

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 148 14 NOVEMBER 2013 PAGES 16402 TO 16590



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Page 16402

1 [PROCEEDINGS ON 14 NOVEMBER 2013]
 2 [09:05] CHAIRPERSON: The Commission resumes.
 3 Major-General, you're still under oath.
 4 WILLIAM MPEMBE: Yes, Chairperson.
 5 CHAIRPERSON: Mr Mpofu, I know you are
 6 pressed for time, so I'm going to try to adhere to time
 7 limits strictly today, and General, may I say this to you -
 8 and please don't take offence - when you give your evidence
 9 sometimes, and I can understand why but sometimes when
 10 you're asked a question you give your answer and then you
 11 say "As I have said in my testimony," and then you repeat
 12 what you said before. That's not necessary; it's on
 13 record. We are pressed for time and it will save time if
 14 you don't - look, if there's something that you feel it
 15 necessary to explain, you have the fullest right to do
 16 that, but you don't have to say "As I said in my
 17 testimony," and then repeat your testimony which we've
 18 already heard. You understand?
 19 MAJOR-GENERAL MPEMBE: Yes, Chairperson.
 20 CHAIRPERSON: If you feel that it's
 21 necessary for you to say something to make sure what you're
 22 now saying is understood, you can do so. So in other
 23 words, I don't want to hamper you in your evidence, but
 24 please bear that in mind. Mr Mpofu -
 25 MR MPOFU: Thank you very much,

Page 16403

1 Chairperson.
 2 CHAIRPERSON: Are you ready to proceed?
 3 CROSS-EXAMINATION BY MR MPOFU (CONTD.):
 4 I'm ready. Thank you very much, thanks, Chairperson, for
 5 that intervention, or pre-emptive strike. Good morning,
 6 General.
 7 MAJOR-GENERAL MPEMBE: Good morning,
 8 Advocate.
 9 MR MPOFU: We were, or when we finished
 10 on Monday, or rather Tuesday, we were dealing with that
 11 bazooka, the Scorpion, and what I wanted to ask you to -
 12 CHAIRPERSON: Sorry, before you carry on
 13 about that, did you request further information from the
 14 SAPS on -
 15 MR MPOFU: Yes, we've had a discussion,
 16 Chairperson. What we'll do is when we have information
 17 that looks like it's in agreement with each other, we'll
 18 just submit it to the -
 19 CHAIRPERSON: Yes, yes. No, no, I
 20 understand, but you haven't got information yet?
 21 MR MPOFU: No, not yet. I got some
 22 verbal information from Mr Mathibedi, but after that we
 23 agreed that we would do it the way that I have just
 24 referred to -
 25 CHAIRPERSON: Alright, anyway so you

Page 16404

1 won't go back on those aspects now in your cross-
 2 examination -
 3 MR MPOFU: Yes, as to whether -
 4 CHAIRPERSON: You're asking something
 5 else?
 6 MR MPOFU: - it can destroy a building
 7 and all that, I won't deal with that, yes.
 8 CHAIRPERSON: Can you, just for the sake
 9 of those of us who are going to read the record later,
 10 which I take it means all of us, identify the exhibits
 11 which depicts this Scorpion that you're talking about?
 12 MR MPOFU: I think it's 55, HHH55,
 13 Chairperson.
 14 CHAIRPERSON: I see, thank you.
 15 MR MPOFU: It's one of three photographs.
 16 MR MPOFU: HHH55 has three profiles of
 17 the same -
 18 CHAIRPERSON: Thank you. Alright, carry
 19 on.
 20 MR MPOFU: Thank you, Chairperson.
 21 General, I know that you said this was not your decision to
 22 bring the STF, so obviously the Scorpion which came with
 23 the STF was also not your decision, but you must understand
 24 that when I'm questioning you, I'm also questioning you in
 25 your capacity as the CEO of the operation, so to speak, for

Page 16405

1 your responsibility and accountability at that level. You
 2 understand?
 3 CHAIRPERSON: You're referring to the
 4 expression "overall commander."
 5 MR MPOFU: Overall commander, yes.
 6 CHAIRPERSON: They have CEOs in
 7 broadcasting corporations, but not in the police.
 8 MR MPOFU: No, those are the group CEOs.
 9 It's more important, Chairperson. Right, you understand,
 10 thank you, General. Now having said that, so that I'm not
 11 unfair to you, what I want to say, was it in your view
 12 really necessary to bring those kinds of big guns and
 13 snipers even for the purposes of scaring of the community?
 14 CHAIRPERSON: [Microphone off, inaudible]
 15 community is the right expression. You mean the strikers?
 16 MR MPOFU: Well okay, the strikers. I'm
 17 sure the community was equally scared, but let's confine it
 18 to the strikers.
 19 CHAIRPERSON: I don't know about that,
 20 but anyway, let's carry on. Time is precious, Mr Mpofu.
 21 MR MPOFU: Ja. You understand the
 22 question, General?
 23 MAJOR-GENERAL MPEMBE: Maybe my answer
 24 will demonstrate whether I understand or not.
 25 CHAIRPERSON: [Microphone off, inaudible]

Page 16406

1 MR MPOFU: Yes.

2 CHAIRPERSON: [Microphone off, inaudible]

3 let's see if you understand the question.

4 MAJOR-GENERAL MPEMBE: Yes, Chairperson.

5 MR MPOFU: Yes, it was necessary. It was

6 really necessary? Remember my question, was it really

7 necessary to bring such big guns and snipers and people of

8 that nature even for the purposes of scaring of the

9 strikers. Is your answer yes to that, or did you not

10 understand the question?

11 MAJOR-GENERAL MPEMBE: I said yes,

12 Chairperson.

13 MR MPOFU: Okay.

14 CHAIRPERSON: It was necessary as part of

15 the show of force to do what was done in that regard?

16 MAJOR-GENERAL MPEMBE: Correct,

17 Chairperson.

18 MR MPOFU: And are you aware that this

19 Scorpion big gun that we saw was still being utilised even

20 during the stage 3 of the operation and that we saw it, I

21 think in the video EEE16 for example, rushing next to the

22 kraal? Are you aware of that? So it was not confined to

23 scare tactics or whatever you call it, show of force.

24 CHAIRPERSON: I'm not sure that question

25 is firstly correctly phrased. I think I know what you

Page 16407

1 mean, but I'm not sure you've expressed it correctly. What

2 Mr Mpofu is asking you is we had the show of force, which

3 was at a definite stage, I think it was part of stage 2.

4 When you were into stage 3 you weren't endeavouring simply

5 by show to influence the strikers to act in a particular

6 way. You were actually dealing with the situation which

7 had arisen, in a sense I suppose at that stage reacting to

8 what was thought to be – whether it was or not is another

9 matter we'll decide later, but what was thought to be a

10 threat to the police, and what Mr Mpofu wants to know from

11 you is do you think it appropriate for this Scorpion weapon

12 to be – is the weapon mounted on the Scorpion actually? –

13 to be used for that purpose. That's his question.

14 MR MPOFU: That's correct. Thank you,

15 Chairperson.

16 MAJOR-GENERAL MPEMBE: My answer will be

17 no, Chairperson, no any other Scorpion vehicle or, has been

18 used during the dispersal because stage 3 to me is a

19 dispersal action and we don't even use live ammunition in

20 dispersing the strikers.

21 MR MPOFU: Okay, so can I take from that

22 answer that you're saying the role of the Scorpion should

23 have been confined to the so-called show of force and not

24 in the operation itself?

25 MAJOR-GENERAL MPEMBE: Correct,

Page 16408

1 Chairperson, and General Annandale went in detail about

2 that, what was the reason why the STF was there.

3 MR MPOFU: Thank you very much. You keep

4 on saying this, that whenever we talk about the STF we

5 should ask General Annandale. Did you yourself disagree

6 with the bringing in of the STF into this operation?

7 MAJOR-GENERAL MPEMBE: I've already said

8 no, Chairperson, I didn't disagree.

9 MR MPOFU: Did you agree with it?

10 MAJOR-GENERAL MPEMBE: If I didn't agree,

11 I think I could have raised it with him.

12 CHAIRPERSON: It sounds by implication as

13 if you either agreed or you were prepared to bow, as it

14 were, to the perhaps superior knowledge of General

15 Annandale as to when the STF is appropriate or not. So you

16 either agreed or you didn't actually have an opinion, but

17 you didn't feel in a position to disagree with him because

18 he's got more expertise in that field than you have. It's

19 one of those, I would imagine. Which of the two is it?

20 MAJOR-GENERAL MPEMBE: Chairperson, I

21 didn't disagree, taking into account that that was not a

22 normal crowd management. That's the first thing. The

23 second issue is that General Annandale was there as a

24 specialised head and those are the main two reasons, but

25 the most appropriate one is that it was not a normal crowd

Page 16409

1 situation.

2 CHAIRPERSON: If you had disagreed, if

3 you had thought that STF was inappropriate in the

4 circumstances, would you have raised that with General

5 Annandale and told him to take them away?

6 MAJOR-GENERAL MPEMBE: Yes, Chairperson.

7 MR MPOFU: And if General Annandale

8 hadn't called the STF, would you have called them yourself

9 as CJOC?

10 MR MPOFU: Yes, Chairperson, I did say

11 there was a time where STF was used in one of my

12 operations.

13 CHAIRPERSON: But that's not an answer to

14 the question, you see. The question is if General

15 Annandale hadn't brought the STF along, would you on your

16 own initiative have said, 'We need the STF, General

17 Annandale, would you please bring them?' or would you not

18 have done that?

19 MAJOR-GENERAL MPEMBE: I could have done

20 that. Yes, Chairperson, I could have done that.

21 CHAIRPERSON: I know you could have done

22 it. The question is, would you have done it? That's what

23 Mr Mpofu wants to know.

24 MR MPOFU: That's correct, Chairperson.

25 CHAIRPERSON: I know it's a hypothetical

Page 16410

1 question because the situation didn't arise and if you
 2 can't answer, you can't answer, but can you help us – it's
 3 something Mr Mpofu wants to know, if General Annandale
 4 hadn't brought the STF, would you, looking back, have said,
 5 'Hey, we need the STF, please bring them,' or would you
 6 have left the matter?
 7 MAJOR-GENERAL MPEMBE: I could have said
 8 they should be brought.
 9 CHAIRPERSON: I don't think we'll get any
 10 further with that –
 11 MR MPOFU: We won't get further. That's
 12 still not –
 13 CHAIRPERSON: I don't know whether you'll
 14 get any further than that.
 15 MR MPOFU: For the record, that's not an
 16 answer to the question, but we'll leave that for argument,
 17 General. I think the Chairperson has tried –
 18 COMMISSIONER HEMRAJ: Well General, if
 19 you were planning the operation, would you have included
 20 the STF in the units that you would have had on the scene,
 21 if you were planning the operation and if you were in
 22 General Annandale's place?
 23 MAJOR-GENERAL MPEMBE: Correct,
 24 Chairperson.
 25 MR MPOFU: Okay, well of course if you're

Page 16411

1 in General Annandale's place you would have done exactly
 2 what he did. That's not what I was asking. I'm saying if,
 3 let's assume General Annandale didn't exist, would you on
 4 your own initiative, looking at the situation, have ordered
 5 or requisitioned, or whatever the correct word is, the
 6 bringing of the STF from wherever they are based, on an own
 7 initiative, no Annandale, no nobody?
 8 CHAIRPERSON: I think that's merely a
 9 repetition of what Adv Hemraj asked and she got the answer,
 10 so –
 11 MR MPOFU: Ja, no it's not the –
 12 CHAIRPERSON: If you don't like that
 13 answer then of course you could do something about it. If
 14 it suits you, then maybe it's sensible to move on.
 15 MR MPOFU: Ja, I will, Chairperson. I
 16 just didn't want it to be amended as if that was my
 17 question –
 18 CHAIRPERSON: No, but you're giving an
 19 opportunity to the witness to amend his answer by asking
 20 the question again. Some cross-examiners quit when they're
 21 ahead, or when they think they're ahead.
 22 MR MPOFU: No, Chairperson, all cross-
 23 examiners that I know, I teach cross-examination for 15
 24 years, I've been teaching it, is if a question is changed
 25 and I leave it, then I'm not going to leave it, whatever

Page 16412

1 the free lessons are –
 2 CHAIRPERSON: It's not an appropriate
 3 forum for us to debate –
 4 MR MPOFU: Ja.
 5 CHAIRPERSON: - what is and what is not
 6 good cross-examination, but you carry on with yours.
 7 MR MPOFU: Then thank you, I agree with
 8 that last remark, Chairperson. Now General, again, I just
 9 want to say this again for you so that it's clear; you
 10 heard the Chairperson correcting me when I used the term
 11 CEO, but as the overall commander you would agree that one
 12 of your responsibilities was to see to it that things are
 13 done by the book, correct?
 14 MAJOR-GENERAL MPEMBE: Yes, Chairperson.
 15 MR MPOFU: And when we say one of your
 16 responsibilities was to make sure that things are done by
 17 the book, the book in that sentence would mean the
 18 prescripts, correct?
 19 MAJOR-GENERAL MPEMBE: Standing Order
 20 262.
 21 MR MPOFU: Yes. Well ja, when I say
 22 things should be done by the book, I mean the prescripts as
 23 a unit. In other words, let me help you, I mean, when I
 24 say the prescripts I mean the Constitution of the Republic
 25 of South Africa, (1), okay? I mean the legislation and the

Page 16413

1 common law. That's (2), okay. And (3), I mean the
 2 Standing Orders. (4), I mean the plan that was devised, in
 3 other words things also had to be done according to the
 4 plan, and fifthly I mean the, what one might call ethics,
 5 professional ethics, rules of common decency and that kind
 6 of thing. You understand? So when I say the prescripts I
 7 mean that body of things that you had to follow.
 8 MAJOR-GENERAL MPEMBE: Correct,
 9 Chairperson.
 10 MR MPOFU: Are we together? Yes, so when
 11 you, your job was to make sure things are done by the book,
 12 it encompassed those things, correct?
 13 MAJOR-GENERAL MPEMBE: Yes, Chairperson.
 14 MR MPOFU: Right, now were you aware for
 15 example that Colonel Scott, who was the architect of the
 16 plan, did not even know what rule 262 entailed until after
 17 Roots, or at Roots?
 18 CHAIRPERSON: I don't think that's an
 19 entirely accurate statement.
 20 MR MPOFU: Well, that's what he said –
 21 CHAIRPERSON: He did say he wasn't aware
 22 of what that actually, what that document said. He was
 23 aware of what its predecessor had said and he assumed that
 24 the context of 262 was more or less in line with the
 25 previous, but you are correct insofar as you say that he

Page 16414

1 wasn't acquainted specifically with the contents of
 2 Standing Order 262, and that's the question you're asking.
 3 Do you understand that? Colonel Scott admitted that his
 4 knowledge of Public Order Policing rules was based upon the
 5 previous standing orders which preceded 262, and he wasn't
 6 aware of the actual terms of 262. Were you aware of that?
 7 MAJOR-GENERAL MPEMBE: No, Chairperson.
 8 MR MPOFU: Thank you.
 9 MAJOR-GENERAL MPEMBE: And I just want
 10 also to explain again, very short, Chairperson, Colonel
 11 Scott did not plan for the operation. We planned for the
 12 operation and I think it was said also to the Commission.
 13 He was there to compile, and I did explain to the
 14 Commission if Captain Bembe was there, he could have done
 15 the same work.
 16 MR MPOFU: Alright, I'll leave that for
 17 argument. Let's go back to what I had said to you about
 18 things being done by the book. Or no, before we get there;
 19 that's going to be the kernel of my cross-examination with
 20 you this morning, so I just want to, I'll ask you just a
 21 few loose ends before we get to it, ja. You would agree
 22 there's a whole debate which doesn't really involve you
 23 about the characterisation of the whole operation. All I
 24 want from you is your own confirmation that this operation
 25 had two main components to it, and was neither one nor the

Page 16415

1 other. In other words, would you agree – let's start with
 2 this; would you agree that at the root of the problem was a
 3 wage dispute?
 4 MAJOR-GENERAL MPEMBE: Correct,
 5 Chairperson.
 6 MR MPOFU: And would you agree that it
 7 would also not be fair, or even correct to just say then it
 8 was just a wage dispute? Yes, there was a wage dispute at
 9 the root of it, but there was also the security aspect.
 10 Those were two components of the issue. Is that correct?
 11 MAJOR-GENERAL MPEMBE: Correct,
 12 Chairperson, as far as killings and damage to properties.
 13 MR MPOFU: Yes, and that it would be
 14 incorrect, to say the least, for anyone to characterise the
 15 problem either as just a labour issue or just a security
 16 issue? It was a combination of both, correct?
 17 MAJOR-GENERAL MPEMBE: It is correct,
 18 Chairperson. What I wanted also to explain is that the
 19 police were only concentrating on the other part of the
 20 security issue.
 21 MR MPOFU: Ja, no I accept that, but you
 22 agree with the combination that I've put to you?
 23 MAJOR-GENERAL MPEMBE: Yes, Chairperson.
 24 [09:24] MR MPOFU: So much so that at L114 the
 25 police presentation and I'm sure you'd agree with this,

Page 16416

1 it's in the police presentation L114, the last dash. It
 2 says, "this was not only a security issue and the root of
 3 the conflict was outside the mandate of the police." You
 4 would agree with that?
 5 MAJOR-GENERAL MPEMBE: Chairperson, I'm
 6 just requesting the page –
 7 MR MPOFU: 114, L114. Slide 1, L114.
 8 CHAIRPERSON: I think what he said –
 9 actually what he said in his evidence a moment ago. He
 10 said the police were only concentrating on the security
 11 side. What he said there as we can see now from the
 12 screen, the last bullet, this is at the JOCCOM briefing on
 13 the morning of Wednesday the 15th at 6am. This was not only
 14 a security issue which is the point you make, and the root
 15 of the conflict, the very words you used was outside the
 16 mandate of the police.
 17 MR MPOFU: Yes, that's why I used those
 18 words. You would go along with that, General, correct?
 19 MAJOR-GENERAL MPEMBE: Yes, Chairperson.
 20 MR MPOFU: Then you said something in, I
 21 think on Friday or on part of the other cross-examinations.
 22 Effectively you are saying if the parties had done what
 23 they did after the tragedy which was to get together and
 24 talk then the tragedy would not have happened. Is that
 25 your view?

Page 16417

1 MAJOR-GENERAL MPEMBE: Chairperson, I'm
 2 just requesting may I be appraised with the –
 3 CHAIRPERSON: Sorry, never mind whether
 4 he said it before, do you say it now? When he said it
 5 before is a matter, in our ledger we can look at our
 6 leisure. We can look for the reference, but never mind
 7 that. Sitting there now today, Mr Mpofu asks you looking
 8 back is it your opinion that if the negotiations and
 9 discussions and so forth which took place after the tragedy
 10 which led to the peaceful or relatively – I'm afraid that's
 11 not entirely – but a relatively peaceful situation has
 12 prevailed since then – if those – if parties had behaved
 13 before the tragedy the way they did afterwards in those
 14 discussions and that agreement they came to, do you think
 15 that this tragedy would still have happened or do you think
 16 it would not have happened. That's Mr Mpofu's question.
 17 Is that right?
 18 MAJOR-GENERAL MPEMBE: It could not have
 19 happened, Chairperson.
 20 MR MPOFU: Thank you, Chair. And from –
 21 I'm sorry, you wanted to –
 22 MAJOR-GENERAL MPEMBE: Yes. I'm sorry,
 23 Chairperson. Will the parties also include the strikers
 24 themselves?
 25 MR MPOFU: Well –

Page 16418

1 MAJOR-GENERAL MPEMBE: The definition of
2 these parties, will it include strikers themselves?
3 MR MPOFU: Ja. Yes, it does because they
4 were also involved in the talks afterwards –
5 MAJOR-GENERAL MPEMBE: No –
6 MR MPOFU: That's exactly what I'm going
7 to get into right now.
8 CHAIRPERSON: Yes, I'm sorry to
9 intervene. I take it when you gave your answer yes, you
10 were including the strikers. I mean it didn't require, as
11 I understood you, it didn't require what one can call
12 unilateral action from the employer. It required a
13 particular attitude and response from the strikers as well.
14 I take it that's what you said. That's what you meant, is
15 that right?
16 MAJOR-GENERAL MPEMBE: Correct,
17 Chairperson. I only wanted to inquire whether it's a broad
18 understanding for the commission also.
19 MR MPOFU: Yes, ja.
20 CHAIRPERSON: - as you see I understood
21 it and I think Mr Mpofo did as well. So we're all on the
22 same page at the moment.
23 MR MPOFU: Thank you, General, but that's
24 a very pertinent question that you're asking. Would you
25 also agree that from your own interaction with the

Page 16419

1 strikers, starting from the 13th up to the 16th, your own
2 interactions and those of other people, that it was the
3 consistent view of the strikers that they wanted to talk to
4 management?
5 MAJOR-GENERAL MPEMBE: I just wanted
6 clarity, Chairperson. I don't understand the question.
7 CHAIRPERSON: I'll try to explain it to
8 you. What Mr Mpofo says is from your understanding based
9 upon what the strikers had told you and what you understood
10 the strikers' attitude to be before the tragedy, what they
11 were saying was, amongst other things, we want to speak to
12 the employer. I think at some stage they actually wanted
13 Mr Farmer, who I think wasn't available, but they wanted Mr
14 Farmer who was the CEO of Lonmin to talk to them.
15 Alternatively, they wanted somebody else representing Mr
16 Farmer to speak to them. That's Mr Mpofo's question. Did
17 you understand that to be part, at least, of the attitude
18 of the strikers prior to the tragedy?
19 MAJOR-GENERAL MPEMBE: Yes, Chairperson.
20 MR MPOFU: Thank you, General. And would
21 it be fair to say that – would it be fair to say that you,
22 among other people, were frustrated, if I'm not putting it
23 too high, by the absence of reciprocation from Lonmin on
24 that request?
25 MAJOR-GENERAL MPEMBE: I just want to

Page 16420

1 understand the reciprocal role of Lonmin.
2 MR MPOFU: Ja, you remember the – we've
3 agreed that the strikers wanted to talk. So for the
4 situation that happened after the tragedy to take place,
5 the Lonmin would've had to reciprocate and –
6 CHAIRPERSON: Reciprocate – I'm not sure
7 reciprocate is the right word. What you mean I think is
8 respond.
9 MR MPOFU: Ja.
10 CHAIRPERSON: To indicate a willingness
11 on their side –
12 MR MPOFU: Ja.
13 CHAIRPERSON: - to talk to the strikers
14 at least –
15 MR MPOFU: Accept their offer, ja.
16 CHAIRPERSON: No, hang on. I am not sure
17 whether offer is the right word either. No, let's get it
18 formulated correctly. I think what you want – what you are
19 asking is what was lacking from Lonmin's side according to
20 what you are putting, was an appropriate response to the
21 requests or desire on the part of the strikers to talk to
22 them. Is that correct?
23 MR MPOFU: Yes, in fact, Chairperson,
24 maybe –
25 CHAIRPERSON: Engage with them perhaps in

Page 16421

1 the Lonmin –
2 MR MPOFU: - we know engage is –
3 CHAIRPERSON: Alright, we leave that.
4 Engage is an unfortunate word. But I think I put it
5 correctly. What was lacking, you say, was that – I'm not
6 sure whether Lonmin would agree. I see the Lonmin light is
7 on, but we'll get to you in a moment – your question is
8 based upon the proposition that certainly as seen by this
9 witness there was a lack of a, shall we say, an appropriate
10 response by Lonmin to the desire communicated to them by
11 the police –
12 MR MPOFU: Yes.
13 CHAIRPERSON: - that the, they the
14 strikers wanted to talk to someone in a higher position in
15 Lonmin about their wage demands. Is that –
16 MR MPOFU: Ja. Chairperson, you have
17 covered an aspect which I had left out which might turn off
18 the lights. Did you when you received those messages from
19 the workers, convey them to Lonmin?
20 CHAIRPERSON: Now before you answer the
21 question, we've got an objection from Lonmin. Let's hear
22 what the objection is.
23 MR SHOZI: Well it's off for now, I want
24 to hear the question.
25 MR MPOFU: Ja. The question is did you,

Page 16422

1 after – now when I say you once again, I mean you and SAPS,
 2 ja. Did you, after receiving these numerous requests from
 3 the strikers convey them to Lonmin?
 4 MAJOR-GENERAL MPEMBE: Correct,
 5 Chairperson.
 6 MR MPOFU: And we know that Lonmin was
 7 not prepared to speak to the strikers, correct?
 8 MR SHOZI: No, Chairperson, it's
 9 incorrect. Lonmin never said that. Lonmin is on record as
 10 having said on the 15th of August we are prepared to speak
 11 to the strikers if they lay down their weapons. So the
 12 premise of the question is incorrect.
 13 MR MPOFU: Okay.
 14 CHAIRPERSON: I don't if that's quite
 15 correct. Part of Lonmin's attitude, as I understand it – I
 16 know this is the time to debate it, we will debate it when
 17 your witnesses are in the witness box more fully, my
 18 understanding was they were prepared to negotiate through
 19 the recognised union structures. The recognised union
 20 structures meant they were prepared to negotiate about this
 21 wage claim or demand with NUM because the recognised union
 22 structures only accorded bargaining rights in respect of
 23 wages to NUM. That I think is a fairly consistent stance
 24 that was adopted by Lonmin. Whether it's – was appropriate
 25 or not is a matter that will be debated later, but is my

Page 16423

1 state and facts correct or not?
 2 MR SHOZI: It is correct, Chairperson.
 3 CHAIRPERSON: Yes. So now that now we
 4 know or at least I think we know that the strikers didn't
 5 want to proceed or they claim they didn't want proceed
 6 through the union channels, they wanted to negotiate as
 7 RDOs, not wearing any trade union hat or cap or beret or
 8 whatever trade unionists wear. And so if your client's
 9 stance was we're only prepared to talk through the
 10 recognised union structures and if that means we're only
 11 prepared to talk through NUM, then the point that Mr Mpofu
 12 is putting is not incorrect. So I think I will allow –
 13 overrule your objection insofar as you still persist in it
 14 and let him carry on, but we will both listen carefully to
 15 his subsequent questions and if he steps out of line we'll
 16 deal with it. Alright?
 17 MR MPOFU: Yes. That's correct,
 18 Chairperson. To be fair to Lonmin, General, is it your
 19 understanding that Lonmin had put two preconditions to
 20 talking. One was that arms had to be laid down and the
 21 other one was that they would only speak to recognised
 22 unions. You remember that?
 23 MAJOR-GENERAL MPEMBE: Chairperson, the
 24 Lonmin's response is in terms of, the way in which I
 25 understand it, is in terms of Exhibit 004, page 27, it's

Page 16424

1 paragraph 16 –
 2 MR MPOFU: Well –
 3 MAJOR-GENERAL MPEMBE: - until to page
 4 28.
 5 MR MPOFU: Yes, General, I don't want to
 6 go to that because of time. I'm saying a nutshell,
 7 including 004 and 00 whatever, did you understand that the
 8 Lonmin had put two preconditions to talking. One being
 9 that they had to lay down arms and two, that they would
 10 only speak to the recognised unions in general.
 11 MAJOR-GENERAL MPEMBE: Yes, it's part of
 12 them, but there are others also that they did put in. Not
 13 in the mountain, without weapons, in a safe environment.
 14 MR MPOFU: Yes. No. I understand that.
 15 I'm saying the – when the discussions – well I'm telling
 16 you now that I'm putting it to you as a fact, if you know,
 17 you know, if you don't, you don't. You can tell us. That
 18 are you aware that when the subsequent negotiations
 19 happened which you referenced earlier, that the strikers
 20 were still bearing arms and that Lonmin spoke, not only
 21 with the recognised union but with the delegation of the
 22 workers themselves.
 23 MAJOR-GENERAL MPEMBE: Chairperson, I was
 24 told that –
 25 MR MPOFU: Yes.

Page 16425

1 MAJOR-GENERAL MPEMBE: - Lonmin at one
 2 stage, in that meeting by Mr Mathunjwa that there was a
 3 stage where Lonmin spoke to the RDOs –
 4 MR MPOFU: Yes.
 5 MAJOR-GENERAL MPEMBE: - but I don't have
 6 personal knowledge of it.
 7 MR MPOFU: No. Exactly. That's what I'm
 8 trying to say. That's what you meant when you said if they
 9 had done what they did subsequently earlier. In other
 10 words to speak to the RDOs and to speak to them even though
 11 they had not laid down their arms. Now but the question
 12 really that I wanted to ask you was –
 13 CHAIRPERSON: Carry on, unless the
 14 question I'm going to ask anticipates yours in which case
 15 tell me. You were asked about whether you felt frustrated
 16 about Lonmin's attitude. Now there are very – as you say
 17 there are various aspects of it. One of them relates to
 18 their reluctance and unwillingness, or put it more
 19 accurately, refusal, to negotiate with the strikers in
 20 circumstances where the strikers were armed. They didn't
 21 want to negotiate with people who were armed. Right?
 22 MAJOR-GENERAL MPEMBE: Yes, Chairperson.
 23 CHAIRPERSON: Were you frustrated about
 24 that or did you consider that a reasonable attitude for
 25 Lonmin to take up? Was it reasonable for Lonmin to say

<p style="text-align: right;">Page 16426</p> <p>1 we're not prepared to negotiate while you people have got 2 weapons in your hands? We haven't got weapons in our 3 hands, we don't think it appropriate if you have weapons in 4 yours. Would that have been an appropriate thing for 5 Lonmin to say? Do you understand the question? 6 MAJOR-GENERAL MPEMBE: I understand the 7 question, Chairperson, and my question was on both. My 8 approach was on both as they put it to me. Yes, on the 9 other hand I saw it as a frustration because the police 10 were there, they could escort them to go there. 11 CHAIRPERSON: Yes. 12 MAJOR-GENERAL MPEMBE: On the other hand 13 I could see they themselves, when they say it and I mean 14 with such dangerous weapons and what has happened to the 15 securities, on the other hand I saw it as reasonable. 16 CHAIRPERSON: So that was a reasonable 17 request, but of course they went further than that. They 18 didn't just say we want – if you put your weapons down, 19 we'll talk to you. They said, as I understand it, even if 20 you do you put your weapons down we still won't talk to 21 you. We'll only talk through the recognised union 22 representatives and that appears from statement of Mr 23 Kwadi, let's get his name right, Mr Kwadi, Peter Fanyana 24 Kwadi, Exhibit KK, page 9 where he says in paragraph 9.1, 25 he's talking about what he said to Mr Mathunjwa on the 16th</p>	<p style="text-align: right;">Page 16428</p> <p>1 to read you extracts just to save time which would – which 2 come from Exhibit L, that I will argue later in support of 3 that, Chairperson. If you go to L96, Exhibit L96 at the 4 last bullet, you say, the last two bullets. The 5 representatives stated that the protestors wanted the mine 6 management to give them an increase to ensure that their 7 salaries were R12 500 per month and the next bullet you say 8 – or rather not you, the document says, "the group was 9 informed that their requests would be forwarded to the JOC 10 and the SAPS could not force the mine to negotiate with 11 them." Remember that? 12 MAJOR-GENERAL MPEMBE: I see, 13 Chairperson. 14 MR MPOFU: Yes, and then if you go to 15 L109, I'll just read them successively. L109, the bullet 16 just before the last one. You say, "the mine's management 17 were still not prepared to engage in negotiations." And 18 then if you go to L113, second bullet, "Lonmin stated that 19 the mine would not negotiate with the striking miners as 20 there was a two year wage agreement in place with all the 21 unions." Then if you go to L117, at the last bullet, "the 22 representatives asked if the mine's management was present 23 and they were informed that the mine had indicated that 24 they would not negotiate with them unless the workers put 25 down their weapons and returned to normal duties."</p>
<p style="text-align: right;">Page 16427</p> <p>1 in the morning. He says, "I advised Mathunjwa that Lonmin 2 management was not prepared to discuss the strikers' 3 demands or grievances outside of collective bargaining 4 structures and therefore would not recognise AMCU's 5 collective bargaining agent for the strikers." Now that 6 means that if it was to be done within the framework and 7 only in the framework of collective bargaining structures 8 meant that AMCU couldn't take part. The only union 9 representatives who were part of the collective bargaining 10 structure at that stage were those from NUM. So Lonmin's 11 attitude was this – we're not prepared to talk to the 12 strikers. We're only prepared to talk to union 13 representatives. We're not prepared to talk to AMCU about 14 their wages. We're only prepared to talk to NUM. That is 15 their attitude. Now that meant, I would assume, that the 16 police had very little to offer the strikers by way of an 17 inducement to accede to the request that they lay down 18 their arms and come and talk in a normal way to Lonmin 19 because Lonmin wasn't going to talk them. They were only 20 going to NUM, the representatives and they didn't want to 21 represent them and there's another history which we don't 22 have to go into at this stage. Now did you find that 23 frustrating? 24 MAJOR-GENERAL MPEMBE: Yes, Chairperson. 25 MR MPOFU: Thank you. And I'm just going</p>	<p style="text-align: right;">Page 16429</p> <p>1 Remember that being said? General? 2 [09:44] CHAIRPERSON: Were you present at that 3 meeting on the 15th of August between SAPS management and 4 Lonmin, representatives of Lonmin, which took place at half 5 past 5 in the morning on the 15th, which is dealt with in 6 that slide 113. 7 MAJOR-GENERAL MPEMBE: Chairperson, to 8 that meeting I was present. 9 CHAIRPERSON: Yes. 10 MAJOR-GENERAL MPEMBE: But I think this 11 one it was said on the, on Monday, or – 12 CHAIRPERSON: My recollection is that it 13 was, Lonmin had said on a number of occasions from the 13th 14 onwards when these matters were raised with them by the 15 police, that there was a two-year wage agreement in place, 16 and that was one of the reasons they gave for their 17 attitude. I think that's correct, isn't it? 18 MAJOR-GENERAL MPEMBE: Correct, 19 Chairperson. 20 CHAIRPERSON: Ja, and we also know – 21 although I don't know whether you know, but we also know 22 that the – because this was the evidence, that the local 23 representatives of NUM took the same stance and they 24 communicated to the rock drill operators and others that 25 there was nothing they could do in respect of the wage</p>

Page 16430

1 claims that were being raised because of this two-year
 2 agreement. I don't know whether you were aware of that,
 3 but that was NUM's attitude also.
 4 MAJOR-GENERAL MPEMBE: I'm not aware of
 5 that, Chairperson, but what I'm aware –
 6 CHAIRPERSON: You can take it from me,
 7 that was the evidence we got.
 8 MAJOR-GENERAL MPEMBE: Okay, thanks,
 9 Chairperson.
 10 CHAIRPERSON: Mr Zokwana, the president
 11 of NUM, when he came said that that attitude of NUM's as
 12 expressed to the workers was not correct, that they
 13 mightn't have been able to strike, but they certainly could
 14 negotiate about it; there as nothing preventing negotiation
 15 and he referred to an incident in the past where there had
 16 been negotiation for a wage increase despite the fact that
 17 there was a two-year or three-year agreement in place. So,
 18 but anyway, you didn't know about that, but of course now
 19 that you do know about it, it makes it worse because not
 20 only had Lonmin said we don't want to negotiate, we won't
 21 negotiate partly because there's a two-year agreement, but
 22 NUM, the only people with whom Lonmin indicated they were
 23 prepared to negotiate on behalf of the RDOs, had also said
 24 that there can be no negotiation during the two-year
 25 period. Now if you had known that, would you have been

Page 16431

1 even more frustrated than you were?
 2 MAJOR-GENERAL MPEMBE: Correct,
 3 Chairperson, but that was also shown when I called them in
 4 that meeting.
 5 CHAIRPERSON: Yes, yes. No, I
 6 understand.
 7 MR MPOFU: Yes, but –
 8 CHAIRPERSON: Sorry, there's a further
 9 point that I can put to you, just to clear the ground for
 10 Mr Mpofo. According to, also according to exhibit KK, the
 11 statement of Mr Kwadi, in paragraph 3.7 on page 4, this is
 12 what happened on the 10th – you weren't there yet, but you
 13 remember part of the history of this is that there was a
 14 march to the Lonmin offices on the 10th and there were
 15 discussions between a group of people who went inside and
 16 people from Lonmin, and what appears here in the second
 17 part of paragraph 3.7, Mr Kwadi speaking, he says, the
 18 crowd intimidated they were illiterate. They were asked for
 19 their demands in a memorandum and they said we can't give a
 20 memorandum because we're illiterate. "The crowd intimidated
 21 they were illiterate. They wanted to address the
 22 management orally about their demands. They were informed
 23 their request would not be acceded to." So as early as the
 24 10th of August Lonmin said we're not prepared to negotiate
 25 orally with the strikers about their demands, and then I've

Page 16432

1 put the later passages to you.
 2 Now, and then on the same day, paragraph 3.3,
 3 that's the page before the one I read from, page 3, Mr
 4 Kwadi says he had various telephone interactions with Mr
 5 Mokwena and Mr Kgotle about the appropriate response to the
 6 situation. This was after Mr Mathunjwa had said to him
 7 that the striking employees were acting of their own accord
 8 and they weren't members of AMCU. He says he had, I repeat
 9 what I read a moment ago, "I had various telephone
 10 interactions with Mokwena and Kgotle about the appropriate
 11 response to the situation. A decision was taken that no
 12 person from management should receive any memorandum in
 13 respect of the demands as both AMCU and the National Union
 14 of Mineworkers advised they had no knowledge or involvement
 15 in the impending march. Both unions advised their members
 16 were not involved in the events at hand." So I don't know
 17 if you knew that at the time, but if you had know, would
 18 that also have increased your frustration?
 19 MAJOR-GENERAL MPEMBE: Correct,
 20 Chairperson.
 21 MR MPOFU: Thank you –
 22 CHAIRPERSON: Mr Mpofo, I'm sorry if I've
 23 trespassed onto property, onto ground you were intending to
 24 cover. Accept my apologies.
 25 MR MPOFU: It was done in [inaudible]

Page 16433

1 fashion, Chairperson.
 2 MR NTSONKOTA: Sorry, Chair, before Mr
 3 Mpofo continues, for the record again, name is Thando
 4 Ntsonkota on behalf of NUM. Chair, my recollection of the
 5 evidence on this aspect of the wage agreement goes a little
 6 bit further than what the Chair has expressed. If I
 7 recollect accurately, the position was that notwithstanding
 8 the two-year wage agreement, as it had happened in the past
 9 NUM could have been in a position to negotiate it.
 10 However, because the strikers as early as June had
 11 expressed to Mr Da Costa that they do not want any unions
 12 involved, so even if we wanted to negotiate – and we could
 13 – we most likely would not have been in a position to
 14 because we didn't have any mandate that we could have gone
 15 to put to management.
 16 CHAIRPERSON: No, no, the mandate point
 17 is correct. You are entitled to clarify that, but what I
 18 put was also right, that the evidence of the chairman of
 19 the NUM branch at Lonmin was that they at meetings actually
 20 told the workers there's nothing we can do about this wage
 21 demand while the two-year wage agreement is in place, and
 22 Mr Zokwana when he came said that may have been what they
 23 said, but it's not correct, there was something we could
 24 have done; we could have negotiated it. There was a
 25 previous case, I think he said it's something like 2004

Page 16434

1 where despite the fact that there was an agreement covering
 2 a period, there had been a change in circumstance and we
 3 raised that in negotiations and in fact succeeded in
 4 getting an increase. So what the chairman of the local
 5 branch of NUM had told the workers at meetings was in fact
 6 incorrect. So that's necessary to get the whole picture
 7 before us. But anyway, these matters will be covered
 8 presumably more fully when the Lonmin witnesses give
 9 evidence, but what we're busy with at the moment, or rather
 10 what Mr Mpofo is busy with at the moment is trying to
 11 illustrate from the mouth of the overall commander that the
 12 police had a measure of frustration not only with the
 13 strikers because of their behaviour, or misbehaviour, but
 14 also with Lonmin for the reasons that he's busy exploring,
 15 and I think that's permissible questioning and I'm going to
 16 allow him to continue. Mr Mpofo?

17 MR MPOFU: Yes, Chair –

18 CHAIRPERSON: But the fuller attitude of
 19 NUM has been correctly stated.

20 MR MPOFU: That's correct, Chairperson.

21 CHAIRPERSON: You could proceed on the
 22 basis that we're all aware of that.

23 MR MPOFU: Yes, thank you, Chairperson.

24 MR NTSONKOTA: Thank you, Chair.

25 MR MPOFU: Thank you, Mr Ntsonkota. No,

Page 16435

1 it's okay. Not to belabour the point, because I think the
 2 Chairperson did cover it, you would agree that what was
 3 stated in that last bullet which I've just read to you,
 4 they wouldn't negotiate with them unless the workers put
 5 down their weapons and returned to normal duties, that that
 6 would amount to capitulation on the part of the workers?

7 MAJOR-GENERAL MPEMBE: Chairperson, I
 8 just wanted to get the last bullet in the exhibit L –

9 CHAIRPERSON: He's referring to the
 10 second-last bullet, or the penultimate bullet on slide 113.

11 MR MPOFU: No, no, I'm sorry, Chair, I'm
 12 referring to the last bullet on 117. That's the last one I
 13 read, which says the mine hasn't –

14 CHAIRPERSON: Yes, I'm sorry, it says the
 15 same, virtually the same as the penultimate one on 113, but
 16 yes, I was wrong, you then read the later slide which
 17 contains –

18 MR MPOFU: The capitulation –

19 CHAIRPERSON: - effectively the same
 20 statement –

21 MR MPOFU: No, not really. The
 22 significant difference is that the other one is merely a
 23 capitulation, which is the point I'm making to you, that
 24 they would lay down their weapons and come back to work,
 25 then they would talk to them. Do you understand the

Page 16436

1 difference?

2 MAJOR-GENERAL MPEMBE: Chairperson, I
 3 just want to understand the term "capitulation," what does
 4 it mean?

5 MR MPOFU: Alright –

6 CHAIRPERSON: Capitulation really means
 7 surrender, I suppose, giving up the attitude that you've
 8 adopted.

9 MR MPOFU: Yes, let me – I'll also
 10 attempt, and I'll take one step back. I promise I won't
 11 give you a long – Mr Magidiwana gave us a very crash course
 12 in collective bargaining. What he was saying is that what
 13 would break the impasse was that if they were sitting at
 14 the mountain, the chimneys wouldn't work, to use his words,
 15 and therefore one of the two parties had to give something.
 16 Now what I'm saying, what was being asked for here was
 17 effectively end the strike, put your weapons down, come
 18 back to work, then we'll talk to you. What I'm saying is
 19 that in that, that would no longer be now a bargaining, it
 20 would be giving up, as it were. Do you understand?

21 MAJOR-GENERAL MPEMBE: I understand,
 22 Chairperson.

23 MR MPOFU: Ja. Right –

24 CHAIRPERSON: I think the further point
 25 that the strike was an unprotected strike, and this is a

Page 16437

1 matter which presumably will be explored later when the
 2 Lonmin witnesses give their evidence.

3 MR MPOFU: Yes. You do understand that
 4 it was an unprotected strike, but an unprotected strike is
 5 part of legitimate collective bargaining. All it does is
 6 that you don't get protected under the Labour Relations
 7 Act. You can be dismissed. But it's an accepted part of
 8 collective bargaining. Do you know that? Or maybe you
 9 don't?

10 CHAIRPERSON: I'm not sure that you put
 11 it quite accurately that it's legitimate, because if you
 12 can be dismissed by the employer and the employer can't be
 13 forced to take you back, then I'm not sure the word
 14 "legitimate" is entirely appropriate. But the point is
 15 it's not a crime to take part in an unprotected strike.
 16 It's not even illegal.

