

RealTime Transcriptions

TRANSCRIPTION OF THE

COMMISSION OF INQUIRY

MARIKANA

BEFORE TRIBUNAL

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

HELD ON

DAY 229

14 MAY 2014

PAGES 28253 TO 28452



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1 [PROCEEDINGS ON 14 MAY 2014]
 2 [09:07] CHAIRPERSON: The Commission resumes. Mr
 3 Mathibedi, there was evidence yesterday about a form which
 4 Brigadier Calitz was to fill in at the end, a shooting
 5 incident report at the end of the 13th. This witness says
 6 he told Brigadier Calitz about the shots he fired and so on
 7 and it was Brigadier Calitz's duty then to draw up this
 8 report. I don't remember seeing it, I don't think it's an
 9 exhibit. Could you please ask your, those assisting you to
 10 get it for us? I would like to see it.
 11 MR MATHIBEDI SC: I will, Mr Chairperson.
 12 CHAIRPERSON: Thank you very much.
 13 You're still under oath, Captain.
 14 SAMUEL KAY THUPE: (s.u.o.)
 15 CHAIRPERSON: Ms Mosebe?
 16 CROSS-EXAMINATION BY MS MOSEBE (CONTD.):
 17 Chairperson, we have pretty much covered the ground that we
 18 needed to and thank you, we have no further questions.
 19 CHAIRPERSON: Thank you. Re-examination,
 20 Mr Mathibedi?
 21 RE-EXAMINATION BY MR MATHIBEDI SC:
 22 Thanks, Chairperson. Captain, after the shooting incident
 23 at scene 1, did it cross your mind that you should request
 24 Captain Loest to phone the JOC and advise them of the
 25 situation?

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1 CAPTAIN THUPE: No.
 2 MR MATHIBEDI SC: During the 14, 15 hour
 3 briefing that was made by Brigadier Calitz, was mention
 4 made of any warning?
 5 CAPTAIN THUPE: That's correct.
 6 MR MATHIBEDI SC: What was said?
 7 CAPTAIN THUPE: Brigadier Calitz said
 8 they will first lay the barbed wire. After laying the
 9 barbed wire then they will warn the protesters to disperse
 10 and they will give them the reasonable time to disperse.
 11 MR MATHIBEDI SC: Thanks. Captain, when
 12 you saw the Scorpion on the 16th, by then you were aware
 13 that people had been brutally murdered, there was
 14 intimidation, destruction of property. What kind of
 15 situation were the police dealing with?
 16 CAPTAIN THUPE: Ja, it was a dangerous
 17 situation.
 18 MR MATHIBEDI SC: Now did you regard all
 19 the strikers as being dangerous at any stage?
 20 CAPTAIN THUPE: Only the group that were
 21 armed with dangerous weapons that attacked the police.
 22 MR MATHIBEDI SC: Captain, you saw some
 23 strikers approaching Nyala 4 whilst it was deploying barbed
 24 wire, is that correct?
 25 CAPTAIN THUPE: That's correct.

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1 MR MATHIBEDI SC: Now, those protesters
 2 that approached Nyala 4, could they have gone to Nkaneng
 3 without approaching the police line where the police were
 4 busy deploying barbed wire?
 5 CAPTAIN THUPE: That's correct.
 6 MR MATHIBEDI SC: Chairperson, no further
 7 questions for the witness.
 8 CHAIRPERSON: Thank you very much. Thank
 9 you, Captain Thupe, you'll be excused on the usual basis
 10 that if it's necessary for you to come back because of some
 11 point that's arisen, you'll come back without our having to
 12 issue a subpoena for your further attendance. If you - on
 13 that basis you're excused.
 14 CAPTAIN THUPE: Thanks Chair.
 15 CHAIRPERSON: Thank you. Who is going to
 16 call the next witness? Are you going to call the next
 17 witness, Mr Mathibedi?
 18 MR MATHIBEDI SC: Chairperson, it's Adv
 19 Baloyi. I'm going to ask for an adjournment of about 10
 20 minutes.
 21 CHAIRPERSON: Very well, we'll adjourn
 22 for 10 minutes. Sorry?
 23 MR MPOFU: I'm sorry, Chairperson, I had
 24 wanted to address the Commission when Captain Thupe
 25 finishes but I didn't anticipate it to come so quickly, so

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1 we can do the formalities of releasing the Captain.
 2 CHAIRPERSON: Well, the Captain has been
 3 excused I think but if you want, unless your address is
 4 supposed to take place before he is excused.
 5 MR MPOFU: No.
 6 CHAIRPERSON: Alright, he can go and
 7 while, instead of taking a 10 minute adjournment that Mr
 8 Mathibedi asked, we'll take a five minute adjournment after
 9 having heard your address.
 10 MR MPOFU: Well, Chairperson, yes. Thank
 11 you very much. I am addressing the Commission, I think I
 12 must preface it by saying that some of the issues that
 13 we've been instructed to raise do not necessarily lie in
 14 the province of the Commission but as usual we need to
 15 place these matters on record here. Some of them are in
 16 the control of the Commission and others are not.
 17 I've been instructed, Chairperson, to place on
 18 record the objection of the people that we represent and I
 19 understand that other parties will also join issue
 20 regarding - firstly, I think the nub of the problem is the
 21 deadline of the 31st of July which is not of your making and
 22 also the consequences of that deadline, some of which are
 23 in your control, Chairperson, or the control of the
 24 Commission. We are of the view that the deadline of the
 25 31st of July is unreasonable and irrational and it is

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1 arbitrarily set, certainly without taking into account the
 2 interests of the victims and some of the parties. We don't
 3 know what motivated the date, it might well be financial or
 4 political considerations or both, but it certainly does not
 5 take into account the public, the interests of the public
 6 in finding the truth and certainly not the interests of the
 7 victims, most certainly not the interests of the people
 8 that I represent. To illustrate that, Chairperson, we –
 9 CHAIRPERSON: I don't know if you have
 10 to. As you can see, I've got no power to do anything about
 11 it.
 12 MR MPOFU: Ja.
 13 CHAIRPERSON: So if you have any views on
 14 the matter you can address them to somebody, to the
 15 appropriate quarter –
 16 MR MPOFU: Ja, that's where I'm going –
 17 CHAIRPERSON: And I don't know if it's
 18 necessary or appropriate for this Commission to be used as
 19 a basis for putting those views into the public domain.
 20 MR MPOFU: No, Chairperson. What we're
 21 doing, as we did even with the issue of the payment of
 22 legal representatives, is to place the matters on record
 23 here –
 24 CHAIRPERSON: Place it on record if you
 25 consider the restrict, the extension not adequate enough to

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1 deal with what has to be dealt with.
 2 MR MPOFU: Yes.
 3 CHAIRPERSON: You've put that on record –
 4 MR MPOFU: Ja.
 5 CHAIRPERSON: - and I know you're
 6 indicating that you propose to do something about it, to
 7 address your comments to the appropriate quarter. You
 8 concede there's nothing we can do about it.
 9 MR MPOFU: No. Chairperson, if you are
 10 patient with me, I'm building up to, as I said, to the
 11 issues that are in your domain but I have to preface it by
 12 putting the matter into its full context if you don't mind,
 13 Chairperson. I'm saying that where we are now, a
 14 calculation has been done – I won't vouch for it because I
 15 was not party to it but it says that we have effectively 35
 16 days or so left before the deadline, 35 effective days and
 17 this is against –
 18 CHAIRPERSON: Mr Mpofo, I don't want to
 19 be discourteous to you but I think you're being premature,
 20 forgive me for saying so, in what you're doing. What has
 21 happened is the evidence leaders have sat down and have
 22 compiled – I'm not sure they're entirely finished yet but
 23 they've compiled a suggested programme for us to proceed.
 24 MR MPOFU: Yes.
 25 CHAIRPERSON: The witnesses who have to

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1 give oral evidence, the time which they consider
 2 appropriate for that evidence, they've indicated they would
 3 make it, they would give it to us for us to decide whether
 4 we approve of it or not. We've indicated that we thought
 5 it appropriate that that first be given to the parties and
 6 they indicated, they said that that was their intention and
 7 I'm not sure if you've got it yet but if you haven't got it
 8 yet, you're going to get it soon.
 9 MR MPOFU: Ja.
 10 CHAIRPERSON: Once you have responded to
 11 that proposed programme, the proposed programme with your
 12 responses will be put before us and we will then consider
 13 it. What you are now addressing me about sounds to me
 14 relates to matters which may be relevant at that stage but
 15 I think it's premature to deal with it now.
 16 MR MPOFU: No –
 17 CHAIRPERSON: So I'm not closing the door
 18 on –
 19 MR MPOFU: I hear –
 20 CHAIRPERSON: - a chance to speak to us,
 21 but I suggest you do so at the appropriate time.
 22 MR MPOFU: Yes. No, thanks Chairperson,
 23 I understand that but maybe I must cut to the chase. This,
 24 what I'm saying cannot be postponed, Chairperson, because
 25 it relates to the forthcoming witness. That's why I'm

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1 doing it now when Captain Thupe has just finished. It
 2 relates to the programme relating to the next witness so it
 3 cannot be postponed but maybe if you let me –
 4 CHAIRPERSON: The next witness is Captain
 5 Loest.
 6 MR MPOFU: Yes, that's exactly the point.
 7 CHAIRPERSON: And I went –
 8 MR MPOFU: That's where –
 9 CHAIRPERSON: I went through the
 10 applications for leave to cross-examine and the points that
 11 were proposed to be covered, I made a calculation of what,
 12 the time that I thought reasonably necessary to deal with
 13 those points and that's how I arrived at the day –
 14 MR MPOFU: Yes.
 15 CHAIRPERSON: - and then I cut the day up
 16 into appropriate times and I worked out, I forget, it was
 17 either AMCU or the families that produced a detailed
 18 application setting out the questions they want to ask and
 19 I made a calculation as to how long they would need to ask
 20 those questions, what the probable length of the answers
 21 was, that's how I got to the result.
 22 MR MPOFU: Yes. Well, that's exactly
 23 where the crisis comes, Chairperson. I was – instead of
 24 building up to it, maybe I'll start there and then I'll
 25 build back to what I was saying. We, our instructions are

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1 that we are not in a position to cross-examine this witness
 2 for half an hour, 45 minutes –
 3 CHAIRPERSON: You must do the best you
 4 can in the time that I've allotted to you.
 5 MR MPOFU: No, Chairperson –
 6 CHAIRPERSON: Yes, yes –
 7 MR MPOFU: Chairperson, if you can just
 8 listen to me, Chairperson, it will help. Then you can
 9 respond because now I've tried to accommodate the haste by
 10 cutting to the immediate problem, but ja. The issue here
 11 is this, if – we don't even know and Ms Le Roux will
 12 address that aspect, I won't go into it – we don't even
 13 know how many more witnesses are going to come, nobody
 14 knows. I've made enquiries, the police have not, SAPS has
 15 not been able to give us a final list, Lonmin is not able
 16 at this stage to give us a final list, nobody knows what,
 17 how many witnesses are supposed to be fitted in the 35 days
 18 and therefore it's impossible to accept that this deadline
 19 was taken with the view of understanding what is happening
 20 in the Commission. Our witnesses have been on the witness
 21 stand for weeks. Now, when we get to the critical stage,
 22 this next witness Loest is a very important witness who was
 23 right at the point of the so-called self-defence area, if
 24 you know what I mean and the record, Chairperson,
 25 especially in my case is replete with the Chairperson

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1 saying to me, don't ask this question to Calitz or
 2 Annandale or this one or that one, when the people who were
 3 at the scene come you can put those questions and now when
 4 the time comes, we are given half an hour to do that. It's
 5 not possible, Chairperson, to reach the purposes of this
 6 Commission and we understand that this is a situation, as I
 7 said, that's not of your own making. You, as you've
 8 advised me, you are doing the best you can under the
 9 constraints that have been given so we're not blaming the
 10 Commission at all and we don't associate with people who
 11 put the blame on the Commission.
 12 However, the effect of what has happened is that
 13 we're going to have a "kits" Commission or instant
 14 Commission that does not serve the purposes of what we're
 15 supposed to have. This kind of cross-examination of an
 16 important witness such as Loest cannot possibly be done in
 17 half an hour by the best cross-examiner in the world.
 18 CHAIRPERSON: He's not going to be half
 19 an hour, you're going to be cross-examining for half an
 20 hour. Other counsel will be cross-examining for –
 21 MR MPOFU: Ja, 45 minutes.
 22 CHAIRPERSON: If they don't need all the
 23 time that I've given them you can negotiate with them and
 24 you can get some of it from them.
 25 MR MPOFU: Yes.

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1 CHAIRPERSON: But you know cross-
 2 examination isn't a sort of ordeal by exhaustion.
 3 Competent counsel are able to focus, asked focused, brief
 4 questions and get what they want on record in a relatively
 5 short time, depending on the circumstances. Obviously
 6 there are other witnesses to whom what I said doesn't
 7 apply. In my judgment it does apply to Captain Loest but
 8 anyway, please continue.
 9 MR MPOFU: Yes, thank you, Chairperson.
 10 Well, Chairperson, I'll take note of the remarks but the
 11 point of the matter is that a witness like let's say Mpmembe
 12 who, as far as the actual occurrences are concerned is
 13 peripheral, has spent weeks, if not months being cross-
 14 examined by so-called competent counsel here for weeks, but
 15 if now that those witnesses who are directly on point at
 16 the point of the assault and the killing and the injury of
 17 the people are in comparison supposed, on the slate of
 18 competency, supposed to cross-examined for half an hour,
 19 well, that's grossly unfair, it's arbitrary, it's not going
 20 to create any effective outcome for this Commission. If
 21 there was that requirement of competency it should have
 22 been imposed at the beginning for the past 18 months, not
 23 at this stage when there's one month left.
 24 The point we are making is simply this, it should
 25 be obvious that if you look at what we say are important

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1 but peripheral witnesses as far as the core issues are
 2 concerned, the amount of time that was spent with those
 3 people and the amount of time that is proposed to be spent
 4 with the people who were at the coalface of the problem,
 5 then I think anybody, you know, even a child would see that
 6 that is grossly disproportionate, let alone the fact that
 7 there's still Lonmin. Lonmin, which we said at the
 8 beginning was as far at least as my clients are concerned,
 9 was equally responsible as SAPS and they have not even
 10 started and I've made enquiries, they don't even know how
 11 many witnesses they're going to call. We think that there
 12 are many other witnesses that they might call, whether they
 13 want or not.
 14 Chairperson, I don't have to illustrate this. As
 15 I say, I think it's self-evident. It's grossly, grossly
 16 unfair. It's not of your own making, as I've emphasised,
 17 but it is something that we cannot countenance going
 18 through this speed of light. The danger, Chairperson, of
 19 not raising it now is that we will do this superficial job
 20 now and then it might become clear at the end of July that
 21 another extension is needed but it will be irreparable. By
 22 then we would have superficially dealt with crucial
 23 witnesses and we can't very well recall them, so it will be
 24 an exercise in futility to raise it at that stage. It's
 25 very important that we raise it now and we will raise with

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1 the other authorities the issue of the arbitrariness of the
2 deadline, that will be raised with the President and the
3 Minister of Justice and you know, we're going to ask
4 urgently for reasons regarding that and if we have to go to
5 court to review their decision, then we will do so but
6 that's a matter, that's the matter that I said is a
7 separate matter. The current matter facing us is that as a
8 consequence of that arbitrary decision we are now forced
9 into a situation where the Commission really has been
10 rendered, is going to be rendered as, you know, just as an
11 exercise in futility as it were.

12 Now as I said, we don't know what the motivation
13 for the date – I must just say this, our clients and I'm
14 sure that affects all the other parties, there's nobody who
15 wants a speedy resolution and conclusion to this Commission
16 than our clients. So we would support anything that brings
17 that speedy resolution but speedy cannot mean superficial
18 and ineffective. We, my team would like this thing to end
19 tomorrow if possible, we have not been remunerated for this
20 work since March of last year so there's nothing more that
21 we would like than ending it.

22 CHAIRPERSON: I thought you were getting
23 legal aid?

24 MR MPOFU: No, we're not. In reality it
25 hasn't happened but I don't want to bore you with the

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1 details.

