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TRANSCRIPTION OF THE

COMMISSION OF INQUIRY

MARIKANA

BEFORE TRIBUNAL

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

HELD ON

DAY 204

18 MARCH 2014

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<p style="text-align: right;">Page 25005</p> <p>1 [PROCEEDINGS ON 18 FEBRUARY 2014] 2 [09:13] CHAIRPERSON: The Commission resumes. Ms 3 Barnes, I understand your learned leader has been called 4 away to higher business and you are going to deputise for 5 him. Is that correct? 6 MS BARNES: Yes, that's right, Chair. 7 CHAIRPERSON: Let me just find your 8 heads. There's a very interesting article which I saw had 9 been referred to with approval in Australia, written by one 10 our – 11 MS BARNES: The article by Gilbert 12 Barcus, Chair? 13 CHAIRPERSON: One of your colleagues. 14 MS BARNES: Yes. Yes, we have made 15 copies of that. You'll see that we refer to it in our 16 heads. We've also made copies, Chair, of the three 17 international cases that we refer to in our heads. Those I 18 believe have been made available to you early this morning. 19 CHAIRPERSON: Good. 20 MS BARNES: Chair, I will be – 21 CHAIRPERSON: Are you arguing from the 22 heads? Are there passages in the heads from which – the 23 international section for example is dealt with on page 14, 24 paragraphs 43 and following, but I'm not sure which 25 portions of the heads you're going to be referring to</p>	<p style="text-align: right;">Page 25007</p> <p>1 inaudible]. 2 MS BARNES: The general does not derogate 3 from the specific. It's the same principle, and of course 4 it applies – 5 CHAIRPERSON: [Microphone off, inaudible] 6 MS BARNES: The case we'd like to refer 7 the Commission to then is Sasol Synthetic Fuels (Pty) 8 Limited & Others versus Lambert & Others, 2002 (2) SA 21 9 (SCA) – 10 CHAIRPERSON: 2002? 11 MS BARNES: 2002 (2) SA 21 (SCA). The 12 relevant paragraph is at 291 to 30C, and the Court says the 13 following, "When the legislature has given attention to a 14 separate subject and made provision for it, the presumption 15 is that a subsequent general enactment is not intended to 16 interfere with the special provision unless it manifests 17 that intention very clearly." So we submit that that is 18 the principle that applies in the matter at hand and it 19 determines that section 4 of the Commissions Act is the 20 applicable provision in this case. 21 If I might turn then to the question of harm, and 22 here, Chair, we endorse the submissions that were made 23 yesterday by Mr Brickhill that the SAPS bears the onus in 24 this application to establish that there's a reasonable 25 possibility of harm occurring to Mr X, and of course that</p>
<p style="text-align: right;">Page 25006</p> <p>1 because if your going to say things that aren't in the 2 heads I'll have to write them down. That's – 3 MS BARNES: Yes, Chair, what I propose to 4 do is deal essentially with section D of our heads of 5 argument, which is the section that has not yet been dealt 6 with. That is the section in which we make the argument 7 that the Commission ought not to exercise its discretion in 8 favour of granting the SAPS application, assuming that the 9 Commission has the powers to do so, which of course we 10 deny. 11 CHAIRPERSON: Yes, page 11 and following. 12 MS BARNES: That's right, Chair, but 13 before I deal with that in some detail, if I might just at 14 the outset just do two things, firstly just refer the 15 Commission to an authority on the powers question and then 16 secondly if I could just make one point in relation to the 17 harm question that has not yet been made by my colleagues. 18 So the authority that I'd like to refer the 19 Commission to, it would slot in on page 7, paragraph 19 of 20 our heads. That's where we deal with the principle of 21 statutory interpretation, which we say applies in this 22 case. We point out, Chair, that the principle is also 23 sometimes referred to as generalia specialibus non 24 derogant, in other words specialibus – 25 CHAIRPERSON: [Microphone off,</p>	<p style="text-align: right;">Page 25008</p> <p>1 there's a causal connection between the act of testifying 2 in the open Commission and the possibility of harm. It 3 does not, there's no onus on the opposing parties in that 4 regard. It is not our onus to discharge. It – 5 CHAIRPERSON: I doubt whether the SAPS 6 would contend the contrary. I mean they accept, they're 7 asking us to make an order in their favour and they must 8 justify it. I didn't detect any suggestion that you must 9 show why I shouldn't make the order. That's right, Mr 10 Semanya, isn't it? 11 MS BARNES: Yes, we simply make the point 12 in relation to the, in response to the evidence leaders' 13 submission that the opposing parties allegedly did not 14 dispute the fact that there was a possibility of harm. 15 So – 16 CHAIRPERSON: Yes, well, that of course 17 is a different proposition. That doesn't mean you bear an 18 onus, but if in fact you don't dispute it then it could be 19 accepted that you don't quarrel with the contention that 20 there would be some harm, but that's not an onus point, 21 that's something different. 22 MS BARNES: Well Chair, we have disputed 23 it. Mr Brickhill made that point yesterday as well, so I 24 don't need to repeat that. We have disputed it, but I 25 simply make the point that the onus is on SAPS in this</p>

Page 25009

1 regard.
 2 Chair, if I might then turn to, well draw
 3 specific attention on the question of, this question of the
 4 harm to paragraphs 29 to 31 of our heads of argument.
 5 Chair, we quote in paragraph 29 of our heads – it's on page
 6 10 – we quote from the replying affidavit filed by Mr
 7 Pretorius on behalf of SAPS, which says the following, "I
 8 put it no higher than it is a reasonable apprehension for
 9 one such as Mr X, or members of his family, that harm may
 10 befall them if the limited protection sought in terms of
 11 the application is not granted." So that is the allegation
 12 that is made. We note that the allegation is made for one
 13 such as Mr X, not even specifically in relation to Mr X
 14 himself.
 15 We make the further point in paragraph 30 of our
 16 heads that says no direct evidence from Mr X himself as to
 17 the fear that he allegedly harbours. There's also no
 18 detail provided in the application at all as to the basis
 19 of such fear as is allegedly harboured, and without that
 20 the causal connection that is required we submit has simply
 21 not been established.
 22 And then, Chair, on the question of harm we
 23 submit with respect that in addition to the test which I
 24 think was essentially agreed upon yesterday, the test set
 25 out in S versus Leepile, there's another important but

Page 25010

1 related, or important and related standard that applies and
 2 it's the standard of necessity. It's the principle that in
 3 an application such as this relief which infringes upon the
 4 publicity of proceedings such as this can only be granted
 5 if it is necessary, not merely convenient.
 6 CHAIRPERSON: That is dealt with in the
 7 Australian case, the BUSB case to which my attention was
 8 drawn. There's some quite interesting dicta by the
 9 Australian judges on that point, going back to a judgment
 10 of Chief Baron Pollock in the 19th century I think, but one
 11 of the problems of course that you would have is the
 12 enabling section as far as, or empowering section as far as
 13 in-camera aspects of the matter talks about necessary or
 14 desirable, so that I'm not sure that, certainly as far as
 15 the in-camera part is concerned, I understand that you may
 16 want to argue the video link is on a different basis, but
 17 certainly the in-camera part, there the test in the
 18 Commissions Act is simply desirability. I wasn't saying
 19 that by way of endeavouring to bring this debate to an end.
 20 I mean are there authorities or particular aspects you wish
 21 to bring to my attention -
 22 MS BARNES: Yes -
 23 CHAIRPERSON: - of relevance with regard
 24 to the standard of necessity. I have a bit of conceptual
 25 difficulty with that. You know it's like the argument that

Page 25011

1 the person's is only slightly pregnant. I mean, you know,
 2 you're pregnant or not pregnant. Now something is
 3 necessary or it isn't necessary, but the Australians, and I
 4 think the English references in the judgment seem to think
 5 there are standards of necessity and that may be right, but
 6 I've got to get my mind around that. Perhaps you can help
 7 me.
 8 MS BARNES: Well, Chair, we do refer in
 9 our heads on page 9, paragraph 26, to the Scott case and
 10 the Scott case deals with this standard of necessity in
 11 this context and -
 12 CHAIRPERSON: That's a case that's often
 13 been cited with approval in South Africa.
 14 MS BARNES: That's correct, Chair, and
 15 this particular passage, which I'll refer to now, was cited
 16 with approval by Ackerman in the S versus Leepile case. I
 17 believe that was number 4.
 18 CHAIRPERSON: He was referred to - I'm
 19 sure he would have found it himself even if we hadn't
 20 referred him to it.
 21 MS BARNES: Chair, the Scott versus Scott
 22 reference, page 9, paragraph 26 of our heads is, or if I
 23 might start here, "The burden lies on those seeking to
 24 displace its application, that is the application of
 25 publicity in the particular case to make out that the

Page 25012

1 ordinary rule must of necessity be superseded by this
 2 paramount consideration. The question is by no means one
 3 which consistently with the spirit of our jurisprudence can
 4 be dealt with by judges as resting in his mere discretion
 5 as to what is expedient. The latter must treat it as one
 6 of principle and as turning not on convenience but on
 7 necessity." As we have said, Chair, that's been quoted
 8 with approval in our courts.
 9 We also refer, Chair, to the international law,
 10 and I'll come to that -
 11 CHAIRPERSON: I'm sorry to interrupt you.
 12 Just before you move on, were you given a copy of the
 13 judgment in the BUSB case to which Ms Pillay referred?
 14 Well, on -
 15 MS BARNES: We were not, Chair.
 16 CHAIRPERSON: Well then in order to
 17 enable you to help me I'd better lend you my copy, but what
 18 she gave me was a bundle with a number of Australian cases
 19 from the High Court which are referred to in the BUSB case
 20 and at the end of the bundle is a judgment of the Court of
 21 Criminal Appeal in the New South Wales, BUSB versus The
 22 Queen and at page 10 of the - it's a report downloaded from
 23 the internet, page 10 of 19 there's a section on the
 24 implied power, the concept of necessity, and so forth, and
 25 there's a reference to a dictum of Chief Baron Pollock in

<p style="text-align: right;">Page 25013</p> <p>1 the Pelechowski case, which is one of the leading cases in 2 the High Court of Australia, where reference is made to a 3 judgment – oh no, you've got mine – the Attorney-General, I 4 must give you an opportunity to find the page. Mr Gotz 5 will act as your junior for these purposes. At the end is 6 the BUSB case. You'll find BUSB in the top left-hand 7 corner, indicating what you're looking for, and at page 10 8 of 19. Now you'll see on that page there are a number of 9 numbered paragraphs and in part of paragraph 30 is a 10 quotation from the Pelechowski case, "The term necessary in 11 such a setting as this is to be understood in the sense 12 given it by Pollock CB in Attorney-General versus Walker, 13 namely as identifying a power to make orders which are 14 reasonably required or legally ancillary to the 15 accomplishment of the specific remedies for enforcement 16 provided in Division 4 of Part 3 of the District Court Act. 17 In this setting the term 'necessary' does not have the 18 meaning of essential. Rather it is to be subjected to the 19 touchstone of reasonableness." 20 And then the dictum by, I think that's the 21 Australian way of putting it, the dictum by Pollock CB is 22 then given in para 31. "The word 'necessary' does not mean 23 absolutely necessary but reasonably necessary with 24 reference to circumstances of the case," and then in 32 25 there's a passage from which I think you may derive some</p>	<p style="text-align: right;">Page 25015</p> <p>1 section would have been prior to 1996, presumably '94 - as 2 far as I can remember there was an equivalent provision in 3 the interim constitution - one is obliged to interpret it 4 afresh in the light of the Constitution, and you're not 5 interested so much in what was the intention of the 6 legislature in 1947, but interpreting it through, as has 7 been put, through the prism of the Constitution, and I 8 think section 39(2) applies. That's the point Ms Pillay 9 made and I doubt very much if the SAPS will contend to the 10 contrary. So you're obviously on common ground as it were 11 in regard to this submission. So you say the 12 interpretation must be in accordance with our common law 13 and especially, I take it, the Constitution. 14 MS BARNES: Indeed, Chair. Section 34 we 15 would submit demands it, demands that a restrictive 16 interpretation be given to section 4 of the Commissions 17 Act. That would require necessity and not merely 18 desirability. And then – 19 CHAIRPERSON: It's difficult to interpret 20 a statute by effectively deleting two words, which is what 21 you're arguing for. The more sophisticated argument, and 22 I'm not being unkind when I put it to you but is really 23 that I haven't got the power to strike out those words, but 24 another court – a court, not another court, a court might 25 do that if this case were taken further, and it will be</p>
<p style="text-align: right;">Page 25014</p> <p>1 comfort, "However, a test of necessity cannot be stretched 2 to encompass what is merely desirable or useful," and then 3 it goes on. 4 Anyway, that's the passage which I think is 5 relevant for you to deal with. I know it's a bit unfair 6 because you've just seen it the first time now. You were 7 going to deal with the topic, so hopefully you can assist 8 me in this regard. 9 MS BARNES: Yes, thank you, Chair. We 10 would make two submissions. The first is that our law has 11 in Leepile endorsed the necessity requirement as set out in 12 Scott. The second is that given that section 34 of the 13 Constitution is implicated in this matter it clearly 14 applies to Commissions generally. It applies to the 15 Marikana Commission specifically, and given that the relief 16 sought by SAPS infringes on what is guaranteed in terms of 17 that section, the section 4 of the Commissions Act must be 18 restrictively interpreted to, in a manner where the 19 standard is one of necessity and not merely one of 20 desirability. 21 So we would submit that such an interpretation 22 would be in accordance with our common law, and would also 23 give effect to the Bill of Rights in our Constitution. 24 CHAIRPERSON: I thought Ms Pillay made a 25 valid point there, that whatever the interpretation of that</p>	<p style="text-align: right;">Page 25016</p> <p>1 sensible for me to bear that in mind in exercising a 2 discretion I have or deciding whether I should exercise the 3 discretion, and that's really what you're saying, isn't it? 4 MS BARNES: Indeed, that is precisely our 5 submission, Chair. 6 CHAIRPERSON: Because I mean I can't 7 interpret it by saying I interpret it by cutting out the 8 words "or desire," because that with respect is - 9 MS BARNES: No, Chair – 10 CHAIRPERSON: - the kind of argument that 11 might have commended itself to Lewis Carroll, but it 12 doesn't commend itself to – 13 MS BARNES: Chair, I wasn't with respect 14 suggesting that any word be struck out or anything like 15 that. I was simply suggesting that, or submitting that the 16 section should be interpreted in a manner that would accord 17 with section 34 of the Constitution. 18 So Chair, we would submit that – 19 CHAIRPERSON: Sorry, sorry, forgive me 20 for a moment, my attention is being drawn to something. 21 Yes, please proceed. My attention has been drawn to a 22 point that I should put to the representative of SAPS when 23 they reply. 24 MS BARNES: So Chair, we would submit 25 that insofar as the SAPS deal in their application with</p>

<p style="text-align: right;">Page 25017</p> <p>1 questions of the cost and the difficulty of securing Mr X's 2 presence at this venue, and that those are considerations 3 of convenience and not of necessity, and so we would submit 4 that –</p> <p>5 CHAIRPERSON: [Microphone off, inaudible] 6 MS BARNES: And accordingly, Chair, we 7 would submit that those factors are not strictly relevant 8 or germane to the determination that the Commission has to 9 make.</p> <p>10 [09:32] So we would submit then that the SAPS have failed 11 to make out a case on two scores in terms of both the 12 standards that they're required to meet, the first being 13 that they need to show a reasonable possibility of harm and 14 a causal connection between testifying in this Commission 15 in the ordinary course and that harm, that's the first 16 standard that they failed to meet, and the second standard 17 we submit that they failed to meet is that of necessity.</p> <p>18 If I might then, Chair, move to deal with section 19 D of our heads of argument, and here, Chair, we submit that 20 on the assumption that the Commission does in fact have the 21 power to grant the relief sought there are a number of 22 separate considerations that militate against the granting 23 of that relief. One of those, Chair, relates of course to 24 section 34 of the Constitution itself and in that regard we 25 endorse fully the submissions that have been made by Mr</p>	<p style="text-align: right;">Page 25019</p> <p>1 that Wigmore gives for requiring publicity, we refer to 2 those in paragraph 22 of our heads, if I might just refer 3 to that. That's page 8. Wigmore gives three further 4 reasons for requiring publicity, first, "All those involved 5 in the administration of justice are moved to a strict 6 conscientiousness in the performance of duty when acting 7 under the public gaze, since in all experience secret 8 tribunals have exhibited abuses which have been wanting in 9 courts whose procedure was public." Secondly –</p> <p>10 CHAIRPERSON: [Microphone off, inaudible] 11 I'm not sure that that's a factor which operates very 12 powerfully here because what is envisaged is the press, who 13 in a sense are the representatives of the public, would be 14 here. I don't know whether the proceedings will be 15 televised. They used to be on YouTube but presumably it 16 was thought that it wasn't necessary anymore, there were 17 better things to exhibit on YouTube so we're not on YouTube 18 anymore, but they may well be televised. But anyway, the 19 press would be here and so any temptation I might have to 20 misbehave is likely to be counteracted by the presence of 21 the police and the practitioners and everybody else, so I 22 understand if this is like the star chamber, a totally 23 closed room and no-one knows what's going on, people go in 24 as accused and come out as convicted people, that will be 25 different. I don't know that this factor, with respect,</p>
<p style="text-align: right;">Page 25018</p> <p>1 Brickhill.</p> <p>2 We deal in our heads with three remaining sets of 3 considerations, certain common law principles that are 4 applicable, with the rights that both the victims and the 5 community have in relation to the proceedings of this 6 Commission, and then finally we deal with international 7 law. There of course we say, Chair, simply that 8 international law may be used as an interpretive guide by 9 this Commission in exercising its discretion. We say no 10 more than that in relation to the international law.</p> <p>11 We deal with the common law principles on page 12 12 from paragraph 35 of our heads and really our submission 13 under this heading is that there are a number of extremely 14 important advantages that are recognised to flow from 15 proceedings being held both in public and from witnesses 16 appearing in person.</p> <p>17 One of those advantages is the truthfulness and 18 completeness of evidence itself, and that is a factor that 19 the Chair referred to yesterday and quoted Wigmore in that 20 regard. We in fact refer to the same quote from Wigmore in 21 our heads. That appears a little bit earlier on in our 22 heads on page 8, paragraph 21, and that's really the point 23 that the publicity of proceedings tends to enhance the 24 quality of the evidence that is given.</p> <p>25 If we go on to some of the additional reasons</p>	<p style="text-align: right;">Page 25020</p> <p>1 carries much weight [cellphone disturbance].</p> <p>2 Now I'm going to give the person concerned five 3 seconds to turn that thing off, otherwise I'm going to ask 4 him to leave. Alright, let's carry on. Let's hope it's 5 been turned off so I don't have to do what I was 6 threatening to do.</p> <p>7 MS BARNES: Yes, Chair, we merely submit 8 that that's a general factor, a factor in general terms in 9 favour of publicity, but not that there would be – we don't 10 suggest that there would be a particular risk in that 11 regard in this case –</p> <p>12 CHAIRPERSON: I'm sorry to interrupt you. 13 There would be a measure of publicity which would probably 14 be adequate enough to achieve that purpose. I understand 15 the other points you make, which are on a slightly 16 different footing. But anyway, it is a factor, as you say, 17 a general factor which one should bear in mind at all 18 times.</p> <p>19 MS BARNES: And perhaps the second two 20 factors given by Wigmore over the page at the top of page 9 21 are perhaps more compelling in the circumstances of this 22 case. This is that persons actually, or factor 2 that he 23 gives, "Persons actually or potentially affected by 24 litigation have a right to be present for the purpose of 25 hearing what is going on." And finally, "Public attendance</p>

1 secures a strong confidence in judicial remedies which
2 could never be inspired by a system of secrecy." So those
3 are the general advantages to publicity which must be taken
4 account of, we submit.

5 We also quote Wigmore when we deal with the
6 matter of the witness appearing in person. That we deal
7 with on page 13, paragraph 37 of our heads, and Wigmore
8 describes this in the following terms, he says, "The main
9 and essential purpose of confrontation is to secure for the
10 opponent the opportunity of cross-examination. The
11 opponent demands confrontation not for the idle purpose of
12 gazing upon the witness or of being gazed upon by him, but
13 for the purpose of cross-examination which cannot be had
14 except by the direct and personal putting of questions and
15 obtaining of immediate answers."

16 CHAIRPERSON: But wouldn't that happen
17 here? If he was at some other venue but we could see him
18 on the screen and counsel here sees him, asks him a
19 question and gets, asks the question directly and
20 personally, not through an intermediary or anything of that
21 kind, and immediate answers are obtained, the witness
22 doesn't get an opportunity to go away and get coaching from
23 someone on what the answer should be, so surely that
24 purpose will be achieved. It's not intended by the police
25 to ask us to abandon that particular safeguard. That must

1 say.

2 MS BARNES: Well Chair, the reason we
3 raise it, with respect, is that some of us who have been
4 involved in matters in the past that have involved cross-
5 examining via video link have found it to be entirely
6 unsatisfactory. It has been a lot like a bad Skype
7 connection where one has a small image of the witness,
8 which is rather fuzzy, and that's all that one has to deal
9 with. So I'm not sure what –

10 CHAIRPERSON: Are we going to have a
11 small photo image in this case, Mr Semenya?

12 MR SEMENYA SC: Crystal clear, I'm told,
13 Chair.

14 CHAIRPERSON: Fairly big? Larger than
15 life-size?

16 MR SEMENYA SC: Larger than life-size,
17 Chair. It will be on the screen.

18 CHAIRPERSON: Well, if that doesn't
19 happen you can – if I grant the order, and I still haven't
20 made up my mind, I have to consider everything, but if I do
21 you obviously have the right to come again and complain if
22 the quality of the picture was such that there was a
23 serious disadvantage. But anyway, if of course you succeed
24 in your contention that the order shouldn't be granted then
25 that point won't arise.

1 be so surely?

2 MS BARNES: Well, Chair, I think there
3 are two responses to that. The first is that the exchange
4 is not as direct as it would be in a live adversarial
5 exchange. It is muted to some extent by the fact that one
6 is dealing with a witness through an electronic medium.

7 The other point, Chair, relates to the concern we
8 raise about demeanour, and the reason we raise this, we say
9 that using this mechanism will make it very difficult to
10 assess the witness's demeanour –

11 CHAIRPERSON: But is that so? If you
12 engage in a Skype conversation with somebody can you not
13 assess the, say a relative overseas who is talking to you
14 on Skype, can't you see the person's demeanour on Skype?

15 MS BARNES: It's very difficult, we would
16 submit, to assess demeanour over a bad Skype connection, or
17 even an average Skype connection, we would submit, which –

18 CHAIRPERSON: Well, I don't think it's
19 suggested that this is going to be a Skype connection we're
20 going to have. This is going to be a video connection. I
21 mean sometimes you can see the expressions of sportsmen far
22 better on a TV screen than you can from the stands or even
23 the front row at a sports stadium. You know, the camera is
24 quite close sometimes to the person concerned. So I'm not
25 sure that's one of your better points, Ms Barnes, if I may

1 MS BARNES: Yes. Yes, thank you, Chair.
2 So it's a practical concern that we raise and so there's a
3 principled concern in relation to the cross-examination
4 being indirect by virtue of the medium, but there's also a
5 practical consideration that we raise in relation to video
6 links. Perhaps as the Chair has indicated, SAPS might be
7 able to obviate that, but we do raise it as a serious
8 practical concern that some of us have experienced in the
9 past.

10 Chair, that deals then with our submission in
11 relation to the common law. We then deal on page 14 of our
12 heads from paragraph 41 with the question of rights and we
13 make the point that the parties in this Commission have
14 rights, particularly where they have been implicated in the
15 evidence of Mr X it's quite clear that all the parties on
16 whose behalf these heads have been filed, the injured and
17 arrested persons, the families and AMCU are implicated in
18 the evidence of Mr X. We submit that they accordingly are
19 entitled to face him and to challenge those accusations
20 fully and effectively through their lawyers –

21 CHAIRPERSON: The families for whom you
22 appear might be in a slightly weaker position as far as
23 that's concerned because the allegations aren't against
24 them personally but against their deceased breadwinner.
25 But clearly I can understand why from a human emotional

<p style="text-align: right;">Page 25025</p> <p>1 point of view they would wish to see the evidence being 2 given, but still their position isn't as strong as some of 3 the injured and arrested persons who might be personally 4 implicated, and as Mr Mathunjwa who apparently is going to 5 be, as far as we see from the latest statement is also 6 going to be directly accused of having been present, having 7 encouraged the strikers on the night before the killings. 8 MS BARNES: Yes, Chair, that is true. 9 There may of course though still be a reputational impact 10 on the family as a whole. 11 CHAIRPERSON: I understand they have an 12 interest. I can understand the reputational aspect of it 13 mustn't be made light of, but all I'm saying to you is the 14 other people are in a stronger position perhaps because 15 they will be directly involved and there will be 16 allegations against them. In the case of Mr Mathunjwa 17 obviously I take it not of criminal conduct, but certainly 18 of questionable behaviour, to put it gently. 19 MS BARNES: Yes, we take that point, 20 Chair. Chair, then in paragraph 42 of our heads we make 21 the point that – and I don't think it's a controversial 22 point – 23 CHAIRPERSON: I'm sorry, I said you were 24 appearing for the families. You're sort of appearing on 25 behalf of the families amongst others at the moment, but</p>	<p style="text-align: right;">Page 25027</p> <p>1 It doesn't deal with commissions as far as I can see. I 2 understand the argument that based on the Du Preez case 3 which I remember well because the judgment I was a party to 4 was overturned in that case, but the – although not on that 5 point, but we've got South African authority applying the 6 open court publicity principle to commissions. All I'm 7 saying to you is it seems the European Convention doesn't 8 go that far and the passage you quote deals with the 9 situation in litigation, civil or criminal. 10 MS BARNES: It does deal with litigation, 11 Chair, but we would submit that regard may still be had to 12 these clauses in these international instruments and the 13 way that they deal with the requirement of publicity. 14 CHAIRPERSON: I see you very kindly 15 provided me with copies of the judgments of the European 16 Court, is it? The Strasbourg Court, I take it. 17 MS BARNES: We do. We have provided 18 copies. Chair, we set out the principles that have emerged 19 through those cases on page 16 of our heads. If I might 20 just provide a reference in paragraph 45.3 of our heads 21 which is missing, the reference there should be to the case 22 of Kostovski at paragraph 42 – 23 CHAIRPERSON: That is a case also cited 24 in footnote 16, but there you refer to paragraph 41, this 25 is now 42. So I'll just write Kostovski para – have you</p>
<p style="text-align: right;">Page 25026</p> <p>1 your client is actually AMCU. 2 MS BARNES: Yes. 3 CHAIRPERSON: So Mr Mathunjwa is directly 4 in your area of concern. 5 MS BARNES: Yes, that's quite correct, 6 Chair. So in paragraph 42 of our heads, Chair, we make the 7 point that it has been recognised in our law – and I don't 8 think this can be controversial – that the whole process of 9 a commission of inquiry is potentially prejudicial to a 10 person's rights and we cite authorities in that regard in 11 footnote 14 of our heads. One of those is the recent 12 judgment in the Magidiwana matter. 13 CHAIRPERSON: [Microphone off, inaudible] 14 a judgment of the Appeal Court which isn't on appeal, which 15 stands as the law of South Africa. 16 MS BARNES: Yes. Chair, then finally we 17 draw attention to some international law in the last 18 section of our heads of argument and we refer there to 19 article 6 of the European Convention on Human Rights. We 20 also make the point that the requirement of publicity and 21 the circumstances in which publicity can be limited 22 provisionally – 23 CHAIRPERSON: [Microphone off, inaudible] 24 interrupt you. Section 6 of the European Convention 25 appears to deal only with litigation, civil or criminal.</p>	<p style="text-align: right;">Page 25028</p> <p>1 given copies of these judgments to your learned friends for 2 SAPS? 3 MS BARNES: I believe we have, yes. 4 CHAIRPERSON: I see, alright. So they'll 5 be able to answer on these points if they have answers they 6 wish to give us. 7 MS BARNES: Chair, then in the next 8 paragraph, that's 45.4, I also need to give you a reference 9 there. There are in fact two references there. The first 10 is to Doorson versus The Netherlands, that is one of the 11 judgments that has been provided – 12 CHAIRPERSON: [Microphone off, inaudible] 13 MS BARNES: It's not referred to – 14 CHAIRPERSON: How do you spell Doorson? 15 MS BARNES: It's D-O-O-R-S-O-N. 16 CHAIRPERSON: Doorson, what's the 17 reference? 18 MS BARNES: The reference is paragraphs 19 70 and 72 and then also the Van Michelin case – 20 CHAIRPERSON: That is – 21 MS BARNES: That is already referred to 22 at paragraphs 52 to 55, and the principles, we simply seek 23 to emphasise two principles that emerge from this case law. 24 The one is a clear reluctance to make orders of anonymity 25 in relation to witnesses. The other is that where</p>

<p style="text-align: right;">Page 25029</p> <p>1 limitations are to be imposed on publicity they must be 2 strictly necessary and we submit that those are the 3 principles that emerge from the case law and that it's 4 instructive to have regard to them in the circumstances. 5 So Chair, we would submit that the considerations 6 militating against the grant of the relief sought by SAPS 7 are the following. Section 34 of the Constitution, the 8 applicable common law principles in relation to publicity 9 and full and effective cross-examination of witnesses, the 10 rights that the parties have in this case, and then finally 11 we would submit that in exercising its discretion the 12 Commission may have regard to the principles that have 13 emerged from international law, which we submit support our 14 position. Those are our submissions, Chair. 15 CHAIRPERSON: Thank you, Ms Barnes. 16 MR MPOFU: Chair, I don't want to add 17 anything, I just want to clarify the point that you covered 18 on how the arguments are structured. The three presenters, 19 Chair, are effectively arguing for all the parties 20 interchangeably. So whatever Ms Barnes says covers the 21 injured, and so on, and so on. So the issue then is for 22 example on, and in respect of my submissions as far as the 23 in-camera, the conflating of the public with the parties is 24 concerned, the rhetorical question that should be asked is 25 what harm the widows will visit upon Mr X as part of what</p>	<p style="text-align: right;">Page 25031</p> <p>1 opportunity to interview her at any stage. 2 MR BUDLENDER SC: No, Chair, we will do, 3 we will do so. 4 CHAIRPERSON: You will. So insofar as 5 the evidence leaders are here to see to it that all 6 material that is relevant and necessary for our decision, 7 and desirable, to use another word, will be put before us. 8 You're prepared to interview her and insofar as there's any 9 point she wishes to have conveyed, you're prepared to 10 convey it on her behalf? 11 MR BUDLENDER SC: We'll certainly do so, 12 Chair. 13 CHAIRPERSON: Mr Mpofu, would you do your 14 best in your Xhosa to interpret that to her? 15 MR MPOFU: Yes. 16 CHAIRPERSON: I take it she is Xhosa 17 speaking? 18 MR MPOFU: She might not be but I think 19 we'll understand each other. Okay, okay. I will try it in 20 my broken Zulu, ja. 21 CHAIRPERSON: You might explain to her it 22 won't impose any obligations on her. 23 MR MPOFU: Okay, she says thank you. I 24 think we'll explain it through the other representatives as 25 well.</p>
<p style="text-align: right;">Page 25030</p> <p>1 we're saying, even though I don't directly act for them. 2 Thanks, Chairperson. 3 CHAIRPERSON: Thank you. Yes, you've 4 anticipated a question I'm going to ask the representatives 5 for SAPS when they reply. Does anyone else want to have – 6 you've got your microphone on, Ms Barnes. 7 MS BARNES: Chair, I apologise, there's 8 an important fact that I omitted. It's in relation to the 9 matter that was raised yesterday about whether there are 10 possibly any unrepresented parties. I just wanted to place 11 on record that there is in fact an unrepresented party 12 here, Mrs Langa. I'm not sure if she is here today. She's 13 the wife of Julius Langa who lost his life on Monday, the 14 13th of August 2012. 15 [09:52] She's not represented by any attorney. 16 CHAIRPERSON: As far as I understand 17 she's never put herself on record but nevertheless she 18 obviously has an interest in the matter. Mrs Langa, I take 19 it you – do you need someone to interpret? Perhaps Mr 20 Tokota can interpret, or Mr Mpofu, although Mr Tokota's 21 Xhosa is higher. Mrs Langa, do you wish to be allowed to 22 participate as a party in these proceedings from now on? 23 MRS LANGA: Yes, Chairperson. 24 CHAIRPERSON: Alright. Mr Budlender, 25 she's not represented. I don't know whether you've had an</p>	<p style="text-align: right;">Page 25032</p> <p>1 CHAIRPERSON: Thank you. 2 MR MPOFU: Thank you, Chair. 3 CHAIRPERSON: Mrs Langa is then given 4 permission to join as a party. The evidence leaders are 5 requested to interviewer and to see in what way they can be 6 of assistance to her. Thank you for interpreting. I'm 7 interested to hear that the Xhosa word for evidence leader 8 is evidence leader but when you interpret it in Zulu you 9 used some other word. 10 MR MPOFU: Yes, in Xhosa it's e-evidence 11 leader. 12 CHAIRPERSON: I see Xhosa is following 13 the example of English in borrowing words from other 14 languages. The Zulus would appear to be more reluctant to 15 do that. Alright, so thank you Ms Barnes for drawing our 16 attention, that's an important point. I hadn't realised 17 she was present and I hadn't realised that it was, until 18 you drew it to my attention, that it was desirable and 19 perhaps even necessary to join her as a party but that 20 problem has now been solved, thank you. Who is going to do 21 the reply for the SAPS, Ms Baloyi or Mr Semenya? 22 MR SEMENYA SC: I will, Chair. Chair, 23 before I do though – 24 CHAIRPERSON: Shall we take a comfort 25 break now? I'm in your hands.</p>

Page 25033

1 MR SEMENYA SC: Yes.

2 CHAIRPERSON: It's not necessary, I would

3 take it a bit later but if you don't want an interruption

4 in the course of your address it might be sensible to take

5 the comfort break now but you must tell me.

6 MR SEMENYA SC: May I take that offer,

7 Chair, immediately after making this announcement?

8 CHAIRPERSON: Yes.

9 MR SEMENYA SC: There is a confirmatory

10 affidavit of Brigadier Van Zyl together with one by Darren

11 Rangasamy, dealing with the costs associated with giving

12 the protection to Mr X if he were to testify in open

13 hearing. I'm told these were given to parties this

14 morning. It may be that they are in an unsigned form as we

15 speak –

16 CHAIRPERSON: Well, they are also, apart

17 from the unsigned form of the affidavit, Mr Gotz and Ms

18 Barnes and I don't know about the other – and Mr Mpofo and

19 Mr Brickhill are all shaking their heads. So from their

20 body language it would appear that they haven't got those

21 affidavits. So perhaps let's take the adjournment now.

22 You can make sure they've got the affidavits and then we

23 can proceed, that piece of housekeeping having been

24 attended to. And we also haven't got copies so we're all

25 equally disadvantaged, the opposing parties and the

Page 25034

1 Commission. We'll take the comfort break, I think we'll

2 take it for 15 minutes so that this matter can be – perhaps

3 ja, let's take it for 15 minutes now to give ample time for

4 this point to be dealt with.

5 [COMMISSION ADJOURNS COMMISSION RESUMES]

6 [10:33] CHAIRPERSON: The Commission resumes. We

7 were waiting before coming back, to receive copies of the

8 affidavits to which we were referred by Mr Semenya. We've

9 now just a few moments, a few minutes ago received a copy

10 of the affidavit from Brigadier Van Zyl, the provincial

11 head of the detective services in the North-West Province,

12 a confirmatory affidavit of Mr X and an explanatory

13 affidavit by Colonel Rangasamy. I take it that exhibits

14 must now be handed in as exhibits. They wouldn't really be

15 part of the Mr Mdze series. I should imagine we should

16 call them NNN1, 2, 3. Is that – and I suppose we should

17 actually also, while we're about it, give exhibit numbers

18 to the other affidavits that we haven't done yet. So what

19 we'll do is we will make the Notice of Motion NNN1, the

20 Notice of Motion of the application NNN1. NNN2 will be the

21 opposing affidavit, NNN3 –

22 MS PILLAY: With annexures, Chair, the

23 opposing affidavit with annexures.

24 CHAIRPERSON: Yes, with annexures, that's

25 correct, with annexures. NNN3 will be the replying

Page 25035

1 affidavit and then shall we make these NNN4.1, 2, 3.

2 NNN4.1 is the affidavit of Brigadier – no, that's really I

3 suppose Brigadier Van Zyl's is the first one. NNN4.1 is

4 the affidavit of Brigadier Van Zyl. NNN4.2 is the

5 affidavit of Colonel Rangasamy and NNN4.3 is the affidavit

6 of Mr X. Do any of the parties wish to say anything with

7 regard to the affidavits that have been handed in?

8 MR MPOFU: Yes, Chair. Thank you,

9 Chairperson. Chairperson, we are, to say the least,

10 disturbed by this development. These affidavits

11 effectively purport to be supplementary affidavits which

12 are being advanced without even the pretence of an

13 explanation as to why they're only being advanced at this

14 stage. They raise material issues which we would like to

15 deal with but more than that, Chairperson, they raise

16 matters which we, in respect of which we asked for

17 explanations in our answering affidavits, which

18 explanations were not forthcoming in the replying

19 affidavit. And so one cannot now, when the pleadings have

20 closed, seek to deal with matters that were raised in the

21 answering affidavit. Not only after the pleadings have

22 closed but after argument by our side, as it were, which

23 makes it even worse. It might have been understandable if

24 we were given these late, for practical purposes, but

25 allowed to have incorporated them into our argument or to

Page 25036

1 have filed an answering affidavit, even if it was a

2 supplementary affidavit. We might not have quibbled with

3 it as long as we would have had a chance to deal with the

4 material because these proceedings are not, you know we

5 don't, are not run on a technical basis as such but it's

6 not a technical matter, it's a matter of substance that we

7 have to deal with this material.