17 MR MPOFU: Yes.

18 CHAIRPERSON: So to that extent what you
 19 said is the correctly stated position.

20 MR MPOFU: Well, Chairperson, I'm a
 21 thousand percent sure what I've said is correct, without
 22 any qualification. The legitimate way of collective
 23 bargaining, just like an employer can lock out – and this
 24 might be found later to have been fair or not fair, that's
 25 a different matter, but the right of a human being to

1 withdraw their labour is sacrosanct. What the legal
 2 consequences are, are defined in the Labour Relations Act,
 3 but our Constitution guarantees your right to withdraw your
 4 labour at any time, without any warning. You can simply
 5 walk out.
 6 CHAIRPERSON: [Microphone off, inaudible]
 7 MR MPOFU: Well, it is.
 8 CHAIRPERSON: [Microphone off, inaudible]
 9 what you mean by the word "sacrosanct" because if you –
 10 MR MPOFU: Constitutionally speaking.
 11 CHAIRPERSON: No, no, you have a right to
 12 do it. You're not guilty of a crime, but the
 13 sacrosanctness of it is subject to a very substantial
 14 qualification, namely that you can't do it with impunity
 15 because you can be dismissed and there's nothing you can do
 16 about your dismissal if it's an unprotected strike. So,
 17 but maybe it's a semantic debate we're engaging in, which
 18 isn't going to give us very much assistance in answering
 19 the questions the President has sent to us to answer, but
 20 anyway, carry on with your questioning.
 21 MR MPOFU: You said to a previous
 22 question to the Chairperson, you said the issue about the
 23 arms you understood, or I think you said it was reasonable.
 24 Now the question I want to put to you is, do you also think
 25 it was reasonable to say the preconditions that are being

1 put are basically capitulate and just come back to work and
 2 then we'll talk to you? Do you also think that is – I can
 3 understand the issue of the arms –
 4 CHAIRPERSON: No, Mr Mpofo, we've gone
 5 over this ground before. You –
 6 MR MPOFU: Well, those are things –
 7 CHAIRPERSON: No, no, no, give me an
 8 opportunity then I'll give you an opportunity also. The
 9 ground we've gone over is where a question is asked which
 10 the Commission is in a good a place to answer as the
 11 witness, then the question won't be allowed because it's
 12 just a waste of time, but if you, you were dealing earlier
 13 with the question of the police response to the attitude of
 14 Lonmin and I allowed that and I'll continue to allow it.
 15 You got him to concede, with a bit of help from me, but you
 16 got him to concede that there was a substantial element of
 17 frustration on the part of the police at the attitude of
 18 Lonmin. So you can go on asking questions about the
 19 unprotected strike, and so forth, in that context, but
 20 don't ask him whether it was reasonable for Lonmin to do it
 21 because that's not a matter which we are bound by his
 22 answer and which his answer doesn't really help us. But if
 23 you want to ask along the lines that you are previously
 24 dealing with, namely the difficulties it occasioned the
 25 police in trying to do the job they were doing, please

1 proceed.
 2 MR MPOFU: Yes, I'm sorry, Chairperson,
 3 but as I say, I learned from the best. You asked him just
 4 now whether it was reasonable for them to say that the arms
 5 should be put down. All I'm doing now is to say I'm
 6 accepting the answer that it was reasonable for them to say
 7 the arms should be put down. I'm asking whether does he
 8 also, to follow your question, Chairperson, does he also
 9 think it was reasonable to ask them to capitulate. It was
 10 your question.
 11 CHAIRPERSON: I may have been wrong in
 12 asking the question that I was, but –
 13 MR MPOFU: Well, then I'll disallow it,
 14 Chairperson.
 15 CHAIRPERSON: In view of the fact that I
 16 asked it, I'll allow you to ask your question, but let's
 17 not have a long debate with him on his answer.
 18 MAJOR-GENERAL MPEMBE: Chairperson, for
 19 the first part of put down their weapons, it was
 20 reasonable, and returned –
 21 CHAIRPERSON: And Mr Mpofo accepts that.
 22 Yes, carry on.
 23 MAJOR-GENERAL MPEMBE: - and returned to
 24 work, I could say it will amount to – I mean that word,
 25 which I don't understand, and my argument is based

1 constitutionally, as he said, in turn because people are
 2 not allowed in terms of the Constitution to protest while
 3 armed, and also they have the unions, so I didn't see any
 4 necessity of them arming themselves because they have the
 5 people that they can talk for them.
 6 CHAIRPERSON: Mr Mpofo, I think you've
 7 achieved what you wanted to achieve –
 8 MR MPOFU: I have.
 9 CHAIRPERSON: So you've got enough on
 10 record to argue the point.
 11 MR MPOFU: That's correct.
 12 CHAIRPERSON: Whether it's a good point
 13 is a matter we'll see later, but carry on.
 14 MR MPOFU: We'll see, Chairperson. And
 15 is it also correct that it was your view that Lonmin as the
 16 employer have a duty to act in such a way as to control or
 17 quell the situation? And to be fair to you, because I
 18 think that's how you've put it, not only Lonmin, but other
 19 people also had duties, but Lonmin had a primary duty as
 20 the employer to ensure that the situation was quelled.
 21 MAJOR-GENERAL MPEMBE: Yes, Chairperson.
 22 MR MPOFU: Thank you. Okay, just for the
 23 sake of completion, I'm not really going to ask you a
 24 question; I'm just going to make these references for the
 25 benefit of the Commissioner. In L –

<p style="text-align: right;">Page 16442</p> <p>1 CHAIRPERSON: Do you have to give us the 2 references now? Can't you give them to us in argument? 3 We've all studied L over and over again, backwards and 4 forwards and sideways, but I'm sure that if there's 5 something in it that you feel we have to have our attention 6 specifically directed to, you can do so at the appropriate 7 time. I don't think you should - 8 MR MPOFU: No, it's fine, Chairperson, I 9 would have finished by now - 10 CHAIRPERSON: I don't think you should 11 spend your time but I want you to spend it profitably on 12 this today. 13 MR MPOFU: That's fine. I would have 14 finished the references by now, but so I'll leave them. 15 Alright, now let's then go back to what I said would be the 16 main theme of my cross-examination for you this morning. 17 You remember we had agreed about the cluster of prescripts? 18 MAJOR-GENERAL MPEMBE: Correct, 19 Chairperson. 20 MR MPOFU: Right, now I'm going to show 21 you that there were many, dozens of - 22 MAJOR-GENERAL MPEMBE: I'm sorry, 23 Chairperson, I just want to say I did understand what the 24 Advocate is saying, not that necessarily that I agreed, 25 because I was going to be -</p>	<p style="text-align: right;">Page 16444</p> <p>1 President having approved it, was in breach of the 2 Constitution. Are you aware of that? 3 [10:04] CHAIRPERSON: That is a subject that was 4 covered already. It's a matter for debate, but just to cut 5 it short, there's a contention, which will have to be ruled 6 on later, that the use of the defence force helicopter for 7 example, without the President's permission, was a breach 8 of the Constitution. Now I ask you to accept for the sake 9 of the answer that that may be right. Were you aware that 10 there was a possible breach of the Constitution in that 11 regard? 12 MAJOR-GENERAL MPEMBE: No, Chairperson. 13 CHAIRPERSON: So I think we can move on 14 to chapter 2. 15 MR MPOFU: We're still on chapter 1, and 16 I wanted to move on but I have to deal with this 17 qualification now, in case I forget them. In fact it's not 18 a matter of any conjecture. Section 201 - 19 CHAIRPERSON: Mr Mpofu, you've raised the 20 contention earlier with, I think General Annandale, and I 21 think with, I think it was with the National Commissioner 22 as well, certainly with her. Now that's a legal contention 23 that you're going to advance that the Constitution was 24 breached. The witness has already told us that - and I've 25 asked him to accept for the sake of the argument that the</p>
<p style="text-align: right;">Page 16443</p> <p>1 CHAIRPERSON: Yes, yes, yes, no he says 2 he was talking about playing it by the book. 3 MAJOR-GENERAL MPEMBE: Yes. 4 CHAIRPERSON: And then he was asked what 5 do you mean by the book, and he gave us the sort of table 6 of contents of the book he's referring to, chapter 1 was 7 the Constitution, and he told us what was in the other 8 chapters as well. There were six, as far as I remember. 9 MR MPOFU: Five. There was the 10 Constitution, legislation and common law, Standing Orders, 11 the plan, and professional ethics. 12 CHAIRPERSON: I see. Sorry, there were 13 only five chapters, but - 14 MAJOR-GENERAL MPEMBE: Thanks, 15 Chairperson. 16 MR MPOFU: Okay, so let's start with the 17 first chapter, as the Chairperson calls it. Are you aware 18 that in the operation the Constitution was breached at 19 least in one respect, and I'll be the first one to admit 20 that it was not a material respect in respect of the 21 context of what happened. When I say it's not material, it 22 probably didn't make much of a difference, but are you 23 aware that the - your plan, the fact that your plan 24 incorporated the use of members of the South African 25 National Defence Force and their equipment without the</p>	<p style="text-align: right;">Page 16445</p> <p>1 Constitution was breached. Was he aware of it? The answer 2 he gives is he wasn't. If there was a breach of the 3 Constitution, that's a matter you will be able to argue. 4 The relevant facts are before us. We will have regard to 5 what the Constitution says and we will deal with it, but I 6 don't think there's any profit to be gained from asking 7 this witness further questions about something he says he 8 wasn't aware of. He isn't as well equipped as you are to 9 analyse the Constitution, and in any event, he hasn't the 10 benefit of the ruling that we're going to give at the end 11 as to whether it was or was not a breach of the 12 Constitution. He simply says if it was so, if it was so, 13 he wasn't aware of it. So I think you can move on. I'm 14 concerned to save your time, Mr Mpofu. 15 MR MPOFU: Yes. Was it your duty to be 16 familiar with the applicable prescripts or not? 17 MAJOR-GENERAL MPEMBE: Yes, Chairperson, 18 it is my duty. 19 MR MPOFU: Thank you. Alright, now are 20 you also aware that the Constitution requires that members 21 of the police force, police service, among others should 22 act impartially when there's a dispute between third 23 parties? 24 MAJOR-GENERAL MPEMBE: Correct, 25 Chairperson.</p>

<p style="text-align: right;">Page 16446</p> <p>1 MR MPOFU: And are you aware that the 2 Constitution also – or let me put it this way – that in 3 terms of the constitutional structure of the division 4 between the operational management and the political 5 management of the SAPS, you are aware that it would be 6 wrong for operational decisions to be influenced 7 politically, or by political considerations, correct? 8 MAJOR-GENERAL MPEMBE: I need the clarity 9 on that, Chairperson, because I didn't know of any 10 political interference – 11 CHAIRPERSON: I must profess, I share 12 your difficulty in understanding the question, and I 13 understand my colleague, both my colleagues share our 14 difficulty. Mr Mpofu, I'm afraid you're going to have to 15 reformulate the question so that we can understand it. 16 MR MPOFU: Yes, I'll assist all who are 17 confused. 18 CHAIRPERSON: And we'll be grateful for 19 such assistance that you can give us. I must also say that 20 on the assumption that you are correct that there was 21 improper political interference in what amounts to an 22 operational decision, I'm not quite sure what advantage 23 could be derived from covering the matter with this 24 witness. I think I understand where you're going. I can 25 understand the arguments that you're going to advance. I</p>	<p style="text-align: right;">Page 16448</p> <p>1 question you asked him. So repeat the question so he 2 understands it. 3 MR MPOFU: Yes. Thank you, General, I'll 4 assist you. As the overall commander, the big chief, 5 should you have been aware of all the considerations that 6 were influencing, or that would influence the decision to 7 move to the dangerous stage 3? 8 MAJOR-GENERAL MPEMBE: No, Chairperson. 9 CHAIRPERSON: You shouldn't have been, or 10 you weren't? 11 MAJOR-GENERAL MPEMBE: I wasn't. 12 CHAIRPERSON: Mr Mpofu says, he's putting 13 the question slightly differently. He says should you have 14 been aware, not whether you were, but should you have been 15 aware of all the considerations which prompted the decision 16 to move to stage 3 as it was formulated at the 1:30 JOCCOM 17 meeting. That's his question. Now what's your answer to 18 that? In other words, if there were other considerations – 19 let me reformulate the question. If there were other 20 considerations which led to the decision to implement stage 21 3, which as he says is a very risky stage, but if there 22 were other considerations which led to that decision which 23 you were not aware of, which were not communicated to you, 24 would you regard that as inappropriate and incorrect? Is 25 that your question, Mr Mpofu?</p>
<p style="text-align: right;">Page 16447</p> <p>1 can also understand questions you may ask of other 2 witnesses who are to come, but you will remember that we 3 have in the witness box a deputy provisional commissioner, 4 who was admittedly the overall commander of the operation, 5 but these – perhaps we can cut it short either way. Were 6 you aware, yourself, of any political interference in 7 relation to the decisions that were taken or manner in 8 which decisions which were taken were implemented at 9 Marikana? 10 MAJOR-GENERAL MPEMBE: No, Chairperson. 11 The Commission knows what I said in terms of my HHH3, that 12 what I briefed the Provincial Commissioner about. 13 MR MPOFU: I'm afraid it's not as easy as 14 all that, Chairperson, with respect. I'm afraid it's not 15 as easy as all that. The question is this; as the overall 16 commander, as it has already been said, should you have 17 been aware of all the considerations that led to the 18 killing – not to the killing – that led to the advancement 19 to stage 3? Should you as the overall commander? Please 20 answer the question. 21 MAJOR-GENERAL MPEMBE: No, Chairperson, I 22 don't know of any other reasons – 23 CHAIRPERSON: No, no, no, no, that's not 24 the question. Repeat the question again. The witness says 25 he wasn't aware of other considerations, but that's not the</p>	<p style="text-align: right;">Page 16449</p> <p>1 MR MPOFU: That's correct, Chairperson. 2 MAJOR-GENERAL MPEMBE: Yes, Chairperson, 3 I could have seen them inappropriate. 4 CHAIRPERSON: Yes, and presumably if 5 there were other considerations which were operating which 6 you weren't aware of, which you thought were bad 7 considerations, you would then have wished to communicate 8 that to whoever was concerned to say no, no, that's not a 9 reason to implement stage 3, for these reasons, if that 10 were so. I know it's a hypothetical question, but that 11 must be right, surely? 12 MAJOR-GENERAL MPEMBE: Yes, Chairperson. 13 MR MPOFU: Thank you very much, 14 Chairperson. That then deals with the, what I call the 15 breaches of the Constitution, which we will deal with in 16 argument. Now before I move on to the next cluster, 17 chapter, as the Chairperson calls it, which is legislation 18 and the common law, maybe – Chairperson, I see that I'm 19 ahead of myself – 20 CHAIRPERSON: Mr Mpofu, we have the same 21 problem again that what the law is, is a matter for this 22 Commission to take notice of. Whether the law was broken 23 or contravened or not complied with has got two sides to 24 it. The one is what the law is. The other was the 25 underlying facts upon which the contention that there was a</p>

Page 16450

1 breach or contravention or non-compliance rests. Now I
 2 haven't got a problem with your putting the second part to
 3 the witness, endeavouring to establish facts which will
 4 found an argument that there was a breach or contravention
 5 or non-compliance with the law, but I'm not interested in
 6 whether the witness thinks those facts amount to a breach,
 7 contravention, or non-compliance; that's for us to decide.
 8 But the facts underlying that, obviously you can ask and I
 9 won't stop you, but please stick to that.

10 MR MPOFU: Thank you. That's all I'm
 11 canvassing, Chairperson. That's why I said I'd leave the
 12 rest to argument, just now. Now when it comes to – and I'm
 13 assuming you're familiar, as you said, with the prescripts,
 14 but of course, as the Chairperson says, it's not with the
 15 precision of a lawyer. I'm just saying that you would be
 16 generally familiar with the prescripts. Is that a fair
 17 assumption?

18 MAJOR-GENERAL MPEMBE: Correct,
 19 Chairperson.

20 MR MPOFU: Yes.

21 CHAIRPERSON: [Microphone off, inaudible]
 22 that Mr Mpofu said it, but never mind, you've accepted the
 23 assumption, so we can carry on.

24 MR MPOFU: Now you are aware, are you
 25 not, that in terms of the Police Act at least, in terms of

Page 16451

1 the Police Act – and I'll argue, you can, don't worry about
 2 the other part, I'll argue that also in terms of the common
 3 law, that the police are enjoined to employ nothing more
 4 than minimum force, correct?

5 CHAIRPERSON: They are enjoined not to
 6 use force at all unless it's necessary, and insofar as it's
 7 necessary it must be minimum force. What minimum is of
 8 course depends on the circumstances.

9 MR MPOFU: I know. Ja well, you can
 10 answer my question or the one that comes from the Chair.

11 MAJOR-GENERAL MPEMBE: Minimum force
 12 proportionate to the situation.

13 MR MPOFU: Yes, and you are aware in that
 14 context, or one of the areas of your expertise is that you
 15 were teaching Criminal Law, correct? At some stage,
 16 correct?

17 MAJOR-GENERAL MPEMBE: Yes, Chairperson.

18 MR MPOFU: Ja, now –

19 CHAIRPERSON: I'm not sure that his
 20 knowledge of Criminal Law, whether derived from his
 21 teaching activities or otherwise, is relevant for us,
 22 surely.

23 MR MPOFU: Well, then we should not have
 24 been told about it. I got it from the papers.

25 CHAIRPERSON: Well, if necessary we can

Page 16452

1 strike it out of the papers, but let's carry on with the
 2 cross-examination for the moment.

3 MR MPOFU: Ja, okay, now I'm saying that
 4 you are aware that there are no circumstances where the
 5 police are allowed to use maximum force?

6 MAJOR-GENERAL MPEMBE: Chairperson, I
 7 don't understand the word "maximum force."

8 MR MPOFU: Well, it's the opposite of
 9 minimum force.

10 MAJOR-GENERAL MPEMBE: Yes –

11 CHAIRPERSON: Mr Mpofu, there can be a
 12 situation where in the particular circumstances there's no
 13 difference between minimum force and maximum force –

14 MR MPOFU: Except for those circumstances
 15 which are, must be rare, do you accept that –

16 CHAIRPERSON: Sorry, this matter was
 17 debated at length with previous witnesses. It's all on
 18 record. I don't propose to allow you to have a debate on
 19 the matter again –

20 MR MPOFU: I'm not debating it. I just
 21 asked one question, Chairperson. Is he aware or is he not
 22 aware that –

23 CHAIRPERSON: No, he says that –

24 MR MPOFU: If he says he's not, he's not,
 25 I move on.

Page 16453

1 CHAIRPERSON: He said he didn't know what
 2 maximum force meant –

3 MR MPOFU: No, he said he doesn't know
 4 what it means.

5 CHAIRPERSON: And I then endeavoured to
 6 explain that in certain circumstances minimum force and
 7 maximum force can amount to the same thing. But I think
 8 what Mr Mpofu is saying is if there are two ways of
 9 handling a situation and you have to deal with it with the
 10 use of force, there are two ways of dealing with it in that
 11 manner. One would amount to maximum force and the other
 12 would amount to minimum force. I take it you're aware of
 13 the fact that you've got to go the minimum force route and
 14 not the maximum force route. Do you agree with that?

15 MAJOR-GENERAL MPEMBE: Yes, Chairperson,
 16 as I said before that it will depend upon the situation.

17 CHAIRPERSON: Never mind what the
 18 situation is. If the situation is that there are two ways
 19 of doing it, one involving force but of a minimal nature,
 20 and other using force of a more severe nature, which one
 21 could describe as a maximum nature, you've got to go the
 22 minimum route and not the maximum route. Do you agree with
 23 that?

24 MAJOR-GENERAL MPEMBE: I agree with that,
 25 Chairperson. I can just illustrate it quickly to say in

Page 16454

1 the dispersal, and when you disperse the crowd you use
2 minimum force.

3 MR MPOFU: And is there any suggestion
4 that you know of where you must use maximum force?

5 CHAIRPERSON: Is his knowledge relevant?
6 I mean we can think of hostage situations and some of these
7 threats to life, situations of that kind. We can imagine
8 them. Whether he can, does it –

9 MR MPOFU: Well, the legislator didn't
10 imagine it, Chair. It would have said you must use minimum
11 force except in hostage situations –

12 CHAIRPERSON: No, it doesn't say –

13 MR MPOFU: Law, section 13(3)(b) –

14 CHAIRPERSON: No, no, no, Mr Mpofo, I'm
15 not going to argue the law with you now, but we agreed
16 earlier that there are circumstances where minimum force
17 and maximum force coincide because there's nothing short –

18 MR MPOFU: No, I did not agree to that,
19 Chairperson.

20 CHAIRPERSON: Well, perhaps you should
21 have. There will be circumstances where it's not possible
22 for any force to be used except what amounts to maximum
23 force, which is equal to minimum force in those
24 circumstances. But I don't know if it's a profitable
25 debate for us to have now –

Page 16455

1 MR MPOFU: Anyway –

2 CHAIRPERSON: And I'm not sure if it's
3 going to take your cross-examination of the witness any
4 further, so let's carry on.

5 MR MPOFU: Anyway, let me just short-
6 circuit this. Are you aware that according to what you –
7 well, and again I'm using the word "you" liberally – what
8 you stated before the versions were – I'm trying to put
9 this nicely – refined at Roots, that –

10 MR MATHIBEDI SC: Sorry, Mr Chairman,
11 what's the basis of saying the versions were refined at
12 Roots?

13 CHAIRPERSON: I think he's referring to
14 some of the ground that was covered in Mr Chaskalson's
15 cross-examination where various versions of what happened,
16 the working papers were presented from which one can follow
17 the evolution of what amounted to the final police
18 presentation, but I think that's what he's referring to,
19 but if it's anything more than that, you can raise it again
20 and we'll call him to order, but for the meanwhile I think
21 you can carry on, on that basis. I think the General
22 understands the question.

23 MR MPOFU: Yes –

24 CHAIRPERSON: And there was an exercise
25 at Roots, wasn't there, where various versions were

Page 16456

1 presented and they were, working documents were produced
2 and they were worked on and there were changes and
3 modifications and so on. The nature of those modifications
4 we don't have to deal with at the moment, but that's a
5 fact, isn't it though, and you weren't here when Mr
6 Chaskalson cross-examined Colonel Scott, but all that
7 material was put before us. I think that's what Mr Mpofo
8 is referring to, but that was a bit of an aside which
9 probably wasted more time than anything. What you are
10 being asked about is really before Roots, are you referring
11 to what he said before Roots?

12 MR MPOFU: No, I said you in the broad
13 sense, are you aware that before Roots, with the help of
14 some of the people who were working under you or yourself,
15 I don't know, the National Commissioner made a statement to
16 the public and the media to the effect that maximum force
17 had been used? Were you aware of that?

18 MAJOR-GENERAL MPEMBE: Chairperson, if I
19 may be referred to the document?

20 MR MPOFU: I think it's FFF4.

21 CHAIRPERSON: [Microphone off, inaudible]
22 FFF4, it's one of the documents to which you were referred
23 when you were told the nature of the cross-examination Mr
24 Mpofo will be addressing.

25 MR MPOFU: Can you go to –

Page 16457

1 CHAIRPERSON: [Microphone off, inaudible]
2 FFF4, have you got it? Document headed "Civil unrest
3 incident Lonmin Mine, Marikana, North West Province,
4 internal brief" – no, no, FFF4 is the –

5 MR MPOFU: Is the President's one, yes.

6 CHAIRPERSON: This is the President's
7 one.

8 MR MPOFU: Yes, I'm talking about FFF5.

9 CHAIRPERSON: FFF5 is the public one.

10 MR MPOFU: Thank you, Chairperson.

11 CHAIRPERSON: Are you dealing with – but
12 the one you gave notice of that you were going to deal with
13 in cross-examination is FFF4, is that right?

14 MR MPOFU: Yes, well then it means I
15 made –

16 CHAIRPERSON: No wait, no let's be clear
17 so the witness can follow. Are you going to question him
18 about FFF4 or FFF5?

19 MR MPOFU: Let me just check. It's FFF5,
20 so I missed – they're more or less the same document.

21 CHAIRPERSON: No well, there's a
22 significant difference which may be relevant later. We've
23 been through this –

24 MR MPOFU: Not according to this question
25 – I mean not in relation to this question.

<p style="text-align: right;">Page 16458</p> <p>1 CHAIRPERSON: No, no, no, if you're going 2 to refer to FFF5, the question is whether the witness has 3 had an opportunity to see it. 4 MR MPOFU: Well, it's two words – maximum 5 force. 6 COMMISSIONER HEMRAJ: Do you have the 7 document, General? 8 MAJOR-GENERAL MPEMBE: Yes, Chairperson, 9 I do have it. I just wanted maybe to check with the – 10 CHAIRPERSON: You were referred to it as 11 well. It's headed "Media statement from the South African 12 Police Service, Corporate Communication, National Media 13 Centre." Is this the document you're referring to? 14 MR MPOFU: And the part I'm referring to 15 is page 2. 16 CHAIRPERSON: It's page 2 at the foot of 17 the page, it's the last line of the penultimate paragraph. 18 You see the paragraph that begins "The dispersion action 19 had commenced." If you go down to the end of that 20 paragraph you'll see the sentence which reads, "Police 21 retreated systematically and were forced to utilise maximum 22 force to defend themselves." Do you see that? 23 MAJOR-GENERAL MPEMBE: Yes, Chairperson. 24 CHAIRPERSON: That's the sentence that Mr 25 Mpofo is going to ask you about.</p>	<p style="text-align: right;">Page 16460</p> <p>1 would think, but the point that's going to be put to you 2 based on these passages will now be put to you by Mr Mpofo. 3 MR MPOFU: Yes. Well, let me put it this 4 way; I thought you and I had agreed before that private 5 defence also encapsulates minimum force, but that might be 6 a matter for legal argument. So the statements are really 7 the same, that they would act with absolute minimum force, 8 or they would act in private defence, which also requires 9 minimum force. You understand? 10 MAJOR-GENERAL MPEMBE: I do not 11 understand, but – 12 CHAIRPERSON: I'm not sure that you 13 stated it correctly, Mr Mpofo – 14 MR MPOFU: No – 15 CHAIRPERSON: - because in circumstances 16 of private defence a person defending himself or defending 17 another may be obliged to use what amounts to maximum – 18 MR MPOFU: No. 19 CHAIRPERSON: Yes, yes, yes, maximum 20 force. A person dealing for example with a hostage 21 situation or a cash heist or something of that kind might 22 be obliged to shoot the assailant and that would be, would 23 constitute killing someone in those circumstances, would 24 constitute maximum force, but that's the question – 25 MR MPOFU: Ja, that was the –</p>
<p style="text-align: right;">Page 16459</p> <p>1 MR MPOFU: Thank you, and then after 2 Roots, you can go to L282. 3 MR MPEMBE: I just want to find the slide 4 [10:24] MR MPOFU: L282, General. First bullet 5 which says, "The South African Police entered into this 6 conflict situation at Marikana Lonmin Mine with the pure 7 intention to try their utmost to resolve it peacefully 8 through the negotiation, and if necessary, the absolute 9 minimum force." You see that? 10 MAJOR-GENERAL MPEMBE: Correct, 11 Chairperson. 12 MR MPOFU: Thank you. That – 13 CHAIRPERSON: In fairness I think you 14 should then put to him the last sentence of the second 15 bullet in slide 283 so that he gets the complete picture of 16 the police presentation. What the police presentation says 17 is they went there, this is 282, with what's described as 18 "the pure intention to try their utmost to resolve it 19 peacefully through negotiation, and if necessary, the 20 absolute minimum force." And then that's expanded on and 21 then in the last sentence of 283 it says, "The unfortunate 22 reality was that the aggression of the crowd left the SAPS 23 with no other choice than to act in private defence, 24 defending their own lives and the lives of others." So 25 those are the two passages that have to be read together, I</p>	<p style="text-align: right;">Page 16461</p> <p>1 CHAIRPERSON: The question of the 2 application is a matter we needn't debate with the witness. 3 MR MPOFU: Ja. 4 CHAIRPERSON: You can debate it if you 5 want to later on, but – 6 MR MPOFU: Ja, well for the record, 7 Chair – 8 CHAIRPERSON: Sorry, give me a chance. 9 Let's not have things put to the witness that aren't 10 entirely accurate, but I hope in the light of what I've now 11 said he understands the position and he will be able to 12 answer the question you're going to put to him. 13 MR MPOFU: Well, Chairperson, I'm sorry, 14 I have to do this because one of us is inaccurate, so it 15 must be clear which one. I'm saying the common law 16 requirement of private defence, one of them is that you 17 must use as much force as is necessary. What is necessary 18 has been translated by our courts to mean that you, that 19 word "necessary" is actually what is captured by the 20 legislation in section 13(3)(b) of the South African Police 21 Act, which is that you must use as much force, the minimum 22 force necessary. This is basically – 23 CHAIRPERSON: Well, there is no way – 24 MR MPOFU: If you are killing hostages 25 it's not private defence; you are stopping a hostage</p>

Page 16462

1 situation. That's a different thing altogether.

2 CHAIRPERSON: Well, it could be private

3 defence because you could be defending the hostage, but

4 perhaps we can state the same proposition saying you can

5 use as much force as you need, but no more.

6 MR MPOFU: Yes.

7 CHAIRPERSON: Right. If we -

8 MR MPOFU: That's minimum force,

9 otherwise known as minimum force.

10 CHAIRPERSON: As much as you need may in

11 fact involve quite a lot, but anyway, let's not debate

12 the -

13 MR MPOFU: Anyway, I'll leave it.

14 CHAIRPERSON: Let's not debate that

15 further. If you want to make a point to the witness,

16 please put it to the witness -

17 MR MPOFU: [Microphone off, inaudible]

18 move on to something else, Chairperson.

19 CHAIRPERSON: Yes, it might be more

20 profitable to do so.

21 MR MPOFU: Ja, I think so. You also -

22 CHAIRPERSON: Sorry, if you're moving on

23 to another point, Mr Mpofu, I was intending to take the tea

24 adjournment at 10:30 -

25 MR MPOFU: Can I just, so that I finish

Page 16463

1 this chapter, as you called it -

2 CHAIRPERSON: Yes, yes, of course.

3 MR MPOFU: Ja. Do you also accept that -

4 just one more question - do you also accept with your

5 knowledge or absence of it, of Criminal Law, that for there

6 to be a situation of private defence, there must be an

7 attack? Do you accept that?

8 MAJOR-GENERAL MPEMBE: There must be an

9 attack?

10 MR MPOFU: Yes, or an imminent attack.

11 MAJOR-GENERAL MPEMBE: Correct, yes.

12 MR MPOFU: Thank you.

13 CHAIRPERSON: Yes, we'll take the tea

14 adjournment at this stage.

15 [COMMISSION ADJOURNS COMMISSION RESUMES]

16 [10:56] CHAIRPERSON: The Commission resumes. Major-

17 General, you're still under oath.

18 MAJOR-GENERAL MPEMBE: Yes, Chairperson.

19 MAJOR-GENERAL MPEMBE: s.u.o.

20 CHAIRPERSON: Mr Mpofu, I take you have a whole

21 quiver full of questions still to ask the witness.

22 CROSS-EXAMINATION BY MR MPOFU (CONTD.):

23 Thank you. General, following on the question that I asked

24 you, you would then obviously agree that if it is not

25 established that there was an attack, any attack on the

Page 16464

1 police then -

2 CHAIRPERSON: No, I'm sorry, Mr Mpofu. You put

3 the question differently before the adjournment. You put

4 it correctly then. You spoke about an attack or an

5 imminent attack and that was correct, so I suggest you

6 repeat the question the way you did before the adjournment.

7 MR MPOFU: Yes, okay. Would you

8 therefore agree, given your answer before tea, that in the

9 absence of an attack or an imminent attack on, that

10 threatened the life of anybody, the issue of self-defence

11 would not arise at all because it's a prerequisite, as we

12 agreed.

13 MAJOR-GENERAL MPEMBE: Yes, Chairperson.

14 CHAIRPERSON: That ignores the application of the

15 doctrine of putative defence but I take it that's not a

16 matter that need be debated with this witness.

17 MR MPOFU: And it's not a matter that's

18 an issue in this Commission. That has not been raised by

19 anybody but be that as it may -

20 CHAIRPERSON: I'm not sure about that. If, at the

21 end of the day, the facts indicate - I don't say they will,

22 they may well not and I certainly haven't even got a prima

23 facie view on the matter at the moment but if the facts at

24 the end of the day indicate that the principles of putative

25 defence apply, we will say so, but if they don't, we won't.

Page 16465

1 MR MPOFU: Ja.

2 CHAIRPERSON: And I know the police didn't raise

3 that in their opening statement but this is not a trial

4 with pleadings.

5 MR MPOFU: Well, I'm certainly not

6 raising those esoteric issues with the witness. I'm simply

7 just saying no attack, no defence really. Okay, anyway -

8 or even in English you defend yourself against an attack,

9 in simple English. Okay, now you yourself did not observe

10 any attack on the police.

11 MAJOR-GENERAL MPEMBE: Chairperson, I

12 would like that clarity. Is it on the 13th or the 16th?

13 MR MPOFU: No. I'm sorry, yes, no - no,

14 fair enough.

15 CHAIRPERSON: Referring to the 16th now?

16 MR MPOFU: Yes.

17 CHAIRPERSON: Because he finished the 15th

18 yesterday. On the 16th -

19 MR MPOFU: Yes.

20 CHAIRPERSON: At the time of the shooting at scene

21 1 where you were, you were - I think you had just got into

22 the helicopter when you got up in the air, is that correct?

23 MAJOR-GENERAL MPEMBE: Correct,

24 Chairperson.

25 CHAIRPERSON: I think your evidence was, long ago

Page 16466

1 when you were in the witness box, that when you got to the
 2 helicopter you heard something on the radio about people
 3 proceeding to the – the strikers, or some of them
 4 proceeding to attack the TRT, I think you said and you then
 5 got in the helicopter and went up in the air, is that
 6 right?

7 MAJOR-GENERAL MPEMBE: Correct,
 8 Chairperson.

9 CHAIRPERSON: Did you – so that was just before
 10 the shooting. Did you, when you were in the air did you
 11 observe any attack on anybody by anybody else?

12 MAJOR-GENERAL MPEMBE: No, Chairperson.
 13 I already said to the Commission very shortly that I saw it
 14 on the video.

15 CHAIRPERSON: What did you – yes, after the event
 16 obviously when you came down again but did you see it on
 17 the video that same day or did you see it subsequently?

18 We're talking about scene 1 now.

19 MAJOR-GENERAL MPEMBE: Yes, Chairperson,
 20 I've seen it on a subsequent –

21 CHAIRPERSON: No, I know, we all have but did you
 22 see it on the 16th of August or only subsequently?

23 MAJOR-GENERAL MPEMBE: Only subsequently,
 24 yes.

25 CHAIRPERSON: Alright. And did you see from the

Page 16467

1 air anything that happened at scene 2 where some of the
 2 strikers were killed or injured?

3 MAJOR-GENERAL MPEMBE: No, Chairperson.

4 MR MPOFU: When you saw the attack on the
 5 video, what exactly did you see?

6 CHAIRPERSON: What he saw on the video – we've all
 7 seen the video ourselves. What he saw, what his
 8 impressions were, I don't know if that's going to take the
 9 investigation any further. If he'd been an eye witness to
 10 the actual event it would be different but he saw on the
 11 video what we've seen on the video. If there are points
 12 which are relevant, you will doubtless point them out to us
 13 at some stage but I don't know if there's any point in
 14 asking him what he saw on the video, surely.

15 MR MPOFU: So sorry, Chairperson, this is
 16 such a key point in the case, if there was an attack that
 17 he saw and we know that some videos have been withheld. He
 18 might have seen a video where he saw the attack, I don't
 19 know. If he says he saw it on the video, he must surely
 20 tell us what he saw or where he saw it and we'll determine
 21 if it was –

22 CHAIRPERSON: Does it matter what he saw or didn't
 23 see on the video?

24 MR MPOFU: Well –

25 CHAIRPERSON: He is not going to decide whether

Page 16468

1 there was an attack. He is not going to decide whether
 2 there was an imminent attack. He is not going to decide
 3 whether the principles of self-defence or private defence
 4 apply. He may have his own views on the matter. You say
 5 he used to lecture in criminal procedure, he may have
 6 fairly informed views but his views won't bind us. In
 7 fact, without intending any disrespect towards him, I'm not
 8 interested in his views on that matter. We will form our
 9 own views based upon what we've seen and it will be
 10 evidence of eye witnesses and so on.

11 MR MPOFU: Chairperson, maybe I didn't
 12 put this clearly. I'm not canvassing that with him. I'm
 13 saying to you, Chairperson, if he saw a video that you may
 14 now have seen, I would assume that you are interested to
 15 see that video. If you are not, then I'll move on but –

16 CHAIRPERSON: Can I ask a question? Do you know
 17 what videos are on the police hard drive?

18 MAJOR-GENERAL MPEMBE: I will not know
 19 the exhibit number but it was played here when I was giving
 20 my evidence-in-chief.

21 CHAIRPERSON: So the videos you've seen, videos or
 22 video – is it one or more?

23 MAJOR-GENERAL MPEMBE: It's one video
 24 that was played by Adv Ngalwana when he showed me.

25 CHAIRPERSON: I see.

Page 16469

1 MAJOR-GENERAL MPEMBE: Yes.

2 CHAIRPERSON: Okay, so the video you saw to which
 3 you were referring is a video that the Commission has
 4 already seen?

5 MAJOR-GENERAL MPEMBE: Correct,
 6 Chairperson.

7 MR MPOFU: Thank you, yes. That was the
 8 question I was going to ask. Alright, thank you, General.
 9 Now the next, what you call, the next chapter that I want
 10 to deal with is what I call the standing orders and those
 11 kinds of things and here I want to start with – I've
 12 already done this to kind of preface why I'm asking you
 13 these questions but just to make double sure, if you go to
 14 SS2 which is regulation 250. I'll just read it out, I'm
 15 sure you're familiar with it. The portion that I want to
 16 concentrate on is paragraph 8 thereof which says, "The
 17 divisional, provincial or area commissioner must ensure
 18 that the C-JOC is designated and that he or she is
 19 conversant with this order and the relevant legislation and
 20 is well-trained to take responsibility for the operation."
 21 You know that?

22 MAJOR-GENERAL MPEMBE: Yes, Chairperson.

23 MR MPOFU: Then number 2 says, "The C-JOC
 24 is in overall command of the specific operation for which
 25 he or she is designated and is responsible for all actions

Page 16470

1 taken." You know that?

2 MAJOR-GENERAL MPEMBE: Yes, Chairperson.

3 MR MPOFU: And then 9(1) says, "The

4 appointed C-JOC is responsible – again – "for well-planned

5 and co-ordinated action for the duration of an operation."

6 You are aware of that?

7 MAJOR-GENERAL MPEMBE: Yes, Chairperson.

8 MR MPOFU: Thanks, okay. Now you know

9 I've already accused you, fairly or unfairly, of having

10 just been not the real C-JOC but a token C-JOC. I'm just

11 going to canvass a few issues – and you've denied it – I'm

12 just going to canvass a few issues around that topic, okay.

13 On the 13th you have testified that one of the reasons that

14 drove you to go on the ground yourself was to save lives,

15 correct?

16 MAJOR-GENERAL MPEMBE: It would be

17 amongst them, yes, Chairperson.

18 MR MPOFU: Yes and another reason why you

19 went yourself to the ground was the fact that, in fact you

20 put it this way, the fact that you didn't send Calitz and

21 went yourself was the fact that you understood the language

22 and the culture of the people and your own intervention as

23 opposed to his, would have had a positive effect, correct?

24 MAJOR-GENERAL MPEMBE: No, Chairperson, I

25 –

Page 16471

1 MR MPOFU: Sorry.

2 CHAIRPERSON: I think you did say that, you know.

3 You said you went yourself, you didn't send Brigadier

4 Calitz although he was the operational commander and you

5 gave the reason, you said that you spoke the vernacular

6 language that was required to be used and you understood

7 the culture of the people. That's what you said. Now

8 you've already agreed to that and I take it, it follows

9 from that that you felt that you had a contribution to

10 make, inter alia to save lives, et cetera, which you

11 thought you were better able to make than Brigadier Calitz,

12 through no fault of his own but for the reasons you've

13 stated. That's correct too, isn't it?

14 MAJOR-GENERAL MPEMBE: Correct,

15 Chairperson. What I was saying, I didn't speculate what

16 would have happened if Brigadier Calitz goes.

17 CHAIRPERSON: No, we could speculate but it's an

18 unprofitable speculation. We will never know the answer.

19 He might have agreed with Colonel Merafi's attitude for

20 example, it's a possibility, and if Colonel Merafi's plan

21 had been adopted there might or might not have been far

22 more serious consequences than in fact there were but that

23 again is a matter, to some extent, of speculation, isn't

24 it?

25 MAJOR-GENERAL MPEMBE: Correct,

Page 16472

1 Chairperson.

2 MR MPOFU: And yet on the 16th where you

3 were dealing with a much bigger and probably more serious

4 operation involving more people, more guns, big guns and so

5 on, you did the exact opposite. You elected to send

6 Brigadier Calitz and you remained behind, correct?

7 MAJOR-GENERAL MPEMBE: Yes, Chairperson,

8 it's not the opposite.

9 MR MPOFU: Well, it is the opposite in

10 that limited sense that on the 13th you decided not to send

11 Brigadier Calitz and go yourself and on the 16th you decided

12 to send Brigadier Calitz and remain behind, correct?

13 MAJOR-GENERAL MPEMBE: No, Chairperson.

14 CHAIRPERSON: I think your answer doesn't do

15 justice to your case. I think Mr Mpofo is right in saying

16 that on the Monday the 13th you left Calitz behind at the

17 JOC or in fact he first went in a helicopter to direct you

18 to where to go, then he went back to the JOC and you then

19 were both the overall commander and the operational

20 commander on the ground on the 13th, that's correct. On the

21 16th you, there may well be reasons why you did it but

22 that's what he is trying to elicit from you, on the 16th you

23 did it differently. You in fact stayed behind in the JOC

24 until the time when you went in the helicopter and you

25 allowed Brigadier Calitz to act – to function, is a better

Page 16473

1 word – to function as the operational commander, which is

2 the position to which he'd been appointed. Correct? So

3 that is the opposite of what was done on the 13th. Now,

4 there may well be reasons for your doing that. Now did you

5 have any other responsibilities to attend to on the 13th

6 when you went to the railway line, that you had to attend

7 to then and there at that time?

8 MAJOR-GENERAL MPEMBE: Yes, Chairperson,

9 I –

10 CHAIRPERSON: On the Monday.

11 MAJOR-GENERAL MPEMBE: Yes, Chairperson,

12 I did also indicate that my reasons on Monday –

13 CHAIRPERSON: You've given us your reasons. Your

14 reasons were, you felt from a linguistic point of view and

15 a cultural point of view you could better deal with the

16 situation.