2 CHAIRPERSON: There's a judgment in your
3 favour and the order was put into operation pending appeal.

4 MR MPOFU: Ja, well, in theory that's
5 what it is, Chairperson. In reality we have been working
6 for nothing since March last year and I'm not raising that
7 for any other purpose than to say that we would be the very
8 people who really want this thing to end but we cannot let
9 those considerations supersede the real interest of our
10 client which is that there must be thorough and proper
11 investigation of the circumstances that led to their
12 injuries or the deaths of their loved ones. That is the
13 most important thing and we're not going to be party to a
14 superficial job that doesn't yield any purposes, whatever
15 it takes, Chairperson, and if these warnings are not heeded
16 then there might be delays which are even more than is
17 countenanced.

18 This is an invitation I think for all of us to
19 put our heads together and try and wiggle out of a very
20 difficult situation and I must emphasise in closing, we
21 understand that the trigger to all these problems is the
22 deadline that was imposed on all of us.

23 CHAIRPERSON: The time, you complain
24 about the period that I allocated for Captain Loest. What
25 time do you say is appropriate?

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1 MR MPOFU: No, Chairperson, thank you for
2 that. It's much, it's wider than that, Chairperson. It's
3 the whole, the system –

4 CHAIRPERSON: I understand it's wider
5 than that but I'd like an answer to the limited question I
6 put to you.

7 MR MPOFU: Well, you know the answer to
8 that question –

9 CHAIRPERSON: I don't know – no, no -
10 MR MPOFU: - it's in my application.

11 [09:27] CHAIRPERSON: No, the total – you said
12 what you needed, what is the total period, examination-in-
13 chief, cross-examination by evidence leaders, cross-
14 examination by the parties, re-examination, what is the
15 total period of time that you say is appropriate for
16 Captain Loest?

17 MR CHASKALSON SC: Sorry, Mr Chairperson,
18 if I might intervene here. I think one of the issues that
19 we do need to confront now is that parties with a broadly,
20 a broad identity of interest, need to start trading time
21 and taking responsibility for different witnesses because I
22 can understand Mr Mpofu's concern about 30 minutes because
23 there's very little one can do in 30 minutes and if one
24 doesn't know what has been, what is going to be traversed
25 in advance of the 30 minutes it's very difficult to prepare

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1 for a focused 30 minute cross-examination but in truth I,
2 for one, don't see why Captain Loest should take more than
3 a day but I do think that the parties that have a broad
4 identity of interest need to get together and say, we will
5 take, I will take responsibility for Captain Loest, I will
6 give you my time for Lieutenant-Colonel Modiba when he
7 comes or Captain Kidd and in that way it will be easier for
8 people to structure cross-examination. I don't think that
9 the total time allocation is an unreasonable one, given
10 that most of what Captain Loest can speak to is covered by
11 videos from several different angles which will speak to
12 the truth of what happened much more than a man's memory 18
13 months after a very traumatic event. But I do think that
14 the way around this problem is for parties to trade time
15 and to take responsibility for particular witnesses.

16 CHAIRPERSON: Mr Mpofu, does that mean
17 you don't want to answer – well, no, let me not put it in
18 an unfriendly way – that you prefer to leave my question
19 unanswered. You say that –

20 MR MPOFU: No, I'll answer for myself –

21 CHAIRPERSON: You'll answer for yourself,
22 yes.

23 MR MPOFU: Ja.

24 CHAIRPERSON: Answer for yourself.

25 MR MPOFU: I've answered for myself in

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1 the application I gave you, Chairperson. I've said how
2 much time I needed.

3 CHAIRPERSON: Remind me what you said?

4 MR MPOFU: Two and a half hours.

5 CHAIRPERSON: Yes, okay. Alright, thank
6 you, that's your answer. Yes, Mr Gotz?

7 MR GOTZ: Chair, we would like to
8 associate ourselves with comments made by the counsel for
9 the injured and arrested. Part of the problem, I don't
10 want to repeat those concerns but part of the problem is
11 also that we don't in fact have as yet the schedule of
12 witnesses to come –

13 CHAIRPERSON: Well, the point – sorry to
14 interrupt you. The point I put to Mr Mpofo was this, these
15 comments are premature. I understand once you've got the
16 schedule, which I understand, I think you're going to get
17 today, Mr Chaskalson –

18 MR CHASKALSON SC: Mr Budlender is coming
19 back from London tomorrow morning and I would like to chat
20 to him about it before it gets circulated, so that tomorrow
21 –

22 CHAIRPERSON: They should get it
23 tomorrow.

24 MR CHASKALSON SC: Tomorrow morning, yes.

25 CHAIRPERSON: Yes, so you'll get it

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1 tomorrow so you can then –

2 MR GOTZ: Chair, I'd like to make the
3 point –

4 CHAIRPERSON: Alright –

5 MR GOTZ: The point is that in the
6 absence of knowing which witness is to come, I'm prejudiced
7 in knowing what to put to Captain Loest. So to illustrate
8 the point directly, if Kuhn is coming or if Claassen is –

9 CHAIRPERSON: - that Kuhn is coming – I'm
10 sorry to interrupt you.

11 MR GOTZ: If Claassen is coming –

12 CHAIRPERSON: As far as I'm concerned –

13 MR GOTZ: - and when they are coming –

14 CHAIRPERSON: - as far as –

15 MR GOTZ: - is relevant to my preparation
16 of the cross-examination of Captain Loest.

17 CHAIRPERSON: Yes. Mr Gotz, as far as
18 I'm concerned Warrant Officer Kuhn is coming and if he's
19 not on any list, I want him.

20 MR CHASKALSON SC: Chairperson, there may
21 be a health issue there, we understand from SAPS.

22 CHAIRPERSON: I thought I'd been told he
23 was able to come but anyway, be that as it may, if he's
24 physically capable of coming, I want him. Right? The same
25 applies to Claassen who was at the scene 1, in fact was

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1 involved in removing weapons from people and so on. We
2 have his statement already. As far as I'm concerned
3 Claassen has got to come as well, so that you know. If
4 Kuhn can't come, we have his statements but I certainly
5 would hope that he will be able to come and certainly
6 unless he is, for some medical reason, unfit to testify, as
7 far as I'm concerned he's going to have to be a witness.

8 MR GOTZ: Chair, but to continue with the
9 point, we would submit that perhaps the sensible use of –

10 CHAIRPERSON: Before you continue with
11 the point can I put another question to you? You also made
12 the point, you want to know not only who is coming but
13 when. I am not sure what the "when" has got to do with it.
14 If you know that A, B and C are coming, whether they're
15 coming next week or the week after, I don't see how that
16 affects your cross-examination of this witness.

17 MR GOTZ: Chair, the point I'm attempting
18 to make is that we believe that before the Commission can
19 proceed on the basis of significantly curtailed time
20 limits, we need to know what the timetable in full is,
21 which witnesses are coming and the extent to which a
22 particular period of time will be allocated to a witness.
23 The point is illustrated by my cross-examination yesterday
24 where, at the conclusion, I indicated that I was relatively
25 content to leave certain sections and I believed that I

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1 would not be prejudiced in not putting them to Captain
2 Thupe because I would be able to put them to Captain Loest.
3 I made that comment in the absence of knowing that I would
4 only be given 45 minutes to cross-examine Captain Loest and
5 then there one has the prejudice. I've curtailed my cross-
6 examination of Captain Thupe thinking that I would be given
7 the two hours that I had asked for in relation to Captain
8 Loest and I'm now given 45 minutes to deal with the
9 witness. And so with the greatest respect, Chair, I think
10 the next step in the proceedings should be the conclusion
11 of the timetable for the witnesses that are to come and
12 only once that is done can we then –

13 CHAIRPERSON: So what must we do in the
14 meanwhile? Must we adjourn and waste two days? A witness
15 comes, it's quite clear what the witness is going to deal
16 with, I don't know how many statements that he's made have
17 been put before us, we know what matters he can cover.
18 Most of the matters that he's covering are matters that
19 have been dealt with by other witnesses. So the evidence
20 they've given can, if necessary, be put to him if it's
21 necessary.

22 The purpose of cross-examination isn't to expose
23 a witness to a lengthy ordeal of exhaustion, the purpose of
24 cross-examination is to discredit evidence that's adverse
25 to the case of the party cross-examining, which can be done

1 in various ways. Alternatively, to elicit other
2 information which is not in the statement of the witness,
3 which will assist the case of the party who is cross-
4 examining. That's what cross-examination is all about.
5 Cross-examination doesn't have to be lengthy. In fact some
6 of the best cross-examinations are those that are fairly
7 short and pointed and focused.

8 MR GOTZ: Chair, I don't dispute that for
9 a moment but – and I must emphasise that on behalf of AMCU
10 we do not object to the imposition of time limits. We do,
11 however, feel that the imposition of a time limit of 45
12 minutes in our case is too short for an important witness
13 such as Loest, Captain Loest. And so, Chair, we do
14 associate ourselves with the objection and we do propose
15 that the time today be devoted to finalising the timetable
16 –

17 CHAIRPERSON: You've heard –

18 MR GOTZ: - if necessary with the input
19 and participation of all the parties –

20 CHAIRPERSON: I'm sorry to interrupt you
21 –

22 MR GOTZ: - that are present.

23 CHAIRPERSON: You've heard that Mr
24 Budlender has gone to London. Mr Budlender will be back
25 tomorrow morning. You've heard Mr Chaskalson wishes to

1 statements which he can confirm. The main points can be
2 highlighted. I don't propose to waste more time than half
3 an hour on his evidence-in-chief. All the material that
4 his side wishes to put before us can be put before us in
5 half an hour.

6 MR GOTZ: Yes, indeed Chair. We can hear
7 the evidence-in-chief and those parties that are content to
8 cross-examine in the time that has been allocated to them
9 can use that time today. I suspect that we may well find
10 that we use much of the day and the remainder of the day
11 can be used to perhaps sit with Mr Chaskalson and discuss
12 the provisional timetable which has been produced. So we
13 can make full use of today's time.

14 CHAIRPERSON: Thank you. Ms Le Roux,
15 you've turned your machine on?

16 MS LE ROUX: Thank you, Chair. I'm
17 instructed to make the following statement on behalf of the
18 South African Human Rights Commission. The SAHRC is deeply
19 concerned at the procedural consequences of the sudden rush
20 to complete oral evidence in the Commission. While the HRC
21 stands with all South Africans in desiring the conclusion
22 of the Commission's important work, that outcome cannot be
23 compromised by an unfair process to reach it.

24 The HRC has instructed its lawyers to request
25 reasons for the President's decisions to end the

1 finalise the proposed programme which is going to be put to
2 the parties tomorrow for their consideration once Mr
3 Budlender returns. You will be seeing it tomorrow. So
4 what you're really suggesting is that we should sit today
5 and hear no evidence, waste the whole day, when Captain
6 Loest's evidence in my considered judgment – and I must
7 tell you I went through each application very carefully, I
8 made an estimate – some of them were very well drafted, if
9 I may say so, and indicated more or less precisely what
10 questions were going to be asked – worked out how long I
11 thought, based on my experience of trials over a long
12 period of time, what time reasonably would be required and
13 that's how I arrived at a day. You obviously don't agree
14 with me, well, you're entitled to disagree. Anyway I've
15 heard what you have to say. Ms Le Roux?

16 MR GOTZ: Chair –

17 CHAIRPERSON: Sorry, Mr Gotz, I beg your
18 pardon, you're still –

19 MR GOTZ: Just a final point on the use
20 of time today and I say this with respect, I'm not
21 proposing that we do not sit and listen to Captain Loest at
22 all. I think that we can hear evidence-in-chief. I think
23 also that the evidence leaders who are content to –

24 CHAIRPERSON: I'm proposing to allow half
25 an hour for examination-in-chief. The witness has made

1 Commission's work in July and delete paragraph 1.5 of the
2 terms of reference. We're also instructed to address our
3 concerns to the Commission arising from these decisions,
4 which we will do in writing soon.

5 The future conduct of the Commission requires
6 that all parties urgently be provided with a timetable
7 indicating the identity and order of the witnesses to be
8 called by the Commission. This is, in part, so that the
9 legal teams can prioritise issues given the severely
10 limited time that will be available to cross-examine a
11 given witness. CALS, the LRC and SERI provided a joint
12 response to the Commission last week regarding the
13 procedures to be followed until July and look forward to a
14 response from the Commission on those practical proposals
15 as to how to use five days a week to complete the
16 Commission's work.

17 Captain Loest is a vital witness for this
18 Commission, given that he was the commander of the TRT line
19 at scene 1. To start and complete his evidence in one day
20 undermines the credibility of the Commission process. The
21 Human Rights Commission made an application to cross-
22 examine Captain Loest for two and a half hours but were
23 permitted only one hour cross-examination. The consequence
24 is that there are a number of vital matters on which
25 Captain Loest will not be cross-examined at all, matters

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1 that will not be covered adequately and if his evidence
2 will not be tested on those questions.

3 The Commission and public at large must be under
4 no illusion that there are consequences to this apparent
5 race to the end and the SAHRC lodges a formal objection to
6 the rushed manner in which the Commission is now being run.
7 Thank you, Chair.

8 CHAIRPERSON: Thank you. Anyone else
9 want to make any comments before I ask Mr Chaskalson if he
10 has anything further to say? Mr Bizos?

11 MR BIZOS SC: Mr Chairman, with respect,
12 we find ourselves in a position where we have to agree, by
13 the difficulties that have been outlined by our learned
14 friends here. I do believe that your efforts to actually
15 fit a programme into the period to end at the end of July
16 is an impossibility and also with all good faith, to say
17 that a witness a day is an arbitrary approach –

18 CHAIRPERSON: Mr Bizos, I'm sorry, I
19 didn't say a witness a day. I said in my considered
20 judgment Captain Loest's evidence can be dealt with in a
21 day.

22 MR BIZOS SC: Well, let's be –

23 CHAIRPERSON: For example, let's just
24 take one example. It's quite clear that Mr X is going to
25 take much longer than a day. I mean to suggest that we're

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1 saying a witness a day is in fact incorrect.

2 MR BIZOS SC: Well, let me illustrate why
3 one day for Mr Loest is not sufficient, Mr Chairman. He
4 has filed short statements which say, the last one –

5 CHAIRPERSON: I've read his statements,
6 Mr Bizos.

7 MR BIZOS SC: Well, let me just read one
8 small paragraph which is really paragraph 9 where he
9 categorically states that "The purpose of my group's
10 deployment was achieved because we succeeded in protecting
11 members of SAPS when they came under attack from the
12 protesters." Now Mr Chairman, we have been allotted half
13 an hour by consent because we have given time to cross-
14 examine at some length, for which we are thankful, and we
15 hoped that we would, our colleagues would do, needed more
16 time for this – but, Mr Chairman, there are no, there is no
17 indication of how many policemen are going to be called.
18 We have been asking for this, it has never come. We have
19 asked for admissions in relation to the expert evidence,
20 this has not been agreed to. I was hoping to hand over to
21 one of my learned friends our part of the cross-examination
22 on, which is going to be based on the expert witnesses,
23 including Mr Hendrickx, and more particularly the
24 pathologists and their reports. We have asked for
25 admissions in relation to those. They have not been

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1 forthcoming and, Mr Chairman, I don't think that I could
2 manage within half an hour but I hope that others would do
3 it, to put to Mr Loest who is a very important witness –
4 may I refer you to paragraph 138 of exhibit L, commander
5 details, Captain Loest. We did not cross-examine the
6 previous witness because we were waiting for Mr Loest who
7 was their Captain, who was the senior officer who can't say
8 I did not shoot but I didn't have time to give an order.
9 And I wanted to put to him all the injuries that have been
10 documented, I can't do it within half an hour. I don't
11 know whether the others will do it.

12 CHAIRPERSON: Sorry, what's the point of
13 putting all the injuries that have been documented to him?
14 Will he be able to say, oh yes, I remember that particular
15 person's injuries –

16 MR BIZOS SC: No.

17 CHAIRPERSON: - and that one and that
18 one?

19 MR BIZOS SC: No, no –

20 CHAIRPERSON: To put all the persons'
21 injuries which are a matter of record to this witness wil,
22 with respect, be a waste of time.

23 MR BIZOS SC: No –

24 CHAIRPERSON: So I understand you could
25 ask him about things that he's got knowledge of, I can

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1 understand you can ask him about things that he's in a
2 position to comment on but to put all the injuries of all
3 the people who were injured or killed at scene 1 to this
4 particular witness would be a total waste of time.

5 MR BIZOS SC: He was –

6 CHAIRPERSON: If that's the reason for
7 saying that a day is not enough, I can understand why the
8 reason advanced is clearly a specious one.

