Baloyi's

24 statement, exhibit GGG16, he says certain things. In

25 paragraph 6 he says that - I'll read it. "The majority of

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1 police officers were standing on the railway track looking

2 at the strikers. One of the strikers pulled out of the

3 group, I suspected he was in possession of a firearm. I

4 tried to stop him and he ran away and I told myself I would

5 not catch him and other police officers chased him. The

6 strikers started to be restless and some wanted to pull out

7 of the group and I called them to order. They started

8 singing and stood up, moved towards the police and we

9 allowed them to proceed." Now did you see Captain Baloyi

10 calling strikers who wanted to pull out of the group and

11 calling them to order?

12 MAJOR-GENERAL MPEMBE: No, Chairperson.

13 CHAIRPERSON: Then in paragraph 7 he

14 says, "When they were about 300 metres away from us the

15 General told us to let them go and we would disarm them at

16 the mountain. One senior colonel advised the General that

17 if we intended to disarm them it was better to disarm them

18 there because at the mountain they would outnumber us. The

19 General told us to follow them. I advised the General that

20 stun grenades should be used to disperse them." Do you

21 have any comment on that?

22 MAJOR-GENERAL MPEMBE: Chairperson,

23 according to my statement, HH3, I said I did not receive

24 any advice from Lieutenant Baloyi.

25 CHAIRPERSON: Then he goes on in para 8

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1 to say this, "I called other members to come with me to

2 get into the Nyala and only two members responded to my

3 call and I told the driver," this is the point particularly

4 I want you to comment on, "I told the driver that the

5 General wanted us to delay the strikers until we got them

6 together before disarming them." The statement that you

7 wanted them, that's the members of the police, to delay the

8 strikers until you got them together before disarming them,

9 did you say that? Was that a correct statement of your

10 attitude?

11 MAJOR-GENERAL MPEMBE: No, Chairperson.

12 CHAIRPERSON: Did you have any

13 interaction personally, any interaction with Captain Baloyi

14 at all at the scene there on the 13th?

15 MAJOR-GENERAL MPEMBE: No, Chairperson,

16 but what I know is Captain Baloyi was also there on the

17 13th.

18 CHAIRPERSON: Mr Gumbi, you will remember

19 that yesterday and the reason I ask these questions now was

20 yesterday when you were putting something allegedly based

21 on instructions you received from your client, I raised

22 para 7 and you said you'd get instructions. You haven't

23 put anything to the witness relating to the instructions of

24 your client. I believe your client's present today. Is

25 there anything you wish to put to him in relation to direct

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1 instructions in the context of the passages I put to the

2 witness now?

3 MR GUMBI: My instruction, Chairperson,

4 is that there is nothing we can put further.

5 CHAIRPERSON: Yes Major-General.

6 MAJOR-GENERAL MPEMBE: Chairperson, according to

7 situational appropriateness as stated in FF1, page 5 and I

8 quoted paragraph 3.3.1 which states that, "Situation

9 appropriateness is the assessment by the operational

10 commander of the Public Order situation and the taking of

11 the most appropriate action at that time." It does not

12 include the utilisation of the radios, any other issue, he

13 only talks about the issue.

14 CHAIRPERSON: Yes, no I spotted that, I

15 didn't want to debate that with Mr Gumbi but that's

16 relevant, I understand. Now, I see that in the second

17 sentence in paragraph 8 of his statement Captain Baloyi

18 says, "I took one stun grenade from one of the members and

19 we drove slowly behind the strikers towards east and the

20 strikers allowed the driver in the Nyala to pass them to

21 the left side, etcetera. Now obviously he didn't have a

22 stun grenade in his possession before that if his statement

23 is correct. Was there was any need for him to get a stun

24 grenade from another member?

25 MAJOR-GENERAL MPEMBE: No, Chairperson,

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1 if he could see that the stun grenade could have been used
 2 he had members under his command who could have used the
 3 stun grenade.
 4 CHAIRPERSON: Mr Gumbi, is there anything
 5 further that you wish to ask, relating to your client's
 6 case?
 7 MR GUMBI: Nothing, Chairperson.
 8 MR NGALWANA: Chairperson, I'm still not
 9 clear what my learned friend's client's version is as
 10 regards the issue of an instruction or alleged issue of an
 11 instruction by General Mpembe to fire teargas and stun
 12 grenades. Let me make a few references. In his statement
 13 Lieutenant Baloyi in paragraph 7 says, he advised the
 14 General that stun grenades should be used to disperse them.
 15 He doesn't say that the General in fact issued the
 16 instruction, that's the first thing.
 17 CHAIRPERSON: That's a question you could
 18 ask Captain Baloyi when he comes to give evidence. I take
 19 it your point is you don't want to be ambushed by evidence
 20 being given of which you've had no prior warning, it's not
 21 covered by the statement.
 22 MR NGALWANA: Yes, Chair.
 23 CHAIRPERSON: Which you would hear for
 24 the first time when the Captain goes into the witness box.
 25 So alright I hear it, so you've got a number of points that