17 MAJOR-GENERAL MPEMBE: And the other one

18 is that I wanted to rely on my experience because by then,

19 the Chairperson will remember that by then it was the only

20 contingency plan that was drawn on Saturday so –

21 CHAIRPERSON: Yes.

22 MAJOR-GENERAL MPEMBE: That's the main

23 issue also, but for the 16th and I think Chairperson is

24 correct to say that then there was, then we had the time of

25 planning and everything was in place, there was the

<p style="text-align: right;">Page 16474</p> <p>1 interpreter there, I had many reasons. The only difference 2 that I wanted to show now when I disagree with the 3 Advocate, it was only to say yes, on the 16th I was 4 comfortable because there was, structures, everything was 5 put in place. 6 CHAIRPERSON: Yes. Anyway, Mr Mpfu I think may 7 explore that point further but he is interested in the 8 contrast between what you did on the 13th and the 16th. Mr 9 Mpfu, I take it you want to carry on with the point. 10 MR MPOFU: Thank you, yes Chairperson. 11 As far, I'm just limiting it to what I will call the 12 language and culture reason. Brigadier Calitz didn't 13 suddenly acquire the knowledge of the languages and the 14 culture in the three days. He still had that handicap, 15 correct? 16 MAJOR-GENERAL MPEMBE: No, Chairperson. 17 MR MPOFU: Oh, so he had – what did he 18 do, a crash course in two days in Zulu or Fanagolo? 19 MAJOR-GENERAL MPEMBE: There was a 20 Fanagolo interpreter and he was also interpreting the 21 actions of the minds. He was well-armed in terms of not, 22 armed in terms of the people who can assist him. 23 MR MPOFU: Well, are you talking about 24 the interpreter from Lonmin? 25 MAJOR-GENERAL MPEMBE: Correct,</p>	<p style="text-align: right;">Page 16476</p> <p>1 Isn't that a neutral fact? 2 MAJOR-GENERAL MPEMBE: Correct, 3 Chairperson, but there was no Fanagolo speaking person. 4 MR MPOFU: Yes, but we know now the 5 Fanagolo speaking person was the Lonmin guy that we have 6 discounted just now. 7 CHAIRPERSON: On the 13th there was no Fanagolo 8 person. They actually asked for one and Lonmin for some 9 reason declined to provide one. So the witness, according 10 to his evidence, then spoke basically in isiZulu which, 11 being an Nguni language, could be understood fairly easily 12 by Xhosa speaking, isiXhosa speaking people but the Lonmin 13 man speaking Fanagolo wasn't there. He asked for, I think 14 he asked the Lonmin representative to arrange for – Mr 15 Blou, I think it was, and Mr Blou refused. So there is 16 that difference between the 13th and the 16th. 17 MR MPOFU: Ja, well, he didn't know that 18 before he went there. 19 MR SHOZI SC: Chair, for the record, we 20 didn't decline to provide a Fanagolo interpreter on Monday. 21 That's not our case, we dispute that. 22 CHAIRPERSON: Let's get, let's ask – yes, I hear 23 what you say. Let's ask the witness. My understanding may 24 well have been wrong. Am I – what was the position on the 25 13th? Did you ask for the Lonmin representative to provide</p>
<p style="text-align: right;">Page 16475</p> <p>1 Chairperson. 2 MR MPOFU: Can you envisage a situation 3 where the interpreter from Lonmin, for example, would have 4 given the necessary warnings in the languages that were 5 necessary? 6 MAJOR-GENERAL MPEMBE: Chairperson, he 7 could have interpreted them. 8 MR MPOFU: No, remember the warnings that 9 were given to the people, the 3 000 gathered, in their 10 languages. That's what the prescripts say, correct? 11 MAJOR-GENERAL MPEMBE: Yes, Chairperson. 12 MR MPOFU: Ja, now I'm asking you a 13 question, whether can you as the C-JOC envisage a situation 14 where those warnings which were to be given to the 3 000 15 people or so in their own languages would have been given 16 by the Lonmin interpreter or not, according to the 17 prescripts 262? 18 MAJOR-GENERAL MPEMBE: In Fanagolo, 19 Chairperson, correct. And there were so many POP members 20 that could have spoken all the languages that were there. 21 MR MPOFU: Yes, but we know that the 22 warning, or rather when you decided that because of your 23 language proficiency you should go yourself and be the 24 operational commander and the C-JOC, there were also many 25 POPs who could speak the language, isn't that correct?</p>	<p style="text-align: right;">Page 16477</p> <p>1 a Fanagolo interpreter? 2 MAJOR-GENERAL MPEMBE: Correct, 3 Chairperson. 4 CHAIRPERSON: And did the Lonmin representative 5 provide a Fanagolo interpreter? 6 MAJOR-GENERAL MPEMBE: No, Chairperson. 7 CHAIRPERSON: What was his response to your 8 request? 9 MAJOR-GENERAL MPEMBE: Chairperson – 10 CHAIRPERSON: What was his response to your 11 request in regard to the provision of a Fanagolo 12 interpreter? 13 MAJOR-GENERAL MPEMBE: If they, they said 14 they are not prepared to negotiate. 15 CHAIRPERSON: Mr Shozi, your objection falls away. 16 Carry on, Mr Mpfu. 17 MR MPOFU: Thank you. Really General, I 18 don't want to go around in circles on this. The gist of my 19 question is this, that while you thought, among other 20 things, that your understanding of the culture of the 21 people – I suppose that includes their body language – and 22 on the day that we spoke about, on Tuesday, you could even 23 understand the meaning of the words in the songs which are 24 all, as I said on Monday, admirable reasons why you chose 25 to go yourself, I'm saying those admirable considerations</p>

Page 16478

1 you did not take into account on the 16th. That's all, and
 2 I'd like your comment on it.
 3 MAJOR-GENERAL MPEMBE: Chairperson, on
 4 the 13th I already said, I'll be very quick, there was no
 5 negotiator. On the 16th there was, negotiators were
 6 provided for Brigadier Calitz, there was a Fanagolo
 7 speaking person. There were many POP members who can speak
 8 different languages that could assure that the operation
 9 goes well.
 10 [11:16] MR MPOFU: Alright, well we'll leave that
 11 for argument.
 12 COMMISSIONER HEMRAJ: But weren't some of
 13 the negotiators able to speak some of the African languages
 14 as well? Some of the negotiators that were with Colonel
 15 McIntosh on the 16th.
 16 MAJOR-GENERAL MPEMBE: I'm not sure, but
 17 I think I was relying also on the officers, but maybe if we
 18 check the names of the negotiators, because I know that
 19 they were four, but as on the 13th they were not there.
 20 MR MPOFU: Thank you, and also we've
 21 already established that – once again, just to be fair, let
 22 me – I'm now giving you instances which I'm going to argue
 23 at the end show that you were, after the 13th you were no
 24 longer the real CJOC and you had either been removed or you
 25 had disengaged yourself. I'm not interested which one it

Page 16479

1 is, but –
 2 MR MATHIBEDI SC: Sorry, Mr Chairman, he
 3 had been removed, the witness had been removed by who?
 4 MR MPOFU: Okay, by whoever –
 5 CHAIRPERSON: Sorry, what Mr Mpofo is
 6 doing is he's giving a preliminary statement as to the
 7 ground he's going to cover in the cross-examination for the
 8 next few minutes, so I take it the details that you ask for
 9 will be provided when he deals with the specific point that
 10 he has dealt with in his summary. So am I right, Mr Mpofo?
 11 MR MPOFU: That's correct, Chairperson,
 12 and –
 13 CHAIRPERSON: So, but the point that is
 14 taken is one you'll bear in mind, as Mr Mathibedi has said,
 15 you say he was removed, he wants to know by whom. When you
 16 get to that question under this topic I hope you will
 17 include that information in the question you ask, alright?
 18 MR MPOFU: Yes, I'll do it immediately,
 19 Chairperson. And in fairness to Mr Mathibedi, maybe I
 20 should – well, I should also use the word that I did use on
 21 Tuesday, which was that you were "sidelined," so when I say
 22 removed, I mean it in that sense. Do you understand,
 23 General?
 24 MAJOR-GENERAL MPEMBE: I do understand,
 25 Chairperson.

Page 16480

1 MR MPOFU: Yes, not that you're agreeing
 2 with it, ja. Okay, I'm saying, look, there are two
 3 possibilities, at least you've introduced two
 4 possibilities, or the second possibility. The first one
 5 which I canvassed with General Annandale was that he just
 6 upped and left in Pretoria and drove to the Marikana area,
 7 and I think the word I used was "uninvited." The second
 8 possibility, which is what you raised, was that he could
 9 possibly have been called up by the Provincial
 10 Commissioner. What I'm saying is that for the purposes of
 11 this question I'm not, I don't mind which of those is true,
 12 we'll argue that in due course. The gist of what I'm going
 13 to be talking to you about is that you were sidelined and
 14 General Annandale was installed, either by himself or by
 15 someone else, in your place. That's all. So we don't have
 16 to go to the wherefores and whys. You understand?
 17 MAJOR-GENERAL MPEMBE: I understand,
 18 Chairperson.
 19 MR MPOFU: Thank you. Now you also, I
 20 think you did confirm that – okay, sorry, that is a
 21 repetition. We've spoken about the chairing of meetings
 22 and so on. But would you agree that Colonel Scott
 23 effectively reported to General Annandale, and I'm taking a
 24 globular view of his evidence; I can't pinpoint a
 25 particular section, but would that be fair?

Page 16481

1 MAJOR-GENERAL MPEMBE: No, Chairperson.
 2 MR MPOFU: Okay, would it be fair to say
 3 that according to the records at least, after the 13th up to
 4 the 16th you did not utter a single word, or issue any
 5 instruction that is in the minutes of the JOCCOM meetings
 6 that took place?
 7 MAJOR-GENERAL MPEMBE: No, Chairperson, I
 8 did utter, and also speak or give instructions, but in my
 9 understanding is that not everything that is discussed in
 10 the meeting by whom it will be recorded, only important
 11 decisions.
 12 MR MPOFU: Yes –
 13 CHAIRPERSON: Can you give us an example
 14 of one or other, one or two of the instructions you gave to
 15 which you're referring?
 16 MAJOR-GENERAL MPEMBE: Chairperson, I did
 17 give instructions in terms of detention facilities,
 18 processing of arrested people, arranging various activities
 19 that could take place on that day.
 20 MR MPOFU: We'll get to the arresting of
 21 people. Can you remember any other instructions that you
 22 gave in that three days?
 23 MAJOR-GENERAL MPEMBE: I do not
 24 understand the question.
 25 MR MPOFU: Well, can you –

<p style="text-align: right;">Page 16482</p> <p>1 CHAIRPERSON: You've given examples, 2 you've given us examples of instructions that you gave 3 during that period in your capacity, I take it, as overall 4 commander. What Mr Mpfu wants to know is can you give us 5 any other examples. Is that right, Mr Mpfu? 6 MR MPOFU: That's right, Chair. Thank 7 you, Chairperson. 8 MAJOR-GENERAL MPEMBE: Chairperson, on 9 the 14th I said I chaired the meeting when the plan was 10 debated, I was chairing that meeting. There were changes 11 that were made to the plan. I think I said it in detail 12 in – 13 MR MPOFU: Okay, I'll leave that for 14 argument. But what we do know for sure is that – or 15 rather, one of the issues that I'm going to argue is an 16 indication of your being sidelined is that we know for sure 17 that the time of the operation on the 16th was determined 18 not by you but by General Annandale, correct? 19 MAJOR-GENERAL MPEMBE: Yes, Chairperson. 20 MR MPOFU: And we know that when you 21 wanted to see for yourself, to put it mildly, you had to 22 ask General Annandale for transport, correct? 23 MAJOR-GENERAL MPEMBE: Chairperson, I did 24 explain that in any operation, whether it's even in the 25 normal situation, even the Provincial Commissioner, I just</p>	<p style="text-align: right;">Page 16484</p> <p>1 reasons I've given, but let's not get bogged down on that 2 issue now. You've got more important questions to ask, 3 haven't you? 4 MR MPOFU: Chairperson, there's no need 5 for us to be bogged down. That's why I used the exact 6 words of Mr Shoji, so that we don't get bogged down. I was 7 giving in actually. He provided for you what Mr Shoji 8 calls the Protea chopper, otherwise known as the Lonmin 9 chopper, correct? 10 MAJOR-GENERAL MPEMBE: Yes, Chairperson, 11 I just want to give – not, a short explanation. 12 Chairperson, as I have said, he was always in the JOC. He 13 could also be able to detect any emergencies where the 14 chopper could have been needed. 15 MR MPOFU: Yes, okay. That's the reason. 16 Okay, I was just interested in the fact. Ja, okay. You 17 would accept that in the regulations there's no such thing 18 as a deputy CJOC, or the parts that I read you. It says 19 the CJOC must be in overall command of the specific 20 operation for which he or she is designated, and is 21 responsible for all actions taken. And then says the 22 appointed CJOC is responsible for well planned and 23 coordinated actions for the duration of an operation. It 24 doesn't foresee a so-called deputy CJOC, correct? 25 MAJOR-GENERAL MPEMBE: No, Chairperson.</p>
<p style="text-align: right;">Page 16483</p> <p>1 want to make an example, you have a deputy responsible for 2 resources and that person knows where, which resources are 3 available. It's in the same way that happened in that 4 operation. In that sense it's correct, not that I couldn't 5 have gone anywhere without the authority of General 6 Annandale. 7 MR MPOFU: Yes, but you did not even 8 know, but he knew, that all the choppers were gone and the 9 only one that he could have assisted you was with the 10 Lonmin chopper, otherwise known as the Coin Security 11 chopper. 12 MR SHOZI: No, it's a Protea chopper, 13 otherwise known as Lonmin chopper. 14 MR MPOFU: The Protea chopper, otherwise 15 known as the Lonmin chopper. 16 CHAIRPERSON: Come on, we don't have to 17 get involved in a debate about that. We know that Coin 18 were, it was the Coin helicopter. It was there pursuant to 19 a contract between Lonmin and Protea. Lonmin were paying 20 for the use of the helicopter. We know all those facts, 21 but you're just making a point about it, it may irritate Mr 22 Shoji, let's just call it the Coin helicopter. 23 MR MPOFU: No, Chairperson – 24 CHAIRPERSON: We know what's meant. You 25 can argue later that it was really a Lonmin chopper for the</p>	<p style="text-align: right;">Page 16485</p> <p>1 MR MPOFU: Thanks. And you've already 2 testified – I'm sorry to repeat this, but I'm using it in 3 this particular context – that the decision to bring the 4 STF into the picture was taken by General Annandale. Just 5 confirm that. We've gone through that, correct? 6 MAJOR-GENERAL MPEMBE: Yes, Chairperson. 7 MR MPOFU: Are you aware that – alright, 8 and you've already testified that you would expect as a 9 CJOC to be informed of all the major considerations taken 10 into account to launch an operation to the stage 3. You 11 remember that? 12 MAJOR-GENERAL MPEMBE: Correct, 13 Chairperson. That was in relation to political – 14 MR MPOFU: Yes, yes, including that, ja. 15 Now if you were the real CJOC, would it – or let me put it 16 this way. Would it surprise you that the Provincial 17 Commissioner would discuss some of the considerations being 18 taken, including political considerations, with a 19 representative from Lonmin, but not with you as the big 20 chief of the JOC? 21 MAJOR-GENERAL MPEMBE: Chairperson, I am 22 a junior to Lieutenant-General Mbombo. She has no 23 obligation to say anything to me. She is my commander and 24 I have no obligation in terms of hierarchical structure to 25 tell her what to do.</p>

<p style="text-align: right;">Page 16486</p> <p>1 MR MPOFU: No, General, I'm sure you 2 understand the question. It's not that. I know the 3 hierarchy. I'm saying to you as the CJOC, the man who has 4 been appointed to be all the things I've read to you, who 5 must take responsibility ultimately for all actions, as 6 I've read it out to you, okay, would it be consistent with 7 a person of that statute if they were really holding that 8 position, that your immediate superior, the Provincial 9 Commissioner, in relation to the very operation that you 10 are in overall command of, would discuss some of the 11 considerations which would influence the movement to a 12 dangerous stage of that operation with someone who's – 13 forget the ranks, who's not even a member of SAPS, with 14 someone who is an employee of Lonmin as opposed to the big 15 chief? 16 MAJOR-GENERAL MPEMBE: I did not know 17 about the situation, Chairperson. 18 MR MPOFU: Well, assume that I'm correct. 19 Now you know, would it surprise you? 20 CHAIRPERSON: Sorry, let me ask a 21 question before Mr Mpofu proceeds. Have you read the 22 transcript of the discussion which took place on the 23 Tuesday between, I think it was more than one 24 representative of Lonmin – 25 MR MPOFU: Mr Mokwena and another one.</p>	<p style="text-align: right;">Page 16488</p> <p>1 what you were talking about. 2 MR MPOFU: Yes, yes. 3 CHAIRPERSON: Now we know that that 4 assumption isn't correct and you've got to approach the 5 matter certainly from a different angle. 6 MR MPOFU: Yes, I think it's JJJ192. 7 CHAIRPERSON: If there is a particular 8 passage to which you wish to refer – 9 MR MPOFU: Yes. 10 CHAIRPERSON: - and if the witness hasn't 11 got a copy, I suppose it will have to be put up on the 12 screen. 13 MR MPOFU: Yes. Yes, thank you, 14 Chairperson. 15 MR SHOZI: Chair, of course the contents 16 of this transcripts are yet to be agreed upon between the 17 parties. So if Mr Mpofu could have regard – 18 CHAIRPERSON: Yes, Mr Mpofu – 19 MR MPOFU: I'll bear that in mind. 20 CHAIRPERSON: The caveat that's been 21 expressed by Mr Shozi is correct, that there is still some 22 controversy as to the accuracy of the transcription, and so 23 subject to that caveat you can proceed, but the witness 24 must understand there may be an argument about the precise 25 correctness of what's been transcribed, but I presume the</p>
<p style="text-align: right;">Page 16487</p> <p>1 CHAIRPERSON: Yes, representatives of 2 Lonmin on the one hand and the Provincial Commissioner, 3 Lieutenant-General Mbombo on the other. Have you – it's an 4 exhibit before us. Have you had an opportunity to read it? 5 MAJOR-GENERAL MPEMBE: No, Chairperson, 6 it's the first time that I hear. 7 MR MPOFU: Ja, okay – 8 CHAIRPERSON: So I think that's an 9 explanation for some of the mystification that the witness 10 has shown in response to the questions you asked. Maybe 11 you can, if you consider it necessary, put a few short 12 extracts from the transcript in question, which really 13 formed the underlying and assumed basis of the questions 14 you asked him, which he didn't understand – 15 MR MPOFU: Yes, fair enough, Chairperson. 16 So - 17 CHAIRPERSON: So then you may or may not 18 get a meaningful answer. 19 MR MPOFU: Yes. No, thank you, 20 Chairperson, I think yes, I was, as it were, trying to 21 short-circuit, because – 22 CHAIRPERSON: No, I think I'm correct in 23 saying you assumed he'd read it. 24 MR MPOFU: Yes. 25 CHAIRPERSON: And you assumed he knew</p>	<p style="text-align: right;">Page 16489</p> <p>1 general gist of it is beyond controversy. 2 MR MPOFU: Yes, thank you, Chairperson. 3 Yes, I'll bear that in mind, Mr Shozi. The parts that I'm 4 going to refer to are quite clear, with respect. One is 5 page 9, the printed page 9. 6 CHAIRPERSON: What line are you referring 7 to, or the passage to which you will refer the witness – 8 MR MPOFU: Yes, I'm trying to get it. 9 CHAIRPERSON: - at what line does it 10 begin? 11 MR MPOFU: Yes, thank you, Chairperson. 12 Yes, okay, there's a part that says, it's line 29, I 13 suppose, Chairperson, General, this is a discussion between 14 Mr Mokwena and the SAPS Commissioner. When we say SAPS 15 Commissioner, it's Provincial Commissioner. I think that's 16 common cause. It says, "But when I was speaking to 17 Minister Mthethu," who I – 18 CHAIRPERSON: That's obviously a 19 transcription error. 20 MR MPOFU: Mthethwa. 21 CHAIRPERSON: Yes. 22 MR MPOFU: - "he mentioned a name to me 23 that is also calling him, that is pressurising him. 24 Unfortunately it is a politically high .." Mr Mokwena 25 says, "It is Cyril, SAPS Commissioner?" "Cyril Ramaphosa,</p>

Page 16490

1 yes. Now remember now when I was talking to the National
 2 Commissioner last night, she said to me, 'Look General, who
 3 are the shareholders here?' So I said I do not know the
 4 shareholders, but I know that when I spoke to the Minister
 5 he mentioned Cyril, and then she says, 'Now I got it.' You
 6 know why she said she got it? Remember Cyril was in the
 7 appeal committee of Malema. Remember?" Mr Mokwena, "Yes."
 8 "And he was very strong in terms of the decision that was
 9 made." "Yes." "And remember that in Impala Malema came
 10 with our Premier and spoke to those people about that they
 11 should make their demands, but in a way that – and after
 12 that we ourselves as the police, we managed, you know,
 13 manage the situation after Malema came. Now our discussion
 14 with the National Commissioner was around this thing that
 15 say is this thing now happening such that again Malema come
 16 and defuse this thing so that it becomes as if Malema has
 17 taken charge of the mining, the mine." Mr Mokwena, "Yes."
 18 "Once again remember Malema's view that the mines should
 19 be.." Mr Mokwena, "Nationalised." SAPS Commissioner,
 20 "nationalised and all that, so it has got a serious
 21 political connotation that we need to take into account,
 22 but which we need to find a way of defusing. Hence I told
 23 these guys that we need to act such that we kill this
 24 thing." "Immediately, yes."
 25 [11:36] CHAIRPERSON: That's Mokwena speaking,

Page 16491

1 "Immediately, yes, Mr Mokwena. SAPS Commissioner, When
 2 tomorrow we have to move in if today we do not find co-
 3 operation n these people, we need to move in such that we
 4 kill it because we need to protect a situation where any
 5 jig and jive from a political area, .." Okay and it goes
 6 on, or rather then they talk about somebody else.
 7 CHAIRPERSON: The PAC leader, I take it, Mr Godi.
 8 MR MPOFU: Ja, the APC actually of Mr
 9 Godi, which is a variation of the PAC.
 10 CHAIRPERSON: Thank you, I accept your guidance on
 11 that.
 12 MR MPOFU: Thank you, Chair. And then
 13 there's somewhere else, I'm sorry I can't find it on hand
 14 now but you can take my word for it on this one, there's
 15 somewhere else where she also says that there's a financial
 16 consideration, this thing must end today or soon because
 17 she had to pay for it. This is the question, the
 18 Chairperson was correct, this is a matter we'll canvass
 19 with the other witnesses. So all I'm asking you is, if
 20 those considerations, one, that there was pressure from
 21 shareholders, two, that you did not want to get Malema to
 22 be seen to be the person defusing the situation and three,
 23 the payment, this thing was now costing money and so on, if
 24 those considerations weighed heavily in coming to the
 25 decision, was that something that should have been shared

Page 16492

1 with someone holding the position of C-JOC who is, after
 2 all, responsible for all the actions at the end of the day?
 3 MAJOR-GENERAL MPEMBE: Chairperson,
 4 before I respond I just want to state very shortly
 5 CHAIRPERSON: State?
 6 MAJOR-GENERAL MPEMBE: Very shortly, is
 7 to say I am not aware of this. It's the first time that I
 8 see it and I see there they say it's the SAPS Commissioner.
 9 I know sometimes they will say it's the top cop only to
 10 find it's a constable.
 11 CHAIRPERSON: Yes, well, we are told that the
 12 reference to the SAPS Commissioner is a reference to
 13 Lieutenant-General Mbombo.
 14 MAJOR-GENERAL MPEMBE: Yes.
 15 CHAIRPERSON: We must assume that that's correct.
 16 We're also told that the transcription is not necessarily
 17 entirely correct and there is ongoing discussions between
 18 the SAPS and Lonmin about that, but the general gist of it
 19 I take it is correct and – but I think we must accept,
 20 until we're told it's not so, that the reference to the
 21 SAPS Commissioner is a reference to Lieutenant-General
 22 Mbombo. Sorry, I was interrupting you but that's in
 23 response to the point you were making.
 24 MAJOR-GENERAL MPEMBE: Yes, Chairperson,
 25 that whatever I say now it will be a matter of speculation,

Page 16493

1 of not correct, not correct, but as I've said earlier on I
 2 was not there, I don't have any knowledge of this and I
 3 cannot say that General Mbombo – and as I've indicated, if
 4 General Mbombo spoke there, she has no obligation to ask
 5 permission from me.
 6 CHAIRPERSON: That's not Mr Mpofo's question. Mr
 7 Mpofo's says obviously she didn't have to ask permission
 8 but he asked you, as I understood his question, for your
 9 view as to the appropriateness of her discussing matters of
 10 this kind with an outsider from Lonmin. And it might well
 11 be embarrassing for you to express an opinion on that and
 12 it may well be that it's for us to decide whether that was
 13 appropriate, but perhaps – you know there have been times
 14 in the past, you remember Brigadier Mkhwanazi was asked
 15 questions too, to comment on things that the National
 16 Commissioner said and he asked not to be pressed on that
 17 point which, in effect, said something but without saying
 18 it. I think you're putting him in an embarrassing position
 19 –
 20 MR MPOFU: No –
 21 CHAIRPERSON: - asking him to comment on the
 22 appropriateness of –
 23 MR MPOFU: No –
 24 CHAIRPERSON: - his senior in this regard. It's a
 25 matter for argument which you will doubtless raise with us

<p style="text-align: right;">Page 16494</p> <p>1 at the appropriate time, is that correct, Mr Mpofu? 2 MR MPOFU: No, I'm afraid not, 3 Chairperson. I accept that – that's why I'm saying to him 4 I'm not going to canvass the whys and wherefores. I'm 5 asking this for a very limited purpose which I've made 6 clear. For the third time, I'm going to make it for the 7 third time. The question, General, is simply, would you as 8 the Chief JOC or the big person who is responsible for all 9 the actions and so on, would you find it strange that major 10 consideration for when the operation should get to a 11 particular stage and concluded, are not discussed with you? 12 Forget that they were discussed with Mr Mokwena, that's 13 just a secondary part, that they're not discussed with you 14 but what is more, they are discussed with someone who is 15 not even a member of SAPS. That's just for emphasis. The 16 real question is about you, sir. 17 MAJOR-GENERAL MPEMBE: Chairperson, I am 18 on record. I don't want to go in deeper detail, that I 19 briefed the Provincial Commissioner and from that point of 20 view I believed that what I briefed about going to stage 3, 21 it was that one. And as I say, this is the first one, I 22 really don't have comment. 23 CHAIRPERSON: Well, you told us – we covered that 24 before, I don't propose doing it again – you told us before 25 in one of your statements that, and later in your evidence</p>	<p style="text-align: right;">Page 16496</p> <p>1 appears, that there had been a telephone conversation with 2 the Minister of Safety and Security who had said he was 3 being pressurised by someone who was identified as Mr 4 Ramaphosa. Now whether there was such a conversation, 5 whether there was any pressure of that sort is a matter 6 that we will presumably be wiser about later when the 7 Minister and Mr Ramaphosa testify, but the question I think 8 Mr Mpofu wants to know from you is, did the Provincial 9 Commissioner at any stage say to you what she allegedly or 10 apparently said to Lonmin, that this information that there 11 was this alleged pressure by Mr Ramaphosa exercised on the 12 Minister, did she ever tell you about that or was that 13 something that she did not mention to you? 14 MAJOR-GENERAL MPEMBE: No, there was no 15 discussion between myself and General Mbombo about Mr Cyril 16 Ramaphosa and the Minister and – 17 MR MPOFU: Thank you, Chairperson, that's 18 enough. Sorry, Commissioner, to put – 19 COMMISSIONER TOKOTA: General, do I 20 understand you to be saying, look, I'm not in charge of the 21 police, General Mbombo is in charge. I have no control 22 over her actions, discussing things with certain people and 23 she has no obligation to report to me what she has 24 discussed, what plans she had and I can't question that. 25 So therefore in this regard I can't help you. Is that the</p>
<p style="text-align: right;">Page 16495</p> <p>1 that you briefed her on the Thursday. Now this discussion 2 takes place on the Tuesday, so it's said, and we see the 3 person who we are told is Lieutenant-General Mbombo saying 4 to someone else that you would have to move in on 5 Wednesday, that's tomorrow, and the reason, among the 6 reasons given would seem to be the need, as she puts it, to 7 kill this thing because otherwise the same thing will 8 happen that happened at Impala, Mr Malema will come and Mr 9 Malema will claim the credit for having – it's not put as 10 clearly as that but that, I take it, is what it amounts to 11 – for having defused the situation. Now, that's what the 12 questioning is about. Now I take it the idea of getting in 13 before Mr Malema can come and do anything was not discussed 14 with you, is that correct? 15 MAJOR-GENERAL MPEMBE: Yes, Chairperson, 16 but including the whole discussion, I didn't know about it. 17 CHAIRPERSON: Obviously you weren't at, you 18 weren't at the discussion but I take it we can accept that 19 Lieutenant-General Mbombo didn't say to you, by the way, 20 we've got to act quickly because we've got to sort the 21 thing out before Mr Malema comes. That was never put to 22 you, was it, by anybody? Am I correct? 23 MAJOR-GENERAL MPEMBE: Correct, 24 Chairperson. 25 CHAIRPERSON: And she also said that, or so it</p>	<p style="text-align: right;">Page 16497</p> <p>1 way I understand, is it correct? 2 MAJOR-GENERAL MPEMBE: Exactly correct, 3 Commissioner. 4 MR MPOFU: You couldn't have put it 5 better, I'm sure, but did – we've now dealt with those two 6 considerations. A third consideration that also arises 7 from this conversation is on page 15 where she says, r 8 rather – 9 CHAIRPERSON: Could we have page 15 please and 10 while you're getting it, Mr Mpofu will tell us what line 11 he's referring to. 12 MR MPOFU: Yes. 13 CHAIRPERSON: Have you got a copy of the document? 14 MAJOR-GENERAL MPEMBE: I have it here. 15 Somebody put it here but it, immediately when the question 16 was asked it disappeared. 17 CHAIRPERSON: Have you found it again? It 18 reappeared. The case of the disappearing and reappearing 19 document. It has now reappeared. 20 MAJOR-GENERAL MPEMBE: Yes, Chairperson. 21 CHAIRPERSON: We are told by Mr Mpofu, whose 22 instructions in this regard we will comply with, that we 23 must look at page 15. What line must we look at, Mr Mpofu? 24 MR MPOFU: From 10 onwards. "That is 25 what I was saying. You know, the other key challenge is</p>

<p style="text-align: right;">Page 16498</p> <p>1 that all these members that are here, I have to pay them so 2 how much am I going to cough out for all these days. I 3 mean I have to, I have given them now up until the weekend 4 if we cannot sort this thing but my hope is that by 5 tomorrow the latest or you get the gist." What she's 6 really saying is that because of financial considerations 7 the thing should be ended soon, not later by the weekend 8 but preferably tomorrow. Was that key challenge discussed 9 with you, the consideration for moving at a particular time 10 as opposed to another? 11 MAJOR-GENERAL MPEMBE: No, Chairperson, 12 but according to my personal knowledge the dispersal and 13 the evidence before this Commission is that the dispersal 14 didn't go on Wednesday, it actually happened on another 15 day. 16 MR MPOFU: Yes, which was the same week. 17 That's why she said, "I give them until this weekend, if we 18 cannot sort this thing but my hope is that by tomorrow" – 19 so it could have been Wednesday, Thursday, Friday, until 20 the weekend, you understand that? 21 MAJOR-GENERAL MPEMBE: No Chairperson, I 22 don't understand. 23 MR MPOFU: Do you know what the weekend 24 is? It means Friday, Saturday, Sunday, any time between 25 the time she was talking and Friday, Saturday, Sunday,</p>	<p style="text-align: right;">Page 16500</p> <p>1 day, the Wednesday. In fact no action was taken to sort 2 out the problem on the Wednesday by the Lieutenant-General. 3 You were the one who took action in arranging for the 4 presidents of the unions to come and address the strikers, 5 is that right? 6 MAJOR-GENERAL MPEMBE: Correct, 7 Chairperson, and I told her this is what is going to happen 8 and she didn't disagree with me, she agreed with me. 9 MR MPOFU: Ja, well, okay we've already 10 covered that point that she, although she said preferably 11 the following day but her timeframe was until the weekend, 12 so I'm not going to go through that again. Okay, let's go 13 to page 8. A fourth consideration that seems to have 14 played a role on when and how the operation should be done 15 is contained – Chairperson, I think we can start at line, 16 page 8 line 15, well, where it says "SAPS Commissioner." 17 The second, the third SAPS Commissioner on the page. "You 18 see I want us to, I want us, you remember last night, 19 Albie, I raised this thing that when we were dealing with 20 Impala we had a lot of allegations and rumours and some of 21 these allegations they were pointing to the management, 22 that the management is colluding with AMCU and so on and so 23 forth and at some point, at some point ourselves, we were 24 asking ourselves questions to say but these rumours that we 25 are getting, these issues are being said, they might find</p>
<p style="text-align: right;">Page 16499</p> <p>1 correct? 2 MAJOR-GENERAL MPEMBE: No - 3 CHAIRPERSON: I would interpret "until the 4 weekend" as probably – Mr Mpofo, do me a favour, just keep 5 quiet while I'm speaking – 6 MR MPOFU: I didn't say anything – 7 CHAIRPERSON: I would interpret "until the 8 weekend" as meaning until the end of Friday but I may be 9 wrong in that regard, but were you told at any stage by 10 Lieutenant-General Mbombo that there was any time limit 11 that she was imposing, that she was expecting the problem 12 to be sorted out by any particular time? 13 MAJOR-GENERAL MPEMBE: No Chairperson, as 14 I said earlier on that she did not prescribe to me the 15 time, the day. 16 CHAIRPERSON: She didn't say it has got to be 17 sorted out by such and such a date. 18 MAJOR-GENERAL MPEMBE: No Chairperson, 19 and she listened to me, Chairperson, if you remember very 20 well after I spoke to the unions to say I am going to give 21 negotiation the chance, I've got the unions of, the 22 presidents, and that's it and – 23 CHAIRPERSON: Remember this you said, this 24 conversation allegedly took place on the Tuesday and we saw 25 already that she was talking about acting on the following</p>	<p style="text-align: right;">Page 16501</p> <p>1 truth somehow because we were looking at how the management 2 was moving forward in terms of taking action, in terms of, 3 you know, because what we believe is, is that whether there 4 is this unrest, this unrest now, this unrest does not 5 withdraw our policy. Our policies are still intact. They 6 need to be implemented in the best way and the unrest 7 situation, they should take its own form but like I said 8 yesterday that once we are on the site as the cops then we 9 take control of the security issue but the administrative 10 issues should also take their own life, so at the end of 11 the day when we were dealing with these issues we ended up 12 ourselves not being comfortable in terms of understanding 13 whether the Impala Mine management really is colluding with 14 the mine. But also remember from a political point of view 15 there was even this feeling that, you know, the mining 16 sector wants to replace NUM, you know, with a new face and 17 maybe that is why these things are erupting. So I think 18 yesterday, Albie, you will recall, you will recall that 19 when this discussion with the National Commissioner came 20 she also, from the discussion that she raised with you and 21 you know, and some of these questions that she raised, you 22 remember I raised them in the morning in our meeting and 23 she also felt you know it is difficult to separate 24 management from giving these people a leeway and if 25 management gave these people this type of leeway, how do we</p>

<p style="text-align: right;">Page 16502</p> <p>1 separate them from the allegation that can come and say but 2 they are supporting them? So I want us to, when you said 3 people must be arrested, I want us to be very clear that 4 any information that we get, we should get so that we 5 arrest people, that is our interest because yourselves here 6 as management you will clear yourselves from this Mr 7 Mokwena perception, SAPS Commissioner, you know Mr Kwadi 8 here. You will clear yourself by ensuring that you defuse 9 the situation" and so on and so on. The gist of this is 10 that, and this goes directly to the fact that you remember 11 the people I represent were arrested, some of them, you 12 understand that? Do you know that I represent people who 13 were arrested in the operation? 14 MAJOR-GENERAL MPEMBE: No, I understand 15 Chairperson, but I need just maybe to bring this to the 16 attention of the Commission to say I find it really 17 extremely difficult for me to comment on something that I 18 am told in the Commission, it talks about my senior and I 19 was never being given before and now I am expected to 20 answer questions and really I find it extremely difficult 21 for me. 22 MR MPOFU: Okay General, once again I 23 must preface whatever I am going to say with an apology for 24 that situation, you are quite right, but just remember all 25 I'm asking you about is not the details of who said what</p>	<p style="text-align: right;">Page 16504</p> <p>1 must bear that in mind too, but let's hear. What precisely 2 do you want to ask him about this allegation? Sorry, 3 before you answer the question can I just put it to you, 4 the way I see what the Commissioner was saying, the 5 Provincial Commissioner. She was saying in the case of 6 Impala and from Impala onwards there was the suggestion 7 that the mine owners were in fact trying to undermine NUM 8 and replace them with another union, namely AMCU, and there 9 was the suggestion that that was part of the explanation 10 for what was happening. 11 [11:56] And she is now saying there was this allegation. 12 We've got to know whether that's correct or not and she 13 seems to be linking her question to the fact that Lonmin 14 wasn't giving a lot of information to the SAPS in regard to 15 the people who were on the koppie, people whose faces could 16 be seen on the photographs and that kind of thing. And she 17 seems to be suggesting that look here if you don't give us 18 this information, I'm saying I'm not sure if she's saying 19 it directly, but if you don't give us this kind of 20 information we will be strengthened in the perception that 21 you people are really in a sense trying to help AMCU to 22 undermine NUM and which in effect affects the effectiveness 23 of our operation. That's what I understand her to be 24 saying. Whether I'm right or not is another matter. But 25 if that's so, what questions you want to ask this witness</p>
<p style="text-align: right;">Page 16503</p> <p>1 and why and so on. All I'm saying is that you as C-JOC, if 2 these were some of the considerations that were taken to 3 influence the direction, let's leave it neutral like that, 4 of the operation, that when those considerations were being 5 discussed, not with you as the C-JOC but with outsiders, is 6 – 7 CHAIRPERSON: I'm sorry, Mr Mpofu, I understood 8 what you were saying in relation to the earlier 9 considerations that you put. I'm not quite sure where this 10 one takes you – 11 MR MPOFU: Well – 12 CHAIRPERSON: Sorry, can I just – I think I 13 understand what the Commissioner allegedly said to Lonmin 14 but I'm not quite sure about, firstly about the question 15 that you are asking about it, perhaps you could make that 16 clear to us. 17 MR MPOFU: Ja. 18 CHAIRPERSON: And we can then see whether, in the 19 circumstances, we can expect the witness to give an answer. 20 You will remember we have ground rules here. One of them 21 is that a person to be cross-examined should be given prior 22 notice of what, the matters to be covered, in particular 23 documents to be covered and he is at a disadvantage, as he 24 points out, that this document wasn't given to him and that 25 was an unfortunate oversight but let's first see – and we</p>	<p style="text-align: right;">Page 16505</p> <p>1 about that. 2 MR MPOFU: Yes, thank you, Chairperson. 3 Well with respect, Chairperson, I think this – that's why I 4 was asking the last question. This aspect is more – 100 5 times more relevant than even the other three aspects that 6 we covered, for me. Because I represent people who were 7 arrested. What has been suggested here – 8 CHAIRPERSON: Yes, I understand that, Mr 9 Mpofu. 10 MR MPOFU: Can I finish? 11 CHAIRPERSON: The question is the 12 relevance of asking the question of this witness. 13 MR MPOFU: No. 14 CHAIRPERSON: I'm sure you will ask 15 questions of Lieutenant General Mbombo when she comes about 16 this, but what question are you asking this witness about? 17 MR MPOFU: Well I'm asking the same 18 question - this is the fourth time now. I'm asking the 19 same question that I've asked in respect of the other three 20 issues namely whether if there was a consideration of 21 killing, to use that unfortunate word, a perception that 22 the management was helping AMCU and if the way to kill that 23 perception was by arresting people so that it can be seen 24 that they are not assisting AMCU? 25 CHAIRPERSON: I don't understand the</p>

<p style="text-align: right;">Page 16506</p> <p>1 commissioner to be saying that. What I understand is –</p> <p>2 MR MPOFU: Well I –</p> <p>3 CHAIRPERSON: Can I just put this to you</p> <p>4 first? My understanding was she was saying that you will</p> <p>5 quote "kill" unquote this perception if you give us the</p> <p>6 information and if you don't give us the information then</p> <p>7 you won't kill the perception and the perception will still</p> <p>8 be there.</p> <p>9 MR MPOFU: No.</p> <p>10 CHAIRPERSON: But anyway, now you and I</p> <p>11 have debated it, let's see what precisely formulated</p> <p>12 question –</p> <p>13 MR MPOFU: Ja.</p> <p>14 CHAIRPERSON: - you have to ask this</p> <p>15 witness based on the passage –</p> <p>16 MR MPOFU: Yes.</p> <p>17 CHAIRPERSON: - that you read to him from</p> <p>18 the transcript.</p> <p>19 MR MPOFU: Thank you. Okay, to do that,</p> <p>20 General, I'll just read the last two sentences, not that</p> <p>21 whole long thing. "So I wondered when you said people must</p> <p>22 be arrested, underline arrested, so when you said people</p> <p>23 must be arrested, I want us to be very clear that any</p> <p>24 information that we get we should get so that we arrest</p> <p>25 people. That is our - because yourselves there as manager</p>	<p style="text-align: right;">Page 16508</p> <p>1 [12:20] CHAIRPERSON: The Commission resumes. Major-</p> <p>2 General, you're still under oath.</p> <p>3 MAJOR-GENERAL MPEMBE: Correct,</p> <p>4 Chairperson.</p> <p>5 MAJOR-GENERAL MPEMBE: s.u.o.</p> <p>6 CHAIRPERSON: Mr Mpofu, you were going to take</p> <p>7 this question that's dealt with on pages 8 and 9, I think</p> <p>8 it is, of the exhibit further with the witness.</p> <p>9 CROSS-EXAMINATION BY MR MPOFU (CONTD.):</p> <p>10 Yes. Thank you, Chairperson, if I can just make an</p> <p>11 enquiry. Sorry, sorry General. Okay, I won't revisit the</p> <p>12 issues that I've discussed with you. All I think I can</p> <p>13 just say to you is that I'm going to argue at the end of</p> <p>14 the case that these indications that I've given of what</p> <p>15 seems to be serious operational matters having a bearing on</p> <p>16 the operation for which you were responsible or for which</p> <p>17 you carried the overall responsibility, those matters being</p> <p>18 discussed not with you but with someone who is not even a</p> <p>19 member of SAPS are clear indications of the extent to which</p> <p>20 you were sidelined and to which nobody really took you</p> <p>21 seriously as the real C-JOC.</p> <p>22 CHAIRPERSON: I'm sorry, why do you say – I</p> <p>23 understand the first part of your question but why do you</p> <p>24 say no-one took him seriously?</p> <p>25 MR MPOFU: Well – [microphone off,</p>
<p style="text-align: right;">Page 16507</p> <p>1 you will clear yourself from this perception, from this</p> <p>2 perception," and so on. So it's very clear that the</p> <p>3 perception by arresting people, the perception that there</p> <p>4 is assistance to AMCU will thereby be undermined and I'm</p> <p>5 saying to you that since I represent people who were</p> <p>6 arrested, for this reason or for any other reason, I don't</p> <p>7 know, the only question really that's relevant to you –</p> <p>8 I'll ask the other questions to the provincial commissioner</p> <p>9 – the only question that's relevant to you is if this was a</p> <p>10 consideration, the killing of the pro AMCU perception, was</p> <p>11 it discussed with you? If not, do you find it strange?</p> <p>12 MAJOR-GENERAL MPEMBE: Chairperson, I've</p> <p>13 already said that nothing here was discussed with me but</p> <p>14 whether I said is that I did give considerations that I</p> <p>15 discussed with Provincial Commissioner Mbombo and they are</p> <p>16 on record. And the other thing is General Mbombo did not</p> <p>17 effect any arrest. Arrests were effected by members and</p> <p>18 whereby they gave statements for crimes that those people</p> <p>19 have committed.</p> <p>20 CHAIRPERSON: Yes. I think at this stage</p> <p>21 we can – if it's convenient for you, Mr Mpofu, we take the</p> <p>22 comfort break and then you can proceed with the matter</p> <p>23 thereafter.</p> <p>24 MR MPOFU: Thank you, Chairperson.</p> <p>25 [INQUIRY ADJOURNS INQUIRY RESUMES]</p>	<p style="text-align: right;">Page 16509</p> <p>1 inaudible].</p> <p>2 CHAIRPERSON: No, I think you should actually.</p> <p>3 MR MPOFU: Ja.</p> <p>4 CHAIRPERSON: Alright, repeat the question minus</p> <p>5 that section so that the witness and I can follow you.</p> <p>6 MR MPOFU: Ja. I'm asking for your</p> <p>7 comment to this proposition, General, that these</p> <p>8 considerations, these facts, if they are true, that these</p> <p>9 major considerations which have a bearing on the operation,</p> <p>10 its timing and its nature are matters which should have</p> <p>11 been discussed with someone who was the real C-JOC and who,</p> <p>12 according to the prescripts, is overall responsible for all</p> <p>13 actions. What is your comment to that?</p> <p>14 MAJOR-GENERAL MPEMBE: Chairperson, as I</p> <p>15 said before, these – I don't know whether, I don't want to</p> <p>16 use the so-called considerations but what has been said</p> <p>17 there –</p> <p>18 MR MPOFU: Yes.</p> <p>19 MAJOR-GENERAL MPEMBE: It has never been</p> <p>20 considered in the implementation of dispersal. Two, is</p> <p>21 that it's known what I have briefed the Provincial</p> <p>22 Commissioner about and three, I had no knowledge of this.</p> <p>23 MR MPOFU: Yes, no, I accept that you had</p> <p>24 no knowledge of the desire to kill it, whatever that means,</p> <p>25 because of these considerations. I'm simply, that's</p>