8 Secondly, Chairperson, even a cursory browsing of

9 these documents would suggest that some of the material

10 here we have to counteract by making our own

11 investigations. I'll just make a simple example,

12 Chairperson.

13 CHAIRPERSON: Mr Mpofo –

14 MR MPOFU: Yes, Chairperson?

15 CHAIRPERSON: You can carry on.

16 MR MPOFU: Yes, I'll –

17 CHAIRPERSON: I want to say this to you –

18 MR MPOFU: - two other points, Chair.

19 CHAIRPERSON: It seems to be undesirable

20 – well, you make your two points first before I tell you

21 what it is –

22 MR MPOFU: Yes, thank you, Chairperson.

23 The second point, Chairperson, is that as I say, even a

24 quick look on this suggests that there will be unhelpful at

25 best, or if not irrelevant completely to the inquiry that

<p style="text-align: right;">Page 25037</p> <p>1 needs to be made and I'll make a very simple example. 2 CHAIRPERSON: If they're irrelevant then 3 of course you don't have to worry about them but it's only 4 if they may be relevant that you have to deal with them, 5 possibly reply – 6 MR MPOFU: Yes, but the Chairperson was 7 right – sorry. 8 CHAIRPERSON: I understand your argument. 9 Maybe you will contend they're irrelevant but you would 10 obviously wish to cover yourself by saying, as you have 11 done in other parts of the argument, in the event – 12 MR MPOFU: Yes. 13 CHAIRPERSON: - that they are relevant, 14 which we deny – 15 MR MPOFU: Yes. 16 CHAIRPERSON: - we would like to reply. 17 MR MPOFU: Correct. 18 CHAIRPERSON: Yes, I understand. 19 MR MPOFU: No, fair enough, Chairperson. 20 All I'm saying is that even that point we might raise in 21 limine in an answering affidavit but the point I'm making 22 is that – 23 CHAIRPERSON: I don't think that this 24 forum is one where we either allow witnesses to be battered 25 or in limine points to be taken.</p>	<p style="text-align: right;">Page 25039</p> <p>1 MR MPOFU: Well, I would like an – well, 2 what I'm trying to say, Chairperson, whether it's in 3 writing or verbally doesn't matter, we'd like a proper 4 opportunity to – so what I'm saying here now is what I'm 5 saying after having looked at these things for 10 minutes, 6 so I don't want that to be the alpha and omega of our 7 response here. The next point is, somehow in this costing 8 exercise is slipped in the affidavit of Mr X which, quite 9 frankly, has nothing to do with the costing exercise but is 10 something that we have demanded to be done. Ms Barnes this 11 morning went on for a few minutes about the absence of Mr 12 X's own averments. 13 CHAIRPERSON: I think "went on" is an 14 unhappy way of putting it. 15 MR MPOFU: Well – 16 CHAIRPERSON: She argued the matter quite 17 forcefully for some time. 18 MR MPOFU: Yes, she did. 19 CHAIRPERSON: And made the point – 20 MR MPOFU: For a while, ja. No, no – 21 CHAIRPERSON: That's a better way of 22 putting it. 23 MR MPOFU: The longer it is, the better 24 for the weight of what I'm about to say, Chairperson. The 25 point really is that this is something that we have raised</p>
<p style="text-align: right;">Page 25038</p> <p>1 MR MPOFU: Yes, thank you, Chairperson, 2 but if they are relevant then, Chairperson, allow me just 3 to make this example. The purported purpose of these 4 documents is to display to the Commission the cost that 5 might be involved in assisting Mr X and so on but what use 6 is that inquiry if we don't have the cost of, the 7 countermanding cost of the video link because for example 8 if the cost of bringing him here is 200 000 but the cost of 9 the video link is 500 000 then this whole exercise is 10 futile. And so firstly – 11 CHAIRPERSON: Prima facie that sounds 12 like a good point - 13 MR MPOFU: Thank you, thank you. 14 CHAIRPERSON: - which Mr Semenya will be 15 taking aboard, I'm sure. 16 MR MPOFU: Yes. Thank you, Chairperson, 17 we'll raise these in writing in good time. The third one 18 is the fact that somehow in the – 19 CHAIRPERSON: You don't have to raise it 20 in writing, you've raised it, it'll be transcribed, Mr 21 Semenya has heard it, if he thinks there's anything in it 22 he will supplement. 23 MR MPOFU: Okay. 24 CHAIRPERSON: If he thinks there isn't 25 anything in it he'll tell us later.</p>	<p style="text-align: right;">Page 25040</p> <p>1 as a weakness and it turns out, Chairperson, that this 2 affidavit of Mr X was actually commissioned on the 10th of 3 March 2014, some eight days ago. I mean, and we don't know 4 why it was withheld. It's just sneaked in as part of a 5 costing exercise and it's something that is of vital 6 importance. The criticism we had was the fact that Mr 7 Pretorius's affidavit was – or rather it was not Mr X's 8 affidavit or at the very worst that Mr X's confirmatory 9 should have been there. 10 CHAIRPERSON: There's even a better 11 point, it was apparently typed in February. 12 MR MPOFU: Chairperson? Oh well, that is 13 another – ja, it's typed in February and which - 14 CHAIRPERSON: Mr Mpofo, I don't want to 15 be difficult. 16 MR MPOFU: Yes. 17 CHAIRPERSON: You know, this is an 18 application which is literally about life and death. The 19 basis of the application is a fear – 20 MR MPOFU: Yes. 21 CHAIRPERSON: - which you say is not 22 well-founded but that's another matter. 23 MR MPOFU: Sure. 24 CHAIRPERSON: That Mr X could be killed 25 if he –</p>

Page 25041

1 MR MPOFU: By the widows.
 2 CHAIRPERSON: - if he comes and gives
 3 evidence and the application isn't granted. So therefore
 4 it's not a kind of matter in which, technical points can
 5 really be taken. And if, for example, the application
 6 were, if the application would fail because there's no
 7 affidavit from Mr X and because his affidavit is out of
 8 time and, you know, the sort of affidavit one doesn't
 9 receive out of time without a proper explanation and so on,
 10 then and if that were the reason for the application to
 11 fail, then they would come back with another application
 12 half an hour later with the application in it, so we'd have
 13 the whole exercise all over again. So let's concentrate on
 14 the matter.
 15 MR MPOFU: No, Chair –
 16 CHAIRPERSON: What I'm proposing to do,
 17 subject to what you have to say –
 18 MR MPOFU: Sure.
 19 CHAIRPERSON: - is to stop hearing the
 20 application at this stage, to postpone it, to enable your
 21 side and perhaps the evidence leaders too if they want to
 22 be involved, to file further affidavits if you wish to do
 23 so and then obviously give you an opportunity to argue the
 24 further points that arise and then and only after that
 25 would the police be given an opportunity to reply now and

Page 25042

1 then you come with affidavits and so on. So the only
 2 question – I see you're nodding your head so if that
 3 proposal meets, is favourably received, then the only
 4 question is until when I should postpone the application.
 5 MR MPOFU: Thank you, Chairperson.
 6 CHAIRPERSON: I would, my instincts are
 7 to make it next Monday. That gives you, I don't know
 8 whether you work on a public holiday but that gives you two
 9 days because we're not sitting tomorrow because these
 10 chambers aren't available and we decided not to sit
 11 Thursday because Friday is a public holiday, we'd just have
 12 to come back for one day. It gives you two days to prepare
 13 such replying affidavits as you consider appropriate, to
 14 give them to the police and then we can then proceed with
 15 the application on Monday. That's what I would propose.
 16 MR MPOFU: Yes.
 17 CHAIRPERSON: How do you react to that
 18 proposal?
 19 MR MPOFU: Chairperson, if I may just
 20 consult with my fellow travellers? Chairperson –
 21 CHAIRPERSON: Sorry, while you're taking
 22 instructions or going to tell me what the instructions are,
 23 Adv Hemraj points out that there's a point that could also
 24 have been taken that you didn't take, presumably you waived
 25 it but nevertheless it may be a point that requires

Page 25043

1 consideration and that is the annexures to Colonel
 2 Rangasamy's affidavit aren't initialled either by the
 3 commissioner or the deponent to the affidavit. In the
 4 interests of good order that should be sorted out as well.
 5 If we postpone the matter till Monday that's something that
 6 can also be attended to in the interim.
 7 MR MPOFU: Yes. No, Chairperson, as the
 8 Chairperson correctly pointed out, let me point out that
 9 we're not really interested in those technical issues. The
 10 point we're making is that there needs to be an explanation
 11 –
 12 CHAIRPERSON: I understand that but
 13 things should be done properly.
 14 MR MPOFU: Yes.
 15 CHAIRPERSON: This is an important
 16 Commission –
 17 MR MPOFU: Alternatively there should be
 18 an explanation, ja. That's all really.
 19 CHAIRPERSON: Anyway, but this is put up
 20 to us as a matter of literally life and death, we've got to
 21 take it very seriously.
 22 MR MPOFU: Yes.
 23 CHAIRPERSON: And we've got to, as I say,
 24 if the papers aren't in order they'll just come back again
 25 so there's no point –

Page 25044

1 MR MPOFU: No, Chair.
 2 CHAIRPERSON: The only question is, is
 3 Monday a good day?
 4 MR MPOFU: Chairperson, let me take one
 5 step back. What our proposal is, would be that this whole
 6 inquiry be treated discreetly, in other words that SAPS can
 7 answer, can reply now to what has been argued and whatever
 8 our responses will be on this discreet issue which is about
 9 costing, because really this is one leg of their case which
 10 is quite discreet and severable and it might take a few
 11 minutes in that case, or no minutes at all, because we
 12 might ask for this and they give it to us and then we
 13 simply give you the papers.
 14 CHAIRPERSON: On the other hand, you
 15 might not. There might be an extensive argument and then
 16 they would have to reply again.
 17 MR MPOFU: But it is still discreet –
 18 CHAIRPERSON: I hear what you're saying.
 19 MR MPOFU: Yes.
 20 CHAIRPERSON: Let's hear what Mr Semenya
 21 says about this.
 22 MR SEMENYA SC: Chair –
 23 CHAIRPERSON: Of course, it's whether
 24 Monday is enough time, is what – but the first question is
 25 the idea of a postponement for extra papers to be filed

<p style="text-align: right;">Page 25045</p> <p>1 and, if necessary, extra argument to be received and if 2 that is appropriate, it seems to me prima facie it is, then 3 the question whether postponement till Monday would give 4 enough time to your learned opponents as well as to the 5 police. 6 MR SEMENYA SC: Chair, I will be indebted 7 if we were to look at Wednesday. I have difficulties with 8 Monday and Tuesday coming but the idea of a postponement we 9 support, Chair. The second issue which Mr Mpofo raised is 10 about something being discreet and severable. We would 11 contend differently. We intend to be able to argue in 12 reply, resting all of that reply on the basis of facts that 13 they want to respond to. 14 MR MPOFU: Yes. Well, in that case then, 15 Chairperson, the idea of Wednesday might make sense because 16 we, before any reply is offered we would like to reargue 17 our portion on the basis, for example, that now it is Mr X 18 himself, not Mr Pretorius who is scared of the widows. 19 CHAIRPERSON: No – no, I said – yes, Mr 20 Mpofo I understand that. I said that it may well be that 21 you would wish to argue the matter further in the light of 22 these papers and clearly that opportunity must be afforded 23 you. So if Wednesday is acceptable to all concerned then 24 we will stand this application down and – 25 MR MPOFU: Chair, I'm sorry, Chairperson.</p>	<p style="text-align: right;">Page 25047</p> <p>1 that have been handed in this morning by close of sitting, 2 the session of the Commission on Monday and the police will 3 be given the opportunity to reply thereto, if any 4 affidavits are filed, by the close of the sitting of the 5 Commission on Tuesday. The matter, as I said, will then be 6 argued at 9 o'clock or so soon thereafter as can be on 7 Wednesday. 8 [10:52] MR MPOFU: Thank you, or so soon 9 thereafter. Thank you, Chairperson. Mr Brickhill, just 10 for the sake of completion, will not be here next week but 11 we'll get his input. He's not available next week at all. 12 CHAIRPERSON: Are you content not to be – 13 I understand how these things work but – 14 MR BRICKHILL: Chair, I wouldn't want to 15 further delay the finalisation of the application. 16 CHAIRPERSON: Thank you, thank you. Very 17 well, we will now adjourn for Major-General Naidoo to be 18 contacted. I don't know how, where he is, but he is close 19 by – unless he can, well, yes. Let's adjourn, take the tea 20 adjournment now and as soon as the tea adjournment is over 21 we'd expect the Major-General to be at the witness table, 22 waiting to be reminded he's under oath. We'll now adjourn 23 for tea. 24 [COMMISSION ADJOURNS COMMISSION RESUMES] 25 [11:18] CHAIRPERSON: The Commission resumes.</p>
<p style="text-align: right;">Page 25046</p> <p>1 I need another consent. Chairperson, yes, we're happy with 2 Wednesday. The proposal is therefore that we would file an 3 answer on Monday, if any, and the SAPS might want to reply 4 on, end of business on Tuesday and then hopefully we will 5 be ready. 6 CHAIRPERSON: I take it I don't have to 7 make an order to that effect. 8 MR MPOFU: On that, ja – 9 CHAIRPERSON: The proposal, Mr Semanya, 10 is that they file – when on Monday, lunch time? 11 MR MPOFU: Close of business. 12 CHAIRPERSON: Close of business on Monday 13 – business isn't an appropriate expression to use. 14 MR MPOFU: Okay - 15 CHAIRPERSON: Close of the session on 16 Monday and the police will then have an opportunity to 17 reply in an affidavit or affidavits to be filed by close of 18 sitting on Tuesday and the matter then argued on Wednesday. 19 That seems appropriate. 20 MR SEMENYA SC: Those time frames are 21 accepted, Chair. 22 CHAIRPERSON: So the application will 23 then be postponed until Wednesday of next week and it is 24 recorded that the opposing parties will file such 25 affidavits as they may wish in response to the affidavits</p>	<p style="text-align: right;">Page 25048</p> <p>1 Major General, you're still under oath. 2 GANASEN NAIDOO: Still under oath, Chair. 3 CHAIRPERSON: Mr Mpofo, you are cross- 4 examining. 5 MR MPOFU: Yes, thank you, Chairperson. 6 CHAIRPERSON: You've dealt with most of 7 the topics in respect of which I gave you leave, but there 8 are some points left that you want to raise with the 9 witness, I take it. 10 CROSS-EXAMINATION BY MR MPOFU (CONTD.): 11 That's correct, Chairperson. Good morning, Major General. 12 GENERAL NAIDOO: Good morning, Advocate. 13 MR MPOFU: Okay, I've got two sections 14 that I want to deal with, but if you can allow me before 15 that, I'm just going to sweep through a few – 16 CHAIRPERSON: May I ask you, obviously 17 don't tell me what they are, but can you give me the 18 numbers on the document that you – 19 MR MPOFU: Well, I will, Chairperson, in 20 due course. I don't have the document with me, but they 21 mainly deal with – 22 CHAIRPERSON: I deliberately said the 23 numbers because I take it you mightn't want to disclose at 24 this stage what the topics are. 25 MR MPOFU: Ja-no, I don't mind,</p>

Page 25049

1 Chairperson.

2 CHAIRPERSON: Alright, well then what are

3 they?

4 MR MPOFU: The one issue is around the

5 arrests that were made, seeing that I act for the injured

6 and arrested –

7 CHAIRPERSON: That is topic 5, yes.

8 MR MPOFU: Yes.

9 CHAIRPERSON: Issues and circumstances

10 connected with arrested protesters specifically and

11 generally only in respect of scene 2 arrests.

12 MR MPOFU: Yes. The other issue really

13 is related to that but it arises from the cross-

14 examination, and that's to do with – yes, it's to do with –

15 okay, I'd rather not disclose that one now, but it flows

16 from –

17 CHAIRPERSON: Well, carry on in the

18 meanwhile with the -

19 MR MPOFU: Thank you.

20 CHAIRPERSON: - with number 5 and then –

21 MR MPOFU: Ja, well as I was busy saying

22 to the witness, Chairperson, Major General, I'm just going

23 to ask you a couple of things which might look unrelated.

24 It's just to clean up some of the issues that we've already

25 covered, so please forgive me, I'll be jumping from one

Page 25050

1 thing to another for a few minutes.

2 The first one relates to the topic that we

3 concluded last time about the so-called sub-quality

4 intelligence. I just wanted to ask you, is it my correct

5 understanding that at the meeting of the 13th where there

6 was National Commissioner, Brigadier Engelbrecht, and

7 people like that, that there was a complaint or a criticism

8 of the quality of intelligence by some of the senior

9 people?

10 GENERAL NAIDOO: Chair yes, there was a

11 discussion about the lack, or the level of intelligence

12 that was required and was not available.

13 MR MPOFU: Okay –

14 GENERAL NAIDOO: Hence the decision to

15 enhance the capacity that was deployed there, yes.

16 MR MPOFU: Okay, fine. Thank you very

17 much. And then there was an issue that we, you and I were

18 debating on the first day of the cross-examination and I

19 couldn't find the actual reference and that had to do with

20 – you remember the criticism I was meting out to the police

21 to say that they did not treat the strikers in the same way

22 as they treated their own wounded or deceased?

23 GENERAL NAIDOO: I remember.

24 MR MPOFU: You remember that topic, yes.

25 GENERAL NAIDOO: Yes, I remember, Chair.

Page 25051

1 MR MPOFU: Yes, and in the course of that

2 I suggested among other things that the body of the

3 deceased policemen had been taken to the hospital, whereas

4 the other bodies were left there lying on the veld.

5 GENERAL NAIDOO: Chair, I think what I

6 responded there was that I know that one of the injured

7 policeman who later died was taken to the hospital in a

8 police vehicle, that's correct.

9 MR MPOFU: Yes, that's the point, and you

10 said you knew nothing about the body of the deceased one

11 being taken to the hospital.

12 GENERAL NAIDOO: Chair, I, what I

13 indicated was I remember that there was one deceased

14 policeman on the scene, yes. I did not know about how his

15 body was transported and to where, yes.

16 MR MPOFU: Yes, okay. Well then can you

17 go to paragraph 28 of your statement, JJJ108? You say

18 there, "Two police officers were killed and a third was

19 seriously injured and airlifted to Pretoria. We then

20 visited the mine hospital where we viewed the body of the

21 deceased member who was hacked to death."

22 GENERAL NAIDOO: That's correct.

23 MR MPOFU: Yes, which is the correct

24 version?

25 GENERAL NAIDOO: Chair, that was the one

Page 25052

1 who was transported to the Andrew Saffy Hospital and he

2 died there. There was still another member that was on the

3 scene.

4 MR MPOFU: Ja, well whichever one, but

5 was the body of a deceased policeman taken to the hospital?

6 CHAIRPERSON: No Mr Mpofo, that's not

7 what he says. What he says is there was one policeman

8 killed on the scenes. There was another policeman who was

9 seriously injured.

10 MR MPOFU: Yes.

11 CHAIRPERSON: There were two who were

12 injured there, but one of them was seriously injured and he

13 was taken to hospital, but he died after being – or I'm not

14 sure if it's after or while being transported to the

15 hospital, and it was the body of that policeman, the one

16 who didn't die on the scene but died after he was taken

17 away from the scene that he is referring to in paragraph

18 28.

19 MR MPOFU: Yes, okay I understand that.

20 So does that mean then that Lieutenant Baloyi and another

21 policeman were airlifted?

22 GENERAL NAIDOO: No, Chair. Lieutenant

23 Baloyi was airlifted.

24 MR MPOFU: Yes?

25 GENERAL NAIDOO: As far as I can

Page 25053

1 understand that this member that was transferred to,
 2 transported to the Andrew Saffy Hospital was transported by
 3 his unit commander Colonel Merafe in a police vehicle.
 4 That's the way I understand it.
 5 MR MPOFU: By road?
 6 GENERAL NAIDOO: By road, Chair.
 7 MR MPOFU: Okay, alright, understand.
 8 Okay, then the next of those quick issues has to do with –
 9 yes, I also, I think it's still paragraph 28, I also
 10 criticised you of not mentioning the dead miners in one of
 11 your statements. You remember that?
 12 GENERAL NAIDOO: I do, Chair.
 13 MR MPOFU: Ja, and you contested that
 14 statement, correct?
 15 GENERAL NAIDOO: Chair, what I indicated
 16 that I wrote my statement as the information as I became
 17 aware of it, I did mention the miners later on in paragraph
 18 35, yes.
 19 MR MPOFU: Of the subsequent statement.
 20 You did not mention them in the original statement of
 21 November 2012.
 22 GENERAL NAIDOO: No Chair, that's not
 23 correct, because it's exactly the same words that I used in
 24 my original statement which I had paragraphed in the
 25 consolidated statement. I think we did deal with that

Page 25054

1 matter on Friday, I think it was.
 2 MR MPOFU: Okay sorry, I think we're
 3 speaking at cross purposes. Remember the paragraph 28, the
 4 one that I just read to you now?
 5 GENERAL NAIDOO: Yes.
 6 MR MPOFU: Ja, there after talking about
 7 the policeman who was hacked to death you say, "We were
 8 also informed that there were also about three other
 9 individuals who were killed in the encounter and their
 10 bodies were still on the scene." That you did not mention
 11 in your original statement.
 12 GENERAL NAIDOO: Sorry Chair, let me just
 13 check.
 14 CHAIRPERSON: [Microphone off, inaudible]
 15 compare paragraph 25 in your second statement to what you
 16 say in page 2 of your first statement, your first statement
 17 being exhibit DD, and if you go down, if you go round about
 18 line 10, start at line 9, "Just as we were outside
 19 Potchefstroom the Provincial Commissioner received a call
 20 that the members under the command of Major General Mpembe
 21 who were left at Marikana were attacked by the miners and
 22 some police personnel had been killed. We immediately
 23 turned around and returned to Marikana," and if one goes on
 24 in that paragraph, three lines from the end of the
 25 paragraph there is a reference to "Two police officers were

Page 25055

1 killed and a third was seriously injured and airlifted to
 2 Pretoria. We then visited the mine hospital where we
 3 viewed the body of the deceased member who was hacked to
 4 death." That's the passage that –
 5 GENERAL NAIDOO: It's 28.
 6 CHAIRPERSON: - Mr Mpofu is referring to.
 7 Now in your later statement where you amplified some of the
 8 things that you had said earlier, which is exhibit JJJ108,
 9 one sees that you added at the end of 28 a passage that is
 10 not in your earlier statement. That's the point I think
 11 that Mr –
 12 MR MPOFU: Yes.
 13 CHAIRPERSON: - Mpofu is referring to.
 14 GENERAL NAIDOO: Okay, Chair, yes.
 15 MR MPOFU: Agreed?
 16 CHAIRPERSON: And also if one goes to
 17 your paragraph 25, now that's the counterpart of the
 18 passage that I read from your first statement, the relevant
 19 sentence is, ends with the words "and some police personnel
 20 had been killed," and then you then added the clause "and
 21 there were other unspecified casualties among the
 22 protesters as well," in paragraph 25. So what Mr Mpofu is
 23 saying to you is that if one compares your paragraph 25 in
 24 your new statement and your paragraph 28 one sees you've
 25 now inserted references to the deceased mineworkers which

Page 25056

1 had not appeared in the earlier statement.
 2 GENERAL NAIDOO: Of course, Chair.
 3 CHAIRPERSON: Now that's the point he's
 4 busy with, and he is correct?
 5 GENERAL NAIDOO: Yes, Chair.
 6 CHAIRPERSON: Alright. So Mr Mpofu, now
 7 that I've cleared the path through the bush for you, would
 8 you like to carry on?
 9 MR MPOFU: Thank you, Chairperson. Thank
 10 you, General. Ja, then the other quick issue that I want
 11 to deal with is just – and I think another witness
 12 clarified this, but just for the purposes of rounding off,
 13 am I correct in my understanding that the briefings – okay,
 14 you don't have to, well, just to give you background; one
 15 of the criticisms that we will give, we have indicated we
 16 will give at the end of the case is that for the size and
 17 importance of an operation such as this one the times that
 18 were allowed for the briefings of these hundreds and
 19 hundreds of policemen were simply inadequate, 10 minutes
 20 here –
 21 CHAIRPERSON: You're referring now to the
 22 briefing at 2:30 obviously –
 23 MR MPOFU: Yes, on the 16th.
 24 CHAIRPERSON: - on the Thursday
 25 afternoon.

<p style="text-align: right;">Page 25057</p> <p>1 MR MPOFU: That's correct, Chairperson, 2 yes. You know what I'm talking about? I'm now talking 3 about Colonel, the briefings which were sparked by Colonel 4 Scott and continued onwards. 5 GENERAL NAIDOO: Of course, Chair. 6 MR MPOFU: Yes, so I'm asking you this 7 question in that context. The – 8 GENERAL NAIDOO: Sorry, the question? 9 MR MPOFU: Sorry, General? 10 GENERAL NAIDOO: Sorry, no okay, I'm 11 waiting for the question. 12 MR MPOFU: Okay, yes. Now the first 13 thing I want you to clarify for the Commission is that 14 there were effectively three sets of briefings that were 15 expected to occur in that short space of time, and let me 16 just explain what I mean by that. There was the briefing 17 by Scott to people like you, the senior command. 18 GENERAL NAIDOO: Okay. 19 MR MPOFU: And then you would go and 20 brief your section commanders, if I'm using the correct 21 term, that's the second set of briefing, and then they 22 would go and brief their people. Let's put it like that. 23 Is that correct? 24 GENERAL NAIDOO: Chair, I think we dealt 25 with this during the original cross-exam. The briefing</p>	<p style="text-align: right;">Page 25059</p> <p>1 GENERAL NAIDOO: That's correct, the 2 commanders attended the briefing with me so that we cut the 3 communication chain short. 4 MR MPOFU: Yes, and was that also 5 motivated by the fact that there was inadequate time? 6 GENERAL NAIDOO: No Chair, because the 7 briefing was held at forward holding area 1 and all the 8 commanders on, who fell under me were there, so it was just 9 a practical arrangement. 10 MR MPOFU: Okay, no that makes sense. 11 Ja, you were hosting the briefing as it were. 12 GENERAL NAIDOO: That's correct, Chair. 13 MR MPOFU: Thank you. Okay, right. Then 14 were you aware of the barbed wire that was supplied by 15 Lonmin? 16 GENERAL NAIDOO: I became aware of it, 17 yes. 18 MR MPOFU: Yes, okay. Then the next 19 issue is about, round about the, or when you were involved 20 in that shootout - let's call it that – you said that 21 members of the NIU made an advance in order to engage the, 22 I suppose the protesters, correct? 23 GENERAL NAIDOO: Chair no, I'm not sure 24 which one because the NIU had a couple of advances. Is it 25 after I joined the NIU?</p>
<p style="text-align: right;">Page 25058</p> <p>1 took place as follows; yes, Colonel Scott came and briefed 2 the commanders. 3 MR MPOFU: Right. 4 GENERAL NAIDOO: And as far as the 5 commanders that were under my command, they were all part 6 of the briefing. So I did not go and attend that briefing 7 on my own. So Colonel Scott briefed us all. Colonel 8 Gaffley was there, Colonel Modiba was there, K9, everybody, 9 and then they in turn went back and briefed their members. 10 MR MPOFU: Okay – 11 CHAIRPERSON: What you're saying, there 12 were effectively two briefings, the Scott briefing of the 13 commanders – 14 GENERAL NAIDOO: That's right. 15 CHAIRPERSON: - and then the briefing by 16 the commanders of the people who were – 17 GENERAL NAIDOO: That's correct. 18 CHAIRPERSON: - under their command. 19 GENERAL NAIDOO: Yes, Chair. 20 MR MPOFU: Yes, okay, that might pertain 21 to your unit. You may or may not know if in respect of 22 other people there were three briefings because one of the 23 witnesses, I can't remember which one, I think it was 24 Calitz admitted that there were three sets of briefings, 25 but you are saying in your unit there were two?</p>	<p style="text-align: right;">Page 25060</p> <p>1 MR MPOFU: Yes. Or at any time did they 2 make an advance to engage the protesters? 3 GENERAL NAIDOO: Chair, there was 4 statements and evidence was led here where the NIU 5 indicated that they initially advanced and engaged with 6 protesters, yes. 7 MR MPOFU: Let me just get the correct 8 reference. Ja alright, it's page 22940, day 189, 22940 9 going to 41. 10 CHAIRPERSON: Yes, yes, we have 940 on 11 the screen. 12 MR MPOFU: Yes. 13 CHAIRPERSON: Line? 14 MR MPOFU: To give it context, 15 Chairperson, we'll start at, let's start at line 8, or 6. 16 You said there were approximately two or three people who 17 fired. 18 GENERAL NAIDOO: Okay, Chair. 19 MR MPOFU: Then Mr Semenya says, "How 20 much fire do they discharge in that direction, if you can?" 21 "I would say more than five each. I can't remember the 22 exact number because they were using a rifle." Mr Semenya, 23 "Using?" and you say, "They were using an R5 rifle." 24 "Okay, and you say that the firing from inside the koppie 25 stopped?" "It stopped immediately, yes Chair," you say.</p>

Page 25061

1 The question, "And when the NIU line reached the rocks
2 where shots had emanated from do they not find anybody
3 there?" Then you say, "No Chair, when the firing occurred,
4 as soon as our firing stopped the NIU line moved to engage
5 but there was nobody there to engage, yes Chair." Remember
6 that?

7 GENERAL NAIDOO: I remember that, Chair.
8 MR MPOFU: Ja, now the only question I
9 want to ask there is in using those words you meant that
10 they were moving on to use their R5s obviously?
11 [11:38] GENERAL NAIDOO: Chair, who? The NIU?
12 MR MPOFU: Yes.
13 GENERAL NAIDOO: Well, I think in that
14 evidence I did indicate that there were NIU people that
15 used their R5s, yes.
16 MR MPOFU: With R5s, yes. Yes, that's
17 what I'm saying. So the tools that they would have used
18 for that "engagement" would have been their R5s?
19 GENERAL NAIDOO: That's correct, Chair.
20 MR MPOFU: Thank you. And maybe to round
21 off that point, if somebody were to issue an order to those
22 people with R5s to engage they would be meaning that they
23 must shoot them with live ammunition because that's all
24 they had, correct?
25 GENERAL NAIDOO: Chair, engage not

Page 25062

1 necessarily means to use their rifles. Engage would
2 probably mean to face and confront, as far as I –
3 MR MPOFU: Yes.
4 GENERAL NAIDOO: A specific order to use
5 the rifles would have been to fire or to shoot, but engage
6 not necessarily means that they should use their rifles.
7 CHAIRPERSON: But could include it?
8 GENERAL NAIDOO: It could, yes.
9 MR MPOFU: Yes. Thank you. Right, now
10 let's go to the – okay, those are the small issues that I
11 wanted to round up with you.
12 MR SEMENYA SC: Chair, in the meantime Ms
13 Matthews does not refer to me.
14 MR MPOFU: Pardon?
15 MR SEMENYA SC: Ms Matthews on line 9,
16 that's the reference to me.
17 CHAIRPERSON: Yes, we had noticed that
18 there were errors in the transcription and I'm not sure
19 that, I'm talking about that one, but we did draw them to
20 the attention of the transcribers. I wonder who Ms
21 Matthews was.
22 MR MPOFU: Well, I think we'll just have
23 to thank Ms Matthews for that correction, yes.
24 CHAIRPERSON: That was Mr Semanya perhaps
25 speaking in a falsetto voice.

Page 25063

1 MR MPOFU: Thank you. General, yes now
2 I'm going to deal with – you do understand that I represent
3 among others the 259 people who were arrested?
4 GENERAL NAIDOO: Yes, I do.
5 MR MPOFU: And that on top of that I also
6 represent the 13 other people who were not arrested at the
7 scene, who were injured and arrested at various hospitals?
8 GENERAL NAIDOO: I do.
9 MR MPOFU: Yes, which up the total number
10 of people I represented in that category was 272, except
11 two of them are left now, Mr Mpofana and Mr Mabotyana
12 allegedly committed suicide. You are aware of that?
13 GENERAL NAIDOO: I did read about that in
14 the media, yes.
15 MR MPOFU: Yes, and one of the people who
16 committed suicide was one of the six people who have met
17 the Commissioners, who had been subpoenaed by the evidence
18 leaders. Just putting that for the record, Chairperson.
19 Now so in that connection I'd like to understand
20 the circumstances under which my clients were arrested.
21 GENERAL NAIDOO: Okay.
22 MR MPOFU: Would it be fair to say that
23 the police had foreseen, or premeditated the arrests? In
24 other words it was known beforehand that the arrests would
25 be made?

Page 25064

1 GENERAL NAIDOO: Chair, I think just to
2 explain the police approach, there was in terms of our
3 briefing a gathering of individuals, some of whom had
4 dangerous weapons and they were gathering illegally, and
5 the, what was communicated to us at 2:30 a decision had
6 been taken to disperse the illegal gathering and people
7 that do not disperse and who fail to lay down their arms
8 would be then arrested and prosecuted, so yes, that was the
9 basis in terms of what we conducted our operations.
10 MR MPOFU: Okay, and to support the
11 statement that I make, contingency, or plans were made for
12 what is referred to as Canters to effect those arrests,
13 were made before any problem had started, correct?
14 GENERAL NAIDOO: Chair yes, the
15 contingency plan, logistical arrangements were made for
16 both the recovery of weapons as well as the possible
17 arrests of any suspects.
18 MR MPOFU: And to the extent that you
19 brought emergency medical services one can also say that
20 injuries were foreseen, injuries to people?
21 GENERAL NAIDOO: Chair, we did testify to
22 that effect, yes.
23 MR MPOFU: Yes, okay, and to the extent
24 that mortuary vans were brought you could say that deaths
25 were also foreseen?

<p style="text-align: right;">Page 25065</p> <p>1 GENERAL NAIDOO: Chair, as I testified, I 2 was not aware of the mortuary vans at that stage – 3 MR MPOFU: Ja, you – 4 GENERAL NAIDOO: And the circumstances 5 around that, so - 6 MR MPOFU: Sorry. Ja, I'm sorry, when I 7 say "you" I don't mean you personally. SAPS, to the extent 8 that SAPS brought mortuary vans it would be fair to say 9 that they foresaw deaths? 10 GENERAL NAIDOO: Chair, I'm not sure what 11 the circumstances around the mortuary vans, but yes, 12 mortuary vans are normally utilised for deceased. 13 CHAIRPERSON: As far as I can recall the 14 evidence is four mortuary vans were asked for and one was 15 sent, and clearly the person who asked for the mortuary 16 vans anticipated there would be deaths – I mustn't say 17 would – 18 MR MPOFU: No, fair enough. 19 CHAIRPERSON: - anticipated there might 20 be deaths, and of course it's not clear, because I don't 21 think the person concerned has given evidence, whether it 22 was solely the deaths of miners, the possible deaths of 23 miners that was foreseen, or it was also considered that 24 members of the police might also be killed. 25 MR MPOFU: Ja, well I didn't say – that's</p>	<p style="text-align: right;">Page 25067</p> <p>1 MR MPOFU: Thanks. 2 CHAIRPERSON: Well, either deaths or 3 possible deaths. 4 GENERAL NAIDOO: No, it's deaths, Chair, 5 not possible. I said that is possible. 6 CHAIRPERSON: Yes, I said possible. 7 MR MPOFU: Now let's start then, as I was 8 saying then my clients would like to understand the 9 circumstances of their arrests. Let's start firstly with 10 the people, the arrests that you personally effected. 11 GENERAL NAIDOO: Yes, Chair. 12 MR MPOFU: Do I understand you to be 13 saying that you came across about three strikers hiding in 14 the grass or something like that? 15 GENERAL NAIDOO: Chair, I said that I 16 came across personally one striker together with a member 17 of the K9, and there were other members of the K9 who 18 arrested another two strikers. I can't testify to the 19 exact circumstances of their arrests, but in that sweep 20 three miners were arrested, yes. 21 MR MPOFU: And they were hiding in the 22 grass? 23 GENERAL NAIDOO: The one that we 24 arrested, yes. 25 MR MPOFU: What does that mean? I mean</p>
<p style="text-align: right;">Page 25066</p> <p>1 why I said "persons," Chairperson. Police are also 2 persons. 3 GENERAL NAIDOO: Thank you. 4 MR SEMENYA SC: Chair, for the record, I 5 think the Chair said one was sent. I thought it was on 6 standby. 7 CHAIRPERSON: Sorry? 8 MR SEMENYA SC: It was on standby. The 9 request was to have it on standby. 10 CHAIRPERSON: It wasn't actually sent, it 11 was on standby. Yes, I see. But anyway, four were asked 12 for, one was made available either – and we've heard on 13 standby. That's why I said the person who asked for them 14 obviously thought there might be deaths. 15 MR MPOFU: Yes. 16 CHAIRPERSON: Whether it was solely 17 deaths of miners or also – mineworkers, or also possibly 18 deaths of police members is also a matter that may still 19 have to be investigated insofar as it's relevant. 20 MR MPOFU: Yes, and that's why I asked 21 the question in a neutral fashion. So to the extent that 22 somebody from SAPS ordered or asked for mortuary vans those 23 people, or that person foresaw the deaths to people, 24 correct? 25 GENERAL NAIDOO: That's possible, yes.</p>	<p style="text-align: right;">Page 25068</p> <p>1 how – 2 GENERAL NAIDOO: He was – Chair, he was, 3 as I indicated lying low in the grass and as we approached 4 he woke up. 5 CHAIRPERSON: Did I hear you say "woke 6 up"? 7 GENERAL NAIDOO: Sit up. 8 CHAIRPERSON: Stood up? 9 GENERAL NAIDOO: Yes. 10 CHAIRPERSON: I mean you don't know if he 11 was asleep. 12 GENERAL NAIDOO: No, no, no, not – 13 CHAIRPERSON: Unlikely that he was. 14 GENERAL NAIDOO: No, not likely. 15 CHAIRPERSON: So when you say, it was you 16 and Warrant Officer Harmse, is that right? 17 GENERAL NAIDOO: No, it was Sergeant 18 Brazier. 19 CHAIRPERSON: Sergeant? 20 GENERAL NAIDOO: Brazier. 21 CHAIRPERSON: Sergeant Brazier? 22 GENERAL NAIDOO: That's right. 23 CHAIRPERSON: You and Sergeant Brazier, 24 were you at that stage walking in a northerly direction on 25 the eastern side of the koppie?</p>

Page 25069

1 GENERAL NAIDOO: We were walking on the
2 southern side of the koppie.
3 CHAIRPERSON: Oh, still on the southern
4 side?
5 GENERAL NAIDOO: That's correct, Chair.
6 CHAIRPERSON: I see. I see, you hadn't
7 reached actually the koppie yet?
8 GENERAL NAIDOO: No, no, we were far away
9 from the koppie, just going in the direction –
10 CHAIRPERSON: And then there was someone,
11 at least someone in the grass and as you approached he
12 stood up?
13 GENERAL NAIDOO: He stood up, yes.
14 CHAIRPERSON: So presumably – yes, I see,
15 and then you arrested him.
16 GENERAL NAIDOO: That's correct, Chair.
17 CHAIRPERSON: Did you arrest him or
18 Sergeant Brazier?
19 GENERAL NAIDOO: Well, we both did. I
20 did assist him in terms of the fact that Sergeant Brazier
21 searched him while I covered him, etcetera.
22 CHAIRPERSON: Now in terms of the
23 Criminal Procedure Act it's necessary to inform the person
24 being arrested of the reason for the arrest.
25 GENERAL NAIDOO: Yes.

Page 25070

1 CHAIRPERSON: So did you comply with that
2 provision in the Criminal Procedure Act?
3 GENERAL NAIDOO: Well, as far as I could
4 remember Sergeant Brazier was asking him what are you doing
5 here, put down your arms, and we're going to arrest you,
6 and then we took – he had a knife and a –
7 CHAIRPERSON: You're supposed to tell him
8 what you're arresting him for.
9 GENERAL NAIDOO: Yes.
10 CHAIRPERSON: That's what the section
11 says.
12 GENERAL NAIDOO: Ja.
13 CHAIRPERSON: It's no good saying "What
14 are you doing?"
15 GENERAL NAIDOO: No, of course –
16 CHAIRPERSON: You've got to tell him why
17 you're arresting him. You must tell him what the charge
18 is -
19 GENERAL NAIDOO: Of course.
20 CHAIRPERSON: - on which he's being
21 arrested so that he can if necessary do something. Now was
22 that done?
23 GENERAL NAIDOO: Chair, as I was
24 indicating that Sergeant Brazier was conversing to him. I
25 tried to now recount some of the things that Sergeant

Page 25071

1 Brazier did tell him. I think I'm not being specific or
2 verbatim as to what he said. So he did indicate to him,
3 you know, drop down your weapons, and why have you got the
4 weapons, and come, we're going to arrest you for this
5 thing, etcetera, and then he, Sergeant Brazier loaded him
6 into the police vehicle from there. So I broadly just
7 indicate what I recollect in terms of that arrest, yes.
8 MR MPOFU: Maybe the Chairperson will
9 follow up, but let me just put this to you –
10 GENERAL NAIDOO: Okay.
11 MR MPOFU: - that none of the people I
12 represent were ever told what they were arrested for.
13 That's so you can either, and that would include the ones
14 that you are talking about. I do understand that you say
15 you can't recall correctly, but I'm now putting to you
16 positively that they were not told.
17 GENERAL NAIDOO: Chair, I think that
18 would be unlikely; in addition to these three, I'm talking
19 about the larger number, they were taken to a processing
20 centre. They were taken to a place where they were
21 processed in terms of, you know, informing them of their
22 rights and things like that. So it's unlikely –
23 CHAIRPERSON: Aren't arrested persons
24 supposed to be told at the time of their arrests what the
25 charge is on which they're being arrested?

Page 25072

1 GENERAL NAIDOO: Yes, Chair.
2 CHAIRPERSON: So in the case of the
3 person who was arrested by Sergeant Brazier you can't
4 positively say that was done. You say he spoke to him, but
5 I understand maybe if you were some distance away –
6 GENERAL NAIDOO: Chair, yes it –
7 CHAIRPERSON: - that you can't say
8 positively that he was informed in the course of his arrest
9 then.
10 GENERAL NAIDOO: Chair, as I –
11 CHAIRPERSON: And – sorry, carry on.
12 GENERAL NAIDOO: So as I indicated that
13 Sergeant Brazier did have a conversation with him whilst,
14 you know, removing his weapons, etcetera, and I tried to
15 get the gist of what the conversation was about and he did
16 indicate now come with me, I'm taking you to the van, I'm
17 arresting you for these things. We asked him, "What are
18 you doing with these weapons?" and things like that. So
19 I'm trying to summarise what Sergeant Brazier said –
20 CHAIRPERSON: No, I understand. But Mr
21 Mpofo goes further; he says in the case of all the people
22 who were arrested there not one of them was told at the
23 time of his arrest what the cause of the arrest was or on
24 what charge he was being arrested. Now the follow-up
25 question, he suggested I might ask a follow-up question.