9 MR BIZOS SC: The others say that we were
10 not there, the communications did not work, we cannot claim
11 responsibility. He was the commander, he ordered them
12 forward. I am entitled to put to him how come there were
13 so many shots in the back. Why, how did it come about that
14 there were so many shots on the side, and to expect all
15 that to be canvassed within one day is unrealistic –

16 CHAIRPERSON: I don't agree with that but
17 anyway, I understand what you've said. Is there anything
18 else you wish to say?

19 MR BIZOS SC: No, Mr Chairman, other than
20 through you, that we actually ask for admissions to be
21 made, for the number of witnesses to be limited by the
22 police telling us who they intend calling and not
23 duplication and for everyone to co-operate, having in mind
24 that it is a physical impossibility for these proceedings
25 to be completed by the end of July.

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1 CHAIRPERSON: The information as to which
2 witnesses the police propose calling is in the possession
3 of the evidence leaders and I understand will be made
4 available to you as soon as possible. As far as the
5 admissions are concerned, do I understand you to say you
6 haven't had a response yet from the police as to whether
7 they're prepared to make the admissions? It's not that
8 they've refused, they just haven't reverted to you, is that
9 correct?

10 MR BIZOS SC: Well, we have repeatedly
11 asked.

12 CHAIRPERSON: Have they not reverted to
13 you because if so, I want to say that I agree with you that
14 this is clearly a matter in respect of which admissions
15 would be appropriate, depending obviously on the nature of
16 the questions you've asked and I would appeal to the police
17 to respond as soon as possible to that request.

18 MR BIZOS SC: Thank you, Mr Chairman.

19 CHAIRPERSON: Ms Lewis?

20 MS LEWIS: Mr Chair, on behalf of the
21 families I associate myself with the comments and the
22 objections that have been made by my learned friends and I
23 would like to emphasise, Mr Chair, that from the families'
24 perspective Loest is one of the most critical witnesses.
25 For the family members of those people who were killed at

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1 scene 1, this is one of the witnesses whom they are the
2 most interested to hear and we associate ourselves with the
3 objection on the basis that the total time that has been
4 allotted is simply not sufficient for such an important
5 witness and in particular the 45 minutes that have been
6 allotted to the families is not sufficient, Mr Chair.

7 [09:47] CHAIRPERSON: I note what you've said.
8 Mr Chaskalson?

9 MR CHASKALSON SC: Chair, I've heard the
10 submissions from the parties who are concerned about their
11 allocations of time. I stand by my earlier submission.
12 Most of what Captain Loest speaks to on the 16th is covered
13 on video tape from several different video cameras. There
14 are a number of key questions that Captain Loest has to
15 answer. My own view is that they can adequately be
16 addressed in the course of a day. I can understand the
17 concern of people who have been given 30 minutes or 45
18 minutes but we can't, because of that problem, allow double
19 the length of time and invite duplicating cross-
20 examination. The solution to that is for parties with a
21 broad identity of interests to get together and to trade
22 time. So that would be my view.

23 CHAIRPERSON: Thank you. Yes, Mr Mpofo?

24 MR MPOFU: Sorry, Chairperson, I promise
25 I'll be very brief. I think the danger with this is, this

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1 is not a Loest issue. This issue is, the Loest thing is
2 simply an illustration of the real problem. The real
3 problem is what Mr Bizos has just said, it is impossible,
4 impossible for this Commission to be finished at the 31st of
5 July and do justice to the work that needs to be done.
6 That's where we must start. Once we accept that then we
7 say that the consequences of that imposition of that
8 deadline is that there is unfairness on behalf, as it has
9 been articulated by various people. Manifest unfairness
10 and manifest injustice which will be caused to this
11 Commission. So we can solve the issue of Loest and so on
12 but it's not going to remove the fundamental issue which is
13 that - the Loest and the imposition of the 30 minutes and
14 all that is something that you had to do, Chairperson,
15 because you are working against the deadline of the 31st of
16 July. That's the real elephant in the room, so it's no use
17 to try and do all the superficial solutions and add an hour
18 here or two hours there, that's not going to resolve the
19 problem. So Chairperson, that's all.

20 CHAIRPERSON: I understand you want to
21 say something more?

22 MR GOTZ: Chair, just one comment in –

23 CHAIRPERSON: Another bite at the cherry
24 from you.

25 MR GOTZ: Chair, just one comment in

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1 response to my learned friend Mr Chaskalson. Quite apart
2 from the fact that the parties are and have in fact been
3 communicating with each other in respect of the topics that
4 have been covered, the immediate problem that we face of
5 course is that we haven't engaged in the exercise that Mr
6 Chaskalson is suggesting, one of trading time between the
7 parties and yet we are nevertheless expected to cross-
8 examine Captain Loest today in the absence of having
9 engaged in that practice. So in effect Mr Chaskalson, my
10 learned friend Mr Chaskalson's point falls away because
11 that, we're still confronted with the immediate prejudice
12 in relation to Captain Loest.

13 MR CHASKALSON SC: Mr Chairperson, if I
14 can briefly respond to –

15 CHAIRPERSON: Did you want to say
16 something? What I wanted to suggest, or you say first then
17 I'll say what I have in mind.

18 MR CHASKALSON SC: Well, my proposal was
19 that the two processes that can definitely take place at
20 this stage are for the evidence-in-chief of Captain Loest
21 to be led and for the evidence leaders, for Mr Wesley to
22 cross-examine.

23 CHAIRPERSON: Sorry, that's what I was
24 going to say. I was going to suggest let's have the
25 evidence-in-chief, let's have the cross-examination by the

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1 evidence leaders. I did say last week that the parties
 2 wishing to apply for leave to cross-examine should talk to
 3 the evidence leaders about the topics the evidence leaders
 4 propose covering, which will avoid duplication and so on.
 5 I don't know whether that's happened but let's have the
 6 evidence-in-chief, let's have the cross-examination by the
 7 evidence leaders and after that we can give the parties
 8 some time to see what they can do to come to an agreement
 9 as to the allocation of the areas they want to cover in
 10 cross-examination that have not been covered to their
 11 satisfaction by the evidence leaders. I interrupted you,
 12 Mr Chaskalson.

13 MR CHASKALSON SC: But can I suggest that
 14 we deal with tea breaks and comfort breaks in a manner that
 15 doesn't unnecessarily waste time so that there can be an
 16 extended consolidated tea and comfort break at the end of
 17 the evidence leaders' cross-examination or an early lunch
 18 break or whatever, so that consultations can take place
 19 then.

20 CHAIRPERSON: Yes, I understand that but
 21 the reason we take a comfort break is not just a matter of
 22 convenience. Experience shows, experience teaches one that
 23 if you sit for more than an hour and a quarter, hour and a
 24 half, people's concentration tends to dissipate. So the
 25 reason for the comfort break actually is to avoid that

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1 problem, so you can't just say, well, today we'll have a
 2 comfort break after two and a half hours because the
 3 purpose of the comfort break would be defeated but I hear
 4 what you say. Ms Baloyi, are you ready to lead the
 5 witness?

6 MR BIZOS: Mr Chairman?
 7 CHAIRPERSON: Yes, Mr Bizos?
 8 MR BIZOS: I'm sorry, I support Mr
 9 Chaskalson's proposal and to place on record that if there
 10 is time available, even though we're at the bottom of the
 11 list, I am prepared to continue after Mr Chaskalson, Mr
 12 Chairman, today.

13 CHAIRPERSON: You mean after the evidence
 14 leaders?
 15 MR BIZOS: Pardon?
 16 CHAIRPERSON: You say continue after –
 17 MR BIZOS: After the evidence leaders.
 18 CHAIRPERSON: I don't know who is going
 19 to cross-examine on behalf of the evidence leaders. I
 20 think it's Mr Wesley. Anyway, you're prepared to continue
 21 after –

22 MR BIZOS: After the evidence leaders.
 23 When they finish –
 24 CHAIRPERSON: Yes, thank you for your
 25 offer. You're prepared to be the first cross-examiner

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1 after Mr Wesley –
 2 MR BIZOS: Yes.
 3 CHAIRPERSON: - without any further
 4 intermission between the two unless it's necessary for the
 5 purposes of comfort or for refreshment.
 6 MR BIZOS: Mr Chairman, I think that as a
 7 matter of principle we shouldn't use court time, so to
 8 speak, or Commission hours for consulting among ourselves.
 9 Late afternoons, evenings, very early mornings, yes. Let
 10 us push forward in order to do what we can as soon as
 11 possible.
 12 CHAIRPERSON: Thank you, thank you, Mr
 13 Bizos. Ms Baloyi, are you ready to lead the witness?
 14 MS BALOYI: Chairperson, I am but I was
 15 going to ask that we stand down for five minutes.
 16 CHAIRPERSON: Five minutes we'll stand
 17 down for. First comfort break, five minutes.
 18 [COMMISSION ADJOURNS COMMISSION RESUMES]
 19 [10:21] CHAIRPERSON: The Commission resumes. Ms
 20 Baloyi, you call – are you going to call the witness or is
 21 Mr Semanya who has now appeared, going to call the witness?
 22 MS BALOYI: I will be leading the
 23 witness.
 24 CHAIRPERSON: You'll be calling –
 25 MS BALOYI: Thank you.

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1 CHAIRPERSON: What are the witness's full
 2 names?
 3 MS BALOYI: Chair, the witness's full
 4 names are Paul Bismarck Loest.
 5 CHAIRPERSON: Sorry?
 6 MS BALOYI: Paul Bismarck Loest.
 7 CHAIRPERSON: Yes, I should have seen
 8 that from the statement. Right, Captain Loest, would you
 9 please stand? Are you prepared to take the oath, will the
 10 oath be binding on your conscience or do you wish to make
 11 an affirmation?
 12 CAPTAIN LOEST: I have no problem with
 13 taking the oath, sir.
 14 CHAIRPERSON: Would you raise your right
 15 hand and say, will you swear that the evidence that you are
 16 going to give before the Commission will be the truth, the
 17 whole truth and nothing but the truth? Please raise your
 18 right hand and say, I swear, so help me God.
 19 CAPTAIN LOEST: I swear, so help me God.
 20 CHAIRPERSON: Thank you, you may be
 21 seated.
 22 PAUL BISMARCK LOEST: (d.s.s.)
 23 CHAIRPERSON: I understand from what I've
 24 been told in chambers that you have been suffering from
 25 post-traumatic stress syndrome since the events that you're

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1 going to tell us about but you may feel at a certain stage
2 from time to time in the course of your evidence that it's
3 difficult for you to concentrate and you would like a short
4 adjournment at that stage. When that happens, please
5 indicate and obviously I will receive such requests
6 favourably because we're very appreciative of the fact that
7 despite the medical history, you are prepared to come and
8 give evidence before us. So don't feel embarrassed about
9 it at all, just if there's a problem, just tell us. We
10 don't want to be unfair to you. We want, on the other
11 hand, to get the full benefit from what you can tell us
12 about your knowledge about what happened. Right, thank
13 you.

14 MR MPOFU: Chairperson, if I may, just
15 before he starts I just wanted to quickly place something
16 else on record. The absence of the people I represent is
17 due to the current tensions that are building up in the
18 Marikana area. So even apropos the other issues, we're
19 going to use the lunch hour to try and get telephonic
20 instructions but there is that matter, Chair.

21 CHAIRPERSON: Yes, yes, I understand and
22 I hope those tensions will soon be eased and will fall
23 away.

24 MR MPOFU: Thank you, Chairperson.

25 CHAIRPERSON: Ms Baloyi?

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1 call, I think it would be sensible to call it HHH14.1.

2 MS BALOYI: Indeed, Chair.

3 CHAIRPERSON: And that'll be typed
4 version of HHH14. Then the –

5 MR WESLEY: Chair, sorry, might I
6 interrupt at this stage already? I think there's a
7 difficulty here. HHH14, according to my records, is a
8 statement by Lieutenant-Colonel McIntosh.

9 MS BALOYI: 34 is a different one –

10 CHAIRPERSON: - what's described in the
11 index to the bundle.

12 MS BALOYI: Chair, we're checking that,
13 that's what I was trying to –

14 CHAIRPERSON: Alright, while that's being
15 checked may I ask you, Mr Wesley, the statement dated the
16 5th of November 2012 which, according to this index, is
17 HHH44, is that correct?

18 MR WESLEY: No, Chair. That statement
19 according to the records hasn't been handed in. HHH44 is
20 in fact a statement, if I'm not mistaken, it is – I'll tell
21 you now, Chair. No, that is a statement by Captain Loest
22 but it's the typed statement dated 7 November.

23 CHAIRPERSON: Oh, so that's –

24 MR WESLEY: Number 3.

25 CHAIRPERSON: Item 3. Oh dear, so

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1 EXAMINATION BY MS BALOYI: Thank you,
2 Chair. Chair, perhaps if we could start with some
3 housekeeping issues. We've provided a bundle of documents
4 to the Commissioners and the documents have also been sent
5 to the parties. We have an index, Chair, at the front of
6 the bundle.

7 CHAIRPERSON: Yes, so a bit of
8 housekeeping.

9 MS BALOYI: Yes.

10 CHAIRPERSON: So you want to mark some
11 statements?

12 MS BALOYI: Yes, Chair.

13 CHAIRPERSON: We're now in the S-series.

14 MR WELSEY: SSS, Chair.

15 CHAIRPERSON: SSS, alright.

16 MS BALOYI: Yes.

17 CHAIRPERSON: So SSS1 will be – well, the
18 first statement, the first item in your bundle is already
19 an exhibit, it's HHH14.

20 MS BALOYI: Yes.

21 CHAIRPERSON: Then you've got a typed
22 version, is that a typed version of the same document?

23 MS BALOYI: Yes, it's a typed version of
24 the same document.

25 CHAIRPERSON: So that really we will

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1 there's a bit of a problem in relation to this index. I
2 think we did carry – you know we normally try to do the
3 housekeeping at the beginning to save time.

4 MS BALOYI: Yes, Chair.

5 CHAIRPERSON: At the moment we're
6 actually doing the opposite. Let's just carry on –

7 MS BALOYI: Yes, Chair.

8 CHAIRPERSON: - and deal with the
9 statements as we get them and hopefully those supporting
10 you and advising you will get the housework done correctly
11 by the time you get to produce the statement.

12 MS BALOYI: Thank you, Chair. Chair, the
13 one –

14 CHAIRPERSON: Before you get on – Mr
15 Wesley, can you tell us, this statement of the 25th of
16 September, is that, which is described as HHH14, is that
17 not an exhibit at all?

18 MR WESLEY: It's not yet, Chair, not
19 according to our records.

20 CHAIRPERSON: Well, let's make it SSS1
21 then.

22 MR WESLEY: SSS1 Chair and then the typed
23 version would be SSS2.

24 CHAIRPERSON: That's the statement,
25 that's the statement of Captain Loest dated 25 September.

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1 MS BALOYI: Thank you, Chair.
 2 CHAIRPERSON: And then SSS1.1 is the
 3 typed copy of the above, right? Typed copy of SSS. Right,
 4 then the next statement, the 5th of November, you say that's
 5 also a new statement?
 6 MR WESLEY: It's new, Chair.
 7 CHAIRPERSON: So that'll be exhibit SSS2,
 8 that's the statement of 5 November 2012 and then SSS2.1
 9 will be the typed copy of SSS2. And then the next one is
 10 the statement of 7 November, you say that is an exhibit?
 11 MR WESLEY: It's HHH44 –
 12 CHAIRPERSON: We don't have to mark that.
 13 The statement 25th of – sorry, you say that is, what is
 14 that? HHH44, alright. Then we've got a supplementary
 15 statement of 25 January 2014, is that an exhibit?
 16 MR WESLEY: That is not an exhibit, it
 17 should be SSS3, Chair.
 18 CHAIRPERSON: That's the statement of 25
 19 January 2014, that's SSS3. Then the diary will be SSS4, is
 20 that right?
 21 MR WESLEY: That's correct, Chair.
 22 CHAIRPERSON: And then the video is
 23 already before us, KKK2. So we've done the housekeeping.
 24 MS BALOYI: Chair, we have an additional
 25 document that we included which we gave to the

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1 Commissioners and circulated to the parties, that is the CV
 2 and his training record.
 3 CHAIRPERSON: Oh yes. Well, I suspect
 4 that they should have been the first one but never mind.
 5 So we'll call that SSS5, CV of Captain Loest. Alright so
 6 now we've got everything from the housekeeping point of
 7 view under control, so now you can start with the witness.
 8 MS BALOYI: Thank you, Chair, I'm
 9 indebted to the Chair.
 10 CHAIRPERSON: Mr Wesley will be the
 11 timekeeper and you've got half an hour.
 12 MS BALOYI: I will endeavour, Chair, to
 13 achieve that feat.
 14 CHAIRPERSON: No, if you get him to
 15 confirm the statements –
 16 MS BALOYI: Yes.
 17 CHAIRPERSON: And then highlight the – so
 18 then everything you need is before us as evidence.
 19 MS BALOYI: Yes.
 20 CHAIRPERSON: And then you can highlight
 21 the points you consider important.
 22 MS BALOYI: Thank you, Chair, thank you.
 23 Captain Loest, if you would look at the first statement
 24 which we have marked SSS1 and the typed version SSS1.1, you
 25 confirm that is your statement, do you?