<p style="text-align: right;">Page 16510</p> <p>1 exactly the point that you had no knowledge when you should 2 have because these were matters that concerned what I'm 3 calling loosely your operation, if you were the C-JOC. 4 MAJOR-GENERAL MPEMBE: Chairperson, I 5 repeat again, this has never been used to disperse on the 6 16th. According to me they were never being a consideration 7 for the dispersal. the considerations that were considered 8 were the ones that I briefed the Provincial Commissioner 9 about and which is in front of the Commission. 10 MR MPOFU: Ja, well, that's even worse, 11 General. It means that if the, or rather when General 12 Mbombo was listening to your five points which you told him 13 the following day, she was just going through the motions. 14 There already were other considerations which had been 15 taken into account. 16 CHAIRPERSON: How can he answer that, Mr Mpofo? 17 MR MPOFU: Well – 18 CHAIRPERSON: I can understand that that's a 19 question that you want to ask Lieutenant-General Mbombo – 20 MR MPOFU: No – 21 CHAIRPERSON: But if you, how can you put it to 22 him that she was just going through motions? How does he 23 know from his own knowledge whether she was going through 24 the motions? I can understand it's a legitimate question 25 to ask her.</p>	<p style="text-align: right;">Page 16512</p> <p>1 Mpeembe. I don't know why it was given to us. Do you know 2 anything about it? 3 MR MATHIBEDI SC: We know nothing, Mr 4 Chairman. 5 CHAIRPERSON: Sorry? 6 MR MATHIBEDI SC: We know nothing, it was 7 not made available to us. 8 CHAIRPERSON: Mr Chaskalson, can you help us? 9 MR CHASKALSON SC: I think it was given 10 to you, Chairperson, because Mr Mpofo indicated that he 11 wanted to use it and I suggested that a copy be given to 12 the Commissioners and the witness before it gets used. 13 Where it comes from, it's one of the statements in the 14 statements directory on the SAPS master hard drive. 15 COMMISSIONER HEMRAJ: And it's not been 16 before – 17 MR CHASKALSON SC: And it's not yet an 18 exhibit. 19 MR MPOFU: Ja - 20 CHAIRPERSON: Are you going to deal with it? 21 MR MPOFU: Yes, I'm moving on – 22 CHAIRPERSON: We'd better give it an exhibit 23 number then. 24 MR MPOFU: Chairperson? 25 CHAIRPERSON: We'd better give it, if it's not</p>
<p style="text-align: right;">Page 16511</p> <p>1 MR MPOFU: Yes. 2 CHAIRPERSON: But I have problems with your 3 putting it to this witness. 4 MR MPOFU: Well, Chairperson, if he knows 5 now, which he didn't know then, that the decision was 6 already taken, surely that must be a big thing. If at that 7 time he thought all this is being done because of what I've 8 said and it turns out now, as I'm explaining to him, that 9 there were other considerations, how can that be irrelevant 10 to a person who believed genuinely, I can understand from 11 his point of view, that it was his say-so or rather 12 considerations that were taken into account and when it 13 turns out there were four other considerations which he no 14 clue about that were taken into account. How on - 15 CHAIRPERSON: How is he - I'm sorry, how is his 16 response to that proposition, in fact it's far more 17 complicated than you put it but I won't go into that with 18 you now, but how can his response to that help us here in 19 deciding, in answering the questions we've been asked to 20 answer. 21 MR MPOFU: Okay, I'll move on. General – 22 CHAIRPERSON: Before we move on can I deal with 23 something? Mr Mathibedi, when we came back after the 24 comfort break we found on the table here what purports to 25 be another statement by General Mpeembe, Major-General</p>	<p style="text-align: right;">Page 16513</p> <p>1 previously an exhibit we'll have to give it an exhibit 2 number. 3 MR MPOFU: Yes. 4 CHAIRPERSON: Is this the appropriate stage to do 5 so? 6 MR MPOFU: Yes. 7 CHAIRPERSON: Or – alright. 8 MR MPOFU: Chairperson, when I was saying 9 I'm moving on, I was going to it. 10 CHAIRPERSON: Okay, no, I understand. It's HHH – 11 MS PILLAY: 62, Chair. 12 CHAIRPERSON: Sorry? 13 MS PILLAY: 62. 14 CHAIRPERSON: HHH62. Alright, I'd better make a 15 note in my book. Exhibit HHH62, statement by General 16 Mpeembe dated – unsigned statement by General Mpeembe dated 17 August 2012. So in other words this is a pre-Roots 18 statement. If the date at the end is correct it's a pre- 19 Roots statement, is that correct, Mr Mpofo? 20 MR MPOFU: That's correct, Chair. 21 CHAIRPERSON: Does the witness have a copy? 22 MAJOR-GENERAL MPEMBE: No, Chairperson. 23 MR MPOFU: On the screen. 24 CHAIRPERSON: You can have mine in the meanwhile. 25 Oh, you're getting someone else's. My one is, my offer is</p>

Page 16514

1 spurned, alright. Ms Pillay, thank you very much for
 2 giving a copy to the witness. Now this statement isn't
 3 signed by you but it's got your name on it. Have you seen
 4 it before? You see this is also a problem in respect of
 5 the requirement that people get prior notification of
 6 documents so that they can study them. I haven't seen the
 7 document before either. I don't know what new material is
 8 in it or possibly what material isn't in it. May I ask you
 9 this question, Mr Mpofo, assuming you hold this cross-
 10 examination, were to hold this cross-examination over till
 11 after lunch so that the witness has an opportunity to study
 12 the document and so do we, the Commissioners, would that
 13 prejudice you in the presentation of your cross-
 14 examination?
 15 MR MPOFU: Chairperson, if you can just
 16 allow me one question and then it will be clear and then I
 17 will, depending on the answer.
 18 CHAIRPERSON: [Microphone off, inaudible]
 19 MR MPOFU: Thank you, Chairperson.
 20 CHAIRPERSON: - put his clarifying question first.
 21 MR MPOFU: Yes.
 22 MR MATHIBEDI SC: Sorry, Mr Chairman, we
 23 also would like to have a look at the statement before, you
 24 know, any questions can be put to the witness.
 25 MR MPOFU: Ja.

Page 16515

1 CHAIRPERSON: It's suggested that subject to this
 2 question we're going to hear in a moment, that this matter
 3 could stand down till after lunch and possibly Mr Mpofo can
 4 use some of his other cross-examination –
 5 MR MPOFU: Yes.
 6 CHAIRPERSON: - material in the meanwhile, but
 7 let's first hear what his question is.
 8 MR MPOFU: I promise I won't refer to the
 9 statement, Chairperson. General, did you at any stage
 10 attend the – you remember that on the 15th in the evening
 11 the NUM, or rather AMCU was ready to go to the mountain,
 12 the NUM was reluctant and then at some stage they wanted to
 13 have a caucus, remember that?
 14 MAJOR-GENERAL MPEMBE: I remember,
 15 Chairperson.
 16 MR MPOFU: Did you at any stage attend
 17 the NUM caucus?
 18 MAJOR-GENERAL MPEMBE: No, Chairperson.
 19 MR MPOFU: Okay. Alright, then we'll
 20 deal with it after lunch. Thank you, Chairperson.
 21 CHAIRPERSON: You're moving on to your next point?
 22 MR MPOFU: Yes.
 23 CHAIRPERSON: That gives Mr Mathibedi also a
 24 chance to study the document, and the witness as well.
 25 MR MPOFU: Yes, that's correct.

Page 16516

1 CHAIRPERSON: Did you – let's just get this out of
 2 the way. Can you recall having made a typed statement such
 3 as the one that I have in my hand which is now exhibit
 4 HHH62, in August of this year, of last year?
 5 MAJOR-GENERAL MPEMBE: Chairperson, the
 6 statement that I made it was the manuscript which maybe
 7 could have been typed.
 8 CHAIRPERSON: I see. In any event, you can't
 9 answer the question then either at this stage.
 10 MAJOR-GENERAL MPEMBE: Yes.
 11 CHAIRPERSON: That's the sort of question you can
 12 be asked after lunch when you've had a chance to study the
 13 document. Alright, okay. Mr Mpofo?
 14 MR MPOFU: Thank you very much,
 15 Chairperson. I apologise again, Chairperson. I have to
 16 ask this in a careful way because I know you have refuted
 17 my premise but if –
 18 CHAIRPERSON: I don't know what your premise is
 19 but I suspect he may not have refuted it, he may simply
 20 have rejected it. Whether it's a successful rejection so
 21 that the proposition –
 22 MR MPOFU: Exactly.
 23 CHAIRPERSON: - stands refuted, is a matter we may
 24 have to decide later.
 25 MR MPOFU: Thank you, Chairperson.

Page 16517

1 That's why I'm saying if, if ultimately the Commission
 2 agrees with my contention that you were just a figurehead
 3 type of C-JOC without the authority, I think is the correct
 4 word that the Chairperson had given me, would you agree
 5 that that would constitute yet another deviation from the
 6 prescripts because of what I read to you of what a C-JOC
 7 should be saddled with?
 8 MAJOR-GENERAL MPEMBE: Chairperson, I
 9 don't know whether I'm asked to give an opinion or to
 10 speculate.
 11 MR MPOFU: No
 12 CHAIRPERSON: No, let's approach it this way. Mr
 13 Mpofo has suggested to you that you were sidelined, you
 14 weren't the real C-JOC, you were – I don't know what the
 15 correct word would be but you were the nominal, titular C-
 16 JOC, the real C-JOC was General Annandale. Now you've
 17 denied that, you say that's not the way you see the matter
 18 and it's not your understanding of the situation at all but
 19 he's asking you now to assume for the sake of the answer
 20 that what you deny is in fact correct, that you were the
 21 titular C-JOC, that the real C-JOC was General Annandale.
 22 And he says if that is so, only if that is so, do you
 23 accept that that would be a deviation from the prescripts,
 24 particularly the requirements of, I take it, standing order
 25 262 paragraph 8 because paragraph 8 says there's got to be

<p style="text-align: right;">Page 16518</p> <p>1 a C-JOC and it spells out his responsibilities but that 2 must be a real C-JOC who has really got the 3 responsibilities and is able to appropriately take those 4 responsibilities because he is clothed with the necessary 5 authority. So that's the question he is asking. Do you 6 understand the question? 7 MAJOR-GENERAL MPEMBE: I – 8 CHAIRPERSON: I know you reject the assumption on 9 which it rests, so if you answer the question you won't be 10 taken to have impliedly accepted the assumption but he says 11 if you accept that assumption, which he knows you don't, 12 what is your answer in respect of the further point that he 13 has put to you? Am I putting it correctly, Mr Mpofu? 14 MR MPOFU: Thank you, Chairperson, very 15 much, yes. 16 MAJOR-GENERAL MPEMBE: That's why I'm 17 saying, Chairperson, I don't believe so that it was like 18 that but I think when the Provincial Commissioner appointed 19 me as the C-JOC I did believe that I am the real C-JOC. I 20 never thought that she could make me a token C-JOC. 21 MR MPOFU: Yes. No, that I accept, 22 General, and I'll move on just now if – this is my last 23 attempt. I accept, one, that you saw, must have seen 24 yourself as the real C-JOC or that appointment to be what 25 it purports to be. I also accept that nobody said to you,</p>	<p style="text-align: right;">Page 16520</p> <p>1 Brigadier Calitz and to the JOC. As overall commander I 2 could only give direction when that direction was sought, 3 either from the JOC or from the operational commander. 4 Neither sought direction." What did you want to 5 communicate to the Commission when you included that in 6 your statement? 7 MAJOR-GENERAL MPEMBE: Chairperson, it's 8 explained in terms of exhibit HHH page 11, paragraph 28. 9 MR MPOFU: Okay General, we're going to 10 get there just now. I'll rely on the screen. HHH3 11 paragraph 28, please. 12 MAJOR-GENERAL MPEMBE: Page 11. 13 MR MPOFU: Page 11. 14 MAJOR-GENERAL MPEMBE: Paragraph 28, 15 Chairperson. 16 CHAIRPERSON: Yes, you see the paragraph? Oh, 17 it's not on the screen yet. It's page 11 of the statement, 18 supplementary statement, page 11 para 28. Para 28. 19 MR MPOFU: Thank you very much. 20 [12:40] CHAIRPERSON: I'll read it out for the 21 benefit – 22 MR MPOFU: Yes. 23 CHAIRPERSON: - of people who haven't got 24 the screen in front of them. "I should add to what I say 25 in paragraph 51 of my original statement," that's the</p>
<p style="text-align: right;">Page 16519</p> <p>1 listen here, you are not the real C-JOC, just sit here and 2 say nothing, but all I'm saying to you is that if, if the 3 Provincial Commissioner, between the Provincial 4 Commissioner and General Annandale there was a situation 5 where he was installed, without your knowledge, as the real 6 C-JOC, that would be a deviation from a regulation that 7 says the C-JOC, he or she is designated and is responsible 8 for all actions taken. That would be a deviation from 9 that, would you agree? 10 MAJOR-GENERAL MPEMBE: No, Chairperson, 11 in the sense that the standing order says that the C-JOC is 12 appointed by the Provincial Commissioner. If in the same 13 assumption, Chairperson, it must be put in the same 14 assumption, if it was that it was General Annandale he 15 should have been appointed by somebody else so that that 16 could still be within – 17 MR MPOFU: Fair enough. That's the 18 answer, okay. Thank you, General. Now, when you said in 19 your statement and I'm paraphrasing now, when you said in 20 your statement, I think it's paragraph 51 of HHH12 – is it 21 GGG12? GGG12. What paragraph did I say? 51. What did 22 you want to communicate to the Commission when you said at 23 GGG12 paragraph 51, "At all times while I was in the 24 helicopter, which was a period of about 20 minutes, I was 25 accessible by radio both to the operational commander</p>	<p style="text-align: right;">Page 16521</p> <p>1 paragraph that was read by Mr Mpofu, "that as overall 2 commander I am the soundboard to the operational commander 3 and the JOC when problems arise, and they inform me through 4 the radio or cell phone of those problems and seek my 5 guidance. This did not happen. It is not the function of 6 the overall commander to usurp the functions of the 7 operational commander, particularly when the operational 8 commander is better positioned, has been on the ground and 9 experiencing action first-hand." That's what you say. 10 MAJOR-GENERAL MPEMBE: Correct, 11 Chairperson. 12 CHAIRPERSON: A couple of questions arise 13 from that, which Mr Mpofu may well ask you, but I'd like to 14 ask you one at the outset. In the last sentence you say, 15 "It is not the function of the overall commander to usurp 16 the functions of the operational commander," and then you 17 say "particularly when the operational commander is better 18 positioned, has been on the ground and experiencing action 19 first-hand." I'm not quite sure why you use the word 20 "particularly" because if being in the air and able to see 21 what was happening below you were in fact in a better 22 position to see what was happening and see if things which 23 should be attended to, would it not have been appropriate 24 for you to have intervened, as it were, and if necessary 25 issued some kind of instruction even though the operational</p>

Page 16522

1 commander didn't seek guidance from you? What do you say
2 about that?

3 MAJOR-GENERAL MPEMBE: I did say it's
4 correct what the Chairperson is saying. But in this case I
5 couldn't say anything when I didn't see anything wrong, or
6 when there was nothing reported to me.

7 MR MPOFU: Yes, and in any event the
8 operational commander is always, or let's say usually would
9 always, or usually be in a better position than anyone
10 sitting in the JOC because the operational commander would
11 be on the ground. So the prescript that says you must
12 communicate to the overall commander obviously assumes that
13 the operational commander would always be in a better
14 position from that point of view. Do you understand what
15 I'm saying?

16 MAJOR-GENERAL MPEMBE: No, Chairperson.

17 MR MPOFU: I'm saying isn't it so that by
18 definition the operational commander, who would be on the
19 ground, would always be in a better position to make
20 assessments than someone, albeit senior, who is not on the
21 ground?

22 MAJOR-GENERAL MPEMBE: In that aspect,
23 yes, Chairperson.

24 MR MPOFU: Yes, so that the duty to
25 communicate with the overall commander is imposed, despite

Page 16523

1 the fact that the operational commander would always be in
2 a better position. Do you understand that?

3 MAJOR-GENERAL MPEMBE: I do understand
4 what the Advocate is trying to say; provided that there is
5 something that I see or I hear from the radio, that is not
6 in accordance with the plan.

7 MR MPOFU: Yes. Okay, again short-
8 circuiting, my reading - and you can comment - of your
9 paragraph 51 either in the original form or this form, is
10 that you were criticising the operational commander and the
11 people in the JOC for not seeking your direction, I think
12 is the word that you used, despite the fact that you say
13 you were accessible by radio.

14 MAJOR-GENERAL MPEMBE: Not correct,
15 Chairperson -

16 CHAIRPERSON: I don't see where the
17 criticism is, Mr Mpofo. I understand the point that they
18 never asked for guidance and therefore he didn't give any,
19 but I'm not sure that I see any criticism. Perhaps you can
20 direct me to what I should see in that regard?

21 MR MPOFU: Alright, you wouldn't just out
22 of the blue say to the Commission, 'Look, if direction was
23 asked from me I would have given it, but as it happens, it
24 was never asked from me,' if that was meant to be a
25 compliment.

Page 16524

1 MAJOR-GENERAL MPEMBE: I still do not
2 understand the question, Chairperson.

3 MR MPOFU: Well, okay, we'll leave it for
4 argument. Anyway, that argument is going to -

5 CHAIRPERSON: Sorry, can I ask a question
6 flowing from your question? If you had seen something from
7 the air which required immediate attention and which wasn't
8 receiving attention, because you could hear on the radio
9 what instructions Brigadier Calitz was giving, I take it -
10 that's right, isn't it?

11 MAJOR-GENERAL MPEMBE: Yes, Chairperson.

12 CHAIRPERSON: Now if you'd seen something
13 which you thought required an instruction from him, which
14 he was not giving, even though he didn't seek guidance from
15 you, would you have said to him, 'Look here, Brigadier
16 Calitz, there's this problem, you'd better deal with it, or
17 you'd better issue an instruction along these lines?'

18 MAJOR-GENERAL MPEMBE: Correct,
19 Chairperson.

20 CHAIRPERSON: So from the fact you didn't
21 do so can we infer you didn't see anything which required
22 in your opinion an intervention of the kind I've mentioned?

23 MAJOR-GENERAL MPEMBE: Correct,
24 Chairperson.

25 MR MPOFU: And I will also argue that you

Page 16525

1 were also still trying to convey the same criticism or
2 commentary when you referred in paragraph 56 of HHH - or
3 rather, GGG12, or if I'm wrong you'll tell us what you
4 wanted the Commission to understand by that. You said, "I
5 wish to state" - sorry, are we there? Paragraph 56 of
6 GGG12, there you said, "I wish to state that if I had been
7 told immediately after scene 1, but before scene 2, that
8 people had been killed, I would have directed that police
9 members do a show or force and contain the situation while
10 attending to the scene around the kraal. Effectively I
11 would have directed that we would do the same thing that I
12 had done on Monday, the 13th." Let's just deal with the
13 first part of that. I think that the significance of this
14 is - and I don't want to put it higher, I think we've
15 already had that debate - the significance of this is that
16 had this happened and had you intervened, I think the
17 Chairperson previously corrected me, there could have been
18 two outcomes; you could have said go ahead, or you could
19 have said don't go ahead with scene 2. Can we accept that
20 as a, just as a statement of general fact?

21 MAJOR-GENERAL MPEMBE: No, Chairperson.

22 MR MPOFU: So the pause or break that you
23 might have called for if you had been called between scene
24 1 and scene 2, could not have resulted in either you saying
25 yes, go ahead with scene 2, or saying don't go any further.

<p style="text-align: right;">Page 16526</p> <p>1 Are you saying none – which one of those two could not have 2 eventuated? 3 MAJOR-GENERAL MPEMBE: None of them, 4 Chairperson, and the inference that can be drawn there is 5 that it's purely a situational appropriateness that 6 Brigadier Calitz could have applied and I need also to 7 state that in my testimony I even said that should also be 8 taken into account with regard to exhibit FFF1, and 9 paragraph 5.2.8. 10 MR MPOFU: Okay, I'll also leave that for 11 argument. Thank you – 12 CHAIRPERSON: Sorry, let's take this 13 point further. In 56 you say that what you would have done 14 if you'd been told immediately after scene 1, but before 15 scene 2, that people had been killed. So a number of 16 points flow from that. The first is you've told us that 17 you were not told and you did not know immediately after 18 scene 1, before scene 2, that people had been killed. 19 That's correct, isn't it? You didn't know. 20 MAJOR-GENERAL MPEMBE: Correct, 21 Chairperson. 22 CHAIRPERSON: Secondly, the people to 23 whom you refer in 52, to whom you would have responded if 24 they had – sorry, 51, if direction is required, were 25 Brigadier Calitz and those in the JOC. Now according to</p>	<p style="text-align: right;">Page 16528</p> <p>1 didn't tell you, then that's something for which you can't 2 be held responsible. 3 MAJOR-GENERAL MPEMBE: Correct, 4 Chairperson, and Chairperson, just in addition, as I said 5 before I did also explain what I meant in paragraph 56, 6 again exhibit HHH3, paragraph 29. 7 MR MPOFU: Ja, no, that's fine. It's not 8 necessary. 9 MR MATHIBEDI SC: Sorry, Mr Chairman, the 10 purpose of exhibit HHH3, as clearly set out in paragraph 3, 11 was to address the criticisms that were levelled against 12 the police by the expert. That should be taken into 13 consideration. 14 MR MPOFU: Okay. 15 CHAIRPERSON: Yes, yes, that's not an 16 objection though, that's an observation you could make at 17 the appropriate time. I think we must allow Mr Mpofo to 18 continue. If he asks a question to which objection can be 19 taken, you can object, but I don't like comments being 20 added in – 21 MR MATHIBEDI SC: Sorry, Mr Chairman, if 22 I could be allowed to say something. 23 CHAIRPERSON: You may. 24 MR MATHIBEDI SC: This deals with the 25 issue as to whether the witness was criticising the conduct</p>
<p style="text-align: right;">Page 16527</p> <p>1 the evidence we've heard so far - whether that's correct or 2 not is a matter that may be debated later – those in the 3 JOC didn't know about scene 1 at that stage. So if that's 4 correct they couldn't have told you. If they did know, 5 they should have told you, I take it, but they didn't. Is 6 that right? 7 MAJOR-GENERAL MPEMBE: Correct, 8 Chairperson. 9 CHAIRPERSON: As far as Brigadier Calitz 10 is concerned, I think it's his statement – we'll be hearing 11 his evidence next, but as far as I can see from his 12 statement we've got he says he didn't know about that scene 13 1 had happened before scene 2. Whether that's correct we 14 will see. Whether he was culpable in not knowing is also a 15 matter that may well be investigated, but as far as what we 16 have at the moment is concerned, the position is that as 17 far as we know he didn't know. So therefore he couldn't 18 have told you either. Is that right? 19 MAJOR-GENERAL MPEMBE: Correct, 20 Chairperson. 21 CHAIRPERSON: But if he had known, you 22 would have expected him to have told you? 23 MAJOR-GENERAL MPEMBE: Correct, 24 Chairperson. 25 CHAIRPERSON: And if he did know and he</p>	<p style="text-align: right;">Page 16529</p> <p>1 of the police in not informing him of the situation on the 2 ground. 3 CHAIRPERSON: [Microphone off, inaudible] 4 that and he did say that his understanding is they didn't 5 know and therefore they can't be criticised. But as I 6 understand it, if they did know, that's a different matter, 7 but he's not saying that and we're not able during his 8 cross-examination to determine whether the people who 9 didn't communicate with him had knowledge which they should 10 have communicated. I think that's the situation. So I 11 think the point you make is not an invalid point, but I 12 don't think, with respect, it need be made. But anyway, 13 thank you for making it all the same, but please don't 14 interrupt unless there's an objection to be raised in 15 future. Carry on, Mr Mpofo. 16 MR MPOFU: Thank you very much, 17 Chairperson. Just a quick aside – 18 CHAIRPERSON: No, no, no asides, just 19 questions, please. 20 MR MPOFU: Well, okay, I'm just trying to 21 structure the argument, Chairperson, so that he knows I'm 22 dealing with a different topic. I'm helping the witness. 23 Outside of what we were discussing now, can you confirm 24 that the – you said you saw the attack, what you call the 25 attack, on television. Can you confirm that that so-called</p>

Page 16530

1 attack happened almost immediately before the shooting of
2 the people?
3 MAJOR-GENERAL MPEMBE: I just wanted to
4 say when? Was it the 13th or the 16th?
5 MR MPOFU: 16th.
6 MAJOR-GENERAL MPEMBE: Or the 16th, or
7 whether was it imminent or was in progress or what? I just
8 wanted to find out –
9 MR MPOFU: Ja, whether it's imminent or
10 whatever, but that it happened almost back to back. There
11 was what you saw on television as what you call the attack,
12 and almost immediately thereafter was the defence, correct?
13 MAJOR-GENERAL MPEMBE: Chairperson, I
14 don't know what is correct there. I just wanted to find
15 out the question correctly.
16 CHAIRPERSON: It doesn't matter what he
17 saw on the television. We went through that -
18 MR MPOFU: Yes, it –
19 CHAIRPERSON: We went through that
20 before. We've seen it –
21 MR MPOFU: No, Chairperson, this is a
22 different question, with greatest respect. The fact that
23 we mention the same thing doesn't mean I'm asking it for
24 the same purpose. I'm just simply, I'm asking the witness
25 whether when he saw the so-called attack it was immediately

Page 16531

1 followed by the private defence or not.
2 CHAIRPERSON: Does it matter what he saw?
3 We can see it –
4 MR MPOFU: Well, it's going to matter
5 when you know what my next question is going to be,
6 Chairperson. You can't know it prophetically. As I said,
7 I'm dealing with a different topic.
8 CHAIRPERSON: Is there any prejudice to
9 your telling me what the next question is before I rule on
10 this question?
11 MR MPOFU: Yes, Chairperson. There will
12 be, yes.
13 CHAIRPERSON: [Microphone off, inaudible]
14 MR MPOFU: Yes, Chairperson. Well, you
15 asked me the question.
16 CHAIRPERSON: It's quite a serious
17 allegation to make.
18 MR MPOFU: Well, you made the allegation,
19 Chairperson. You asked me. I'm just answering honestly.
20 [Microphone off, inaudible] in my cross-examination. I'm
21 only putting it, I'm not –
22 CHAIRPERSON: Yes, I know, I –
23 MR MPOFU: - [inaudible] by the witness.
24 CHAIRPERSON: I am conscious of the fact
25 that I must be fair to you and allow you to cross-examine

Page 16532

1 in a manner which does justice to your clients' cause. I
2 understand that. Without wishing to set a precedent, I'll
3 allow you to ask this question, but don't quote it to me
4 again next time you try to do the same thing.
5 MR MPOFU: I won't. I promise,
6 Chairperson. General, in fairness, I think in any event
7 you didn't understand the question, in fairness, so I'll
8 just repeat it. All I'm asking you is whether you have
9 testified here that you have – and we all know you were not
10 there, but that subsequently you saw the, what you call the
11 attack. For now I'm accepting that as a fact. I'll
12 dispute it on another occasion. All I'm asking you is
13 simply whether the attack that you saw was followed almost
14 immediately by the defensive action of shooting the
15 attackers on a –
16 CHAIRPERSON: Is it the attack or the
17 imminent attack?
18 MR MPOFU: Whatever.
19 CHAIRPERSON: Remember you covered that
20 ground before.
21 MR MPOFU: Ja, whatever. Okay –
22 CHAIRPERSON: So the question is the
23 attack or imminent attack that you saw, was it followed
24 immediately by the response which is characterised by SAPS
25 as being an exercise of either self-defence or private

Page 16533

1 defence, from what you saw on the television, the video
2 that you saw?
3 MAJOR-GENERAL MPEMBE: Chairperson, I
4 just want to find the question, is that there, was it an
5 imminent or was attack in progress or, and then followed by
6 an action of the police, or what precisely that I need to
7 answer? Or was it an imminent or an attack in progress?
8 MR MPOFU: I don't know, General. You
9 said you saw an attack. Whether, was it imminent, the one
10 you saw on television, or was it an attack? How do I know
11 that?
12 MAJOR-GENERAL MPEMBE: So I'm still not
13 getting the question clearly.
14 CHAIRPERSON: Let me try. Let's start at
15 the back. You saw police action on the video which Mr
16 Ngalwana showed when you were giving evidence-in-chief,
17 correct?
18 MAJOR-GENERAL MPEMBE: Yes, Chairperson.
19 CHAIRPERSON: Now what did you see before
20 that action by the police? What were the people at whom
21 the shots were fired, what were they doing immediately
22 prior to the shots being fired, that you saw?
23 MAJOR-GENERAL MPEMBE: What was the
24 conduct of the police?
25 CHAIRPERSON: No, no, no, no, the

Page 16534

1 strikers. You see, the police fired. You saw the police
2 firing, right?
3 MAJOR-GENERAL MPEMBE: Correct,
4 Chairperson.
5 CHAIRPERSON: Now before the police fired
6 you saw the strikers, didn't you?
7 MAJOR-GENERAL MPEMBE: Correct,
8 Chairperson.
9 CHAIRPERSON: Right, now what were the
10 strikers doing?
11 MAJOR-GENERAL MPEMBE: Oh, they were
12 charging at the police.
13 MR MPOFU: Yes, and that charging, was it
14 almost immediately followed by the firing? That's the
15 question really. Yes or no?
16 MAJOR-GENERAL MPEMBE: Which firing?
17 Because there were so many firings that happened.
18 MR MPOFU: The one that the Chairperson
19 was talking to you about two questions ago. The big one,
20 you remember, when people were mowed down, that firing.
21 MAJOR-GENERAL MPEMBE: Chairperson, I
22 testified that I was also informed that all minimum force
23 was used and that one was the last one. But the last force
24 that was used I could see it on the screen.
25 MR MPOFU: Okay, I'll accept that for

Page 16535

1 now. When that minimum force was being applied, was it
2 applied almost immediately after what you saw as the
3 attack?
4 MAJOR-GENERAL MPEMBE: Firstly what I
5 know and what I was informed is that the minimum force was
6 used.
7 MR MPOFU: Yes, when that minimum force –
8 let's accept that for now, and I must emphasise, only for
9 now – when that minimum force was used, and you say it's
10 being used, was it almost immediately a few seconds after
11 what you saw the charging attackers?
12 [12:59] MAJOR-GENERAL MPEMBE: The minimum forced
13 was used first and the last resort it was the one that I
14 saw.
15 MR MPOFU: Ja, when the last –
16 CHAIRPERSON: Sorry, what do you mean by
17 the minimum force?
18 MAJOR-GENERAL MPEMBE: Chairperson, I'm
19 referring the use of the teargas, the use of the stun
20 grenades.
21 CHAIRPERSON: Yes, the less than lethal
22 force which the POP members –
23 MAJOR-GENERAL MPEMBE: Correct,
24 Chairperson.
25 CHAIRPERSON: Is that what you mean? So

Page 16536

1 you say you saw that and then you saw what you've
2 described.
3 MAJOR-GENERAL MPEMBE: Chairperson, what
4 I say is that I was told that that one was used first but,
5 yes.
6 MR MPOFU: General Mpeembe, I'm not
7 talking about what you were told, you told this Commission
8 that you saw something, okay. Forget about what you were
9 told for now. I'm saying to you when you saw what you call
10 the last resort force that was used, was it almost
11 immediately preceded by the attack or not, or the charging?
12 MAJOR-GENERAL MPEMBE: The charging came
13 first, Chairperson.
14 MR MPOFU: And was it immediately
15 followed by the minimum force, last resort? Correct?
16 MAJOR-GENERAL MPEMBE: There was the
17 teargas used, Chairperson.
18 MR MPOFU: No, I'm not going to leave
19 this one. Forget the teargas, forget what the police call
20 incident 1 or incident 2 or wat nogal.
21 CHAIRPERSON: But why must he forget the
22 teargas?
23 MR MPOFU: Because I'm not talking about
24 it.
25 CHAIRPERSON: Sorry, just give me an

Page 16537

1 opportunity. You asked him about a video, I already
2 indicated to you I'm not impressed with questions directed
3 to him about what he sees on the video because we see the
4 video as well. But I said I'd allow you to do it because
5 you said your next question is important and you can't ask
6 it in the earlier questions asked. But we won't go into
7 that for the moment, but the video we saw did show us
8 rifles being fired without a recoil which we were told
9 meant rubber bullets. We also saw teargas, we saw these
10 things happening as I understand it, before live ammunition
11 was used. So to say to the witness, when you're talking
12 about the video, forget about the teargas is asking him to
13 do something which may not be appropriate in the
14 circumstances. You may like to think about that over the
15 adjournment. It's now 1 o'clock, we're now going to
16 adjourn until 2. The witness is going to read the
17 statement in the meanwhile, so will we, and you can resume
18 your questioning on this topic after -
19 MR MPOFU: I appreciate that,
20 Chairperson. Can I just say this? Chairperson, thanks, if
21 I may just say this, so that we don't leave it hanging. I
22 appreciate what the Chairperson has said. Please, when I
23 say forget about the teargas and so on I was not being
24 funny. All I was saying is that I accept that there was
25 teargas, I accept that there was water, I accept that there

Page 16538

1 was stun grenades and so on. The incident that I'm talking
 2 to you about is when live ammunition was used by the TRT
 3 and we'll talk about it after lunch. But that's really – I
 4 was not saying forget in the sense that I'm dismissing it.
 5 I'm simply saying surely if we're talking about self
 6 defence and last resort you know that we're talking about
 7 the fatal shooting. So after lunch that's what we'll
 8 talking about. It was only in that context and if you took
 9 it differently I apologise.

10 COMMISSIONER HEMRAJ: Mr Mpofo, Mr Mpofo,
 11 I'm not sure when last the witness looked at the video,
 12 would it assist you if during the lunch adjournment you
 13 direct his attention or his counsel's attention to that
 14 part of the video that you're referring to? So that he
 15 might look at it and then be better positioned to answer
 16 your questions after lunch. Would that assist?

17 MR MPOFU: Well it wouldn't assist me
 18 because I don't know, he said he saw an attack on
 19 television. I don't know, it might assist him because he's
 20 the one who saw the attack. I don't know when –

21 CHAIRPERSON: I'm sorry to interrupt you.
 22 He did say that he saw a video which Mr Ngalwana showed.

23 MR MPOFU: Yes.

24 CHAIRPERSON: You remember that was a
 25 long time ago and it may well be that it would be helpful

Page 16539

1 for him –

2 MR MPOFU: It will assist him, ja.

3 CHAIRPERSON: Ja, so –

4 MR MPOFU: Thank you. I think he must
 5 then identify that attack for us, thank you.

6 CHAIRPERSON: That's a matter for Mr
 7 Mathibedi and obviously though the General is under cross-
 8 examination, there can be no objection from anybody to Mr
 9 Mathibedi speaking to the witness about this during the
 10 adjournment and making the necessary arrangements if the
 11 witness and he consider it appropriate.

12 MR MATHIBEDI: Thank you, Mr Chairman.

13 [COMMISSION ADJOURNS COMMISSION RESUMES]

14 [14:19] CHAIRPERSON: The Commission resumes. I
 15 apologise to those who were affected by the fact that we
 16 are beginning late, later than the time I indicated, but we
 17 had various matters to attend to in chambers, which took
 18 longer than I anticipated. Major-General, you're still
 19 under oath.

20 WILLIAM MPEMBE: Correct, Chairperson.

21 CHAIRPERSON: Mr Mathibedi, I understand
 22 you wish to make a statement.

23 MR MATHIBEDI SC: Thanks, Mr Chairman.
 24 Mr Chairman, I think it's very critical and fair to both
 25 our witnesses and ourselves that, you know, we've laid down

Page 16540

1 rules as to what should follow. Parties should make
 2 available questions and indicate which statements are going
 3 to be used in cross-examining witnesses. Now we have a
 4 situation wherein, you know, General Mpenbe was given a
 5 statement during the course of the day and we've also
 6 received a second one. Now that being the case, it cannot
 7 be expected of the witness to fairly and properly prepare
 8 for answering questions because it may mean he may have to
 9 read other documents, and if things go on as they are
 10 continuing, Mr Chairman, we really submit that it's unfair
 11 and we are being prejudiced. Thanks, Mr Chairman.

12 CHAIRPERSON: Mr Mpofo, this is one of
 13 the matters that we discussed in chambers. I understood
 14 you to say that unless the witness indicates after tea that
 15 he's happy to be cross-examined today on these matters, you
 16 don't propose asking him any questions about it today. You
 17 hope, as I understand it, to be able to finish this
 18 afternoon, but if you don't, then other things will have to
 19 be done, but clearly Mr Mathibedi is right that we have to
 20 be fair to the witness and it is unfortunate that the rules
 21 we lay down in respect of prior notice of documents and so
 22 on haven't been complied with, but to some extent that's
 23 water under the bridge. But I wish to express the hope,
 24 and I'm not just speaking obviously to you but everybody,
 25 that that rule that we issued in the hope of promoting

Page 16541

1 fairness and also expeditious dealing with matters will be
 2 complied with in the future. Yes, Mr Mpofo?

3 MR MPOFU: Thank you very much,
 4 Chairperson. I must say, as I've already said to the
 5 General, that I have to apologise; I think all of us are
 6 trying to adhere with the rules, but as we know, cross-
 7 examination sometimes takes its own direction and the one
 8 document that I have presented, I literally had wanted to
 9 refer to one sentence, and I made it clear to Mr Mathibedi
 10 over the lunch. The other one, yes, is quite new and in
 11 respect of both in any event, even the one where there's
 12 one sentence, I've said that one of two things; if the
 13 witness, Mr Mathibedi has asked for 15 minutes, so I said
 14 instead of wasting time now, let the witness decide after
 15 tea if the 15 minutes is enough. If he still feels that he
 16 needs more time, then we'll deal with it that way, ja.

17 CHAIRPERSON: Yes, we will be in the
 18 witness's hands effectively. Now has the video clip aspect
 19 been sorted out?

20 MAJOR-GENERAL MPEMBE: Correct,
 21 Chairperson, I did speak to the technician, even though
 22 it's not the precise one, but that is more or less what
 23 I've been shown.

24 CHAIRPERSON: [Microphone off, inaudible]
 25 Mr Mathibedi and your cross-examiner, are we in a position

<p style="text-align: right;">Page 16542</p> <p>1 now to see the video, or would you want to deal with it in 2 re-examination or what exactly is the way forward as you 3 see it, as far as this video is concerned? 4 MR MATHIBEDI SC: Mr Chairman, I'm also 5 going to ask that this aspect should stand down, because as 6 the General was trying to read the statement, at the same 7 time we were trying to locate the relevant video, but we 8 only, you know, located it recently. So we would like to 9 have that opportunity of looking at it. 10 CHAIRPERSON: That seems fair in the 11 circumstances. All witnesses are important, but this 12 witness is particularly important, I think, and we always 13 try to be fair to the parties and to the witnesses, and so 14 I think we must – 15 MR MPOFU: Chairperson, yes, what I was 16 going to – 17 CHAIRPERSON: I'm not suggesting that 18 you're being unfair, Mr Mpofo. 19 MR MPOFU: No, no, of course. What I was 20 going to suggest to, in respect of the video, was actually, 21 because in my list I had included EEE16 which I suspect 22 contains what the witness – but I don't want to take a 23 chance and then it turns out that I'm wrong, because EEE16 24 was on the list, but it's a bit longish. So I'll go along 25 with what Mr Mathibedi is saying.</p>	<p style="text-align: right;">Page 16544</p> <p>1 that was that it took about, or rather it would have taken 2 about 12 minutes – these are not exact estimates, because 3 as it happened, the other two didn't even roll out, but one 4 of the results is that what could have taken two or three 5 minutes if it was done simultaneously, was now bound to 6 take about 12 minutes, 10 to 12 minutes. Understand me? 7 MAJOR-GENERAL MPEMBE: Yes, I do 8 understand, Chairperson. 9 MR MPOFU: Yes, now the importance of 10 this, and I want your comment, I'm going to argue at the 11 end that this was a crucial deviation in the sense that one 12 could not have expected when you were planning that the 13 strikers were just going to stand there and fold their arms 14 for 12 minutes, whereas if it was done simultaneously, the 15 situation could have been contained. As it happened now, 16 they were running all over the show. There was just a much 17 longer period which was an unnecessary deviation from the 18 plan. There might have been good reasons to do it, but I'm 19 just saying the impact of it was that it then allowed for a 20 much longer time for the strikers to kind of be all over 21 the show, if you get what I'm saying. 22 MAJOR-GENERAL MPEMBE: I'm just listening 23 to the question. Is that I must comment? 24 MR MPOFU: No, no, you're quite right, 25 it's quite a long speech that I made. Let me break it</p>
<p style="text-align: right;">Page 16543</p> <p>1 CHAIRPERSON: I've already reminded you, 2 you're under oath. Mr Mpofo, do you wish to continue with 3 your – I take it you wish to continue with your cross- 4 examination. 5 CROSS-EXAMINATION BY MR MPOFU (CONTD.: 6 Thank you, Chairperson. Right, General, because of this 7 discussion I'm going to move to something new, not what we 8 were busy with previously. I'm now going to deal – 9 remember we were busy dealing with what I claim are 10 deviations from the prescripts, broadly defined. Ja, okay. 11 Okay, now I'm now dealing with the section that deals with 12 deviations from the plan, okay. 13 MAJOR-GENERAL MPEMBE: Yes, Chairperson, 14 I'm still listening. 15 MR MPOFU: Which is chapter 4 of our 16 book. Right, what may be a very important deviation, I 17 just want to check your awareness of it, you can accept 18 that evidence was led with Colonel Scott about this, but 19 one of what I will argue at the end was a key deviation was 20 the fact that the barbed wire which had been planned to be 21 rolled out simultaneously, was rolled out sequentially. 22 You understand that question? 23 MAJOR-GENERAL MPEMBE: I understand, 24 Chairperson. 25 MR MPOFU: Yes, and one of the results of</p>	<p style="text-align: right;">Page 16545</p> <p>1 down. The reason why you wanted to do simultaneous rollout 2 was for the rapidity, so that the rollout happens within a 3 short space of time, correct? 4 MAJOR-GENERAL MPEMBE: I'm still 5 listening, Chairperson. 6 MR MPOFU: Now it's a question now. I'm 7 saying was the reason that according to the plan, which you 8 accepted or endorsed, the rollout was meant to be 9 simultaneous, was the reason that it would have then taken 10 a shorter time? 11 MAJOR-GENERAL MPEMBE: Chairperson, the 12 how part of it, it was left to the operational people 13 because you couldn't well plan and determine what will 14 happen, because that is depending completely on the 15 mechanism of the barbed wire itself, and according to the 16 plan that I know, that was probably so left to the 17 operational people, and I think Brigadier Calitz and 18 Brigadier Makhubela, they will be able to explain if there 19 was any deviation they will be able to say why that could, 20 deviation was there. 21 MR MPOFU: Yes, okay. I accept both of 22 those statements, and this is my final attempt. I accept 23 that if there's a reason it will be given by the 24 operational people. All I'm asking you is – and we also 25 know that according to the plan, it was supposed to be done</p>

Page 16546

1 simultaneously. All I'm asking you is was one of the
2 reasons why it had to be done simultaneously as opposed to
3 sequentially because it would have taken a shorter period
4 of time to complete the rollout, or not, if you know?