Page 25073

1 The follow-up question is are you able from your own
 2 knowledge to deal with that allegation, or is that
 3 something that you perhaps for understandable reasons can't
 4 deal with yourself?
 5 GENERAL NAIDOO: Yes, from my
 6 observation, as I indicated there was even a subsequent
 7 process where they were informed of their constitutional
 8 rights, but at the time, let's talk about the bulk of
 9 people that were hidden behind the rocks, etcetera, who
 10 subsequently came out. I also I think, I'm not sure in my
 11 statement I indicated it, the members were shouting to them
 12 to drop their weapons and come out without their weapons,
 13 we would not harm them. Yes, we would deal with the – so
 14 there was continuous communication. The people that were
 15 being arrested knew why they were being confronted. They
 16 were being told to drop their weapons. There were even few
 17 that came out with their weapons still in their hands and
 18 they were, you know, the policemen were shouting, "Drop the
 19 weapons. Leave it down there," and then move them to a
 20 place where they could, so it was quite clear why they were
 21 being arrested and it was being communicated. As I said,
 22 policemen were not only speaking in English; there were a
 23 lot of members speaking in the vernacular as well. So if
 24 during that process it was not clear why they were being
 25 arrested then –

Page 25074

1 MR SEMENYA SC: Chair, our reading of
 2 section 39(2) is that it is either at the time of arrest or
 3 immediately thereafter.
 4 MR MPOFU: Ja, well let's assume, for the
 5 purposes of this questioning now let's assume that when
 6 they eventually got to police stations they were told, you
 7 would accept that they were – let's just check the issue of
 8 immediacy. So there would be the point at which the people
 9 were arrested, right? For example those people hiding
 10 among the grass.
 11 GENERAL NAIDOO: Yes, Chair.
 12 MR MPOFU: Ja, and then they were
 13 gathered in their large number outside the, in that open
 14 arresting area, let's call it that.
 15 GENERAL NAIDOO: Yes, Chair.
 16 MR MPOFU: That's step 2, and after they
 17 were gathered there then they were loaded into the vans,
 18 step 3.
 19 GENERAL NAIDOO: Yes.
 20 MR MPOFU: Ja, and then from there then
 21 they were transported to Lonmin holding cells, or I don't
 22 know what you call it, to some place at Lonmin, at Number
 23 1, Shaft number 1.
 24 CHAIRPERSON: I'm sure senior counsel
 25 who's in attendance today from Lonmin will object if you

Page 25075

1 put it that way.
 2 MR MPOFU: Yes.
 3 CHAIRPERSON: Because there's no
 4 suggestion that Lonmin had holding cells, but Lonmin did
 5 make some facilities, accommodation available for the
 6 processes, according to the evidence, for the processing of
 7 the people arrested. But they weren't, they can't be
 8 described as Lonmin holding cells –
 9 MR MPOFU: Well, they do have holding
 10 cells, as it were, Chairperson, but that's what –
 11 CHAIRPERSON: - after taking to holding
 12 cells.
 13 MR MPOFU: Yes.
 14 CHAIRPERSON: But anyway, let's get the
 15 terminology right –
 16 MR MPOFU: Ja, at Shaft number 1.
 17 CHAIRPERSON: - then we won't have
 18 objections.
 19 MR MPOFU: Let's call it Shaft number 1
 20 where they were taken, that's step number 4, correct?
 21 GENERAL NAIDOO: Chair, correct.
 22 MR MPOFU: Correct?
 23 GENERAL NAIDOO: Correct, Chair.
 24 MR MPOFU: Ja, now on your version then
 25 it was only at step number 4 – oh, and then step number 5

Page 25076

1 they were taken to various police stations, correct?
 2 GENERAL NAIDOO: That's correct, Chair.
 3 MR MPOFU: Ja, so it would have been at
 4 step number 5 perhaps that they were informed of the reason
 5 for their arrest?
 6 GENERAL NAIDOO: No, Chair. What I
 7 indicated was immediately when they were confronted by the
 8 police they were confronted about laying down their weapons
 9 and moving to one side and explained to them that they are
 10 going to be placed on one side out of the scene. That's
 11 where they were placed in the larger area. I can't really
 12 say what was being said in vernacular, but the policemen
 13 were communicating to them that they must put down their
 14 weapons and things like that. I spoke about specifically
 15 the arrest where I was present when Sergeant Brazier
 16 executed the arrest and he also communicated to the person
 17 that he was in possession of weapons, to drop it, why, what
 18 was he doing with the weapons, and he indicated to him now
 19 he's going to be placing him in the police van, etcetera.
 20 I did not, I can't give it to you verbatim what he said.
 21 So at that stage the people that were being arrested knew
 22 that they were in possession of weapons that they should
 23 not be in possession of, and the police were putting them
 24 one side, asking them to drop their weapons, etcetera.
 25 They were then loaded onto the trucks and taken a short

Page 25077

1 distance away to the processing centre where they were
 2 processed by the detectives.
 3 [11:58] And there they were given their constitutional
 4 rights and the whole process and from that processing
 5 centre then they were detained at the various police
 6 stations, I think just to outline the process as given.
 7 MR MPOFU: Okay. So you can only be sure
 8 that they were told the reason for their arrest at stage
 9 number 4, at the Lonmin shaft number 1.
 10 GENERAL NAIDOO: Chair, I think that is
 11 where the formal process is, where they are given a
 12 document of their constitutional rights, yes.
 13 MR MPOFU: Yes. And if their evidence is
 14 that that happened more than two or three hours after their
 15 arrest, you can hardly describe that as immediately after
 16 their arrest, correct?
 17 GENERAL NAIDOO: Chair, as I indicated,
 18 during the process of arrest, it was a large number of
 19 people and they were being told about putting down their
 20 weapons and they were being arrested. So I don't know if
 21 the inference from there, as I said, I can't verbatim
 22 indicate what was being said but they were being told to
 23 put down their weapons and to move to the side where they
 24 were being arrested.
 25 MR MPOFU: Ja. No, General, I'm sorry to

Page 25078

1 belabour this. It's one thing to say they knew, as you
 2 correctly said, they knew as you say, so if I shoot someone
 3 and the police come and arrest me I must know that it must
 4 have something to do with that but it's a different thing
 5 for me to be told, you are now being arrested for shooting
 6 of so-and-so. Do you accept the difference?
 7 GENERAL NAIDOO: Chair, that is why I'm
 8 saying, as most of the members that were speaking to them
 9 were speaking vernacular, I can't verbatim say what they
 10 were communicating but I understand what the counsel is
 11 saying and accept this, yes.
 12 MR MPOFU: Yes. And the person, this
 13 person, the one in the arrest that you were involved –
 14 GENERAL NAIDOO: Yes, Chair.
 15 MR MPOFU: Why was he arrested?
 16 GENERAL NAIDOO: Chair, as I indicated to
 17 you, the instructions in terms of dispersal was that people
 18 that dispersed will drop their weapons and disperse, will
 19 not be arrested and would not be stopped in any way.
 20 People who were still in possession of their weapons and
 21 refused to drop those weapons and also those who did not
 22 disperse would be arrested and acting in terms of that
 23 instruction the one individual was arrested. He was, as I
 24 indicated, arrested with two weapons.
 25 MR MPOFU: Yes, okay. So the main reason

Page 25079

1 he was arrested was because he was in possession of those
 2 two weapons?
 3 GENERAL NAIDOO: He was, as I indicated
 4 before I started giving these answers, there was a
 5 gathering of people with dangerous weapons, it was an
 6 illegal gathering therefore and the whole intention of the
 7 dispersal was to disperse and to disarm and arrest people
 8 that failed to disarm or disperse.
 9 MR MPOFU: No, General, you can't have it
 10 both ways. So despite the fact that there was this, what
 11 you call illegal gathering, which we'll leave later for
 12 argument, the decision was to let those participants of the
 13 illegal gathering go home if they were not armed, correct?
 14 GENERAL NAIDOO: That's correct, Chair.
 15 MR MPOFU: Ja, so then your answer to my
 16 question must be yes, that the reason why this particular
 17 gentleman was arrested was because he had those two
 18 weapons?
 19 GENERAL NAIDOO: That's correct, Chair.
 20 MR MPOFU: Yes. Now, where are the two
 21 weapons?
 22 GENERAL NAIDOO: Chair, I think this was
 23 the evidence that was led. The weapons have all been
 24 transported to the police station.
 25 MR MPOFU: So –

Page 25080

1 CHAIRPERSON: Is it possible to identify
 2 the weapons to which you are referring which were in the
 3 possession of the person who was arrested as you've
 4 described?
 5 GENERAL NAIDOO: I'm not sure. We can
 6 check with Sergeant Brazier if he can remember, yes, Chair.
 7 MR MPOFU: Well, to your knowledge as the
 8 senior person who was there, is the answer to what the
 9 Chairperson is saying in relation to all those people,
 10 would it be possible to identify specific weapons in that
 11 pile of weapons that was on the site with any individual?
 12 GENERAL NAIDOO: Chair, it would be
 13 difficult. As I indicated it was a mass arrest. A lot of
 14 the people were, as they were coming out, were forced to
 15 abandon their weapons, et cetera, so yes, it would be very
 16 difficult.
 17 MR MPOFU: It would be impossible, would
 18 you agree?
 19 GENERAL NAIDOO: Not in all cases. In
 20 some cases it might be possible.
 21 COMMISSIONER HEMRAJ: Can I just
 22 understand, how were these exhibits then entered in the
 23 SAP13s, as just having been recovered from a mass of people
 24 or what was the entry?
 25 GENERAL NAIDOO: Chair, I'm not sure but

Page 25081

1 we can check with the crime scene people how they processed
2 and entered it, yes.

3 COMMISSIONER HEMRAJ: Because won't that
4 be an indication of whom they were recovered from? Won't
5 there be the CAS number that relates to that arrest? Won't
6 that give us some indication?

7 GENERAL NAIDOO: Chair, ja, I suppose it
8 would have been linked to the dockets and their arrest at
9 scene 2, yes.

10 MR MPOFU: Well, I can assist you again.
11 In the documents of the criminal cases there's not a single
12 person who has been linked to a single of those arms. So,
13 and I venture to say to you that is because in the manner
14 in which you've described the arrests having been done, it
15 would have been impossible to do that exercise.

16 CHAIRPERSON: Do you wish to comment on
17 that?

18 GENERAL NAIDOO: Chair, no, I've
19 commented already. I have indicated that it would be
20 difficult, yes.

21 CHAIRPERSON: Yes, you've indicated it
22 would be difficult. The impression I get is, you can't
23 really deal specifically with these allegations put to you.

24 GENERAL NAIDOO: No, Chair.

25 MR MPOFU: Well, did you or did you not

Page 25082

1 participate in some of the arrests?

2 GENERAL NAIDOO: Chair, I specifically
3 indicated the one arrest, yes.

4 MR MPOFU: Ja, you participated in the
5 arrest, ja. I'm asking you in that capacity so –

6 GENERAL NAIDOO: That's why, Chair, I
7 indicated that I know the weapons were taken by Sergeant
8 Brazier and we can establish from him exactly what the
9 trail was.

10 MR MPOFU: Alright, let's approach it
11 from a different angle. You said that at some stage that
12 there were – or firstly, a number of the strikers were
13 hiding among the rocks, correct?

14 GENERAL NAIDOO: That's correct, Chair.

15 MR MPOFU: And several shoutings, for
16 lack of a better word, were made for them to come out,
17 correct?

18 GENERAL NAIDOO: The policemen were
19 calling out to them, yes.

20 MR MPOFU: Yes, and after – I think you
21 said there was some initial reluctance, is that correct?

22 GENERAL NAIDOO: That's correct, Chair.

23 MR MPOFU: And then some of them came
24 out.

25 GENERAL NAIDOO: That's correct, Chair.

Page 25083

1 MR MPOFU: With their hands up.

2 GENERAL NAIDOO: Yes, Chair.

3 MR MPOFU: And they were taken to the,
4 what I've described as the arresting area, correct?

5 GENERAL NAIDOO: That's correct, Chair.

6 MR MPOFU: And they were tied down or not
7 tied down, asked to put their hands to their backs and face
8 down for about an hour or so and then later they were put
9 onto the van.

10 GENERAL NAIDOO: Chair, I think that was
11 the process where they were being searched for any weapons
12 on their person, yes.

13 MR MPOFU: Ja. And this is exactly the
14 point, here were people who were told, come out, leave your
15 weapons there and indeed they come up, on your version,
16 with their hands up and yet they were still arrested. Why
17 were those people arrested?

18 GENERAL NAIDOO: Chair, I think I did
19 testify to the fact that not all of them came out without
20 any weapons and not all of them left their weapons at the
21 rocks.

22 MR MPOFU: Sure.

23 GENERAL NAIDOO: Some of them came out
24 with their weapons and they were then confronted to drop
25 their weapons where they were as they were coming out and

Page 25084

1 that's when they were subsequently taken to the arresting
2 area and arrested, yes.

3 MR MPOFU: Yes. Okay, so let's put those
4 ones aside who came out with their weapons and dropped
5 them, let's consider only the ones who came out with their
6 hands up. Why were those people arrested?

7 GENERAL NAIDOO: Chair, I think I
8 indicated two things, that the instruction was that the
9 people that did not disperse and the people that failed to
10 disarm would be arrested and I think we're covering both in
11 terms of this.

12 MR MPOFU: Ja, but these people were
13 disarmed.

14 GENERAL NAIDOO: Chair, yes.

15 MR MPOFU: Why were they arrested?

16 GENERAL NAIDOO: They disarmed after
17 being confronted, not when the dispersal process took
18 place.

19 MR MPOFU: No, General Naidoo, please.
20 You say the people came out with their hands up. You don't
21 know when they disarmed, do you? Or you don't even know if
22 they ever had arms the whole day. They came up with their
23 hands up, is that correct?

24 GENERAL NAIDOO: Some of them, yes.

25 MR MPOFU: Why were those people

Page 25085

1 arrested?

2 GENERAL NAIDOO: Chair, because they were

3 part of that illegal gathering.

4 MR MPOFU: But I thought the illegal

5 gathering people were exempted and allowed to go home,

6 you've just testified.

7 GENERAL NAIDOO: Chair, I already

8 indicated to you and I indicated in earlier testimony that

9 the people that were dispersed and that dispersed were

10 allowed to freely disperse. The people that refused to

11 disperse and the people who refused to disarm were the ones

12 that were arrested and the people that were in the grouping

13 at koppie 3 obviously did not disperse as did the other

14 people who were not hindered in dispersal.

15 MR MPOFU: The strikers had gathered at

16 koppie 1, correct?

17 GENERAL NAIDOO: That's correct, Chair.

18 MR MPOFU: And these events we're talking

19 about, they were arrested at koppie 3, correct?

20 GENERAL NAIDOO: That's correct, Chair.

21 MR MPOFU: That means they had dispersed

22 from koppie 1, which is about 300 metres away, correct?

23 GENERAL NAIDOO: Chair, I would not

24 really say they dispersed. I would say they regrouped.

25 MR MPOFU: Come on, General. Did the

Page 25086

1 people that were arrested with their hands up at koppie 3,

2 had they dispersed from koppie 1 or not?

3 GENERAL NAIDOO: Chair, they retreated

4 from koppie 1 to koppie 3.

5 MR MPOFU: They dispersed before they

6 retreated?

7 GENERAL NAIDOO: Chair, if they dispersed

8 they would not -

9 MR MPOFU: Thank you.

10 GENERAL NAIDOO: They would have followed

11 the line of the other strikers.

12 CHAIRPERSON: Mr Mpofo, I have been

13 asked, it's been drawn to my attention in fact that I

14 should have a comfort break round about now. If you want

15 to round this point off first, please do so, but I'm in

16 your hands.

17 MR MPOFU: Chairperson, no, it would be

18 convenient, Chair.

19 CHAIRPERSON: Alright, we'll take a

20 comfort break now. Let's try to be back within 10 minutes.

21 [COMMISSION ADJOURNS COMMISSION RESUMES]

22 [12:32] CHAIRPERSON: The Commission resumes.

23 Major-General, you're still under oath.

24 GENERAL NAIDOO: Still under oath, Chair.

25 CHAIRPERSON: Mr Mpofo?

Page 25087

1 MR MPOFU: Thank you, Chairperson.

2 Chairperson, if I may just address the Commission first.

3 I'm now going to use a statement which was distributed to

4 the Commissioners and the witness but what I wanted to say

5 is I had hoped that - the statement is not signed but I had

6 hoped that by now it would have been signed but

7 unfortunately due to the strike, it's been difficult to

8 trace some of our clients. We suspect some of them might

9 have decided to go home but we can give the assurance, we

10 can give the assurance that as soon as -

11 CHAIRPERSON: Well, I don't know what Mr

12 Mpofo's, what Mr Semanya says about it but he, but you

13 remember a statement by Mr X -

14 MR MPOFU: Yes.

15 CHAIRPERSON: - which was not signed and

16 was put in and we allowed cross-examination on it -

17 MR MPOFU: Yes.

18 CHAIRPERSON: - on the basis that the

19 signed one would be forthcoming later. So there is, there

20 has been a relaxation of the usual standards in these

21 matters and so you would rely on that to justify what you

22 want to.

23 MR MPOFU: I intended exactly to do that,

24 Chairperson. Obviously subject to -

25 CHAIRPERSON: I can't think of a reason

Page 25088

1 why we can distinguish what I allowed then from the present

2 case.

3 MR MPOFU: Thank you -

4 CHAIRPERSON: Unless Mr Semanya's has got

5 a vigorous objection. Mr Semanya?

6 MR SEMENYA SC: No, Chair, I have no

7 objection.

8 CHAIRPERSON: Mr Semanya having got that

9 indulgence himself, can scarcely deprive you of the

10 indulgence.

11 MR MPOFU: Thank you very much,

12 Chairperson.

13 CHAIRPERSON: Alright, do we have to - it

14 hasn't been marked.

15 MR MPOFU: Yes, it hasn't been marked,

16 Chairperson.

17 CHAIRPERSON: Alright, so we're back to

18 the M series.

19 MR MPOFU: MMM.

20 CHAIRPERSON: According to my notes, the

21 last MMM exhibit is 49.

22 MR MPOFU: 49.

23 CHAIRPERSON: So this will be MMM50.

24 MR MPOFU: Five zero, yes, thank you,

25 Chair.

Page 25089

1 CHAIRPERSON: Statement of Shadrack
 2 Zandisile Mtshamba, M-T-S-H-A-M-B-A.
 3 MR MPOFU: Thank you, Chair. Thank you
 4 very much Chairperson.
 5 CHAIRPERSON: Have you seen the document?
 6 MR MPOFU: Yes, ja.
 7 GENERAL NAIDOO: s.u.o.
 8 CROSS-EXAMINATION BY MR MPOFU (CONTD.):
 9 General, you remember the statement which was given to you
 10 last week?
 11 GENERAL NAIDOO: I remember, Chair.
 12 MR MPOFU: Thank you. Now in relation to
 13 what we are dealing with I want to draw your attention to
 14 paragraph, let's start from 25 just for – ja. Or actually
 15 let's start from 24 just so that we don't revisit that.
 16 This is at scene 2.
 17 CHAIRPERSON: Sorry, Mr Mpofo, has the
 18 statement been given to those responsible for operating the
 19 screen? So will it up on the screen?
 20 MR MPOFU: Unfortunately I doubt if my
 21 attorneys did that. No, unfortunately it hasn't,
 22 Chairperson.
 23 CHAIRPERSON: Do you have to cross-
 24 examine on it now? Is there not some other matter you can
 25 deal with in the meanwhile and then during the lunch time

Page 25090

1 if arrangements can be made.
 2 MR MPOFU: Okay, yes.
 3 CHAIRPERSON: It would make it easier, I
 4 think.
 5 MR MPOFU: Yes.
 6 CHAIRPERSON: If it will prejudice your
 7 cross-examination to wait until after lunch –
 8 MR MPOFU: No.
 9 CHAIRPERSON: Then obviously I won't
 10 insist on it but if we can do it that way I think it would
 11 help.
 12 MR MPOFU: Yes, I can, I can,
 13 Chairperson, yes. Okay, thank you. Thank you, Chair.
 14 Alright, General, let's move to something else. Can you
 15 just tell us what is the position currently in respect of
 16 the use of SSG. What is SSG to begin with, is it a form of
 17 ammunition?
 18 GENERAL NAIDOO: It's a form of
 19 ammunition for shotgun.
 20 MR MPOFU: Yes, okay. And what is the
 21 current position in respect of the use of SSG ammunition or
 22 shotgun?
 23 GENERAL NAIDOO: Chair, primarily it's
 24 not used for crowd management, there's an instruction to
 25 that.

Page 25091

1 MR MPOFU: Yes.
 2 GENERAL NAIDOO: It's primarily used in
 3 the SAPS currently for training or other operational
 4 requirements.
 5 MR MPOFU: Okay, so it would be fair to
 6 say it's banned in respect of crowd management.
 7 GENERAL NAIDOO: It's banned, yes.
 8 MR MPOFU: Yes, thank you. And okay, you
 9 may not – I suppose you may not be the source of the
 10 original instructions but do you know why SSG is banned in
 11 crowd management?
 12 GENERAL NAIDOO: Chair, I think it's an
 13 alignment of the policies, the policing policies in terms
 14 of the use of force where previously number 5, that's
 15 birdshot, and SSG was used. It's now not allowed. So I
 16 think an alignment of our policies in terms of the new
 17 dispensation.
 18 MR MPOFU: No, fair enough, but I'm just
 19 saying obviously it's banned for a reason because it's
 20 inappropriate to be used in crowd management, would that be
 21 fair?
 22 GENERAL NAIDOO: Well, it's lethal force,
 23 yes.
 24 MR MPOFU: Yes. And do you know whether
 25 or not SSG was used in the Marikana massacre, tragedy,

Page 25092

1 whatever?
 2 GENERAL NAIDOO: Chair, specifically?
 3 MR MPOFU: Yes, yes, specifically.
 4 GENERAL NAIDOO: Are we talking about a
 5 specific incident or are we talking about generally?
 6 MR MPOFU: No, I'm talking about the
 7 Marikana killings or massacre.
 8 GENERAL NAIDOO: Chair, by whom? Is it
 9 by the SAPS –
 10 MR MPOFU: By the SAPS.
 11 GENERAL NAIDOO: As far as I know the
 12 SAPS was not issued with SSG.
 13 MR MPOFU: Okay, I understand. Can I go
 14 ahead? Yes. Okay, so as far as you are concerned no SAPS
 15 personnel were allowed to use SSG at the koppies, correct?
 16 GENERAL NAIDOO: That's correct, Chair.
 17 MR MPOFU: And were, or rather the ban on
 18 the SSG was operational at that time, correct?
 19 GENERAL NAIDOO: It's many years now,
 20 Chair, yes.
 21 MR MPOFU: For many years, yes, including
 22 2012?
 23 GENERAL NAIDOO: That's correct, Chair.
 24 MR MPOFU: Now can we first go to – do
 25 you remember the set of photos that you received last week?

<p style="text-align: right;">Page 25093</p> <p>1 GENERAL NAIDOO: Yes, Chair. 2 MR MPOFU: Okay, can you go to the first 3 page? Chairperson, you should have a colour photo. 4 CHAIRPERSON: We'd better mark them. 5 MR MPOFU: We haven't marked them. We 6 haven't marked them, Chairperson. 7 CHAIRPERSON: No, I said we'd better mark 8 them. 9 MR MPOFU: Did we? 10 CHAIRPERSON: No, I am suggesting we mark 11 them now. We didn't mark them. 12 MR MPOFU: Yes, no, we didn't. We simply 13 put the handwriting with their originals. 14 CHAIRPERSON: Alright. 15 MR MPOFU: They are from the Mohlaki 16 series, I think. 17 CHAIRPERSON: Now I've been handed, I 18 think it's four photographs, IMG0961.JPG – 19 MR MPOFU: That's correct. 20 CHAIRPERSON: 0962. 21 MR MPOFU: Yes. 22 CHAIRPERSON: JPG, 3 and 23 MR MPOFU: That's correct. 24 CHAIRPERSON: - there's 4. So let's mark 25 them all MMM51.</p>	<p style="text-align: right;">Page 25095</p> <p>1 I wonder if the operators would, I know that – oh yes, that 2 answers my question. 3 CHAIRPERSON: [Microphone off, inaudible] 4 we've now got on the screen – the people who read the 5 record won't understand what you've said, just said, but 6 we've now got on the screen MMM51.1 which is IMG0961. 7 MR MPOFU: That's correct. Thank you. 8 Now General, what kind of cartridges are those or - 9 GENERAL NAIDOO: Chair, I don't think 10 it's a cartridge. 11 MR MPOFU: Ja. 12 GENERAL NAIDOO: It appears to be 13 something that emanates from a shotgun, yes. 14 MR MPOFU: Yes, it's a casing, I think 15 would be a better description. It's a shotgun shot casing. 16 GENERAL NAIDOO: Possible, ja. 17 MR MPOFU: Ja. Okay, and if you look at 18 that one and the next one which is MMM51.2 – 19 CHAIRPERSON: That's exhibit MMM51.2. 20 MR MPOFU: Yes. 21 CHAIRPERSON: Which is the photograph 22 IMG0962.JPG. 23 MR MPOFU: Yes. The tearings that you 24 see there on those casings would indicate that they had 25 been fired, correct?</p>
<p style="text-align: right;">Page 25094</p> <p>1 MR MPOFU: MMM – 2 CHAIRPERSON: 51.1 will be photo 3 IMG0961.JPG and then 51.2 will be the same except it will 4 be 0962. 5 MR MPOFU: Yes. 6 CHAIRPERSON: And – 7 MR MPOFU: The third one – 8 CHAIRPERSON: The third one will be 63, 9 that'll be 51 point – 10 MR MPOFU: Point 3. 11 CHAIRPERSON: 3, 0963.JPG. Sorry, I 12 thought I had four, I've got six. 13 MR MPOFU: Yes, it's two pages, three of 14 each. 15 CHAIRPERSON: Alright, so we'll mark them 16 all as we – 17 MR MPOFU: In that order. 18 CHAIRPERSON: All the way down to 51.6. 19 MR MPOFU: Yes, thank you, Chair. 20 CHAIRPERSON: Let me just make notes of 21 what they all are. So 0963 is 51.3, 0964, 0964 will be 22 51.4, MMM51.4. 0965 will be 51.5 and the last one 0966 23 will be 51.6. Alright, I've marked them all accordingly, 24 you may now continue. 25 MR MPOFU: Yes, thank you, Chairperson.</p>	<p style="text-align: right;">Page 25096</p> <p>1 GENERAL NAIDOO: It would appear so, yes. 2 MR MPOFU: Yes. Now, if you then go to 3 the next page you see that on all those three photos – 4 CHAIRPERSON: This is MMM51.3, that's the 5 photograph IMG963.JPG at the moment. 6 MR MPOFU: Yes, point 4 to point 6. 7 CHAIRPERSON: We haven't got those on the 8 screen at the moment. We've got – 9 MR MPOFU: Oh yes, we don't. 10 CHAIRPERSON: IMG0962, 63. Now we've got 11 0964. 12 MR MPOFU: Yes, you see that, what you 13 can see there – 14 CHAIRPERSON: Now we're seeing 65, 0965. 15 MR MPOFU: And 66. 16 CHAIRPERSON: And 0966. Now what does 17 one see in the middle of the photograph MMM51.6? There's a 18 round, I don't know if it's, what's it made of? A white – 19 MR MPOFU: White circle. 20 CHAIRPERSON: Disk, a white disk with the 21 words "SSG" on it. What exactly is that, Major-General? 22 GENERAL NAIDOO: Chair, it would appear 23 to be the front end of a shotgun cartridge. Normally you 24 have that holding the projectiles in place, sir. 25 CHAIRPERSON: And then on top of it,</p>

Page 25097

1 covering the lower part of it – although I say the lower
 2 part of it, it's actually the top part of it on the
 3 photograph but if one assumes that the top part of the disk
 4 is the one, the part with SSG written on it then it's the
 5 lower part. There's another disk which is sort of a light
 6 brown colour, very light brown, what is that? Is that also
 7 part of –
 8 GENERAL NAIDOO: It could be, Chair. I'm
 9 not sure.
 10 CHAIRPERSON: You say it could be a disk
 11 like that lying on the other side?
 12 GENERAL NAIDOO: It could be, yes, part
 13 of a similar disk or part of this disk, I'm not sure.
 14 CHAIRPERSON: It looks like something to
 15 do with the shotgun.
 16 GENERAL NAIDOO: It would appear.
 17 CHAIRPERSON: And with pellets, is that
 18 right?
 19 GENERAL NAIDOO: It's normally this part
 20 that retains the pellets in a shotgun cartridge.
 21 CHAIRPERSON: Yes.
 22 MR MPOFU: Right, so would you agree, to
 23 put it at its lowest, that from these photographs it would
 24 seem that the banned ammunition SSG was used at the scene,
 25 correct?

Page 25098

1 GENERAL NAIDOO: Used –
 2 MR MPOFU: Shot.
 3 GENERAL NAIDOO: I'm not sure where these
 4 photographs are taken but it would appear that it is SSG
 5 pieces or pieces of SSG cartridge, yes.
 6 MR MPOFU: Yes.
 7 CHAIRPERSON: Are you able to tell us who
 8 took these photographs and where and when?
 9 MR MPOFU: Chairperson, I stand
 10 corrected, I think it's Mohlaki. It's in the Mohlaki
 11 series, ja. Well, I can't remember his rank but – Captain,
 12 yes, he's Captain, yes. Captain –
 13 CHAIRPERSON: Captain Mohlaki.
 14 MR MPOFU: Yes, these were photographs
 15 taken by Captain Mohlaki at scene, General.
 16 CHAIRPERSON: On the 16th of August?
 17 MR MPOFU: On the 16th of August.
 18 CHAIRPERSON: After the shootings there.
 19 MR MPOFU: Correct, yes. Subsequent to
 20 the shooting event. If you can just accept that for now,
 21 would you then agree with the conclusion that I'm seeking
 22 to draw?
 23 GENERAL NAIDOO: Sorry, can you repeat
 24 the conclusion?
 25 MR MPOFU: Okay. I was saying if these

Page 25099

1 photographs were taken on the 16th at scene 2 after the
 2 shootings, it would appear that on that or during the
 3 commotion that occurred there, the banned ammunition called
 4 SSG was used against the protesters?
 5 GENERAL NAIDOO: Chair, I could rather
 6 indicate that yes, if these things were found there –
 7 MR MPOFU: Yes.
 8 GENERAL NAIDOO: - that it was possibly
 9 used at some stage but we can't indicate specifically when,
 10 whether it was during the commotion as indicated.
 11 CHAIRPERSON: Yes. I take it we also
 12 don't know who used it.
 13 GENERAL NAIDOO: Exactly, Chair.
 14 CHAIRPERSON: So it might have been
 15 members of the South African Police Service, it might also
 16 have been other people who were on the scene.
 17 GENERAL NAIDOO: Chair, yes.
 18 CHAIRPERSON: It might have been. How
 19 probable that is, is a matter we have to look at.
 20 GENERAL NAIDOO: There's two other
 21 parties that could have possibly used – as well.
 22 MR MPOFU: Yes. That's exactly why I
 23 framed the question neutrally again. It would appear that
 24 the banned ammunition SSG was used on that day, on the 16th
 25 during the action that took place there, correct?

Page 25100

1 GENERAL NAIDOO: Chair, if that is what
 2 has been found at the scene, as I said, it does not
 3 necessarily indicate the day but if it was found on the
 4 scene we accept that it was part of the evidence that was
 5 recovered on that day, yes.
 6 MR MPOFU: And we can also assume that
 7 Captain Mohlaki took these photographs exactly to indicate
 8 that fact.
 9 GENERAL NAIDOO: That's correct.
 10 CHAIRPERSON: Do you know where on koppie
 11 3 those photographs were taken or is that something we have
 12 to ask Captain Mohlaki, either by his coming and giving
 13 evidence or by sending him a request, sending the police a
 14 request which he can answer. I'm not sure if he's going to
 15 come and –
 16 MR MPOFU: Yes, Chairperson. I suspect
 17 this is the kind of thing that will be dealt with –
 18 CHAIRPERSON: It's on his sketch plan,
 19 isn't it, which is an exhibit? It should be.
 20 MR MPOFU: No, apparently it's not,
 21 Chairperson, but I agree with the Chairperson. I think,
 22 I'm sure Mr Semanya – this is the kind of thing that a
 23 request will cover, an appropriately worded request.
 24 [12:52] CHAIRPERSON: If one looks at his sketch
 25 plan of which a copy was provided for us in earlier cross-

<p style="text-align: right;">Page 25101</p> <p>1 examination of this witness, but we didn't have the key, I 2 can't remember if the key mentioned these disks but we got 3 it quite a long time ago so my memory may be inaccurate on 4 that but I'm inclined to think we would have focused on it 5 at the time if it had been mentioned - 6 MR MPOFU: - I doubt - 7 CHAIRPERSON: I don't know whether you 8 can help us on that. 9 MR MPOFU: I doubt it myself, 10 Chairperson. Mr Wesley also seems to agree with you and I 11 that those were not on the sketch so we'll just forward an 12 appropriate request. 13 COMMISSIONER HEMRAJ: Isn't there a key 14 to the photographs, though? Does it not perhaps indicate 15 on that key to the photographs where this was taken? Mr 16 Wesley can you help us? 17 MR WESLEY: I'll have a look, 18 Commissioner. 19 COMMISSIONER HEMRAJ: Thank you. 20 MR MPOFU: Thank you very much, 21 Chairperson. 22 CHAIRPERSON: You weren't aware of this 23 at the time, these photographs, were you? 24 GENERAL NAIDOO: No, Chair. 25 CHAIRPERSON: Presumably Captain Mohlaki</p>	<p style="text-align: right;">Page 25103</p> <p>1 MR MPOFU: Okay and you would have been 2 involved in such an investigation. 3 GENERAL NAIDOO: Probably yes, I would 4 have had - 5 MR MPOFU: Or at least been aware of how 6 - 7 GENERAL NAIDOO: I would have been aware 8 and I would have been expected to assist in such an 9 investigation. 10 MR MPOFU: Yes. And in fact in support 11 of that statement you yourself, just to show that these are 12 matters which are your general concern, as it were, you on 13 the - okay, it's difficult to work out the date of this 14 letter but you issued an instruction to do with people 15 having to hand in, among others, SSG, correct? 16 GENERAL NAIDOO: All - 17 MR MPOFU: This year. 18 GENERAL NAIDOO: - shotgun ammunition, 19 yes. 20 MR MPOFU: In January of this year. 21 GENERAL NAIDOO: 16th of January. 22 MR MPOFU: 2014, 16th of January. 23 GENERAL NAIDOO: Yes. 24 MR MPOFU: Okay yes, I can see. Oh ja, 25 it says 011 where it's supposed to say 01, yes. On the 16th</p>
<p style="text-align: right;">Page 25102</p> <p>1 was but of course it raises quite a serious question, 2 doesn't it? 3 GENERAL NAIDOO: Of course. 4 CHAIRPERSON: And if the members, the 5 senior members of the police service had been aware of it 6 at the time - they may have been, I don't know - one would 7 have expected it to have been investigated because if it 8 was members of the police service who used this ammunition 9 it would have been a serious matter. 10 GENERAL NAIDOO: Definitely, Chair. 11 CHAIRPERSON: But is this the first 12 you've heard of it? 13 GENERAL NAIDOO: It's the first time, 14 yes. I have not been informed about this particular - 15 CHAIRPERSON: And you obviously weren't 16 at the time either. 17 GENERAL NAIDOO: No, Chair. 18 CHAIRPERSON: But would you have been 19 involved in, you know, if there had been investigations 20 about this at the time would you have expected to have been 21 told or was it something that would have been outside the 22 matters which you were concerned with? 23 GENERAL NAIDOO: No, definitely such an 24 infringement by a police official would have been 25 investigated and I would have known about it.</p>	<p style="text-align: right;">Page 25104</p> <p>1 of January 2014, correct? 2 GENERAL NAIDOO: That's correct, Chair. 3 MR MPOFU: And Chairperson, that letter 4 will be found, there's a cluster of documents which I don't 5 intend to use all of them but the last, no, it's not the 6 last. 7 CHAIRPERSON: We've got a pile of 8 documents - 9 MR MPOFU: Yes. 10 CHAIRPERSON: - we have been given. I 11 don't think they're exhibits yet. 12 MR MPOFU: No, they're not. It's 20 13 December 2011 is the one in front. I'm assuming they're in 14 the same sequence as mine, Chairperson. There's the first 15 letter, 20 December, a two page letter. It's one, two, 16 three - 17 COMMISSIONER HEMRAJ: It's page 6 in the 18 bundle, Mr Mpofo, is it? 19 MR MPOFU: That's correct, thank you. 20 Page 6 of that little bundle. Yes, and it's on the screen. 21 CHAIRPERSON: Let's give the bundle an 22 exhibit number. We'll call it MMM52. 23 MR MPOFU: MMM52. 24 CHAIRPERSON: And it's, well, I suppose 25 if then -</p>

Page 25105

1 MR MPOFU: 41.2.
 2 CHAIRPERSON: - what we'll have to do is,
 3 yes, we'll have to number each one separately. It will be
 4 MMM52.1 et cetera.
 5 MR MPOFU: Exactly.
 6 CHAIRPERSON: Now the one you're
 7 referring to is what number in the bundle?
 8 MR MPOFU: It will now be MMM52.6,
 9 Chairperson.
 10 CHAIRPERSON: And what is number 6?
 11 GENERAL NAIDOO: It's a letter that's on
 12 the screen right now.
 13 CHAIRPERSON: It's a letter –
 14 MR MPOFU: Signed by General Naidoo dated
 15 20, rather 16 January 2014. There's just a mistake. If
 16 you can go to the bottom where the signature appears.
 17 COMMISSIONER HEMRAJ: Yes.
 18 CHAIRPERSON: It's letter, it's letter
 19 from Major-General Naidoo.
 20 MR MPOFU: "Regarding withdrawal of –"
 21 CHAIRPERSON: "Regarding withdrawal of
 22 round," it should be shotgun –
 23 MR MPOFU: It is –
 24 CHAIRPERSON: Shotgun, shotgun?
 25 MR MPOFU: Without the "r" ja.

Page 25106

1 CHAIRPERSON: You should read your
 2 letters before you sign them. "Regarding withdrawal of
 3 round," I suppose I've got to write what is on the letter,
 4 "round shotgun" –
 5 GENERAL NAIDOO: Shotgun.
 6 CHAIRPERSON: "12-bore."
 7 MR MPOFU: Yes.
 8 CHAIRPERSON: Dated, and again I'll have
 9 to put this in quotation marks, "16" –
 10 GENERAL NAIDOO: January.
 11 CHAIRPERSON: It's dated 20/04/01.
 12 MR MPOFU: 2014, Chairperson.
 13 CHAIRPERSON: Sorry, 2014/011, that's
 14 what it is.
 15 MR MPOFU: It's a mistake.
 16 CHAIRPERSON: 16.
 17 MR MPOFU: Yes.
 18 CHAIRPERSON: "Really," I put it as
 19 "Really 2014/01/16." So it's really the 16th of January
 20 2014 but the pen slipped when he was writing the date and
 21 he missed the description of the –
 22 GENERAL NAIDOO: Shotgun.
 23 CHAIRPERSON: In the letter which
 24 referred to shotguns and not shortguns. So that's, you
 25 dictated the letter and you didn't spot it when it came

Page 25107

1 back typed to you. It wasn't really you, it was Brigadier
 2 Alexander, I take it.
 3 GENERAL NAIDOO: That's correct, Chair.
 4 CHAIRPERSON: Brigadier Alexander
 5 prepared the letter.
 6 GENERAL NAIDOO: Yes, he's supply chain –
 7 CHAIRPERSON: And you signed it.
 8 GENERAL NAIDOO: That's correct.
 9 CHAIRPERSON: Neither of you spotted that
 10 the shotgun had become shortgun, but anyway we won't waste
 11 time on that.
 12 MR MPOFU: And the 011, yes. Okay.
 13 CHAIRPERSON: Alright. And so what
 14 happened was the letter says "As per instruction by the
 15 Provincial Commissioner," so she actually issued the
 16 instruction, you then had to – you and Brigadier Alexander
 17 had to see to it that the instruction went out.
 18 GENERAL NAIDOO: Yes, with Brigadier
 19 Alexander.
 20 CHAIRPERSON: "All POP units in the
 21 North-West Province are instructed, herewith instructed to
 22 hand in the following rounds, shotgun 12-bore by 17 January
 23 2014 at 13H00." And then it was bore, round shotgun 12-
 24 bore number 5, round shotgun 12-bore SSG and then round
 25 shotgun 12-bore AAA.

Page 25108

1 GENERAL NAIDOO: That's correct, Chair.
 2 CHAIRPERSON: and then the letter
 3 continues, "Ensure proper co-ordination and PAS issues to
 4 Potchefstroom POP of all relevant ammunition." Now what's
 5 a PAS issue?
 6 GENERAL NAIDOO: It's a provisioning
 7 administration system because, as I indicated in my earlier
 8 testimony, that all government assets are, they're listed
 9 on a system and have to be accounted for on the system.
 10 CHAIRPERSON: Thank you. I see it's now
 11 1 o'clock, Mr Mpofu. Is this perhaps an appropriate stage
 12 for us to take the adjournment?
 13 MR MPOFU: Yes, Chairperson.
 14 CHAIRPERSON: Unless there's something, a
 15 point you want to slip in first before we take the
 16 adjournment. I'm in your hands.
 17 MR MPOFU: Yes, it's just a quick one,
 18 Chairperson. The item listed in 1.2 is the same as what we
 19 saw on the pictures, correct?
 20 GENERAL NAIDOO: That's correct, Chair.
 21 MR MPOFU: Ja. Okay, Chairperson, we can
 22 break at that point.
 23 CHAIRPERSON: Alright, we'll now take the
 24 lunch adjournment.
 25 [COMMISSION ADJOURNS COMMISSION RESUMES]

Page 25109

1 [13:55] CHAIRPERSON: The Commission resumes.
 2 Major-General, you're still under oath.
 3 GENERAL NAIDOO: Still under oath, Chair.
 4 CHAIRPERSON: Mr Mpofo, I take it the
 5 document that you wanted to have put up on the screen,
 6 that's the statement by Mr Shadrack Zandisile Mtshamba -
 7 MR MPOFU: Yes.
 8 CHAIRPERSON: Exhibit MMM50, is that now
 9 on the screen? Although I know you, I think you've got to
 10 deal – you're finishing off a point.
 11 MR MPOFU: Yes, I'll come to it later but
 12 it is, it has been arranged.
 13 CHAIRPERSON: Alright.
 14 MR MPOFU: It's been arranged.
 15 CHAIRPERSON: Please proceed with your
 16 cross-examination.
 17 GENERAL NAIDOO: s.u.o.
 18 CROSS-EXAMINATION BY MR MPOFU (CONTD.):
 19 Thank you, Chairperson. General, ja, we were still dealing
 20 with the SSG issue.
 21 GENERAL NAIDOO: Correct.
 22 MR MPOFU: Now, your evidence earlier was
 23 that this SSG, rather by the time the events of the 16th
 24 August 2012 occurred, it had already been banned for years,
 25 correct?

Page 25110

1 GENERAL NAIDOO: That's correct, Chair.
 2 MR MPOFU: Right, now – and then you kind
 3 of banned it again, January this year.
 4 GENERAL NAIDOO: Chair, not banned it.
 5 If I could explain, the arrangement was that the ammunition
 6 was placed at certain units and stations and they were no
 7 longer going to be on order and they had to be utilised for
 8 training purposes, et cetera, until they were depleted and
 9 the police were not going to buy any more of this
 10 ammunition.
 11 MR MPOFU: Yes, but surely if it had been
 12 banned for years, it must have been depleted a long time
 13 ago.
 14 GENERAL NAIDOO: Chair –
 15 MR MPOFU: Otherwise if you are doing it
 16 again now it means it was supplied during the period of the
 17 ban. Am I correct?
 18 GENERAL NAIDOO: No, it's not correct
 19 Chair.
 20 MR MPOFU: Okay.
 21 GENERAL NAIDOO: The ammunition that was
 22 stockpiled at certain units were drawn from various
 23 stations and units and that particular stockpile was
 24 intended to be utilised until depletion. What we found in
 25 January this year is that although it was more than 10

Page 25111

1 years, that the stockpile had not depleted sufficiently to
 2 be taken out of circulation.
 3 MR MPOFU: So in 10 years or so the
 4 stock, as it were, was still available to members.
 5 GENERAL NAIDOO: Chair, when you say
 6 available, it was still in stock at those units where they
 7 were placed, yes.
 8 COMMISSIONER HEMRAJ: Was access to that
 9 ammunition subject to the same rules that, active to other
 10 ammunition?
 11 GENERAL NAIDOO: Any other ammunition,
 12 it's the same process.
 13 MR MPOFU: Yes, but the point is,
 14 effectively it was accessible to members of POP?
 15 GENERAL NAIDOO: For training purposes,
 16 yes.
 17 MR MPOFU: Yes, but these are
 18 nevertheless, I mean whatever purposes, it was available
 19 for them. They could use it for training or they could
 20 just admire it or whatever.
 21 GENERAL NAIDOO: Chair –
 22 MR MPOFU: It was available, so –
 23 GENERAL NAIDOO: I think when you say
 24 available, there are two POP units where the areas, because
 25 of the facilities they had, were the main storage areas of

Page 25112

1 the ammunition. The booking out of ammunition and issuing
 2 of ammunition in POPS is a very specific process. I think
 3 we dealt with it earlier in my testimony. So what I'm
 4 saying is that there was old stock of ammunition in stock
 5 and the idea was that until it was depleted it would be
 6 stored there and utilised for training exercises, et
 7 cetera. It was withdrawn from use in crowd management
 8 duties.
 9 CHAIRPERSON: I want to ask you a
 10 question about that.
 11 GENERAL NAIDOO: Yes, Chair.
 12 CHAIRPERSON: I take it when it was
 13 taken, taken out of the storeroom or this room, wherever it
 14 was stored, store –
 15 GENERAL NAIDOO: That's right.
 16 CHAIRPERSON: - notes would have been
 17 kept and registers would have been filled in.
 18 GENERAL NAIDOO: At the relevant store,
 19 yes.
 20 CHAIRPERSON: Is that right?
 21 GENERAL NAIDOO: That's correct, Chair.
 22 CHAIRPERSON: Now if some, if these
 23 pellets that were used at scene 2 were used by members of
 24 the police service and if the pellets that they fired were
 25 police stock, then that should be reflected in some way in

Page 25113

1 the records, should it not?