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1 CAPTAIN LOEST: That's correct, Chair.
 2 MS BALOYI: And do you confirm the
 3 contents of that statement?
 4 CAPTAIN LOEST: That's correct, Mr Chair.
 5 MS BALOYI: Now if you would do the same
 6 with the statement that we have marked SSS2, the
 7 handwritten statement and it has an unsigned typed version
 8 as SSS2.1, do you confirm that as your statement?
 9 CAPTAIN LOEST: That's correct, Mr Chair.
 10 MS BALOYI: Do you confirm the contents
 11 and the signature?
 12 CAPTAIN LOEST: That's correct.
 13 MS BALOYI: Then if you would look at the
 14 next statement which we have marked, which is SSS – no, it
 15 is HHH44, that is item 3, the one that we've marked 3, do
 16 you confirm –
 17 CHAIRPERSON: The statement of the 7th of
 18 November 2012.
 19 CAPTAIN LOEST: That's correct, Mr Chair.
 20 CHAIRPERSON: You confirm that as well.
 21 MS BALOYI: And then lastly if you look
 22 at the statement SSS3 that we've just marked SSS3 – SSS3
 23 yes, the supplementary statement and that's the statement
 24 of the 25th of January 2014, you confirm the content of that
 25 statement?

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1 CAPTAIN LOEST: That's correct, Mr Chair.
 2 MS BALOYI: And you confirm the
 3 signature.
 4 CAPTAIN LOEST: That's correct.
 5 MS BALOYI: Yes. Now perhaps if I can
 6 just on this last statement, the supplementary statement,
 7 is it correct that this statement was prepared by the
 8 evidence leaders, Mr Wesley, after your consultation with
 9 him?
 10 CAPTAIN LOEST: That's correct, Chair.
 11 MS BALOYI: Now Captain Loest, we've also
 12 – when did you join the SAPS?
 13 CAPTAIN LOEST: 1986, Chair.
 14 MS BALOYI: 1986.
 15 CAPTAIN LOEST: Correct.
 16 MS BALOYI: And are you still employed at
 17 SAPS?
 18 CAPTAIN LOEST: No, I'm currently
 19 medically boarded.
 20 MS BALOYI: With effect from?
 21 CAPTAIN LOEST: From the 28th of February
 22 2014.
 23 MS BALOYI: And the reason for your
 24 medical boarding is what?
 25 CAPTAIN LOEST: I was diagnosed on the

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1 14th of February 2013 with post-traumatic stress disorder
2 and major depression.
3 MS BALOYI: Yes.
4 CAPTAIN LOEST: And subsequently boarded.
5 MS BALOYI: And you've received treatment
6 for this condition?
7 CAPTAIN LOEST: I'm currently still under
8 treatment, yes.
9 MS BALOYI: Now you have before you a
10 copy of your training record and CV, according to that
11 document at some point you started out as a member of the
12 POP, am I correct?
13 CAPTAIN LOEST: That's correct, Mr Chair.
14 MS BALOYI: When did you join the TRT?
15 CAPTAIN LOEST: In 2011, Chair.
16 MS BALOYI: And in the time that you were
17 a member of the POP did you receive the POP training?
18 CAPTAIN LOEST: That's correct, Mr Chair.
19 MS BALOYI: Now, let's proceed and deal
20 with the events of the 13th of August. You said in your
21 statement, in your various statements and specifically in
22 the further statement, in the supplementary statement you
23 state that you were involved in the incident of the 13th of
24 August, am I correct?
25 CAPTAIN LOEST: That's correct, Chair.

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1 MS BALOYI: Yes, and you state there that
2 you were flying with Colonel Vermaak.
3 CAPTAIN LOEST: That's correct, Chair.
4 MS BALOYI: Just for the record, just to
5 confirm for the record, do you know – we know from the
6 evidence that has been led before the Commission that at
7 some point teargas was thrown and the police were attacked.
8 Do you know why the first teargas was thrown by police?
9 CAPTAIN LOEST: No, Mr Chair, I can't - I
10 bear no knowledge of that.
11 MS BALOYI: When you were in the
12 helicopter with Colonel Vermaak were you able, before the
13 teargas was thrown were you able to see what was happening
14 on the ground with strikers?
15 CAPTAIN LOEST: No, Mr Chair, I did not.
16 MS BALOYI: Now we know –
17 CHAIRPERSON: Captain, sorry, Lieutenant-
18 Colonel Vermaak said that as far as he could see the group
19 of strikers were just moving forward but ultimately it
20 would appear in the direction of the koppie, although he
21 wouldn't have known precisely in which direction they were
22 moving. He said he couldn't see any deviation either to
23 the right or the left and he says he actually asked, he
24 actually said to you why was the teargas thrown because he
25 couldn't see any reason why that should have happened. Do

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1 you confirm that that's correct?
2 CAPTAIN LOEST: That's correct, Mr Chair.
3 MS BALOYI: Now, when we – we know that
4 the helicopter landed and you deal with this in paragraph 5
5 of your supplementary statement at page 2, paragraph 5
6 where you say that "Lieutenant-Colonel Vermaak ordered the
7 helicopter to land after he saw a SAPS member on the
8 ground," do you see that?
9 CAPTAIN LOEST: Yes, I do, Chair.
10 MS BALOYI: And you give details of who
11 this SAPS member was. Now when the, after the helicopter
12 landed what did you do?
13 CAPTAIN LOEST: I then basically went off
14 to go and assist Warrant Officer Monene to see what is the
15 medical problem with him and then Colonel Vermaak asked me,
16 he needed some TRT members and I gave a couple of members
17 instruction to go with him.
18 MS BALOYI: Did Colonel Vermaak tell you,
19 when he said to you he needed some TRT members did he tell
20 you why he needed the TRT members?
21 CAPTAIN LOEST: He just indicated that he
22 wanted to go and attend to something, that's all.
23 MS BALOYI: That is all he said to you?
24 CAPTAIN LOEST: That's correct, Chair.
25 MS BALOYI: Now, and again after you

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1 landed did you see General Mpembe on the ground?
2 CAPTAIN LOEST: Mr Chair, I can't
3 specifically recall that I saw him directly after he landed
4 but I knew he was there somewhere on the ground.
5 MS BALOYI: Did you at any point while
6 you were on the ground, did you at any point speak to
7 General Mpembe?
8 CAPTAIN LOEST: Mr Chair, if I can recall
9 correctly I might have spoken to him but I can't really
10 recall the contents of the conversation.
11 MS BALOYI: And do you remember anything
12 about his demeanour? I know you're struggling to remember
13 but do you remember anything at all about his demeanour?
14 CAPTAIN LOEST: Mr Chair, ja, he was – it
15 was quite a tense situation so he was running up and down
16 and things were hectic at that stage.
17 MS BALOYI: Now, you state that you then
18 helped load Lieutenant Baloyi onto the helicopter and you
19 went off to hospital. Somewhere else you do explain what
20 happened at the hospital. Now after you had taken
21 Lieutenant Baloyi to hospital, did you return to the scene
22 where the incident with the miners happened?
23 CAPTAIN LOEST: That's correct, Chair.
24 MS BALOYI: In fact let me ask you,
25 before you left, after Colonel Vermaak had said to you, you

<p style="text-align: right;">Page 28301</p> <p>1 should give him TRT members, did you see him again before</p> <p>2 you left the scene to take Lieutenant Baloyi to hospital?</p> <p>3 CAPTAIN LOEST: No, Mr Chair.</p> <p>4 MS BALOYI: Now after you had been to</p> <p>5 hospital did you return to the scene?</p> <p>6 CAPTAIN LOEST: That's correct, Chair.</p> <p>7 MS BALOYI: And when you returned to the</p> <p>8 scene did you find General Mpmembe back at the scene?</p> <p>9 CAPTAIN LOEST: Mr Chair, like I said, I</p> <p>10 can recall he was on the scene but I can't specifically</p> <p>11 remember that I did have a specific discussion with him</p> <p>12 with regard to –</p> <p>13 CHAIRPERSON: No, no, the question is a</p> <p>14 slightly different one. According to your statement you</p> <p>15 confirmed, what you did immediately after you arrived is</p> <p>16 you actually went to Monene to try to resuscitate him.</p> <p>17 Have you got first aid training of any kind?</p> <p>18 CAPTAIN LOEST: Yes, I do, sir.</p> <p>19 CHAIRPERSON: I see. You tried to</p> <p>20 resuscitate him, I think you said for about 20 minutes,</p> <p>21 then I take it you realised that there was no point, he was</p> <p>22 dead and there's no way he could be resuscitated, is that</p> <p>23 right?</p> <p>24 CAPTAIN LOEST: That's correct, Mr Chair.</p> <p>25 CHAIRPERSON: You then turned to</p>	<p style="text-align: right;">Page 28303</p> <p>1 CHAIRPERSON: He was there. And then the</p> <p>2 evidence is that he was then taken away by vehicle.</p> <p>3 CAPTAIN LOEST: That's correct, Chair.</p> <p>4 CHAIRPERSON: And you saw him leaving in</p> <p>5 the vehicle?</p> <p>6 CAPTAIN LOEST: Yes, that's correct, sir.</p> <p>7 CHAIRPERSON: I think that's the point</p> <p>8 that counsel put to you.</p> <p>9 MS BALOYI: Thank you, Chair, thank you.</p> <p>10 Now Captain, when you came back to the scene did you see</p> <p>11 Colonel Vermaak?</p> <p>12 CAPTAIN LOEST: Yes, I did.</p> <p>13 MS BALOYI: Did you speak with him?</p> <p>14 CAPTAIN LOEST: Yes, Mr Chair, I did.</p> <p>15 MS BALOYI: Now we've heard from Colonel</p> <p>16 Vermaak evidence that certain threats were made regarding</p> <p>17 the life, to the life of General Mpmembe. Do you know</p> <p>18 anything about it?</p> <p>19 CAPTAIN LOEST: Mr Chair, only what</p> <p>20 Colonel Vermaak told me. I didn't witness or anything</p> <p>21 else.</p> <p>22 MS BALOYI: What did Colonel Vermaak say</p> <p>23 to you?</p> <p>24 CAPTAIN LOEST: Colonel Vermaak just</p> <p>25 informed me that some members made a threat towards General</p>
<p style="text-align: right;">Page 28302</p> <p>1 Lieutenant Baloyi, saw he was injured and you in fact</p> <p>2 accompanied him to the hospital as you've told us.</p> <p>3 CAPTAIN LOEST: That's correct.</p> <p>4 CHAIRPERSON: Now what counsel wants to</p> <p>5 know from you is, when you came back – I don't know if it's</p> <p>6 possible for you to tell us roughly how long that was after</p> <p>7 the initial landing. You landed, you were about 20 minutes</p> <p>8 with Monene, you then spent some time with Baloyi and then</p> <p>9 went with him to hospital and then came back. Now what,</p> <p>10 can you tell us more or less what the time lapse was</p> <p>11 between your original arrival when the helicopter landed</p> <p>12 the first time and your return from the hospital?</p> <p>13 CAPTAIN LOEST: Mr Chair, I would say</p> <p>14 most probably an hour.</p> <p>15 CHAIRPERSON: An hour.</p> <p>16 CAPTAIN LOEST: More or less.</p> <p>17 CHAIRPERSON: Okay. When you got back,</p> <p>18 you told us I think when you – the first time when you</p> <p>19 landed there was a hectic scene, I think you said, and</p> <p>20 General Mpmembe was walking or running, I'm not sure which</p> <p>21 it is, moving quite fast around but you can't remember</p> <p>22 whether you actually spoke to him. When you came back from</p> <p>23 the hospital was he still there?</p> <p>24 CAPTAIN LOEST: Mr Chair, yes, if I</p> <p>25 recall correctly he was still there on the scene.</p>	<p style="text-align: right;">Page 28304</p> <p>1 Mpmembe and that he wants to remove him from the scene.</p> <p>2 MS BALOYI: Did he tell you who these</p> <p>3 members were?</p> <p>4 CAPTAIN LOEST: No, Mr Chair, he did not.</p> <p>5 MS BALOYI: Now you, you are TRT based in</p> <p>6 the North-West?</p> <p>7 CAPTAIN LOEST: That's correct, Mr Chair.</p> <p>8 [10:41] MS BALOYI: Yes. And to this day do you</p> <p>9 know, do you know the identities of the members, the TRT</p> <p>10 members or the members rather that Colonel Vermaak alleges</p> <p>11 made threats to the life of General Mpmembe?</p> <p>12 CAPTAIN LOEST: No, Mr Chair, not at all.</p> <p>13 CHAIRPERSON: You, according to his</p> <p>14 evidence and I think you confirmed this, you got together a</p> <p>15 number of TRT people to accompany him. He wanted to go off</p> <p>16 to do something. You said you weren't quite sure what it</p> <p>17 was. He told us what it was but you don't know what it</p> <p>18 was. Can you tell us who those people were? Or firstly,</p> <p>19 how many were – you got a group of members of the police</p> <p>20 service together to accompany him on this mission he was</p> <p>21 going on. That's right, isn't it?</p> <p>22 CAPTAIN LOEST: That's correct, Mr Chair.</p> <p>23 CHAIRPERSON: Approximately how many?</p> <p>24 CAPTAIN LOEST: Mr Chair, I'm not 100%</p> <p>25 sure, most probably 10, 15.</p>

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1 CHAIRPERSON: 10, 15. Can you, do you
2 know who they were?
3 CAPTAIN LOEST: No, sir. I just called a
4 couple of members that were in the vicinity and I
5 instructed to go with the General, with the Colonel.
6 CHAIRPERSON: So you can't assist us in
7 identifying any of those people?
8 CAPTAIN LOEST: No, I can't.
9 CHAIRPERSON: I see. The people who,
10 according to Colonel Vermaak, made the threat to him and
11 it's not suggested, as I understand the evidence, that they
12 actually went to Mpmembe and threatened him to his face,
13 they effectively made threats to Lieutenant-Colonel Vermaak
14 on what they wanted, what was going to happen to General
15 Mpmembe. So they were part of that group of 10 or 15 but
16 you can't help us to identify them?
17 CAPTAIN LOEST: No sir, unfortunately
18 not.
19 MS BALOYI: Now perhaps some final
20 questions on the 13th. We heard from the evidence of
21 Colonel Vermaak that when he was in the chopper while you
22 were still flying the chopper, he saw a striker running off
23 with an R5 rifle. Did you see that?
24 CAPTAIN LOEST: No, Mr Chair, I did not.
25 MS BALOYI: And we also heard him say

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1 that he, from the chopper he saw the strikers carrying an
2 injured striker who was wearing white overalls and running
3 away from the scene with him. Did you see that?
4 CAPTAIN LOEST: No, Mr Chair, I didn't
5 see that either.
6 MS BALOYI: Now if you would turn to –
7 COMMISSIONER HEMRAJ: Just before that,
8 initially when Colonel Vermaak asked for a few members and
9 went off in a particular direction, was he armed with
10 anything, that's Vermaak himself?
11 CAPTAIN LOEST: Mr Chair, I think he had
12 his sidearm with him if I remember correctly.
13 CHAIRPERSON: Did he have any other
14 weapon with him as far as you can remember?
15 CAPTAIN LOEST: No.
16 CHAIRPERSON: Was his sidearm in his hand
17 or in the holster?
18 CAPTAIN LOEST: Mr Chair, no, his firearm
19 was holstered in his sidearm, in his holster.
20 CHAIRPERSON: So as far as you can recall
21 he didn't have anything in his hands.
22 CAPTAIN LOEST: No, sir.
23 COMMISSIONER HEMRAJ: And those members
24 that accompanied him would have had what weapons in
25 addition to their sidearms?