5 MAJOR-GENERAL MPEMBE: Chairperson, I
6 just want to be appraised particularly in the plan where it
7 speaks about simultaneous and the rollout.

8 MR MPOFU: Okay –

9 CHAIRPERSON: The trouble is, you see,
10 there wasn't a written, much of a written plan for reasons
11 that were explored in depth with Colonel Scott, and it was
12 a concept, as he explained to us, and at about 2 o'clock at
13 the JOC meeting he says he was then asked to explain how he
14 saw the matter going forward, and he then later went down,
15 went to the forward holding area, first forward holding
16 area I think it was, and spoke to the commanders and all he
17 could do was show them on his laptop, because there weren't
18 even any hardcopy documents to show, so I don't know that
19 Mr Mpofo can show you in the plan, because there's nothing
20 to show. What happened subsequently was that in order to
21 assist the Commission, as he explains, Colonel Scott then
22 subsequently produced the documents that would have been
23 present, that would have been available if there had been
24 time on the 16th, and these had been made available to us.
25 But he fairly conceded that these weren't contemporaneous

Page 16547

1 documents, they were documents that were compiled later.
2 So Mr Mpofo, have I answered the question that was put to
3 you correctly?

4 MR MPOFU: Yes, Chairperson, but I'll
5 just move on just for the sake of time economy, but maybe
6 before I do that, I'll give what – with your permission,
7 Chairperson, I'll do just one final attempt. General, the
8 premise of my question is the fact that Colonel Scott
9 himself – so this is common cause – Colonel Scott has
10 testified that it was intended that there would be a
11 simultaneous rollout and that it did not happen that way,
12 and as I said to you, there might be good reasons and we'll
13 deal with those with Brigadier Calitz and so on. So you
14 can accept that that's Colonel Scott's evidence, that it
15 was intended to be simultaneous, but as it turned out, it
16 become sequential. So all I was asking you, if you accept
17 that and if you know, is was the reason that it was meant
18 to be done simultaneously to ensure that you minimise the
19 reaction time, if there's such a thing, of the crowd as
20 opposed to rolling it sequentially for 12 minutes and they
21 are supposed to be watching all this, if you understand.
22 If you don't, I'll move on, I promise.

23 MAJOR-GENERAL MPEMBE: Thanks,
24 Chairperson. Why I wanted the quotation to the plan,
25 because I approved the plan, and secondly, I might not be

Page 16548

1 sitting here then I think that that is what in the plan
2 which I approved, whereas Colonel Scott while he was
3 testifying, he was testifying about his thinking, but not
4 necessarily what was contained in the plan.

5 MR MPOFU: Okay, fair enough. Alright –

6 CHAIRPERSON: The point is he didn't say
7 that you approved the plan. The way he gave the evidence
8 was this; that there was a concept that had been worked out
9 basically between him and General Annandale, but there
10 wasn't much detail attached to it, and that at the end of
11 the first section of the JOC meeting at half past 1 he was
12 then asked, then there was questions how this concept
13 should be implemented and no-one else volunteered and he
14 then stood up and expounded it orally as he saw it should
15 be done, and he said this was then approved and he was then
16 dispatched to the forward holding area 1 to explain it to
17 the commanders, and he didn't have any hardcopies; there
18 wasn't time to prepare hardcopies, so all he did was he
19 took his laptop with him and he sat in the Vito with the
20 door open, and 20 commanders stood next to him and then he
21 showed them on the screen of his laptop – that was his
22 evidence, you see. So on his version there wasn't any
23 detailed plan to be approved by you or anybody else before
24 the JOC began, JOCCOM meeting began. I think that's an
25 accurate summary of what he said.

Page 16549

1 MR MPOFU: It is, Chairperson. But don't
2 worry about it, General. Maybe let me move to my next
3 point. Unfortunately they are linked, but I'll also
4 abandon it if I'm confusing you. Let me maybe put it this
5 way; what I'm going to argue is that a deviation that was
6 consequent upon the sequential rollout of the barbed wire,
7 which took longer, which also had a major impact on the
8 fate of the operation, was the fact that what was – well,
9 firstly you can confirm what was, if things had been equal
10 and everything had gone well, it's correct, isn't it, that
11 after the rollout of the barbed wire then there would have
12 been the first warning according to the regulations. You
13 remember there are two warnings that you have to be given.
14 So the first warning in their language, saying what it is
15 that is demanded of them, or whatever, would have then
16 followed. Do you understand? Or rather, do you agree?

17 MAJOR-GENERAL MPEMBE: Correct,
18 Chairperson.

19 MR MPOFU: Yes, and so where I'm going
20 with this is to say what robbed us – and I mean all of us,
21 the police and the protesters and everyone – what robbed us
22 of that opportunity for the communication, which is
23 crucial, of saying put down your weapons, if you want to go
24 this way, don't go this way, warra-warra, is the fact that
25 the more prolonged rollout of the barbed wire then made

Page 16550

1 that to disappear, whereas had the rollout been rapid, as
 2 planned, we might have had a situation where the
 3 communication would have happened. Do you see where I'm
 4 going?
 5 MAJOR-GENERAL MPEMBE: I see,
 6 Chairperson.
 7 MR MPOFU: Yes, and do you agree?
 8 MAJOR-GENERAL MPEMBE: I don't agree,
 9 Chairperson.
 10 MR MPOFU: Okay.
 11 MAJOR-GENERAL MPEMBE: And shortly is to
 12 say one might not be in a proper way to comment on the
 13 implementation of the barbed wire when I was not there, but
 14 according to the Standing Order you need to put first the
 15 defensive mechanism.
 16 MR MPOFU: Okay, I'll argue that later.
 17 Thank you, General. Just on this question of warnings, you
 18 would agree that at the time just before the fatal
 19 shooting, I'm talking about the live ammunition, it would
 20 have been a good idea – I won't put it higher than that –
 21 to communicate to the strikers to say put down your
 22 weapons, or something of that nature, before the actual
 23 fatal shooting happened. Would that have been a good idea?
 24 MAJOR-GENERAL MPEMBE: Chairperson, as
 25 I've said sequentially in terms of the Standing Order you

Page 16551

1 first put a defensive mechanism, and I am now told that
 2 while the defensive mechanism was placed and something
 3 happens, which actually after the defensive mechanism then
 4 the warning could have followed.
 5 [14:39] MR MPOFU: Yes. No, I get you exactly
 6 what you're saying, but all I'm saying is that let's assume
 7 that things now have gone as they have gone; if there was a
 8 two minute break, which there was, between what you, the
 9 police, call incident 2 and incident 3 which was the fatal
 10 one, would it have been a good idea to use that time to say
 11 to the strikers, assuming the means were there and the
 12 opportunity was there, to say to them, put down your
 13 weapons or don't use the road or whatever, just so that to
 14 avoid bloodshed?
 15 MAJOR-GENERAL MPEMBE: Chairperson, I'm
 16 not in a position to comment on this one, hence I was not
 17 there. Otherwise it would be a question of speculation but
 18 I think Brigadier, I think probably Brigadier Makhubela and
 19 those that were there, they might be in a position to
 20 explain.
 21 MR MPOFU: Okay, I'll approach it
 22 differently. Is the reason why communication is
 23 highlighted as such an important thing in the prescripts,
 24 is it because it's important for both sides to know what is
 25 expected by the other side? Yes, no?

Page 16552

1 MAJOR-GENERAL MPEMBE: Yes, Chairperson.
 2 MR MPOFU: Thank you. Now if that is
 3 such an important consideration, because we all know if
 4 people, if this one is assuming this and that, that's just
 5 a recipe for chaos. It's better to say do this or don't do
 6 this or I'm giving you five minutes or I'm giving you two
 7 minutes because then at least you know we are talking about
 8 the same thing. That's a desirable thing. That's one of
 9 the benefits of communication, isn't it, because you say I
 10 give you five minutes then you know, rather than I assume
 11 that I've given you five minutes and you assume I've given
 12 you three minutes because that's a recipe for disaster,
 13 correct?
 14 MAJOR-GENERAL MPEMBE: Correct,
 15 Chairperson, but in this case that chance couldn't be
 16 there, as I am told.
 17 MR MPOFU: Yes, okay. Would your answer
 18 to that change if I say that what we have observed from the
 19 videos and when we get to your video I'll also cover this
 20 point, is certainly that there was certainly enough means,
 21 meaning the loudhailer, and opportunity to give a warning –
 22 I'm using the term loosely now – to the media to say just
 23 before the fatal shooting, "Media go away, media go away."
 24 What I'm saying is that could those means and that
 25 opportunity have been used to say put down your weapons,

Page 16553

1 put down your weapons, instead of "Media go away?"
 2 MAJOR-GENERAL MPEMBE: I don't understand
 3 the one of the media going away.
 4 MR MPOFU: No, okay, I'm sorry –
 5 MAJOR-GENERAL MPEMBE: And who made it.
 6 MR MPOFU: No, once again just accept it
 7 from me that when we play the video, it's common cause that
 8 shortly before the fatal shooting there's a voice, I'm not
 9 sure if it's Brigadier Calitz, it might be somebody else.
 10 I think there was speculation about that but it doesn't
 11 matter for the purposes of this question. There's a voice
 12 that, it is common cause, says at least twice, "Media go
 13 away, media go away" and then the strikers emerge and then
 14 there's the shooting. Just accept that for now, just trust
 15 me.
 16 CHAIRPERSON: Mr Mathibedi?
 17 MR MATHIBEDI SC: Mr Chairman, where was
 18 the police officer when he requested the media to move
 19 away, because we cannot use that to determine whether there
 20 was or there wasn't sufficient time, you know, for the
 21 protesters to be warned.
 22 MR MPOFU: Well, Chairperson, with
 23 respect, I hear where Mr Mathibedi is coming from. I don't
 24 think it's relevant where the person who was saying that
 25 is. All we can accept is that that person was certainly in

Page 16554

1 a good position to be able to see that the media was in the
2 wrong place, so to speak, and that they must be told not to
3 be in that place. I can't, when we get to Brigadier Calitz
4 maybe we'll get to those details. All now I'm talking
5 about is simply just the opportunity to use the loudhailer
6 and to warn a particular constituency, if you like.

7 CHAIRPERSON: What I understand your question to
8 be, I'm not sure if the witness can answer it but anyway
9 that's another matter, that why was a warning not given to
10 the strikers to put down their arms, desist than what they
11 were doing rather than a warning to the media to go away.
12 Is that your question?

13 MR MPOFU: Yes.

14 CHAIRPERSON: I don't know –

15 MR MPOFU: Not the full question but it –

16 CHAIRPERSON: I'm not sure we need to know the
17 position of the policeman who gave the one order rather
18 than the other for the question to be answered, so – let's
19 see, I'm not sure that the General can answer the question
20 anyway. Let's just see.

21 COMMISSIONER HEMRAJ: But I think Mr
22 Mathibedi's point might have some merit because there's a
23 lot of noise on that video at that particular time, Mr
24 Mpofo, the video that you're referring to when the voice is
25 heard saying "Media go away."

Page 16555

1 MR MPOFU: No, that's true, Commissioner,
2 but if the person was confident, despite the noise, to warn
3 the media then he should have been confident, despite the
4 noise, to warn the strikers.

5 CHAIRPERSON: I would suspect the witness can't
6 answer. Can you answer that question, General?

7 MAJOR-GENERAL MPEMBE: Chairperson, as I
8 say, I was not there. I'm not in a proper position to
9 answer that but what I do know, even according to the plan,
10 is that we had Captain Adriano, that he was always supposed
11 to be with the media. Whether it's him who warned that,
12 I'm not sure and –

13 CHAIRPERSON: I see. If it is, he is the person
14 to whom Mr Mpofo can address the question he has now
15 addressed to you, namely, why didn't he rather say to the
16 strikers, lay down your arms, stop doing what you're doing
17 rather than say to the media, get away. Is that
18 effectively what you're saying?

19 MAJOR-GENERAL MPEMBE: What I'm saying is
20 normally when the operation is in motion like that, it's
21 either the operational commander or one of the operational
22 section commanders that can warn the protesters, rather
23 than somebody else. So I don't know, I was just saying
24 maybe it might have been Captain Adriano who warned the
25 media, who is actually responsible for the media safety.

Page 16556

1 CHAIRPERSON: It sounds like a question that may
2 usefully be put to Brigadier Calitz, so obviously this
3 witness can't help us. So you had better move on to the
4 next point, Mr Mpofo.

5 MR MPOFU: Thank you, thank you,
6 Chairperson. One of the contentious issues in this case,
7 for me at least, is the question when it comes to scene 1,
8 is whether or not as the strikers claim – I am now talking
9 about the point at which they were shot – whether or not,
10 as they claim, once they had reached the road they were
11 going to turn left and go to Nkaneng or, as the police
12 feared, when they got to the road they would cross it and
13 kill them or whatever they feared. And that is quite
14 frankly the only question that might need to be answered.
15 Now I'm going to ask you questions around that issue, you
16 understand?

17 MAJOR-GENERAL MPEMBE: I understand,
18 Chairperson.

19 MR MPOFU: Yes. Now another deviation in
20 my book, it might or might not be a valid one, is around
21 the fact that the TRT according to the plan was always
22 supposed to be 100 metres away from, at least 100 metres
23 away from the POP line that they were supposed to protect,
24 agreed?

25 MAJOR-GENERAL MPEMBE: Agreed,

Page 16557

1 Chairperson.

2 MR MPOFU: Yes. Now, and according to
3 Colonel Scott, one of the reasons for that 100 metre
4 distance was to enable the TRT to have response time,
5 that's why they're called the tactical response team, to
6 have response time within which, in that 100 metres if
7 anyone was attacking them they would give them warnings and
8 decide what to do and so on and that's why that 100 metre
9 distance. And in any event the weaponry that they carry
10 has more than 100 metre range so it wouldn't really affect
11 their effectiveness. Do you agree broadly with that?

12 MAJOR-GENERAL MPEMBE: Chairperson, I
13 understand the understanding of Colonel Scott according to
14 the crowd management policy. TRT and the STF and even
15 according to the plan, they were at 100 metres because they
16 are not part of the dispersal group.

17 MR MPOFU: Correct.

18 MAJOR-GENERAL MPEMBE: And then they will
19 only come to the fore when the lives of the POP were in
20 danger.

21 MR MPOFU: No – no. I hear that. What
22 I'm suggesting to you is that the 100 metre distance was
23 sufficient for them to respond to a life-threatening
24 situation which might face the POP. That's one of the
25 functions of the 100 metre distance, agreed?

Page 16558

1 MAJOR-GENERAL MPEMBE: No, Chairperson.
 2 MR MPOFU: I'm sorry, can you go to L72,
 3 last bullet. It says there – sorry General, are you there?
 4 MAJOR-GENERAL MPEMBE: Correct,
 5 Chairperson. Yes, L means there –
 6 MR MPOFU: Exhibit L72 yes –
 7 MAJOR-GENERAL MPEMBE: Slide 72.
 8 MR MPOFU: Slide 72.
 9 MAJOR-GENERAL MPEMBE: That's correct,
 10 Chairperson.
 11 MR MPOFU: Ja, okay. I'll read it out to
 12 you. If you agree with that sentiment or you want to
 13 qualify it you'll let me know. It says there, "The members
 14 of POP in the armoured vehicles would have a response group
 15 of members of the TRT approximately 100 metres to their
 16 rear to respond and assist their colleagues should the
 17 protesters threaten the members of POPS line to the point
 18 where they could not escape or were forced to exit their
 19 armoured vehicles." Is that a correct statement of what
 20 the plan was intended to be like?
 21 MAJOR-GENERAL MPEMBE: Correct,
 22 Chairperson.
 23 MR MPOFU: And if you go to L138, the
 24 bottom slide and the last small block says that, it's about
 25 the TRT neutral area response team. The response team, as

Page 16559

1 we know, is the TRT – "to remain 100 metres behind the POP
 2 monitoring and negotiation group." And after that jump one
 3 slide, I mean one bullet, "and respond to attacks on POP
 4 line on command from the operational commander when the
 5 safety of POP members or others has been compromised to the
 6 extent that where lives may be lost in the absence of a
 7 tactical response." Do you see that?
 8 MAJOR-GENERAL MPEMBE: I see,
 9 Chairperson.
 10 MR MPOFU: Yes. So is it correct that
 11 then all these actions of saving lives and so on, according
 12 to the two slides I've shown you, could and should have
 13 been done from a 100 metre distance? Or rather with the
 14 TRT remaining within 100 metres.
 15 MAJOR-GENERAL MPEMBE: Not remaining,
 16 Chairperson, but only coming to the fore when the life of
 17 POP members is threatened.
 18 MR MPOFU: Okay, so what does the word
 19 "remain" in that first bullet want to tell us? "Remain 100
 20 metres behind the POP monitoring," what do you read into
 21 that?
 22 MAJOR-GENERAL MPEMBE: Chairperson, it
 23 has to be understood that while the other, the place of the
 24 barbed wire, warning of the people, they should not be part
 25 of the dispersal group. Hence there is that monitoring and

Page 16560

1 negotiation because the teams were divided according to
 2 their roles.
 3 MR MPOFU: Okay. Do you accept, whether
 4 or not you agree with Colonel Scott, let's put it on the
 5 side now but do you agree that one of the benefits of such
 6 a 100 metre distance would be, could be a life saving one
 7 in the sense that there would be time between any perceived
 8 attack and the point of danger, if you get what I mean? I
 9 can unpack it if you want. In other words, there would be
 10 time if you – just logically, if you're going to have to
 11 travel 100 metres before you are threatening to me, it's
 12 better than if you only have to travel 15 metres before you
 13 are a threat to me. Would you agree with that?
 14 MAJOR-GENERAL MPEMBE: I agree,
 15 Chairperson, but that was not the only reason and as I
 16 said, they were not part of the dispersal group because
 17 it's not a POP crowd management policy that you use live
 18 ammunition in the dispersal, so we wanted it must be very
 19 clear.
 20 MR MPOFU: Okay, I don't think you've
 21 answered my question but I'll move on, on this vein. No,
 22 we'll do that once when you've seen the video but maybe let
 23 me ask you from your memory now and if your memory is not
 24 good we'll wait for the video, do you remember that the TRT
 25 members actually ran, ran towards the point at which they

Page 16561

1 did the basic line, if you know what I mean.
 2 MAJOR-GENERAL MPEMBE: I remember that,
 3 Chairperson.
 4 MR MPOFU: Yes, okay. And you would
 5 agree also that that action of run – sorry, sorry General.
 6 MAJOR-GENERAL MPEMBE: Chairperson, just
 7 also to place this on record that the exhibit L page 138,
 8 it was made for the Commission, it was not part of the
 9 plan.
 10 CHAIRPERSON: Well, you know that's half right
 11 because the evidence of Colonel Scott is he made it for the
 12 Commission to tell the Commission what the plan was. I
 13 understand your point, the document didn't exist at the
 14 time the plan was approved and so on and even an attempt
 15 was made to carry it out, but Colonel Scott says that was
 16 the plan. The purpose of preparing this document for the
 17 Commission was to tell the Commission what the plan was.
 18 So that's why I say your answer is only half right but
 19 perhaps I'm usurping Mr Mpofu's prerogative. I'm sorry, Mr
 20 Mpofu.
 21 MR MPOFU: No, Chairperson, thank you
 22 very much. In any event I'm going to move on. I accept
 23 that, General. We accept that both the plan that was
 24 presented to you at half past one and the one that existed
 25 before that, is not exactly what was implemented but I

<p style="text-align: right;">Page 16562</p> <p>1 think Colonel Scott was just telling us what was being 2 planned. In any event, the purpose of this question is 3 that – I think you've answered the question, that the 100 4 metre distance was meant to create this response time but 5 you said that was not the only reason, correct? So that's 6 fine.</p> <p>7 CHAIRPERSON: I was proposing to take the tea 8 adjournment at about 3 o'clock, Mr Mpofu, so when it's 9 convenient for you please let me know.</p> <p>10 MR MPOFU: Thank you very much, 11 Chairperson. No okay, I'll also leave this for when the 12 video is here. To your knowledge, let me put it this way, 13 to your knowledge was it foreseeable from the point of view 14 of the TRT members who were involved, the shooters – that's 15 what we call them just for short.</p> <p>16 [14:58] Was it foreseeable that the strikers were going 17 to go for that gap towards the road in order either to go 18 to Nkaneng or to attack them, whatever. But was it 19 foreseeable that they would go for that gap?</p> <p>20 MAJOR-GENERAL MPEMBE: No, Chairperson, 21 but I need also to explain that I'm not in a better 22 position to explain whether it was foreseeable for them.</p> <p>23 MR MPOFU: No, fair enough,, but was it 24 foreseeable for SAPS, for you, to SAPS as such, you as the 25 big planners and so on that the – maybe let me put it</p>	<p style="text-align: right;">Page 16564</p> <p>1 takes place they might go there. But it was not 2 foreseeable, Chairperson, this is what I want to emphasise 3 while the barbed wire was placed they will advance even 4 when the barbed wire was placed. That to me is critical.</p> <p>5 MR MPOFU: No, I accept that, but then - 6 okay it might be unfair to ask you. By the way have you, 7 as the overall commander, spoken to any of the shooters 8 since the 16th?</p> <p>9 MAJOR-GENERAL MPEMBE: I testified that I 10 only spoke to the commanders and I also said what 11 commanders told me.</p> <p>12 MR MPOFU: Okay, so that would mean then 13 it might be not fair to ask you that if it was not 14 foreseeable that the strikers would go to that gap then why 15 were the TRT people running towards that gap and forming a 16 basic line even before the strikers emerged?</p> <p>17 MAJOR-GENERAL MPEMBE: Chairperson, 18 according to the plan I said TRT was only there, that they 19 will come to the fore when the lives of the POP was in 20 danger. And my answer is when they ran to the fore it was 21 when the life of POP was in danger.</p> <p>22 MR MPOFU: Okay, so if they went to form 23 a basic line in front of that gap before the strikers had 24 even rounded the kraal it would mean that they did so 25 prematurely, agreed? Or one, or that it was foreseeable</p>
<p style="text-align: right;">Page 16563</p> <p>1 clearer, that there would be an advance towards the 2 informal settlement on the part of the strikers? Was that 3 foreseeable?</p> <p>4 MAJOR-GENERAL MPEMBE: That they will 5 advance to the barbed wire or to the informal settlement?</p> <p>6 MR MPOFU: No, that they would advance 7 towards the informal settlement.</p> <p>8 MAJOR-GENERAL MPEMBE: Chairperson, there 9 is one part of the informal settlement that we called it a 10 negative attraction, that one I could say it was, that's 11 why we had to have a plan, a contingency plan for that. 12 But that they will advance when the barbed wire was placed 13 it was not foreseeable.</p> <p>14 MR MPOFU: No, General, yes, okay I think 15 I understand what you're saying. Remember I'm asking you 16 now in relation to, we all now because they were shot dead 17 and injured, have to second guess what they would have done 18 once they got to gap and the road. But what I'm saying is 19 was it foreseeable that they would advance towards the 20 informal settlement and when you answer that question bear 21 in mind that there was a particular Nyala that was 22 positioned to prevent exactly that.</p> <p>23 MAJOR-GENERAL MPEMBE: Chairperson, I 24 think I answered the question to say informal settlement 25 was part of a negative attraction that when the dispersal</p>	<p style="text-align: right;">Page 16565</p> <p>1 that the strikers are going to come there?</p> <p>2 MAJOR-GENERAL MPEMBE: Chairperson, they 3 couldn't have been there because they are not part of the 4 dispersal group.</p> <p>5 MR MPOFU: Okay, thank you.</p> <p>6 COMMISSIONER HEMRAJ: That's assuming 7 that the TRT went there without the POPs members in front 8 of them.</p> <p>9 MR MPOFU: I'm sorry, Commissioner?</p> <p>10 COMMISSIONER HEMRAJ: Your question is 11 based on the premise that TRT members went to that area 12 without the POPs members being in front of them.</p> <p>13 MR MPOFU: No. Remember this is linked 14 to the 100 metre gap.</p> <p>15 COMMISSIONER HEMRAJ: Yes.</p> <p>16 MR MPOFU: I'm saying if they ran towards 17 the danger so to speak and thereby closed the gap to about 18 15 metres, I think that's what Mr Chaskalson and I were – 19 it has not been measured properly and closed the gap, the 20 100 metre gap and made it shorter. But the crucial part of 21 this question is if they did that before the strikers even 22 approached that gap it would mean that they knew that they 23 can only be going there. Because why would you just stand 24 at some place with a cocked gun if nobody is ever going to 25 come to that place? That's really the gist of the</p>

<p style="text-align: right;">Page 16566</p> <p>1 question. In any event why they ran there is not something 2 you would answer. I really just wanted to establish you 3 see that the 100 metre gap was one of the mechanisms by 4 which lives could be saved, that's all. Okay and maybe 5 just to complete this particular aspect which I won't 6 belabour because I raised it with Colonel Scott as well, 7 slide L139. The first slide, the bullet just before the 8 last one says "the northern" are you there, General? 9 MAJOR-GENERAL MPEMBE: Correct, 10 Chairperson, I'm there. 11 MR MPOFU: So the northern Nyala is to 12 angle slightly towards the west to assist in protecting a 13 possible advance towards the informal settlement. Was 14 that, according to you, part of the considerations forming 15 part of the plan? 16 MAJOR-GENERAL MPEMBE: I'm sorry, 17 Chairperson, I might have been looking at the wrong slide. 18 Is it slide 39? 19 MR MPOFU: 139, sorry, General. 20 MAJOR-GENERAL MPUFO: Oh, thanks, thanks. 21 Ja, I see what is being written there, Chairperson. 22 MR MPOFU: Does it help you to answer a 23 question as to the foresee ability or otherwise of an 24 advance to the informal settlement? 25 MAJOR-GENERAL MPEMBE: Chairperson, I</p>	<p style="text-align: right;">Page 16568</p> <p>1 MR MPOFU: Yes. 2 MAJOR-GENERAL MPEMBE: Chairperson, my 3 humble request is that I be given enough time. 4 CHAIRPERSON: That seems a fair request 5 in the circumstances. 6 MR MPOFU: Thank you. 7 CHAIRPERSON: We don't want to deal 8 unfairly with you, and I hope to think we've dealt fairly 9 with you so far, but if so, we'll try to persist to the end 10 of your evidence in that manner. 11 MR MPOFU: Yes. 12 MAJOR-GENERAL MPEMBE: Thank you, 13 Chairperson. 14 MR MPOFU: And General, just to complete 15 that discussion, there is video evidence which is on the 16 list, it's EEE16, so while you are dealing with the 17 statements, can you just check that video as well? If it 18 contains the part that we are looking for about the attack 19 and so on, then we might as well use that because I was 20 going to use it for another purpose, but if it's not there, 21 then you can introduce your own video whenever it is. 22 Okay, thank you. 23 MAJOR-GENERAL MPEMBE: Thanks, 24 Chairperson. I'll do so. 25 CROSS-EXAMINATION BY MR MPOFU (CONTD.):</p>
<p style="text-align: right;">Page 16567</p> <p>1 said informal settlement it was considered as negative 2 attraction. 3 MR MPOFU: Okay. Yes, Chairperson, this 4 will be an appropriate time. 5 CHAIRPERSON: All right, we'll now take 6 the tea adjournment. 7 [COMMISSION ADJOURNS COMMISSION RESUMES] 8 [15:27] CHAIRPERSON: The Commission resumes. 9 Major-General, you're still under oath. 10 WILLIAM MPEMBE: Yes, Chairperson. 11 CHAIRPERSON: You were asked whether, it 12 was suggested to you, you might like to read the two 13 statements and tell us if you were ready to be questioned 14 on them, but if the answer is you're not, then it can be 15 arranged that you be cross-examined subsequently when 16 you've had a chance to read them. But in any event, Mr 17 Mpofo, have you got other material to cover in cross- 18 examination – 19 MR MPOFU: If the General is not ready, 20 yes, Chairperson. General, you've now read the statements, 21 correct? 22 MAJOR-GENERAL MPEMBE: Yes, I did have 23 the statements of Brigadier Engelbrecht and my – 24 MR MPOFU: And also yours, one of – 25 MAJOR-GENERAL MPEMBE: And my statement.</p>	<p style="text-align: right;">Page 16569</p> <p>1 Right, am I correct, is it my correct understanding on my 2 part that the only, according to the plan at least the only 3 time that the TRT were – no, I'll start with another topic. 4 We'll get to this. It's correct that one of the key 5 assumptions which informed your plan and your planning was 6 that some of the strikers were going to refuse to leave the 7 koppie, correct? 8 MAJOR-GENERAL MPEMBE: Yes, Chairperson. 9 I'm sorry, Chairperson, it was not an assumption; it was an 10 intelligence. 11 MR MPOFU: Yes, based on the intelligence 12 you assumed that some of the strikers would not leave the 13 koppie? 14 MAJOR-GENERAL MPEMBE: Yes, Chairperson. 15 MR MPOFU: And it turned out that that 16 was the wrong intelligence, or in fact if there's such a 17 thing. It shouldn't be called intelligence. The real 18 issue is that as it happened, all the strikers left the 19 koppie, correct? 20 MAJOR-GENERAL MPEMBE: Chairperson, I was 21 not there, but I was informed that others, while the barbed 22 wire was placed, then that's the time that they came. 23 Others they did disperse. 24 MR MPOFU: Sorry, I'm going to refer you 25 to a slide and if you can't make it out, we'll deal with it</p>

<p style="text-align: right;">Page 16570</p> <p>1 with someone else. Slide 200 I think would be sufficient 2 for – 200 or 194 or both. Would you accept, General, if 3 you can - and as I say, I can't press you because both you 4 and I were not there – that at the stage of slide 194 and 5 200 it would seem that there were no longer people 6 gathering at the koppie, at the big koppie, at least. 7 MAJOR-GENERAL MPEMBE: The indications by 8 slide is that others were dispersing, but there are other 9 lines, the yellow line as well as the red line, that's 10 showing other strikers that were, as is allegedly being 11 said, that they were attempting to approach the police 12 line. 13 MR MPOFU: Yes, I accept that, but in any 14 event, nobody seems to be saying we're staying at the 15 koppie, no matter what. They might have been attacking or 16 whatever, or going to the barbed wire, but there was no, 17 nobody stayed at the mountain itself, correct? 18 MAJOR-GENERAL MPEMBE: At that one 19 according to the slides, correct, Chairperson. 20 MR MPOFU: Thank you. And that leads me 21 to the next question, to the question I wanted to ask you 22 just now. Based on that assumption, to your knowledge, if 23 you know, is it correct that the only time that it was 24 envisaged that the TRT would be involved in so-called close 25 quarter confrontations, was if the strikers had indeed</p>	<p style="text-align: right;">Page 16572</p> <p>1 MAJOR-GENERAL MPEMBE: No, Chairperson. 2 MR MPOFU: Was there any other situation 3 that you know of where the people with live ammunition, 4 including STF, NIU, and TRT, would be involved in close- 5 quarter confrontation? I'm assuming that means what it 6 should mean in English. 7 MAJOR-GENERAL MPEMBE: Chairperson, the 8 role of the TRT and the STF, other than the one that I've 9 already said, it was also to clear up even after 10 dispersals. It, to clear up in terms of checking what 11 could have been left behind. Chairperson, may I also state 12 that the bullet 1 and bullet 2, they should be also read 13 together, but this one that the Advocate is saying now, it 14 was the role of that TRT. 15 MR MPOFU: Yes. No, I accept that, and 16 the bullet 1, the reason I didn't read it is because we 17 dealt with it before tea. It's where I was questioning you 18 about how far back the response teams were going to be, 19 remember? 20 MAJOR-GENERAL MPEMBE: I remember, 21 Chairperson. 22 MR MPOFU: Yes. 23 CHAIRPERSON: Slide 80 relates to the 24 operational plan as it existed on Tuesday, the 14th. 25 MR MPOFU: Chairperson, are you –</p>
<p style="text-align: right;">Page 16571</p> <p>1 refused to leave the mountain and they had taken, I think 2 it was called a high position at the mountain, such that 3 they would have to be cleared. Only in that, strictly in 4 that situation was TRT according to the plan expected to be 5 involved in so-called close quarter confrontations. Is 6 that in accordance with your – and I'm not trying to trick 7 you; you can just go to L80, just so that we short-circuit 8 – exhibit L80, the second bullet, Chairperson. You see 9 what it says there? "TRT, NIU, and STF would also be 10 responsible for close-quarter confrontations to approach 11 groups armed with sharp-edged weapons that refuse to 12 disperse, and move to higher ground where the armoured 13 vehicles and water cannons could not access them." You see 14 that part, General? 15 MAJOR-GENERAL MPEMBE: Correct, 16 Chairperson, I do see it. 17 MR MPOFU: Yes, all I'm saying to you is 18 that these people were, all these people mentioned here 19 were armed with live ammunition. I'm saying this situation 20 envisaged here where people refused to disperse and move to 21 the higher ground, which is the top of the mountain, I 22 assume, it's the only situation where people with live 23 ammunition were envisaged to be involved in so-called 24 close-quarter confrontation, as opposed to the 100-metre 25 distance that we discussed, correct?</p>	<p style="text-align: right;">Page 16573</p> <p>1 CHAIRPERSON: It may be that despite the 2 fact that that slide relates to the plan as it was, or as 3 it allegedly was on the 14th, that it may have been carried 4 over later, maybe. Perhaps, can you help us on that? 5 MAJOR-GENERAL MPEMBE: Chairperson, you 6 are correct, because according to the calendar it shows the 7 14th, but this, it could also be the one that was intended 8 on the 16th, because on the 14th, Chairperson, if the 9 Commission can recall, nothing happened on the 14th. 10 MR MPOFU: Yes. 11 CHAIRPERSON: According to Colonel Scott, 12 on the 14th the plan was still the encirclement plan, but, 13 so that what's in exhibit L has to be read subject to that 14 correction that he explained. 15 MR MPOFU: Yes, the Chairperson is right, 16 but obviously this stage you are talking about now where 17 people are standing on higher ground and the STF is being 18 deployed, even if it was being spoken about on the 13th or 19 the 12th, but it was envisaged in stage 3. So let's forget 20 the date. This kind of thing would happen in stage 3, 21 correct? On whichever date it might have eventuated. 22 MAJOR-GENERAL MPEMBE: The dispersion – 23 MR MPOFU: Yes. 24 MAJOR-GENERAL MPEMBE: Correct, 25 Chairperson, that is stage 3.</p>

<p style="text-align: right;">Page 16574</p> <p>1 MR MPOFU: Thank you. I'm just going to 2 ask you about – to round off the last chapter of the 3 prescripts, if you remember, it was that catchall which is 4 the professional ethics, rules of common decency and Ubuntu 5 and all that. Now would you accept that according to the 6 professional standards which might be expected from the 7 police, it would be important that when they communicate 8 with stakeholders in a situation such as the one we are 9 discussing, that they do so honestly and truthfully, and 10 play open cards. Would that be a fair assumption? 11 MAJOR-GENERAL MPEMBE: I don't understand 12 "open cards" because there is a time where the other 13 information is confidentiality, when it comes to – 14 MR MPOFU: Intelligence, no fair enough. 15 MAJOR-GENERAL MPEMBE: Yes. 16 MR MPOFU: Ja, okay. But truthfully and 17 honestly, excluding the situations where there might be 18 intelligence considerations. 19 MAJOR-GENERAL MPEMBE: Correct, 20 Chairperson. 21 MR MPOFU: Thank you. Now did I 22 understand you correctly that – and I think the Chairperson 23 asked you this at the end of your evidence – did I 24 understand you correctly that your evidence was that when 25 you said to the union leaders that – and I'm paraphrasing –</p>	<p style="text-align: right;">Page 16576</p> <p>1 that right? You never foresaw in your wildest dreams that 2 34 people would be killed. 3 MAJOR-GENERAL MPEMBE: Correct, 4 Chairperson, I could not even foresee that. 5 MR MPOFU: And the bloodshed which you 6 really, or not really did not foresee in, or rather which 7 you claimed to have foreseen in, when you were talking to 8 the unionists, what scale of bloodshed? About 20 people 9 dead? 10 MAJOR-GENERAL MPEMBE: Chairperson, I did 11 explain that I was also referring to what was happening 12 since Sunday, but I did not foresee that 16 people will be 13 dead on Thursday. 14 MR MPOFU: If it can be shown – big if – 15 if it can be shown that some of the actions of the members 16 of the police there were influenced by a motive such as 17 revenge for what had happened on the 13th to their 18 colleagues, that would also be a deviation from a 19 professional point of view of what would be expected from 20 them, correct? 21 MAJOR-GENERAL MPEMBE: I'm unable to 22 answer, Chairperson, because I don't know where – 23 CHAIRPERSON: He's not saying it 24 happened. He says if it can be shown – IF it can be shown 25 that some of the actions of some of the police on the 16th</p>
<p style="text-align: right;">Page 16575</p> <p>1 to want to disarm people carrying axes with guns would lead 2 to bloodshed, that you yourself did not believe that you 3 were just using it as a ploy of some sort? 4 MAJOR-GENERAL MPEMBE: I don't understand 5 the "ploy," but what I said, it was the strategy also of 6 also making them to be aware that this was a serious 7 situation that they will have to attend, but, and I made it 8 clear that I did not foresee so many people dead on the 9 16th. That I could not foresee. 10 MR MPOFU: And when you said to Merafe 11 for example that should his version of what should have 12 happened take place, a possible Tatane situation may occur, 13 can you accept that you were then by saying that foreseeing 14 real bloodshed, not a simulated one? 15 MAJOR-GENERAL MPEMBE: Chairperson, when 16 I spoke about Tatane I was speaking about the possible 17 violence. It's totally different from what happened on the 18 16th. 19 CHAIRPERSON: In the Tatane incident, I 20 think I'm correct in saying only Mr Tatane died, but that 21 was bad enough, one person. Am I correct? 22 MAJOR-GENERAL MPEMBE: Correct, 23 Chairperson. 24 CHAIRPERSON: Never in your wildest 25 dreams did you imagine that 34 people would be killed. Is</p>	<p style="text-align: right;">Page 16577</p> <p>1 were actuated by considerations of revenge, that would not 2 be in accordance with the plan; that would be a deviation 3 from the plan. Is that your question, Mr Mpofu? 4 MR MPOFU: Yes, or from the prescripts, 5 yes. Or from what would be expected from them from this 6 catchall professional ethics – 7 CHAIRPERSON: Yes, let me reformulate it. 8 Question he's asking you is this; if, and he stresses the 9 word "if," if it can be shown that some of the actions of 10 some of the police on the 16th were actuated by 11 considerations of revenge for what had happened on the 13th, 12 that would be a deviation from the general standard of 13 professional ethics, professional behaviour, which would be 14 expected from members of the police service at all times. 15 Is that correct? 16 MR MPOFU: Thank you very much, 17 Chairperson. 18 MAJOR-GENERAL MPEMBE: Correct, 19 Chairperson, on speculation. 20 [15:47] MR MPOFU: Yes, I'll accept that. And 21 I'm now going to talk to you about, in the same vein about 22 the removal of weapons from the scene, from among the dead 23 bodies and the injured people, and I'm just going to ask 24 you one question there, which is this; am I understanding 25 what was planned correctly that one of the reasons why the</p>

<p style="text-align: right;">Page 16578</p> <p>1 investigators were to be kept in one of the holding areas – 2 I don't know which one, whether it was 1 or 2 – until after 3 the operation was exactly so that the people who might be 4 involved in the investigation are not the same people who 5 were involved in the operation, so as not to contaminate 6 the scene, and I'm asking you the question bearing in mind 7 your background as one of the things you lectured in your 8 life was the crime scene management? Am I correct? 9 MAJOR-GENERAL MPEMBE: There is a crime 10 scene management, but I just want to get clarity in terms 11 of precisely what should I answer. 12 MR MPOFU: Yes, no sorry, it was a 13 compound question. I'm saying accepting that you have some 14 expertise of whatever nature in crime scene management, and 15 as a person who knows what was being planned, was one of 16 the reasons why the investigating team – the IDs, I don't 17 know if they're still called that – were kept at one of the 18 holding areas with the intention that they would only come 19 after the operation, was one of the reasons for that to 20 maintain the integrity – 21 MR MATHIBEDI SC: Sorry, Mr Chairman – 22 MR MPOFU: Sorry. 23 MR MATHIBEDI SC: I think it should be 24 after the crowd management – 25 MR MPOFU: Oh, ja, I'm happy with that –</p>	<p style="text-align: right;">Page 16580</p> <p>1 MR MPOFU: Yes. No, I'm happy with that. 2 And in terms of the rules of crime scene management and 3 also what I call the professional ethics, it would be a 4 deviation therefrom, wouldn't it, to, once these weapons 5 have been removed, replace them at a later stage? 6 MAJOR-GENERAL MPEMBE: Replacement, 7 Chairperson, I will start with that one; yes, it will be 8 seen not to be correct, but the removal might not 9 necessarily be incorrect in the sense that if it's for the 10 sake of safety it has to be recorded properly and it has to 11 be managed correctly. 12 MR MPOFU: Yes. No, no, I accept that. 13 Let's accept that for now. Let's say there might be safety 14 considerations regarding the removal; all I am saying is 15 that one that has been done it would not be property, would 16 it, for someone to come, let's say an hour later, and try 17 and work out whether this knife was facing this way or that 18 way, and seek to place it back and then take a picture, 19 pretending that that is how the scene was. 20 MAJOR-GENERAL MPEMBE: I've already said 21 no, Chairperson. 22 MR MPOFU: Yes, thank you. And I think 23 we did deal with this one yesterday, or the other day, that 24 not to attend to injured people for a period of about an 25 hour when there were helicopters available, and I'm</p>
<p style="text-align: right;">Page 16579</p> <p>1 MR MATHIBEDI SC: - not operation – 2 MR MPOFU: Okay, let's not call it the 3 operation. Let's call it crowd management. That they 4 would only subsequently come. One of the reasons was to 5 maintain the integrity of the scene so that it would be 6 different people who would be investigating the scene to 7 those who had participated in the crowd management. 8 MAJOR-GENERAL MPEMBE: Correct, 9 Chairperson, but not necessarily that those who 10 participated in the crowd management could not be there 11 because they could be playing a different role rather than 12 the role of the detectives and the LCRC. 13 MR MPOFU: Okay, then let me just ask it 14 bluntly. Do you think it was appropriate that the people 15 who were involved in the shooting exercise were also the 16 same people who were involved in removing the weapons and 17 taking them away from the scene and piling them in a 18 particular place? Is that what you teach in crime scene 19 management? 20 MAJOR-GENERAL MPEMBE: No, Chairperson, 21 that the scene is not supposed to be tampered with. 22 MR MPOFU: Okay. 23 MAJOR-GENERAL MPEMBE: But there will be 24 under certain circumstances, but that should be under very 25 strict supervision, video being taken, and so on.</p>	<p style="text-align: right;">Page 16581</p> <p>1 comparing it to the situation on the 13th when there was one 2 helicopter which was used to evacuate an injured person, 3 that would also not be according to what is expected 4 professionally from the police, and once again I have to 5 qualify that by saying there might have been valid reasons 6 why that is done. I'm just saying at face value to just 7 stand there when people are twitching around and is not 8 something that would be ethically inconsistent with the 9 values of Ubuntu, professional ethics, and just human 10 decency, common human decency. 11 MAJOR-GENERAL MPEMBE: Chairperson, 12 normally, and police wise it's not done that when somebody 13 is injured then the police can transport that person with a 14 police van, because that involves litigation problems later 15 if it should, if the person died and it's found that he was 16 actually not die because of, he died because of being 17 handled improperly. That it's the first thing that the 18 police should consider whenever, and if it's found that at 19 least there is a person who can say they can be 20 transported, and that's why normally the ambulances and the 21 others are put in – are put nearer, but also if, I just 22 want to explain that. Other than that, yes, you can 23 transport the people to comply with Ubuntu, but not taking 24 the risk of putting the organisation into dispute or having 25 litigation problems. I just wanted to explain that.</p>