2 GENERAL NAIDOO: That's correct, Chair.

3 CHAIRPERSON: The record – now do you

4 know whether anyone has done any – well, you don't because

5 you only heard about it here today, I suppose, but you're

6 not aware whether any investigations were done after you

7 signed this letter in January to check whether what now had

8 to be handed in coincided with what was in the records?

9 GENERAL NAIDOO: Yes. Chair, as I

10 testified earlier during the first cross-examination, that

11 there was a particular incident that occurred in Brits

12 which resulted in an investigation and this instruction

13 where the reconciling of all ammunition was done. I'm not

14 aware of the outcome of the reconciling, I've since been

15 here at the Commission but that process, yes, it was

16 undertaken by the supply chain officials to withdraw them

17 from those units, reconcile them against what they say so

18 that we have a picture of what's happening.

19 CHAIRPERSON: So has that reconciliation

20 been done or is it still being done?

21 GENERAL NAIDOO: Chair, it was in process

22 when I came to the Commission so it might be finished, yes.

23 We can establish that.

24 MR MPOFU: So this instruction was

25 prompted, as it were, by the killings in Motleklong.

Page 25114

1 GENERAL NAIDOO: By the incident in

2 Motleklong, yes.

3 MR MPOFU: Yes, where you had discovered

4 that SSG had been used in the course of those killings,

5 despite the fact that it had been banned for years.

6 GENERAL NAIDOO: Chair, yes. I think the

7 Minister did make a statement on this matter. A member

8 admitted to that issue and it's being dealt with by IPID as

9 well as internally, yes.

10 MR MPOFU: Yes, and you as the police

11 leadership, you were surprised to say the least that SSG

12 had been used by members of the police which, rather

13 despite the fact that it had, it was a banned form of

14 ammunition, correct?

15 GENERAL NAIDOO: It was ammunition that

16 was not allowed in crowd management, yes.

17 MR MPOFU: Yes. Hence, as I say, you

18 effectively had to reissue the banning order of this SSG or

19 re-emphasise it, correct?

20 GENERAL NAIDOO: Chair, we didn't re-

21 emphasise it. We withdrew it all from all the stores.

22 COMMISSIONER HEMRAJ: Can I just clarify

23 something, General?

24 GENERAL NAIDOO: Yes.

25 COMMISSIONER HEMRAJ: If that register is

Page 25115

1 properly kept then as at the 16th of August, if you work

2 backwards, you should be able to tell us exactly who it was

3 that booked out this particular ammunition.

4 GENERAL NAIDOO: If they booked it out,

5 yes.

6 COMMISSIONER HEMRAJ: If they booked it

7 out and how much is it.

8 GENERAL NAIDOO: The relevant store

9 manager should be able to do that.

10 CHAIRPERSON: But of course if it wasn't

11 booked out then there'd be a shortfall.

12 GENERAL NAIDOO: That's correct, Chair.

13 CHAIRPERSON: I mean the first thing to

14 do is to check out whether all –

15 GENERAL NAIDOO: It's accounted for.

16 CHAIRPERSON: - all the ammunition that's

17 been taken out has been recorded or if there's a shortfall.

18 GENERAL NAIDOO: That's right.

19 CHAIRPERSON: If there isn't a shortfall

20 then you investigate who took out what ammunition prior to

21 the 16th of August 2012.

22 GENERAL NAIDOO: Chair, yes. Chair, in

23 the issue of Motleklong a member has been identified and he

24 has admitted, so there is that investigation which IPID is

25 conducting, so we would determine the source there.

Page 25116

1 MR MPOFU: Yes. No, no, that we

2 understand, General. I think the point of the questions

3 I'm putting to you is that exactly these issues that are

4 being raised by the Commissioners would have been or should

5 have been the subject of an investigation once it was

6 discovered that SSG had been used on the 16th. Would that

7 be a fair comment?

8 GENERAL NAIDOO: Chair, as I indicated,

9 to our knowledge at that stage no SSG was issued to any

10 member of the SAPS because it was not allowed in crowd

11 management.

12 MR MPOFU: Yes, but that's exactly the

13 same situation that obtained in Motleklong but that did not

14 stop somebody from using it, hence there is an

15 investigation currently underway in respect of that, isn't

16 it?

17 GENERAL NAIDOO: Chair, yes.

18 MR MPOFU: Ja.

19 GENERAL NAIDOO: There is an

20 investigation.

21 MR MPOFU: Ja, alright.

22 CHAIRPERSON: Mr Semenya, you heard what

23 the witness said. I take it that when that exercise is

24 completed the results will be made available to us. I

25 don't know if it's necessary for us to have the evidence on

Page 25117

1 it but if we could have the results it would be helpful.
2 Is there a shortfall? If there wasn't a shortfall, what is
3 revealed in relation to ammunition that was removed from
4 the store in the period prior to the 16th of August 2012?

5 MR SEMENYA SC: We will investigate where
6 the process is and if there is a report it will be
7 submitted to you, Chair.

8 CHAIRPERSON: Thank you. And if it isn't
9 available then obviously as soon as it becomes available
10 you'll give it to us. Thank you.

11 MR MPOFU: Chairperson, my understanding
12 is that there is no such process. My understanding is that
13 that process was never done because the General only learnt
14 about this now, in relation to Marikana at least.

15 CHAIRPERSON: Yes – yes, no, as I say, he
16 said that, yes but presumably the investigation will
17 indicate whether there's a shortfall and they'd have to go
18 back 10 years to see if there's a shortfall, isn't that so?
19 They will know how much they had 10 years ago when the
20 prohibition went out. Every item of ammunition that's been
21 taken out since then has been, should have been recorded,
22 so they will see whether there's a shortfall. If there's a
23 shortfall it means that some stuff has been irregularly or
24 illicitly removed from the store. If everything, there's
25 no shortfall, they'll then be able to see, depending how

Page 25118

1 far back they go – the records presumably go back 10 years
2 – they'll be able to say who took out ammunition in the
3 period before the 16th of August 2012. It may be difficult,
4 that may be where the trail would dry out but nevertheless
5 there's clearly investigation to be done.

6 MR MPOFU: Yes.

7 CHAIRPERSON: And which may well produce
8 results.

9 MR MPOFU: Thank you.

10 CHAIRPERSON: And we've got an
11 undertaking that once that's completed it will be given to
12 us.

13 MR MPOFU: It will be done. Thank you,
14 Chairperson.

15 MR SEMENYA SC: Chair, it's pointed out
16 to me that perhaps one of the other complicating factors is
17 that this exercise may be happening in North-West when we
18 know on the 16th we had people from other provinces as well.
19 So that reconciliation may prove to be nationwide.

20 CHAIRPERSON: Alternatively, it should be
21 done nationwide but as far as those people involved at
22 koppie 3 are concerned, scene 2, we'll know which provinces
23 they came from. So for our purposes I suppose we'd only
24 need the results of the investigations done in the relevant
25 provinces. I don't think there was anyone from the Western

Page 25119

1 Cape there, for example, so we wouldn't need the results of
2 the investigations in the Western Cape, as an example. And
3 of course the point also relates, I suppose, to scene 1 as
4 well because remember there were pellets fired at scene 1
5 also and again we will know who was there, from which
6 province. So the same point would apply, would it not?

7 MR MPOFU: Yes. Thank you, Chairperson.

8 But of course, General, this exercise, good as it is, would
9 really assist us in identifying who might have removed the
10 SSG from the stores and so on but for our purposes what is
11 important is that somebody used it, correct? Would you
12 agree with that?

13 GENERAL NAIDOO: Chair, yes, and there's
14 a range of possibilities, as we know that two shotguns were
15 taken from the security guards. I'm not sure what
16 ammunition those security guards were carrying as well. We
17 need to cross-check with that. I'm not sure forensically
18 whether, if you look at that front of the shotgun SSG
19 cartridge, whether also the manufacturers can be traced so
20 that we can sort of narrow it down to which type of
21 ammunition that was used.

22 MR MPOFU: But yes, okay.

23 CHAIRPERSON: I take it the shotguns –
24 perhaps I'm wrong to say I take it because I may be
25 incorrect but am I correct in thinking that the shotguns

Page 25120

1 that were taken from the security guards on the Sunday the
2 12th were not recovered?

3 GENERAL NAIDOO: No, Chair.

4 CHAIRPERSON: So, well, I suppose it's
5 technically possible that someone might have smuggled them
6 off koppie 3 without it being detected on the 16th. The
7 probability is that they wouldn't have succeeded in getting
8 them away so if they had been used they are likely to be
9 found on the scene. I know that's not very watertight but
10 –

11 GENERAL NAIDOO: Chair, yes.

12 CHAIRPERSON: - it is a factor to be
13 considered.

14 GENERAL NAIDOO: Chair, yes. I'm just
15 including the whole permutation, the possible sources of
16 the shotguns are, which can be traced I'm sure if we look
17 at some of the evidence that's recovered.

18 MR MPOFU: Ja. No, of course, General, I
19 think one can – I mean here could be a whole host of
20 fanciful possibilities. Maybe someone was just walking
21 past the koppie and sommer shot with SSG but I mean the
22 likelihood, you would agree, is that it was, as in this
23 case of Motleklong, used by a member of the police.

24 GENERAL NAIDOO: Or a striker with one of
25 the stolen shotguns, yes.

<p style="text-align: right;">Page 25121</p> <p>1 MR MPOFU: Yes, but that falls under the 2 fanciful possibilities. I'm saying that – let's even say 3 we include all fanciful possibilities, the mere fact, even 4 if you don't exclude any of the fanciful possibilities, the 5 mere fact that a banned form of ammunition was spotted 6 among, at the scene, should have been sufficient for the 7 police to investigate how that came about, correct? 8 GENERAL NAIDOO: Chair, yes, if that was 9 brought to our attention. As you know, that the 10 investigation on the scene is not being led by the police. 11 MR MPOFU: Yes, and fortunately in the 12 case of Motleklong we don't have to go through all these 13 fanciful possibilities because there it is know that this 14 was fired by the police, correct? 15 GENERAL NAIDOO: It was identified, yes. 16 MR MPOFU: Thank you. Now while we are 17 on the subject of withdrawal from the stores and, you know, 18 methods of tracing ammunition, you would agree that the 19 time tested method of collating ammunition taken by a 20 particular member is the method whereby you book your 21 firearm out, if it has 10 bullets it has 10 bullets and 22 then you book it back, if it has six bullets it means you 23 used four. That's the simplest and oldest way of dealing 24 with that issue, correct? 25 GENERAL NAIDOO: Correct.</p>	<p style="text-align: right;">Page 25123</p> <p>1 MR MPOFU: Ja. If that system is broken 2 down then it would be difficult, if not impossible, to 3 trace who took what and what came back and so on. 4 GENERAL NAIDOO: Chair, I am not sure 5 when you say broken down, then not working – 6 MR MPOFU: As in – ja, breached. In 7 other words if somebody takes 10, a gun with 10 bullets but 8 we don't know whether he came back with it or how many 9 bullets were in it when it came back then the whole system 10 would collapse. 11 GENERAL NAIDOO: Of course, yes. 12 MR MPOFU: Thanks. Now what happened to 13 your gun, the one that you fired twice? 14 GENERAL NAIDOO: What about it, Chair? 15 MR MPOFU: Where is it? 16 GENERAL NAIDOO: I have received it back 17 from IPID. 18 MR MPOFU: Did it go for ballistic 19 testing? 20 GENERAL NAIDOO: Yes, Chair. 21 MR MPOFU: Do you know, or rather let me 22 start by doing this. There's a document which is part of 23 those documents that were sent to you, it comes from the 24 IPID file 4, I think. 25 GENERAL NAIDOO: Chair –</p>
<p style="text-align: right;">Page 25122</p> <p>1 MR MPOFU: Ja. Now, and it would be 2 impossible, if you break that system then it might well be 3 impossible to find out who shot what. It would just be 4 chaos. 5 GENERAL NAIDOO: Chair, no. I think I 6 already testified to the way the public order police, the 7 people who use shotguns in the police, how they book the 8 ammunition out. I have testified and it's not as indicated 9 by the counsel. Their method of issuing ammunition is a 10 little bit different. 11 MR MPOFU: Yes, no, I accept that. I'm 12 just saying in general that is how the police keep track of 13 ammunition. 14 GENERAL NAIDOO: Chair, but we can't 15 generalise when it comes to the public order police because 16 they have, they are currently the users of shotguns – 17 MR MPOFU: I'm not talking about public 18 order police, General, just answer the question. Is that, 19 in general, the time tested method of collating the use of 20 ammunition? 21 GENERAL NAIDOO: Well, the method of 22 collating the use of ammunition is the amount that's booked 23 out versus what's booked in, with specific report. 24 MR MPOFU: Correct. 25 GENERAL NAIDOO: Yes.</p>	<p style="text-align: right;">Page 25124</p> <p>1 MR MPOFU: It's headed, maybe for the 2 operator – Chairperson, it would have come with that bundle 3 but it's a loose page headed "Report by commander." Got 4 it, thank you. 5 CHAIRPERSON: That's not an exhibit? 6 MR MPOFU: Let's call it 52, Chairperson? 7 CHAIRPERSON: That's not an exhibit – 8 MR MPOFU: No, it's not yet. 9 CHAIRPERSON: It'll be part of the 52 10 series so we'll make it 52.7 and it's "Report by commander" 11 – 12 MR MPOFU: Can we make it 53 because – 13 CHAIRPERSON: Alright, I'll make it 53. 14 [14:15] MR MPOFU: 53, ja. There's some 15 confusion – 16 CHAIRPERSON: Maybe after 50 – yes, 17 alright, okay. 18 MR MPOFU: Yes. 19 CHAIRPERSON: We'll make it 53. 20 MR MPOFU: Thank you, Chair. 21 CHAIRPERSON: "Report by commander" – is 22 this SAPS15 or 16? 23 GENERAL NAIDOO: 15. 24 MR MPOFU: 1-5. 25 CHAIRPERSON: SAP15, what's the date of</p>

Page 25125

1 it?

2 MR MPOFU: 16th August 2012, Chairperson,
3 to 17th August 2012.

4 CHAIRPERSON: 16/8/2012 to 17/8/2012.

5 This will be MMM53.

6 MR MPOFU: Yes, thank you, Chair. That
7 document, among others, would show us when somebody checked
8 out, as it were, and that would be the time when the
9 exercise I've just described would be done, correct, in
10 relation to ammunition?

11 GENERAL NAIDOO: Chair, no. This is not
12 for booking out of ammunition, it's just a register to book
13 on duty, yes. It's not a firearm register as such.

14 MR MPOFU: Yes, I accept that. I know
15 it's not a firearm register. I'm saying the times at which
16 you assumed possession of certain ammunition and the time
17 at which you surrender it back would coincide with those
18 times, correct?

19 GENERAL NAIDOO: Chair, no. I won't
20 agree with that because in terms of, now we're talking
21 about myself, I'm issued with a personal firearm which is
22 on my equipment sheet. So I do not book my firearm in and
23 out. I am permanently in possession of my firearm with the
24 allocated number of rounds that are issued to me.

25 MR MPOFU: Okay, maybe let me ask it

Page 25126

1 differently. If it so happened that on a particular day
2 you have – that much will be so on these normal days but if
3 it happens on a particular day that you have discharged
4 your firearm, would that be the time at which you collate
5 the ammunition issued?

6 GENERAL NAIDOO: Chair, no. I think
7 we're talking past each other. When you say collate, I'm
8 not sure exactly what is meant.

9 MR MPOFU: Okay. I'm saying on a normal
10 day it might well be that your personal firearm doesn't
11 have to be declared, so let's put that aside and say I
12 accept that.

13 GENERAL NAIDOO: Okay.

14 MR MPOFU: I'm saying now on a day when
15 you have shot at people or whatever it is –

16 CHAIRPERSON: Simply say discharged your
17 firearm, I think that would be –

18 MR MPOFU: Yes, discharged your firearm
19 in whatever circumstances.

20 CHAIRPERSON: I take it he may well fire
21 his, discharge his firearm for practice purposes.

22 MR MPOFU: Yes.

23 CHAIRPERSON: So I take it whenever you
24 discharge your firearm, at some stage thereafter you have
25 to fill in some form?

Page 25127

1 GENERAL NAIDOO: Chair –

2 CHAIRPERSON: Is that correct?

3 GENERAL NAIDOO: As I indicated, there's
4 two things that happen. One is that there is a duty
5 officer that attends to the issue of the shooting. We
6 dealt with that where there was a duty officer from
7 Marikana who attended but he could not give the detail as
8 much as he wanted and the second thing is that you report
9 it to, in this case, the JOC or if you're at a station, to
10 the community service centre, you report it there. So the
11 report of the shooting is normally dealt with by the duty
12 officer.

13 MR MPOFU: Okay, ja –

14 GENERAL NAIDOO: I'm not required, other
15 than my statement which I have to submit, I'm not required
16 to complete any other form, sir.

17 MR MPOFU: Even if you have discharged
18 your firearm?

19 GENERAL NAIDOO: That's the duty officer
20 who completes it. You don't, the shottist himself does not
21 complete –

22 CHAIRPERSON: You presumably then have to
23 provide information –

24 GENERAL NAIDOO: To the duty officer.

25 CHAIRPERSON: To the duty officer.

Page 25128

1 GENERAL NAIDOO: That's correct, Chair.

2 CHAIRPERSON: To enable him or her –

3 GENERAL NAIDOO: That's correct.

4 CHAIRPERSON: To fill in the form.

5 GENERAL NAIDOO: That's correct, Chair.

6 CHAIRPERSON: Okay.

7 MR MPOFU: Yes. Sorry, Chair. And that
8 would be at the time when you knock off duty, correct?

9 GENERAL NAIDOO: At the time of the
10 incident, yes.

11 MR MPOFU: No, no. The incident could
12 happen in a supermarket. I'm saying the time at which you
13 report about the firearms would be when you now report off
14 duty to the duty officer, correct?

15 GENERAL NAIDOO: Chair, I think we're
16 missing the point. The duty officer goes out to where the
17 discharging of the firearm took place and completes a
18 report on the scene and the duty officer takes the process
19 forward. The shottist does not take the process forward.

20 MR MPOFU: General, I think –

21 CHAIRPERSON: I think Mr Mpofo is
22 interested to know when the report was made.

23 GENERAL NAIDOO: Yes.

24 CHAIRPERSON: And the impression I get is
25 that obviously if it was done when you were off duty that's

Page 25129

1 a different question, let's assume we're talking about
 2 shots that were fired when you were on duty. I take it the
 3 answer is that before going off duty –
 4 GENERAL NAIDOO: Yes.
 5 CHAIRPERSON: - you would report it to
 6 the duty officer.
 7 GENERAL NAIDOO: That's correct.
 8 CHAIRPERSON: You wouldn't necessarily do
 9 it as you go off duty but you would do it before, at some
 10 stage before you go off duty. Is that correct?
 11 GENERAL NAIDOO: Let me clarify, Chair.
 12 You have to report it to the duty officer immediately. The
 13 duty officer has to attend it as it happens.
 14 MR MPOFU: Okay, almost instantaneously?
 15 GENERAL NAIDOO: As soon as possible,
 16 yes.
 17 MR MPOFU: Ja. So when you discharged
 18 your firearm twice did you instantaneously report to the
 19 duty officer?
 20 GENERAL NAIDOO: I reported to the JOC,
 21 yes.
 22 MR MPOFU: Is the JOC the same thing as
 23 the duty officer?
 24 GENERAL NAIDOO: Well, in terms of the
 25 operation, yes, that would be the process and the JOC did

Page 25130

1 activate the duty officer from Marikana who did submit a
 2 report.
 3 MR MPOFU: Yes and that was done – well,
 4 okay, let me just cut it short by saying this. If you look
 5 at MMM53 you will see that both General Mpembe and I think
 6 Annandale signed on duty with a signature and off duty with
 7 a time and a signature.
 8 GENERAL NAIDOO: That's correct, Chair.
 9 MR MPOFU: But in your case we only have
 10 your signature on duty and, unlike the other generals, you
 11 did not declare when you went off duty.
 12 GENERAL NAIDOO: That's correct, Chair.
 13 MR MPOFU: Now, the point I'm making is
 14 that insofar as there may be any coincidence and it might
 15 not be instantaneously at the time of going off duty, that
 16 I accept, but insofar as there may be any coincidences
 17 going off duty or – firstly, of those three generals there
 18 you were the only one who discharged your firearm, to your
 19 knowledge, correct?
 20 GENERAL NAIDOO: That's correct, Chair.
 21 MR MPOFU: Yes. Now the question is,
 22 insofar as there's any relationship between going off duty
 23 and anybody having a record of how many shots you have
 24 fired and so on, we wouldn't know at what point you knocked
 25 off, as it were.

Page 25131

1 GENERAL NAIDOO: Chair, I knocked off
 2 almost the next morning, yes. The time when I knocked off
 3 the people that were on duty with me had already gone off
 4 duty, so the going off duty, I don't see the relationship
 5 between it and the reporting of the shooting incident which
 6 I've already testified to.
 7 MR MPOFU: Ja. Well, General, all I'm
 8 saying is that there must be a purpose why the other
 9 generals had to indicate with a signature their time of
 10 going off duty.
 11 GENERAL NAIDOO: Of course.
 12 MR MPOFU: Yes and I'm saying, I'm not
 13 saying it's the sole purpose but I'm saying one of those
 14 purposes is that it would make it possible between point A,
 15 which is going on duty, and point B to be able to find out,
 16 among other things, what happened to whatever ammunition or
 17 firearm they might have been carrying. Would you agree
 18 that there is at least that possible relationship between
 19 the two things?
 20 GENERAL NAIDOO: Chair, I'm not sure.
 21 Maybe it can be explained to me more, in a different
 22 fashion and maybe I'll understand it.
 23 MR MPOFU: Okay. Let me put it this way.
 24 If I were to say to you I'm disputing the fact that you
 25 only fired two shots, you fired 20 shots –

Page 25132

1 GENERAL NAIDOO: Yes, Chair.
 2 MR MPOFU: Ja, I'm just making an
 3 example.
 4 GENERAL NAIDOO: Yes.
 5 MR MPOFU: One of the ways in which you
 6 could counteract my statement would be to say, how can you
 7 say that because I signed on duty at 5 o'clock and I
 8 signed, with 10 bullets, and I signed off duty at X time
 9 with eight bullets, so clearly during the relevant period I
 10 only fired two shots. I'm just saying that that would be
 11 available to you but if you have a blank thing like this
 12 which means you still haven't knocked off since August –
 13 GENERAL NAIDOO: Chair, the person who I
 14 reported the matter would be the appropriate person to
 15 indicate in terms of this. The fact that I did not sign
 16 off the register merely meant that the time when I went off
 17 duty that the people that were normally on duty had already
 18 gone and I could not locate this sheet. That's all it
 19 locates, that's all it indicates. It does in no way have a
 20 bearing on the number of shots I fired. As I indicated,
 21 the two instances, the JOC commander was made aware of the
 22 fact of the shooting, the JOC commander also activated the
 23 duty officer who completed the duty officer's report.
 24 Those are the things that pertain to the shooting. The
 25 time that I went off duty has no bearing in terms of the

<p style="text-align: right;">Page 25133</p> <p>1 number of rounds I shot.</p> <p>2 COMMISSIONER HEMRAJ: Who was the duty</p> <p>3 that came from Marikana, do you know?</p> <p>4 GENERAL NAIDOO: I can check. I know</p> <p>5 there was a duty officer's report, we can check it.</p> <p>6 COMMISSIONER HEMRAJ: So somewhere there</p> <p>7 must be a document that he's completed that indicates how</p> <p>8 many shots were fired by you?</p> <p>9 GENERAL NAIDOO: That he attended the</p> <p>10 shooting and – there are specific questions to be asked in</p> <p>11 terms of that, yes.</p> <p>12 COMMISSIONER HEMRAJ: And that document</p> <p>13 would indicate how many shots you reported having shot?</p> <p>14 GENERAL NAIDOO: That shows to – yes.</p> <p>15 MR MPOFU: Okay. In any event, okay,</p> <p>16 we'll leave that for argument but related to that, you – at</p> <p>17 the very least you've admitted to having shot twice at the</p> <p>18 strikers, correct?</p> <p>19 GENERAL NAIDOO: I did, Chair.</p> <p>20 MR MPOFU: And you've admitted that you</p> <p>21 may have injured or killed one or two people.</p> <p>22 GENERAL NAIDOO: Chair, that's not what I</p> <p>23 admitted. I said that it's unknown.</p> <p>24 MR MPOFU: Yes, unknown but it's</p> <p>25 possible, correct?</p>	<p style="text-align: right;">Page 25135</p> <p>1 So what he was saying was there were a number, as I</p> <p>2 understand it, there were a number of people lying down but</p> <p>3 only two of them were dead, the others were still alive. I</p> <p>4 understand that to be the thrust of what he's saying but he</p> <p>5 did say only two is correct but that appears to be the</p> <p>6 context in that paragraph. There may be something more in</p> <p>7 the passage in the record that you want to quote.</p> <p>8 MR MPOFU: Okay. Well, whatever. The</p> <p>9 point is that –</p> <p>10 CHAIRPERSON: What was the passage that</p> <p>11 you, you referred to a passage in the record but does it</p> <p>12 effectively say the same thing?</p> <p>13 MR MPOFU: Yes, Chairperson, it's on page</p> <p>14 –</p> <p>15 CHAIRPERSON: Yes, no, we've got it.</p> <p>16 It's page 22942.</p> <p>17 MR MPOFU: Yes.</p> <p>18 CHAIRPERSON: Which is day 189.</p> <p>19 MR MPOFU: Ja.</p> <p>20 CHAIRPERSON: And it's lines 8 to 11.</p> <p>21 It's effectively Mr Semanya reading from, the passage from</p> <p>22 the statement that I think I've read.</p> <p>23 MR MPOFU: Ja.</p> <p>24 CHAIRPERSON: That's where the only two</p> <p>25 comes from and he agrees and then explains that there were</p>
<p style="text-align: right;">Page 25134</p> <p>1 GENERAL NAIDOO: Probable, yes.</p> <p>2 MR MPOFU: Ja. Now insofar as it is</p> <p>3 possible that you may have killed one or two people, in</p> <p>4 relation to – in fact your evidence was that after you</p> <p>5 discharged your shots, when you then proceeded to that area</p> <p>6 there were, to use your words, only two people had been</p> <p>7 killed, correct?</p> <p>8 GENERAL NAIDOO: No, Chair. I don't</p> <p>9 remember such words. I think what I indicated for two</p> <p>10 people was that there were two people that were arrested</p> <p>11 with firearms in that particular vicinity.</p> <p>12 MR MPOFU: Okay, can you go to page</p> <p>13 22942, I think it's day 189.</p> <p>14 CHAIRPERSON: Well, is it only two? I</p> <p>15 see in paragraph 26, sorry, paragraph 76 –</p> <p>16 MR MPOFU: 76?</p> <p>17 CHAIRPERSON: 76 of exhibit JJJ108.</p> <p>18 MR MPOFU: JJJ108.</p> <p>19 CHAIRPERSON: I think the thrust of it is</p> <p>20 – perhaps I can read the paragraph. Well, it's on the</p> <p>21 screen now. "In our forward movement to the first bodies</p> <p>22 among the rocks which I observed on my arrival, we</p> <p>23 discovered that only two of the strikers were shot and</p> <p>24 killed. Approximately three strikers were lying still</p> <p>25 among the bodies with pangas and assegais in their hands."</p>	<p style="text-align: right;">Page 25136</p> <p>1 others who were lying between the bodies of the shot</p> <p>2 strikers seeking refuge, so – as I put it to you.</p> <p>3 MR MPOFU: Ja, okay, whatever the context</p> <p>4 was, the point is that after you had shot twice, I'm just</p> <p>5 relating it to the fact that I'm saying there's a</p> <p>6 possibility that you killed one or two persons.</p> <p>7 GENERAL NAIDOO: Chair, the context of</p> <p>8 that particular statement was with regard to when I arrived</p> <p>9 at the NIU line and we went forward to where we thought</p> <p>10 there were about five people that had been shot and only</p> <p>11 two of those people had been shot, three of them were</p> <p>12 uninjured. That is the context in terms of that.</p> <p>13 MR MPOFU: Ja, that's fine, I accept</p> <p>14 that.</p> <p>15 GENERAL NAIDOO: Yes.</p> <p>16 MR MPOFU: I'm saying you, that – I'm</p> <p>17 saying this in relation to the fact that you may have</p> <p>18 killed one or two persons and I'm saying could these two</p> <p>19 persons who were killed, only two of them in whatever</p> <p>20 context, have been those people?</p> <p>21 GENERAL NAIDOO: No, Chair. Those people</p> <p>22 were at the shooting that I arrived at. It was not the</p> <p>23 people that were involved in the incident with myself so –</p> <p>24 MR MPOFU: Okay, so –</p> <p>25 GENERAL NAIDOO: I think we are talking</p>

Page 25137

1 past each other in terms of –

2 MR MPOFU: No, we're not. You've

3 clarified what I was asking. So the one or two persons

4 that you may have killed would have been at a different

5 location, is that what you're saying?

6 GENERAL NAIDOO: Chair, I don't recall

7 indicating where people I may have killed, I indicated the

8 area where I discharged my firearm.

9 MR MPOFU: Brigadier Naidoo, please.

10 GENERAL NAIDOO: I've been demoted.

11 MR MPOFU: You and – I don't want to walk

12 –

13 CHAIRPERSON: You've just demoted him.

14 MR MPOFU: Oh yes, I have. General

15 Naidoo, Doctor, I don't want us to cover the ground that

16 we've already covered. You and I today and on Friday I

17 think, or whenever the last time was, have agreed that you

18 may have killed one or two people.

19 GENERAL NAIDOO: No, Chair –

20 MR MPOFU: If not – oh, sorry, okay.

21 Just give your explanation?

22 GENERAL NAIDOO: I think we indicated the

23 possibility of somebody being killed or injured. We never

24 indicated numbers, et cetera.

25 MR MPOFU: Yes, okay fine. Okay, so you

Page 25138

1 only admit that you may have killed or injured one person.

2 GENERAL NAIDOO: No, I think we indicated

3 that as a result of my shooting there may have been a

4 person injured or killed but that has not been proved by

5 other evidence.

6 MR MPOFU: Yes, that's why I used the

7 word "may." If it was proved I would say you killed.

8 GENERAL NAIDOO: Of course.

9 MR MPOFU: Do you understand?

10 GENERAL NAIDOO: I understand, Chair.

11 MR MPOFU: Ja. I'm saying to you, seeing

12 that you shot twice you may have killed one or two people,

13 correct?

14 GENERAL NAIDOO: May have, yes.

15 MR MPOFU: Yes, thank you. Now seeing

16 that you may have killed one or two people, is your

17 evidence that those two people would have been at a

18 different location as against these two that I was

19 referring to you now?

20 GENERAL NAIDOO: Yes, Chair. Those two

21 were among the bodies that we already testified to that

22 were engaged with the shooting with the NIU when I arrived

23 at the NIU. This is completely a different incident.

24 CHAIRPERSON: What firearms were the NIU

25 people using, R5s?

Page 25139

1 GENERAL NAIDOO: R5s, Chair, and 9

2 millimetres.

3 CHAIRPERSON: And?

4 GENERAL NAIDOO: As well as 9 millimetre.

5 CHAIRPERSON: And 9 millimetre, I see.

6 MR MPOFU: And you – sorry.

7 CHAIRPERSON: And K9, what were they

8 using? The K9 people, what were they using?

9 GENERAL NAIDOO: The same R5s and 9

10 millimetre.

11 CHAIRPERSON: I see. And among the – I

12 don't know whether you can tell us this but I'm sure we can

13 find that out if you can't tell us, the dead bodies that

14 were found at scene 2, do we know how many of them died as

15 a result of R5 fire and how many died as a result of being

16 shot by a pistol?

17 GENERAL NAIDOO: Chair, offhand I don't

18 know but in the previous cross-examination we dealt mostly

19 with high velocity. There were one or two that were lower

20 velocity but the majority were high velocity, yes.

21 MR MPOFU: Yes, General, and I just want

22 to assure you I'm not – whether, who those people that you

23 may have killed and so on would be a subject of a different

24 process, probably in the criminal courts, ja, if you are

25 ever charged but all I need for the purposes of this

Page 25140

1 Commission is that you, there's a possibility that you may

2 have killed one or two persons or injured them. And maybe

3 while we are there, for the record I must say that because

4 of that we will recommend that you should be charged as

5 accused number 7 in the list of public officials who should

6 be charged with murder. In your case it would be not,

7 well, it would principally be because of those one or two

8 deaths, possible, or any other deaths that Mr Chaskalson

9 and I think Mr Ntsebeza dealt with.

10 MR SEMENYA SC: Chair, do people get

11 prosecuted for possible deaths?

12 MR MPOFU: Well, yes. If a person shoots

13 at a crowd of people and two of them die, I'm sure no-one

14 else would be prosecuted except the shooter, or the

15 shottist.

16 CHAIRPERSON: A number of people shot and

17 you can't link any bullets fired by any shottist to any

18 dead body, you'll then have difficulty, absent some

19 invocation of the doctrine of common purpose, you'll have

20 difficulty charging anybody with murder. The most you

21 could do would be to charge them with attempted murder.

22 MR MPOFU: So Chairperson, if there are

23 two people who shoot at a crowd of 1 000 and five of them

24 die and we can't say which bullet went where, they must

25 just go home? I don't think that's how it works. I think

Page 25141

1 those people would be charged with murder.
 2 CHAIRPERSON: Mr Mpofu, I didn't say
 3 that. I didn't say that at all.
 4 [14:35] If there's a crowd of a thousand people, two
 5 people shoot at them and there are five dead and the
 6 circumstances are such that defence of self-defence or
 7 private defence isn't available, it may be impossible to
 8 link either of the two shottists with any of the five
 9 deaths, but both shottists on those facts could be charged
 10 with attempted murder and in all probability neither of
 11 them would go home. That's the answer to you –
 12 MR MPOFU: Thank you. Well, that's all
 13 I'm saying then. Insofar as you were one of the people who
 14 shot, and it may be possible, as the Chairperson says, to
 15 link the deaths, then we're going to recommend that you
 16 should be charged. I'm not saying that you should be
 17 convicted. It might well be that all these fancy
 18 explanations might hold water. I'm just saying that –
 19 CHAIRPERSON: I don't know whether it's
 20 fair to describe them as fancy explanations, and –
 21 MR MPOFU: Okay, or at least possibility.
 22 CHAIRPERSON: It's never sensible to
 23 charge people if they're likely to be acquitted. That can
 24 be an abuse of the prosecutorial function as well.
 25 MR MPOFU: Yes.

Page 25142

1 CHAIRPERSON: So but these are matters –
 2 MR MPOFU: No, I'm conceding –
 3 CHAIRPERSON: - to be debated later.
 4 MR MPOFU: Thank you, Chairperson. I'm
 5 conceding the possibility of an acquittal. We're not going
 6 to recommend that he must be convicted. We are going to
 7 recommend that he must be charged with murder. It will be
 8 for the prosecutor to recommend that he must be convicted
 9 after the evidence has been heard. Do you understand,
 10 General?
 11 GENERAL NAIDOO: I do understand, Chair.
 12 MR MPOFU: Thank you. And by the way, as
 13 it happened your evidence is that one of the reasons, one
 14 of the key reasons that what you've described as the
 15 drastic escalation of personnel had happened was so that
 16 the perpetrators of the murders on the police should be
 17 prosecuted, correct?
 18 GENERAL NAIDOO: Chair, no. What I
 19 indicated was the investigations into various murders
 20 needed to be supported.
 21 MR MPOFU: Yes, but if I remember well
 22 the National Commissioner made it very clear that there
 23 must be this escalation because the people who had murdered
 24 policemen must be brought to book, or prosecuted, correct?
 25 GENERAL NAIDOO: Chair, my testimony was

Page 25143

1 very clear. There were two legs of the operation that
 2 needed to be supported. One was the investigation leg and
 3 one was the public order situation and nowhere did I
 4 indicate the issues of prosecution. The police's
 5 responsibility is to conduct investigations and that's all.
 6 MR MPOFU: General, are you aware – I'm
 7 not saying that you have given this evidence yourself, and
 8 I can't locate it now but I'm saying are you aware or
 9 you're not aware that the National Commissioner in
 10 recommending the drastic escalation among other things was
 11 desirous of the fact that the people who had killed the
 12 police should be brought to book?
 13 GENERAL NAIDOO: Chair, that's why I'm
 14 saying the National Commissioner agreed to the escalation
 15 of resources to support the investigation.
 16 MR MPOFU: Only she just stop at
 17 investigation. She didn't say those people should be
 18 brought to book?
 19 GENERAL NAIDOO: Chair, I'm not going to
 20 put – I don't have the National Commissioner's exact
 21 words –
 22 CHAIRPERSON: Mr Mpofu, the police don't
 23 normally undertake investigations of crimes unless they
 24 think that there's a prospect of them finding the persons
 25 responsible –

Page 25144

1 MR MPOFU: Yes.
 2 CHAIRPERSON: - and again they don't just
 3 do it on the basis that it will stop there. Clearly they
 4 do it on the basis that if the persons who are reasonably
 5 suspected of committing the crime in respect of which
 6 evidence is forthcoming that they did commit the crime,
 7 that they will be prosecuted, that the docket will then be
 8 sent by the police to the prosecuting authorities and the
 9 assumption is that the prosecution authority will do their
 10 duty. I mean that must be –
 11 MR MPOFU: Yes, I would have thought so,
 12 Chairperson. I would have thought it as obvious as it is
 13 to you and me, but obviously it's not as obvious to the
 14 General. Do you agree with the Chairperson, General –
 15 CHAIRPERSON: I don't know if that's a
 16 fair comment, but let's see what he says. You heard what I
 17 said to Mr Mpofu.
 18 GENERAL NAIDOO: Yes, Chair.
 19 CHAIRPERSON: He says it's obvious to him
 20 and it's obvious to me, but it's not so obvious to you.
 21 What comment do you make in respect of that?
 22 GENERAL NAIDOO: Chair, I think you made
 23 a fair comment and I agree with you.
 24 MR MPOFU: Okay, so you accept that the
 25 ultimate aim would be that those people should be

<p style="text-align: right;">Page 25145</p> <p>1 prosecuted?</p> <p>2 GENERAL NAIDOO: By the prosecuting</p> <p>3 authority, yes.</p> <p>4 MR MPOFU: Yes, correct. Now ja, do you</p> <p>5 accept therefore that similarly the people who murdered the</p> <p>6 strikers should be prosecuted?</p> <p>7 GENERAL NAIDOO: Chair, I think we went</p> <p>8 through that exercise. We did –</p> <p>9 MR MPOFU: Can we go through it again?</p> <p>10 GENERAL NAIDOO: We've discussed this and</p> <p>11 we, I've already indicated there's a clear understanding</p> <p>12 that matters will be investigated and decisions will be</p> <p>13 taken, and this is how the criminal justice system works</p> <p>14 and we would have to account in terms of that.</p> <p>15 MR MPOFU: General, just answer the</p> <p>16 question. Are you equally desirous that the people who</p> <p>17 murdered the strikers should be investigated and prosecuted</p> <p>18 eventually?</p> <p>19 GENERAL NAIDOO: Chair, as I've indicated</p> <p>20 there is a process; people are tasked with that</p> <p>21 investigation and they will let us know. I'm one of the</p> <p>22 people that will probably be investigated.</p> <p>23 CHAIRPERSON: Perhaps we could put the</p> <p>24 question slightly differently. If you introduced an</p> <p>25 element of conditionality into it, if some of the strikers</p>	<p style="text-align: right;">Page 25147</p> <p>1 documents, but the sum total of it is that your version of</p> <p>2 the events where you were shooting people where you might</p> <p>3 have killed or injured somebody, that version is not</p> <p>4 captured in exhibit L.</p> <p>5 GENERAL NAIDOO: Chair, not specifically.</p> <p>6 It's broadly yes –</p> <p>7 MR MPOFU: Not? Yes.</p> <p>8 GENERAL NAIDOO: Not specifically</p> <p>9 indicated General Naidoo shot this, no.</p> <p>10 MR MPOFU: Yes, thank you, and it is your</p> <p>11 evidence, I think, that what happened at Roots, which was</p> <p>12 were exhibit L was born, that what happened at Roots was</p> <p>13 meant to be an account of exactly what happened at the</p> <p>14 scene, or the scenes, correct?</p> <p>15 GENERAL NAIDOO: Chair, as indicated that</p> <p>16 each grouping, yes, presented what they experienced, yes.</p> <p>17 MR MPOFU: Ja, so from that it would be</p> <p>18 fair then to say that one of two things, either you did not</p> <p>19 – the version of that shooting event which you gave here,</p> <p>20 it is either you did not give it at Roots, or if you gave</p> <p>21 it, somehow it was missed out, or it's one of the two,</p> <p>22 correct?</p> <p>23 GENERAL NAIDOO: Chair, I wouldn't say it</p> <p>24 was missed out. I don't remember seeing specific names of</p> <p>25 individuals who were the shottists in the various</p>
<p style="text-align: right;">Page 25146</p> <p>1 were murdered by the police –</p> <p>2 GENERAL NAIDOO: Yes.</p> <p>3 CHAIRPERSON: - and if it can be</p> <p>4 ascertained with reasonable certainty - certainty required</p> <p>5 for a criminal prosecution - who was responsible for such</p> <p>6 murders, would you also be desirous of those persons being</p> <p>7 charged, just as you would be desirous of strikers who</p> <p>8 murdered policemen being prosecuted?</p> <p>9 GENERAL NAIDOO: Of course, Chair,</p> <p>10 exactly as we are doing now in Brits, those policemen were</p> <p>11 charged and process is going, the criminal and the</p> <p>12 departmental.</p> <p>13 MR MPOFU: Good, and if those</p> <p>14 prosecutions were to take place they would primarily</p> <p>15 involve the shooters, the people who would have killed the</p> <p>16 strikers, correct?</p> <p>17 GENERAL NAIDOO: Depending on the</p> <p>18 charges, yes.</p> <p>19 MR MPOFU: And you are one of the</p> <p>20 shooters, correct?</p> <p>21 GENERAL NAIDOO: That is correct, Chair.</p> <p>22 MR MPOFU: Thank you. Now I just want to</p> <p>23 deal with an issue – I'm not going to traverse this because</p> <p>24 Mr Chaskalson dealt with it, but you would accept that from</p> <p>25 – I'm summarising what Mr Chaskalson put to you using many</p>	<p style="text-align: right;">Page 25148</p> <p>1 incidents. There are incidents where they refer to the</p> <p>2 shooting. Maybe they didn't describe it as I would have</p> <p>3 described it, and I already testified to the fact that I</p> <p>4 saw the presentation as being more broader inclusive one</p> <p>5 instead of giving the specific details.</p> <p>6 MR MPOFU: Okay, as I say, I don't intend</p> <p>7 to revisit – all I know that –</p> <p>8 CHAIRPERSON: [Microphone off, inaudible]</p> <p>9 say to you, Mr Mpofu, that firstly this point was covered</p> <p>10 very extensively by Mr Chaskalson –</p> <p>11 MR MPOFU: As I've said, Chairperson.</p> <p>12 CHAIRPERSON: And secondly, it's not one</p> <p>13 of the topics on which I gave you permission to cross-</p> <p>14 examine. I expect –</p> <p>15 MR MPOFU: No, but Chairperson –</p> <p>16 CHAIRPERSON: Don't say "but no,</p> <p>17 Chairperson." You are confined to the issues in terms of</p> <p>18 the practice rules we adopted to cross-examine on the</p> <p>19 issues in respect of which I gave you, for which you</p> <p>20 applies and for which I gave you permission.</p> <p>21 I've allowed you a fair amount of latitude</p> <p>22 because some of the points you were touching were points</p> <p>23 that hadn't been previously cross-examined and I thought</p> <p>24 they – the subject of cross-examination, and I thought it</p> <p>25 was only appropriate that I should allow you to ask the</p>

Page 25149

1 questions. But now you're busy repeating something Mr
2 Chaskalson asked, so I must remind you, I gave you
3 permission on five topics and I expect you to adhere to
4 those five topics.