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1 CAPTAIN LOEST: Well, as standard
2 procedure, they had R5s with them.
3 COMMISSIONER HEMRAJ: All of them?
4 CAPTAIN LOEST: Mr Chair, no, I can't
5 comment on that. I can't really recall if all of them had
6 R5s but they were dressed in full operational uniform.
7 COMMISSIONER HEMRAJ: And these R5s they
8 had in their possession throughout the operation,
9 throughout the time that you saw them on the 13th?
10 CAPTAIN LOEST: Yes, I presume so, Mr
11 Chair.
12 COMMISSIONER HEMRAJ: Thank you.
13 MS BALOYI: Captain Loest, whilst you
14 were at the scene, you were back at the scene from
15 hospital, did you hear any members or in your presence did
16 any members complain about the manner in which General
17 Mpmembe had managed the operation?
18 CAPTAIN LOEST: No, Mr Chair, no-one.
19 MS BALOYI: Did you hear any allegation
20 that General Mpmembe had ordered that members should leave
21 their weapons in the vehicles?
22 CAPTAIN LOEST: No, Mr Chair, I did not.
23 MS BALOYI: Now if you would then look at
24 paragraph 6 of that same statement and this is now about
25 the operation of the 16th and you say there, "On 16 August I

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1 attended the JOC meeting early in the morning. The plan in
2 respect of the TRT was the same as the previous day." Now
3 if you may please, what was the plan of the TRT in the
4 previous day?
5 CAPTAIN LOEST: Mr Chair, the TRT was
6 supposed to be behind the POPS contingent and assist to
7 cover basically their back and just to create a safe area
8 behind the POPS line.
9 COMMISSIONER HEMRAJ: And the POPS line
10 would be deployed where?
11 CAPTAIN LOEST: Mr Chair, approximately
12 100 metres behind the POPS line.
13 COMMISSIONER HEMRAJ: Are you talking
14 about the negotiating Nyalas, that line?
15 CAPTAIN LOEST: That's correct, Mr Chair.
16 MS BALOYI: Yes and then you say, in the
17 fourth line you say "The TRT would deploy about 50 metres
18 behind the POP." Do you see that?
19 CAPTAIN LOEST: That's correct, Mr Chair.
20 MS BALOYI: Is that correct? Is that –
21 CAPTAIN LOEST: No, that's not correct.
22 I only established afterwards it was a bit further, 100
23 metres and not 50 metres.
24 MS BALOYI: So do you want to make a
25 correction, correction to what you say in that line?

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1 CAPTAIN LOEST: Yes, I would like to
 2 correct that 50 to 100 metres.
 3 MS BALOYI: Then you say, "I deployed the
 4 TRT vehicles facing east and west alternatively with one
 5 vehicle facing south and one vehicle facing north." Was
 6 this, are you describing here the deployment of the
 7 vehicles on the 16th, am I correct?
 8 CAPTAIN LOEST: That's correct, Chair.
 9 MS BALOYI: Yes and what time is this
 10 when you positioned the vehicles in this way that you
 11 describe?
 12 CAPTAIN LOEST: Mr Chair, approximately
 13 about 9 o'clock.
 14 MS BALOYI: Then you say, "The purpose of
 15 the TRT was to provide support and backup for POPS.
 16 Brigadier Calitz was positioned in the middle of the POPS
 17 line inside the negotiation Nyala. He was our operational
 18 commander and he was to give us instructions." Do you see
 19 that?
 20 CAPTAIN LOEST: I do, Mr Chair.
 21 MS BALOYI: What instructions was
 22 Brigadier Calitz to give that you refer to here?
 23 CAPTAIN LOEST: Any further instructions
 24 regarding the operation as the day would proceed.
 25 MS BALOYI: Now, what was your

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1 understanding of what was to happen with the operation on
 2 that day, from the JOCCOM meeting in the morning, what was
 3 your understanding of what would happen with the operation?
 4 CAPTAIN LOEST: According to my
 5 knowledge, Mr Chair, at some stage the POP members would
 6 start an operation to disarm the striking workers.
 7 MS BALOYI: And the role of the TRT would
 8 be what, in that operation?
 9 CAPTAIN LOEST: The TRT was there to be a
 10 backup for the POP members.
 11 MS BALOYI: And where you speak about
 12 Brigadier Calitz would give instructions, is that – the
 13 instruction you're talking about, is that the instruction
 14 to disarm, is that what you're referring to?
 15 CAPTAIN LOEST: Mr Chair, yes. According
 16 to my knowledge the POPS members would do that specific
 17 task and the TRT would only be there in support of the POPS
 18 members and then any other instructions that would have
 19 come, would have come from Brigadier Calitz himself.
 20 MS BALOYI: Yes. Now before, before we
 21 move on to the next paragraph, just so that I don't forget
 22 about this, can we just go back to the events of the 13th
 23 and just finish off one point? Now we know from the
 24 evidence so far that on the 13th during the incident
 25 involving the police and the strikers, stun grenades and

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1 teargas were thrown from the helicopter. We know that from
 2 the evidence. Why did you, in the chopper, do that?
 3 CAPTAIN LOEST: Mr Chair, Colonel Vermaak
 4 started throwing teargas and stun grenades towards the
 5 striking workers to disperse them because I think at that
 6 stage he was able to see that somebody got injured at the
 7 bottom on the ground.
 8 COMMISSIONER HEMRAJ: You did not throw
 9 any?
 10 CAPTAIN LOEST: Mr Chair, no, I just
 11 assisted him in taking the grenades out of the canisters
 12 and passing it on to him.
 13 MS BALOYI: Yes. Now, you've explained
 14 that Brigadier Calitz would give instructions and that the
 15 role of the TRT was to provide backup. Now was the TRT
 16 briefed to participate in any crowd management activity on
 17 the 16th?
 18 CAPTAIN LOEST: Mr Chair, if I can recall
 19 correctly, our role was solely a support role of POP and
 20 not specifically participating in a crowd management
 21 situation.
 22 MS BALOYI: Now if you then go to the
 23 next page, paragraph 7, you say "I attended a meeting at
 24 forward holding area 1 where Colonel Scott said that the
 25 POPS would try to contain the protesters and that if that

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1 did not happen and protesters broke through during the
 2 dispersion action, then the TRT would form up in a basic
 3 line and stand their ground and by doing so discourage the
 4 protesters from resisting dispersion and disarming."
 5 Please explain how this was to happen?
 6 CAPTAIN LOEST: Mr Chair, basically what
 7 would have happened there was the members of TRT, their
 8 equipment looks different to, our attire that we wear is
 9 different to those of POPS and what we would have tried to
 10 establish there was with our mere presence the protesters
 11 would be discouraged to carry on with whatever they were
 12 doing.
 13 CHAIRPERSON: This meeting you refer to
 14 here in paragraph 7 at the forward holding area number 1,
 15 what time did that take place?
 16 CAPTAIN LOEST: Mr Chair, I stand
 17 corrected but I think it was 14:30.
 18 CHAIRPERSON: Thank you.
 19 MS BALOYI: Now then you go on to say,
 20 "After the briefing of Colonel Scott, Brigadier Calitz made
 21 it clear to the TRT commanders that no instruction for the
 22 use of live ammunition would be given by any commander and
 23 that each member will have his own decision in deciding if
 24 his life is in danger to justify action in self-defence."
 25 Now this, this discussion or this discussion by Brigadier

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1 Calitz, does it happen in the same briefing by Colonel
 2 Scott at 2:30? Is it the same briefing?
 3 CAPTAIN LOEST: Mr Chair, no. That
 4 happened on the scene. All the commanders were called
 5 together and Brigadier Calitz gave us a quick briefing on
 6 the scene as well.
 7 MS BALOYI: And this was after the
 8 briefing by Colonel Scott?
 9 CAPTAIN LOEST: That's correct, Mr Chair.
 10 MS BALOYI: Now following the briefing by
 11 Brigadier Calitz, did you do any briefing of your members?
 12 CAPTAIN LOEST: That's correct, Mr Chair.
 13 After that I went to the members and I briefed them of what
 14 I was briefed and informed them of the instructions.
 15 MS BALOYI: What was your briefing to
 16 your members?
 17 CAPTAIN LOEST: That the members would at
 18 some stage get an instruction to form up and form a basic
 19 line and if at some stage things would happen that the POPS
 20 line would be broken and the protesters would come through,
 21 we would stand our ground and not act at all. We will not
 22 get a command to do anything but just to stay in a basic
 23 line and to keep the protesters at bay.
 24 MS BALOYI: Now in the briefing by
 25 Colonel Scott at 2:30 did he say anything about what the

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1 role or the use of barbed wire would be?
 2 CAPTAIN LOEST: The barbed wire was
 3 basically to keep the protesters and the police apart as
 4 well as to protect the police and to form, it will form
 5 part of the operation to lead the protesters in a specific
 6 area and to make a certain area safe for the police to work
 7 in properly.
 8 MS BALOYI: And in this briefing, did
 9 Colonel Scott say anything about the manner in which the
 10 barbed wire, not the positioning but the how, how the
 11 barbed wire was to be deployed?
 12 CAPTAIN LOEST: That's correct, Mr Chair.
 13 Colonel Scott instructed the members to throw the wire
 14 simultaneously to form a defensive barrier between the
 15 members of the police and the protesters.
 16 MS BALOYI: Now in this, in the same
 17 statement at paragraph 13 you say, "In my experience of 27
 18 years dealing with crowd management incidents, the
 19 simultaneous deployment of barbed wire in itself creates a
 20 threat as it crosses gaps between barriers which need to be
 21 physically guarded by members on foot, which increases
 22 their vulnerability. The staggered deployment of barbed
 23 wire eliminates the requirement of additional personnel and
 24 ensures a solid barrier." Do you see that?
 25 CAPTAIN LOEST: I do, Mr Chair.

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1 MS BALOYI: Did you raise this in the
 2 briefing by Colonel Scott?
 3 CAPTAIN LOEST: No, I did not, Mr Chair.
 4 MS BALOYI: Why not?
 5 CAPTAIN LOEST: Mr Chair, at that stage I
 6 was a member of TRT and I felt that the POP commanders
 7 should have addressed that with Colonel Scott with regard
 8 to the deployment of the barbed wire.
 9 MS BALOYI: Yes.
 10 COMMISSIONER HEMRAJ: When you say the
 11 barbed wire in itself creates a threat, to whom is that
 12 threat created?
 13 CAPTAIN LOEST: Mr Chair, no, not a
 14 threat, the barbed wire itself but simultaneous deployment
 15 sometimes creates a gap between different wire carts being
 16 dropped, which in turn you then have to place members to
 17 fill that gap whereas staggered deployment creates a solid
 18 barrier. Where the one Nyala stops, the next wire starts
 19 so it's tied together and you form a solid barrier.
 20 CHAIRPERSON: But the answer to the
 21 question, sorry, is that the threat that you're talking
 22 about is a threat to the police and if you do it
 23 simultaneously you'll have these gaps. The police behind
 24 it won't be properly protected because of the gap. So
 25 therefore, as you say, the gap has to be physically

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1 guarded, but when you talk about a threat you mean
 2 obviously a threat to the police members behind the
 3 barrier. That must be right.
 4 CAPTAIN LOEST: That's correct, Mr Chair.
 5 MS BALOYI: Thank you, Chair. And then
 6 you say at paragraph 8, "The TRT formed up behind the POP
 7 Nyalas. During the deploying of the barbed wire I saw the
 8 protesters walking next to one of the Nyalas busy deploying
 9 the wire. The protesters did try to get in front of the
 10 Nyala which was busy deploying the barbed wire but were
 11 prevented by the same Nyala cutting them off. At that
 12 stage I instructed TRT members under my command to form a
 13 basic line behind POP facing north and the members
 14 deployed. During the formation of the basic line the
 15 members drew and cocked their firearms as it is a standard
 16 procedure for operational readiness." Now you, in the
 17 previous paragraph we've made the correction that the TRT
 18 was to stay 100 metres behind the POP. Now this action
 19 that you're describing in paragraph 8, the basic line that
 20 was formed, was that in accordance with the plan as you
 21 describe it in the previous paragraph at page, paragraph 6?
 22 CAPTAIN LOEST: No, Mr Chair. If
 23 everything went according to plan we would have not acted
 24 the way that we did and I had to make a call on the scene
 25 to get our members ready for if something does go wrong and

<p style="text-align: right;">Page 28317</p> <p>1 I called the members up and asked them to form a basic line 2 because I could see from behind me that the protesters were 3 trying to get in front of the Nyala that are busy deploying 4 the wire and to come into the safety area or should is say 5 safety zone that we created. 6 CHAIRPERSON: Before you carry on, 7 perhaps just for clarity I'd like to ask you a question. 8 The evidence is that there was a small kraal, I think you 9 talk somewhere about the kraal and we call it the small 10 kraal. Now as you were facing the koppie, the barbed wire 11 was in front of you and the strikers were on the other 12 side, on the koppie side of the wire. Now you talk here 13 about the protesters trying to get in front of the Nyala 14 which is busy deploying the barbed wire but were prevented 15 by the Nyala cutting them off. Now am I correct in 16 thinking that he cut them off by proceeding to the left- 17 hand side as you face the koppie, of that small kraal? Is 18 that correct? 19 CAPTAIN LOEST: Correct, Mr Chair. 20 CHAIRPERSON: And that's the Nyala which 21 we call the Nyala number 4. I don't know if you know that 22 but there were six Nyalas – 23 CAPTAIN LOEST: I didn't know that – 24 CHAIRPERSON: - we call that Nyala number 25 4. Now this basic line that you're talking about that you</p>	<p style="text-align: right;">Page 28319</p> <p>1 you faced the koppie or the right-hand side? 2 CAPTAIN LOEST: Mr Chair, I think it was 3 the left-hand side if I can remember correctly? 4 MS BALOYI: Chairperson, I just want to 5 confirm, I'm getting distracting indications from Mr Wesley 6 that my time is up. I'm assuming that I do have some grace 7 because of the intervention of the Commission – 8 CHAIRPERSON: I've used up some of your 9 time so you can use up the time that – 10 MS BALOYI: Thank you. 11 CHAIRPERSON: - I took away from you. 12 MS BALOYI: Now Captain, you've just 13 described in paragraph 8 the movement of the strikers and 14 we have also throughout the evidence of other witnesses 15 seen visuals of what transpired there. And we know that 16 the TRT did discharge firearms. What was your observation 17 when the TRT discharged their weapons? I need you to give 18 a description of what was happening at that time. 19 CAPTAIN LOEST: Mr Chair, as the first 20 shots were fired I observed most of the shots were fired 21 into the ground in front of the protesters. 22 MS BALOYI: Yes and why in the first 23 place were shots discharged into the ground? Why did TRT 24 members fire, on your observation of what was happening 25 there?</p>
<p style="text-align: right;">Page 28318</p> <p>1 instructed the TRT members to form, where was that? Was 2 that on the left-hand side as you face the koppie, of the 3 kraal, or on the other side, on the right-hand side of the 4 kraal or did you form two, did you give instruction 5 ultimately for the formation of two basic lines, one after 6 the other? 7 CAPTAIN LOEST: Mr Chair, I only 8 instructed the members from TRT. I later realised that the 9 members of NIU filled in behind us, a couple of metres 10 behind us but we faced northwards. 11 CHAIRPERSON: Northwards means towards 12 the koppie, I take it. 13 CAPTAIN LOEST: No sir, towards the 14 village – 15 CHAIRPERSON: Towards Nkaneng. 16 [11:01] CAPTAIN LOEST: The south-eastern side 17 of, if you look at the kraal, I would say if you look at 18 the kraal, the south-eastern side of the kraal, just before 19 the kraal there's a dirt road. 20 CHAIRPERSON: Yes. 21 CAPTAIN LOEST: Just before that dirt 22 road we basically formed up there. 23 CHAIRPERSON: Yes. Now were you on the 24 left-hand side as you faced the koppie, the left-hand side, 25 was the basic line on the left-hand side of the kraal as</p>	<p style="text-align: right;">Page 28320</p> <p>1 CAPTAIN LOEST: I think the members felt 2 threatened and that is why they fired. 3 MS BALOYI: Yes. What I'm asking you to 4 describe, Captain, is the strikers, where were the strikers 5 and what were they doing at that point shortly before the 6 shooting by the TRT and during the shooting by the TRT? 7 CAPTAIN LOEST: They, the strikers 8 basically went around the kraal – 9 MS BALOYI: Yes. 10 CAPTAIN LOEST: - and because the last 11 Nyala stopped on the southern edge of the kraal and then 12 the strikers went around the kraal and as they came round 13 the kraal facing us, they started crouching in a tight 14 formation towards the TRT line-up and I could clearly see 15 that a lot of them had fire – sorry, weapons in their hands 16 and they were charging us. 17 MS BALOYI: Did anyone give an order for 18 the TRT to fire? 19 CAPTAIN LOEST: Mr Chair, no. That is 20 not what happened at all. I, as the briefing I received, I 21 instructed my members as well that no command will be given 22 to use live ammunition and that each member would have to 23 act on his own if he felt threatened, that he would act in 24 self-defence. 25 MS BALOYI: Now Captain, we know from the</p>