<p style="text-align: right;">Page 16582</p> <p>1 MR MPOFU: Yes. No, that's fair enough, 2 but all those considerations were, is covered when it came 3 to the paramount issue of saving Lieutenant Baloyi's life 4 on the 13th, correct? 5 MAJOR-GENERAL MPEMBE: Chairperson, as I 6 said, it was done, but those that, who did it, they can say 7 under what circumstances. 8 MR MPOFU: Yes, fair enough. Thank you. 9 Right, now I'm sorry to do this; I'm jumping back to 10 something that I thought I had passed. When Major-General 11 Mpembe, Mbombo, sorry, when Major-General – 12 CHAIRPERSON: The Provincial Commissioner 13 is a lieutenant-general. 14 MR MPOFU: Lieutenant-General, let's call 15 it – 16 CHAIRPERSON: This witness is Mpembe, 17 he's a major-general. 18 MR MPOFU: That's correct, yes. So I got 19 both my ranks and my surnames mixed up. When the 20 Provincial Commissioner – let's just say that – at the 21 meeting of the 16th, the 1:30 meeting, when she reported to 22 that meeting that she had been in a meeting with Mr 23 Mathunjwa for the whole morning, you knew that that was not 24 true, correct? 25 MAJOR-GENERAL MPEMBE: No, Chairperson.</p>	<p style="text-align: right;">Page 16584</p> <p>1 answer the next question, which is you didn't correct the 2 Provincial Commissioner or point out to anybody that she 3 had in fact not had a meeting with Mr Mathunjwa the whole 4 morning. It figures if you didn't see anything wrong then 5 you didn't correct it, correct? 6 MAJOR-GENERAL MPEMBE: Chairperson, it's 7 the testimony in this Commission that those minutes, there 8 was no time that they could be corrected. If the 9 Provincial Commissioner saw that and she had an opportunity 10 to correct it, she might have corrected it, but my 11 understanding at that time when she was speaking, I'm 12 saying she was referring to that, but it's already been an 13 evidence before the Commission. 14 MR MPOFU: Okay, now according to the, 15 one of the key elements of the plan was that stage 3 should 16 be proceeded with as a matter of last resort, correct? 17 MAJOR-GENERAL MPEMBE: It was actually a 18 last resort. 19 MR MPOFU: Yes, and the meaning of that 20 was among other things that all negotiations must have 21 failed or been terminated, correct? 22 MAJOR-GENERAL MPEMBE: Chairperson, I 23 just want to say, as I elucidated it in terms of my HHH3 – 24 MR MPOFU: Chairperson, if you'll just 25 bear with me, I've just lost my – now the negotiations that</p>
<p style="text-align: right;">Page 16583</p> <p>1 MR MPOFU: Well, in the morning you had 2 been with the Provincial Commissioner when she was going to 3 the press conference. You also had witnessed the brief 4 conversation that she had had with Mr Mathunjwa, correct? 5 MAJOR-GENERAL MPEMBE: Chairperson, the 6 testimony when, my testimony is that there was a time where 7 Mr Mathunjwa came and I introduced him to the Provincial 8 Commissioner. By that time, my understanding was that 9 Provincial Commissioner is referring to that time. 10 MR MPOFU: Yes, okay. So that 11 introduction of yours between Mr Mathunjwa and the 12 Provincial Commissioner, did you regard that as a meeting 13 of the whole morning, as it was reported at the 1:30 14 meeting? 15 MAJOR-GENERAL MPEMBE: Not necessarily 16 the whole morning, but as I'm saying, my understanding, 17 Chairperson, was that she was referring to that time. 18 MR MPOFU: General, surely you know what 19 a meeting that lasts the whole morning means, don't you? 20 So if somebody says in your presence something that is to 21 your knowledge false, all I'm saying is that you knew that 22 that statement was at best an exaggeration because you had 23 spent time with the Provincial Commissioner, correct? 24 MAJOR-GENERAL MPEMBE: No, Chairperson. 25 MR MPOFU: Okay, well that would then</p>	<p style="text-align: right;">Page 16585</p> <p>1 were taking place included the intervention of Mr 2 Mathunjwa, correct? 3 MAJOR-GENERAL MPEMBE: Yes, Chairperson. 4 MR MPOFU: And limiting ourselves to that 5 specific intervention, then stage 3 should have been 6 advanced when the success or otherwise of his intervention 7 had been determined, correct? 8 MAJOR-GENERAL MPEMBE: I just want to get 9 – his success or what? 10 MR MPOFU: Ja, no, remember we've agreed 11 that one of the conditions, pre-conditions for stage 3 is 12 that the negotiations must have failed. That's what is 13 meant by it being a last resort – 14 MAJOR-GENERAL MPEMBE: Correct, 15 Chairperson. 16 MR MPOFU: Yes, now I'm saying therefore 17 logically it would mean, if we are limiting ourselves now 18 to Mr Mathunjwa's intervention, stage 3 could only be 19 rolled out once the success or otherwise of that particular 20 intervention was determinable, or determined, correct? 21 MAJOR-GENERAL MPEMBE: Correct, 22 Chairperson. 23 MR MPOFU: Right, so knowing that, which 24 we agree, you and I now, if you had been at the scene – and 25 again forgive me for going into the area of speculation –</p>

<p style="text-align: right;">Page 16586</p> <p>1 if you had been at the scene, would it be fair to say that 2 you would have enquired as to whether Mr Mathunjwa's 3 efforts have borne any fruit or not before getting into the 4 dangerous last resort stage, correct? 5 MAJOR-GENERAL MPEMBE: Correct, 6 Chairperson. 7 MR MPOFU: Yes, but even more so, if Mr 8 Mathunjwa – let's assume you didn't have time to talk to 9 him for some reason or another, but as soon as he was 10 leaving you could see that some of the people who according 11 to the police did not want to be involved in any trouble 12 were actually leaving, if you could see that happening, 13 without even talking to Mr Mathunjwa, would you have 14 allowed that process to take its course for people to leave 15 voluntarily, assuming that they have now been convinced by 16 Mr Mathunjwa? 17 MAJOR-GENERAL MPEMBE: Chairperson, in, 18 without any speculation – 19 MR MPOFU: Yes. 20 MAJOR-GENERAL MPEMBE: - I think 21 Brigadier Calitz is in a better position, because if he 22 could have realised that Mr Mathunjwa was successful, 23 surely he could have, not have continued that stage 3 be 24 implemented. 25 MR MPOFU: Yes.</p>	<p style="text-align: right;">Page 16588</p> <p>1 was that you were arranging for cells for the arrestees? 2 MAJOR-GENERAL MPEMBE: I don't know, 3 Chairperson, whether I'm now allowed to elaborate something 4 that I've already said. 5 MR MPOFU: Yes, once you've answered the 6 question – 7 MAJOR-GENERAL MPEMBE: Because I thought 8 that is already on record where, what I said. 9 CHAIRPERSON: Yes, Mr Mpofu, I understand 10 that you're not going to finish by half past 4. Is that 11 right? 12 MR MPOFU: Yes, Chairperson, definitely 13 not. 14 CHAIRPERSON: And I understand that 15 you're not available tomorrow. 16 MR MPOFU: Yes, Chairperson, thank you. 17 CHAIRPERSON: Ja well, we won't go into 18 that, but you're not available tomorrow, and in any event 19 the witness needs time to study these extra statements and 20 so on that have been provided. 21 MR MPOFU: Yes, and the video, 22 Chairperson. 23 CHAIRPERSON: And the video, to identify 24 the video, and so forth. So in the circumstances it seems 25 best therefore for us to take the adjournment now until</p>
<p style="text-align: right;">Page 16587</p> <p>1 MAJOR-GENERAL MPEMBE: So I'm talking 2 about Brigadier Calitz was physically there, who could have 3 made an assessment, as I normally say an operational 4 commander is there to make an assessment. 5 MR MPOFU: No, that's fair. So you agree 6 with me that if he could see that Mr Mathunjwa had had some 7 success, he should have not rolled out stage 3? Are we 8 agreed on that? 9 MAJOR-GENERAL MPEMBE: Chairperson, I'm 10 saying Brigadier Calitz, he's in a better position to 11 answer because he was there. 12 MR MPOFU: Okay. Is there any reason for 13 you to have avoided going to the scene on the 16th even – 14 well, we've already dealt with the period before the 15 tragedy. My understanding is that you did not immediately 16 go there even after you had learned more or less about what 17 had happened, correct? 18 MAJOR-GENERAL MPEMBE: Correct, 19 Chairperson. I also testified why I didn't go to the 20 scene. 21 MR MPOFU: Ja, you said you were 22 arranging cells, correct? 23 MAJOR-GENERAL MPEMBE: No, Chairperson, 24 not only that. 25 MR MPOFU: Was that one of the reasons</p>	<p style="text-align: right;">Page 16589</p> <p>1 tomorrow. I understand that counsel for the evidence 2 leaders has certain questions they wish to ask the General 3 in any event, so we won't waste all of tomorrow. I don't 4 know how long that questioning will take, but it's 5 difficult to predict these things in any event. 6 [16:07] So what I'm proposing is we adjourn now until 7 tomorrow morning at 9 o'clock and that at that point the 8 evidence leaders will interpose their supplementary 9 questioning of the witness in the light of some of the 10 material that's become available since he was last in the 11 witness box when he was cross-examined on behalf of the 12 evidence leaders, and that you will resume your cross- 13 examination on Monday. Is that your understanding? 14 MR MPOFU: That's my understanding, 15 Chairperson. 16 CHAIRPERSON: And you're content that 17 that should happen – 18 MR MPOFU: I'm more than content. I'm 19 grateful, Chairperson. 20 CHAIRPERSON: Can you give us an 21 indication – I know these things are difficult, but can you 22 give us an indication more or less, subject to things over 23 which you have no control, such as what we colloquially 24 call injury time, can you give us an indication as to how 25 long you're likely to be on Monday?</p>

1 MR MPOFU: At worst until lunch,
2 Chairperson. I'm not saying on which day. No, I'm joking,
3 Chairperson. On Monday.
4 CHAIRPERSON: Yes, you know, I don't like
5 that expression "at the worst," because that creates
6 assumptions which I don't think are satisfactory.
7 MR MPOFU: Yes, round about lunchtime.
8 CHAIRPERSON: You are here to question
9 the witness, to elicit as much, many facts as you can on
10 behalf of your clients to put their case properly before
11 the Commission –
12 MR MPOFU: I appreciate that, thanks.
13 CHAIRPERSON: It's your duty to do that
14 and to suggest that we should go on longer than a certain
15 time which is at the worst, is an unfortunate way of
16 looking at it.
17 MR MPOFU: Yes. No, Chairperson, okay,
18 let's rather put it then as a target rather than as a
19 restriction. I will try to finish by lunchtime,
20 Chairperson, but you're quite right, I might stray a little
21 bit further than that.
22 CHAIRPERSON: Alright, thank you for
23 that. We will adjourn now until tomorrow morning 9
24 o'clock.
25 [COMMISSION ADJOURNED]



<p>A</p> <p>abandon 16549:4</p> <p>ability 16566:23</p> <p>able 16430:13 16445:3 16461:11 16471:11 16478:13 16484:13 16518:3 16521:20 16529:7 16540:17 16545:18,19 16554:1</p> <p>absence 16419:23 16463:5 16464:9 16559:6</p> <p>absolute 16459:8,20 16460:7</p> <p>accede 16427:17</p> <p>acceded 16431:23</p> <p>accept 16415:21 16420:15 16432:24 16444:8,25 16452:15 16463:3,4,7 16484:17 16491:10 16492:19 16494:3 16495:18 16509:23 16517:23 16518:11,21,23,25 16525:19 16534:25 16535:8 16537:24,25 16537:25 16543:17 16545:21,22 16547:14,16 16553:6 16553:14,25 16560:3 16561:22,23 16564:5 16570:2,13 16572:15 16574:5 16575:13 16577:20 16580:12 16580:13</p> <p>accepted 16437:7 16450:22 16518:10 16545:8</p> <p>accepting 16440:6 16532:11 16578:13</p> <p>accepts 16440:21</p> <p>access 16571:13</p> <p>accessible 16519:25 16523:13</p> <p>accord 16432:7</p> <p>accorded 16422:22</p> <p>account 16408:21 16478:1 16485:10 16490:21 16510:15 16511:12,14 16526:8</p> <p>accountability 16405:1</p> <p>accuracy 16488:22</p> <p>accurate 16413:19 16461:10 16548:25</p> <p>accurately 16425:19 16433:7 16437:11</p> <p>accused 16470:9</p> <p>achieve 16441:7</p> <p>achieved 16441:7</p> <p>acquainted 16414:1</p> <p>acquire 16474:13</p> <p>act 16407:5 16437:7 16438:2 16441:16 16445:22 16450:25 16451:1 16459:23</p>	<p>16460:7,8 16461:21 16472:25 16490:23 16495:20</p> <p>acting 16432:7 16499:25</p> <p>action 16407:19 16418:12 16458:18 16470:5 16500:1,3 16501:2 16521:9,18 16532:14 16533:6,15 16533:20 16561:5</p> <p>actions 16469:25 16474:21 16484:21 16484:23 16486:5 16492:2 16494:9 16496:22 16509:13 16519:8 16559:11 16576:15,25 16577:9</p> <p>activities 16451:21 16481:18</p> <p>actual 16414:6 16467:10 16550:22</p> <p>actuated 16577:1,10</p> <p>add 16520:24</p> <p>added 16528:20</p> <p>addition 16528:4</p> <p>address 16431:21 16500:4 16528:11 16555:14</p> <p>addressed 16555:15</p> <p>addressing 16456:24</p> <p>adhere 16402:6 16541:6</p> <p>adjoin 16537:16 16589:6 16590:23</p> <p>ADJOURNED 16590:25</p> <p>adjournment 16462:24 16463:14 16464:3,6 16537:15 16538:12 16539:10 16562:8 16567:6 16588:25</p> <p>ADJOURNS 16463:15 16507:25 16539:13 16567:7</p> <p>administrative 16501:9</p> <p>admirable 16477:24,25</p> <p>admit 16443:19</p> <p>admitted 16414:3</p> <p>admittedly 16447:4</p> <p>adopted 16422:24 16436:8 16471:21</p> <p>Adriao 16555:10,24</p> <p>Adv 16411:9 16468:24</p> <p>advance 16444:23 16446:25 16563:1,5,6 16563:12,19 16564:3 16566:13,24</p> <p>advanced 16585:6</p> <p>advancement 16447:18</p> <p>advantage 16446:22</p> <p>advised 16427:1 16432:14,15</p> <p>Advocate 16403:8 16442:24 16474:3 16523:4 16572:13</p>	<p>affect 16557:10</p> <p>afraid 16417:10 16446:14 16447:13 16447:14 16494:2</p> <p>Africa 16412:25</p> <p>African 16443:24 16458:11 16459:5 16461:20 16478:13</p> <p>afternoon 16540:18</p> <p>agent 16427:5</p> <p>aggression 16459:22</p> <p>ago 16416:9 16432:9 16465:25 16534:19 16538:25</p> <p>agree 16408:9,10 16412:7,11 16414:21 16415:1,2,6,22,25 16416:4 16418:25 16421:6 16435:2 16453:14,22,24 16454:18 16463:24 16464:8 16480:22 16517:4 16519:9 16549:16 16550:7,8 16550:18 16557:11 16558:12 16560:4,5 16560:13,14 16561:5 16585:24 16587:5</p> <p>agreed 16403:23 16408:13,16 16420:3 16442:17,24 16454:15 16460:4 16464:12 16471:8,19 16488:16 16500:8 16556:24,25 16557:25 16564:25 16585:10 16587:8</p> <p>agreeing 16480:1</p> <p>agreement 16403:17 16417:14 16428:20 16429:15 16430:2,17 16430:21 16433:5,8 16433:21 16434:1</p> <p>agrees 16517:2</p> <p>ahead 16411:21,21 16449:19 16525:18 16525:19,25</p> <p>air 16465:22 16466:5 16466:10 16467:1 16521:20 16524:7</p> <p>albeit 16522:20</p> <p>Albie 16500:19 16501:18</p> <p>alia 16471:10</p> <p>allegation 16502:1 16504:2,11 16531:17 16531:18</p> <p>allegations 16500:20 16500:21</p> <p>alleged 16496:11</p> <p>allegedly 16496:9 16499:24 16503:13 16570:10 16573:3</p> <p>allow 16423:12 16434:16 16439:14 16440:16 16452:18</p>	<p>16514:16 16528:17 16531:25 16532:3 16537:4</p> <p>allowed 16439:11,14 16441:2 16452:5 16472:25 16528:22 16544:19 16586:14 16588:3</p> <p>alright 16403:25 16404:18 16414:16 16421:3 16423:16 16436:5 16442:15 16445:19 16466:25 16469:8 16478:10 16479:17 16485:7 16509:4 16513:7,14 16514:1 16515:19 16516:13 16523:21 16548:5 16590:22</p> <p>Alternatively 16419:15</p> <p>altogether 16462:1</p> <p>ambulances 16581:20</p> <p>AMCU 16427:8,13 16432:8,13 16500:22 16504:8,21 16505:22 16505:24 16507:4,10 16515:11</p> <p>AMCU's 16427:4</p> <p>amend 16411:19</p> <p>amended 16411:16</p> <p>ammunition 16407:19 16537:10 16538:2 16550:19 16560:18 16571:19,23 16572:3</p> <p>amount 16435:6 16440:24 16450:6 16453:7,11,12</p> <p>amounted 16455:17</p> <p>amounts 16446:21 16454:22 16460:17 16495:10</p> <p>analyse 16445:9</p> <p>angle 16488:5 16566:12</p> <p>Annandale 16408:1,5 16408:15,23 16409:5 16409:7,15,17 16410:3 16411:3,7 16444:20 16480:5,14 16480:23 16482:18 16482:22 16483:6 16485:4 16517:16,21 16519:4,14 16548:9</p> <p>Annandale's 16410:22 16411:1</p> <p>answer 16402:10 16405:23 16406:9 16407:16,22 16409:13 16410:2,2 16410:16 16411:9,13 16411:19 16418:9 16421:20 16438:19 16439:10,22,22 16440:6,17 16444:9 16445:1 16447:20 16448:17 16451:10</p>	<p>16461:12 16464:8 16471:18 16472:14 16487:18 16502:20 16503:19 16504:3 16510:16 16511:20 16514:17 16516:9 16517:19 16518:9,12 16519:18 16533:7 16538:15 16552:17 16554:8,19 16555:6,6 16555:9 16561:18 16563:20 16564:20 16566:2,22 16567:14 16576:22 16578:11 16584:1 16587:11</p> <p>answered 16547:2 16554:18 16556:14 16560:21 16562:3 16563:24 16588:5</p> <p>answering 16438:18 16511:19 16531:19 16540:8</p> <p>anticipated 16539:18</p> <p>anticipates 16425:14</p> <p>anybody 16464:10,19 16466:11,11 16495:22 16539:8 16548:23 16584:2</p> <p>anyway 16403:25 16405:20 16430:18 16434:7 16438:20 16455:1,5 16462:11 16462:13 16465:7 16474:6 16506:10 16524:4 16529:12 16554:8,20</p> <p>APC 16491:8</p> <p>apologies 16432:24</p> <p>apologise 16516:15 16538:9 16539:15 16541:5</p> <p>apology 16502:23</p> <p>apparently 16496:10</p> <p>appeal 16490:7</p> <p>appears 16426:22 16431:16 16496:1</p> <p>applicable 16445:16</p> <p>application 16461:2 16464:14</p> <p>applied 16526:6 16535:1,2</p> <p>apply 16464:25 16468:4</p> <p>appointed 16470:4 16473:2 16484:22 16486:4 16518:18 16519:12,15</p> <p>appointment 16518:24</p> <p>appraised 16417:2 16546:6</p> <p>appreciate 16537:19,22 16590:12</p> <p>approach 16426:8 16488:4 16517:12 16551:21 16570:11 16571:10</p>
---	---	---	--	--

<p>approached 16565:22 appropriate 16407:11 16408:15,25 16412:2 16420:20 16421:9 16422:24 16426:3,4 16432:5,10 16437:14 16442:6 16493:13 16494:1 16513:4 16521:23 16528:17 16537:13 16539:11 16567:4 16579:14 appropriately 16518:3 appropriateness 16493:9,22 16526:5 approved 16444:1 16547:25 16548:2,7 16548:15,23 16561:14 approximately 16558:15 architect 16413:15 area 16469:17 16480:6 16491:5 16546:15,16 16548:16 16558:25 16565:11 16585:25 areas 16451:14 16578:1,18 aren't 16461:9 argue 16428:2 16441:10 16445:3 16451:1,2 16454:15 16478:22 16480:12 16482:15 16483:25 16508:13 16524:25 16543:19 16544:10 16549:5 16550:16 argument 16410:16 16414:17 16440:25 16442:2 16444:25 16449:16 16450:4,12 16460:6 16478:11 16482:14 16488:24 16493:25 16524:4,4 16526:11 16529:21 arguments 16446:25 arisen 16407:7 arises 16497:6 armed 16425:20,21 16441:3 16474:22 16571:11,19 arming 16441:4 armoured 16558:14,19 16571:12 arms 16423:20 16424:9 16424:20 16425:11 16427:18 16438:23 16439:3 16440:4,7 16544:13 16554:10 16555:16 arrange 16476:14 arranged 16567:15 arrangements 16539:10 arranging 16481:18 16500:3 16587:22 16588:1</p>	<p>arrest 16502:5 16506:24 16507:17 arrested 16481:18 16502:3,11,13 16505:7 16506:22,22 16506:23 16507:6 arrestees 16588:1 arresting 16481:20 16505:23 16507:3 Arrests 16507:17 aside 16456:8 16529:17 asides 16529:18 asked 16402:10 16411:9 16425:15 16428:22 16431:18 16436:16 16439:9 16440:3,16 16443:4 16444:25 16448:1 16452:21 16456:10 16463:23 16476:8,13 16476:14 16487:10 16487:14 16493:8,14 16493:16 16497:16 16505:19 16511:19 16516:12 16517:9 16523:18,23,24 16531:15,19 16537:1 16537:6 16541:13 16546:13 16548:12 16567:11 16574:23 asking 16404:4 16407:2 16411:2,19 16414:2 16418:24 16420:19 16439:18 16440:7,12 16445:6 16467:14 16469:12 16475:12 16491:19 16493:21 16494:5 16500:24 16502:25 16503:15 16505:4,12 16505:16,17,18 16509:6 16517:19 16518:5 16530:23,24 16532:8,12 16537:12 16540:16 16545:24 16546:1 16547:16 16563:15 16577:8 16578:6 asks 16417:7 16528:18 aspect 16415:9 16421:17 16433:5 16505:4 16522:22 16541:18 16542:5 16566:5 aspects 16404:1 16425:17 16505:5 assailant 16460:22 assessment 16587:3,4 assessments 16522:20 assist 16446:16 16448:4 16474:22 16538:12,16,17,19 16539:2 16546:21 16558:16 16566:12 assistance 16438:18 16446:19 16507:4</p>	<p>assisted 16483:9 assisting 16505:24 assume 16411:3 16427:15 16468:14 16486:18 16492:15 16517:19 16551:6 16552:10,11 16571:22 16586:8 assumed 16413:23 16487:13,23,25 16569:12 assumes 16522:12 assuming 16450:13 16514:9 16551:11 16552:4 16565:6 16572:5 16586:15 assumption 16446:20 16450:17,23 16488:4 16518:8,10,11 16519:13,14 16569:9 16570:22 16574:10 assumptions 16569:5 16590:6 assure 16478:8 attached 16548:10 attack 16463:7,9,10,25 16463:25 16464:4,5,9 16464:9 16465:7,8,10 16466:4,11 16467:4 16467:16,18 16468:1 16468:2 16529:24,25 16530:1,11,25 16532:11,13,16,17,23 16532:23 16533:5,7,9 16533:10 16535:3 16536:11 16538:18 16538:20 16539:5 16560:8 16562:18 16568:18 attackers 16532:15 16535:11 attacking 16557:7 16570:15 attacks 16559:3 attempt 16436:10 16518:23 16545:22 16547:7 16561:14 attempting 16570:11 attend 16473:5,6 16515:10,16 16539:17 16575:7 16580:24 attended 16521:23 attending 16525:10 attention 16442:5 16502:16 16524:7,8 16538:13,13 attitude 16418:13 16419:10,17 16422:15 16425:16 16425:24 16427:11 16427:15 16429:17 16430:3,11 16434:18 16436:7 16439:13,17 16471:19 attraction 16563:10,25</p>	<p>16567:2 August 16422:10 16429:3 16431:24 16466:22 16513:17 16516:4 authority 16483:5 16517:3 16518:5 available 16419:13 16483:3 16512:7 16540:2 16546:23,24 16580:25 16588:15 16588:18 16589:10 avoid 16551:14 avoided 16587:13 aware 16406:18,22 16413:14,21,23 16414:6,6 16424:18 16430:2,4,5 16434:22 16443:17,23 16444:2 16444:9 16445:1,8,13 16445:20 16446:1,5 16447:6,17,25 16448:5,14,15,23 16449:6 16450:24 16451:13 16452:4,21 16452:22 16453:12 16455:6 16456:13,17 16470:6 16485:7 16492:7 16575:6 awareness 16543:17 axes 16575:1</p>	<p>16548:9 basis 16434:22 16455:11,21 16487:13 bazooka 16403:11 bear 16402:24 16479:14 16488:19 16489:3 16504:1 16563:20 16584:25 bearing 16424:20 16508:15 16509:9 16578:6 began 16548:24,24 beginning 16539:16 begins 16458:18 behalf 16430:23 16433:4 16589:11 16590:10 behaved 16417:12 behaviour 16434:13 16577:13 belabour 16435:1 16566:6 believe 16501:3 16518:17,19 16575:2 believed 16494:20 16511:10 Bembe 16414:14 benefit 16441:25 16445:10 16520:21 benefits 16552:9 16560:5 beret 16423:7 best 16440:3 16501:6 16583:22 16588:25 better 16471:11 16472:25 16473:15 16497:5 16512:22,25 16513:14 16521:8,17 16521:21 16522:9,13 16522:19 16523:2 16524:16,17 16538:15 16552:5 16556:3 16560:12 16562:21 16586:21 16587:10 beyond 16489:1 big 16405:12 16406:7 16406:19 16448:4 16472:4 16485:19 16486:14 16494:8 16511:6 16534:19 16562:25 16570:6 16576:14 bigger 16472:3 bind 16468:6 bit 16433:6 16439:15 16456:8 16542:24 16590:21 block 16558:24 bloodshed 16551:14 16575:2,14 16576:5,8 Blou 16476:15,15 blue 16523:22 bluntly 16579:14 bodies 16577:23</p>
B				
			<p>back 16404:1 16410:4 16414:17 16417:8 16435:24 16436:10 16436:18 16437:13 16439:1 16442:15 16472:18 16511:23 16530:10,10 16533:15 16572:18 16580:18 16582:9 background 16578:7 backwards 16442:3 bad 16449:6 16575:21 Baloyi's 16582:3 barbed 16543:20 16545:15 16549:6,11 16549:25 16550:13 16559:24 16563:5,12 16564:3,4 16569:21 16570:16 bargaining 16422:22 16427:3,5,7,9 16436:12,19 16437:5 16437:8,23 based 16411:6 16414:4 16419:8 16421:8 16440:25 16460:2 16468:9 16506:15 16565:11 16569:11 16570:22 basic 16561:1 16564:16 16564:23 basically 16439:1 16461:22 16476:10</p>	

<p>body 16413:7 16477:21 bogged 16484:1,5,6 book 16412:13,17,17 16412:22 16413:11 16414:18 16443:2,5,6 16513:15 16543:16 16556:20 borne 16586:3 bottom 16558:24 bound 16439:21 16544:5 bow 16408:13 box 16422:17 16447:3 16466:1 16589:11 branch 16433:19 16434:5 breach 16444:1,7,10 16445:2,11 16450:1,4 16450:6 breached 16443:18 16444:24 16445:1 breaches 16449:15 break 16436:13 16507:22 16511:24 16525:22 16544:25 16551:8 bridge 16540:23 brief 16457:4 16583:3 briefed 16447:12 16494:19,20 16495:1 16509:21 16510:8 briefing 16416:12 Brigadier 16471:3,11 16471:16 16472:6,11 16472:12,25 16474:12 16478:6 16493:14 16520:1 16524:9,15 16526:6 16526:25 16527:9 16545:17,18 16547:13 16551:18 16551:18 16553:9 16554:3 16556:2 16567:23 16586:21 16587:2,10 bring 16404:22 16405:12 16406:7 16409:17 16410:5 16485:3 16502:15 bringing 16408:6 16411:6 broad 16418:17 16456:12 broadcasting 16405:7 broadly 16543:10 16557:11 broken 16449:22 brought 16409:15 16410:4,8 building 16404:6 bullet 16416:12 16428:4,7,15,18,21 16435:3,8,10,10,12 16459:4,15 16558:3 16559:3,19 16566:7 16571:8 16572:12,12</p>	<p>16572:16 bullets 16428:4 16537:9 busy 16434:9,10,14 16543:8,9</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>C 16517:15 calendar 16573:6 Calitz 16470:20 16471:4,11,16 16472:6,11,12,16,25 16474:12 16478:6 16520:1 16524:9,16 16526:6,25 16527:9 16545:17 16547:13 16553:9 16554:3 16556:2 16586:21 16587:2,10 call 16406:23 16413:4 16418:11 16449:14 16455:20 16469:9,10 16474:11 16483:22 16529:24 16530:11 16532:10 16536:9,19 16551:9 16562:15 16579:2,3 16580:3 16582:14 16589:24 called 16409:8,8 16431:3 16463:1 16480:9 16525:23,23 16557:5 16563:9 16569:17 16571:2 16578:17 calling 16489:23 16510:3 calls 16443:17 16449:17 16484:8 cannons 16571:13 canvass 16470:11,12 16491:18 16494:4 canvassed 16480:5 canvassing 16450:11 16468:12 can't 16410:2,2 16431:19 16437:12 16438:14 16442:2 16480:24 16496:25 16528:1 16529:5 16531:6 16554:3 16556:3 16569:25 16570:3 cap 16423:7 capacity 16404:25 16482:3 capitulate 16439:1 16440:9 capitulation 16435:6 16435:18,23 16436:3 16436:6 Captain 16414:14 16555:10,24 captured 16461:19 cards 16574:10,12 careful 16516:16 carefully 16423:14</p>	<p>carried 16508:17 16573:3 carry 16403:12 16404:18 16405:20 16412:6 16423:14 16425:13 16438:20 16440:22 16441:13 16450:23 16452:1 16455:4,21 16474:9 16477:16 16529:15 16557:9 16561:15 carrying 16575:1 case 16425:14 16433:25 16444:17 16467:16 16472:15 16476:21 16497:18 16504:5 16508:14 16522:4 16540:6 16552:15 16556:6 16590:10 cash 16460:21 catchall 16574:3 16577:6 caucus 16515:13,17 cause 16489:16 16532:1 16547:9 16553:7,12 caveat 16488:20,23 cell 16521:4 cells 16587:22 16588:1 Centre 16458:13 CEO 16404:25 16412:11 16419:14 CEOs 16405:6,8 certain 16453:6 16496:22 16579:24 16589:2 16590:14 certainly 16421:8 16430:13 16444:22 16464:22 16465:5 16488:5 16552:20,20 16553:25 cetera 16471:10 Chair 16417:20 16433:2,4,6 16434:17 16434:24 16435:11 16451:10 16454:10 16461:7 16476:19 16482:6 16488:15 16491:12 16513:11 16513:20 chaired 16482:9 chairing 16480:21 16482:10 chairman 16433:18 16434:4 16455:10 16479:2 16512:4 16514:22 16528:9,21 16539:12,23,24 16540:10,11 16542:4 16553:17 16578:21 challenge 16497:25 16498:8 chambers 16539:17 16540:13 chance 16461:8</p>	<p>16499:21 16515:24 16516:12 16542:23 16552:15 16567:16 change 16434:2 16552:18 changed 16411:24 changes 16456:2 16482:10 channels 16423:6 chaos 16552:5 chapter 16443:6,17 16444:14,15 16449:17 16463:1 16469:9 16543:15 16574:2 chapters 16443:8,13 characterisation 16414:23 characterise 16415:14 characterised 16532:24 charge 16490:17 16496:20,21 charging 16534:12,13 16535:11 16536:11 16536:12 Chaskalson 16456:6 16512:8,9,17 16565:18 Chaskalson's 16455:14 check 16457:19 16458:9 16478:18 16543:17 16568:17 checking 16572:10 chief 16448:4 16485:20 16486:15 16494:8 chimneys 16436:14 choice 16459:23 chopper 16483:10,11 16483:12,13,14,15,25 16484:8,9,14 choppers 16483:8 chose 16477:24 circles 16477:18 circuit 16455:6 circuiting 16523:8 circumstance 16434:2 circumstances 16409:4 16425:20 16451:8 16452:4,12,14 16453:6 16454:16,21 16454:24 16460:15 16460:23 16503:19 16537:14 16542:11 16568:5 16579:24 16582:7 16588:24 Civil 16457:2 CJOC 16409:9 16478:24 16484:18 16484:19,22,24 16485:9,15 16486:3 claim 16422:21 16423:5 16495:9 16543:9 16556:8,10 claimed 16576:7 claims 16430:1 clarify 16433:17</p>	<p>clarifying 16514:20 clarity 16419:6 16446:8 16465:12 16578:10 clear 16412:9 16431:9 16457:16 16461:15 16489:4 16494:6 16502:3,6,8 16503:16 16506:23 16507:1,2 16508:19 16514:16 16541:9 16560:19 16572:9,10 16575:8 cleared 16571:3 clearer 16563:1 clearly 16468:12 16495:10 16528:10 16533:13 16540:19 clients 16532:1 16590:10 client's 16423:8 clip 16541:18 close 16570:24 16571:5 16572:4 closed 16565:17,19 close-quarter 16571:10 16571:24 clothed 16518:4 clue 16511:14 cluster 16442:17 16449:16 cocked 16565:24 Coin 16483:10,17,18 16483:22 coincide 16454:17 colleague 16446:13 colleagues 16446:13 16558:16 16576:18 collective 16427:3,5,7,9 16436:12 16437:5,8 16437:22 colloquially 16589:23 colluding 16500:22 16501:13 Colonel 16413:15 16414:3,10 16456:6 16471:19,20 16478:14 16480:22 16543:18 16546:11 16546:21 16547:8,9 16547:14 16548:2 16557:3,13 16560:4 16561:11,15 16562:1 16566:6 16573:11 combination 16415:16 16415:22 come 16427:18 16428:2 16435:24 16436:17 16439:1 16447:2 16483:16 16490:15 16495:8,13 16500:4 16502:1 16557:19 16564:19 16565:1,25 16578:18 16579:4 16580:16 comes 16450:12 16451:10 16495:21</p>
---	--	--	---	---

<p>16505:15 16512:13 16556:7 16574:13 comfort 16507:22 16511:24 comfortable 16474:4 16501:12 coming 16491:24 16553:23 16559:16 command 16469:24 16484:19 16486:10 16559:4 commander 16405:4,5 16412:11 16434:11 16447:4,16,19 16448:4 16471:4 16472:19,20 16473:1 16475:24 16482:4 16485:23 16519:25 16520:1,3 16521:2,2 16521:6,7,8,15,16,17 16522:1,8,10,12,13 16522:18,25 16523:1 16523:10 16555:21 16559:4 16564:7 16587:4 commanders 16546:16 16548:17,20 16555:22 16564:10 16564:11 commenced 16458:19 comment 16478:2 16493:15,21 16494:22 16502:17 16509:7,13 16523:8 16544:10,23 16550:12 16551:16 commentary 16525:2 comments 16528:19 commission 16402:2 16414:12,14 16418:18 16439:10 16447:11 16449:22 16463:15,15,16 16464:18 16466:13 16469:3 16498:13 16502:16,18 16508:1 16510:9 16517:1 16519:22 16520:5 16523:22 16525:4 16536:7 16539:13,13 16539:14 16546:21 16561:8,12,12,17,17 16567:7,7,8 16573:9 16584:7,13 16590:11 16590:25 commissioner 16410:18 16441:25 16444:21 16447:3,12 16456:15 16458:6 16469:17 16478:12 16480:10 16482:25 16485:17 16486:9 16487:2 16489:14,15 16489:15,25 16490:2 16490:14,19 16491:1 16492:8,12,21</p>	<p>16493:16 16494:19 16496:9,18,19 16497:3 16500:16,17 16501:19 16502:7 16503:13 16504:4,5 16506:1 16507:8,15 16509:22 16510:8 16512:15 16518:18 16519:3,4,12 16538:10 16554:21 16555:1 16565:6,9,10 16565:15 16582:12 16582:20 16583:2,8,9 16583:12,23 16584:2 16584:9 Commissioners 16512:12 16514:12 committed 16507:19 committee 16490:7 common 16413:1,5 16443:10 16449:18 16451:2 16461:15 16489:16 16547:9 16553:7,12 16574:4 16581:10 communicate 16449:7 16519:22 16520:5 16522:12,25 16529:9 16550:21 16574:7 communicated 16421:10 16429:24 16448:23 16529:10 communication 16458:12 16549:22 16550:3 16551:22 16552:9 community 16405:13 16405:15,17 comparing 16581:1 compile 16414:13 compiled 16547:1 complete 16459:15 16546:4 16566:5 16568:14 completely 16545:14 completion 16441:23 complicated 16511:17 complied 16449:23 16540:22 16541:2 compliment 16523:25 comply 16497:22 16581:23 components 16414:25 16415:10 compound 16578:13 compromised 16559:5 concede 16439:15,16 conceded 16546:25 concentrate 16469:16 concentrating 16415:19 16416:10 concept 16546:12 16548:8,12 concerned 16445:14 16449:8 16510:2 16527:10,16 16542:3</p>	<p>concluded 16494:11 conditions 16585:11 conduct 16528:25 16533:24 conference 16583:3 confident 16555:2,3 confidentiality 16574:13 confine 16405:17 confined 16406:22 16407:23 confirm 16480:20 16485:5 16529:23,25 16549:9 confirmation 16414:24 conflict 16416:3,15 16459:6 confrontation 16571:24 16572:5 confrontations 16570:25 16571:5,10 confused 16446:17 confusing 16549:4 conjecture 16444:18 connotation 16490:21 conscious 16531:24 consequences 16438:2 16471:22 consequent 16549:6 consider 16425:24 16487:11 16539:11 16581:18 consideration 16491:16 16494:10 16497:6 16498:9 16500:13 16505:20 16507:10 16510:6 16528:13 16552:3 considerations 16446:7 16447:17,25 16448:5 16448:15,18,20,22 16449:5,7 16477:25 16485:9,17,18 16486:11 16491:20 16491:24 16497:6 16498:6 16503:2,4,9 16507:14 16509:8,9 16509:16,25 16510:7 16510:14 16511:9,12 16511:13 16566:14 16574:18 16577:1,11 16580:14 16582:2 considered 16509:20 16510:7 16567:1 consistent 16419:3 16422:23 16486:6 constable 16492:10 constituency 16554:6 constitute 16460:23,24 16517:5 Constitution 16412:24 16438:3 16441:2 16443:7,10,18 16444:2,8,10,23 16445:1,3,5,9,12,20 16446:2 16449:15</p>	<p>constitutional 16446:3 constitutionally 16438:10 16441:1 contain 16525:9 contained 16500:15 16544:15 16548:4 contains 16435:17 16542:22 16568:18 contaminate 16578:5 CONTD 16403:3 16463:22 16508:9 16543:5 16568:25 contemporaneous 16546:25 content 16589:16,18 contention 16444:5,20 16444:22 16449:25 16517:2 contentious 16556:6 contents 16414:1 16443:6 16488:15 context 16413:24 16439:19 16443:21 16451:14 16485:3 16538:8 contingency 16473:20 16563:11 continue 16434:16 16439:14 16528:18 16543:2,3 continued 16586:23 continues 16433:3 continuing 16540:10 contract 16483:19 contrast 16474:8 contravened 16449:23 contravention 16450:1 16450:4,7 contribution 16471:9 control 16441:16 16496:21 16501:9 16589:23 controversy 16488:22 16489:1 convenient 16507:21 16562:9 conversant 16469:19 conversation 16496:1,4 16497:7 16499:24 16583:4 convey 16421:19 16422:3 16525:1 convinced 16586:15 coordinated 16484:23 cop 16492:9 cops 16501:8 copy 16488:11 16497:13 16512:11 16513:21 16514:2 Corporate 16458:12 corporations 16405:7 corrected 16525:17 16584:8,10 correcting 16412:10 correction 16573:14 correctly 16406:25</p>	<p>16407:1 16420:18 16421:5 16434:19 16437:19 16460:13 16464:4 16518:13 16530:15 16547:3 16574:22,24 16577:25 16580:11 correctness 16488:25 Costa 16433:11 costing 16491:23 cough 16498:2 couldn't 16427:8 16483:4 16497:4 16522:5 16527:4,17 16545:13 16552:15 counsel 16589:1 counsel's 16538:13 couple 16521:12 course 16410:25 16411:13 16426:17 16430:18 16436:11 16450:14 16451:8 16463:2 16474:18 16480:12 16488:15 16540:5 16542:19 16586:14 courts 16461:18 cover 16432:24 16435:2 16479:7 16552:19 16567:17 covered 16421:17 16434:7 16444:4 16455:14 16494:23 16500:10 16503:22 16503:23 16505:6 16532:19 16582:2 covering 16434:1 16446:23 co-ordinated 16470:5 crash 16436:11 16474:18 create 16562:4 creates 16590:5 credit 16495:9 crime 16437:15 16438:12 16578:8,9 16578:14 16579:18 16580:2 crimes 16507:18 criminal 16451:15,20 16463:5 16468:5 critical 16539:24 16564:4 criticised 16529:5 criticising 16523:10 16528:25 criticism 16523:17,19 16525:1 criticisms 16528:11 cross 16404:1 16411:22 16514:9,13 16539:7 16541:6 16543:3 16556:12 16567:17 16589:12 cross-examination 16403:3 16411:23</p>
---	--	--	---	---