5 If there's an extra point you want to raise that
6 isn't covered by that, that has become apparent to you
7 since that application was made, which you consider it
8 appropriate you should cross-examine on, I will obviously
9 consider it and I will be flexible if I consider that you
10 are contributing to the process. But please, insofar as
11 you can, stick to the five topics.

12 MR MPOFU: Thank you, Chairperson. Well,
13 Chairperson, really, I mean when I prefaced this question -
14 I'm obviously building to something. When I prefaced this
15 question by acknowledging that Mr Chaskalson has covered
16 this, it was really for your benefit so that you understand
17 that I'm not going to cross-examine on it.

18 CHAIRPERSON: No, I understand that but
19 I -

20 MR MPOFU: Ja.

21 CHAIRPERSON: But the point to which
22 you're building up didn't, I can't see how it fits in, in
23 any of the five topics I gave permission on. That's all.

24 MR MPOFU: Ja, okay. You can't see,
25 Chairperson, because as I say it's building up to something

Page 25151

1 like that, on the rock, that that may well have been
2 friendly fire?

3 GENERAL NAIDOO: Chair no, I think we
4 traversed this one as well. I think I specifically
5 indicated the shottist in this case was visible to me.

6 MR MPOFU: Okay, and let's now look at it
7 from the other side of the coin. If when you were shooting
8 at whoever, if one of your shots had missed somebody else
9 might have mistaken your shot for hostile fire when it was
10 actually friendly fire, correct?

11 GENERAL NAIDOO: Chair, two things; in
12 terms of the angle shooting, as I indicated, was downwards
13 directly and secondly, at that stage most of the other
14 shooting had stopped. So in terms of how it was perceived
15 by other people, I can't testify to that.

16 MR MPOFU: Oh, I see. So when you shot
17 the shooting had stopped from the other side?

18 GENERAL NAIDOO: I said most of the
19 shooting had stopped.

20 MR MPOFU: Yes.

21 GENERAL NAIDOO: There was already a call
22 by the Special Task Force commander, we find out now, for
23 cease fire and the helicopter had already indicated to
24 people that the policemen were now going into the bush. So
25 the bulk of the shooting had already ended.

Page 25150

1 that is in the future, that is still coming. Now I'm
2 saying, General, and I emphasise again, I don't want to re-
3 traverse what Mr Chaskalson has covered, but you'll
4 remember that he went through with you 11 incidents, I
5 think, to demonstrate the fact that none of those accorded
6 with what you had told the Commission. You remember that
7 cross-examination?

8 GENERAL NAIDOO: I remember the cross-
9 examination.

10 MR MPOFU: Yes, okay. Now the point that
11 I really want to go to is this; in relation to the - and
12 you must understand again the people I represent, as I
13 said, just as much as they want to know how they were
14 arrested, which we'll come back to, the others also want to
15 know the circumstances under which they were injured, and
16 I'm only going to ask you this issue. Are you aware that
17 in relation to scene 2 the version of the police is that
18 the people who were shooting there, the policemen who were
19 shooting there may have mistakenly been responding to
20 friendly fire, something to that effect?

21 GENERAL NAIDOO: I'm aware of that
22 version.

23 MR MPOFU: Yes, so in that context would
24 you accept that when you were shooting after you saw that
25 bullet bouncing on the stone in front of you or something

Page 25152

1 MR MPOFU: Alright. Okay, can we now
2 just go back to MMM50, before I get into more trouble.
3 MMM50.

4 CHAIRPERSON: Which paragraph of - do you
5 want to take him through the whole of it, or is there -

6 MR MPOFU: Yes, Chairperson, yes -

7 CHAIRPERSON: I take it, I thought when I
8 read it that you were probably going to deal with
9 paragraphs 23 and following -

10 MR MPOFU: Yes, yes.

11 CHAIRPERSON: - which is page 5.

12 MR MPOFU: Yes, Chairperson. Okay,
13 General, I'm just going to read it out. This is a
14 statement of Mr Mtjamba, who was one of the people arrested
15 at scene 2. You understand? He says at paragraph 23, "At
16 koppie 3, scene 2, I joined other fellow protesters and we
17 hid ourselves behind big rocks. I could observe more or
18 less 50 in number in my immediate vicinity. I later
19 realised that there were a few hundred of us." 24, "As I
20 was hiding myself I heard shots," rather "lots of gunshots
21 coming from different directions. I was scared for my life
22 and I covered my face with my hands for some time,
23 expecting to be shot at any time. Some of the shots were
24 single shots and others were short bursts of fire." Just
25 to pause there, that would seem to accord with your account

<p style="text-align: right;">Page 25153</p> <p>1 that there were both 9mm and R5s being used, correct?</p> <p>2 GENERAL NAIDOO: Correct, Chair.</p> <p>3 MR MPOFU: Yes, and then number 25 he</p> <p>4 says, "As protesters were running around for cover one came</p> <p>5 and joined us. He was wounded on his arm and I assisted</p> <p>6 him by wrapping the wound with a jacket. The wound</p> <p>7 appeared to be a gunshot wound."</p> <p>8 26, "One protester suggested that we should come</p> <p>9 out of the hiding place with our hands up. He said, 'Guys,</p> <p>10 let's surrender.' He then went out of the group with his</p> <p>11 hands raised up."</p> <p>12 27, "He was shot on his hands or arms. He</p> <p>13 kneeled down and as he tried to stand up still with his</p> <p>14 hands up, he was shot in the stomach and he fell down. He</p> <p>15 then tried to stand up, but was shot again and he fell</p> <p>16 down. He tried to crawl, but could not do so."</p> <p>17 Number 28, "Another surrendering protester was</p> <p>18 shot in his head and also fell down within my line of</p> <p>19 sight. Others who surrendered were lucky and they were</p> <p>20 escorted by armed policemen without being shot at point</p> <p>21 blank."</p> <p>22 29, "Then three policemen came out from the front</p> <p>23 facing towards our direction. I then heard the voice</p> <p>24 shouting, 'Cease fire, cease fire.' One policeman was</p> <p>25 raising his arm, apparently sending some signal to his</p>	<p style="text-align: right;">Page 25155</p> <p>1 GENERAL NAIDOO: Correct, Chair.</p> <p>2 MR MPOFU: And also you have already</p> <p>3 testified that some of the people who were surrendering</p> <p>4 were arrested, which I'll come to now, but now I want to</p> <p>5 ask you specifically if you have any knowledge about some</p> <p>6 of those people who were in the process of surrendering</p> <p>7 being shot at.</p> <p>8 GENERAL NAIDOO: Chair, not to my</p> <p>9 knowledge. As I indicated that people were arrested, but</p> <p>10 if you look at the description of some of this, and it was</p> <p>11 also led in other cross-examination where a statement was</p> <p>12 introduced of one Sergeant Molangoanyane who on the other</p> <p>13 side describes something very similar –</p> <p>14 CHAIRPERSON: I'm sorry to interrupt you,</p> <p>15 Major General, could you give us the exhibit number,</p> <p>16 please, so when we read the record we can follow it up?</p> <p>17 MR MPOFU: Yes.</p> <p>18 [14:55] GENERAL NAIDOO: Chair, I'm going to have</p> <p>19 a problem with that. It was one of the statements that Mr</p> <p>20 Chaskalson introduced during his cross-examination.</p> <p>21 MR MPOFU: Yes, Chairperson, maybe we</p> <p>22 could short-circuit this by me accepting that there was</p> <p>23 reference to this issue of people who were surrendering.</p> <p>24 I'm not sure if it was Adv Chaskalson or my learned</p> <p>25 colleague Mr Ntsebeza, but the point, General, is – I</p>
<p style="text-align: right;">Page 25154</p> <p>1 colleagues." Again that paragraph would accord with the</p> <p>2 calls that you have testified about of cease fire, correct?</p> <p>3 GENERAL NAIDOO: Correct, Chair.</p> <p>4 MR MPOFU: Okay, then he says, "We were</p> <p>5 ordered to lie down on our stomachs and crawl to an open</p> <p>6 space, and as we crawled about two to three people remained</p> <p>7 where they were. They could not crawl. They appeared to</p> <p>8 have sustained gunshot wounds. I still think they may have</p> <p>9 been dead." And then the rest is about policemen who were</p> <p>10 kicking them – or well, I must as well read that part.</p> <p>11 31, "A lot of policemen came there and they were</p> <p>12 searching us. They were kicking us whilst we were lying on</p> <p>13 the ground and they were bragging amongst themselves about</p> <p>14 the manner in which they had taken people down. Some were</p> <p>15 laughing loudly. Some even said that if it were in</p> <p>16 Zimbabwe they would burn us alive with petrol. They</p> <p>17 referred to us as useless and as cop killers," and so on.</p> <p>18 So now there are two or three issues that come</p> <p>19 from that. Again the issue about laughing, some were</p> <p>20 laughing loudly, you can accept that there's been objective</p> <p>21 evidence and it has been admitted by, I think Captain</p> <p>22 Mohlaki or some other witness. So you would agree that</p> <p>23 some of these accounts, I'm not saying you have knowledge</p> <p>24 of all these things, but at least some of those that I've</p> <p>25 pointed to you accord with your evidence, correct?</p>	<p style="text-align: right;">Page 25156</p> <p>1 accept that – I'm saying you do understand that Mr Mtjamba</p> <p>2 is a witness who I intend to call and who is one of the</p> <p>3 people that I act for?</p> <p>4 GENERAL NAIDOO: Yes, and the –</p> <p>5 MR MPOFU: Because he was arrested.</p> <p>6 GENERAL NAIDOO: And the statement that</p> <p>7 I'm referring to conversely also describes a policeman's</p> <p>8 account where he shot two people and it, why I'm raising</p> <p>9 the particular thing is because he refers to where he shot</p> <p>10 a person in the hand and in the arm and etcetera, and even</p> <p>11 indicates he shot him in the head –</p> <p>12 MR MPOFU: Thank you, ja.</p> <p>13 GENERAL NAIDOO: So it corroborates what</p> <p>14 your witness says.</p> <p>15 MR MPOFU: Okay, yes. Thank you. So</p> <p>16 apart from the other corroborations that I pointed out from</p> <p>17 your evidence, you're saying that it's further corroborated</p> <p>18 by that person?</p> <p>19 CHAIRPERSON: I'm sorry, what was the</p> <p>20 name of the constable whose statement you referred to?</p> <p>21 GENERAL NAIDOO: Sergeant Molangoanyane.</p> <p>22 Molangoanyane.</p> <p>23 MR MPOFU: And the exhibit number?</p> <p>24 CHAIRPERSON: Well, that's the point;</p> <p>25 we're trying to find the exhibit number. I can't find it</p>

Page 25157

1 in my notes, but – there it is, but –
 2 MR MPOFU: We'll find it, Chairperson.
 3 CHAIRPERSON: Alright, well it was handed
 4 in. No sorry, what's his name again? Oh, there it is,
 5 Molangoanyane.
 6 GENERAL NAIDOO: Yes, that's the one on
 7 the –
 8 CHAIRPERSON: Yes, I think –
 9 MR MPOFU: MMM6.
 10 CHAIRPERSON: I think Ms le Roux handed
 11 it in.
 12 MR MPOFU: I'm told it's MMM6,
 13 Chairperson.
 14 CHAIRPERSON: Yes, that's correct. It is
 15 MMM6, yes, thank you. Well done, Mr Mpofu, thank you.
 16 MR MPOFU: Thanks, Chairperson.
 17 CHAIRPERSON: Oh, it's on the screen.
 18 GENERAL NAIDOO: Yes.
 19 CHAIRPERSON: So I was the one who was
 20 unobservant. You were more observant than I at any rate –
 21 MR MPOFU: I'm not wearing my glasses,
 22 Chairperson.
 23 CHAIRPERSON: Anyway, let's not waste
 24 time on it further. But in relation to the exhibit we're
 25 now busy with, which is MMM50, you've been taken through

Page 25158

1 that.
 2 GENERAL NAIDOO: Chair.
 3 CHAIRPERSON: And you said certain
 4 portions would agree with, you were able to agree with
 5 certain of the things he said, but I understood you to be
 6 still busy with your answer, or did I misunderstand?
 7 GENERAL NAIDOO: Chair no, what I was
 8 merely pointing out was that what this witness describes
 9 from one side is also described by the police official in
 10 the second statement from the police side as well. So it's
 11 something that we should look at from both sides.
 12 MR MPOFU: Yes.
 13 COMMISSIONER HEMRAJ: Aren't the
 14 circumstances of that shooting different from the one that
 15 Mr Mpofu is putting to you in the current statement?
 16 GENERAL NAIDOO: Chair, if they're
 17 describing the wounds and the shooting in the arm and on
 18 the head and etcetera, the Sergeant describes exactly the
 19 same type of shooting, and it was more or less in the same
 20 area where the bulk of the people were. If we remember, we
 21 went through that exercise of trying to see, locate where
 22 this Sergeant, he said he entered the bush there and the
 23 shooting occurred.
 24 MR MPOFU: Thank you, General. I must
 25 say I appreciate your honesty in pointing out that

Page 25159

1 coincidence. Indeed in my mind what I had thought we would
 2 do is to find let's say one of the wounded people whose
 3 wounds coincide with his description, and so on, but what
 4 you've suggested is a better shortcut in the sense that if
 5 the shooting incident is described by both sides then there
 6 is that commonality as well, apart from your own evidence.
 7 You understand?
 8 GENERAL NAIDOO: Chair, yes.
 9 MR MPOFU: Thanks. Alright, in any event
 10 the point here is that – let's leave aside now the issue of
 11 surrendering people who may have been shot. We can leave
 12 it at that. We'll deal with it in argument. Going back to
 13 the surrendering people who were arrested, which is what
 14 you and I were discussing before lunch, you remember that?
 15 GENERAL NAIDOO: Yes, Chair.
 16 MR MPOFU: Yes, would you agree that – or
 17 firstly let me say you can't say how many of the people who
 18 were arrested had come up with bare hands up and how many
 19 were disarmed?
 20 GENERAL NAIDOO: No, Chair, I can't
 21 offhand say, no.
 22 MR MPOFU: And worst still, because you
 23 were seeing the people for the first time, you wouldn't be
 24 able to identify who came out without arms in their –
 25 sorry, now the word "arms" is – ja, without weapons and

Page 25160

1 with their arms up and who was disarmed by the police?
 2 GENERAL NAIDOO: No, Chair, there was a
 3 large number.
 4 MR MPOFU: In fact that would be an
 5 almost impossible exercise, correct?
 6 GENERAL NAIDOO: Possibly, yes.
 7 MR MPOFU: Yes, and so of the 259 people
 8 that were arrested, any one of them could have fallen into
 9 the group that merely came out with their hands and
 10 carrying no arms, correct?
 11 GENERAL NAIDOO: That's possible, Chair.
 12 MR MPOFU: Thank you.
 13 CHAIRPERSON: Mr Mpofu, I'm reminded I
 14 must take the tea adjournment soon, but obviously when it's
 15 convenient for the purposes of your cross-examination we'll
 16 do so. I don't want to interrupt you –
 17 MR MPOFU: Chair, it will make better
 18 sense to do it right now, Chairperson, because I'm coming
 19 towards the end, then I'll have a chance just to look
 20 through my notes.
 21 CHAIRPERSON: Yes, very good. We'll take
 22 the tea adjournment at this point, quarter of an hour.
 23 MR MPOFU: Thank you, Chairperson.
 24 [COMMISSION ADJOURNS COMMISSION RESUMES]
 25 [15:25] CHAIRPERSON: The Commission resumes.

Page 25161

1 Major-General, you're still under oath.
 2 GENERAL NAIDOO: Still under oath, Chair.
 3 CHAIRPERSON: Mr Mpofu?
 4 GENERAL NAIDOO: s.u.o.
 5 CROSS-EXAMINATION BY MR MPOFU (CONTD.):
 6 Thank you, Chairperson. General, I'm just going to ask you
 7 one or two questions on a very narrow matter which I've not
 8 seen on the record but I can bet that Mr Chaskalson must
 9 have dealt with it but I'm just going to – I need you to
 10 look at L67 and L142. Let's rather, let's start with L67.
 11 Yes.
 12 CHAIRPERSON: You see the – have you
 13 found the slide?
 14 GENERAL NAIDOO: Yes, Chair.
 15 CHAIRPERSON: It's on the screen, of
 16 course.
 17 MR MPOFU: Thank you, yes.
 18 CHAIRPERSON: It says "Designated command
 19 positions" –
 20 MR MPOFU: Yes.
 21 CHAIRPERSON: On the JOCCOM, isn't it?
 22 MR MPOFU: Yes. Thank you, Chairperson,
 23 and where it's pointing to the last dash from the bottom,
 24 second last, sorry yes. "Commander of reserve and support
 25 forces, Major-General Naidoo. Role, manage and reserve" –

Page 25162

1 rather – "manage the reserve and support forces kept at
 2 FHA, releasing resources as required by the operational
 3 commander." Do you see that?
 4 GENERAL NAIDOO: I see that, Chair.
 5 CHAIRPERSON: If that's the position on
 6 the 14th of August –
 7 MR MPOFU: Yes.
 8 CHAIRPERSON: At that stage there was
 9 only one forward holding area.
 10 GENERAL NAIDOO: That's correct.
 11 CHAIRPERSON: Subsequently forward
 12 holding area 2 was added.
 13 GENERAL NAIDOO: On the 15th.
 14 CHAIRPERSON: But I take it that it
 15 didn't alter your responsibilities insofar as they related
 16 to the reserve and support forces kept at forward holding
 17 area 1.
 18 GENERAL NAIDOO: That's correct, Chair.
 19 MR MPOFU: Thank you. And then the slide
 20 141, as the Chair says, pertains to the 16th, hence it now
 21 says forward holding area 1.
 22 CHAIRPERSON: No, 141 relates to
 23 immediate reaction area 2.
 24 MR MPOFU: 142. I'm sorry, Chair.
 25 CHAIRPERSON: What you want is 142.

Page 25163

1 MR MPOFU: 142, yes, sorry.
 2 CHAIRPERSON: No, but – yes, 142 is the
 3 correct one.
 4 MR MPOFU: General, the only question
 5 really is, from a reading of those two slides it would seem
 6 that under normal circumstances you were not allowed to
 7 release any of your units unless you were required to do so
 8 by the operational commander.
 9 GENERAL NAIDOO: That's correct, Chair.
 10 MR MPOFU: Yes. And then there's the
 11 second question which flows from that, is – and again I'll
 12 try and short-circuit it without having to play the video.
 13 I hope you have seen the relevant video. If you haven't,
 14 you either accept my word or we'll have to play them. Some
 15 of the evidence that we have seen from the videos shows us
 16 the mounted unit, I think that's what it's called –
 17 GENERAL NAIDOO: Yes, Chair.
 18 MR MPOFU: - around the area of scene 1,
 19 assisting in the dispersion, so to speak, chasing people
 20 around. Do you remember seeing that on any of the videos?
 21 GENERAL NAIDOO: Chair, I remember seeing
 22 the mounted unit. They were doing a sweep from forward
 23 holding area 1 towards scene 1, yes.
 24 MR MPOFU: Yes. And so those people,
 25 insofar as they were now far away from forward holding area

Page 25164

1 1, would have been released to – sorry, would have been
 2 released by you, correct?
 3 GENERAL NAIDOO: Chair, as I testified
 4 during the initial cross-examination, when certain people
 5 were placed at immediate response area 1, then the mounted
 6 unit was placed at forward holding area 1 in a ready
 7 position to sweep towards scene 1 and/or the dispersion
 8 area, yes.
 9 MR MPOFU: Yes. Now what I find
 10 remarkable and I'm inviting you to comment if you share my
 11 surprise, is that one of the units under your command,
 12 namely the mounted unit, would have managed to get to scene
 13 1 to sweep, as you call it, even before another unit under
 14 your command, namely the medical services which I would
 15 assume was more urgently needed, had gotten there. Would
 16 you comment on that?
 17 GENERAL NAIDOO: Chair, yes. Firstly,
 18 what you said was true and secondly, I think we covered
 19 that in testimony when we indicated the units, the mounted
 20 unit was placed in direct proximity to scene 1 because of
 21 the terrain between forward holding area 1 and the, what
 22 became scene 1 and whereas the other units were directed to
 23 take the route of the immediate response area and we went
 24 through the whole exercise indicating what happened there
 25 and how eventually we did not arrive at where we intended

Page 25165

1 to arrive.

2 MR MPOFU: Thanks. Okay, that's fine. I

3 remember that explanation but you would agree that at face

4 value one would've expected of your units, the one that

5 should have gotten around scene 1 before anybody else,

6 given the tragedy that had just occurred, should have been

7 the medical services.

8 GENERAL NAIDOO: Chair, we've already

9 acceded to that.

10 MR MPOFU: Yes, thank you. Alright.

11 Well, Chairperson, I have several matters that I would have

12 wanted to put to the General but I don't want to, since

13 that phrase has been used so much on television, I don't

14 want to put to him unnecessary things that have already

15 been covered in the testimony, as long as the usual

16 arrangement holds, Chairperson, that you won't hold it

17 against me if I have not put a specific version to him.

18 Most of it has been put in the course of the questioning.

19 CHAIRPERSON: I've indicated that to you

20 previously.

21 MR MPOFU: Yes.

22 CHAIRPERSON: And I don't propose

23 deviating or departing now from what I said earlier.

24 MR MPOFU: Yes. Thank you, Chairperson.

25 In that case I have nothing further. Thank you, General.

Page 25166

1 CHAIRPERSON: Mr Semenya – Mr Mpofo was

2 the last cross-examiner, that was the way it was intended

3 to be. Mr Semenya, are you ready to do the re-examination

4 now or do you wish to do that next week?

5 MR SEMENYA SC: With your permission,

6 Chair, can I do that next week?

7 CHAIRPERSON: I doubt whether you'll

8 finish it today. I don't know how long your re-examination

9 will be but it's probably desirable that it should be dealt

10 with all in one and you'll presumably be better able to

11 prepare yourself for it next week. I understand you're not

12 available on Monday and Tuesday. I also understand that

13 the next witness, Colonel Vermaak, who is going to be led

14 by Adv Pillay, is likely to be about two days. So that

15 seems to fit in quite neatly with our schedule if he gives

16 evidence-in-chief Monday and Tuesday, then on Wednesday

17 morning we have the – I take it that it will only be

18 Wednesday morning, although one never knows in this

19 Commission, we'll then deal with the resumption of the

20 application for an in camera hearing. Is that so?

21 MR SEMENYA SC: That is indeed so, Chair.

22 CHAIRPERSON: Yes, Mr Budlender?

23 MR BUDLENDER SC: Chair, I've just

24 discussed this with Adv Pillay. She thinks that in chief

25 Lieutenant-Colonel Vermaak will not be as much as two days.

Page 25167

1 She seems very confident about it, so we may have a dead

2 period on Tuesday sometime unless somebody else cross-

3 examines first.

4 MR SEMENYA SC: Chair, you would recall

5 we were going to be cross-examining but we were going to do

6 that last, so there would be a whole number of other

7 parties who may –

8 CHAIRPERSON: Yes, the arrangement was

9 that, for reasons that I don't have to elaborate on, it was

10 likely that you would wish to cross-examine Colonel Vermaak

11 after other counsel have cross-examined. Alright, well,

12 that being –

13 MR BUDLENDER SC: What we'll then do,

14 Chair, is we will ask for, we'll send out a note today to

15 everyone reminding them if they want to cross-examine

16 Lieutenant-Colonel Vermaak they must get in applications

17 now.

18 CHAIRPERSON: Yes.

19 MR BUDLENDER SC: So that you can decide

20 which will be permitted.

21 CHAIRPERSON: Yes. I think they should

22 get in the applications by the end of tomorrow and so I can

23 consider the applications on Thursday and then give my

24 rulings so that's all in place by the time the evidence-in-

25 chief begins on Monday. And then we've already agreed that

Page 25168

1 the police will cross-examine last so the position that Mr

2 Mpofo likes to occupy to cross-examine I'm afraid he's not

3 going to have this time but there are reasons which I'm

4 sure Mr Mpofo understands.

5 MR MPOFU: Chair –

6 CHAIRPERSON: The parties can agree among

7 themselves as to order of cross-examination.

8 MR MPOFU: Chairperson, yes –

9 CHAIRPERSON: And the evidence leaders of

10 course won't cross-examine on this occasion.

11 MR MPOFU: Yes.

12 CHAIRPERSON: At least I take it not,

13 because one of the evidence leaders will be leading the

14 evidence.

15 MR MPOFU: Will be leading, correct.

16 Yes, Chairperson, on a serious note, you're quite right

17 that I usually like to be the last cross-examiner but my

18 instructions, in fairness to Mr Semenya, will be that the

19 issue of SAPS cross-examining Vermaak who's virtually their

20 own witness in a way, last, is something that we will take

21 instructions on. I'm not quite sure that it would be

22 appropriate, seeing that it's likely to be friendly fire,

23 as it were. I think it would be better for us –

24 CHAIRPERSON: No – no, I understand that

25 the reasons for the request that they cross-examine last is

1 they don't intend their fire to be friendly.
2 MR MPOFU: Well, in that case –
3 CHAIRPERSON: On the contrary.
4 MR MPOFU: I accept that, Chair.
5 CHAIRPERSON: That's the reason.
6 MR MPOFU: Thank you.
7 CHAIRPERSON: But –
8 MR MPOFU: We'll discuss it with Mr
9 Semenya.
10 CHAIRPERSON: You can discuss it with Mr
11 Semenya outside the chamber.
12 MR MPOFU: Thank you, Chairperson.
13 CHAIRPERSON: Alright, so we'll adjourn
14 now until Monday morning 9 o'clock.
15 [COMMISSION ADJOURNED]
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<p>AAA 25107:25 abandon 25021:25 25080:15 able 25024:7 25028:5 25045:11 25073:1 25098:7 25115:2,9 25117:25 25118:2 25131:15 25158:4 25159:24 25166:10 aboard 25038:15 absence 25039:11 absent 25140:18 absolutely 25013:23 abuse 25141:24 abuses 25019:8 acceded 25165:9 accept 25008:6 25074:7 25078:6,11 25098:20 25100:4 25122:11 25125:14 25126:12 25130:16 25136:13 25144:24 25145:5 25146:24 25150:24 25154:20 25156:1 25163:14 25169:4 acceptable 25045:23 accepted 25008:19 25046:21 accepting 25155:22 access 25111:8 accessible 25111:14 accommodation 25075:5 accomplishment 25013:15 accord 25016:16 25152:25 25154:1,25 accorded 25150:5 account 25021:4 25145:14 25147:13 25152:25 25156:8 accounted 25108:9 25115:15 accounts 25154:23 accusations 25024:19 accused 25019:24 25025:6 25140:5 achieve 25020:14 achieved 25021:24 Ackerman 25011:16 acknowledging 25149:15 acquittal 25142:5 acquitted 25141:23 act 25007:19 25008:1 25010:18 25013:5,16 25014:17 25015:17 25030:1 25049:5 25069:23 25070:2 25156:3 acting 25019:6 25078:22 action 25099:25 activate 25130:1</p>	<p>activated 25132:22 active 25111:9 actual 25050:19 add 25029:16 added 25055:9,20 25162:12 addition 25009:23 25071:18 additional 25018:25 address 25033:4 25087:2 adequate 25020:14 adhere 25149:3 adjourn 25047:17,19 25047:22 25169:13 ADJOURNED 25169:15 adjournment 25033:21 25047:20,20 25108:12,16,24 25160:14,22 ADJOURNS 25034:5 25047:24 25086:21 25108:25 25160:24 administration 25019:5 25108:7 admire 25111:20 admit 25138:1 admitted 25058:24 25114:8 25115:24 25133:17,20,23 25154:21 adopted 25148:18 Adv 25042:23 25155:24 25166:14 25166:24 advance 25059:21 25060:2 advanced 25035:12,13 25060:5 advances 25059:24 advantages 25018:14 25018:17 25021:3 adversarial 25022:4 Advocate 25048:12 affidavit 25009:6 25033:10,17 25034:10,12,13,21,23 25035:1,2,4,5,5,19,21 25036:1,2 25037:21 25039:8 25040:2,7,8 25041:7,7,8 25043:2 25043:3 25046:17 affidavits 25033:21,22 25034:8,18 25035:7 25035:10,11,17 25041:22 25042:1,13 25046:17,25,25 25047:4 afforded 25045:22 afraid 25168:2 afresh 25015:4 Africa 25011:13 25026:15 African 25027:5 25099:15</p>	<p>afternoon 25056:25 ago 25034:9 25040:3 25101:3 25110:13 25117:19 agree 25080:18 25097:22 25098:21 25100:21 25101:10 25119:12 25120:22 25121:18 25125:20 25131:17 25144:14 25144:23 25154:22 25158:4,4 25159:16 25165:3 25168:6 agreed 25009:24 25055:15 25137:17 25143:14 25167:25 agrees 25135:25 ahead 25092:14 aim 25144:25 airlifted 25051:19 25052:21,23 25055:1 Alexander 25107:2,4 25107:16,19 alignment 25091:13,16 alive 25135:3 25154:16 allegation 25009:11,12 25073:2 allegations 25024:23 25025:16 25081:23 allegedly 25008:13 25009:17,19 25063:12 allocated 25125:24 allow 25037:24 25038:2 25048:14 25148:25 allowed 25030:21 25035:25 25056:18 25085:5,10 25087:16 25088:1 25091:15 25092:15 25114:16 25116:10 25148:21 25163:6 alpha 25039:6 alright 25020:4 25028:4 25030:24 25032:15 25049:2 25053:7 25056:6 25060:8 25082:10 25086:19 25088:13 25088:17 25090:14 25093:14 25094:15 25094:23 25107:13 25108:23 25109:13 25116:21 25124:13 25124:17 25152:1 25157:3 25159:9 25165:10 25167:11 25169:13 alter 25162:15 Alternatively 25043:17 25118:20 AMCU 25024:17 25026:1 ammunition 25061:23 25090:17,19,21</p>	<p>25097:24 25099:3,24 25102:8 25103:18 25108:4 25110:5,10 25110:21 25111:9,10 25111:11 25112:1,1,2 25112:4 25113:13 25114:14,15 25115:3 25115:16,20 25117:3 25117:20 25118:2 25119:16,21 25121:5 25121:18,19 25122:8 25122:9,13,20,22 25125:10,12,16 25126:5 25131:16 amount 25122:22 25148:21 ample 25034:3 amplified 25055:7 ancillary 25013:14 Andrew 25052:1 25053:2 and/or 25164:7 angle 25082:11 25151:12 Annandale 25130:6 annexures 25034:22,23 25034:24,25 25043:1 announcement 25033:7 anonymity 25028:24 answer 25021:23 25028:5 25044:7 25046:3 25079:15 25080:8 25100:14 25122:18 25129:3 25141:11 25145:15 25158:6 answering 25035:17,21 25036:1 25037:21 answers 25021:15,21 25028:5 25079:4 25095:2 anticipated 25030:4 25065:16,19 anybody 25061:2 25130:23 25140:20 25165:5 anymore 25019:16,18 anyway 25014:4 25019:18 25020:16 25023:23 25043:19 25066:11 25075:14 25107:10 25157:23 apart 25033:16 25156:16 25159:6 apologise 25030:7 apparent 25149:6 apparently 25025:4 25040:11 25100:20 25153:25 appeal 25012:21 25026:14,14 appear 25024:22 25032:14 25033:20 25096:1,22 25097:16 25098:4 25099:2,23 appeared 25056:1</p>	<p>25153:7 25154:7 appearing 25018:16 25021:6 25025:24,24 appears 25018:21 25026:25 25095:12 25105:16 25135:5 applicable 25007:20 25018:4 25029:8 application 25006:8 25007:24 25009:11 25009:18 25010:3 25011:24,24 25016:25 25034:20 25040:18,19 25041:3 25041:5,6,10,11,12 25041:20 25042:4,15 25045:24 25046:22 25047:15 25149:7 25166:20 applications 25167:16 25167:22,23 applies 25006:21 25007:4,18 25010:1 25014:14,14 25015:8 25148:20 apply 25119:6 applying 25027:5 appreciate 25158:25 apprehension 25009:8 approach 25064:2 25082:10 approached 25068:3 25069:11 appropriate 25042:13 25045:2 25046:13,19 25101:12 25108:11 25132:14 25148:25 25149:8 25168:22 appropriately 25100:23 approval 25005:9 25011:13,16 25012:8 approximately 25060:16 25134:24 area 25026:4 25059:7 25074:14 25076:11 25083:4 25084:2 25134:5 25137:8 25158:20 25162:9,12 25162:17,21,23 25163:18,23,25 25164:5,6,8,21,23 areas 25111:24,25 aren't 25006:1 25024:23 25042:10 25043:2,24 25071:23 25158:13 argue 25010:16 25041:23 25045:11 25045:21 argued 25039:16 25044:7 25046:18 25047:6 arguing 25005:21 25015:21 25029:19 argument 25006:5,6</p>

25009:4 25010:25 25015:21 25016:10 25017:19 25026:18 25027:2 25035:22,25 25037:8,11 25044:15 25045:1 25079:12 25133:16 25159:12 arguments 25029:18 arises 25049:13 arm 25153:5,25 25156:10 25158:17 armed 25079:13 25153:20 arms 25064:7 25070:5 25081:12 25084:22 25153:12 25159:24 25159:25 25160:1,10 arranged 25109:12,14 arrangement 25059:9 25110:5 25165:16 25167:8 arrangements 25064:15 25090:1 arrest 25069:17,24 25070:5 25071:4,7 25072:8,23,23 25074:2 25076:5,15 25076:16 25077:8,15 25077:16,18 25078:3 25078:13 25079:7 25080:13 25081:5,8 25082:3,5 arrested 25024:17 25025:3 25049:6,10 25063:3,6,7,20 25064:8 25067:18,20 25067:24 25069:15 25069:24 25070:21 25071:12,23,25 25072:3,22,24 25073:15,21,25 25074:9 25075:7 25076:21 25077:20 25077:24 25078:5,15 25078:19,22,23,24 25079:1,17 25080:3 25083:16,17 25084:2 25084:6,10,15 25085:1,12,19 25086:1 25134:10 25150:14 25152:14 25155:4,9 25156:5 25159:13,18 25160:8 arresting 25070:8,17 25072:17 25074:14 25083:4 25084:1 arrests 25049:5,11 25063:23,24 25064:12,17 25067:9 25067:10,19 25071:24 25081:14 25082:1 arrival 25134:22 arrive 25164:25 25165:1 arrived 25136:8,22	25138:22 article 25005:8,11 25026:19 ascertained 25146:4 aside 25084:4 25126:11 25159:10 asked 25029:24 25035:16 25065:14 25065:15 25066:11 25066:13,20,22 25072:17 25083:7 25086:13 25133:10 25149:2 asking 25008:7 25057:6 25070:4 25076:24 25082:5 25137:3 asks 25021:18,19 asleep 25068:11 aspect 25025:12 aspects 25010:13,20 assegais 25134:25 assess 25022:10,13,16 assets 25108:8 assist 25014:7 25069:20 25081:10 25103:8 25119:9 assistance 25032:6 assisted 25153:5 assisting 25038:5 25163:19 associated 25033:11 assume 25074:4,5 25100:6 25129:1 25164:15 assumed 25125:16 assumes 25097:3 assuming 25006:8 25104:13 assumption 25017:20 25144:9 assurance 25087:9,10 assure 25139:22 attacked 25054:21 attempted 25140:21 25141:10 attend 25058:6 25129:13 attendance 25020:25 25074:25 attended 25033:24 25043:6 25059:2 25127:7 25133:9 attends 25127:5 attention 25007:13 25009:3 25010:7,21 25016:20,21 25026:17 25032:16 25032:18 25062:20 25086:13 25089:13 25121:9 attorney 25030:15 attorneys 25089:21 Attorney-General 25013:3,12 August 25030:14	25098:16,17 25109:24 25115:1,21 25117:4 25118:3 25125:2,3 25132:12 25162:6 Australia 25005:9 25013:2 Australian 25010:7,9 25012:18 25013:21 Australians 25011:3 authorities 25010:20 25026:10 25144:8 authority 25006:15,18 25027:5 25144:9 25145:3 available 25005:18 25042:10 25047:11 25050:12 25066:12 25075:5 25111:4,6,18 25111:22,24 25116:24 25117:9,9 25132:11 25141:7 25166:12 average 25022:17 averments 25039:12 aware 25053:17 25059:14,16 25063:12 25065:2 25101:22 25102:5 25103:5,7 25113:6,14 25132:21 25143:6,8,9 25150:16,21	25010:22 25011:8,14 25011:21 25012:15 25014:9 25015:14 25016:4,9,13,24 25017:6 25020:7,19 25022:2,15,25 25023:2 25024:1 25025:8,19 25026:2,5 25026:16 25027:10 25027:17 25028:3,7 25028:13,15,18,21 25029:15,20 25030:6 25030:7 25032:15 25033:18 25039:10 Baron 25010:10 25012:25 based 25027:2 basis 25009:18 25010:16 25036:5 25040:19 25045:12 25045:17 25064:9 25087:18 25144:3,4 battered 25037:24 bear 25008:17 25016:1 25020:17 bearing 25132:20,25 bears 25007:23 befall 25009:10 begins 25167:25 behalf 25009:7 25024:16 25025:25 25031:10 behaviour 25025:18 belabour 25078:1 believe 25005:18 25011:17 25028:3 benefit 25149:16 best 25031:14 25036:25 bet 25161:8 better 25012:17 25019:17 25022:22 25022:25 25039:21 25039:23 25040:10 25082:16 25093:4,7 25095:15 25159:4 25160:17 25166:10 25168:23 big 25023:14 25152:17 Bill 25014:23 birdshot 25091:15 bit 25010:24 25014:5 25018:21 25033:3 25122:10 blank 25132:11 25153:21 bodies 25051:4 25054:10 25134:21 25134:25 25136:1 25138:21 25139:13 body 25033:20 25051:2 25051:10,15,20 25052:5,15 25055:3 25140:18 book 25121:20,22 25122:7 25125:12,22 25142:24 25143:12	25143:18 booked 25115:3,4,6,11 25122:22,23 booking 25112:1 25125:12 bore 25107:23,24 born 25147:12 borrowing 25032:13 bottom 25105:16 25161:23 bouncing 25150:25 bragging 25154:13 Brazier 25068:18,20,21 25068:23 25069:18 25069:20 25070:4,24 25071:1,5 25072:3,13 25072:19 25076:15 25080:6 25082:8 breached 25123:6 breadwinner 25024:24 break 25032:25 25033:5 25034:1 25086:14,20 25108:22 25122:2 Brickhill 25007:23 25008:23 25018:1 25033:19 25047:9,14 brief 25057:20,22 briefed 25058:1,7,9 briefing 25056:22 25057:16,21,25 25058:6,6,12,15 25059:2,7,11 25064:3 briefings 25056:13,18 25057:3,14 25058:12 25058:22,24 Brigadier 25033:10 25034:10 25035:2,3,4 25050:6 25107:1,4,16 25107:18 25137:9 bring 25010:19,21 bringing 25038:8 Brits 25113:11 25146:10 broader 25148:4 broadly 25071:6 25147:6 broken 25031:20 25123:1,5 brought 25064:19,24 25065:8 25121:9 25142:24 25143:12 25143:18 brown 25097:6,6 browsing 25036:8 Budlender 25030:24 25031:2,11 25166:22 25166:23 25167:13 25167:19 building 25149:14,22 25149:25 bulk 25073:8 25151:25 25158:20 bullet 25140:24 25150:25 bullets 25121:21,21,22
		B		
		B 25131:15 back 25010:9 25034:7 25041:11 25042:12 25043:24 25044:5 25058:9 25086:20 25088:17 25107:1 25117:18 25118:1,1 25121:22 25123:3,8,9 25123:16 25125:17 25150:14 25152:2 25159:12 background 25056:14 backs 25083:7 backwards 25115:2 bad 25022:16 25023:6 ballistic 25123:18 Baloyi 25032:21 25052:20,23 ban 25092:17 25110:17 banned 25091:6,7,10 25091:19 25097:24 25099:3,24 25109:24 25110:3,4,12 25114:5 25114:13 25121:5 banning 25114:18 barbed 25059:14 Barcus 25005:12 bare 25159:18 Barnes 25005:3,6,11,14 25005:20 25006:3,12 25007:2,6,11 25008:11,22		