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1 video evidence that we've seen that the shooting lasts for
2 eight seconds, I think. Your impression, that shooting in
3 that time, did it deal with the threat that you saw?
4 CAPTAIN LOEST: Yes, I do, Mr Chair.
5 MS BALOYI: Now we also know from the
6 video evidence and from your statement that you were one
7 of the members that shouted "cease fire" at some point.
8 Were you the first member to shout "cease fire?"
9 CAPTAIN LOEST: No, I was not, Mr Chair.
10 MS BALOYI: And when you did shout "cease
11 fire," why did you shout "cease fire?"
12 CAPTAIN LOEST: Mr Chair, there was no
13 imminent threat anymore, that's why I gave the instruction
14 to cease fire.
15 MS BALOYI: Yes. Did you at any point
16 during this operation discharge your firearm on that day?
17 CAPTAIN LOEST: No, Mr Chair, I did not.
18 MS BALOYI: The reason being? Why did
19 you not fire?
20 CAPTAIN LOEST: Mr Chair, I was in
21 command of that line-up and my role on that line-up was to
22 command and control the members with me and not – well, ja,
23 basically to command and control the members.
24 MS BALOYI: We've also seen from the
25 video evidence or heard from the sound evidence that after

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1 the calls to cease fire there was a continuation of some
2 sporadic shooting. Did you become aware of that?
3 CAPTAIN LOEST: Mr Chair, yes, afterwards
4 when I saw the videos I did hear some of the shots going
5 off after the cease fire instructions were given.
6 MS BALOYI: And do you know why that
7 shooting continued?
8 CAPTAIN LOEST: I've got no idea. I
9 can't speculate on that, why specific members fired. I
10 couldn't see what they saw.
11 MS BALOYI: Yes. Now we also have seen,
12 we've seen from the video evidence as well that immediately
13 after the shooting we have visuals of members of the SAPS
14 who are amongst the strikers who are lying down. Now did –
15 and we know that medical assistance was not provided by any
16 of the members there. Do you know if any of your members
17 that were with you that day have first aid training?
18 CAPTAIN LOEST: Mr Chair, all the members
19 that were with me on that scene that day, none of them had
20 medical training except myself.
21 MS BALOYI: And you did not provide
22 medical assistance.
23 CAPTAIN LOEST: No, Mr Chair, I did not.
24 MS BALOYI: Why not?
25 CAPTAIN LOEST: Mr Chair, at that stage I

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1 was the commander of those members, I had to first of all
2 safeguard the scene, make sure that the scene is safe so I
3 can get the medical people, the medical personnel in as
4 quickly as possible to attend to the injured and then
5 secondly, to attend to my members that were at that stage
6 already quite traumatised.
7 MS BALOYI: Now we know from the evidence
8 including the transcript of your telephone calls that you
9 called Brigadier Pretorius.
10 CAPTAIN LOEST: That's correct, Mr Chair.
11 MS BALOYI: And you say that you called,
12 in your statement you say that you called her to arrange
13 and, among other things, you asked her to arrange for
14 medics.
15 CAPTAIN LOEST: That's correct, Mr Chair.
16 MS BALOYI: Now you also speak in your
17 statement to you giving instructions to members to remove
18 weapons from the scene. Why did you do that?
19 CAPTAIN LOEST: Mr Chair, first of all
20 the scene had to be safeguarded and for the members of the
21 police to safeguard the scene properly there must be no
22 threat and as well as the medical personnel need to work in
23 a safe environment as well. So I gave an instruction that
24 all persons lying down or that are still at the scene need
25 to be searched and all weapons and firearms found need to

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1 be removed and then only after that I can then basically
2 declare the scene safe. The members can then hold the
3 perimeter and the medical teams can come in and attend to
4 the injured.
5 MS BALOYI: Now we know that at some
6 point the medics did arrive. Were you still at the scene?
7 CAPTAIN LOEST: Yes, I was, Mr Chair.
8 MS BALOYI: And are you aware of any
9 member having prevented any of the medical personnel to
10 attend to the injured people?
11 CAPTAIN LOEST: Not at all, ma'am.
12 MS BALOYI: Now the communication with
13 Brigadier Pretorius, that was by cell phone.
14 CAPTAIN LOEST: That is correct, Mr
15 Chair.
16 MS BALOYI: Is that the only
17 communication that you had?
18 CAPTAIN LOEST: No, Mr Chair, I had a
19 hand radio as well but due to interference I could not
20 communicate with anyone with my hand radio and then I used
21 the telephone.
22 MS BALOYI: And do you know if any of
23 your members were able, did communicate with anyone on
24 their radios?
25 CAPTAIN LOEST: Mr Chair, I think after

<p style="text-align: right;">Page 28325</p> <p>1 several attempts failed, I think members just left the 2 radios and started communicating via telephone. 3 MS BALOYI: Finally, Captain, we know 4 that post the events in Marikana there was a session at 5 Roots convened by the SAPS. Did you attend that session, 6 any part of it? 7 CAPTAIN LOEST: Yes, I did, Mr Chair. 8 MS BALOYI: Thank you, Chair, those are 9 our questions. 10 CHAIRPERSON: Thank you. I think Mr 11 Mojapelo had better keep the time to make sure that Mr 12 Wesley doesn't go over. Mr Wesley, cross-examination on 13 behalf of the evidence leaders? 14 CROSS-EXAMINATION BY MR WESLEY: Thank 15 you, Chair. If we could – sorry, Captain, let me get 16 something, just something formal out of the way. Do I 17 address you now as Captain or Mister? Which is the better 18 way to do it? Shall we stick to Captain - 19 CAPTAIN LOEST: Mr Chair, you can address 20 me any way you want. 21 MR WESLEY: I'm used to Captain, so let's 22 stick to Captain. 23 CAPTAIN LOEST: That's fine. 24 MR WESLEY: Captain, in paragraph 4 of 25 your supplementary statement you deal with the events of</p>	<p style="text-align: right;">Page 28327</p> <p>1 very difficult to hear exactly what was happening and what 2 instructions were given on the ground. 3 MR WESLEY: Okay, let me ask you this 4 then. Did you hear any instructions being given over the 5 radio about the firing of teargas maybe or using stun 6 grenades or things to that effect? 7 CAPTAIN LOEST: No, Mr Chair, not at all. 8 CHAIRPERSON: You said earlier that, 9 about what Lieutenant-Colonel Vermaak had said to you when 10 you saw the first teargas being fired. Immediately prior 11 to that did you hear anything said on the radio about 12 teargas or stun grenades or anything of that kind? 13 CAPTAIN LOEST: No, Mr Chair, not at all. 14 MR WESLEY: Okay, we're going to go to 15 the 16th no. You deal in paragraph 3, we don't need to go 16 there, of your further statement about the JOC meeting in 17 the morning. You say, I'll read it to you, "I arrived at 18 Lonmin mine JOC shortly after 07:00. Upon my arrival at 19 JOC I attended a briefing by Lieutenant-Colonel Scott about 20 the operational plan for the day." Then in your 21 supplementary statement in paragraph 6, again I'll read it 22 to you, the first sentence reads "On 16 August I attended 23 the JOC meeting early in the morning." Now irrespective of 24 times, please don't concern yourself about the exact time, 25 you did attend the JOC meeting though that morning, on the</p>
<p style="text-align: right;">Page 28326</p> <p>1 the 13th. It's SSS3. You detail how you flew around with 2 Lieutenant-Colonel Vermaak. What I want to show you is an 3 exhibit triple zero, triple O13 in fact, OOO13. Now this 4 is a picture or a photograph that Colonel Vermaak used to 5 describe the direction of travel of the strikers just prior 6 to, can I say the explosion of violence on that day. The 7 arrow indicates the direction that they were travelling in. 8 Does that accord with your memory? 9 CAPTAIN LOEST: Mr Chair, yes, it looks 10 correct. 11 MR WESLEY: While you were flying around 12 on the 13th in the helicopter, did you have a radio with you 13 in the helicopter that was capable of picking up the radio 14 transmissions that were occurring between members on the 15 ground? 16 CAPTAIN LOEST: Yes, Mr Chair, we did. 17 MR WESLEY: Did you hear, were you able 18 to hear while you were flying around, any of the 19 communications between the members on the ground? 20 CAPTAIN LOEST: Yes, Mr Chair, we did. 21 MR WESLEY: Now do you know, of those 22 instructions, do you know what General Mpembe's voice 23 sounds like over a radio? 24 CAPTAIN LOEST: Mr Chair, yes, I do but 25 due to all the noise and the different distractions it was</p>	<p style="text-align: right;">Page 28328</p> <p>1 Thursday the 16th of August? 2 CAPTAIN LOEST: Yes, Mr Chair, I did. 3 MR WESLEY: Now when you went to attend 4 that meeting, what or how many TRT members did you have 5 under your command? 6 CAPTAIN LOEST: Mr Chair, I stand 7 corrected but I think – 8 MR WESLEY: Approximately. 9 CAPTAIN LOEST: In the vicinity of about 10 70 to 80. 11 MR WESLEY: Now were they from several 12 units or only from the North-West, your unit, Rustenburg in 13 fact? 14 CAPTAIN LOEST: The four units in the 15 North-West Province. 16 MR WESLEY: It was a mixed group? 17 CAPTAIN LOEST: That's correct, Mr Chair. 18 Klerksdorp, Rustenburg, Brits and I think if I remember 19 correctly, Mafikeng if I am not mistaken. 20 MR WESLEY: Now in the last sentence of 21 paragraph 6 of your supplementary statement you say that, 22 and I'll read it to you, it's referring to Brigadier 23 Calitz, "He was our operational commander and he was to 24 give us instructions." Apart from Brigadier Calitz, 25 because I want to know the line of command, the chain of</p>

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1 command from yourself and upwards, apart from Brigadier
2 Calitz was there anybody else who was there who could give
3 you instructions or did in fact give you instructions about
4 the deployment of the TRT members under your command?
5 CAPTAIN LOEST: No, Mr Chair. My direct
6 commander above me would have been Brigadier Calitz
7 himself.
8 MR WESLEY: Okay, so your instructions
9 come from him only.
10 CAPTAIN LOEST: Mr Chair, yes. I suppose
11 if there would have been another member with a higher rank
12 than me then I had to honour that instruction as well.
13 MR WESLEY: Okay. On the day did you
14 receive any instructions from any other commanders but
15 Brigadier Calitz?
16 CAPTAIN LOEST: Mr Chair, no. Besides
17 the briefing from Colonel Scott it was only Brigadier
18 Calitz.
19 MR WESLEY: Now you attended the meeting,
20 what's going to happen during the course of the day is
21 explained to you. In your own words could you tell the
22 Commissioners what was the plan to be? I know you've
23 touched on it in chief but if you could just expand on that
24 a little bit more. What was the plan? Remember we're
25 early morning now, Thursday morning, what was the plan?

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1 CAPTAIN LOEST: Mr Chair, the plan was
2 basically for the POPS members to get the striking workers
3 to surrender their firearms and to hand it over so they can
4 proceed peacefully. If that would not work, the members of
5 TRT would then basically assist and play a supportive role
6 and just assist the members of POPS in whatever way
7 possible to achieve the planned operation.
8 MR WESLEY: If we could just look at
9 this. If, for instance, and this is prior to what happens
10 later on, if for instance the POPS members had, they're
11 standing on one side and we have the protesters on the
12 other side and I need to understand your understanding of
13 what you're supposed to do. If the POP members used
14 shotguns, they used teargas, they used their normal public
15 order policing methods to try and get the crowd to disarm
16 and the crowd simply say we will not do so, in that sort of
17 situation what was the TRT supposed to do?
18 CAPTAIN LOEST: Mr Chair, our
19 instructions were clear regarding that was, our only
20 purpose was just to form a line and not to let the
21 protesters proceed any further. Like I said earlier on,
22 with our mere presence, the way that we were dressed and
23 our equipment would give a clear indication towards the
24 protesters that we are, I would say, a higher level of
25 aggression and that we are able to use lethal force if need

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1 be.
2 MR WESLEY: And that use of lethal force,
3 would that be in the event that POP are threatened, the
4 public order policing? Is that as I understand what you're
5 saying?
6 CAPTAIN LOEST: Mr Chair, yes. If
7 members' lives are endangered then we would be able to
8 assist the POP members if the less lethal option did not
9 attain the desired goal that we wanted.
10 MR WESLEY: So if I understand you
11 correctly it was not the idea that the TRT at any stage, if
12 POP had tried their methods and things didn't work, for the
13 TRT then to go to the crowds and disarm them?
14 CAPTAIN LOEST: No, not at all, Mr Chair.
15 MR WESLEY: Could you have a look at
16 exhibit TT4, please? Paragraph 2.3, it's on the first page
17 at the bottom of the first page. I just want to read you a
18 passage, I'll read it from what is up on the screen. "Full
19 deployment," this is dealing with input on daily
20 deployments, "Full deployment will be done in accordance
21 with the strategy plan but without the razor wire deployed.
22 Only the Nyalas and wire trailers prepositioned. If the
23 situation escalates, stage 3 will be implemented but proper
24 communication will be done with all commanders when that
25 decision is taken." Now I think it's unfair, this is a

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1 minute of the JOC meeting that I'm showing you now so this
2 is what's recorded at the early morning JOC meeting. So if
3 the situation escalates stage 3 will be implemented but
4 proper communication will be done with all commanders when
5 that decision is taken, do you see that?
6 CAPTAIN LOEST: Yes, I do, sir.
7 MR WESLEY: How was that proper
8 communication intended to be done? What method was going
9 to be used to effect that communication?
10 CAPTAIN LOEST: Mr Chair, I would
11 speculate that another briefing session would have been
12 held.
13 MR WESLEY: So that would be done by
14 briefing session only? Would radios maybe be used?
15 CAPTAIN LOEST: Mr Chair, I think due to
16 the fact that the radios gave so much problems, I think a
17 person to person briefing would have been the effective way
18 to do it.
19 MR WESLEY: You say because of the
20 problems with the radios, was the problem with the radios
21 already very clear at the early morning JOC meeting there?
22 CAPTAIN LOEST: Mr Chair, from time to
23 time radios did give problems. We weren't exactly sure
24 what the problem was.
25 MR WESLEY: But was this aired at the JOC

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1 meeting?

2 CAPTAIN LOEST: I can't remember, Mr

3 Chair.

4 [11:21] MR WESLEY: But you attended the JOC

5 meeting and you knew of the radio problems, so if they talk

6 about proper communication you would expect a face-to-face

7 meeting in fact between people and not the use of a radio?

8 CAPTAIN LOEST: That's correct, Mr Chair.

9 MR WESLEY: And that's because of the

10 difficulties that you'd been experiencing with the radios.

11 If you could have a look, this leads on to what you say in

12 paragraph 9 of your supplementary statement, here you talk

13 about the radios and we're dealing with the 16th again. You

14 say, "On the day I tried to make use of my hand radio

15 during the operations." Now we're later in the day.

16 "Radio communication was difficult because of interference

17 caused by the power lines, for example SAPS members could

18 not answer my calls, I could not hear some members who were

19 talking on the radio and I heard broken conversations. It

20 was virtually impossible to talk on the radio." You state

21 that there. Just to finish up one part, in HHH40 –

22 CHAIRPERSON: Have you moved away from

23 this communication point?

24 MR WESLEY: No, not moving away from the

25 communications, Chair, no. I just want to ask him just to

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1 fill in one word in the paragraph –

2 CHAIRPERSON: There is a question I want

3 to ask, which may fall away in the light of your next

4 question but if it doesn't, I'll ask it.

5 MR WESLEY: Sorry, Chair, I was looking

6 at the wrong statement. If we could look at just SSS2.1,

7 you see in that paragraph you talk about on the day you had

8 problems with the radio communications. If we look at

9 SSS2.1 paragraph 3 there's just a word missing. I just

10 want you to fill it in. You see there in paragraph 3 you

11 say "During the radio communication that was very poor at

12 the scene" – I think there's a word missing there after

13 "during," is that "day?" Should that read "During the day

14 the radio communication that was very poor" or something to

15 that effect? Is that what you say -

16 CAPTAIN LOEST: I think so, Mr Chair.

17 CHAIRPERSON: Can I ask you about the

18 communication? It may be, of course, "Due to the fact that

19 the radio communication was very poor" – but anyway the

20 basic meaning is clear, isn't it? You were asked a

21 question about proper communication between all commanders

22 when a decision is taken. What happened was you were at

23 the six o'clock JOC meeting, these minutes are a heavily

24 edited version of it and they're not, as far as we can see

25 they're not entirely accurate but this section about proper

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1 communication seems to be correct. Now what was said at

2 the meeting was that when, was that it was hoped that the

3 strikers would lay down their weapons voluntarily, is that

4 correct?