16412:6 16414:19 16442:16 16452:2 16455:3,15 16456:23 16457:13 16463:22 16479:7 16508:9 16514:10 16515:4 16529:8 16531:20 16543:5 16568:25 cross-examinations 16416:21 cross-examine 16531:25 cross-examined 16456:6 16503:21 16540:15 16567:15 16589:11 cross-examiner 16541:25 cross-examiners 16411:20 cross-examining 16540:3 crowd 16408:22,25 16431:18,20 16454:1 16459:22 16547:19 16557:14 16560:17 16578:24 16579:3,7 16579:10 crucial 16544:11 16549:23 16565:20 culpable 16527:14 cultural 16473:15 culture 16470:22 16471:7 16474:12,14 16477:20 cut 16444:4 16447:5 Cyril 16489:25,25 16490:5,6 16496:15 C-JOC 16469:18,23 16470:4,10,10 16475:13,24 16492:1 16503:1,5 16508:21 16509:11 16510:3 16517:3,6,14,16,21 16517:21 16518:1,2 16518:19,19,20,24 16519:1,6,7,11	16499:15 16500:1,11 16501:11 16510:13 16540:5 16580:23 16590:2 days 16474:14,18 16481:22 16498:2 dead 16563:16 16575:8 16576:9,13 16577:22 deal 16404:7 16423:16 16444:16 16445:5 16449:15 16453:9 16456:4 16457:12 16469:10 16473:15 16511:22 16512:20 16515:20 16524:16 16525:12 16541:16 16542:1 16543:8 16547:13 16568:7 16569:25 16580:23 dealing 16403:10 16407:6 16439:12,24 16453:10 16457:11 16460:20 16472:3 16500:19 16501:11 16529:22 16531:7 16541:1 16543:9,11 16568:16 deals 16449:14 16479:9 16528:24 16543:11 dealt 16429:5 16479:10 16497:5 16508:7 16568:8 16572:17 16587:14 debate 16412:3 16414:22 16422:16 16422:16 16438:17 16440:17 16444:4 16452:18 16454:25 16461:2,4 16462:11 16462:14 16483:17 16525:15 debated 16422:25 16452:17 16464:16 16482:10 16506:11 16527:2 debating 16452:20 decency 16413:5 16574:4 16581:10,10 decide 16407:9 16450:7 16467:25 16468:1,2 16493:12 16516:24 16541:14 16557:8 decided 16472:10,11 16475:22 deciding 16511:19 decision 16404:21,23 16432:11 16446:22 16448:6,15,20,22 16485:3 16490:8 16491:25 16511:5 decisions 16446:6 16447:7,8 16481:11 decline 16476:20 declined 16476:9 deeper 16494:18 defence 16443:25	16444:6 16459:23 16460:5,8,16 16461:16,25 16462:3 16463:6 16464:15,25 16465:7 16468:3 16530:12 16531:1 16533:1 16538:6 defend 16458:22 16465:8 defending 16459:24 16460:16,16 16462:3 defensive 16532:14 16550:15 16551:1,2,3 defined 16438:2 16543:10 definite 16407:3 definitely 16588:12 definition 16418:1 16522:18 defuse 16490:16 16502:8 defused 16495:11 defusing 16490:22 16491:22 delegation 16424:21 demand 16422:21 16433:21 demanded 16549:15 demands 16421:15 16427:3 16431:19,22 16431:25 16432:13 16490:11 demonstrate 16405:24 denied 16470:11 16517:17 deny 16517:20 depend 16453:16 depending 16514:17 16545:14 depends 16451:8 depicts 16404:11 deployed 16573:18 depth 16546:11 deputy 16447:3 16483:1 16484:18,24 derived 16446:23 16451:20 describe 16453:21 described 16459:17 16536:2 designated 16469:18 16469:25 16484:20 16519:7 desirable 16552:8 desire 16420:21 16421:10 16509:24 desist 16554:10 despite 16430:16 16434:1 16522:25 16523:12 16555:2,3 16573:1 destroy 16404:6 detail 16408:1 16482:11 16494:18 16548:10 detailed 16548:23	details 16479:8 16502:25 16554:4 detect 16484:13 detectives 16579:12 detention 16481:17 determinable 16585:20 determine 16467:20 16529:8 16545:13 16553:19 determined 16482:17 16585:7,20 deviation 16517:5,23 16519:6,8 16543:16 16543:19 16544:11 16544:17 16545:19 16545:20 16549:5 16556:19 16576:18 16577:2,12 16580:4 deviations 16543:10,12 devised 16413:2 didn't 16408:8,10,16 16408:17,21 16410:1 16411:3,16 16430:18 16433:14 16441:3 16443:22 16446:9 16453:1 16454:9 16465:2 16467:22 16468:11 16470:20 16471:3,15 16474:12 16476:17,20 16487:14 16493:7 16495:16,19 16498:14 16499:6,16 16500:8 16511:5 16522:1,5 16523:18 16524:14,20,21 16526:19 16527:3,5 16527:12,17 16528:1 16529:4,9 16532:7 16534:6 16544:3 16548:6,17 16555:15 16561:13 16572:16 16584:1,4,5 16586:8 16587:19 die 16581:16 died 16575:20 16581:15,16 difference 16435:22 16436:1 16443:22 16452:13 16457:22 16474:1 16476:16 different 16437:25 16462:1 16467:10 16478:8 16488:5 16529:6,22 16530:22 16531:7 16575:17 16579:6,11 differently 16448:13 16464:3 16472:23 16538:9 16551:22 difficult 16501:23 16502:17,20 16589:5 16589:21 difficulties 16439:24 difficulty 16446:12,14 direct 16472:17	16523:20 16538:13 directed 16442:6 16525:8,11 16537:2 direction 16503:3 16520:2,2,4 16523:11 16523:22 16526:24 16541:7 directly 16502:10 16504:19 directory 16512:14 disadvantage 16503:23 disagree 16408:5,8,17 16408:21 16474:2 16500:8 disagreed 16409:2 disallow 16440:13 disappear 16550:1 disappeared 16497:16 disappearing 16497:18 disarm 16575:1 disaster 16552:12 discounted 16476:6 discuss 16427:2 16485:17 16486:10 discussed 16481:9 16494:11,12,13,14 16495:13 16496:24 16498:8 16503:5 16507:11,13,15 16508:12,18 16509:11 16540:13 16571:25 discussing 16493:9 16496:22 16529:23 16574:9 discussion 16403:15 16486:22 16489:13 16490:13 16495:1,16 16495:18 16496:15 16501:19,20 16543:7 16568:15 discussions 16417:9,14 16424:15 16431:15 16492:17 disengaged 16478:25 dismissal 16438:16 dismissed 16437:7,12 16438:15 dismissing 16538:4 dispatched 16548:16 dispersal 16407:18,19 16454:1 16498:12,13 16509:20 16510:7 16557:16 16559:25 16560:16,18 16563:25 16565:4 dispersals 16572:10 disperse 16454:1 16510:5 16569:23 16571:12,20 dispersing 16407:20 16570:8 dispersion 16458:18 16573:22 dispute 16415:3,8,8 16445:22 16476:21
--	---	---	---	--

D

Da 16433:11
damage 16415:12
danger 16557:20
16560:8 16564:20,21
16565:17
dangerous 16426:14
16448:7 16486:12
16586:4
dash 16416:1
date 16499:17
16513:18 16573:20
16573:21
dated 16513:16,16
day 16432:2 16464:21
16464:24 16466:17
16477:22 16481:19
16492:2 16498:15

16532:12 16581:24 disrespect 16468:7 distance 16557:4,9,22 16557:25 16559:13 16560:6 16562:4 16571:25 divided 16560:1 division 16446:3 divisional 16469:17 doctrine 16464:15 document 16413:22 16428:8 16456:19 16457:2,20 16458:7 16458:13 16497:13 16497:19 16503:24 16514:7,12 16515:24 16516:13 16541:8 16561:13,16 documents 16456:1,22 16503:23 16514:6 16540:9,21 16546:18 16546:22 16547:1,1 doesn't 16414:22 16439:22 16453:3 16454:12 16472:14 16484:24 16530:16 16530:23 16553:10 doing 16439:25 16440:5 16453:19 16473:4 16479:6 16494:24 16533:21 16534:10 16554:11 16555:16,16 door 16548:20 double 16469:13 doubtless 16467:12 16493:25 dozens 16442:21 drawn 16473:20 16526:4 dreams 16575:25 16576:1 drill 16429:24 drive 16468:17 16512:14 drove 16470:14 16480:6 due 16480:12 duration 16470:5 16484:23 duties 16428:25 16435:5 16441:19 duty 16441:16,19 16445:15,18 16522:24 16590:13	economy 16547:5 EEE16 16406:21 16542:21,23 16568:16 effect 16456:16 16470:23 16493:17 16504:22 16507:17 effected 16507:17 effectively 16416:22 16435:19 16436:17 16480:23 16525:10 16541:18 16555:18 effectiveness 16504:22 16557:11 efforts 16586:3 either 16408:13,16 16415:15 16420:17 16447:5 16478:24 16480:14 16514:7 16516:9 16520:3 16523:9 16525:24 16527:18 16532:25 16555:21 16562:17 elaborate 16588:3 elected 16472:5 element 16439:16 elements 16584:15 elicit 16472:22 16590:9 else's 16513:25 elucidated 16584:23 embarrassing 16493:11,18 emerge 16553:13 emerged 16564:16 emergencies 16484:13 emphasis 16494:15 emphasise 16535:8 16564:2 employ 16451:3 employee 16486:14 employees 16432:7 employer 16418:12 16419:12 16437:12 16437:12,23 16441:16,20 enable 16557:4 encapsulates 16460:5 encirclement 16573:12 encompassed 16413:12 endeavoured 16453:5 endeavouring 16407:4 16450:3 ended 16498:7 16501:11 endorsed 16545:8 ends 16414:21 engage 16420:25 16421:2,4 16428:17 engaging 16438:17 Engelbrecht 16567:23 English 16465:8,9 16572:6 enjoined 16451:3,5 enquired 16586:2 enquiry 16508:11 ensure 16428:6	16441:20 16469:17 16547:18 ensuring 16502:8 entailed 16413:16 entered 16459:5 entirely 16413:19 16417:11 16437:14 16461:10 16492:17 entitled 16433:17 environment 16424:13 envisage 16475:2,13 envisaged 16570:24 16571:20,23 16573:19 equal 16454:23 16549:9 equally 16405:17 equipment 16443:25 equipped 16445:8 error 16489:19 erupting 16501:17 escape 16558:18 escort 16426:10 esoteric 16465:6 establish 16450:3 16566:2 established 16463:25 16478:21 estimates 16544:2 et 16471:10 ethically 16581:8 ethics 16413:4,5 16443:11 16574:4 16577:6,13 16580:3 16581:9 evacuate 16581:2 evening 16515:10 event 16445:9 16466:15 16467:10 16516:8 16522:7 16532:6 16541:11 16557:9 16561:22 16562:2 16566:1 16567:16 16570:14 16588:18 16589:3,5 events 16432:16 eventuated 16526:2 16573:21 everybody 16540:24 evidence 16402:8,23 16416:9 16429:22 16430:7 16433:5,18 16434:9 16437:2 16465:25 16468:10 16476:10 16480:24 16494:25 16498:13 16527:1,11 16543:18 16547:14 16548:7,22 16561:11 16568:10 16568:15 16574:23 16574:24 16584:13 16589:1,8,12 evidence-in-chief 16468:20 16533:16 evolution 16455:17 exact 16472:5 16484:5	16544:2 exactly 16411:1 16418:6 16425:7 16467:5 16497:2 16510:1 16516:22 16542:2 16551:5 16561:25 16563:22 16578:3 exaggeration 16583:22 examination 16404:2 16514:10,14 16539:8 16541:7 16543:4 16567:18 16589:13 examiners 16411:23 example 16406:21 16413:15 16444:7 16460:20 16471:20 16475:3 16481:13 16483:1 16575:11 examples 16482:1,2,5 excluding 16574:17 exercise 16455:24 16532:25 16579:15 exercised 16496:11 exhibit 16423:25 16426:24 16428:2,3 16431:10 16435:8 16468:19 16487:4 16508:8 16512:18,22 16513:1,1,15 16516:3 16520:8 16526:8 16528:6,10 16558:6 16561:7 16571:8 16573:13 exhibits 16404:10 exist 16411:3 16561:13 existed 16561:24 16572:24 exit 16558:18 expanded 16459:20 expect 16485:8 16503:19 expected 16502:19 16527:22 16540:7 16544:12 16551:25 16571:4 16574:6 16576:19 16577:5,14 16581:3 expecting 16499:11 expeditious 16541:1 experience 16473:18 experiencing 16521:9 16521:18 expert 16528:12 expertise 16408:18 16451:14 16578:14 explain 16402:15 16414:10,13 16415:18 16419:7 16453:6 16482:24 16528:5 16545:18 16546:13 16548:16 16551:20 16562:21 16562:22 16576:11 16581:22,25 explained 16520:8	16546:12 16573:14 explaining 16511:8 explains 16546:21 explanation 16484:11 16487:9 16504:9 explore 16474:7 explored 16437:1 16546:11 exploring 16434:14 expounded 16548:14 express 16493:11 16540:23 expressed 16407:1 16430:12 16433:6,11 16488:21 expression 16405:4,15 16590:5 extent 16437:18 16471:23 16508:19 16540:22 16559:6 extra 16588:19 extracts 16428:1 16487:12 extremely 16502:17,20 eye 16467:9 16468:10
E				F
earlier 16424:19 16425:9 16439:12 16444:20 16454:16 16493:1 16499:14 16503:8 16537:6 early 16431:23 16433:10 easily 16476:11 easy 16447:13,15				face 16501:16 16557:24 16581:6 faces 16504:15 facie 16464:23 facilities 16481:17 facting 16580:17 fact 16420:23 16424:16 16430:16 16434:1,3,5 16440:15 16443:23 16444:17 16453:13 16456:5 16462:11 16468:7 16470:19,19 16470:20,21 16471:22 16472:17 16472:23 16476:1 16484:16 16500:1 16502:10 16504:7,13 16511:16 16517:20 16521:21 16523:1,12 16524:20 16525:20 16530:22 16531:24 16532:11 16539:15 16543:20 16547:8 16549:8,24 16556:21 16569:16 16573:2 16584:3 facts 16423:1 16445:4 16449:25 16450:3,6,8 16464:21,23 16483:20 16509:8 16590:9 failed 16584:21 16585:12 fair 16415:7 16419:21 16419:21 16423:18 16437:24,24 16441:17 16450:16 16465:14 16478:21 16480:25 16481:2

16487:15 16519:17 16531:25 16539:24 16540:20 16542:10 16542:13 16548:5 16562:23 16564:13 16568:4 16574:10,14 16582:1,8 16586:1 16587:5 fairly 16422:23 16468:6 16470:9 16476:11 16540:7 16546:25 16568:8 fairness 16459:13 16479:19 16532:6,7 16541:1 falls 16477:15 false 16583:21 familiar 16445:16 16450:13,16 16469:15 Fanagolo 16474:18,20 16475:18 16476:3,5,7 16476:13,20 16477:1 16477:5,11 16478:6 Fanyana 16426:23 far 16415:12 16443:8 16471:21 16474:11 16511:16 16527:1,9 16527:11,15,17 16542:3 16568:9 16572:18 Farmer 16419:13,14,16 fashion 16433:1 fatal 16538:7 16550:18 16550:23 16551:9 16552:23 16553:8 fate 16549:8 fault 16471:12 favour 16499:4 feared 16556:12,13 feel 16402:14,20 16408:17 16442:5 feeling 16501:15 feels 16541:15 felt 16425:15 16471:9 16473:14 16501:23 FFF1 16526:8 FFF4 16456:20,22 16457:2,4,13,18 FFF5 16457:8,9,18,19 16458:2 field 16408:18 fifthly 16413:4 figurehead 16517:2 figures 16584:4 final 16455:17 16545:22 16547:7 financial 16491:15 16498:6 find 16427:22 16459:3 16490:22 16491:2,13 16492:10 16494:9 16500:25 16502:16 16502:20 16507:11 16530:8,14 16533:4 fine 16442:8,13	16528:7 16562:6 finish 16462:25 16505:10 16540:17 16588:10 16590:19 finished 16403:9 16442:9,14 16465:17 fired 16533:21,22 16534:1,5 16537:8 firing 16534:2,14,16,20 firings 16534:17 first 16408:22 16440:19 16443:17 16443:19 16459:4 16472:17 16480:4 16487:6 16492:7 16494:21 16503:25 16506:4 16508:23 16514:20 16515:7 16525:13 16526:16 16535:13 16536:4,13 16546:15 16548:11 16549:12,14 16550:14 16551:1 16559:19 16566:7 16581:17 firstly 16406:25 16503:14 16535:4 16549:9 first-hand 16521:9,19 five 16443:9,13 16510:12 16552:6,10 16552:11 flow 16526:16 flowing 16524:6 fold 16544:13 follow 16413:7 16440:8 16455:16 16457:17 16509:5 16540:1 followed 16531:1 16532:13,23 16533:5 16534:14 16536:15 16549:16 16551:4 following 16463:23 16499:25 16500:11 16510:13 follows 16471:8 foot 16458:16 force 16406:15,23 16407:2,23 16428:10 16443:25 16444:6 16445:21 16451:4,6,7 16451:11 16452:5,7,9 16452:13,13 16453:2 16453:6,7,10,11,12 16453:13,14,19,20 16454:2,4,11,16,17 16454:22,23,23 16456:16 16458:5,22 16459:9,20 16460:5,7 16460:9,20,24 16461:17,21,22 16462:5,8,9 16525:9 16534:22,23 16535:1 16535:5,7,9,17,22 16536:10,15 forced 16437:13	16458:21 16535:12 16558:18 fore 16557:19 16559:16 16564:19,20 foresaw 16576:1 foresee 16484:24 16566:23 16575:8,9 16576:4,6,12 foreseeable 16562:13 16562:16,19,22,24 16563:3,13,19 16564:2,14,25 foreseeing 16575:13 foreseen 16576:7 forget 16444:17 16486:13 16494:12 16536:8,19,19,21 16537:12,23 16538:4 16573:19 forgive 16585:25 form 16468:8 16501:7 16523:9,9 16564:22 formed 16487:13 forming 16564:15 16566:14 formulated 16420:18 16448:16 16506:11 forth 16417:9 16439:19 16500:23 16588:24 forum 16412:3 forward 16501:2 16542:2 16546:14,15 16546:15 16548:16 forwarded 16428:9 forwards 16442:4 found 16437:24 16450:4 16497:17 16511:24 16581:15 16581:18 four 16478:19 16511:13 fourth 16500:13 16505:18 framework 16427:6,7 frankly 16556:14 free 16412:1 Friday 16416:21 16498:19,24,25 16499:8 front 16510:9 16520:24 16564:23 16565:7,12 fruit 16586:3 frustrated 16419:22 16425:15,23 16431:1 frustrating 16427:23 frustration 16426:9 16432:18 16434:12 16439:17 full 16463:21 16554:15 fuller 16434:18 fullest 16402:15 fully 16422:17 16434:8 function 16472:25 16473:1 16521:5,15 functions 16521:6,16 16557:25	funny 16537:24 further 16403:13 16410:10,11,14 16426:17 16431:8 16433:6 16436:24 16445:7 16455:4 16462:15 16467:9 16474:7 16508:8 16518:12 16525:25 16526:13 16590:21 future 16529:15 16541:2 <hr/> G <hr/> gained 16445:6 gap 16562:17,19 16563:18 16564:14 16564:15,23 16565:14,17,19,20,22 16566:3 gathered 16475:9 gathering 16570:6 generally 16450:16 genuinely 16511:10 getting 16434:4 16495:12 16497:10 16500:25 16513:25 16533:13 16586:3 GGG12 16519:21,21 16519:23 16525:3,6 gist 16477:18 16480:12 16489:1 16492:18 16498:5 16502:9 16565:25 give 16402:8,10 16428:6 16431:19 16434:8 16436:11,15 16437:2 16438:18 16439:7,8 16442:1,2 16445:10 16446:19 16461:8 16481:8,13 16481:17 16482:4 16484:11 16498:17 16499:20 16503:19 16504:17,19 16506:5 16506:6 16507:14 16512:22,25 16513:1 16517:9 16520:2 16523:18 16536:25 16547:6 16552:10,21 16557:7 16589:20,22 16589:24 given 16464:8 16473:13 16475:4,9 16475:14,15 16482:1 16482:2 16484:1 16495:6 16498:3 16502:19 16503:21 16503:24 16508:14 16512:1,9,11 16517:4 16523:23 16540:4 16545:23 16549:13 16552:11,11 16554:9 16568:3 gives 16445:2 16515:23 giving 16411:18	16436:7,20 16468:19 16478:22 16479:6 16484:7 16501:24 16504:14 16514:2 16524:9,14 16533:16 16552:6,6 globular 16480:24 go 16404:1 16414:17 16416:18 16424:6 16426:10 16427:22 16428:3,14,18,21 16439:18 16442:15 16453:13,21 16456:25 16458:19 16459:2 16469:13 16470:14 16472:11 16472:18 16475:23 16477:18,25 16480:16 16494:18 16498:14 16500:12 16500:12 16511:17 16515:11 16525:18 16525:19,25,25 16537:6 16540:9 16542:24 16549:23 16549:24 16552:23 16552:23 16553:1,12 16553:13 16554:11 16554:25 16556:11 16558:2,23 16562:17 16562:17,19 16564:1 16564:14 16571:7 16587:16,19 16588:17 16590:14 Godi 16491:7,9 goes 16433:5 16471:16 16478:9 16491:5 16502:10 good 16403:5,7 16412:6 16439:10 16441:12 16544:18 16547:12 16550:20 16550:23 16551:10 16554:1 16560:24 grateful 16446:18 16589:19 greatest 16530:22 grenades 16535:20 16538:1 grievances 16427:3 ground 16431:9 16432:23 16439:5,9 16455:14 16470:14 16470:19 16472:20 16479:7 16503:20 16521:8,18 16522:11 16522:19,21 16529:2 16532:20 16571:12 16571:21 16573:17 group 16405:8 16428:8 16431:15 16557:16 16558:14 16559:2,25 16560:16 16565:4 groups 16571:11 guarantees 16438:3 guess 16563:17
--	---	--	---	---

<p>guidance 16491:10 16521:5 16522:1 16523:18 16524:14 guilty 16438:12 gun 16406:19 16565:24 guns 16405:12 16406:7 16472:4,4 16575:1 guy 16476:5 guys 16490:23</p> <hr/> <p style="text-align: center;">H</p> <p>hadn't 16409:8,15 16410:4 half 16429:4 16548:11 16561:10,18,24 16588:10 hamper 16402:23 hand 16426:9,12,15 16432:16 16487:2 16491:13 16516:3 handicap 16474:14 handled 16581:17 handling 16453:9 hands 16426:2,3 16541:18 hang 16420:16 hanging 16537:21 happen 16495:8 16500:7 16521:5 16545:14 16547:11 16573:20 16589:17 happened 16416:24 16417:15,16,19 16420:4 16424:19 16426:14 16431:12 16433:8 16443:21 16455:15 16467:1 16471:16 16483:3 16495:8 16498:14 16525:16 16527:13 16530:1,10 16534:17 16544:3,15 16546:20 16550:3,23 16569:18 16573:9 16575:12,17 16576:17,24 16577:11 16587:17 happening 16490:15 16504:10 16521:21 16521:22 16537:10 16576:11 16586:12 happens 16523:23 16545:2 16551:3 happy 16540:15 16578:25 16580:1 hard 16468:17 16512:14 hardcopies 16548:17 16548:18 hardcopy 16546:18 hasn't 16435:13 16445:9 16488:10 hat 16423:7 haven't 16403:20 16426:2 16450:2 16484:3 16520:23 16540:22</p>	<p>head 16408:24 headed 16457:2 16458:11 hear 16421:21,24 16476:22 16487:6 16504:1 16515:2,7 16523:5 16524:8 16553:23 16557:21 heard 16402:18 16412:10 16466:2 16527:1 16554:25 hearing 16527:10 heavily 16491:24 heist 16460:21 held 16528:2 helicopter 16444:6 16465:22 16466:2,5 16472:17,24 16483:18,20,22 16519:24 16581:2 helicopters 16580:25 help 16410:2 16412:23 16439:15,22 16456:13 16496:25 16504:21 16511:18 16512:8 16556:3 16566:22 16573:4 helpful 16538:25 helping 16505:22 16529:22 Hemraj 16410:18 16411:9 16458:6 16478:12 16512:15 16538:10 16554:21 16565:6,10,15 Hey 16410:5 he'd 16467:9 16473:2 16487:23 he's 16408:18 16434:14 16435:9 16443:6 16448:12 16452:24 16452:24 16455:13 16455:18 16479:6,7 16497:11 16517:19 16529:7 16540:15 16576:23 16577:8 16582:17 16587:10 HHH 16513:10 16520:8 16525:2 HHH12 16519:20 HHH3 16447:11 16520:10 16528:6,10 16584:23 HHH55 16404:12,16 HHH62 16513:14,15 16516:4 hierarchical 16485:24 hierarchy 16486:3 high 16419:23 16489:24 16571:2 higher 16421:14 16525:14 16550:20 16571:12,21 16573:17 highlighted 16551:23 history 16427:21</p>	<p>16431:13 hold 16514:9,10 holding 16486:7 16492:1 16546:15,15 16548:16 16578:1,18 honestly 16531:19 16574:9,17 hope 16461:10 16479:16 16498:4,18 16540:17,23,25 16568:8 hostage 16454:6,11 16460:20 16461:25 16462:3 hostages 16461:24 hour 16580:16,25 human 16437:25 16581:9,10 humble 16568:3 hypothetical 16409:25 16449:10</p> <hr/> <p style="text-align: center;">I</p> <p>idea 16495:12 16550:20,23 16551:10 identified 16496:3 identify 16404:10 16539:5 16588:23 IDs 16578:16 ignores 16464:14 illegal 16437:16 illiterate 16431:18,20 16431:21 illustrate 16434:11 16453:25 imagine 16408:19 16454:7,10 16575:25 immediate 16486:8 16524:7 immediately 16479:18 16490:24 16491:1 16497:15 16525:7 16526:14,17 16530:1 16530:12,25 16532:14,24 16533:21 16534:14 16535:2,10 16536:11 16536:14 16587:15 imminent 16463:10 16464:5,9 16468:2 16530:7,9 16532:17 16532:23 16533:5,7,9 impact 16544:19 16549:7 Impala 16490:9 16495:8 16500:20 16501:13 16504:6,6 impartially 16445:22 impass 16436:13 impending 16432:15 implement 16448:20 16449:9 implementation 16509:20 16550:13 implemented 16447:8</p>	<p>16501:6 16548:13 16561:25 16586:24 implication 16408:12 impliedly 16518:10 importance 16544:9 important 16405:9 16481:10 16484:2 16537:5 16542:11,12 16543:16 16551:23 16551:24 16552:3 16574:7 imposed 16522:25 imposing 16499:11 impressed 16537:2 impressions 16467:8 improper 16446:21 improperly 16581:17 impunity 16438:14 inaccurate 16461:14 inappropriate 16409:3 16448:24 16449:3 inaudible 16405:14,25 16406:2 16432:25 16438:6,8 16450:21 16456:21 16457:1 16462:17 16509:1 16514:18 16529:3 16531:13,20,23 16541:24 incident 16430:15 16457:3 16536:20,20 16538:1 16551:9,9 16575:19 include 16417:23 16418:2 16479:17 included 16410:19 16520:5 16542:21 16585:1 includes 16477:21 including 16418:10 16424:7 16485:14,18 16495:16 16572:4 inconsistent 16581:8 incorporated 16443:24 incorrect 16415:14 16422:9,12 16423:12 16434:6 16448:24 16580:9 increase 16428:6 16430:16 16434:4 increased 16432:18 indicate 16420:10 16464:21,24 16473:12 16540:2 indicated 16428:23 16430:22 16493:3 16512:10 16537:2 16539:16 indicates 16540:14 indication 16482:16 16589:21,22,24 indications 16508:14 16508:19 16570:7 inducement 16427:17 infer 16524:21 inference 16526:4</p>	<p>influence 16407:5 16448:6 16486:11 16503:3 influenced 16446:6 16576:16 influencing 16448:6 inform 16521:3 informal 16563:2,5,7,9 16563:20,24 16566:13,24 16567:1 information 16403:13 16403:16,20,22 16479:17 16496:10 16502:4 16504:14,18 16504:20 16506:6,6 16506:24 16574:13 informed 16428:9,23 16431:22 16468:6 16485:9 16534:22 16535:5 16569:5,21 informing 16529:1 initiative 16409:16 16411:4,7 injured 16467:2 16563:17 16577:23 16580:24 16581:2,13 injury 16589:24 inquire 16418:17 INQUIRY 16507:25,25 inside 16431:15 insofar 16413:25 16423:13 16451:6 installed 16480:14 16519:5 instances 16478:22 instruction 16481:5 16521:25 16524:13 16524:17 instructions 16481:8 16481:14,17,21 16482:2 16497:22 16524:9 intact 16501:5 integrity 16578:20 16579:5 intelligence 16569:10 16569:11,16,17 16574:14,18 intended 16547:10,15 16558:20 16573:7 intending 16432:23 16462:23 16468:7 intention 16459:7,18 16578:18 inter 16471:10 interaction 16418:25 interactions 16419:2 16432:4,10 interest 16502:5 interested 16450:5 16468:8,14 16474:7 16478:25 16484:16 interference 16446:10 16446:21 16447:6 internal 16457:4 interpose 16589:8</p>
--	---	--	---	---

<p>interpret 16499:3,7 interpreted 16475:7 interpreter 16474:1,20 16474:24 16475:3,16 16476:20 16477:1,5 16477:12 interpreting 16474:20 interrupt 16529:14 16538:21 interrupting 16492:22 intervene 16418:9 intervened 16521:24 16525:16 intervention 16403:5 16470:22 16524:22 16585:1,5,6,18,20 intimated 16431:18,20 introduce 16568:21 introduced 16480:3 16583:7 introduction 16583:11 invalid 16529:11 investigated 16527:15 investigating 16578:16 16579:6 investigation 16467:9 16578:4 investigators 16578:1 involve 16414:22 16462:11 involved 16418:4 16432:16 16433:12 16483:17 16562:14 16570:24 16571:5,23 16572:4 16578:4,5 16579:15,16 16586:11 involvement 16432:14 involves 16581:14 involving 16453:19 16472:4 irrelevant 16511:9 irritate 16483:21 isiXhosa 16476:12 isiZulu 16476:10 isn't 16429:17 16438:18 16445:8 16456:5 16475:25 16488:4 16514:2 16522:17 16524:10 16526:19 16549:10 issue 16408:23 16415:10,15,16,20 16416:2,14 16438:22 16439:3 16464:10,18 16473:23 16481:4 16484:2 16501:9 16524:17 16528:25 16556:15 16569:18 16582:3 issued 16521:25 16540:25 issues 16465:6 16470:11,12 16482:15 16500:25 16501:10,11</p>	<p>16505:20 16508:12 16556:6 I'd 16450:11 16521:13 I'll 16414:16,20 16436:9,10 16439:8 16439:14 16440:13 16440:16 16442:14 16443:19 16446:16 16448:3 16451:1,2 16462:13 16479:18 16482:13 16488:19 16489:3 16520:20 16526:10 16532:2,7 16532:11 16534:25 16542:24 16547:4,6,7 16547:22 16549:3 16550:16 16568:24 16569:3 16577:20 I've 16408:7 16411:24 16415:22 16431:25 16432:22 16435:3 16437:21 16444:24 16461:10 16484:1 16486:4,6 16524:22 16541:4,12,23 16543:1 16550:25 16572:8 16580:20 16584:25 16588:4</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>ja 16405:21 16411:11 16411:15 16412:4,21 16414:21 16415:21 16418:3,19 16420:2,9 16420:12,15 16421:16,25 16422:2 16429:20 16436:23 16451:9,18 16452:3 16460:25 16461:3,6 16462:21 16463:3 16465:1 16475:12 16476:17 16480:2 16484:16 16485:14 16487:7 16491:8 16500:9 16503:17 16506:13 16509:3,6 16510:10 16512:19 16514:25 16528:7 16530:9 16532:21 16535:15 16539:2,3 16541:16 16543:10 16558:11 16566:21 16574:16 16578:25 16585:10 16587:21 16588:17 jig 16491:5 jive 16491:5 JJJ192 16488:6 job 16413:11 16439:25 JOC 16428:9 16472:17 16472:18,23 16484:12 16485:20 16494:8 16517:16 16520:1,3 16521:3 16522:10 16523:11 16526:25 16527:3</p>	<p>16546:13 16548:11 16548:24 JOCOM 16416:12 16448:16 16481:5 16548:24 joking 16590:2 jump 16559:2 jumping 16582:9 June 16433:10 junior 16485:22 justice 16472:15 16532:1</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>keep 16408:3 16499:4 kept 16578:1,17 kernel 16414:19 key 16467:16 16497:25 16498:8 16543:19 16569:4 16584:15 Kgotle 16432:5,10 kill 16490:23 16491:4 16495:7 16505:22 16506:5,7 16509:24 16556:13 killed 16467:2 16525:8 16526:15,18 16575:25 16576:2 killings 16447:18,18 16460:23 16461:24 16505:21 16507:10 killings 16415:12 kind 16413:5 16454:7 16460:21 16469:12 16493:10 16504:16 16504:19 16521:25 16524:22 16544:20 16573:20 kinds 16405:12 16469:11 KK 16426:24 16431:10 knew 16432:17 16483:8 16487:25 16565:22 16582:23 16583:21 knife 16580:17 knowing 16527:14 16585:23 knowledge 16408:14 16414:4 16425:6 16432:14 16451:20 16454:5 16463:5 16474:13 16493:2 16498:12 16509:22 16509:24 16510:1,23 16519:5 16529:9 16562:12,13 16570:22 16583:21 known 16430:25 16462:9 16483:10,13 16483:15 16484:8 16509:21 16527:21 knows 16447:11 16483:2 16511:4 16518:11 16529:21 16578:15</p>	<p>koppie 16504:15 16569:7,13,19 16570:6,6,15 kraal 16406:22 16525:10 16564:24 Kwadi 16426:23,23,24 16431:11,17 16432:4 16502:7</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>L 16428:2 16435:8 16441:25 16442:3 16558:5 16561:7 16573:13 labour 16415:15 16437:6 16438:1,2,4 lack 16421:9 lacking 16420:19 16421:5 laid 16423:20 16425:11 16539:25 language 16470:21 16471:6 16474:12 16475:23,25 16476:11 16477:21 16549:14 languages 16474:13 16475:4,10,15,20 16478:8,13 laptop 16546:17 16548:19,21 lasts 16583:19 lat 16506:20 late 16539:16 latest 16498:5 launch 16485:10 law 16413:1 16443:10 16449:18,21,22,24 16450:5 16451:3,15 16451:20 16454:13 16454:15 16461:15 16463:5 lawyer 16450:15 lay 16422:11 16424:9 16427:17 16435:24 16540:21 16555:16 LCRC 16579:12 lead 16575:1 leader 16491:7 leaders 16574:25 16589:2,8,12 leads 16570:20 learned 16440:3 16587:16 leave 16410:16 16411:25,25 16414:16 16421:3 16442:14 16450:11 16462:13 16478:10 16482:13 16503:3 16524:3 16526:10 16536:18 16537:21 16562:11 16569:6,12 16571:1 16586:14 leaving 16586:10,12 lecture 16468:5</p>	<p>lectured 16578:7 led 16417:10 16447:17 16447:18 16448:20 16448:22 16543:18 ledger 16417:5 leeway 16501:24,25 left 16410:6 16421:17 16459:22 16472:16 16480:6 16545:12,16 16556:11 16569:18 16572:11 legal 16438:1 16444:22 16460:6 legislation 16412:25 16443:10 16449:17 16461:20 16469:19 legislator 16454:9 legitimate 16437:5,11 16437:14,22 16510:24 leisure 16417:6 length 16452:17 lessons 16412:1 lethal 16535:21 let's 16405:17,20 16406:3 16411:3 16414:17 16415:1 16440:16 16442:15 16443:16 16452:1 16455:4 16457:16 16461:9 16462:11,14 16476:22,22,23 16483:22 16484:1 16500:12 16503:3,25 16504:1 16515:7 16516:1 16517:12 16522:8 16525:12 16526:12 16533:14 16535:8 16551:6 16554:18,20 16560:4 16573:19 16579:2,3 16580:13,13,16 16582:14,20 16586:8 16590:18 let's 16420:17 16421:21 16426:23 16506:11 level 16405:1 levelled 16528:11 liberally 16455:7 Lieutenant 16505:15 16582:3 lieutenant-general 16485:22 16487:3 16492:13,21 16495:3 16495:19 16499:10 16500:2 16510:19 16582:13,14 life 16454:7 16464:10 16501:10 16559:16 16560:6 16564:21 16578:8 16582:3 life-threatening 16557:23 light 16421:6 16461:10 16589:9 lights 16421:18</p>
--	---	--	--	--

<p>limit 16499:10 limited 16472:10 16494:5 limiting 16474:11 16585:4,17 limits 16402:7 line 16413:24 16423:15 16458:17 16473:6 16489:6,9,12 16497:10,23 16500:15,16 16556:23 16558:17 16559:4 16561:1 16564:16,23 16570:9 16570:9,12 lines 16439:23 16524:17 16570:9 linguistic 16473:14 linked 16549:3 16565:13 linking 16504:13 list 16542:21,24 16568:16 listen 16423:14 16519:1 listened 16499:19 listening 16510:12 16543:14 16544:22 16545:5 literally 16541:8 litigation 16581:14,25 little 16427:16 16433:5 16590:20 live 16407:19 16537:10 16538:2 16550:19 16560:17 16571:19 16571:22 16572:3 lives 16459:24,24 16470:14 16471:10 16557:19 16559:6,11 16564:19 16566:4 local 16429:22 16434:4 locate 16542:7 located 16542:8 lock 16437:23 logically 16560:10 16585:17 long 16436:11 16440:17 16465:25 16506:21 16538:25 16544:25 16589:4,25 longer 16436:19 16478:24 16539:18 16544:17,20 16549:7 16570:5 16590:14 longish 16542:24 Lonmin 16419:14,23 16420:1,5 16421:1,6 16421:6,10,15,19,21 16422:3,6,9,24 16423:18,19 16424:8 16424:20 16425:1,3 16425:25,25 16426:5 16427:1,18,19 16428:18 16429:4,4 16429:13 16430:20</p>	<p>16430:22 16431:14 16431:16,24 16433:19 16434:8,14 16437:2 16439:14,18 16439:20 16441:15 16441:18,19 16457:3 16459:6 16474:24 16475:3,16 16476:5,8 16476:12,14,25 16477:4 16483:10,13 16483:15,19,19,25 16484:8 16485:19 16486:14,24 16487:2 16492:18 16493:10 16496:10 16503:13 16504:13 Lonmin's 16420:19 16422:15 16423:24 16425:16 16427:10 look 16402:14 16417:5 16417:6 16480:2 16490:2 16496:20 16497:23,23 16504:17 16514:23 16523:22 16524:15 16538:15 looked 16538:11 looking 16410:4 16411:4 16417:7 16501:1 16542:9 16566:17 16568:18 16590:16 looks 16403:17 loose 16414:21 loosely 16510:3 16552:22 lost 16559:6 16584:25 lot 16462:11 16500:20 16504:14 16554:23 loudhailer 16552:21 16554:5 lunch 16514:11 16515:3,20 16516:12 16538:3,7,12,16 16541:10 16590:1 lunchtime 16590:7,19 L109 16428:15,15 L113 16428:18 L114 16415:24 16416:1 16416:7,7 L117 16428:21 L138 16558:23 L139 16566:7 L282 16459:2,4 L72 16558:2,6 L80 16571:7,8 L96 16428:3,3</p> <p style="text-align: center;">M</p> <p>Magidiwana 16436:11 main 16408:24 16414:25 16442:16 16473:22 maintain 16578:20 16579:5 major 16463:16</p>	<p>16485:9 16494:9 16508:1 16509:9 16549:7 Makhubela 16545:18 16551:18 making 16435:23 16483:21 16492:23 16529:13 16539:10 16575:6 Malema 16490:7,9,13 16490:15,16 16491:21 16495:8,9 16495:13,21 Malema's 16490:18 man 16476:13 16486:3 manage 16490:13 managed 16490:12 16580:11 management 16408:22 16419:4 16427:2 16428:6,16,22 16429:3 16431:22 16432:12 16433:15 16446:4,5 16500:21 16500:22 16501:1,13 16501:24,25 16502:6 16505:22 16557:14 16560:17 16578:8,10 16578:14,24 16579:3 16579:7,10,19 16580:2 manager 16506:25 mandate 16416:3,16 16433:14,16 manner 16447:7 16453:11 16532:1 16568:10 manuscript 16516:6 march 16431:14 16432:15 Marikana 16447:9 16457:3 16459:6 16480:6 master 16512:14 material 16443:20,21 16456:7 16514:7,8 16515:6 16567:17 16589:10 Mathibedi 16403:22 16455:10 16479:2,14 16479:19 16511:23 16512:3,6 16514:22 16515:23 16528:9,21 16528:24 16539:7,9 16539:12,21,23 16540:19 16541:9,13 16541:25 16542:4,25 16553:16,17,23 16578:21,23 16579:1 Mathibedi's 16554:22 Mathunjwa 16425:2 16426:25 16427:1 16432:6 16582:23 16583:4,7,11 16584:3 16585:2 16586:8,13 16586:16,22 16587:6</p>	<p>Mathunjwa's 16585:18 16586:2 matter 16407:9 16410:6 16417:5 16422:25 16437:1,25 16439:21 16441:13 16444:4,18 16445:3 16446:23 16449:21 16452:16,19 16460:6 16461:2 16464:16,17 16464:23 16467:22 16468:4,8 16471:23 16488:5 16491:18 16492:25 16493:25 16496:5 16504:24 16507:22 16515:2 16516:23 16517:17 16527:2,15 16529:6 16530:16 16531:2,4 16539:6 16546:14 16553:11 16554:9 16570:15 16584:16 matters 16429:14 16434:7 16493:9 16503:22 16508:15 16508:17 16509:10 16510:2 16539:17 16540:13,15 16541:1 maximum 16452:5,7 16452:13 16453:2,7 16453:11,14,21,22 16454:4,17,22 16456:16 16458:4,21 16460:17,19,24 Mbombo 16485:22 16487:3 16492:13,22 16493:3,4 16495:3,19 16496:15,21 16499:10 16505:15 16507:15,16 16510:12,19 16582:11 McIntosh 16478:15 mean 16405:15 16407:1 16412:17,22 16412:23,24,25 16413:1,2,4,7 16418:10 16420:7 16422:1 16426:13 16436:4 16438:9 16440:24 16443:5 16454:6 16457:25 16461:18 16479:22 16498:3 16530:23 16535:16,25 16540:8 16549:20 16559:3 16560:8 16561:1 16564:12,24 16565:22 16572:6 16585:17 meaning 16477:23 16499:8 16552:21 16584:19 meaningful 16487:18 means 16404:10 16423:10 16427:6</p>	<p>16436:6 16453:4 16457:14 16498:24 16509:24 16510:11 16551:11 16552:20 16552:24 16558:5 16572:5 16583:19 meant 16418:14 16422:20 16425:8 16427:8,15 16453:2 16483:24 16523:24 16528:5 16537:9 16545:8 16547:17 16562:4 16585:13 measure 16434:12 measured 16565:19 mechanism 16545:15 16550:15 16551:1,2,3 mechanisms 16566:3 media 16456:16 16458:11,12 16552:22,23,23 16553:1,3,12,13,18 16554:1,11,25 16555:3,11,17,25,25 meeting 16425:2 16429:3,8 16431:4 16448:17 16481:10 16482:9,10 16501:22 16546:13 16548:11 16548:24 16582:21 16582:21,22,22 16583:12,14,19 16584:3 meetings 16433:19 16434:5 16480:21 16481:5 member 16486:13 16494:15 16508:19 members 16432:8,15 16443:24 16445:20 16475:19 16478:7 16498:1 16507:17 16525:9 16535:22 16558:13,15,17 16559:5,17 16560:25 16562:14 16565:7,11 16565:12 16576:15 16577:14 memorandum 16431:19,20 16432:12 memory 16560:23,23 mention 16496:13 16530:23 mentioned 16489:22 16490:5 16524:22 16571:18 Merafe 16575:10 Merafi's 16471:19,20 merely 16411:8 16435:22 merit 16554:22 messages 16421:18 metre 16557:3,8,10,22 16557:25 16559:13 16560:6 16562:4</p>
--	--	--	--	--