25123:7,9 25132:8,9 25140:17 bundle 25012:18,20 25104:18,20,21 25105:7 25124:2 burden 25011:23 burn 25154:16 bursts 25152:24 BUSB 25010:7 25012:13,19,21 25013:6,6 bush 25056:7 25151:24 25158:22 business 25005:4 25046:4,11,12,13 busy 25049:21 25056:4 25149:1 25157:25 25158:6 buy 25110:9	25012:13,19 25013:1 25013:6,10,24 25015:25 25017:11 25020:11,22 25023:11 25025:16 25027:2,4,21,23 25028:19,23 25029:3 25029:10 25044:9,11 25045:14 25056:16 25072:2,21 25088:2 25120:23 25121:12 25127:9 25130:9 25140:6 25151:5 25165:25 25169:2 cases 25005:17 25012:18 25013:1 25027:19 25080:19 25080:20 25081:11 casing 25095:14,15 casings 25095:24 casualties 25055:21 category 25063:10 causal 25008:1 25009:20 25017:14 cause 25072:23 CB 25013:12,21 cease 25151:23 25153:24,24 25154:2 cellphone 25020:1 cells 25074:21 25075:4 25075:8,10,12 centre 25071:20 25077:1,5 25127:10 century 25010:10 certain 25018:3 25110:6,22 25125:16 25158:3,5 25164:4 certainly 25010:14,17 25025:17 25031:11 certainty 25146:4,4 cetera 25080:15 25105:4 25110:8 25112:7 25137:24 chain 25059:3 25107:6 25113:16 challenge 25024:19 chamber 25019:22 25169:11 chambers 25042:10 chance 25036:3 25160:19 chaos 25122:4 charge 25070:17 25071:25 25072:24 25140:21 25141:23 charged 25139:25 25140:4,6 25141:1,9 25141:16 25142:7 25146:7,11 charges 25146:18 charging 25140:20 chasing 25163:19 Chaskalson 25140:8 25146:24,25 25148:10 25149:2,15 25150:3 25155:20,24	25161:8 check 25054:13 25074:7 25080:6 25081:1 25113:7 25115:14 25133:4,5 checked 25125:7 chief 25010:10 25012:25 25166:24 25167:25 circle 25096:19 circulation 25111:2 circumstances 25013:24 25020:21 25026:21 25029:4 25049:9 25063:20 25065:4,11 25067:9 25067:19 25126:19 25141:6 25150:15 25158:14 25163:6 cite 25026:10 cited 25011:13,15 25027:23 civil 25026:25 25027:9 clarified 25056:12 25137:3 clarify 25029:17 25057:13 25114:22 25129:11 clause 25055:20 clauses 25027:12 clean 25049:24 clear 25023:12 25024:15 25028:24 25065:20 25073:20 25073:24 25142:22 25143:1 25145:11 cleared 25056:7 clearly 25007:17 25014:13 25024:25 25045:22 25065:15 25118:5 25132:9 25144:3 client 25026:1 clients 25063:20 25067:8 25087:8 close 25022:24 25046:11,12,15,17 25047:1,4,18 closed 25019:23 25035:20,22 cluster 25104:4 coaching 25021:22 coin 25151:7 coincide 25125:17 25159:3 coincided 25113:8 coincidence 25130:14 25159:1 coincidences 25130:16 collapse 25123:10 collate 25126:4,7 collating 25121:19 25122:19,22 colleague 25155:25 colleagues 25005:13 25006:17 25154:1	Colonel 25034:13 25035:5 25043:1 25053:3 25057:3,3 25058:1,7,7,8 25166:13 25167:10 colour 25093:3 25097:6 come 25012:10 25019:24 25023:21 25041:11 25042:1,12 25043:24 25071:4 25072:16 25073:12 25078:3 25082:16 25083:14,15 25085:25 25100:15 25109:11 25124:2 25150:14 25153:8 25154:18 25155:4 25159:18 comes 25041:2 25122:15 25123:23 25135:25 comfort 25014:1 25032:24 25033:5 25034:1 25086:14,20 coming 25034:7 25045:8 25080:14 25083:25 25100:12 25150:1 25152:21 25160:18 command 25054:20 25057:17 25058:5,18 25161:18 25164:11 25164:14 commander 25053:3 25124:3,10,21 25132:21,22 25151:22 25161:24 25162:3 25163:8 commanders 25057:20 25058:2,5,13,16 25059:2,8 commend 25016:12 commended 25016:11 comment 25081:16 25116:7 25144:16,21 25144:23 25164:10 25164:16 commented 25081:19 commission 25005:2 25006:7,9,15,19 25007:7 25008:2 25014:15 25017:8,14 25017:20 25018:6,9 25024:13 25026:9 25029:12 25034:1,5,5 25034:6 25038:4 25043:16 25047:2,5 25047:24,24,25 25057:13 25086:21 25086:21,22 25087:2 25108:25,25 25109:1 25113:15,22 25140:1 25150:6 25160:24,24 25160:25 25166:19 25169:15 commissioned 25040:2	commissioner 25043:3 25050:6 25054:19 25080:21 25081:3 25101:13,18,19 25104:17 25105:17 25107:15 25111:8 25114:22,25 25115:6 25133:2,6,12 25142:22 25143:9,14 25158:13 Commissioners 25063:17 25087:4 25116:4 Commissioner's 25143:20 commissions 25007:19 25010:18 25014:14 25014:17 25015:16 25027:1,6 commit 25144:6 committed 25063:12 25063:16 committing 25144:5 common 25014:22 25015:10,12 25018:3 25018:11 25024:11 25029:8 25140:19 commonality 25159:6 commotion 25099:3,10 communicated 25064:5 25073:21 25076:16 communicating 25076:13 25078:10 communication 25059:3 25073:14 community 25018:5 25127:10 compare 25054:15 compares 25055:23 compelling 25020:21 complain 25023:21 complaint 25050:7 complete 25127:16,21 completed 25116:24 25118:11 25132:23 25133:7 completely 25036:25 25138:23 completeness 25018:18 completes 25127:20 25128:17 completion 25047:10 complicating 25118:16 comply 25070:1 conceding 25142:2,5 concentrate 25041:13 concept 25012:24 conceptual 25010:24 concern 25022:7 25024:2,3,8 25026:4 25103:12 concerned 25010:15 25020:2 25022:24 25024:23 25029:24 25045:23 25065:21 25092:14 25102:22
---	---	---	--	---

<p>25118:22 concluded 25050:3 conclusion 25098:21,24 conditionality 25145:25 conduct 25025:17 25143:5 conducted 25064:9 conducting 25115:25 confidence 25021:1 confident 25167:1 confined 25148:17 confirmatory 25033:9 25034:12 25040:8 conflating 25029:23 confront 25062:2 confrontation 25021:9 25021:11 confronted 25073:15 25076:7,8 25083:24 25084:17 confusion 25124:15 connected 25049:10 connection 25008:1 25009:20 25017:14 25022:16,17,19,20 25023:7 25063:19 conscientiousness 25019:6 consent 25046:1 consider 25023:20 25042:13 25084:5 25149:7,9,9 25167:23 consideration 25012:2 25024:5 25043:1 considerations 25017:2 25017:22 25018:3 25029:5 considered 25065:23 25120:13 consistently 25012:3 consolidated 25053:25 constable 25156:20 constitution 25014:13 25014:23 25015:3,4,7 25015:13 25016:17 25017:24 25029:7 constitutional 25073:7 25077:3,12 consult 25042:20 contacted 25047:18 CONTD 25048:10 25089:8 25109:18 25161:5 contend 25008:6 25015:9 25037:9 25045:11 content 25047:12 contention 25008:19 25023:24 contested 25053:13 context 25011:11 25057:7 25060:14 25135:6 25136:3,7,12 25136:20 25150:23 contingency 25064:11</p>	<p>25064:15 continue 25094:24 continued 25057:4 continues 25108:3 continuous 25073:14 contrary 25008:6 25015:10 25169:3 contributing 25149:10 controversial 25025:21 25026:8 convenience 25012:6 25017:3 convenient 25010:5 25086:18 25160:15 Convention 25026:19 25026:24 25027:7 conversation 25022:12 25072:13,15 conversely 25156:7 conversing 25070:24 convey 25031:10 conveyed 25031:9 convicted 25019:24 25141:17 25142:6,8 cop 25154:17 copies 25005:15,16 25027:15,18 25028:1 25033:24 25034:7 copy 25012:12,17 25034:9 25100:25 corner 25013:7 corrected 25098:10 correction 25062:23 correctly 25043:8 25071:15 25078:2 corroborated 25156:17 corroborates 25156:13 corroborations 25156:16 cost 25017:1 25038:4,6 25038:7,8,8 costing 25039:7,9 25040:5 25044:9 costs 25033:11 couldn't 25050:19 counsel 25021:18 25074:24 25078:10 25122:9 25167:11 counteract 25036:10 25132:6 counteracted 25019:20 countermanding 25038:7 counterpart 25055:17 couple 25049:23 25059:24 course 25006:9 25007:3,25 25008:16 25010:11 25017:15 25017:23 25018:7 25023:23 25025:9 25033:4 25037:3 25044:23 25048:20 25051:1 25056:2 25057:5 25065:20 25070:15,19 25072:8</p>	<p>25102:1,3 25114:4 25115:10 25119:3,8 25120:18 25123:11 25131:11 25138:8 25146:9 25161:16 25165:18 25168:10 court 25007:12 25012:19,20 25013:2 25013:16 25015:24 25015:24,24,24 25026:14 25027:6,16 25027:16 courts 25012:8 25019:9 25139:24 cover 25037:10 25100:23 25137:15 25153:4 covered 25029:17 25049:25 25069:21 25137:16 25148:9 25149:6,15 25150:3 25152:22 25164:18 25165:15 covering 25084:10 25097:1 covers 25029:20 co-ordination 25108:3 crawl 25153:16 25154:5,7 crawled 25154:6 crime 25081:1 25144:5 25144:6 crimes 25143:23 criminal 25012:21 25025:17 25026:25 25027:9 25069:23 25070:2 25081:11 25139:24 25145:13 25146:5,11 criticised 25053:10 criticism 25040:6 25050:7,20 criticisms 25056:15 cross 25023:4 25048:3 25049:13 25054:3 25089:23 25100:25 25148:13 25150:8 25167:2 cross-check 25119:17 cross-exam 25057:25 cross-examination 25021:10,13 25024:3 25029:9 25048:10 25050:18 25087:16 25089:8 25090:7 25109:16,18 25113:10 25139:18 25148:24 25150:7 25155:11,20 25160:15 25161:5 25164:4 25168:7 cross-examine 25148:18 25149:8,17 25167:10,15 25168:1 25168:2,10,25 cross-examined</p>	<p>25148:23 25167:11 cross-examiner 25166:2 25168:17 cross-examining 25167:5 25168:19 crowd 25090:24 25091:6,11,20 25112:7 25114:16 25116:10 25140:13 25140:23 25141:4 Crystal 25023:12 current 25090:21 25158:15 currently 25090:15 25091:3 25116:15 25122:16 cursor 25036:8 cut 25059:2 25130:4 cutting 25016:7</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 25006:4 25017:19 dangerous 25064:4 25079:5 Darren 25033:10 dash 25161:23 date 25103:13 25106:20 25124:25 dated 25105:14 25106:8,11 day 25042:12 25044:3 25050:18 25060:8 25084:22 25099:24 25100:3,5 25126:1,3 25126:10,14 25134:13 25135:18 days 25040:3 25042:9 25042:12 25126:2 25166:14,25 DD 25054:17 dead 25053:10 25135:3 25139:13 25140:18 25141:5 25154:9 25167:1 deal 25006:4,13,20 25014:5,7 25016:25 25017:18 25018:2,6 25018:11 25021:5,6 25023:8 25024:11 25026:25 25027:1,10 25027:13 25035:15 25035:20 25036:3,7 25037:4 25048:14,21 25053:25 25056:11 25063:2 25073:2,4,13 25081:23 25089:25 25109:10 25146:23 25152:8 25159:12 25166:19 dealing 25022:6 25033:11 25089:13 25109:19 25121:23 deals 25011:10 25024:10 25027:8 dealt 25005:23 25006:5 25010:6 25012:4</p>	<p>25034:4 25048:6 25057:24 25100:17 25112:3 25114:8 25127:6,11 25139:18 25140:9 25146:24 25161:9 25166:9 death 25040:18 25043:20 25051:21 25054:7 25055:4 deaths 25064:24 25065:9,16,20,22,22 25066:14,17,18,23 25067:2,3,4 25140:8 25140:8,11 25141:9 25141:15 debate 25010:19 debated 25142:3 debating 25050:18 deceased 25024:24 25050:22 25051:3,10 25051:13,21 25052:5 25055:3,25 25065:12 December 25104:13,15 decide 25167:19 decided 25042:10 25087:9 deciding 25016:2 decision 25031:6 25050:14 25064:5 25079:12 decisions 25145:12 declare 25130:11 declared 25126:11 defence 25141:6,7 definitely 25102:10,23 delay 25047:15 deleting 25015:20 deliberately 25048:22 demand 25039:10 demands 25015:15,15 25021:11 demeanour 25022:8,10 25022:14,16 demonstrate 25150:5 demoted 25137:10,13 deny 25006:10 25037:14 departing 25165:23 departmental 25146:12 depending 25117:25 25146:17 depleted 25110:8,12 25111:1 25112:5 depletion 25110:24 deployed 25050:15 deponent 25043:3 deprive 25088:9 deputise 25005:4 derive 25013:25 derogant 25006:24 derogate 25007:2 describe 25077:15 25141:20 25148:2 described 25075:8 25080:4 25081:14 25083:4 25125:9</p>
---	---	---	--	--

<p>25142:14 25148:3 25158:9 25159:5 describes 25021:8 25155:13 25156:7 25158:8,18 describing 25158:17 description 25095:15 25106:21 25155:10 25159:3 Designated 25161:18 desirability 25010:18 25014:20 25015:18 desirable 25010:14 25014:2 25031:7 25032:18 25166:9 desire 25016:8 desirous 25143:11 25145:16 25146:6,7 despite 25079:10 25114:5,13 detail 25006:13 25009:18 25127:7 details 25148:5 detained 25077:5 detect 25008:8 detected 25120:6 detective 25034:11 detectives 25077:2 determination 25017:8 determine 25115:25 determines 25007:19 development 25035:10 deviating 25165:23 dicta 25010:8 dictated 25106:25 dictum 25012:25 25013:20,21 didn't 25008:8 25042:24 25052:16 25065:25 25093:11 25093:12 25101:1 25106:25 25114:20 25141:2,3 25143:17 25148:2 25149:22 25162:15 die 25052:16 25140:13 25140:24 died 25051:7 25052:2 25052:13,16 25139:14,15 difference 25078:6 different 25008:17,21 25010:16 25019:25 25020:16 25078:4 25082:11 25122:10 25129:1 25131:21 25137:4 25138:18,23 25139:23 25152:21 25158:14 differently 25045:11 25126:1 25145:24 difficult 25015:19 25022:9,15 25040:15 25080:13,16 25081:20,22 25087:7 25103:13 25118:3</p>	<p>25123:2 difficulties 25045:7 difficulty 25010:25 25017:1 25140:18,20 direct 25009:16 25021:14 25022:4 25164:20 directed 25164:22 direction 25060:20 25068:24 25069:9 25153:23 directions 25152:21 directly 25021:19 25025:6,15 25026:3 25030:1 25151:13 disadvantage 25023:23 disadvantaged 25033:25 disarm 25079:7,8 25084:10 25085:11 disarmed 25084:13,16 25084:21 25159:19 25160:1 discharge 25008:4 25060:20 25126:21 25126:24 discharged 25126:3,16 25126:18 25127:17 25129:17 25130:18 25134:5 25137:8 discharging 25128:17 disclose 25048:23 25049:15 discovered 25114:3 25116:6 25134:23 discreet 25044:8,10,17 25045:10 discreetly 25044:6 discretion 25006:7 25012:4 25016:2,3 25018:9 25029:11 discuss 25169:8,10 discussed 25145:10 25166:24 discussing 25159:14 discussion 25050:11 disk 25096:20,20 25097:3,5,10,13,13 disks 25101:2 dispensation 25091:17 dispersal 25078:17 25079:7 25084:17 25085:14 disperse 25064:6,7 25078:18,22 25079:7 25079:8 25084:9 25085:10,11,13 dispersed 25078:18 25085:9,9,21,24 25086:2,5,7 dispersion 25163:19 25164:7 displace 25011:24 display 25038:4 dispute 25008:14,18 disputed 25008:22,24</p>	<p>disputing 25131:24 distance 25072:5 25077:1 distinguish 25088:1 distributed 25087:3 District 25013:16 disturbance 25020:1 disturbed 25035:10 Division 25013:16 docket 25144:7 dockets 25081:8 Doctor 25137:15 doctrine 25140:19 document 25048:18,20 25077:12 25089:5 25109:5 25123:22 25125:7 25133:7,12 documents 25036:9 25038:4 25081:11 25104:4,8 25123:23 25147:1 doesn't 25008:17 25016:12 25021:22 25023:18 25027:1,7 25039:3 25041:8 25102:2 25126:10 doing 25070:4,14 25072:18 25076:18 25110:15 25123:22 25146:10 25163:22 Doorson 25028:10,14 25028:16 doubt 25008:5 25015:9 25089:20 25101:6,9 25166:7 downloaded 25012:22 downwards 25151:12 drastic 25142:15 25143:10 draw 25009:2 25026:17 25062:19 25089:13 25098:22 drawing 25032:15 drawn 25010:8 25016:20,21 25086:13 25110:22 drew 25032:18 drop 25071:3 25073:12 25073:16,18 25076:17,24 25078:18,21 25083:24 dropped 25084:4 dry 25118:4 Du 25027:2 due 25048:20 25087:7 duties 25112:8 duty 25019:6 25125:13 25127:4,6,11,19,24 25127:25 25128:8,14 25128:14,16,18,25 25129:2,3,6,9,10,12 25129:13,19,23 25130:1,6,6,10,11,15 25130:17,22 25131:3 25131:4,4,10,15</p>	<p>25132:7,8,17,17,23 25132:23,25 25133:2 25133:5 25144:10 D-O-O-R-S-O-N 25028:15</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>earlier 25018:21 25055:8,10 25056:1 25085:8 25100:25 25108:7 25109:22 25112:3 25113:10 25165:23 early 25005:18 easier 25090:3 eastern 25068:25 effect 25014:23 25046:7 25064:12,22 25150:20 effected 25067:10 effective 25029:9 effectively 25015:20 25024:20 25029:19 25035:11 25057:14 25058:12 25111:14 25114:18 25135:12 25135:21 eight 25040:3 25132:9 either 25037:24 25043:2 25066:12 25067:2 25071:13 25074:2 25100:12 25102:16 25141:8 25147:18,20 25163:14 elaborate 25167:9 electronic 25022:6 element 25145:25 emanated 25061:2 emanates 25095:13 emerge 25028:23 25029:3 emerged 25027:18 25029:13 emergency 25064:19 emotional 25024:25 emphasise 25028:23 25114:21 25150:2 empowering 25010:12 enable 25012:17 25041:20 25128:2 enabling 25010:12 enactment 25007:15 encompass 25014:2 encounter 25054:9 encouraged 25025:7 endeavouring 25010:19 ended 25151:25 endorse 25007:22 25017:25 endorsed 25014:11 ends 25055:19 enforcement 25013:15 engage 25022:12 25059:21 25060:2</p>	<p>25061:4,5,22,25 25062:1,5 engaged 25060:5 25138:22 engagement 25061:18 Engelbrecht 25050:6 English 25011:4 25032:13 25073:22 enhance 25018:23 25050:15 Ensure 25108:3 entered 25080:22 25081:2 25158:22 entirely 25023:5 entitled 25024:19 entry 25080:24 envisaged 25019:12 equally 25033:25 25145:16 equipment 25125:22 equivalent 25015:2 errors 25062:18 escalation 25142:15,23 25143:10,14 escorted 25153:20 especially 25015:13 essential 25013:18 25021:9 essentially 25006:4 25009:24 establish 25007:24 25082:8 25113:23 established 25009:21 et 25080:15 25105:4 25110:8 25112:6 25137:24 etcetera 25069:21 25071:5 25072:14 25073:9 25076:19,24 25156:10 25158:18 European 25026:19,24 25027:7,15 event 25037:11 25098:20 25133:15 25147:19 25159:9 events 25085:18 25109:23 25147:2 eventually 25074:6 25145:18 25164:25 everybody 25019:21 25058:8 evidence 25008:12 25009:16 25018:18 25018:24 25024:15 25024:18 25025:1 25031:5 25032:4,7,8 25041:3,21 25060:4 25061:14 25063:17 25065:14,21 25075:6 25077:13 25079:23 25100:4,13 25109:22 25116:25 25120:17 25134:4 25138:5,17 25142:9,13 25143:7 25144:6 25147:11 25154:21,25</p>
---	---	--	---	---

25156:17 25159:6 25163:15 25168:9,13 25168:14 evidence-in 25167:24 evidence-in-chief 25166:16 exact 25060:22 25067:19 25143:20 exactly 25053:23 25082:8 25083:13 25087:23 25096:21 25099:13,22 25100:7 25105:5 25115:2 25116:3,12 25126:8 25146:10 25147:13 25158:18 examination 25049:14 25101:1 25150:9 examine 25089:24 25148:14 examines 25167:3 examining 25023:5 25048:4 example 25005:23 25029:22 25032:13 25036:11 25037:1 25038:3,7 25041:5 25045:17 25074:9 25119:1,2 25132:3 exchange 25022:3,5 exclude 25121:4 executed 25076:16 exempted 25085:5 exercise 25006:7 25016:2 25038:9 25039:8,9 25040:5 25041:13 25081:15 25116:23 25118:17 25119:8 25125:9 25145:8 25158:21 25160:5 25164:24 exercises 25112:6 exercising 25016:1 25018:9 25029:11 exhibit 25019:17 25034:17 25054:17 25055:8 25088:21 25095:19 25100:19 25104:22 25109:8 25124:5,7 25134:17 25147:4,12 25155:15 25156:23,25 25157:24 exhibited 25019:8 exhibits 25034:13,14 25080:22 25104:11 expect 25047:21 25148:14 25149:3 expected 25057:15 25102:7,20 25103:8 25165:4 expecting 25152:23 expedient 25012:5 experience 25019:7 experienced 25024:8 25147:16	explain 25031:21,24 25057:16 25064:2 25110:5 explained 25076:9 25131:21 explains 25135:25 explanation 25035:13 25041:9 25043:10,18 25137:21 25165:3 explanations 25035:17 25035:18 25141:18 25141:20 explanatory 25034:12 expression 25046:13 expressions 25022:21 extensive 25044:15 extensively 25148:10 extent 25022:5 25064:18,23 25065:7 25066:21 extra 25044:25 25045:1 25149:5 extremely 25018:13 e-evidence 25032:10	falls 25121:1 false 25062:25 families 25024:17,21 25025:24,25 family 25009:9 25025:10 fanciful 25120:20 25121:2,3,4,13 fancy 25141:17,20 far 25010:12,12,14 25015:2 25022:21 25024:22 25025:5 25027:1,8 25029:22 25030:16 25052:25 25058:4 25062:2 25065:13 25069:8 25070:3 25092:11,14 25118:1,21 25163:25 fashion 25066:21 25131:22 favour 25006:8 25008:7 25020:9 favourably 25042:3 fear 25009:17,19 25040:19 February 25005:1 25040:11,13 fell 25059:8 25153:14 25153:15,18 fellow 25042:20 25152:16 FHA 25162:2 file 25041:22 25046:2 25046:10,24 25123:24 filed 25009:6 25024:16 25036:1 25044:25 25046:17 25047:4 fill 25126:25 25128:4 filled 25112:17 finalisation 25047:15 finally 25018:6 25020:25 25026:16 25029:10 find 25005:7 25013:4,6 25050:19 25061:2 25122:3 25131:15 25139:13 25151:22 25156:25,25 25157:2 25159:2 25164:9 finding 25143:24 fine 25050:16 25136:13 25137:25 25165:2 finish 25166:8 finished 25113:22 finishing 25109:10 fire 25060:20 25062:5 25126:20 25139:15 25150:20 25151:2,9 25151:10,23 25152:24 25153:24 25153:24 25154:2 25168:22 25169:1 firearm 25121:21 25125:13,15,21,22,23 25126:4,10,17,18,21	25126:24 25127:18 25128:17 25129:18 25130:18 25131:17 25137:8 firearms 25128:13 25134:11 25138:24 fired 25060:17 25095:25 25112:24 25119:4 25121:14 25123:13 25129:2 25130:24 25131:25 25131:25 25132:10 25132:20 25133:8 25140:17 firing 25060:24 25061:3,4 first 25014:6,10 25017:12,15 25019:4 25022:3 25028:9 25035:3 25036:20 25044:24 25050:2,18 25054:16,16 25055:18 25057:12 25086:15 25087:2 25092:24 25093:2 25102:11,13 25104:14 25108:15 25113:10 25115:13 25134:21 25159:23 25167:3 firstly 25006:14 25038:10 25067:9 25082:12 25130:17 25148:9 25159:17 25164:17 fit 25166:15 fits 25149:22 five 25020:2 25060:21 25088:24 25136:10 25140:23 25141:5,8 25149:3,4,11,23 flexible 25149:9 flow 25018:14 flows 25049:15 25163:11 focused 25101:4 follow 25071:9 25155:16 followed 25086:10 following 25005:24 25006:11 25007:13 25009:7 25021:8 25029:7 25032:12 25107:22 25152:9 follows 25058:1 follow-up 25072:24,25 25073:1 footing 25020:16 footnote 25026:11 25027:24 force 25091:14,22 25151:22 forced 25080:14 forcefully 25039:17 forces 25161:25 25162:1,16	forensically 25119:17 foresaw 25065:9 25066:23 foreseen 25063:23 25064:20,25 25065:23 forgive 25016:19 25049:25 form 25033:14,17 25090:16,18 25114:13 25121:5 25126:25 25127:16 25128:4 formal 25077:11 forth 25012:24 forthcoming 25035:18 25087:19 25144:6 fortunately 25121:11 forum 25037:24 forward 25059:7 25101:11 25128:19 25128:19 25134:21 25136:9 25162:9,11 25162:16,21 25163:22,25 25164:6 25164:21 found 25011:19 25023:5 25099:6 25100:2,3 25104:4 25110:24 25120:9 25139:14 25161:13 four 25065:14 25066:11 25093:18 25094:12 25121:23 framed 25099:23 frames 25046:20 frankly 25039:9 freely 25085:10 Friday 25042:11 25054:1 25137:16 friendly 25150:20 25151:2,10 25168:22 25169:1 friends 25028:1 front 25022:23 25096:23 25104:13 25119:18 25150:25 25153:22 Fuels 25007:7 full 25029:9 fully 25017:25 25024:20 function 25141:24 further 25009:15 25015:25 25019:3 25041:22,24 25045:21 25047:15 25072:21 25156:17 25157:24 25165:25 futile 25038:10 future 25150:1 fuzzy 25023:8
F				
	face 25024:19 25062:2 25083:7 25152:22 25165:3 facie 25038:11 25045:2 facilities 25075:5 25111:25 facing 25153:23 fact 25008:14,18 25017:20 25018:20 25022:5 25028:9 25030:8,11 25038:18 25040:6 25059:5 25069:20 25079:10 25083:19 25086:13 25100:8 25103:10 25114:5,13 25121:3,5 25131:24 25132:15 25132:22 25134:4 25136:5,17 25143:11 25148:3 25150:5 25160:4 factor 25018:18 25019:11,25 25020:8 25020:8,16,17,22 25120:12 factors 25017:7 25020:20 25118:16 facts 25045:12 25141:9 fail 25041:6,11 25064:7 failed 25017:10,16,17 25079:8 25084:9 fair 25037:19 25063:22 25065:8,18 25091:5 25091:18,21 25116:7 25141:20 25144:16 25144:23 25147:18 25148:21 Fairly 25023:14 fairness 25168:18 fallen 25160:8			
	G			
	Gaffley 25058:8 GANASEN 25048:2			

<p>gathered 25074:13,17 25085:15</p> <p>gathering 25064:3,4,6 25079:5,6,11,13 25085:3,5</p> <p>gaze 25019:7</p> <p>gazed 25021:12</p> <p>gazing 25021:12</p> <p>generalia 25006:23</p> <p>generalise 25122:15</p> <p>generally 25014:14 25049:11 25092:5</p> <p>generals 25130:10,17 25131:9</p> <p>gentleman 25079:17</p> <p>gently 25025:18</p> <p>germane 25017:8</p> <p>getting 25120:7</p> <p>Gilbert 25005:11</p> <p>gist 25072:15</p> <p>give 25013:4 25014:23 25020:2 25028:6,8 25034:3,17 25041:23 25042:14 25044:12 25044:13 25045:3 25048:17 25056:14 25056:15,16 25060:14 25076:20 25081:6 25087:9,10 25104:21 25117:10 25127:7 25137:21 25147:20 25155:15 25167:23</p> <p>given 25007:13 25012:12 25013:12 25013:22 25014:12 25014:15 25015:16 25018:24 25020:20 25025:2 25028:1 25032:3 25033:13 25035:24 25041:25 25047:3 25065:21 25077:3,6,11 25089:9 25089:18 25104:10 25118:11 25143:7 25165:6</p> <p>gives 25019:1,3 25020:23 25041:2 25042:7,8,12 25166:15</p> <p>giving 25033:11 25079:4 25100:12 25148:5</p> <p>glasses 25157:21</p> <p>go 25018:25 25019:23 25021:22 25027:8 25051:17 25054:17 25054:17 25057:19 25057:22 25058:6 25062:10 25079:13 25085:5 25087:9 25092:13,24 25093:2 25096:2 25105:16 25117:17 25118:1,1 25121:12 25123:18 25129:9,10 25134:12</p>	<p>25140:25 25141:11 25145:9 25150:11 25152:2</p> <p>goes 25014:3 25054:23 25055:16 25072:21 25128:16</p> <p>going 25005:4,25 25006:1 25010:9 25014:7 25019:23 25020:2,3,25 25022:19,20,20 25023:10 25025:4,6 25030:4 25032:20 25042:22 25048:15 25049:22 25060:9 25063:2 25069:9 25070:5 25071:4 25076:10,19 25087:3 25100:14 25110:7,9 25129:3 25130:15,17 25130:22 25131:4,10 25131:15 25141:15 25142:5,6 25143:19 25146:11,23 25149:17 25150:16 25151:24 25152:8,13 25155:18 25159:12 25161:6,9 25166:13 25167:5,5 25168:3</p> <p>good 25005:19 25038:12,17 25043:4 25044:3 25048:11,12 25070:13 25119:8 25146:13 25160:21</p> <p>gotten 25164:15 25165:5</p> <p>Gotz 25013:4 25033:17</p> <p>government 25108:8</p> <p>grant 25017:21 25023:19 25029:6</p> <p>granted 25009:11 25010:4 25023:24 25041:3</p> <p>granting 25006:8 25017:22</p> <p>grass 25067:14,22 25068:3 25069:11 25074:10</p> <p>ground 25015:10 25137:15 25154:13</p> <p>group 25153:10 25160:9</p> <p>grouping 25085:12 25147:16</p> <p>guaranteed 25014:16</p> <p>guards 25119:15,16 25120:1</p> <p>guide 25018:8</p> <p>gun 25123:7,13</p> <p>gunshot 25153:7 25154:8</p> <p>gunshots 25152:20</p> <p>Guys 25153:9</p>	<p>25054:7 25055:3</p> <p>hadn't 25011:19 25032:16,17 25069:6 25148:23</p> <p>half 25041:12</p> <p>hand 25007:18 25044:14 25103:15 25107:22 25156:10</p> <p>handed 25034:14 25035:7 25047:1 25093:17 25113:8 25157:3,10</p> <p>hands 25032:25 25073:17 25083:1,7 25083:16 25084:6,20 25084:23 25086:1,16 25108:16 25134:25 25152:22 25153:9,11 25153:12,14 25159:18 25160:9</p> <p>handwriting 25093:13</p> <p>happen 25021:16 25023:19 25127:4 25128:12</p> <p>happened 25077:14 25107:14 25123:12 25126:1 25131:16 25142:13,15 25147:11,12,13 25164:24</p> <p>happening 25113:18 25118:17</p> <p>happens 25126:3 25129:13</p> <p>happy 25046:1</p> <p>harboured 25009:19</p> <p>harbours 25009:17</p> <p>harm 25006:17 25007:21,25 25008:2 25008:14,20 25009:4 25009:9,22 25017:13 25017:15 25029:25 25073:13</p> <p>Harmse 25068:16</p> <p>hasn't 25088:14,15 25089:21</p> <p>haven't 25015:23 25023:19 25163:13</p> <p>head 25034:11 25042:2 25153:18 25156:11 25158:18</p> <p>headed 25124:1,3</p> <p>heading 25018:13</p> <p>heads 25005:8,16,17,22 25005:22,25 25006:2 25006:4,20 25009:4,5 25009:16 25011:9,22 25017:19 25018:2,12 25018:21,22 25019:2 25021:7 25024:12,16 25025:20 25026:6,11 25026:18 25027:19 25027:20 25033:19</p> <p>hear 25032:7 25044:18 25044:20 25068:5</p> <p>heard 25038:21</p>	<p>25066:12 25102:12 25113:5 25116:22 25142:9 25144:16 25152:20 25153:23</p> <p>hearing 25020:25 25033:13 25041:19 25166:20</p> <p>held 25018:15 25059:7</p> <p>helicopter 25151:23</p> <p>help 25011:6 25012:17 25090:11 25101:8,16</p> <p>helpful 25117:1</p> <p>Hemraj 25042:23 25080:21 25081:3 25101:13,19 25104:17 25105:17 25111:8 25114:22,25 25115:6 25133:2,6,12 25158:13</p> <p>herewith 25107:21</p> <p>he'll 25038:25</p> <p>he's 25047:11,22 25056:3 25070:20 25076:19 25098:12 25100:14 25107:6 25133:7 25135:4 25168:2</p> <p>hid 25152:17</p> <p>hidden 25073:9</p> <p>hiding 25067:13,21 25074:9 25082:13 25152:20 25153:9</p> <p>high 25012:19 25013:2 25139:19,20</p> <p>higher 25005:4 25009:8 25030:21</p> <p>hindered 25085:14</p> <p>hold 25141:18 25165:16</p> <p>holding 25059:7 25074:21 25075:4,8,9 25075:11 25096:24 25162:9,12,16,21 25163:23,25 25164:6 25164:21</p> <p>holds 25165:16</p> <p>holiday 25042:8,11</p> <p>home 25079:13 25085:5 25087:9 25140:25 25141:11</p> <p>honesty 25158:25</p> <p>hope 25020:4 25163:13</p> <p>hoped 25087:5,6</p> <p>hopefully 25014:7 25046:4</p> <p>hospital 25051:3,7,11 25051:20 25052:1,5 25052:13,15 25053:2 25055:2</p> <p>hospitals 25063:7</p> <p>host 25120:19</p> <p>hostile 25151:9</p> <p>hosting 25059:11</p> <p>hour 25041:12 25083:8 25160:22</p> <p>hours 25077:14</p>	<p>housekeeping 25033:23</p> <p>human 25024:25 25026:19</p> <p>hundred 25152:19</p> <p>hundreds 25056:18,19</p>
			I	
			<p>idea 25044:25 25045:8 25045:15 25112:5</p> <p>identified 25115:23 25121:15</p> <p>identify 25080:1,10 25159:24</p> <p>identifying 25013:13 25119:9</p> <p>idle 25021:11</p> <p>illegal 25064:6 25079:6 25079:11,13 25085:3 25085:4</p> <p>illegally 25064:4</p> <p>illicitly 25117:24</p> <p>image 25023:7,11</p> <p>imagine 25034:15</p> <p>IMG0961 25095:6</p> <p>IMG0961.JPG 25093:18 25094:3</p> <p>IMG0962 25096:10</p> <p>IMG0962.JPG 25095:22</p> <p>IMG963.JPG 25096:5</p> <p>immediacy 25074:8</p> <p>immediate 25021:15,21 25152:18 25162:23 25164:5,23</p> <p>immediately 25033:7 25054:22 25060:25 25074:3 25076:7 25077:15 25129:12</p> <p>impact 25025:9</p> <p>implicated 25014:13 25024:14,17 25025:4</p> <p>implied 25012:24</p> <p>importance 25040:6 25056:17</p> <p>important 25009:25 25010:1 25018:14 25030:8 25032:16 25043:15 25119:11</p> <p>impose 25031:22</p> <p>imposed 25029:1</p> <p>impossible 25080:17 25081:15 25122:2,3 25123:2 25141:7 25160:5</p> <p>impression 25081:22 25128:24</p> <p>inaccurate 25101:3</p> <p>inadequate 25056:19 25059:5</p> <p>inappropriate 25091:20</p> <p>inaudible 25007:1,5 25017:5 25019:10 25026:13,23 25028:12 25054:14 25095:3 25148:8</p>	
	H			
	hacked 25051:21			

<p>incident 25092:5 25113:11 25114:1 25128:10,11 25131:5 25136:23 25138:23 25159:5</p> <p>incidents 25148:1,1 25150:4</p> <p>inclined 25101:4</p> <p>include 25062:7 25071:13 25121:3</p> <p>including 25092:21 25120:15</p> <p>inclusive 25148:4</p> <p>incorporated 25035:25</p> <p>incorrect 25119:25</p> <p>indebted 25045:6</p> <p>indicate 25061:14 25071:2,7 25072:16 25077:22 25095:24 25099:6,9 25100:3,7 25101:14 25117:17 25131:9 25132:15 25133:13 25143:4</p> <p>indicated 25024:6 25051:13 25053:15 25056:15 25060:5 25068:3 25072:12 25073:6,11 25076:7 25076:18 25077:17 25078:16,24 25079:3 25080:13 25081:19 25081:21 25082:3,7 25084:8 25085:8,8 25099:10 25108:7 25116:8 25122:8 25127:3 25132:20 25134:9 25137:7,22 25137:24 25138:2 25142:19 25145:11 25145:19 25147:9,15 25151:5,12,23 25155:9 25164:19 25165:19</p> <p>indicates 25132:19 25133:7 25156:11</p> <p>indicating 25013:7 25070:24 25137:7 25164:24</p> <p>indication 25081:4,6</p> <p>indirect 25024:4</p> <p>individual 25078:23 25080:11</p> <p>individuals 25054:9 25064:3 25147:25</p> <p>indulgence 25088:9,10</p> <p>inference 25077:21</p> <p>inform 25069:23</p> <p>information 25053:16 25127:23</p> <p>informed 25054:8 25072:8 25073:7 25076:4 25102:14</p> <p>informing 25071:21</p> <p>infringement 25102:24</p> <p>infringes 25010:3 25014:16</p>	<p>initial 25082:21 25164:4</p> <p>initialled 25043:2</p> <p>initially 25060:5</p> <p>injured 25024:16 25025:3 25029:21 25049:5 25051:6,19 25052:9,12,12 25055:1 25063:7 25133:21 25137:23 25138:1,4 25140:2 25147:3 25150:15</p> <p>injuries 25064:20,20</p> <p>input 25047:11</p> <p>inquiry 25026:9 25036:25 25038:6 25044:6</p> <p>inserted 25055:25</p> <p>inside 25060:24</p> <p>insist 25090:10</p> <p>insofar 25016:25 25031:4,8 25066:19 25130:14,16,22 25134:2 25141:13 25149:10 25162:15 25163:25</p> <p>inspired 25021:2</p> <p>instances 25132:21</p> <p>instantaneously 25129:14,18 25130:15</p> <p>instincts 25042:6</p> <p>instructed 25107:21,21</p> <p>instruction 25078:23 25084:8 25090:24 25103:14 25107:14 25107:16,17 25113:12,24</p> <p>instructions 25042:22 25042:22 25078:17 25091:10 25168:18 25168:21</p> <p>instructive 25029:4</p> <p>instruments 25027:12</p> <p>intelligence 25050:4,8 25050:11</p> <p>intend 25045:11 25104:5 25148:6 25156:2 25169:1</p> <p>intended 25007:15 25021:24 25087:23 25110:24 25164:25 25166:2</p> <p>intention 25007:17 25015:5 25079:6</p> <p>interchangeably 25029:20</p> <p>interest 25025:12 25030:18</p> <p>interested 25015:5 25032:7 25043:9 25128:22</p> <p>interesting 25005:8 25010:8</p> <p>interests 25043:4</p> <p>interfere 25007:16</p>	<p>interim 25015:3 25043:6</p> <p>intermediary 25021:20</p> <p>internally 25114:9</p> <p>international 25005:17 25005:23 25012:9 25018:6,8,10 25026:17 25027:12 25029:13</p> <p>internet 25012:23</p> <p>interpret 25015:3,19 25016:7,7 25030:19 25030:20 25031:14 25032:8</p> <p>interpretation 25006:21 25014:21 25014:25 25015:12 25015:16</p> <p>interpreted 25014:18 25016:16</p> <p>interpreting 25015:6 25032:6</p> <p>interpretive 25018:8</p> <p>interrupt 25012:11 25020:12 25026:24 25155:14 25160:16</p> <p>interruption 25033:3</p> <p>interview 25031:1,8</p> <p>interviewer 25032:5</p> <p>introduced 25145:24 25155:12,20</p> <p>investigate 25115:20 25117:5 25121:7</p> <p>investigated 25066:19 25102:7,25 25145:12 25145:17,22</p> <p>investigation 25103:2,9 25113:12 25115:24 25116:5,15,20 25117:16 25118:5 25121:10 25143:2,15 25143:17 25145:21</p> <p>investigations 25036:11 25102:19 25113:6 25118:24 25119:2 25142:19 25143:5,23</p> <p>inviting 25164:10</p> <p>invocation 25140:19</p> <p>involve 25146:15</p> <p>involved 25019:4 25023:4,4 25025:15 25038:5 25041:22 25059:19 25078:13 25102:19 25103:2 25118:21 25136:23</p> <p>in-camera 25010:13,15 25010:17 25029:23</p> <p>IPID 25114:8 25115:24 25123:17,24</p> <p>irregularly 25117:23</p> <p>irrelevant 25036:25 25037:2,9</p> <p>isn't 25008:10 25011:3 25016:3 25025:2 25026:14 25141:7</p>	<p>25149:6</p> <p>issue 25029:21 25044:8 25045:9 25049:4,12 25050:17 25056:10 25059:19 25061:21 25074:7 25108:5 25109:20 25114:8 25115:23 25121:24 25127:5 25146:23 25150:16 25154:19 25155:23 25159:10 25168:19</p> <p>issued 25092:12 25103:14 25107:15 25116:9 25125:21,24 25126:5</p> <p>issues 25035:14 25043:9 25049:9,24 25053:8 25062:10 25108:3 25116:3 25143:4 25148:17,19 25154:18</p> <p>issuing 25112:1 25122:9</p> <p>item 25108:18 25117:20</p> <p>it'll 25038:20 25124:9</p> <p>I'd 25006:18 25012:17 25049:15 25063:19</p> <p>I'll 25006:2 25011:15 25012:10 25027:25 25049:25 25155:4 25160:19</p> <p>I'm 25005:24 25010:14 25011:18 25012:11 25015:22 25019:11 25020:2,3,12 25022:24 25023:9,12 25025:13,23 25027:6 25030:4,12 25048:15 25049:22 25052:13 25057:2,2,6,10,20 25059:23 25061:17 25062:18,19 25063:2 25065:6,10 25071:1 25071:15,18 25072:16,16,19 25073:10 25074:24 25141:13,16,18 25142:2,4 25143:6,8 25143:13,19 25145:21 25146:23 25146:25 25149:14 25149:17 25150:1,16 25150:21 25152:13 25154:23 25155:14 25155:18,24 25156:1 25156:7,8,19 25157:12,21 25160:13,18</p> <p>I've 25011:6 25048:13 25056:7 25145:11,19 25148:11,21 25154:24</p>	<p>ja 25031:20 25034:3 25039:20 25040:13 25043:18 25046:8 25049:21 25052:4 25053:13 25054:6 25056:10 25059:11 25060:8 25061:8 25065:3,6,25 25070:12 25074:4,12 25074:20 25075:16 25075:24 25076:3 25077:25 25079:15 25081:7 25082:4,5 25083:13 25084:12 25089:6,14 25095:11 25095:16,17 25098:11 25103:24 25105:25 25108:21 25109:19 25116:18 25116:21 25120:18 25122:1 25123:1,6 25124:14 25127:13 25129:17 25131:7 25132:2 25134:2 25135:19,23 25136:3 25136:13 25138:11 25139:24 25145:4 25147:17 25149:20 25149:24 25156:12 25159:25</p> <p>jacket 25153:6</p> <p>January 25103:20,21 25103:22 25104:1 25105:15 25106:10 25106:19 25107:22 25110:3,25 25113:7</p> <p>Ja-no 25048:25</p> <p>JJJ108 25051:17 25055:8 25134:17,18</p> <p>JOC 25127:9 25129:20 25129:22,25 25132:21,22</p> <p>JOCCOM 25161:21</p> <p>join 25032:4,19</p> <p>joined 25059:25 25152:16 25153:5</p> <p>JPG 25093:22</p> <p>judges 25010:9 25012:4</p> <p>judgment 25010:9 25011:4 25012:13,20 25013:3 25026:12,14 25027:3</p> <p>judgments 25027:15 25028:1,11</p> <p>judicial 25021:1</p> <p>Julius 25030:13</p> <p>jumping 25049:25</p> <p>junior 25013:5</p> <p>jurisprudence 25012:3</p> <p>justice 25019:5 25145:13</p> <p>justify 25008:8 25087:21</p>
			J	K