5 CAPTAIN LOEST: That's correct, sir.

6 CHAIRPERSON: It was also said by the

7 criminal intelligence representative, that's Colonel

8 Isaacs, that the intelligence was that they wouldn't lay

9 down their weapons and in fact that they wouldn't leave the

10 koppie and they were prepared to fight if their demands

11 weren't met, which includes resisting the police. Do you

12 remember that?

13 CAPTAIN LOEST: Yes, I do, sir.

14 CHAIRPERSON: Right. So a decision as to

15 whether to proceed to what was call the tactical option, in

16 other words take the weapons away from them if they

17 declined to lay them down voluntarily, that decision would

18 be communicated. I take it that's what is being referred

19 to about the proper communication be done with all

20 commanders when that decision is taken. Is that correct?

21 CAPTAIN LOEST: Yes, Chair.

22 CHAIRPERSON: Now in fact what happened

23 was that after the 1:30 JOC meeting which you didn't

24 attend, Colonel Scott and Brigadier Pretorius came to

25 forward holding area 1 and had a briefing, is that right?

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1 You attended that briefing, as you told us, about 2:30 –

2 CAPTAIN LOEST: Chair, yes. 14:30

3 Colonel Scott gave the briefing.

4 CHAIRPERSON: And so the, what exactly

5 was to be done by way of implementing stage 3 of the

6 tactical option, that's what was conveyed by Colonel Scott

7 at the 2:30 meeting, is that right?

8 CAPTAIN LOEST: Mr Chair, yes, basically

9 like I explained before is, the members of TRT would just

10 form a line and keep them at bay.

11 CHAIRPERSON: So what I'm saying to you

12 is that the communication referred to, which you say

13 couldn't be done by radio because the radios were

14 defective, there may have been another reason not to use

15 the radio which you don't have to go into but the actual

16 communication you got relating to the implementation of the

17 tactical option, that was an oral communication on a face-

18 to-face basis from Colonel Scott at the 2:30 briefing at

19 the forward holding area 1, is that right?

20 CAPTAIN LOEST: That's correct, Mr Chair.

21 CHAIRPERSON: Thank you.

22 MR WESLEY: Now dealing with the radios,

23 you had difficulty with the radio during the course of the

24 day on the 16th. Did you report your difficulties to

25 anybody?

<p style="text-align: right;">Page 28337</p> <p>1 CAPTAIN LOEST: Mr Chair, we only 2 realised that we're having problems with our radios once we 3 started using handsets and not the mobile radios that were 4 installed in the vehicles where we remained the whole week. 5 We only used our handsets after we got out of the vehicle 6 and started forming up in a basic line. 7 MR WESLEY: At approximately what time 8 did you realise there was that problem then? 9 CAPTAIN LOEST: Mr Chair, I would say 10 about 15:30, in that vicinity. 11 MR WESLEY: Okay, well then the answer is 12 probably obvious. You realised the difficulty then at 13 approximately 15:30 but did you report it at that stage 14 then to anybody? 15 CAPTAIN LOEST: No, Mr Chair, I did not. 16 CHAIRPERSON: I take it of course not 17 much could be done about it at 15:30. You'd already been 18 told the tactical option was going to start, you're out in 19 the field, the radios now pack up or don't function 20 properly when you use them outside the Nyalas, nothing 21 could be done I take it at that stage to correct the 22 problem, is that correct? 23 CAPTAIN LOEST: That's correct, Mr Chair. 24 MR WESLEY: If we could please have 25 JJJ10.450 on the screen?</p>	<p style="text-align: right;">Page 28339</p> <p>1 CHAIRPERSON: What do you mean by at this 2 time? 3 MR WESLEY: At this time, I'm going to 4 give you, tell you what the time was. If you notice the 5 line of Nyalas that are facing to the right of the 6 photograph in front of the koppie, do you see them? 7 CAPTAIN LOEST: Yes, I do, sir. 8 MR WESLEY: Do you see that the one on 9 the extreme left is near to the one on the right, the one 10 just in front of it, rather? 11 CAPTAIN LOEST: Yes, I do, Mr Chair. 12 MR WESLEY: Okay. This is the moment 13 that Nyala 1 – that's Nyala 1 approaching Nyala 2, so 14 what's happened is this is the time when the barbed wire 15 was starting to be rolled out. Do you see that? 16 CAPTAIN LOEST: Yes, I do, Mr Chair. 17 MR WESLEY: Okay, so that's the time. 18 This is more or less when the operation then commenced. 19 CAPTAIN LOEST: That's correct, Mr Chair. 20 MR WESLEY: Okay. Now if you could just 21 direct the Commission's attention to your vehicles and your 22 members, where they exactly were and then I want to ask you 23 about the orientation of the vehicles and why they were 24 orientated like that. 25 CAPTAIN LOEST: Mr Chair, if you have a</p>
<p style="text-align: right;">Page 28338</p> <p>1 CHAIRPERSON: Which one do you want? 2 MR WESLEY: 4540, Chair. Now you have, 3 in chief you were taken through the deployment and you 4 described how the Nyalas were deployed – won't you just 5 take this to him just to show him = you will notice from 6 this photograph, I just want to place you so you know what 7 the time is. You'll see on the left-hand side, well, you 8 see the big koppie in the middle towards the top, do you 9 see that? Do you see that? 10 CAPTAIN LOEST: Sorry, Mr Wesley, if you 11 can just repeat? 12 MR WESLEY: Do you see the koppie, the 13 big koppie in the middle at the top of the photograph? 14 CAPTAIN LOEST: Yes, I do, sir. 15 MR WESLEY: And on the left-hand side is 16 the power station, what we call the power station. 17 CAPTAIN LOEST: Yes, I can see, Chair. 18 MR WESLEY: And then on the right-hand 19 side of the photograph towards the bottom right you see 20 that's what we call the small kraal. 21 CAPTAIN LOEST: Yes, I do, Mr Chair. 22 MR WESLEY: Could you just, with the use 23 of the pointer that I've given you, just explain, point out 24 exactly where your vehicles were and the TRT members were 25 standing at this time? Now –</p>	<p style="text-align: right;">Page 28340</p> <p>1 look at those, the line running there, all those vehicles 2 there are TRT members and then there's a vehicle right at 3 the end facing south and if I can remember correctly, that 4 vehicle parked there is my vehicle. Those vehicles there 5 were POP vehicles. 6 CHAIRPERSON: For the record, below the – 7 firstly we have the line of vehicles which were involved in 8 the unrolling of or uncoiling of the barbed wire, call that 9 the first row. Immediately below those there are five 10 Nyalas, one of which is the negotiating Nyala and then as 11 one proceeds down the picture then we have this row of 12 vehicles, I'm not sure I think it's about 20 vehicles all 13 next to each other and on the extreme right of those 14 vehicles, they all appear to be facing in the direction 15 away from the koppie as far as I can see and then on the 16 extreme right side of that we have a vehicle which is 17 parallel with the bottom of the photograph rather than 18 vertical to it and that's the vehicle you pointed out as 19 being your vehicle, is that correct? 20 CAPTAIN LOEST: Mr Chair, yes. I will 21 just point out to it again. There is the line of the TRT 22 vehicles. There might be other vehicles amongst them as 23 well, I cannot be sure and according to my knowledge that 24 vehicle there is my vehicle. 25 CHAIRPERSON: You're pointing out the</p>

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1 vehicle on the right-hand side of the row of vehicles,
 2 which is parallel with the bottom of the photograph as
 3 opposed to pointing towards the bottom of the photograph as
 4 most of the others or all the others appear to be doing.
 5 CAPTAIN LOEST: That's correct, Chair.
 6 CHAIRPERSON: That's right. And we see
 7 also that in front of the vehicle you've pointed out there
 8 appears to be a pathway which runs from the centre of the
 9 photograph near what I think is a group of strikers, goes
 10 down towards the bottom of the photograph, is that correct?
 11 CAPTAIN LOEST: Yes, I can see that, Mr
 12 Chair.
 13 CHAIRPERSON: Alright, perhaps at this
 14 stage we can take the tea adjournment. How much of his
 15 time has Mr Wesley used up so far, Mr Mojapelo?
 16 MR WESLEY: 21 minutes, Chair.
 17 CHAIRPERSON: So he's got 24 left. We'll
 18 adjourn now. It's now just half past 11, I think we must
 19 be back at quarter to 12.
 20 [COMMISSION ADJOURNS COMMISSION RESUMES]
 21 [12:00] CHAIRPERSON: We're resuming a bit later
 22 than we thought but we understand there were some
 23 discussions, one of which I participated in with Mr Mpofo.
 24 Mr Chaskalson, did I see you moving to turn your light on?
 25 MR CHASKALSON SC: Yes, Chairperson. I

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1 just wanted to place something on record which I've
 2 announced to those of the parties who were in the room
 3 before we resumed. A draft list of witnesses and a draft
 4 schedule of when the witnesses would be called was
 5 mistakenly circulated to the parties before the team of
 6 evidence leaders had discussed it. We have no difficulties
 7 with parties looking at the draft list of witnesses that
 8 has been circulated because that reflects our thinking,
 9 subject to a couple of possible changes. They should
 10 recognise, though, that it is only a draft proposal from
 11 us. The schedule is a very different matter because the
 12 schedule is not a thought through schedule at all. It is
 13 almost an arbitrary allocation of people to date to see how
 14 they would fit and in relation to certain witnesses who we
 15 propose to call and in particular the two Ministers, we
 16 will obviously have to arrange their appearances at the
 17 Commission around their availability.
 18 CHAIRPERSON: I take it Mr Ramaphosa as
 19 well.
 20 MR CHASKALSON SC: Yes. Well, certainly,
 21 well –
 22 CHAIRPERSON: Mr Ramaphosa is going to
 23 have to come, as will the two Ministers, the Minister of
 24 Safety and Security and the Minister of Mineral Resources
 25 will have to come –

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1 MR CHASKALSON SC: Yes, well –
 2 CHAIRPERSON: It depends on their
 3 programmes and their diaries and so on, I take it.
 4 MR CHASKALSON SC: Yes and it's not, and
 5 it's not just confined to those three. Those are the three
 6 most obvious witnesses, there are possibly other witnesses
 7 who will need to be juggled around. It was not a
 8 considered schedule at all and it was there merely to
 9 illustrate how the time gets consumed by witnesses. So I
 10 would invite the parties to consider our draft list of
 11 witnesses, in due course to revert to us with any
 12 suggestions as to where time could be cut or where
 13 additional time is required and also if there are
 14 additional witnesses who parties would like to see on the
 15 list. The list does not include any Lonmin witnesses
 16 because we're still engaged in a documents, in a discovery
 17 process with Lonmin which will inform which Lonmin
 18 witnesses we need to call.
 19 CHAIRPERSON: A statement was made during
 20 the course of the debate earlier this morning that would
 21 seem to imply that there may be some Lonmin witnesses we
 22 don't know about. I don't think that's correct. Long ago
 23 we indicated that witnesses who the parties propose to call
 24 should make statements which should be made available. As
 25 I understand Lonmin, I think, are one of the few exceptions

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1 who have complied with that ruling at least and provided
 2 statements, I take it, of the witnesses they propose
 3 calling. The question is whether some of those do not have
 4 to give oral evidence and one can rely simply on the
 5 affidavits and also possibly submit interrogatories to them
 6 – get supplementary affidavits. Am I correct in –
 7 MR CHASKALSON SC: That's the principal,
 8 the principal issue but there is a secondary issue which is
 9 that it may be when the discovery process is complete which
 10 will happen relatively soon, we hope, that there are
 11 additional Lonmin employees or officers who we would like
 12 to hear from.
 13 MR GOTZ: Chairperson, can I simply –
 14 CHAIRPERSON: Yes, Mr Gotz?
 15 MR GOTZ: May I just place on record,
 16 it's been an enormous, I hesitate to say irritation but
 17 that's what I suppose it is but certainly frustration on
 18 the part of AMCU's side that we have yet to receive witness
 19 statements from Sinclair and any senior executives such as
 20 Jameson or Scott from Lonmin, despite repeated and constant
 21 requests to Lonmin and via the evidence leaders. So it's
 22 not correct, with respect, Chair, that Lonmin has complied
 23 with the requests. You yourself have indicated that you
 24 would like a witness statement from Sinclair, that has not
 25 been forthcoming.

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1 CHAIRPERSON: I wasn't aware of the fact
 2 that it hadn't been provided. Thank you for drawing that
 3 to my attention. Lonmin is represented this morning. I
 4 take it Lonmin's representative has made a note of what has
 5 been said and will see to it. I understand Lonmin have got
 6 some other problems to deal with at the moment as well but
 7 this is something that they mustn't think can be swept off
 8 the table because there are other things to deal with.
 9 This Commission is important, their compliance with the
 10 directions that were given is important also.

11 MR RIPLEY-EVANS: That's correct, Chair.
 12 Sorry, Chair, I don't think I'm on record. I don't know if
 13 I need to come on record but my name is Jonathan Ripley-
 14 Evans, I'm the attorney representing Lonmin. Thank you,
 15 I'll take it up with the powers that be. Thank you, Chair.

16 CHAIRPERSON: Mr Mojapelo you can set
 17 your stopwatch again and Mr Wesley is going to continue
 18 after I've reminded the witness that he is still under
 19 oath.

20 CAPTAIN LOEST: I acknowledge.
 21 PAUL BISMARCK LOEST: (s.u.o.)

22 CROSS-EXAMINATION BY MR WESLEY (CONTD.):
 23 Thank you, Chair, if we could just have JJJ10.4540 back up
 24 on the screen? Now Captain, in paragraph 6 of your
 25 supplementary statement and you went through it in

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1 evidence-in-chief, you explained how you orientated the
 2 vehicles and now we know where they were, can I just ask
 3 you at this moment in time when JJJ10.4540 was taken, where
 4 are the TRT members?

5 CAPTAIN LOEST: Mr Chair, at this stage
 6 if I can remember correctly, all the members are still
 7 inside their vehicles or in very close proximity of their
 8 vehicles.

9 CHAIRPERSON: Is that right? There's
 10 what looks like a black line, you see the line of TRT
 11 vehicles and then below them more or less in the middle –
 12 no, no, you've gone too far – you see with the zooming in,
 13 can you see a line of people parallel to the line of TRT
 14 vehicles? Now I think the evidence we've had so far is
 15 that those were TRT people. If that's incorrect you must
 16 tell me.

17 CAPTAIN LOEST: That's correct, Mr Chair
 18 –

19 CHAIRPERSON: Do you see the people I'm
 20 referring to?

21 CAPTAIN LOEST: Those members are not TRT
 22 members. They're in actual fact not my TRT members from
 23 North-West. They could be some from another province or
 24 from other units but definitely not TRT North-West.

25 COMMISSIONER HEMRAJ: And the small group

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1 on the left-hand side of that group, of that line? Do you
 2 see there's a small group there just on the left-hand side
 3 of the line-up?

4 CHAIRPERSON: They're below two vehicles
 5 which are, one looks like a Canter, I think, they're below
 6 those two vehicles there. Do you see –

7 COMMISSIONER HEMRAJ: Are those your
 8 members?

9 CAPTAIN LOEST: Mr Chair, no. Once again
 10 I don't think those members were mine either. Like I say,
 11 my members were still at that stage in proximity of their
 12 vehicles.

13 MR WESLEY: Now Captain, we saw there in
 14 the close-up, your vehicles are orientated facing north and
 15 south, that's how you did it, staggered, some north, some
 16 facing south. Not north and south, forgive me, east and
 17 west roughly. If one takes the koppie as being roughly
 18 west and then the line, the vehicles roughly east, you are
 19 in an east, roughly east-west orientation, is that correct?

20 CAPTAIN LOEST: That's correct, Mr Chair.
 21 MR WESLEY: Now we can assume from that
 22 and your positioning that you're supposed to be, as you
 23 explained, 100 metres behind the POP line, that – can we
 24 assume, let me ask you, that you were expecting if action
 25 was to occur, that would occur in the direction of the

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1 koppie?