16565:14,20 16566:3 metres 16556:22,22 16557:6,15 16558:15 16559:1,14,20 16560:11,12 16565:18 microphone 16405:14 16405:25 16406:2 16438:6,8 16450:21 16456:21 16457:1 16462:17 16508:25 16514:18 16529:3 16531:13,20 16541:24 mightn't 16430:13 mildly 16482:21 mind 16402:24 16417:3 16417:6 16450:22 16453:17 16479:14 16480:11 16488:19 16489:3 16504:1 16563:21 16578:6 minds 16474:21 mine 16428:5,10,19,23 16435:13 16457:3 16459:6 16490:17 16501:13,14 16504:7 16513:24 miners 16428:19 mines 16490:18 Mineworkers 16432:14 mine's 16428:16,22 minimal 16453:19 minimise 16547:18 minimum 16451:4,7,7 16451:11 16452:9,13 16453:6,12,13,22 16454:2,10,16,23 16459:9,20 16460:5,7 16460:9 16461:21 16462:8,9 16534:22 16535:1,5,7,9,12,17 16536:15 mining 16490:17 16501:15 Minister 16489:17 16490:4 16496:2,7,12 16496:16 minus 16509:4 minute 16551:8 minutes 16479:8 16481:5 16519:24 16541:13,15 16544:2 16544:5,6,6,14 16547:20 16552:6,7 16552:10,11,12 16584:7 misbehaviour 16434:13 missed 16457:20 mixed 16582:19 Mkhwanazi 16493:14 modifications 16456:3 16456:3 Mokwena 16432:5,10 16486:25 16489:14	16489:24 16490:7,17 16490:19,25 16491:1 16494:12 16502:7 moment 16416:9 16418:22 16421:7 16432:9 16434:9,10 16452:2 16456:4 16464:23 16515:2 16527:16 16537:7 Monday 16403:10 16429:11 16472:16 16473:10,12 16476:20 16477:24 16525:12 16589:13 16589:25 16590:3 money 16491:23 monitoring 16559:2,20 16559:25 month 16428:7 morning 16403:5,7 16414:20 16416:13 16427:1 16429:5 16442:16 16501:22 16582:23 16583:1,13 16583:16,19 16584:4 16589:7 16590:23 motion 16555:20 motions 16510:13,22 16510:24 motive 16576:16 mountain 16424:13 16436:14 16515:11 16570:17 16571:1,2 16571:21 mounted 16407:12 mouth 16434:11 move 16411:14 16444:13,16 16445:13 16448:7,16 16449:16 16452:25 16462:18 16468:15 16491:2,3 16495:4 16511:21,22 16518:22 16543:7 16547:5,22 16549:2 16553:18 16556:3 16560:21 16561:22 16571:12,20 movement 16486:11 moving 16462:22 16498:9 16501:2 16512:21 16513:9 16515:21 mowed 16534:20 Mpofu's 16493:6,7 16561:19 Mpofu's 16417:16 16419:16 MPUFO 16566:20 Mthethu 16489:17 Mthethwa 16489:20 mystification 16487:9	16433:3 16489:22 16514:3 names 16478:18 National 16432:13 16443:25 16444:21 16456:15 16458:12 16490:1,14 16493:15 16501:19 nationalised 16490:19 16490:20 nature 16406:8 16453:19,20,21 16456:3,23 16509:10 16550:22 16578:14 nearer 16581:21 necessarily 16442:24 16492:16 16548:4 16579:9 16580:9 16583:15 necessary 16402:12,15 16402:21 16405:12 16406:5,6,7,14 16434:6 16451:6,7,25 16459:8,19 16461:17 16461:17,19,22 16475:4,5 16487:11 16518:4 16521:24 16528:8 16539:10 necessity 16441:4 need 16409:16 16410:5 16446:8 16462:5,10 16464:16 16484:4 16490:21,22,23 16491:3,4 16495:6 16501:6 16502:15 16526:6 16529:12 16533:6 16550:14 16554:16 16556:14 16562:21 needed 16484:14 needn't 16461:2 needs 16541:16 16588:19 negative 16563:10,25 16567:1 negotiate 16422:18,20 16423:6 16425:19,21 16426:1 16428:10,19 16428:24 16430:14 16430:20,21,23 16431:24 16433:9,12 16435:4 16477:14 negotiated 16433:24 negotiation 16430:14 16430:16,24 16459:8 16459:19 16499:21 16559:2 16560:1 negotiations 16417:8 16424:18 16428:17 16434:3 16584:20,25 16585:12 negotiator 16478:5 negotiators 16478:5,13 16478:14,18 neither 16414:25 16520:4	neutral 16476:1 16503:3 16558:25 never 16417:3,6 16422:9 16450:22 16453:17 16471:18 16495:21 16502:19 16509:19 16510:5,6 16518:20 16523:18 16523:24 16575:24 16576:1 new 16501:16 16514:7 16541:10 16543:7 Ngalwana 16468:24 16533:16 16538:22 Nguni 16476:11 nicely 16455:9 night 16490:2 16500:18 NIU 16571:9 16572:4 Nkaneng 16556:11 16562:18 nogal 16536:20 noise 16554:23 16555:2 16555:4 nominal 16517:15 non-compliance 16450:1,5,7 normal 16408:22,25 16427:18 16428:25 16435:5 16482:25 normally 16555:20 16581:12,20 16587:3 North 16457:3 northern 16566:8,11 note 16513:15 notice 16449:22 16457:12 16503:22 16540:21 notification 16514:5 notwithstanding 16433:7 NOVEMBER 16402:1 no-one 16508:24 16548:13 Ntsonkota 16433:2,4 16434:24,25 NUM 16422:21,23 16423:11 16427:10 16427:14,20 16429:23 16430:11 16430:22 16433:4,9 16433:19 16434:5,19 16501:16 16504:7,22 16515:11,12,17 number 16429:13 16468:19 16469:23 16512:23 16513:2 16526:15 numerous 16422:2 NUM's 16430:3,11 nutshell 16424:6 Nyala 16563:21 16566:11	16543:2 16567:9 object 16528:19 objection 16421:21,22 16423:13 16477:15 16528:16,18 16529:14 16539:8 obligation 16485:23,24 16493:4 16496:23 obliged 16460:17,22 observation 16528:16 observe 16465:9 16466:11 observed 16552:18 obviously 16404:22 16450:8 16463:24 16466:16 16489:18 16493:7 16495:17 16522:12 16539:7 16540:24 16556:2 16573:16 occasion 16532:12 occasioned 16439:24 occasions 16429:13 occur 16575:12 offence 16402:8 offer 16420:15,17 16427:16 16513:25 officer 16553:18 officers 16478:17 offices 16431:14 Oh 16474:17 16513:25 16520:16 16534:11 16566:20 16578:25 once 16422:1 16478:21 16490:18 16501:8 16502:22 16553:6 16556:10 16560:22 16563:18 16580:4 16581:4 16585:19 16588:5 ones 16510:8 ongoing 16492:17 onwards 16429:14 16497:24 16504:6 open 16548:20 16574:10,12 opening 16465:3 operating 16449:5 operation 16404:25 16406:20 16407:24 16408:6 16410:19,21 16414:11,12,23,24 16443:18 16447:4 16469:20,24 16470:5 16472:4 16478:8 16482:17,24 16483:4 16484:20,23 16485:10 16486:9,12 16491:3 16494:10 16500:14 16502:13 16503:4 16504:23 16508:16 16509:9 16510:3 16549:8 16555:20 16578:3,5 16578:19 16579:1,3 operational 16446:4,6
	N		O	
n 16491:3 name 16426:23				

16446:22 16471:4 16472:19 16473:1 16475:24 16508:15 16519:25 16520:3 16521:2,7,7,16,17,25 16522:8,10,13,18 16523:1,10 16545:12 16545:17,24 16555:21,21 16559:4 16572:24 16587:3 operations 16409:12 operators 16429:24 opinion 16408:16 16417:8 16493:11 16517:9 16524:22 opportunity 16411:19 16439:8,8 16458:3 16487:4 16514:11 16537:1 16542:9 16549:22 16551:12 16552:21,25 16554:5 16584:9 opposed 16470:23 16486:14 16498:10 16546:2 16547:20 16571:24 opposite 16452:8 16472:5,8,9 16473:3 orally 16431:22,25 16548:14 order 16412:19 16414:2,4 16455:20 16469:19 16517:24 16519:11 16546:20 16550:14,25 16554:17 16562:17 ordered 16411:4 orders 16413:2 16414:5 16443:10 16469:10 organisation 16581:24 original 16520:25 16523:9 outcomes 16525:18 outset 16521:14 outside 16416:3,15 16427:3 16529:23 outsider 16493:10 outsiders 16503:5 overall 16405:4,5 16412:11 16434:11 16447:4,15,19 16448:4 16469:24 16472:19 16482:3 16484:19 16486:10 16508:17 16509:12 16520:1 16521:1,6,15 16522:12,25 16564:7 overrule 16423:13 oversight 16503:25 owners 16504:7 o'clock 16546:12 16589:7 16590:24 o'clock 16537:15 16562:8	P PAC 16491:7,9 page 16416:6 16418:22 16423:25 16424:3 16426:24 16431:11 16432:3,3 16458:15 16458:16,17 16489:5 16489:5 16497:7,9,23 16500:13,16,17 16520:8,12,13,17,18 16561:7 pages 16508:7 papers 16451:24 16452:1 16455:16 para 16520:18,18 paragraph 16424:1 16426:24 16431:11 16431:17 16432:2 16458:17,18,20 16469:16 16517:25 16517:25 16519:20 16519:21,23 16520:8 16520:11,14,16,25 16521:1 16523:9 16525:2,5 16526:9 16528:5,6,10 paramount 16582:3 paraphrasing 16519:19 16574:25 part 16406:14 16407:3 16415:19 16416:21 16419:17 16420:21 16422:15 16424:11 16427:8,9 16431:13 16431:17 16435:6 16437:5,7,15 16439:17 16440:19 16450:2 16451:2 16458:14 16489:12 16494:13 16504:9 16508:23 16525:13 16538:14 16545:12 16557:16 16559:24 16560:16 16561:8 16563:2,9,25 16565:3 16565:20 16566:14 16566:15 16568:18 16569:2 16571:14 participated 16579:7 16579:10 particular 16407:5 16418:13 16452:12 16480:25 16485:3 16488:7 16494:11 16498:9 16499:12 16503:22 16554:6,23 16563:21 16566:5 16579:18 16585:19 particularly 16517:24 16521:7,17,20 16542:12 16546:6 parties 16416:22 16417:12,23 16418:2 16436:15 16445:23 16488:17 16540:1	16542:13 partly 16430:21 parts 16484:18 16489:3 passage 16488:8 16489:7 16506:15 passages 16432:1 16459:25 16460:2 passed 16582:10 pause 16525:22 pay 16491:17 16498:1 paying 16483:19 payment 16491:23 peaceful 16417:10,11 peacefully 16459:7,19 penultimate 16435:10 16435:15 16458:17 perceived 16560:7 percent 16437:21 perception 16502:7 16504:20 16505:21 16505:23 16506:5,7,7 16507:1,2,3,3,10 period 16430:25 16434:2 16482:3 16519:24 16544:17 16546:3 16580:24 16587:14 permissible 16434:15 permission 16444:7 16493:5,7 16547:6 persist 16423:13 16568:9 person 16432:12 16460:16,20 16476:3 16476:5,8 16478:7 16483:2 16486:7 16491:22 16494:8 16495:3 16503:21 16511:10 16553:24 16553:25 16555:2,13 16575:21 16578:15 16581:2,13,15,19 personal 16425:6 16498:12 pertinent 16418:24 Peter 16426:23 phone 16521:4 photographs 16404:15 16504:16 phrased 16406:25 physically 16587:2 picture 16434:6 16459:15 16485:4 16580:18 piling 16579:17 Pillay 16513:11,13 16514:1 pinpoint 16480:24 place 16410:22 16411:1 16417:9 16420:4 16428:20 16429:4,15 16430:17 16433:21 16439:10 16473:25 16474:5 16480:15 16481:6,19 16486:22 16495:2 16499:24	16554:2,3 16559:23 16561:7 16564:1 16565:24,25 16575:12 16579:18 16580:18 16585:1 placed 16551:2 16563:12 16564:3,4 16569:22 plan 16413:2,4,16 16414:11 16443:11 16443:23,23 16471:20 16473:20 16482:9,11 16523:6 16543:12 16544:18 16545:7,13,16,25 16546:6,10,19 16547:24,25 16548:1 16548:4,7,23 16555:9 16556:21 16557:15 16558:20 16561:9,12 16561:14,16,17,23 16563:11,11 16564:18 16566:15 16569:2,5 16571:4 16572:24 16573:2,12 16573:12 16577:2,3 16584:15 planned 16414:11 16484:22 16543:20 16550:2 16562:2 16577:25 16578:15 planners 16562:25 planning 16410:19,21 16473:25 16544:12 16569:5 plans 16496:24 play 16553:7 16574:10 played 16468:19,24 16500:14 playing 16443:2 16579:11 pleadings 16465:4 please 16402:8,24 16409:17 16410:5 16439:25 16447:19 16450:9 16462:16 16497:9 16520:11 16529:13,19 16537:22 16562:9 ploy 16575:3,5 point 16416:14 16423:11 16431:9 16433:16 16435:1,23 16436:24 16437:14 16441:10,12 16460:1 16462:15,23 16467:12,13,16 16473:14,15 16474:7 16474:9 16479:9,13 16483:21 16492:23 16493:17 16494:19 16500:10,23,23 16501:14 16510:1 16511:11 16515:21 16518:12 16522:14 16523:17 16526:13	16529:11,11 16548:6 16549:3 16552:20 16554:22 16556:4,9 16558:17 16560:8,25 16561:13 16562:13 16576:19 16584:2 16589:7 pointing 16500:21 points 16467:11 16503:24 16510:12 16526:16 police 16405:7 16407:10 16415:19 16415:25 16416:1,3 16416:10,16 16421:11 16426:9 16427:16 16429:15 16434:12 16439:13 16439:17,25 16445:21,21 16450:25 16451:1,3 16452:5 16455:17 16458:12,20 16459:5 16459:16,16 16461:20 16464:1 16465:2,10 16468:17 16490:12 16496:21 16525:8 16528:12 16529:1 16533:6,15 16533:20,24 16534:1 16534:1,5,12 16536:19 16549:21 16551:9 16553:18 16556:11 16570:11 16574:7 16576:16,25 16577:10,14 16581:4 16581:12,13,14,18 16586:11 policeman 16554:17 policies 16501:5 Policing 16414:4 policy 16501:5 16557:14 16560:17 political 16446:4,7,10 16446:21 16447:6 16485:13,18 16490:21 16491:5 16501:14 politically 16446:7 16489:24 POP 16475:19 16478:7 16535:22 16556:23 16557:19,24 16558:14 16559:1,3,5 16559:17,20 16560:17 16564:19 16564:21 POPs 16475:25 16558:17 16565:7,12 portion 16469:15 position 16408:17 16421:14 16433:7,9 16433:13 16437:19 16461:11 16473:2 16476:24 16486:8 16492:1 16493:18
---	--	--	--	---

16521:22 16522:9,14 16522:19 16523:2 16527:16 16541:25 16551:16,19 16554:1 16554:17 16555:8 16562:22 16571:2 16586:21 16587:10 positioned 16521:8,18 16538:15 16563:22 positive 16470:23 possibilities 16480:3,4 possibility 16471:20 16480:4,8 possible 16444:10 16454:21 16566:13 16575:12,16 possibly 16480:9 16514:8 16515:3 pre 16513:18 preceded 16414:5 16536:11 precedent 16532:2 precious 16405:20 precise 16488:24 16541:22 precisely 16504:1 16506:11 16533:6 16578:11 precision 16450:15 preconditions 16423:19 16424:8 16438:25 predecessor 16413:23 predict 16589:5 preface 16469:12 16502:23 preferably 16498:8 16500:10 prejudice 16514:13 16531:8 prejudiced 16540:11 preliminary 16479:6 prematurely 16564:25 Premier 16490:10 premise 16422:12 16516:17,18 16547:8 16565:11 prepare 16540:7 16548:18 prepared 16408:13 16422:7,10,18,20 16423:9,11 16426:1 16427:2,11,12,13,14 16428:17 16430:23 16431:24 16477:14 preparing 16561:16 prerequisite 16464:11 prerogative 16561:19 prescribe 16499:14 prescript 16522:11 prescripts 16412:18,22 16412:24 16413:6 16442:17 16445:16 16450:13,16 16475:10,17 16509:12 16517:6,23	16543:10 16551:23 16574:3 16577:4 presence 16583:20 present 16428:22 16429:2,8 16546:23 presentation 16415:25 16416:1 16455:18 16459:16,16 16514:13 presented 16455:16 16456:1 16541:8 16561:24 president 16430:10 16438:19 16444:1 presidents 16499:22 16500:4 President's 16444:7 16457:5,6 press 16570:3 16583:3 pressed 16402:6,13 16493:16 pressure 16491:20 16496:5,11 pressurised 16496:3 pressurising 16489:23 presumably 16434:8 16437:1 16449:4 16496:6 presume 16488:25 pretending 16580:19 Pretoria 16480:6 prevailed 16417:12 prevent 16563:22 preventing 16430:14 previous 16413:25 16414:5 16433:25 16438:21 16452:17 previously 16439:23 16513:1 16525:17 16543:8 pre-conditions 16585:11 pre-emptive 16403:5 pre-Roots 16513:17 prima 16464:22 primary 16441:19 principles 16464:24 16468:3 printed 16489:5 prior 16419:18 16503:21 16514:5 16533:22 16540:21 private 16459:23 16460:4,8,16 16461:16,25 16462:2 16463:6 16468:3 16531:1 16532:25 pro 16507:10 probably 16443:22 16456:9 16472:3 16499:4 16545:16 16551:18 problem 16415:2,15 16449:21 16450:2 16499:11 16500:2 16514:4 16524:16	problems 16511:2 16521:3,4 16581:14 16581:25 procedure 16468:5 proceed 16403:2 16423:5,5 16434:21 16440:1 16488:23 16507:22 proceeded 16584:16 proceeding 16466:3,4 PROCEEDINGS 16402:1 proceeds 16486:21 process 16586:14 processing 16481:18 produced 16456:1 16546:22 profess 16446:11 professional 16413:5 16443:11 16574:4,6 16576:19 16577:6,13 16577:13 16580:3 16581:9 professionally 16581:4 proficiency 16475:23 profiles 16404:16 profit 16445:6 profitable 16454:24 16462:20 profitably 16442:11 progress 16530:7 16533:5,7 prolonged 16549:25 promise 16436:10 16515:8 16532:5 16547:22 promoting 16540:25 prompted 16448:15 proper 16550:12 16555:8 properly 16540:7 16565:19 16580:10 16590:10 properties 16415:12 property 16432:23 16580:15 prophetically 16531:6 proportionate 16451:12 propose 16452:18 16494:24 16540:16 proposing 16562:7 16589:6 proposition 16421:8 16462:4 16509:7 16511:16 16516:21 Protea 16483:12,14,19 16484:8 protect 16491:4 16556:23 protected 16437:6 protecting 16566:12 protest 16441:2 protesters 16549:21 16553:21 16555:22 16558:17	protestors 16428:5 provide 16476:9,20,25 16477:5 provided 16478:6 16479:9 16484:7 16523:4 16588:20 Province 16457:3 provincial 16447:12 16469:17 16480:9 16482:25 16485:16 16486:8 16487:2 16489:15 16494:19 16496:8 16504:5 16507:8,15 16509:21 16510:8 16518:18 16519:3,3,12 16582:12,20 16583:2 16583:7,9,12,23 16584:2,9 provision 16477:11 provisional 16447:3 public 16414:4 16456:16 16457:9 pure 16459:6,18 purely 16526:5 purports 16511:24 16518:25 purpose 16407:13 16494:5 16528:10 16530:24 16561:16 16562:2 16568:20 purposes 16405:13 16406:8 16480:10 16553:11 pursuant 16483:18 putative 16464:15,24 puts 16495:6 putting 16419:22 16420:20 16423:12 16424:16 16448:12 16450:2 16493:18 16511:3 16518:13 16531:21 16581:24	16504:25 16505:15 16507:8 16511:19 16514:24 16521:12 16529:19 16534:19 16537:2,6 16538:16 16540:2,8,16 16548:12 16556:15 16589:2 quick 16478:4 16529:17 quickly 16453:25 16495:20 quiet 16499:5 quit 16411:20 quite 16422:14 16437:11 16446:22 16462:11 16489:4 16502:24 16503:9,14 16521:19 16531:16 16541:10 16544:24 16544:25 16556:13 16590:20 quiver 16463:21 quotation 16547:24 quote 16506:5 16532:3
R				
r 16497:7				
radio 16466:2 16519:25 16521:4 16523:5,13 16524:8				
railway 16473:6				
raise 16455:19 16465:2 16493:25				
raised 16408:11 16409:4 16429:14 16430:1 16434:3 16444:19 16464:18 16480:8 16500:19 16501:20,21,22 16529:14 16566:6				
raising 16465:6				
Ramaphosa 16489:25 16496:4,7,11,16				
ran 16560:25,25 16564:20 16565:16 16566:1				
range 16557:10				
ranks 16486:13 16582:19				
rapid 16550:1				
rapidity 16545:2				
rare 16452:15				
RDOs 16423:7 16425:3 16425:10 16430:23				
reached 16556:10				
reacting 16407:7				
reaction 16547:19				
read 16404:9 16428:1 16428:15 16432:3,9 16435:3,13,16 16459:25 16469:14 16484:18 16486:4,6 16486:21 16487:4,23 16506:17,20 16517:6 16520:20 16521:1				

<p>16537:16 16540:9 16542:6 16558:11 16559:20 16567:12 16567:16,20 16572:12,16 16573:13 reading 16523:8 reads 16458:20 ready 16403:2,4 16515:11 16567:13 16567:19 real 16470:10 16478:24 16485:15 16494:16 16508:21 16509:11 16517:14,16,21 16518:2,19,24 16519:1,5 16569:17 16575:14 realised 16586:22 reality 16459:22 really 16405:12 16406:6,6 16414:22 16425:12 16435:21 16436:6 16439:22 16441:23 16456:10 16460:6 16465:7 16477:17 16483:25 16486:7 16487:12 16494:22 16498:6 16501:13 16502:16 16502:20 16504:21 16507:7 16508:20 16518:2 16534:15 16538:3 16540:10 16557:10 16565:25 16566:2 16576:6,6 reappeared 16497:18 16497:19 reappearing 16497:18 rear 16558:16 reason 16408:2 16449:9 16470:18 16471:5 16474:12 16476:9 16484:15 16495:5 16507:6,6 16545:1,7,9,23 16547:17 16551:22 16560:15 16562:5 16572:16 16586:9 16587:12 reasonable 16425:24 16425:25 16426:15 16426:16 16438:23 16438:25 16439:20 16440:4,6,9,20 reasons 16408:24 16429:16 16434:14 16447:22 16449:9 16470:13 16471:12 16472:21 16473:4,12 16473:13,14 16474:1 16477:24 16484:1 16495:6 16544:18 16546:2,10 16547:12 16557:3 16577:25 16578:16,19 16579:4</p>	<p>16581:5 16587:25 recall 16501:18,18 16516:2 16573:9 receive 16432:12 received 16421:18 16540:6 receiving 16422:2 16524:8 recipe 16552:5,12 reciprocal 16420:1 reciprocate 16420:5,6 16420:7 reciprocation 16419:23 recognise 16427:4 recognised 16422:19 16422:19,21 16423:10,21 16424:10,21 16426:21 recoil 16537:8 recollect 16433:7 recollection 16429:12 16433:4 record 16402:13 16404:9 16410:15 16422:9 16433:3 16441:10 16452:18 16461:6 16476:19 16494:18 16507:16 16561:7 16588:8 recorded 16481:10 16580:10 records 16481:3 red 16570:9 refer 16458:2 16488:8 16489:4,7 16515:8 16526:23 16541:9 16569:24 reference 16417:6 16492:12,12,20,21 referenced 16424:19 references 16441:24 16442:2,14 referred 16403:24 16430:15 16456:19 16456:22 16458:10 16525:2 referring 16405:3 16435:9,12 16443:6 16455:13,18 16456:8 16456:10 16458:13 16458:14 16465:15 16469:3 16481:15 16489:6 16497:11 16535:19 16538:14 16554:24 16576:11 16583:9,17 16584:12 refined 16455:9,11 reformulate 16446:15 16448:19 16577:7 refusal 16425:19 refuse 16569:6 16571:11 refused 16476:15 16571:1,20 refuted 16516:16,19,23</p>	<p>regard 16406:15 16444:11 16445:4 16448:24 16477:11 16488:17 16493:24 16496:25 16497:22 16499:9 16504:14 16523:20 16526:8 16583:12 regarding 16580:14 regulation 16469:14 16519:6 regulations 16484:17 16549:12 reject 16518:8 rejected 16516:20 rejection 16516:20 relates 16425:17 16572:23 16573:2 relation 16447:7 16457:25 16485:13 16486:9 16503:8 16563:16 Relations 16437:6 16438:2 relatively 16417:10,11 relevance 16505:12 relevant 16445:4 16451:21 16454:5 16457:22 16467:12 16469:19 16505:5 16507:7,9 16542:7 16553:24 reluctance 16425:18 reluctant 16515:12 rely 16473:18 16520:10 relying 16478:17 remain 16472:12 16559:1,19,19 remained 16472:6 remaining 16559:14,15 remark 16412:8 remember 16406:6 16420:2 16423:22 16428:11 16429:1 16431:13 16442:17 16443:8 16447:2 16473:19 16475:8 16481:21 16485:11 16490:1,6,7,9,18 16493:14 16499:19 16499:23 16500:18 16501:14,22 16502:10,24 16503:20 16515:10 16515:13,14 16532:19 16534:20 16538:24 16543:9 16549:13 16560:24 16561:2 16563:15 16565:13 16572:19 16572:20 16574:3 16585:10 reminded 16543:1 removal 16577:22 16580:8,14 removed 16478:24</p>	<p>16479:3,3,15,22 16580:5 removing 16579:16 repeat 16402:11,17 16432:8 16447:24 16448:1 16464:6 16485:2 16509:4 16510:5 16532:8 repetition 16411:9 16480:21 replace 16501:16 16504:8 16580:5 Replacement 16580:6 report 16496:23 reported 16480:23 16522:6 16582:21 16583:13 represent 16427:21 16502:11,12 16505:6 16507:5 representative 16476:14,25 16477:4 16485:19 16486:24 representatives 16426:22 16427:9,13 16427:20 16428:5,22 16429:4,23 16487:1 representing 16419:15 Republic 16412:24 request 16403:13 16419:24 16426:17 16427:17 16431:23 16477:8,11 16568:3,4 requested 16553:18 requesting 16416:6 16417:2 requests 16420:21 16422:2 16428:9 require 16418:10,11 required 16418:12 16471:6 16524:7,13 16524:21 16526:24 requirement 16461:16 16514:5 requirements 16517:24 requires 16445:20 16460:8 requisitioned 16411:5 resolve 16459:7,18 resort 16535:13 16536:10,15 16538:6 16584:16,18 16585:13 16586:4 resources 16483:2,2 respect 16422:22 16429:25 16432:13 16443:19,20,20 16447:14 16489:4 16505:3,19 16514:4 16518:12 16529:12 16530:22 16540:21 16541:11 16542:20 16553:23 respond 16420:8 16492:4 16557:23 16558:16 16559:3</p>	<p>responded 16526:23 response 16418:13 16420:20 16421:10 16423:24 16432:5,11 16439:13 16477:7,10 16487:10 16492:23 16511:16,18 16532:24 16557:4,5,6 16558:14,25,25 16559:7 16562:4 16572:18 responsibilities 16412:12,16 16473:5 16518:1,3,4 responsibility 16405:1 16469:20 16486:5 16508:17 responsible 16469:25 16470:4 16483:1 16484:21,22 16492:2 16494:8 16508:16 16509:12 16519:7 16528:2 16555:25 16571:10 rest 16450:12 restriction 16590:19 rests 16450:1 16518:9 resulted 16525:24 results 16543:25 16544:4 resume 16537:17 16589:12 resumes 16402:2 16463:15,16 16507:25 16508:1 16539:13,14 16567:7 16567:8 retreated 16458:21 returned 16428:25 16435:5 16440:20,23 revenge 16576:17 16577:1,11 revisit 16508:11 re-examination 16542:2 rifles 16537:8 right 16402:15 16405:9 16405:15 16413:14 16417:17 16418:7,15 16420:7,17 16425:21 16426:23 16433:18 16436:23 16437:25 16438:3,11 16442:20 16444:9 16449:11 16457:13 16462:7 16466:6 16472:15 16479:10 16482:5,6 16500:5 16502:24 16504:24 16524:10 16527:6,18 16534:2,9 16540:19 16543:6,16 16544:24 16561:10 16561:18 16567:5 16569:1 16573:15 16576:1 16582:9 16585:23 16588:11</p>
--	--	--	--	---

16590:20 rights 16422:22 risk 16581:24 risky 16448:21 road 16551:13 16556:10,12 16562:17 16563:18 robbed 16549:20,21 rock 16429:24 role 16407:22 16420:1 16500:14 16572:8,14 16579:11,12 roles 16560:2 roll 16544:3 rolled 16543:21,21 16585:19 16587:7 rolling 16547:20 rollout 16545:1,2,8 16546:4,7 16547:11 16549:6,11,25 16550:1 root 16415:2,9 16416:2 16416:14 Roots 16413:17,17 16455:9,12,25 16456:10,11,13 16459:2 16513:19 round 16574:2 16590:7 rounded 16564:24 route 16453:13,14,22 16453:22 rubber 16537:9 rule 16413:16 16531:9 16540:25 ruled 16444:5 rules 16413:5 16414:4 16503:20 16540:1,20 16541:6 16574:4 16580:2 ruling 16445:10 rumours 16500:20,24 run 16561:5 running 16544:16 16564:15 rushing 16406:21 R12 16428:7	16492:8,12,18,21 16494:15 16500:16 16500:17 16502:7 16504:14 16508:19 16512:14 16532:24 16562:24,24 sat 16548:19 satisfactory 16590:6 Saturday 16473:20 16498:24,25 save 16402:13 16428:1 16445:14 16470:14 16471:10 saved 16566:4 saving 16559:11 16560:6 16582:3 saw 16406:19,20 16426:9,15 16466:13 16467:4,6,7,10,14,17 16467:18,19,20,20,22 16468:13 16469:2 16499:24 16518:23 16529:24 16530:11 16530:17,25 16531:2 16532:10,13,23 16533:1,2,9,10,15,22 16534:1,6 16535:2,11 16535:14 16536:1,1,8 16536:9 16537:7,9,9 16538:18,20,22 16546:14 16548:14 16584:9 says 16416:2 16419:8 16426:24 16427:1 16428:8 16431:17 16432:4,8 16435:13 16435:14 16443:1 16445:5,7,12 16447:24 16448:12 16448:13,21 16450:14 16452:23 16452:24 16459:5,16 16459:21 16467:19 16469:16,23 16470:3 16484:18,21 16489:12,16,25 16490:5 16491:15 16493:7 16497:7 16500:16 16517:22 16517:25 16518:10 16519:7,11 16522:11 16527:12 16546:13 16553:12 16558:3,13 16558:24 16561:15 16566:8 16571:9 16576:24 16583:20 say-so 16511:11 SC 16455:10 16476:19 16479:2 16512:3,6,9 16512:17 16514:22 16528:9,21,24 16539:23 16542:4 16553:17 16578:21 16578:23 16579:1 scale 16576:8 scare 16406:23	scared 16405:17 scaring 16405:13 16406:8 scene 16410:20 16465:20 16466:18 16467:1 16525:7,7,10 16525:19,23,24,25 16526:14,15,18,18 16527:3,12,13 16556:7 16577:22 16578:6,8,10,14 16579:5,6,17,18,21 16580:2,19 16585:24 16586:1 16587:13,20 Scorpion 16403:11 16404:11,22 16406:19 16407:11 16407:12,17,22 Scott 16413:15 16414:3 16414:11 16456:6 16480:22 16543:18 16546:11,21 16547:8 16547:9 16548:2 16557:3,13 16560:4 16561:11,15 16562:1 16566:6 16573:11 Scott's 16547:14 screen 16416:12 16488:12 16513:23 16520:10,17,24 16534:24 16548:21 second 16408:23 16428:18 16431:16 16450:2 16459:14 16480:4,7 16500:17 16540:6 16563:17 16571:8 secondary 16494:13 secondly 16526:22 16547:25 seconds 16535:10 second-last 16435:10 section 16444:18 16454:13 16461:20 16480:25 16509:5 16543:11 16548:11 16555:22 sector 16501:16 securities 16426:15 security 16415:9,15,20 16416:2,10,14 16483:10 16496:2 16501:9 seek 16521:4 16522:1 16524:14 16580:18 seeking 16523:11 seen 16421:8 16449:3 16466:20 16467:7,11 16467:18 16468:9,14 16468:21 16469:4 16491:22 16504:16 16505:23 16514:3,6 16518:23 16524:6,12 16530:20 16560:22 16580:8 sees 16537:3	self 16538:5 self-defence 16464:10 16468:3 16532:25 semantic 16438:17 send 16470:20 16471:3 16472:5,10,12 senior 16493:24 16502:18 16522:20 sense 16407:7 16456:13 16472:10 16479:22 16483:4 16504:21 16519:11 16538:4 16544:11 16560:7 16580:9 sensible 16411:14 sent 16438:19 sentence 16412:17 16458:20,24 16459:14,21 16521:14 16541:9,12 sentences 16506:20 sentiment 16558:12 separate 16501:23 16502:1 sequential 16547:16 16549:6 sequentially 16543:21 16546:3 16547:20 16550:25 serious 16471:22 16472:3 16490:20 16508:15 16531:16 16575:6 seriously 16508:21,24 service 16445:21 16458:12 16577:14 set 16528:10 16532:2 settlement 16563:2,5,7 16563:9,20,24 16566:13,24 16567:1 severe 16453:20 share 16446:11,13 shared 16491:25 shareholders 16490:3,4 16491:21 sharp-edged 16571:11 she's 16498:5 shoot 16460:22 shooters 16562:14 16564:7 shooting 16465:20 16466:10 16530:1 16532:14 16538:7 16550:19,23 16552:23 16553:8,14 16579:15 short 16414:10 16444:5 16447:5 16454:17 16455:5 16484:11 16487:11 16523:7 16545:3 16562:15 shorter 16545:10 16546:3 16565:20 shortly 16466:13 16492:4,6 16550:11 16553:8	short-circuit 16487:21 16571:7 shot 16556:9 16563:16 shots 16533:21,22 shouldn't 16448:9 16569:17 show 16406:15,23 16407:2,5,23 16442:20 16474:2 16478:23 16525:9 16537:7 16544:16,21 16546:17,18,19,20 showed 16468:24 16533:16 16538:22 16548:21 showing 16570:10 shown 16431:3 16487:10 16541:23 16559:12 16576:14 16576:15,24,24 16577:9 shows 16573:6 Shozi 16421:23 16422:8 16423:2 16476:19 16477:15 16483:12,22 16484:6 16484:7 16488:15,21 16489:3 side 16416:11 16420:11 16420:19 16551:25 16560:5 sidelined 16479:21 16480:13 16482:16 16508:20 16517:13 sides 16449:23 16551:24 sideways 16442:4 signed 16514:3 significance 16525:13 16525:15 significant 16435:22 16457:22 simple 16465:9 simply 16407:4 16438:4 16445:12 16465:6 16494:7 16509:25 16516:19 16530:24 16532:13 16538:5 16554:5 simulated 16575:14 simultaneous 16545:1 16545:9 16546:7 16547:11,15 simultaneously 16543:21 16544:5,14 16546:1,2 16547:18 single 16481:4 sir 16494:16 sit 16519:1 site 16501:8 sitting 16417:7 16436:13 16522:10 16548:1 situation 16407:6 16409:1 16410:1 16411:4 16417:11
S				
sacrosanct 16438:1,9 sacrosanctness 16438:13 saddled 16517:7 safe 16424:13 safety 16496:2 16555:25 16559:5 16580:10,13 sake 16404:8 16441:23 16444:8,25 16517:19 16547:5 16580:10 salaries 16428:7 SAPS 16403:14 16422:1 16428:10 16429:3 16446:5 16459:22 16486:13 16489:14,14,25 16490:19 16491:1				

<p>16420:4 16432:6,11 16441:17,20 16451:12 16452:12 16453:9,16,18,18 16459:6 16460:21 16462:1 16463:6 16473:16 16475:2,13 16482:25 16486:17 16490:13 16491:4,22 16495:11 16501:7 16502:9,24 16517:18 16519:4 16525:9 16529:1,10 16540:4 16544:15 16550:2 16557:24 16571:4,19 16571:22 16572:2 16574:8 16575:7,12 16581:1 situational 16526:5 situations 16454:6,7,11 16574:17 six 16443:8 slide 16416:7 16429:6 16435:10,16 16459:3 16459:15 16558:7,8 16558:24 16559:3 16566:7,7,17,18 16569:25 16570:1,4,8 16572:23 16573:2 slides 16559:12 16570:19 slightly 16448:13 16566:12 small 16558:24 snipers 16405:13 16406:7 somebody 16419:15 16491:6 16497:15 16519:15 16553:9 16555:23 16581:12 16583:20 songs 16477:23 soon 16491:16 16498:7 16586:9 sorry 16403:12 16417:3,21,22 16418:8 16431:8 16432:22 16433:2 16435:11,14 16440:2 16442:22 16443:12 16452:16 16455:10 16461:8,13 16462:22 16464:2 16465:13 16467:15 16471:1 16479:2,5 16480:20 16485:2 16486:20 16491:13 16492:22 16496:18 16503:7,12 16504:2 16508:11,11 16508:22 16511:15 16512:5 16513:12 16514:22 16524:5 16525:5 16526:12,24 16528:9,21 16535:16 16536:25 16538:21 16553:4 16558:2,3</p>	<p>16561:5,5,19 16565:9 16566:16,19 16569:9 16569:24 16578:12 16578:21,22 16582:9 16582:11 sort 16443:5 16495:20 16496:5 16498:4,18 16500:1 16516:11 16575:3 sorted 16499:12,17 16541:19 sought 16520:2,4 soundboard 16521:2 sounds 16408:12 16556:1 South 16412:25 16443:24 16458:11 16459:5 16461:20 so-called 16407:23 16484:24 16509:16 16529:25 16530:25 16570:24 16571:5,23 space 16545:3 speak 16404:25 16419:11,16 16422:7 16422:10 16423:21 16424:10 16425:10 16425:10 16475:25 16478:7,13 16481:8 16541:21 16554:2 16565:17 speaking 16431:17 16438:10 16476:3,5 16476:12,12,13 16478:7 16489:16 16490:25 16499:5 16539:9 16540:24 16575:16 16584:11 speaks 16546:7 specialised 16408:24 specific 16469:24 16479:9 16484:19 16585:5 specifically 16414:1 16442:6 speculate 16471:15,17 16517:10 speculation 16471:18 16471:23 16492:25 16551:17 16553:10 16577:19 16585:25 16586:18 speech 16544:25 spells 16518:1 spend 16442:11,11 spent 16583:23 spoke 16424:20 16425:3 16464:4 16471:5 16476:10 16477:22 16490:4,10 16493:4 16499:20 16546:16 16564:10 16575:16 spoken 16475:20 16480:21 16564:7 16573:18</p>	<p>spurned 16514:1 SS2 16469:14 stage 16406:20 16407:3 16407:3,4,7,18 16419:12 16425:2,3 16427:10,22 16447:19 16448:7,16 16448:20,21 16449:9 16451:15 16463:14 16467:13 16485:10 16486:12 16494:11 16494:20 16496:9 16499:9 16507:20 16513:4 16515:9,12 16515:16 16516:9 16527:3 16570:4 16573:16,19,20,25 16580:5 16584:15 16585:5,11,18 16586:4,23 16587:7 stakeholders 16574:8 stance 16422:23 16423:9 16429:23 stand 16515:3 16542:5 16544:13 16565:23 16581:7 standard 16577:12 standards 16574:6 standing 16412:19 16413:2 16414:2,5 16443:10 16469:10 16517:24 16519:11 16550:14,25 16573:17 stands 16516:23 start 16415:1 16443:16 16469:11 16500:15 16533:14 16569:3 16580:7 starting 16419:1 state 16423:1 16462:4 16492:4,5 16525:5,6 16526:7 16572:11 stated 16428:5,18 16434:19 16435:3 16437:19 16455:8 16460:13 16471:13 statement 16413:19 16426:22 16431:11 16435:20 16456:15 16458:11 16465:3 16479:6 16511:25 16513:15,16,18,19 16514:2,23 16515:9 16516:2,6 16519:19 16519:20 16520:6,17 16520:18,25 16525:20 16527:10 16527:12 16537:17 16539:22 16540:5 16542:6 16558:19 16567:25 16583:22 statements 16460:6 16494:25 16507:18 16512:13,14 16540:2 16545:22 16567:13</p>	<p>16567:20,23 16568:17 16588:19 statute 16486:7 stayed 16472:23 16570:17 staying 16570:14 step 16436:10 steps 16423:15 STF 16404:22,23 16408:2,4,6,15 16409:3,8,11,15,16 16410:4,5,20 16411:6 16485:4 16557:14 16571:9 16572:4,8 16573:17 stick 16450:9 stood 16548:14,20 stop 16450:9 16555:16 stopping 16461:25 strange 16494:9 16507:11 strategy 16575:5 stray 16590:20 strengthened 16504:20 stresses 16577:8 strict 16579:25 strictly 16402:7 16571:3 strike 16403:5 16430:13 16436:17 16436:25,25 16437:4 16437:4,15 16438:16 16439:19 16452:1 strikers 16405:15,16,18 16406:9 16407:5,20 16417:23 16418:2,10 16418:13 16419:1,3,9 16419:10,18 16420:3 16420:13,21 16421:14 16422:3,7 16422:11 16423:4 16424:19 16425:19 16425:20 16427:2,5 16427:12,16 16431:25 16433:10 16434:13 16466:3 16467:2 16500:4 16534:1,6,10 16544:13,20 16550:21 16551:11 16553:13 16554:10 16555:4,16 16556:8 16562:16 16563:2 16564:14,16,23 16565:1,21 16569:6 16569:12,18 16570:10,25 striking 16428:19 16432:7 strong 16490:8 structure 16427:10 16446:3 16485:24 16529:21 structures 16422:19,20 16422:22 16423:10 16427:4,7 16474:4</p>	<p>studied 16442:3 study 16514:6,11 16515:24 16516:12 16588:19 stun 16535:19 16538:1 subject 16438:13 16444:3 16488:23 16515:1 16573:13 16589:22 submit 16403:18 16540:10 subsequent 16423:15 16424:18 16466:20 subsequently 16425:9 16466:17,22,23 16532:10 16546:20 16546:22 16567:15 16579:4 substantial 16438:13 16439:16 succeeded 16434:3 success 16585:6,9,19 16587:7 successful 16516:20 16586:22 successively 16428:15 suddenly 16474:13 sufficient 16553:20 16557:23 16570:1 suggest 16464:5 16542:20 16590:14 suggested 16505:7 16512:11 16515:1 16517:13 16567:12 suggesting 16504:17 16542:17 16557:22 suggestion 16454:3 16504:6,9 suits 16411:14 summary 16479:10 16548:25 Sunday 16498:24,25 16576:12 superior 16408:14 16486:8 supervision 16579:25 supplementary 16520:18 16589:8 support 16428:2 supporting 16502:2 suppose 16407:7 16436:7 16477:21 16488:11 16489:13 supposed 16545:25 16547:21 16555:10 16556:22,23 16579:21 sure 16402:21 16405:17 16406:24 16407:1 16412:16 16413:11 16415:25 16420:6,16 16421:6 16437:10,13,21 16442:4 16446:22 16451:19 16455:2 16460:12 16464:20</p>
---	---	---	--	--

201 16444:18
2012 16513:17
2013 16402:1
250 16469:14
262 16412:20 16413:16
 16413:24 16414:2,5,6
 16475:17 16517:25
27 16423:25
28 16424:4 16520:8,11
 16520:14,18,18
282 16459:17
283 16459:15,21
29 16489:12 16528:6

3

3 16406:20 16407:4,18
 16413:1 16432:3
 16447:19 16448:7,16
 16448:21 16449:9
 16475:9,14 16485:10
 16494:20 16528:10
 16551:9 16562:8
 16573:19,20,25
 16584:15 16585:5,11
 16585:18 16586:23
 16587:7
3.3 16432:2
3.7 16431:11,17
34 16575:25 16576:2
39 16566:18

4

4 16413:2 16431:11
 16543:15 16588:10

5

5 16429:5
5.2.8 16526:9
500 16428:7
51 16519:20,21,23
 16520:25 16523:9
 16526:24
52 16526:23
55 16404:12
56 16525:2,5 16526:13
 16528:5

6

6am 16416:13
62 16513:11,13

7

72 16558:7,8

8

8 16469:16 16500:13,16
 16508:7 16517:25,25
80 16572:23

9

9 16426:24 16489:5,5
 16508:7 16589:7
 16590:23
9(1) 16470:3
9.1 16426:24