<p>keep 25122:12 kept 25112:17 25115:1 25162:1,16 key 25101:1,2,13,15 25142:14 kicking 25154:10,12 killed 25040:24 25051:18 25052:8 25054:9,22 25055:1 25055:20 25065:24 25133:21 25134:3,7 25134:24 25136:6,18 25136:19 25137:4,7 25137:18,23 25138:1 25138:4,7,12,16 25139:23 25140:2 25143:11 25146:15 25147:3 killers 25154:17 killings 25025:7 25092:7 25113:25 25114:4 kind 25016:10 25021:21 25041:4 25095:8 25100:17,22 25110:2 kindly 25027:14 kneeled 25153:13 knew 25051:10 25073:15 25076:21 25078:1,2 knife 25070:6 knock 25128:8 knocked 25130:24 25131:1,2 25132:12 know 25010:25 25011:1 25014:5 25019:14,25 25022:23 25030:25 25033:18 25036:4 25040:3,17 25041:8 25042:7 25047:18 25051:6,14 25057:2 25058:21 25068:10 25071:3,21 25072:14 25073:18 25074:22 25077:20 25078:3 25082:7 25084:21,21 25087:11 25091:10 25091:24 25092:11 25095:1 25096:18 25099:12 25100:10 25101:7 25102:6,19 25109:9 25113:4 25116:25 25117:19 25118:18,22 25119:5 25119:14 25120:9 25121:9,13,17 25123:8,21 25125:14 25128:22 25130:24 25133:3,4 25139:12 25139:14,18 25141:19 25144:15 25145:21 25148:7 25150:13,15 25166:8 knowledge 25073:2</p>	<p>25080:7 25116:9 25130:19 25154:23 25155:5,9 known 25063:24 25102:25 knows 25019:23 25166:18 koppie 25060:24 25068:25 25069:2,7,9 25085:13,16,19,22 25086:1,2,4,4 25100:10 25118:22 25120:6,21 25152:16 koppies 25092:15 Kostovski 25027:22,25 K9 25058:8 25067:17 25067:17 25139:7,8</p> <hr/> <p style="text-align: center;">L</p> <p>L 25147:4,12 lack 25050:11 25082:16 Lambert 25007:8 Langa 25030:12,13,18 25030:21,23 25032:3 language 25033:20 languages 25032:14 large 25074:13 25077:18 25160:3 larger 25023:14,16 25071:19 25076:11 late 25035:24 latest 25025:5 latitude 25148:21 laughing 25154:15,19 25154:20 law 25012:9 25014:10 25014:22 25015:12 25018:3,7,8,10,11 25024:11 25026:7,15 25026:17 25028:23 25029:3,8,13 lawyers 25024:20 lay 25064:7 laying 25076:8 le 25157:10 leader 25005:3 25032:7 25032:8,11 leaders 25008:12 25031:5 25032:4 25041:21 25063:18 25168:9,13 leadership 25114:11 leading 25013:1 25168:13,15 learned 25005:3 25028:1 25045:4 25155:24 learnt 25117:13 leave 25020:4 25048:7 25073:19 25079:11 25083:14 25133:16 25159:10,11 led 25060:4 25079:23 25121:10 25155:11 25166:13</p>	<p>Leepile 25009:25 25011:16 25014:11 left 25048:8 25051:4 25054:21 25063:11 25083:20 left-hand 25013:6 leg 25044:9 25143:2 legally 25013:14 legislature 25007:13 25015:6 legs 25143:1 lend 25012:17 lethal 25091:22 letter 25103:14 25104:3,15,15 25105:11,13,18,18 25106:3,23,25 25107:5,14 25108:2 25113:7 letters 25106:2 let's 25020:4,4 25033:21 25034:3 25041:13 25044:20 25047:19 25057:22 25059:20 25060:15 25062:10 25067:7,9 25073:8 25074:4,5,7 25074:14 25075:14 25075:19 25082:10 25084:3,5 25086:20 25089:14,15 25090:14 25093:24 25104:21 25121:2 25124:6 25126:11 25129:1 25144:16 25151:6 25153:10 25157:23 25159:2,10 25161:10,10 level 25050:11 Lewis 25016:11 lie 25154:5 lies 25011:23 Lieutenant 25052:20 25052:22 Lieutenant-Colonel 25166:25 25167:16 life 25030:13 25040:18 25043:20 25152:21 life-size 25023:15,16 light 25015:4 25025:13 25045:21 25097:5,6 likelihood 25120:22 likes 25168:2 limine 25037:21,25 limitations 25029:1 limited 25007:8 25009:10 25026:21 line 25054:18,18 25060:13,15 25061:1 25061:4 25062:15 25086:11 25136:9 25153:18 lines 25054:24 25135:20 link 25010:16 25023:5 25038:7,9 25140:17</p>	<p>25141:8,15 linked 25081:8,12 links 25024:6 list 25140:5 listed 25108:8,18 literally 25040:18 25043:20 litigation 25020:24 25026:25 25027:9,10 little 25018:21 25104:20 25122:10 live 25022:4 25061:23 loaded 25071:5 25074:17 25076:25 locate 25132:18 25143:8 25158:21 locates 25132:19 location 25137:5 25138:18 logistical 25064:15 long 25036:3 25101:3 25110:12 25165:15 25166:8 longer 25039:23 25110:7 Lonmin 25059:15 25074:21,22,25 25075:4,4,8 25077:9 look 25036:24 25045:7 25049:23 25095:17 25099:19 25101:17 25119:18 25120:16 25130:4 25151:6 25155:10 25158:11 25160:19 25161:10 looked 25039:5 looking 25013:7 looks 25097:14 25100:24 loose 25124:3 lost 25030:13 lot 25023:6 25073:23 25080:13 25154:11 lots 25152:20 loudly 25154:15,20 low 25068:3 lower 25097:1,1,5 25139:19 lowest 25097:23 lucky 25153:19 lunch 25046:10 25089:25 25090:7 25108:24 25159:14 lying 25051:4 25068:3 25097:11 25134:24 25135:2 25136:1 25154:12 L142 25161:10 L67 25161:10,10</p> <hr/> <p style="text-align: center;">M</p> <p>M 25088:18 Mabotyana 25063:11 Magidiwana 25026:12 main 25021:8 25078:25 25111:25</p>	<p>Major 25048:1,11 25049:22 25054:20 25155:15 majority 25139:20 Major-General 25047:17,21 25086:23 25096:21 25105:19 25109:2 25161:1,25 making 25033:7 25036:10 25037:21 25043:10 25130:13 25132:2 manage 25161:25 25162:1 managed 25164:12 management 25090:24 25091:6,11,20 25112:7 25114:16 25116:11 manager 25115:9 manifests 25007:16 manner 25014:18 25016:16 25081:13 25154:14 manufacturers 25119:19 March 25040:3 Marikana 25014:15 25054:21,23 25091:25 25092:7 25117:14 25127:7 25130:1 25133:3 mark 25093:4,7,10,11 25093:24 25094:15 marked 25088:14,15 25093:5,6 25094:23 marks 25106:9 mass 25080:13,23 massacre 25091:25 25092:7 material 25031:6 25035:14 25036:4,7,9 Mathunjwa 25025:4,16 25026:3 matter 25007:18 25010:13 25014:13 25021:6 25026:12 25030:9,18 25034:2 25036:6,6 25039:3,16 25040:22 25041:4,14 25043:5,20 25045:21 25046:18 25047:5 25054:1 25066:18 25089:24 25099:19 25102:9 25114:7 25132:14 25161:7 matters 25023:4 25035:16,20 25087:21 25102:22 25103:12 25142:1 25145:12 25165:11 Matthews 25062:13,15 25062:21,23 Mdze 25034:15 mean 25008:6,17</p>
---	--	---	--	--

25010:20 25011:1 25013:22 25016:6 25022:21 25040:3 25052:20 25057:16 25062:2 25065:7 25067:25,25 25068:10 25111:18 25115:13 25120:19 25120:21 25144:10 25149:13 meaning 25013:18 25061:22 means 25012:2 25062:1 25062:6 25085:21 25110:16 25117:23 25121:22 25132:12 meant 25061:9 25126:8 25132:16 25147:13 measure 25020:13 mechanism 25022:9 media 25063:14 medical 25064:19 25164:14 25165:7 medium 25022:6 25024:4 meet 25017:12,16,17 meeting 25050:5 meets 25042:3 member 25051:21 25052:2 25053:1 25055:3 25067:16 25114:7 25115:23 25116:10 25120:23 25121:20 members 25009:9 25054:20 25058:9 25059:21 25065:24 25066:18 25067:17 25073:11,23 25078:8 25099:15 25102:4,5,8 25111:4,14 25112:23 25114:12 memory 25101:3 mention 25053:17,20 25054:10 mentioned 25101:2,5 mentioning 25053:10 Merafe 25053:3 mere 25012:4 25121:3 25121:5 merely 25010:5 25014:2,19 25015:17 25020:7 25132:16 25158:8 25160:9 met 25063:16 method 25121:19,20 25122:9,19,21 methods 25121:18 meting 25050:20 metres 25085:22 Michelin 25028:19 microphone 25006:25 25007:5 25017:5 25019:10 25026:13 25026:23 25028:12 25030:6 25054:14	25095:3 25148:8 middle 25096:17 mightn't 25048:23 militate 25017:22 militating 25029:6 millimetre 25139:4,5 25139:10 millimetres 25139:2 mind 25011:6 25016:1 25020:17 25023:20 25048:25 25159:1 mine 25013:3 25051:20 25055:2 25104:14 miners 25053:10,17 25054:21 25065:22 25065:23 25066:17 25067:20 mineworkers 25055:25 25066:17 Minister 25114:7 minutes 25034:2,3,9 25039:5,11 25044:11 25044:11 25050:1 25056:19 25086:20 misbehave 25019:20 missed 25106:21 25147:21,24 25151:8 missing 25027:21 25128:16 mistake 25105:15 25106:15 mistaken 25151:9 mistakenly 25150:19 misunderstand 25158:6 MMM 25088:19,21 25094:1 MMM50 25088:23 25109:8 25152:2,3 25157:25 MMM51 25093:25 MMM51.1 25095:6 MMM51.2 25095:18 25095:19 MMM51.3 25096:4 MMM51.4 25094:22 MMM51.6 25096:17 MMM52 25104:22,23 MMM52.1 25105:4 MMM52.6 25105:8 MMM53 25125:5 25130:5 MMM6 25157:9,12,15 Modiba 25058:8 Mohlaki 25093:15 25098:10,10,13,15 25100:7,12 25101:25 25154:22 Molangoanyane 25155:12 25156:21 25156:22 25157:5 moment 25016:20 25025:25 25096:5,8 moments 25034:9 Monday 25030:13 25042:7,15 25043:5	25044:3,24 25045:3,8 25046:3,10,12,16 25047:2 25166:12,16 25167:25 25169:14 morning 25005:18 25033:14 25039:11 25047:1 25048:11,12 25131:2 25166:17,18 25169:14 mortuary 25064:24 25065:2,8,11,12,14 25065:15 25066:22 Motion 25034:19,20 motivated 25059:5 Motleklong 25113:25 25114:2 25115:23 25116:13 25120:23 25121:12 mounted 25163:16,22 25164:5,12,19 move 25012:12 25017:18 25073:19 25077:23 25090:14 moved 25019:5 25061:4 movement 25134:21 moving 25061:10 25076:9 Mpembe 25054:20 25130:5 Mpofana 25063:11 Mpofu's 25087:12 Mtjamba 25152:14 25156:1 Mtshamba 25089:2 25109:6 murder 25140:6,20,21 25141:1,10 25142:7 murdered 25142:23 25145:5,17 25146:1,8 25146:6 murders 25142:16,19 25146:6 mustn't 25025:13 25065:16 muted 25022:5 M-T-S-H-A-M-B-A 25089:2	25031:6 25032:19 25033:2 25045:1 25069:23 25070:21 25116:25 necessity 25010:2,24 25011:5,10 25012:1,7 25012:24 25014:1,11 25014:19 25015:17 25017:3,17 need 25008:24 25017:13 25028:8 25030:19 25046:1 25118:24 25119:1,17 25139:25 25161:9 needed 25142:20 25143:2 25164:15 needs 25037:1 25043:10 neither 25107:9 25141:10 Netherlands 25028:10 neutral 25066:21 neutrally 25099:23 never 25021:2 25030:17 25117:13 25137:23 25141:22 25166:18 nevertheless 25030:17 25042:25 25111:18 25118:4 new 25012:21 25055:24 25091:16 night 25025:7 NIU 25059:21,24,25 25060:4 25061:1,4,11 25061:14 25136:9 25138:22,23,24 NNN1 25034:16,19,20 NNN2 25034:20 NNN3 25034:21,25 NNN4.1 25035:1,2,3 NNN4.2 25035:4 NNN4.3 25035:5 nodding 25042:2 non 25006:23 normal 25126:2,9 25163:6 normally 25065:12 25096:23 25097:19 25127:11 25132:17 25143:23 northerly 25068:24 North-West 25034:11 25107:21 25118:17 note 25009:12 25167:14 25168:16 notes 25088:20 25094:20 25112:16 25157:1 25160:20 Notice 25034:19,20 noticed 25062:17 November 25053:21 no-one 25019:23 25140:13 Ntsebeza 25140:9 25155:25	number 25011:17 25012:18 25013:8 25017:21 25018:13 25049:20 25060:22 25063:9 25071:19 25074:13,22,23 25075:16,19,20,25,25 25076:4 25077:9,9,18 25081:5 25082:12 25091:14 25104:22 25105:3,7,10 25107:24 25125:24 25132:20 25133:1 25135:1,2 25140:5,16 25152:18 25153:3,17 25155:15 25156:23 25156:25 25160:3 25167:6 numbered 25013:9 numbers 25034:17 25048:18,23 25137:24
O				
oath 25047:22 25048:1 25048:2 25086:23,24 25109:2,3 25161:1,2 object 25074:25 objection 25088:5,7 objections 25075:18 objective 25154:20 obligations 25031:22 obliged 25015:3 obligant 25157:20 observation 25073:6 observe 25152:17 observed 25134:22 obtained 25021:21 25116:13 obtaining 25021:15 obviate 25024:7 obvious 25144:12,13,19 25144:20,20 obviously 25015:10 25023:21 25025:17 25030:18 25037:10 25041:23 25048:16 25056:22 25061:10 25066:14 25085:13 25087:24 25090:9 25091:19 25102:15 25117:9 25128:25 25144:13 25149:8,14 25160:14 occasion 25168:10 occupy 25168:2 occur 25057:15 occurred 25061:3 25099:3 25109:24 25113:11 25158:23 25165:6 occurring 25007:25 offer 25033:6 offered 25045:16 offhand 25139:17 25159:21				

<p>officer 25068:16 25127:5,6,12,19,24 25127:25 25128:14 25128:16,18 25129:6 25129:12,13,19,23 25130:1 25132:23 officers 25051:18 25054:25 officer's 25132:23 25133:5 official 25102:24 25158:9 officials 25113:16 25140:5 oh 25013:3 25040:12 25069:3 25075:25 25095:1 25096:9 25103:24 25137:14 25137:20 25151:16 25157:4,17 old 25112:4 oldest 25121:23 omega 25039:6 omitted 25030:8 once 25116:5 25118:11 ones 25071:13 25084:4 25084:5 25085:11 onus 25007:23 25008:3 25008:4,18,20,25 onwards 25057:4 open 25008:2 25027:6 25033:12 25074:13 25154:5 operates 25019:11 operating 25089:18 operation 25056:17 25129:25 25143:1 operational 25091:3 25092:18 25162:2 25163:8 operations 25064:9 operator 25124:2 operators 25095:1 opponent 25021:10,11 opponents 25045:4 opportunity 25013:4 25021:10,22 25031:1 25039:4 25041:23,25 25045:22 25046:16 25047:3 opposing 25008:3,13 25033:25 25034:21 25034:23 25046:24 order 25008:7,9 25012:16 25023:19 25023:24 25043:4,24 25046:7 25059:21 25061:21 25062:4 25094:17 25110:7 25114:18 25122:6,15 25122:18 25143:3 25168:7 ordered 25066:22 25154:5 orders 25013:13 25028:24</p>	<p>ordinary 25012:1 25017:15 original 25053:20,24 25054:11 25057:25 25091:10 originals 25093:13 ought 25006:7 outcome 25113:14 outline 25077:6 outset 25006:14 outside 25054:18 25074:13 25102:21 25169:11 overseas 25022:13 overturned 25027:4 o'clock 25047:6 25108:11 25132:7 25169:14</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>page 25005:23 25006:11,19 25009:5 25011:9,22 25012:22 25012:23 25013:4,7,8 25018:11,22 25019:3 25020:20,20 25021:7 25024:11 25027:19 25054:16 25060:8 25093:3 25096:3 25104:15,17,20 25124:3 25134:12 25135:13,16 25152:11 pages 25094:13 pangas 25134:25 papers 25043:24 25044:13,25 25045:22 para 25013:22 25027:25 paragraph 25006:19 25007:12 25009:5,15 25011:9,22 25013:9 25018:12,22 25019:2 25021:7 25024:12 25025:20 25026:6 25027:20,22,24 25028:8 25051:17 25052:17 25053:9,17 25054:3,15,24,25 25055:17,22,23,24 25089:14 25134:15 25134:15,20 25135:6 25152:4,15 25154:1 paragraphed 25053:24 paragraphs 25005:24 25009:4 25013:9 25028:18,22 25152:9 paramount 25012:2 Pardon 25062:14 part 25010:15,17 25013:9,16 25029:25 25034:15 25040:4 25058:5 25085:3 25097:1,2,2,3,4,5,7 25097:12,13,19</p>	<p>25100:4 25123:22 25124:9 25154:10 participants 25079:12 participate 25030:22 25082:1 participated 25082:4 particular 25010:20 25011:15,25 25020:10 25021:25 25079:16 25102:14 25110:23 25113:11 25115:3 25121:20 25126:1,3 25134:11 25136:8 25156:9 particularly 25024:14 parties 25008:3,13 25024:13,15 25029:10,19,23 25030:10 25033:13 25033:25 25035:6 25046:24 25099:21 25167:7 25168:6 parts 25037:11 party 25027:3 25030:11,22 25032:4 25032:19 PAS 25108:3,5 passage 25011:15 25013:25 25014:4 25027:8 25055:4,9,18 25135:7,10,11,21 passages 25005:22 path 25056:7 pause 25152:25 Pelechowski 25013:1 25013:10 pellets 25097:17,20 25112:23,24 25119:4 pen 25106:20 perceived 25151:14 performance 25019:6 period 25110:16 25117:4 25118:3 25132:9 25167:2 permanently 25125:23 permission 25032:4 25148:13,20 25149:3 25149:23 25166:5 permitted 25167:20 permutation 25120:15 perpetrators 25142:16 person 25018:16 25020:2 25021:6 25022:24 25065:15 25065:21 25066:13 25066:23 25069:23 25072:3 25076:16 25078:12,13 25080:3 25080:8 25081:12 25083:12 25132:13 25132:14 25138:1,4 25140:12 25156:10 25156:18 personal 25021:14 25125:21 25126:10 personally 25021:20</p>	<p>25024:24 25025:3 25065:7 25067:10,16 personnel 25054:22 25055:19 25092:15 25142:15 persons 25020:22,23 25024:17 25025:3 25066:1,2 25071:23 25136:6,18,19 25137:3 25140:2 25143:24 25144:4 25146:6 person's 25011:1 25022:14 25026:10 pertain 25058:20 25132:24 pertains 25162:20 petrol 25154:16 photo 25023:11 25093:3 25094:2 photograph 25095:21 25096:5,17 25097:3 photographs 25093:18 25097:23 25098:4,8 25098:14 25099:1 25100:7,11 25101:14 25101:15,23 photos 25092:25 25096:3 phrase 25165:13 picture 25023:22 25113:18 pictures 25108:19 piece 25033:23 pieces 25098:5,5 pile 25080:11 25104:7 Pillay 25012:13 25014:24 25015:8 25034:22 25166:14 25166:24 pistol 25139:16 place 25030:10 25058:1 25071:20 25073:20 25074:22 25084:18 25096:24 25099:25 25128:17 25146:14 25153:9 25167:24 placed 25076:10,11 25110:6 25111:7 25164:5,6,20 placing 25076:19 plan 25064:15 25100:18,25 plans 25064:11 play 25163:12,14 pleadings 25035:19,21 please 25016:21 25049:25 25084:19 25086:15 25109:15 25137:9 25149:10 25155:16 point 25006:16,22 25008:11,20,23,25 25009:15 25010:9 25014:25 25015:8 25016:22 25018:22</p>	<p>25022:7 25023:25 25024:13 25025:1,19 25025:21,22 25026:7 25026:20 25027:5 25029:17 25031:9 25032:16 25034:4 25036:23 25037:20 25037:21 25038:12 25039:7,19,25 25040:11 25042:23 25042:25 25043:8,10 25043:25 25051:9 25055:10 25056:3 25061:21 25074:8 25083:14 25086:15 25094:9,10 25096:6,6 25108:15,22 25109:10 25111:13 25116:2 25119:3,6 25128:16 25130:13 25130:24 25131:14 25131:15 25135:9 25136:4 25148:9 25149:5,21 25150:10 25153:20 25155:25 25156:24 25159:10 25160:22 pointed 25043:8 25118:15 25154:25 25156:16 pointing 25158:8,25 25161:23 points 25020:15 25022:25 25028:5 25036:18,20 25037:25 25041:4,24 25042:23 25048:8 25148:22,22 police 25019:21 25021:24 25041:25 25042:14 25045:5 25046:16 25047:2 25050:20 25051:8,18 25053:3 25054:22,25 25055:19 25063:23 25064:2 25065:24 25066:1,18 25071:6 25074:6 25076:1,8,19 25076:23 25077:5 25078:3 25079:24 25099:15 25100:13 25102:5,8,24 25110:9 25112:24,25 25114:10,12 25120:23 25121:7,10 25121:14 25122:6,7 25122:12,15,18 25142:16 25143:12 25143:22 25144:8 25146:1 25150:17 25158:9,10 25160:1 25168:1 policeman 25051:7,14 25052:5,7,8,15,21 25054:7 25153:24 policeman's 25156:7</p>
---	--	--	--	---

<p>policemen 25051:3 25056:19 25073:18 25073:22 25076:12 25082:18 25142:24 25146:8,10 25150:18 25151:24 25153:20 25153:22 25154:9,11</p> <p>police's 25143:4</p> <p>policies 25091:13,13,16</p> <p>policing 25091:13</p> <p>Pollock 25010:10 25012:25 25013:12 25013:21</p> <p>POP 25107:20 25108:4 25111:14,24</p> <p>POPS 25112:2</p> <p>portion 25045:17</p> <p>portions 25005:25 25158:4</p> <p>position 25024:22 25025:2,14 25029:14 25090:15,21 25162:5 25164:7 25168:1</p> <p>positions 25161:19</p> <p>positively 25071:16 25072:4,8</p> <p>possession 25076:17,22 25076:23 25078:20 25079:1 25080:3 25125:16,23</p> <p>possibilities 25119:14 25120:20 25121:2,3,4 25121:13</p> <p>possibility 25007:25 25008:2,14 25017:13 25136:6 25137:23 25140:1 25141:21 25142:5</p> <p>possible 25064:16 25065:22 25066:25 25067:3,5,5,6 25080:1,10,20 25095:16 25120:5,15 25129:15 25131:14 25131:18 25133:25 25134:3 25140:8,11 25141:14 25160:11</p> <p>possibly 25030:10 25037:5 25066:17 25099:8,21 25160:6</p> <p>postpone 25041:20 25042:4 25043:5</p> <p>postponed 25046:23</p> <p>postponement 25044:25 25045:3,8</p> <p>Potchefstroom 25054:19 25108:4</p> <p>potentially 25020:23 25026:9</p> <p>power 25012:24 25013:13 25015:23 25017:21</p> <p>powerfully 25019:12</p> <p>powers 25006:9,15</p> <p>practical 25024:2,5,8 25035:24 25059:9</p>	<p>practice 25126:21 25148:18</p> <p>practitioners 25019:21</p> <p>precisely 25016:4</p> <p>Preez 25027:2</p> <p>prefaced 25149:13,14</p> <p>pregnant 25011:1,2,2</p> <p>prejudice 25090:6</p> <p>prejudicial 25026:9</p> <p>premeditated 25063:23</p> <p>prepare 25042:12 25166:11</p> <p>prepared 25031:8,9 25107:5</p> <p>presence 25017:2 25019:20</p> <p>present 25020:24 25025:6 25032:17 25076:15 25088:1</p> <p>presentation 25148:4</p> <p>presented 25147:16</p> <p>presenters 25029:18</p> <p>press 25019:12,19</p> <p>presumably 25015:1 25019:15 25042:24 25069:14 25101:25 25117:16 25118:1 25127:22 25166:10</p> <p>presumption 25007:14</p> <p>pretence 25035:12</p> <p>Pretoria 25051:19 25055:2</p> <p>Pretorius 25009:7 25045:18</p> <p>Pretorius's 25040:7</p> <p>previous 25139:18</p> <p>previously 25091:14 25148:23 25165:20</p> <p>prima 25038:11 25045:2</p> <p>primarily 25090:23 25091:2 25146:14</p> <p>principally 25140:7</p> <p>principle 25006:20,22 25007:3,18 25010:2 25012:6 25027:6</p> <p>principled 25024:3</p> <p>principles 25018:3,11 25027:18 25028:22 25028:23 25029:3,8 25029:12</p> <p>prior 25015:1 25115:20 25117:4</p> <p>prism 25015:7</p> <p>private 25141:7</p> <p>probability 25120:7 25141:10</p> <p>probable 25099:19 25134:1</p> <p>probably 25020:13 25062:2 25103:3 25139:24 25145:22 25152:8 25166:9</p> <p>problem 25032:20 25064:13 25155:19</p> <p>problems 25010:11</p>	<p>procedure 25019:9 25069:23 25070:2</p> <p>proceed 25016:21 25033:23 25042:14 25109:15</p> <p>proceeded 25134:5</p> <p>proceedings 25005:1 25010:4 25018:5,15 25018:23 25019:14 25030:22 25036:4</p> <p>process 25026:8 25073:7,24 25077:4,6 25077:11,18 25083:11 25084:17 25111:12 25112:2 25113:15,21 25117:6 25117:12,13 25128:18,19 25129:25 25139:24 25145:20 25146:11 25149:10 25155:6</p> <p>processed 25071:21 25077:2 25081:1</p> <p>processes 25075:6</p> <p>processing 25071:19 25075:6 25077:1,4</p> <p>produce 25118:7</p> <p>prohibition 25117:20</p> <p>projectiles 25096:24</p> <p>prompted 25113:25</p> <p>proper 25039:3 25041:9 25108:3</p> <p>properly 25043:13 25115:1</p> <p>proposal 25042:3,18 25044:5 25046:2,9</p> <p>propose 25006:3 25042:15 25165:22</p> <p>proposing 25041:16</p> <p>proposition 25008:17</p> <p>prosecuted 25064:8 25140:11,14 25142:17,24 25144:7 25145:1,6,17 25146:8</p> <p>prosecuting 25144:8 25145:2</p> <p>prosecution 25143:4 25144:9 25146:5</p> <p>prosecutions 25146:14</p> <p>prosecutor 25142:8</p> <p>prosecutorial 25141:24</p> <p>prospect 25143:24</p> <p>protection 25009:10 25033:12</p> <p>protester 25153:8,17</p> <p>protesters 25049:10 25055:22 25059:22 25060:2,6 25099:4 25152:16 25153:4</p> <p>prove 25118:19</p> <p>proved 25138:4,7</p> <p>provide 25027:20 25127:23</p> <p>provided 25009:18 25013:16 25027:15 25027:17 25028:11</p>	<p>25100:25</p> <p>province 25034:11 25107:21 25119:6</p> <p>provinces 25118:18,22 25118:25</p> <p>provincial 25034:10 25054:19 25107:15</p> <p>provision 25007:14,16 25007:20 25015:2 25070:2</p> <p>provisionally 25026:22</p> <p>provisioning 25108:6</p> <p>proximity 25164:20</p> <p>Pty 25007:7</p> <p>public 25018:15 25019:7,9,13 25020:25 25029:23 25042:8,11 25122:6 25122:15,17 25140:5 25143:3</p> <p>publicity 25010:4 25011:25 25018:23 25019:1,4 25020:9,13 25021:3 25026:20,21 25027:6,13 25029:1,8</p> <p>purport 25035:11</p> <p>purported 25038:3</p> <p>purpose 25020:14,24 25021:9,11,13,24 25038:3 25131:8,13 25140:19</p> <p>purposes 25013:5 25035:24 25054:3 25056:12 25074:5 25110:8 25111:15,18 25118:23 25119:10 25126:21 25131:14 25139:25 25160:15</p> <p>put 25009:8 25015:7,22 25016:22 25025:18 25030:17 25031:7 25043:19 25057:22 25070:5 25071:9 25075:1 25076:13 25077:23 25081:23 25083:7,8 25084:3 25087:16 25093:13 25097:23 25106:9,18 25109:5 25126:11 25131:23 25136:2 25143:20 25145:23 25146:25 25165:12 25165:14,17,18</p> <p>putting 25013:21 25021:14 25039:14 25039:22 25063:18 25071:15 25076:23 25077:19 25116:3 25158:15</p>	<p>question 25006:15,17 25007:21 25009:3,3 25009:22 25012:2 25021:19,19 25024:12 25029:24 25030:4 25042:2,4 25044:2,24 25045:3 25057:7,8,11 25061:1 25061:8 25066:21 25072:25,25 25073:1 25079:16 25095:2 25099:23 25102:1 25112:10 25122:18 25129:1 25130:21 25145:16,24 25149:13,15 25163:4 25163:11</p> <p>questionable 25025:18</p> <p>questioning 25074:5 25165:18</p> <p>questions 25017:1 25021:14 25116:2 25133:10 25149:1 25161:7</p> <p>quibbled 25036:2</p> <p>quick 25036:24 25053:8 25056:10 25108:17</p> <p>quite 25010:8 25022:24 25024:15 25026:5 25039:8,16 25044:10 25073:20 25101:3 25102:1 25166:15 25168:16,21</p> <p>quotation 25013:10 25106:9</p> <p>quote 25009:5,6 25018:20 25021:5 25027:8 25135:7</p> <p>quoted 25012:7 25018:19</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>r 25105:25</p> <p>raise 25022:8,8 25023:3 25024:2,5,7 25035:14,15 25037:20 25038:17 25038:19 25048:8 25149:5</p> <p>raised 25030:9 25035:20 25038:20 25039:25 25045:9 25116:4 25153:11</p> <p>raises 25102:1</p> <p>raising 25153:25 25156:8</p> <p>Rangasamy 25033:11 25034:13 25035:5</p> <p>Rangasamy's 25043:2</p> <p>range 25119:14</p> <p>rank 25098:11</p> <p>rate 25157:20</p> <p>reached 25061:1 25069:7</p> <p>react 25042:17</p>
Q				
		<p>quality 25018:24 25023:22 25050:8</p> <p>quarrel 25008:19</p> <p>quarter 25160:22</p> <p>Queen 25012:22</p>		

<p>reaction 25162:23</p> <p>read 25054:4 25055:18 25063:13 25095:4 25106:1 25134:20 25135:22 25152:8,13 25154:10 25155:16</p> <p>reading 25074:1 25135:21 25163:5</p> <p>ready 25046:5 25164:6 25166:3</p> <p>realised 25032:16,17 25152:19</p> <p>really 25015:22 25016:3 25018:12,22 25034:14 25035:2 25039:25 25041:5 25043:9,18 25044:9 25049:12 25076:11 25081:23 25085:24 25106:18,19,19 25107:1 25119:9 25149:13,16 25150:11 25163:5</p> <p>reargue 25045:16</p> <p>reason 25022:8 25023:2 25041:10 25069:24 25076:4 25077:8 25078:25 25079:16 25087:25 25091:19 25169:5</p> <p>reasonable 25007:24 25009:8 25017:13 25146:4</p> <p>reasonableness 25013:19</p> <p>reasonably 25013:14 25013:23 25144:4</p> <p>reasons 25018:25 25019:4 25073:3 25142:13,14 25167:9 25168:3,25</p> <p>recall 25065:13 25071:15 25137:6 25167:4</p> <p>receive 25034:7 25041:9</p> <p>received 25034:9 25042:3 25045:1 25054:19 25092:25 25123:16</p> <p>recognised 25018:14 25026:7</p> <p>recollect 25071:7</p> <p>recommend 25140:4 25141:15 25142:6,7,8</p> <p>recommending 25143:10</p> <p>reconcile 25113:17</p> <p>reconciliation 25113:19 25118:19</p> <p>reconciling 25113:13 25113:14</p> <p>record 25030:11,17 25063:18 25066:4 25095:5 25113:3 25130:23 25135:7,11</p>	<p>25140:3 25155:16 25161:8</p> <p>recorded 25046:24 25115:17 25117:21</p> <p>records 25113:1,8 25118:1</p> <p>recount 25070:25</p> <p>recovered 25080:23 25081:4 25100:5 25120:2,17</p> <p>recovery 25064:16</p> <p>refer 25005:15,17 25006:14,18 25007:6 25011:8,15 25012:9 25018:20 25019:1,2 25026:18 25027:24 25062:13 25148:1</p> <p>reference 25011:22 25012:25 25013:2,24 25027:20,21 25028:8 25028:17,18 25050:19 25054:25 25060:8 25062:16 25155:23</p> <p>references 25011:4 25028:9 25055:25</p> <p>referred 25005:9 25006:23 25011:18 25011:20 25012:13 25012:19 25018:19 25028:13,21 25034:8 25064:12 25106:24 25135:11 25154:17 25156:20</p> <p>referring 25005:25 25052:17 25055:6,13 25056:21 25080:2 25105:7 25138:19 25156:7</p> <p>refers 25156:9</p> <p>reflected 25112:25</p> <p>refuge 25136:2</p> <p>refused 25078:21 25085:10,11</p> <p>regard 25008:4 25009:1 25010:23 25014:8 25015:11 25017:24 25018:20 25020:11 25026:10 25027:11 25029:4,12 25035:7 25136:8</p> <p>Regarding 25105:20,21 25106:2</p> <p>register 25114:25 25125:12,13,15 25132:16</p> <p>registers 25112:17</p> <p>regrouped 25085:24</p> <p>reissue 25114:18</p> <p>related 25010:1,1 25049:13 25133:16 25162:15</p> <p>relates 25017:23 25022:7 25050:2 25081:5 25119:3 25162:22</p>	<p>relating 25136:5</p> <p>relation 25006:16 25008:12 25009:13 25018:5,10 25024:3,5 25024:11 25028:25 25029:8 25030:8 25080:9 25089:12 25117:3,14 25125:10 25134:4 25136:17 25150:11,17 25157:24</p> <p>relationship 25130:22 25131:4,18</p> <p>relative 25022:13</p> <p>relaxation 25087:20</p> <p>release 25163:7</p> <p>released 25164:1,2</p> <p>releasing 25162:2</p> <p>relevance 25010:23</p> <p>relevant 25007:12 25014:5 25017:7 25031:6 25037:4,13 25038:2 25055:18 25066:19 25108:4 25112:18 25115:8 25118:24 25132:9 25163:13</p> <p>relief 25010:3 25014:15 25017:21,23 25029:6</p> <p>reluctance 25028:24 25082:21</p> <p>reluctant 25032:14</p> <p>rely 25087:21</p> <p>remained 25154:6</p> <p>remaining 25018:2</p> <p>remarkable 25164:10</p> <p>remedies 25013:15 25021:1</p> <p>remember 25015:2 25027:3 25050:20,23 25050:24,25 25051:13 25053:11 25054:3 25058:23 25060:21 25061:5,7 25070:4 25080:6 25087:13 25089:9,11 25092:25 25098:11 25101:2 25119:4 25134:9 25142:21 25147:24 25150:4,6,8 25158:20 25159:14 25163:20,21 25165:3</p> <p>remind 25149:2</p> <p>reminded 25047:22 25160:13</p> <p>reminding 25167:15</p> <p>removed 25117:3,24 25119:9</p> <p>removing 25072:14</p> <p>repeat 25008:24 25098:23</p> <p>repeating 25149:1</p> <p>reply 25016:23 25030:5 25032:21 25037:5,16 25041:25 25044:7,16 25045:12,12,16</p>	<p>25046:3,17 25047:3</p> <p>replying 25009:6 25034:25 25035:18 25042:13</p> <p>report 25012:22 25117:6 25122:23 25124:3,10,21 25127:8,10,11 25128:13,13,18,22 25129:5,12,18 25130:2 25132:23 25133:5</p> <p>reported 25129:20 25132:14 25133:13</p> <p>reporting 25131:5</p> <p>represent 25063:2,6 25071:12 25150:12</p> <p>representative 25016:22</p> <p>representatives 25019:13 25030:4 25031:24</p> <p>represented 25030:15 25030:25 25063:10</p> <p>reputational 25025:9 25025:12</p> <p>request 25066:9 25100:13,14,23,23 25101:12 25168:25</p> <p>requested 25032:5</p> <p>require 25015:17 25013:14 25017:12 25050:12 25127:14 25127:15 25146:4 25162:2 25163:7</p> <p>requirement 25014:11 25026:20 25027:13</p> <p>requirements 25091:4</p> <p>requires 25042:25</p> <p>requiring 25019:1,4</p> <p>reserve 25161:24,25 25162:1,16</p> <p>resources 25143:15 25162:2</p> <p>respect 25009:23 25016:8,13 25019:25 25023:3 25029:22 25035:16 25048:7 25049:11 25058:21 25090:15,21 25091:6 25116:15 25144:5,21 25148:19</p> <p>respond 25045:13</p> <p>responded 25051:6</p> <p>responding 25150:19</p> <p>response 25008:12 25039:7 25046:25 25164:5,23</p> <p>responses 25022:3 25044:8</p> <p>responsibilities 25162:15</p> <p>responsibility 25143:5</p> <p>responsible 25089:18 25143:25 25146:5</p>	<p>rest 25154:9</p> <p>resting 25012:4 25045:12</p> <p>restrictive 25015:15</p> <p>restrictively 25014:18</p> <p>result 25138:3 25139:15,15</p> <p>resulted 25113:12</p> <p>results 25116:24 25117:1 25118:8,24 25119:1</p> <p>resumes 25005:2 25034:5,6 25047:24 25047:25 25086:21 25086:22 25108:25 25109:1 25160:24,25</p> <p>resumption 25166:19</p> <p>retains 25097:20</p> <p>retreated 25086:3,6</p> <p>returned 25054:23</p> <p>revealed 25117:3</p> <p>revisit 25089:15 25148:7</p> <p>re-emphasise 25114:19</p> <p>re-examination 25166:3,8</p> <p>rhetorical 25029:24</p> <p>rifle 25060:22,23</p> <p>rifles 25062:1,5,6</p> <p>right 25005:6 25006:12 25008:9 25011:5 25020:24 25023:21 25037:7 25058:3,14 25059:13 25062:9 25068:16,22 25074:9 25075:15 25097:18 25097:22 25105:12 25110:2 25112:15,20 25115:18 25160:18 25168:16</p> <p>rights 25014:23 25018:4 25024:12,14 25026:10,19 25029:10 25071:22 25073:8 25077:4,12</p> <p>risk 25020:10</p> <p>road 25053:5,6</p> <p>rock 25151:1</p> <p>rocks 25061:1 25073:9 25082:13 25083:21 25134:22 25152:17</p> <p>Role 25161:25</p> <p>room 25019:23 25112:13</p> <p>Roots 25147:11,12,20</p> <p>round 25054:17 25059:19 25061:20 25062:11 25086:14 25086:15 25096:18 25105:22 25106:3,4 25107:23,24,24</p> <p>rounding 25056:12</p> <p>rounds 25107:22 25125:24 25133:1</p> <p>route 25164:23</p> <p>Roux 25157:10</p>
---	--	--	--	--