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1 you feel should be dealt with. Just give them to us
 2 shortly and then we'll get Mr Gumbi to comment.
 3 MR NGALWANA: Yes, thank you, Chair. We
 4 are then referred to pocket books and diaries of people
 5 allegedly saying that the General issued instructions which
 6 is contrary to what Lieutenant Baloyi says happened. And
 7 then it is put to the General that our argument will be
 8 that there were loud-hailers that were mounted on the
 9 Nyalas and that General Mpembe should have used them to
 10 issue instructions. Now, Chair, either the allegation -
 11 either the Lieutenant's version is that the General did in
 12 fact issue an instruction to fire teargas and stun grenades
 13 or he did not. From what I've just pointed to it is not
 14 clear what his version is.
 15 CHAIRPERSON: Well I'm not quite sure
 16 it's as simple as that. You must remember Captain Baloyi
 17 is in an Nyala. He doesn't say he heard an instruction, so
 18 we can assume he didn't hear one. His case would appear to
 19 be that though he didn't hear the instruction because he
 20 couldn't, other people apparently did and according to the
 21 evidential material which he's put before the Commission a
 22 number of members of the police service had said that by
 23 recording it in diaries and pocket books and so on. That's
 24 his case as I understand it, as I understand you on that
 25 issue, do I understand you correctly, Mr Gumbi?

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1 MR GUMBI: Yes, Chairperson, if my
 2 learned colleague wants to know more, I think Lieutenant
 3 Baloyi is supposed to come and testify and he has an
 4 opportunity to put all these questions.
 5 MR NGALWANA: No, no.
 6 CHAIRPERSON: No but he's entitled to say
 7 that if evidence is going to come which takes him by
 8 surprise -
 9 MR GUMBI: Yes.
 10 CHAIRPERSON: He's entitled to know about
 11 it beforehand that you didn't put what I suggested may be
 12 the case, you didn't put that actually. Now if it's
 13 correct that Captain Baloyi says, "I can't say there was an
 14 instruction, I never heard it, I was in the Nyala." But
 15 there are other people who say that such an instruction was
 16 given and it appears from the pocket books and the diaries
 17 and I'm going to rely on that.
 18 MR GUMBI: Yes, Chairperson.
 19 CHAIRPERSON: If that's his case I
 20 understand and then Mr Ngalwana won't be taken by surprise
 21 when your client goes in the box,
 22 [11:18] MR GUMBI: Yes, Chairperson, that's how I
 23 -
 24 CHAIRPERSON: Have I stated the position
 25 correct?

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1 MR GUMBI: Yes, Chairperson.
 2 MR NGALWANA: I'll leave it that, Chair.
 3 CHAIRPERSON: I think the point has now
 4 been cleared up, Mr Ngalwana? So, Mr Gumbi, you've already
 5 said that's your cross-examination?
 6 MR GUMBI: Thanks very much, Chairperson.
 7 CHAIRPERSON: So I trust that your
 8 learned friend the clarity on the particularity that he
 9 sought?
 10 MR GUMBI: Yes, Chairperson.
 11 CHAIRPERSON: Alright. Now, I understand
 12 that the next cross-examiner is going to rely on a number
 13 of documents and the witness hasn't had an opportunity to
 14 read most of them. That's right, isn't it?
 15 MAJOR-GENERAL MPEMBE: Correct,
 16 Chairperson.
 17 CHAIRPERSON: So I fear - and we also
 18 haven't got copies of those, which we want, so I trust that
 19 they'll be given to us before we leave Centurion today. So
 20 we've got no alternative unfortunately but to adjourn at
 21 this stage until Monday morning at 9 o'clock. I'm sorry
 22 about that because it's quite clear that every second from
 23 now on is going to be vital. We mustn't waste time at all,
 24 but I'm afraid I can't see an answer to this one. So we
 25 will adjourn now, as I said, until 9 o'clock on Monday, but

1 we want copies of the documents that the witness has got
2 before we leave Centurion, so we can study them.

3 [COMMISSION ADJOURNED]

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