<p>row 25022:23 rule 25012:1 rules 25111:9 25148:18 rulings 25167:24 run 25036:5 running 25153:4 R5 25060:23 25139:15 R5s 25061:10,15,16,18 25061:22 25138:25 25139:1,9 25153:1</p> <hr/> <p style="text-align: center;">S</p> <p>S 25009:25 25011:16 SA 25007:8,11 safeguard 25021:25 Saffy 25052:1 25053:2 sake 25047:10 SAPS 25006:8 25007:23 25008:5,25 25009:7 25014:16 25015:9 25016:22,25 25017:10 25024:6 25028:2 25029:6 25030:5 25032:21 25044:6 25046:3 25065:7,8 25066:22 25091:3 25092:9,10 25092:12,14 25116:10 25168:19 SAPS15 25124:22 SAP13s 25080:23 SAP15 25124:25 Sasol 25007:7 saw 25005:8 25108:19 25148:4 25150:24 saying 25010:18 25016:3,7 25025:13 25027:7 25030:1 25037:10,20 25039:4 25039:5 25044:18 25049:21 25055:23 25058:11,25 25061:17 25067:8,13 25070:13 25078:8,11 25080:9 25091:19 25098:25 25112:4 25121:2 25122:12 25125:15 25126:9,14 25128:12 25130:4 25131:8,12,13,13 25132:10 25135:1,4 25136:5,16,17,18 25137:5 25138:11 25141:13,16,18 25143:7,8,14 25150:2 25154:23 25156:1,17 says 25007:12 25009:7 25009:16 25021:8 25029:20 25031:23 25044:21 25052:7,7 25060:19 25070:11 25072:21 25087:12 25103:25 25107:14 25141:14 25144:16 25144:19 25152:15 25153:4 25154:4</p>	<p>25156:14 25161:18 25162:20,21 SC 25023:12,16 25031:2,11 25032:22 25033:1,6,9 25044:22 25045:6 25046:20 25062:12,15 25066:4 25066:8 25074:1 25088:6 25117:5 25118:15 25140:10 25166:5,21,23 25167:4,13,19 SCA 25007:9,11 scarcely 25088:9 scared 25045:18 25152:21 scene 25049:11 25051:14 25052:3,16 25052:17 25054:10 25063:7 25076:10 25081:1,9 25089:16 25097:24 25098:15 25099:1,16 25100:2,4 25112:23 25118:22 25119:3,4 25120:9 25121:6,10 25128:18 25139:14 25147:14 25150:17 25152:15 25152:16 25163:18 25163:23 25164:7,12 25164:20,22 25165:5 scenes 25052:8 25147:14 schedule 25166:15 scores 25017:11 Scott 25011:9,10,21,21 25014:12 25057:4,17 25058:1,7,12 screen 25021:18 25022:22 25023:17 25060:11 25089:19 25089:19 25095:4,6 25096:8 25104:20 25105:12 25109:5,9 25134:21 25157:17 25161:15 searched 25069:21 25083:11 searching 25154:12 second 25014:12 25017:16 25020:19 25036:23 25045:9 25054:15 25057:21 25127:8 25158:10 25161:24 25163:11 secondly 25006:16 25019:9 25036:8 25148:12 25151:13 25164:18 seconds 25020:3 secrecy 25021:2 secret 25019:7 section 25005:23 25006:4,5,6 25007:19 25010:12,12 25012:23 25014:12</p>	<p>25014:17,17 25015:1 25015:8,14,16 25016:16,17 25017:18,24 25026:18,24 25029:7 25057:20 25070:10 25074:2 sections 25048:13 secure 25021:9 secures 25021:1 securing 25017:1 security 25119:15,16 25120:1 see 25005:15 25013:8 25021:17 25022:14 25022:21 25025:1,5 25027:1,14 25028:4 25031:5 25032:5,12 25042:2 25066:11 25069:6,6,14 25095:24 25096:3,12 25096:13,17 25103:24 25107:17 25108:10 25117:18 25117:22,25 25130:5 25131:4 25134:15 25139:5,11 25144:16 25149:22,24 25151:16 25158:21 25161:12 25162:3,4 seeing 25049:5 25096:14 25138:11 25138:15 25147:24 25159:23 25163:20 25163:21 25168:22 seek 25028:22 25035:20 seeking 25011:23 25098:21 25136:2 seen 25014:6 25089:5 25161:8 25163:13,15 sees 25021:18 25055:9 25055:24 self-defence 25141:6 Semenya 25008:10 25023:11,12,16 25032:21,22 25033:1 25033:6,9 25034:8 25038:14,21 25044:20,22 25045:6 25046:9,20 25060:19 25060:22 25062:12 25062:15,24 25066:4 25066:8 25074:1 25087:12 25088:5,6,8 25100:22 25116:22 25117:5 25118:15 25135:21 25140:10 25166:1,3,5,21 25167:4 25168:18 25169:9,11 Semenya's 25088:4 send 25167:14 sending 25100:13,13 25153:25 senior 25050:8</p>	<p>25057:17 25074:24 25080:8 25102:5 sense 25013:11 25019:13 25045:15 25059:10 25159:4 25160:18 sensible 25016:1 25033:4 25141:22 sent 25065:15 25066:5 25066:10 25123:23 25144:8 sentence 25055:19 separate 25007:14 25017:22 separately 25105:3 sequence 25104:14 Sergeant 25068:17,19 25068:21,23 25069:18,20 25070:4 25070:24,25 25071:5 25072:3,13,19 25076:15 25080:6 25082:7 25155:12 25156:21 25158:18 25158:22 series 25034:15 25088:18 25093:16 25098:11 25124:10 serious 25023:23 25024:7 25102:1,9 25168:16 seriously 25043:21 25051:19 25052:9,12 25055:1 service 25099:15 25102:5,8 25112:24 25127:10 services 25034:11 25064:19 25164:14 25165:7 session 25046:15 25047:2 set 25009:24 25014:11 25027:18 25057:21 25092:25 sets 25018:2 25057:14 25058:24 setting 25013:11,17 severable 25044:10 25045:10 Shadrack 25089:1 25109:6 shaft 25074:23 25075:16,19 25077:9 shaking 25033:19 share 25164:10 sheet 25125:22 25132:18 she's 25030:12,15,17 25030:25 shoot 25061:23 25062:5 25078:2 25140:23 25141:5 shooter 25140:14 shooters 25146:15,20 shooting 25078:5</p>	<p>25098:20 25127:5,11 25131:5 25132:22,24 25133:10 25136:22 25138:3,22 25147:2 25147:19 25148:2 25150:18,19,24 25151:7,12,14,17,19 25151:25 25158:14 25158:17,19,23 25159:5 shootings 25098:18 25099:2 shootout 25059:20 shoots 25140:12 short 25057:15 25059:3 25076:25 25130:4 25152:24 shortcut 25159:4 shortfall 25115:11,17 25115:19 25117:2,2 25117:17,18,22,23,25 shortgun 25105:24 25106:4 25107:10 shortguns 25106:24 short-circuit 25155:22 25163:12 shot 25095:15 25098:2 25120:21 25122:3 25126:15 25133:1,13 25133:17 25134:23 25136:1,4,10,11 25138:12 25139:16 25140:16 25141:14 25147:9 25151:9,16 25152:23 25153:12 25153:14,15,18,20 25155:7 25156:8,9,11 25159:11 shotgun 25090:19,22 25095:13,15 25096:23 25097:15 25097:20 25103:18 25105:22,24 25106:5 25106:22 25107:10 25107:22,23,24,25 25119:18 shotguns 25106:24 25119:14,23,25 25120:16,25 25122:7 25122:16 shots 25061:2 25129:2 25130:23 25131:25 25131:25 25132:10 25132:20 25133:8,13 25134:5 25151:8 25152:20,23,24 shottist 25127:20 25128:19 25140:15 25140:17 25151:5 shottists 25141:8,9 25147:25 shouldn't 25008:9 25023:24 shouting 25073:11,18 25153:24 shoutings 25082:15</p>
---	---	---	--	--

<p>show 25008:9 25017:13 25103:11 25125:7</p> <p>shows 25133:14 25163:15</p> <p>side 25035:22 25041:21 25068:25 25069:2,4 25076:9,10,24 25077:23 25097:11 25151:7,17 25155:13 25158:9,10</p> <p>sides 25158:11 25159:5</p> <p>sight 25153:19</p> <p>sign 25106:2 25132:15</p> <p>signal 25153:25</p> <p>signature 25105:16 25130:6,7,10 25131:9</p> <p>signed 25087:5,6,15,19 25105:14 25107:7 25113:7 25130:6 25132:7,8,8</p> <p>similar 25097:13 25155:13</p> <p>similarly 25145:5</p> <p>simple 25036:11 25037:1</p> <p>simplest 25121:23</p> <p>simply 25008:11,25 25009:20 25010:18 25016:15 25018:7 25028:22 25044:13 25056:19 25093:12 25126:16</p> <p>single 25081:11,12 25152:24</p> <p>sir 25096:24 25127:16</p> <p>sit 25042:10 25068:7</p> <p>site 25080:11</p> <p>sitting 25042:9 25046:18 25047:1,4</p> <p>situation 25027:9 25116:13 25143:3</p> <p>six 25063:16 25094:12 25121:22</p> <p>size 25056:16</p> <p>sketch 25100:18,24 25101:11</p> <p>Skype 25022:12,14,14 25022:16,17,19 25023:6</p> <p>slide 25161:13 25162:19</p> <p>slides 25163:5</p> <p>slightly 25011:1 25020:15 25024:22 25145:24</p> <p>slip 25108:15</p> <p>slipped 25039:8 25106:20</p> <p>slot 25006:19</p> <p>small 25023:7,11 25062:10</p> <p>smuggled 25120:5</p> <p>sneaked 25040:4</p> <p>sole 25131:13</p> <p>solely 25065:22 25066:16</p>	<p>solved 25032:20</p> <p>somebody 25022:12 25061:21 25066:22 25116:14 25119:11 25123:7 25125:7 25137:23 25147:3 25151:8 25167:2</p> <p>sommer 25120:21</p> <p>soon 25047:6,8,20 25061:4 25087:10 25117:9 25129:15 25160:14</p> <p>sophisticated 25015:21</p> <p>sorry 25012:11 25016:19,19 25020:12 25025:23 25037:7 25042:21 25045:25 25054:2,12 25057:8,9,10 25065:6 25065:6 25066:7 25072:11 25077:25 25089:17 25094:11 25098:23 25106:13 25128:7 25134:15 25137:20 25139:6 25155:14 25156:19 25157:4 25159:25 25161:24 25162:24 25163:1 25164:1</p> <p>sort 25025:24 25041:8 25097:5 25119:20</p> <p>sorted 25043:4</p> <p>sought 25009:10 25014:16 25017:21 25029:6</p> <p>sounds 25038:11</p> <p>source 25091:9 25115:25</p> <p>sources 25120:15</p> <p>South 25011:13 25012:21 25026:15 25027:5 25099:15</p> <p>southern 25069:2,3</p> <p>so-and-so 25078:6</p> <p>so-called 25050:3</p> <p>space 25057:15 25154:6</p> <p>sparked 25057:3</p> <p>speak 25033:15 25163:19</p> <p>speaking 25031:17 25054:3 25062:25 25073:22,23 25078:8 25078:9</p> <p>special 25007:16 25151:22</p> <p>specialibus 25006:23 25006:24</p> <p>specific 25007:3 25009:3 25013:15 25062:4 25071:1 25080:10 25092:5 25112:2 25122:23 25133:10 25147:24 25148:5 25165:17</p> <p>specifically 25009:13</p>	<p>25014:15 25049:10 25076:14 25081:23 25082:2 25092:2,3 25099:9 25147:5,8 25151:4 25155:5</p> <p>spell 25028:14</p> <p>spirit 25012:3</p> <p>spoke 25072:4 25076:14</p> <p>sports 25022:23</p> <p>sportsmen 25022:21</p> <p>spot 25106:25</p> <p>spotted 25107:9 25121:5</p> <p>SSG 25090:16,16,21 25091:10,15,25 25092:12,15,18 25096:21 25097:4,24 25098:4,5 25099:4,24 25103:15 25107:24 25109:20,23 25114:4 25114:11,18 25116:6 25116:9 25119:10,18 25120:21</p> <p>stadium 25022:23</p> <p>stage 25031:1 25035:14 25041:20 25048:24 25065:2 25068:24 25076:21 25077:8 25082:11 25099:9 25108:11 25116:9 25126:24 25129:10 25151:13 25162:8</p> <p>stand 25045:24 25098:9 25153:13,15</p> <p>standard 25010:1,2,24 25011:10 25014:19 25017:16,16</p> <p>standards 25011:5 25017:12 25087:20</p> <p>standby 25066:6,8,9,11 25066:13</p> <p>stands 25022:22 25026:15</p> <p>star 25019:22</p> <p>start 25011:23 25054:18 25060:15 25060:15 25067:7,9 25089:14,15 25123:22 25161:10</p> <p>started 25064:13 25079:4</p> <p>statement 25025:5 25051:17 25053:14 25053:16,19,20,24,25 25054:11,15,16,16 25055:7,10,18,24 25056:1 25064:11 25073:11 25087:3,5 25087:13 25089:1,9 25089:18 25103:11 25109:6 25114:7 25127:15 25132:6 25135:22 25136:8 25152:14 25155:11 25156:6,20 25158:10</p>	<p>25158:15</p> <p>statements 25053:11 25060:4 25155:19</p> <p>station 25079:24 25127:9</p> <p>stations 25074:6 25076:1 25077:6 25110:6,23</p> <p>statute 25015:20</p> <p>statutory 25006:21</p> <p>step 25044:5 25074:16 25074:18 25075:20 25075:25,25 25076:4</p> <p>stick 25149:11</p> <p>stock 25111:4,6 25112:4,4,25</p> <p>stockpile 25110:23 25111:1</p> <p>stockpiled 25110:22</p> <p>stolen 25120:25</p> <p>stomach 25153:14</p> <p>stomachs 25154:5</p> <p>stone 25150:25</p> <p>stood 25068:8 25069:12,13</p> <p>stop 25041:19 25116:14 25143:16 25144:3</p> <p>stopped 25060:25,25 25061:4 25078:19 25151:14,17,19</p> <p>storage 25111:25</p> <p>store 25112:14,18 25115:8 25117:4,24</p> <p>stored 25112:6,14</p> <p>storeroom 25112:13</p> <p>stores 25114:21 25119:10 25121:17</p> <p>Strasbourg 25027:16</p> <p>stretched 25014:1</p> <p>strict 25019:5</p> <p>strictly 25017:7 25029:2</p> <p>strike 25015:23 25087:7</p> <p>striker 25067:16 25120:24</p> <p>strikers 25025:7 25050:21 25067:13 25067:18 25082:12 25085:15 25086:11 25133:18 25134:23 25134:24 25136:2 25145:6,17,25 25146:7,16</p> <p>strong 25021:1 25025:2</p> <p>stronger 25025:14</p> <p>struck 25016:14</p> <p>structured 25029:18</p> <p>stuff 25117:23 25041:17 25087:24 25111:9 25116:5 25121:17 25139:23 25148:24</p> <p>subjected 25013:18</p>	<p>submission 25008:13 25015:11 25016:5 25018:12 25024:10</p> <p>submissions 25007:22 25014:10 25017:25 25029:14,22</p> <p>submit 25007:17 25009:20,23 25014:21 25015:15 25016:18,24 25017:3 25017:7,10,17,19 25020:7 25021:4 25022:16,17 25024:18 25027:11 25029:2,5,11,13 25127:15 25130:1</p> <p>submitted 25117:7</p> <p>submitting 25016:15</p> <p>subpoenaed 25063:17</p> <p>subsequent 25007:15 25053:19 25073:6 25098:19</p> <p>subsequently 25073:10 25084:1 25162:11</p> <p>substance 25036:6</p> <p>sub-quality 25050:3</p> <p>succeed 25023:23</p> <p>succeeded 25120:7</p> <p>sufficient 25121:6</p> <p>sufficiently 25111:1</p> <p>suggest 25020:10 25036:9</p> <p>suggested 25022:19 25051:2 25072:25 25153:8 25159:4</p> <p>suggesting 25016:14,15 25093:10</p> <p>suggestion 25008:8 25075:4</p> <p>suggests 25036:24</p> <p>suicide 25063:12,16</p> <p>sum 25147:1</p> <p>summarise 25072:19</p> <p>summarising 25146:25</p> <p>Sunday 25120:1</p> <p>supermarket 25128:12</p> <p>superseded 25012:1</p> <p>supplement 25038:22</p> <p>supplementary 25035:11 25036:2</p> <p>supplied 25059:14 25110:16</p> <p>supply 25107:6 25113:16</p> <p>support 25029:13 25045:9 25064:10 25103:10 25143:15 25161:24 25162:1,16</p> <p>supported 25142:20 25143:2</p> <p>suppose 25034:16 25035:3 25059:22 25081:7 25091:9 25104:24 25106:3 25113:5 25118:23 25119:3 25120:4</p>
--	---	--	---	---

<p>supposed 25070:7 25071:24 25103:25 sure 25005:24 25010:14 25011:19 25019:11 25022:25 25023:9 25030:12 25033:22 25038:15 25040:23 25041:18 25052:14 25059:23 25062:18 25065:10 25073:10 25074:24 25077:7 25080:5,25 25083:22 25097:9,13 25098:3 25100:14,22 25119:15,17 25120:16 25123:4 25126:8 25131:20 25139:12 25140:13 25155:24 25168:4,21 surely 25021:23 25022:1 25110:11 surprise 25164:11 surprised 25114:11 surrender 25125:17 25153:10 surrendered 25153:19 surrendering 25153:17 25155:3,6,23 25159:11,13 suspect 25087:8 25100:16 suspected 25144:5 suspects 25064:17 sustained 25154:8 sweep 25048:15 25067:19 25163:22 25164:7,13 Synthetic 25007:7 system 25021:2 25108:7,9,9 25122:2 25123:1,9 25145:13 s.u.o 25089:7 25109:17 25161:4</p> <hr/> <p style="text-align: center;">T</p> <p>table 25047:21 take 25015:13 25025:17,19 25027:16 25030:18 25031:16 25032:24 25033:3,4,6,21 25034:1,2,3,13 25042:24 25043:21 25044:4,10 25046:6 25047:19 25048:9,23 25086:19 25099:11 25107:2 25108:12,15 25108:23 25109:4 25112:12 25116:23 25119:23,24 25126:20,23 25128:19 25129:2 25146:14 25152:5,7 25160:14,21 25162:14 25164:23 25166:17 25168:12</p>	<p>25168:20 taken 25015:25 25021:3 25037:25 25041:5 25042:24 25051:3,7,11 25052:5 25052:13,16 25064:6 25071:19,20 25075:20 25076:1,25 25082:7 25083:3 25084:1 25098:4,15 25099:1 25100:11 25101:15 25111:2 25112:13,13 25115:17 25117:21 25119:15 25120:1 25121:19 25145:13 25154:14 25157:25 takes 25123:7 25128:18 talk 25073:8 talking 25022:13 25054:6 25057:2,2 25062:19 25071:14 25071:18 25085:18 25092:4,5,6 25122:17 25125:20 25126:7 25129:1 25136:25 talks 25010:13 Task 25151:22 tasked 25145:20 tea 25047:19,20,23 25160:14,22 tearings 25095:23 technical 25036:5,6 25041:4 25043:9 technically 25120:5 televised 25019:15,18 television 25165:13 tell 25033:5 25036:20 25038:25 25042:22 25048:17 25070:7,16 25070:17 25071:1 25090:15 25098:7 25115:2 25139:12,13 temptation 25019:19 tends 25018:23 term 25013:10,17 25057:21 terminology 25075:15 terms 25009:10 25014:16 25017:11 25020:8 25021:8 25064:2,9 25069:20 25069:22 25071:7,21 25078:17,22 25084:11 25091:13 25091:16 25125:20 25129:24 25132:15 25132:25 25133:11 25136:12 25137:1 25145:14 25148:17 25151:12,14 terrain 25164:21 test 25009:23,24 25010:17 25014:1 tested 25121:19 25122:19</p>	<p>testified 25065:1 25085:6 25113:10 25122:6,8 25131:6 25138:21 25148:3 25154:2 25155:3 25164:3 testify 25033:12 25064:21 25067:18 25083:19 25151:15 testifying 25008:1 25017:14 testimony 25085:8 25108:8 25112:3 25142:25 25164:19 25165:15 testing 25123:19 Thanks 25030:2 25067:1 25123:12 25157:16 25159:9 25165:2 that'll 25094:9 thereto 25047:3 there'd 25115:11 there's 25005:8 25007:24 25008:1,3 25009:17,25 25010:8 25012:23,25 25013:25 25024:2,4 25030:7 25031:8 25038:21 25040:10 25041:6 25042:23 25043:25 25075:3 25081:11 25090:24 25093:24 25096:17 25097:5 25099:20 25104:4,14 25105:15 25108:14 25115:17 25117:17,18,22,22,24 25118:5 25119:13 25123:22 25124:14 25127:3 25130:22 25136:5 25140:1 25141:4 25143:24 25145:11 25149:5 25154:20 25163:10 they'd 25117:17 they'll 25028:4 25043:24 25117:25 25118:2 they're 25008:6 25017:12 25035:13 25037:2,9 25071:25 25104:11,12,13 25108:8 25141:23 25158:16 they've 25033:22 thing 25020:3 25050:1 25057:13 25071:5 25078:1,4 25100:17 25100:22 25115:13 25127:8 25129:22 25132:11 25135:12 25156:9 things 25006:1,14 25019:17 25039:5 25043:13 25047:13</p>	<p>25049:23 25051:2 25055:8 25070:25 25071:22 25072:17 25072:18 25076:14 25084:8 25099:6 25127:4 25131:16,19 25132:24 25143:10 25147:18 25151:11 25154:24 25158:5 25165:14 thinking 25119:25 thinks 25038:21,24 25166:24 third 25038:17 25051:18 25055:1 25094:7,8 thought 25014:24 25019:16 25066:5,14 25085:4 25094:12 25136:9 25144:11,12 25148:23,24 25152:7 25159:1 thousand 25141:4 threatening 25020:6 three 25005:16 25018:2 25019:3 25029:18 25054:8,24 25057:14 25058:22,24 25060:16 25067:13 25067:20 25071:18 25077:14 25094:13 25096:3 25104:16 25130:17 25134:24 25136:11 25153:22 25154:6,18 thrust 25134:19 25135:4 Thursday 25042:11 25056:24 25167:23 tied 25083:6,7 till 25043:5 25045:3 time 25014:6 25034:3 25038:17 25039:17 25041:8,9 25044:24 25045:4 25046:10,20 25050:3 25057:15 25059:5 25060:1 25071:24 25072:23 25073:8 25074:2 25089:25 25092:18 25101:3,5,23 25102:6 25102:13,16,20 25107:11 25109:23 25110:12 25121:19 25122:19 25125:8,16 25126:4 25128:8,9,12 25130:7,15 25131:2,9 25132:8,16,25 25137:17 25152:22 25152:23 25157:24 25159:23 25167:24 25168:3 times 25020:18 25056:17 25125:15 25125:18 today 25030:12</p>	<p>25074:25 25113:5 25137:16 25166:8 25167:14 Tokota 25030:20 Tokota's 25030:20 told 25023:12 25033:13 25071:12,16,24 25072:22 25073:16 25074:6 25077:8,19 25077:22 25078:5 25083:14 25102:21 25150:6 25157:12 tomorrow 25042:9 25167:22 tools 25061:17 top 25013:6 25020:20 25063:5 25096:25 25097:2,3 topic 25014:7 25049:7 25050:2,24 topics 25048:7,24 25148:13 25149:3,4 25149:11,23 total 25063:9 25147:1 totally 25019:22 touching 25148:22 touchstone 25013:19 trace 25087:8 25123:3 traced 25119:19 25120:16 tracing 25121:18 track 25122:12 tragedy 25091:25 25165:6 trail 25082:9 25118:4 training 25091:3 25110:8 25111:15,19 25112:6 transcribed 25038:20 transcribers 25062:20 transcription 25062:18 transferred 25053:1 transported 25051:15 25052:1,14 25053:2,2 25074:21 25079:24 travellers 25042:20 traverse 25146:23 25150:3 traversed 25151:4 treat 25012:5 25050:21 treated 25044:6 25050:22 tribunals 25019:8 tried 25070:25 25072:14 25153:13 25153:15,16 trouble 25152:2 trucks 25076:25 true 25025:8 25164:18 truthfulness 25018:17 try 25031:19 25086:20 25163:12 trying 25039:2 25072:19 25156:25 25158:21 Tuesday 25045:8</p>
---	--	--	---	---

25046:4,18 25047:5 25166:12,16 25167:2 turn 25007:21 25009:2 25020:3 25058:9 turned 25020:5 25054:23 turning 25012:6 turns 25040:1 TV 25022:22 twice 25123:13 25129:18 25133:17 25136:4 25138:12 type 25119:20 25158:19 typed 25040:11,13 25107:1	25164:22 25165:4 unkind 25015:22 unknown 25133:23,24 unnecessary 25165:14 unobservant 25157:20 unrelated 25049:23 unrepresented 25030:10,11 unsatisfactory 25023:6 unsigned 25033:14,17 unspecified 25055:21 urgently 25164:15 use 25031:7 25038:5 25046:13 25061:10 25062:1,4,6 25087:3 25090:16,21 25091:14 25092:15 25104:5 25111:19 25112:7 25122:7,19 25122:22 25134:6 useful 25014:2 useless 25154:17 users 25122:16 usual 25087:20 25165:15 usually 25168:17 utilised 25065:12 25110:7,24 25112:6	25011:21 25012:21 25013:12 25028:10 25122:23 vicinity 25134:11 25152:18 victims 25018:4 video 25010:16 25022:20 25023:5 25024:5 25038:7,9 25163:12,13 videos 25163:15,20 view 25025:1 viewed 25051:20 25055:3 vigorous 25088:5 virtually 25168:19 virtue 25024:4 visible 25151:5 visit 25029:25 visited 25051:20 25055:2 vital 25040:5 voice 25062:25 25153:23	watertight 25120:9 way 25010:19 25013:21 25027:13 25032:5 25039:14,21 25050:21 25053:4 25075:1 25078:19 25090:10 25094:18 25112:25 25121:23 25122:6 25131:23 25132:19 25142:12 25166:2 25168:20 ways 25079:10 25132:5 weaker 25024:22 weakness 25040:1 weapons 25064:4,16 25071:3,4 25072:14 25072:18 25073:12 25073:12,16,17,19 25076:8,14,17,18,22 25076:24 25077:20 25077:23 25078:18 25078:20,21,24 25079:2,5,18,21,23 25080:2,10,11,15 25082:7 25083:11,15 25083:20,20,24,25 25084:4 25159:25 wearing 25157:21 Wednesday 25045:7,15 25045:23 25046:2,18 25046:23 25047:7 25166:16,18 week 25046:23 25047:10,11 25089:10 25092:25 25166:4,6,11 weight 25020:1 25039:24 well-founded 25040:22 went 25039:11,13 25058:9 25107:17 25117:20 25130:11 25132:16,25 25136:9 25140:24 25145:7 25150:4 25153:10 25158:21 25164:23 weren't 25075:7 weren't 25101:22 25102:15 Wesley 25101:10,16,17 Western 25118:25 25119:2 we'd 25007:6 25039:3 25041:12 25042:11 25047:21 25093:4,7 25118:23 we'll 25031:11,19,24 25034:1,1,19 25038:17 25047:11 25047:22 25060:15 25062:22 25079:11 25086:19 25094:15 25101:11 25104:22 25105:2,3 25108:23 25118:22 25124:10 25124:19 25133:16	25150:14 25157:2 25159:12 25160:15 25160:21 25163:14 25166:19 25167:13 25167:14 25169:8,13 we're 25019:17 25022:19 25030:1 25033:24 25034:17 25042:9 25043:9,10 25046:1 25054:2 25070:5 25071:4 25084:10 25085:18 25088:17 25096:14 25125:20 25126:7 25128:15 25129:1 25137:2 25141:15 25142:5 25156:25 25157:24 we've 25005:16 25027:5 25034:8 25043:20,23 25049:24 25066:12 25095:4,6 25096:8,10 25104:7 25118:10 25135:15 25137:16 25145:10 25165:8 25167:25 what's 25019:23 25028:16 25096:18 25108:4 25113:18 25122:23 25124:25 25157:4 whichever 25052:4 whilst 25072:13 25154:12 white 25096:18,19,20 who's 25074:25 25168:19 widows 25029:25 25041:1 25045:18 wife 25030:13 Wigmore 25018:19,20 25019:1,3 25020:20 25021:5,7 wire 25059:14 wish 25010:20 25025:1 25028:6 25030:21 25035:6 25037:10 25041:22 25045:21 25046:25 25081:16 25166:4 25167:10 wishes 25031:9 withdraw 25113:16 withdrawal 25105:20 25105:21 25106:2 25121:17 withdrawn 25112:7 withdrew 25114:21 withheld 25040:4 witness 25021:6,12,21 25022:6 25023:7 25047:21 25048:9 25049:22 25056:11 25087:4 25101:1 25116:23 25154:22 25156:2,14 25158:8		
U						
ultimate 25144:25 understand 25005:3 25010:15 25019:22 25020:14 25024:25 25025:11,12 25027:2 25030:16 25031:19 25037:8,18 25043:12 25045:20 25047:13 25052:19 25053:1,4,7 25063:2,19 25067:8 25067:12 25071:14 25072:5,20 25078:10 25080:22 25092:13 25095:5 25116:2 25131:22 25135:2,4 25138:9,10 25142:9 25142:11 25149:16 25149:18 25150:12 25152:15 25156:1 25159:7 25166:11,12 25168:24 understandable 25035:23 25073:3 understanding 25050:5 25056:13 25117:11 25117:12 25145:11 understands 25168:4 understood 25013:11 25158:5 undertake 25143:23 undertaken 25113:16 undertaking 25118:11 underway 25116:15 undesirable 25036:19 unfair 25014:5 unfortunately 25087:7 25089:20,21 unhappy 25039:14 unhelpful 25036:24 uninjured 25136:12 unit 25053:3 25058:21 25058:25 25163:16 25163:22 25164:6,12 25164:13,20 units 25107:20 25110:6 25110:22,23 25111:6 25111:24 25113:17 25163:7 25164:11,19	25014:2 useless 25154:17 users 25122:16 usual 25087:20 25165:15 usually 25168:17 utilised 25065:12 25110:7,24 25112:6	V	valid 25014:25 value 25165:4 van 25028:19 25033:10 25034:10 25035:3,4 25072:16 25076:19 25083:9 vans 25064:24 25065:2 25065:8,11,12,14,16 25066:22 25074:17 various 25063:7 25076:1 25077:5 25110:22 25142:19 25147:25 vehicle 25051:8 25053:3 25071:6 veld 25051:4 velocity 25139:19,20,20 venture 25081:13 venue 25017:2 25021:17 verbally 25039:3 verbatim 25071:2 25076:20 25077:21 25078:9 Vermaak 25166:13,25 25167:10,16 25168:19 vernacular 25073:23 25076:12 25078:9 version 25051:24 25075:24 25083:15 25147:1,3,19 25150:17,22 25165:17 versus 25007:8 25009:25 25011:16	W	wait 25090:7 waiting 25034:7 25047:22 25057:11 waived 25042:24 Wales 25012:21 walk 25137:11 Walker 25013:12 walking 25068:24 25069:1 25120:20 want 25010:16 25029:16,17 25030:5 25033:3 25036:17 25039:6 25040:14 25041:21 25045:13 25046:3 25047:14 25048:8,14,23 25056:10 25057:13 25061:9 25086:14 25087:22 25089:13 25108:15 25112:9 25135:7 25137:11,15 25139:21 25146:22 25149:5 25150:2,11 25150:13,14 25152:5 25155:4 25160:16 25162:25 25165:12 25165:14 25167:15 wanted 25030:10 25050:4 25062:11 25087:4 25109:5 25127:8 25165:12 wanting 25019:8 Warrant 25068:16 wasn't 25010:18 25016:13 25019:16 25066:10 25107:1 25115:10 25117:2 waste 25107:10 25157:23 water 25141:18	

<p>25166:13 25168:20 witnesses 25018:15 25028:25 25029:9 25037:24 25058:23 witness's 25022:10 woke 25068:4,5 wonder 25062:20 25095:1 won't 25023:25 25075:17 word 25013:22 25016:14 25031:7 25032:7,9 25082:16 25138:7 25159:25 25163:14 worded 25100:23 words 25006:24 25015:20,23 25016:8 25032:13 25044:6 25053:23 25055:19 25061:9 25063:24 25096:21 25123:7 25134:6,9 25143:21 work 25042:8 25047:13 25103:13 25115:1 working 25123:5 works 25140:25 25145:13 worry 25037:3 worse 25035:23 worst 25040:8 25159:22 wouldn't 25021:16 25034:14 25047:14 25119:1 25120:7 25129:8 25130:24 25147:23 25159:23 would've 25165:4 wound 25153:6,6,7 wounded 25050:22 25153:5 25159:2 wounds 25154:8 25158:17 25159:3 wrapping 25153:6 write 25006:2 25027:25 25106:3 writing 25038:17,20 25039:3 25106:20 written 25005:9 25097:4 wrong 25119:24 wrote 25053:16</p> <hr/> <p style="text-align: center;">X</p> <p>X 25007:25 25009:9,13 25009:13,16 25024:15,18 25029:25 25033:12 25034:12 25035:6 25038:5 25039:8 25040:2,24 25041:7 25045:17 25087:13 25132:8 Xhosa 25030:21 25031:14,16 25032:7 25032:10,12</p>	<p>X's 25017:1 25039:12 25040:7,8</p> <hr/> <p style="text-align: center;">Y</p> <p>year 25103:17,20 25110:3,25 years 25092:19,21 25109:24 25110:12 25111:1,3 25114:5 25117:18,19 25118:1 yesterday 25007:23 25008:23 25009:24 25018:19 25030:9 YouTube 25019:15,17 25019:17 you'll 25005:15 25013:6,8 25117:10 25140:18,19 25150:3 25166:7,10 you're 25005:25 25011:2 25013:7 25015:4,10,21 25016:3 25025:24 25031:8,9 25042:2,21 25044:18 25048:1 25056:21 25058:11 25070:7,8,17 25086:23 25105:6 25109:2,10 25113:5 25127:9 25137:5 25143:9 25149:1,22 25156:17 25161:1 25166:11 25168:16 you've 25013:3 25014:6 25030:3,6,25 25038:20 25048:6 25055:24 25070:16 25080:3 25081:14,21 25085:6 25095:5 25102:12 25109:9 25133:17,20 25137:2 25137:13 25142:14 25157:25 25159:4</p> <hr/> <p style="text-align: center;">Z</p> <p>Zandisile 25089:2 25109:6 zero 25088:24 Zimbabwe 25154:16 Zulu 25031:20 25032:8 Zulus 25032:14 Zyl 25033:10 25034:10 25035:4 Zyl's 25035:3</p> <hr/> <p style="text-align: center;">0</p> <p>000 25038:8,9 25140:23 01 25103:25 011 25103:25 25107:12 09:13 25005:2 09:32 25017:10 09:52 25030:15 0962 25093:20 25094:4 0963 25094:21 0963.JPG 25094:11 0964 25094:21,21</p>	<p>25096:11 0965 25094:22 25096:14 0966 25094:22 25096:16</p> <hr/> <p style="text-align: center;">1</p> <p>1 25059:7 25074:23,23 25075:16,19 25077:9 25085:16,22 25086:2 25086:4 25108:11 25119:3,4 25140:23 25162:17,21 25163:18,23,23 25164:1,5,6,7,13,20 25164:21,22 25165:5 1-5 25124:24 1.2 25108:18 10 25009:6 25012:22,23 25013:7 25039:5 25054:18 25056:19 25086:20 25110:25 25111:3 25117:18,19 25118:1 25121:21,21 25123:7,7 25132:8 10th 25040:2 10:33 25034:6 10:52 25047:8 11 25006:11 25135:20 25150:4 11:18 25047:25 11:38 25061:11 11:58 25077:3 12 25018:11 25107:23 12th 25120:2 12-bore 25106:6 25107:22,24,25 12:32 25086:22 12:52 25100:24 13 25021:7 25063:6 13H00 25107:23 13th 25030:14 25050:5 13:55 25109:1 14 25005:23 25024:11 25026:11 14th 25162:6 14:15 25124:14 14:35 25141:4 14:55 25155:18 141 25162:20,22 142 25162:24,25 25163:1,2 15 25034:2,3 25124:23 15th 25162:13 15:25 25160:25 16 25027:19,24 25105:15 25106:9,16 25124:22 16th 25056:23 25098:16,17 25099:1 25099:24 25103:21 25103:22,25 25106:19 25109:23 25115:1,21 25116:6 25117:4 25118:3,18 25120:6 25125:2</p>	<p>25162:20 16/8/2012 25125:4 17 25107:22 17th 25125:3 17/8/2012 25125:4 18 25005:1 189 25060:8 25134:13 25135:18 19 25006:19 25012:23 25013:8 19th 25010:10 1947 25015:6 1996 25015:1</p> <hr/> <p style="text-align: center;">2</p> <p>2 25007:8,11 25020:22 25034:16 25035:1 25049:11 25054:16 25074:16 25081:9 25089:16 25099:1 25112:23 25118:22 25139:14 25150:17 25152:15,16 25162:12,23 2:30 25056:22 25064:5 20 25104:12,15 25105:15 25131:25 20/04/01 25106:11 200 25038:8 2002 25007:8,10,11 2011 25104:13 2012 25030:14 25053:21 25092:22 25109:24 25115:21 25117:4 25118:3 25125:2,3 2014 25005:1 25040:3 25103:22 25104:1 25105:15 25106:12 25106:20 25107:23 2014/01/16 25106:19 2014/011 25106:13 21 25007:8,11 25018:22 22 25019:2 22940 25060:8,8 22942 25134:13 25135:16 23 25152:9,15 24 25089:15 25152:19 25 25054:15 25055:17 25055:22,23 25089:14 25153:3 259 25063:3 25160:7 26 25011:9,22 25134:15 25153:8 27 25153:12 272 25063:10 28 25051:17 25052:18 25053:9 25054:3 25055:5,9,24 25153:17 29 25009:4,5 25153:22 29I 25007:12</p> <hr/> <p style="text-align: center;">3</p> <p>3 25013:16 25034:16</p>	<p>25035:1 25074:18 25085:13,19 25086:1 25086:4 25093:22 25094:10,11 25100:11 25118:22 25120:6 25152:16 30 25009:15 25013:9 30C 25007:12 300 25085:22 31 25009:4 25013:22 25154:11 32 25013:24 34 25014:12 25015:14 25016:17 25017:24 25029:7 35 25018:12 25053:18 37 25021:7 39(2) 25015:8 25074:2</p> <hr/> <p style="text-align: center;">4</p> <p>4 25007:19 25011:17 25013:16 25014:17 25015:16 25075:20 25075:25 25077:9 25093:24 25096:6 25123:24 41 25024:12 25027:24 25060:9 41.2 25105:1 42 25025:20 25026:6 25027:22,25 43 25005:24 45.3 25027:20 45.4 25028:8 49 25088:21,22</p> <hr/> <p style="text-align: center;">5</p> <p>5 25049:7,20 25075:25 25076:4 25091:14 25107:24 25132:7 25152:11 50 25124:16 25152:18 500 25038:9 51 25094:9 51.1 25094:2 51.2 25094:3 51.3 25094:21 51.4 25094:22 51.5 25094:22 51.6 25094:18,23 52 25028:22 25124:6,9 52.7 25124:10 53 25124:12,13,14,19 55 25028:22</p> <hr/> <p style="text-align: center;">6</p> <p>6 25026:19,24 25060:15 25096:6 25104:17,20 25105:10 63 25094:8 25096:10 65 25096:14 66 25096:15</p> <hr/> <p style="text-align: center;">7</p> <p>7 25006:19 25140:5 70 25028:19</p>
---	--	---	---	--

72 25028:19
76 25134:15,16,17

8

8 25018:22 25019:3
25060:15 25135:20

9

9 25011:9,22 25020:20
25047:6 25054:18
25062:15 25139:1,4,5
25139:9 25169:14

9mm 25153:1
94 25015:1
940 25060:10