2 CAPTAIN LOEST: That's correct, Mr Chair.
 3 MR WESLEY: And that's where you
 4 expected, if I can use maybe vulgar English, things to
 5 happen.

6 CAPTAIN LOEST: Mr Chair, yes. That's
 7 why our members were placed in that fashion, one vehicle
 8 alternatively facing east, west, east, west, some members
 9 to look towards the POP contingent that are standing and
 10 facing the koppie and the other vehicle next to him will be
 11 facing the back, protecting the other side as well.

12 MR WESLEY: Now at this moment in time,
 13 at this stage you hadn't received any instructions from
 14 Brigadier Calitz to reorientate your vehicles or to move to
 15 another area or to do anything of that sort?

16 CAPTAIN LOEST: That's correct, Mr Chair.
 17 MR WESLEY: Okay. If we can then go to
 18 day 128, page 13494, little bit more – there. From line 12
 19 Colonel Scott is giving evidence here. Now Colonel Scott,
 20 Mr Semenya asks him, "Colonel Scott, we have up on our
 21 screen slide 181. What message does that convey?" I'm
 22 going to show you slide 181 now but I want to show you what
 23 he explains about it, so you can understand it when you
 24 look at it, what I'm telling you. He goes on to explain
 25 there, "What you see on screen is, to the best of my

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1 recollection I must state as well, because as I say that
 2 day was, but it's what I have shown to the people at
 3 forward holding area 1, and to the best of my recollection,
 4 it's the same slide as well or the same Google picture that
 5 was then put into a slide. I may be incorrect in that but
 6 this is what I could find, and I know that this comes from
 7 that time period. But I know that I did work on the
 8 forward holding area 2 slide to better tweak it for the
 9 presentation at the front. The inserts that you see in the
 10 white blocks and the blue arrows, were what I inserted
 11 afterwards after briefing the members at the front to more
 12 accurately depict the briefing that was given to them."
 13 I'll stop right there. Oh, he says "And what you can see
 14 and what you can see there is the red icon vehicles along
 15 the orange line, and those are Nyalas 1 to 6 and those
 16 Nyalas are the razor wire Nyalas." So if I can just stop
 17 there. The important point, when I show you slide 181 of
 18 exhibit L, please Craig, the white blocks that you see with
 19 writing in them and arrows, that you must ignore. Colonel
 20 Scott explained that wasn't there and then those blue
 21 arrows that you see, that wasn't there either. So if you
 22 can picture this without those. At the briefing that you
 23 received from Colonel Scott, is that what you were shown
 24 during the briefing?
 25 CAPTAIN LOEST: Mr Chair, yes. I can

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1 recall something like that.
 2 MR WESLEY: Something like that, you're
 3 not sure.
 4 CAPTAIN LOEST: Mr Chair, yes, I can't
 5 remember. It's too long ago.
 6 MR WESLEY: Okay, were you given any hard
 7 copies of something to take with you from that briefing?
 8 CAPTAIN LOEST: No, Mr Chair, not at all.
 9 MR WESLEY: Now you attended this
 10 briefing. Explain to the Commissioners how, from your
 11 perspective, where you were attending the briefing, what
 12 you saw, how did it happen? How did the briefing go down?
 13 CAPTAIN LOEST: Mr Chair, Colonel Scott
 14 explained to us what will happen with the deployment of the
 15 barbed wire and then to contain the protesters and to
 16 disarm them and then from there basically the situation
 17 would have been contained and we will then most probably
 18 receive a next briefing but unfortunately that didn't go to
 19 plan.
 20 MR WESLEY: Okay. Now the physical area,
 21 the place that you received the briefing, could you
 22 describe that because Colonel Scott testified he was in
 23 the back of a Vito, a Mercedes Vito vehicle.
 24 CAPTAIN LOEST: That is correct.
 25 MR WESLEY: Is that correct?

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1 CAPTAIN LOEST: That's correct.
 2 MR WESLEY: What view did you have of the
 3 screen that he used? He says he used a computer. Was this
 4 picture on a computer? Is that how it happened?
 5 CAPTAIN LOEST: That's correct, Mr Chair.
 6 We were basically standing, some members were seated inside
 7 the vehicle, others were standing outside the vehicle and
 8 we moved around more or less as he gave briefing to
 9 instruct certain members to do certain things.
 10 MR WESLEY: How long did you have to look
 11 at this picture during this briefing? How long were you
 12 given?
 13 CAPTAIN LOEST: Mr Chair, most probably a
 14 couple of seconds maximum.
 15 MR WESLEY: Now in your experience, with
 16 your many years' experience in the SAPS, was that an
 17 adequate briefing for what was to happen that afternoon?
 18 CAPTAIN LOEST: Mr Chair, I would have
 19 expected most probably to receive a hard copy that I could
 20 then at least take it over to my members because now I have
 21 to explain to my members with nothing in hand, to show them
 22 exactly what needs to be done.
 23 MR WESLEY: You would say it was not an
 24 adequate briefing. I see you shaking your head.
 25 CAPTAIN LOEST: Yes. No, for sure it was

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1 not an adequate briefing.
 2 MR WESLEY: Now you testified –
 3 COMMISSIONER HEMRAJ: Sorry, inadequate
 4 in terms of time and detail?
 5 CAPTAIN LOEST: Mr Chair, yes. Time was
 6 of the essence and the detail was very sketchy. We had to
 7 do it very quickly.
 8 COMMISSIONER HEMRAJ: Did you have any
 9 opportunity to seek clarification?
 10 CAPTAIN LOEST: Mr Chair, yes, some
 11 members did ask clarification but like I said, due to time
 12 constraints we had to move on.
 13 MR WESLEY: Now you've testified about
 14 TRT members being armed with R5 rifles, is that correct?
 15 CAPTAIN LOEST: That's correct.
 16 MR WESLEY: I want to ask you about
 17 ammunition. Evidence has been led that after 12 o'clock
 18 that morning on the 16th – 12 o'clock already in the
 19 afternoon, in fact, ja, 12 noon – Brigadier Calitz would
 20 have given an instruction to Colonel Merafe that 4 000
 21 rounds of R5 ammunition be brought to the scene at
 22 Marikana. Do you know anything about that?
 23 CAPTAIN LOEST: No, Mr Chair, nothing.
 24 MR WESLEY: The members that were under
 25 your command, do you know what their ammunition supply was

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1 in respect of R5 ammunition?

2 CAPTAIN LOEST: Mr Chair, according to my

3 knowledge, the normal standard issue. I do bear knowledge

4 that some members who shot on the 13th had not received new

5 ammunition. That's the only, that I know about it.

6 MR WESLEY: To your knowledge was there a

7 shortage of R5 ammunition at the scene that was of such a

8 nature that would require an extra 4 000 rounds of R5

9 ammunition to be brought?

10 CAPTAIN LOEST: No, not according to my

11 knowledge.

12 CHAIRPERSON: Just to get an

13 understanding of how that works, normally, ignoring what

14 had been fired on the 13th and not been replaced, normally

15 when a TRT man goes into the field with his R5 presumably

16 he's got a full magazine, has he, of bullets? Is that

17 correct?

18 CAPTAIN LOEST: Mr Chair, yes, according

19 to operational procedures he's supposed to have two full

20 magazines –

21 CHAIRPERSON: Two full magazines?

22 CAPTAIN LOEST: - 60 rounds.

23 CHAIRPERSON: 60 rounds, I see. And can

24 you tell us, this 4 000 that was asked for, how many

25 magazines-full would that be? That's a mathematical

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1 question. You say there are 30 per magazine?

2 CAPTAIN LOEST: That's correct, Chair.

3 CHAIRPERSON: So it's simply a question

4 of dividing 30 into 4 000.

5 CAPTAIN LOEST: That's correct, Chair.

6 CHAIRPERSON: And how many people there,

7 can you tell us how many people were there in possession of

8 R5s who would have needed refills, if necessary?

9 CAPTAIN LOEST: Mr Chair, very few. Most

10 of the members that were with me had a couple of rounds

11 that were shot but not a lot of ammunition.

12 CHAIRPERSON: [Microphone off, inaudible]

13 As far as I can see, 4 000 rounds is 133 full magazines, is

14 that correct? And how many, do we know how many people,

15 never mind people who had used some and hadn't got refills,

16 how many R5 rifles were on the scene, could you –

17 CAPTAIN LOEST: Mr Chair, I stand

18 corrected. I'm not sure of the amount but there was

19 sufficient.

20 CHAIRPERSON: Yes, so I just want to make

21 sure I understand what you're saying. In respect of those

22 who had discharged R5 ammunition on the 13th, you say they

23 hadn't got refills yet?

24 CAPTAIN LOEST: To the best of my

25 knowledge, no sir.

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1 CHAIRPERSON: And how many members would

2 that have been?

3 CAPTAIN LOEST: Chair, I'm not 100% sure.

4 CHAIRPERSON: Ballpark figure?

5 MR CHASKALSON SC: Chairperson, it will be

6 in an exhibit. We can get you the exact figure declared by

7 SAPS.

8 CHAIRPERSON: I see. Alright, thank you,

9 okay. I won't worry you further for information that's

10 available to us anyway.

11 COMMISSIONER HEMRAJ: That's unusual,

12 isn't it, for them not to replenish their ammunition?

13 CAPTAIN LOEST: Mr Chair, yes. I'm not

14 exactly sure why it was not replaced. I can't comment on

15 that.

16 MR WESLEY: Okay, Captain, in paragraph

17 12 of your supplementary statement you deal with events

18 after the shooting. You've gone through it, I'm not going

19 to take you through it in detail but you do mention there

20 that at a point in time you took out your cell phone, you

21 had a missed call from Brigadier Pretorius and thereafter

22 you mentioned telephone calls that were exchanged, you

23 phoned Brigadier Pretorius and you received telephone calls

24 as well. I want to just confirm something with you. Could

25 we have exhibit JJJ188, JJJ188? Now these are extracts of

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1 cell phone records that we obtained. Craig, if you can

2 just go out a bit, there we go. You'll see they all relate

3 to the 16th of August, if I can direct your attention to the

4 third last, second last and last line, do you see that?

5 CAPTAIN LOEST: Yes, I do, Chair.

6 MR WESLEY: The third last line 16 August

7 2012 at 16:05:44, duration 46 seconds there's a voice call

8 from yourself to Brigadier Pretorius, do you see that?

9 CAPTAIN LOEST: Yes, I do, Chair.

10 MR WESLEY: That's the first record we

11 have of a telephone call made by you at approximately that

12 time. Does that accord with your memory that that would be

13 approximately when you made your call?

14 CAPTAIN LOEST: That's correct, Chair.

15 MR WESLEY: And the duration

16 approximately 46 seconds.

17 CAPTAIN LOEST: That's correct, Chair.

18 MR WESLEY: And then according to the

19 records we obtained in the next short while, I know later

20 you made other telephone calls but shortly after the

21 shooting at 16:08:54 there was a call from Brigadier

22 Pretorius to you for a minute and nine seconds and then at

23 16:13:52 there's a 40 second voice call from Brigadier

24 Pretorius to you. Do you recall that?

25 [12:20] CAPTAIN LOEST: That's correct, Chair.

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1 MR WESLEY: And those are the telephone
 2 calls that you're talking about in paragraph 12 –
 3 CAPTAIN LOEST: That's correct, Chair.
 4 MR WESLEY: - of the supplementary
 5 statement. Right, the last item I want to ask you about,
 6 if we could have JJJ127.1 please, JJJ127.1 and if we could
 7 go to the 24th page and the inscription, it's OB number
 8 1018, there we go, okay. Now if I can, if you look on the
 9 screen – it might be easier if I point it out to you here,
 10 there, 15:56 situation report. "Papa1 reporting that
 11 people are running towards the houses, running to the
 12 western side of the koppie." Then "18 bodies are down,"
 13 you see that? "18 bodies are down."
 14 CAPTAIN LOEST: I do, Chair.
 15 MR WESLEY: Now if we carry on down just
 16 above 16:05 you see there's "Chopper 2 reporting two bodies
 17 down," do you see that? Do you see that?
 18 CAPTAIN LOEST: Can you just refer again
 19 where –
 20 MR WESLEY: You see there in the fourth
 21 column there's 16:05.
 22 CAPTAIN LOEST: Yes, I do.
 23 MR WESLEY: Just to the right and above
 24 that.
 25 CAPTAIN LOEST: Okay, now I've got it.

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1 Thank you, Chair.
 2 MR WESLEY: It reads, "Chopper 2
 3 reporting two bodies down," do you see that?
 4 CAPTAIN LOEST: Yes, I do, sir.
 5 MR WESLEY: Now then at 16:05 next to
 6 that we get "Instructions given to the medics to go and
 7 assist at holding area. There are 30 people/bodies lying
 8 down." You see that?
 9 CAPTAIN LOEST: I do, sir.
 10 MR WESLEY: And the fourth last line,
 11 Craig if you can go down, "Members informed to go to the
 12 bodies and make sure no weapons as others are not injured."
 13 Again the reference is to bodies. Do you see that,
 14 "Members informed" -
 15 CAPTAIN LOEST: Yes, I see that.
 16 MR WESLEY: - "to go to bodies," okay.
 17 Now if you hear a report, bodies are down, what do you
 18 understand that to mean?
 19 CAPTAIN LOEST: According to my
 20 knowledge, that people are injured.
 21 CHAIRPERSON: [Microphone off, inaudible]
 22 CAPTAIN LOEST: I beg your pardon, Chair?
 23 CHAIRPERSON: Or dead.
 24 CAPTAIN LOEST: Chair, yes. Either
 25 injured or dead.

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1 MR WESLEY: If we can then just go over
 2 to the next page, please, the seventh line from the top and
 3 there's your name. "Captain Loest of TRT reported that 28
 4 are wounded." That's a report that you made then to the
 5 JOC. Seventh line from the top –
 6 CAPTAIN LOEST: Yes, no, I've got that.
 7 MR WESLEY: "Captain Loest of TRT
 8 reported that 28 are wounded." Can you remember how did
 9 you make that report?
 10 CAPTAIN LOEST: Mr Chair, according to my
 11 knowledge I think I phoned the report in because of the
 12 problems with the hand radios.
 13 MR WESLEY: If we can then go down to
 14 the, I think it's about the 12th line from the bottom, your
 15 name is mentioned again there. 12th line from the bottom.
 16 CAPTAIN LOEST: I see that, Chair.
 17 MR WESLEY: "Captain Loest reported that
 18 group of people trying to block the ambulances but was
 19 sorted out." Can you just tell the Commissioners, what was
 20 going on there? What was happening?
 21 CAPTAIN LOEST: Chair, if I can remember
 22 correctly local, the local people, the local inhabitants of
 23 that area prevented the ambulances from coming through. I
 24 didn't deal with it specifically myself but that was just a
 25 report that was made to me.

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1 MR WESLEY: And what was done to sort it
 2 out?
 3 CAPTAIN LOEST: Mr Chair, I don't bear
 4 knowledge. All I know is that I was, this incident was
 5 reported to me but also at the same time I was informed
 6 that the situation has been resolved and the ambulances
 7 came through.
 8 MR WESLEY: And can you tell us where
 9 approximately, did you receive a report or do you know
 10 where the blocking, where this blocking was happening in
 11 relation to where you were?
 12 CAPTAIN LOEST: No, I don't bear
 13 knowledge. A member, I can't even remember who
 14 specifically, just informed me that there was a problem
 15 with the local people that blocked the ambulances but it
 16 was sorted out and the ambulances could move freely.
 17 MR WESLEY: Okay. Thank you, Chair.
 18 MR CHASKALSON SC: Chairperson, I can
 19 give you that information. There were 31 R5 shots in total
 20 fired on the 13th, 29 of which were fired by TRT members.
 21 So 31 in total, 29 by TRT members.
 22 CHAIRPERSON: It's actually just short of
 23 one magazine full.
 24 MR CHASKALSON SC: Indeed. And the
 25 reference I'm told is HHH23.

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1 CHAIRPERSON: You didn't need to order
 2 4 000 rounds to replace the ones that had been discharged
 3 by TRT people on the 13th. Have you finished, Mr Wesley?
 4 MR WESLEY: That's my questions, Chair.
 5 CHAIRPERSON: Mr Bizos, you're next.
 6 MR BIZOS SC: Yes, Mr Chair –
 7 MR WESLEY: Chair, might I just say
 8 there's five minutes now spare.
 9 CHAIRPERSON: It can be done with focused
 10 questions. Mr Bizos, you're still – how long did I give
 11 you, half an hour? Don't try to use the extra five
 12 minutes, just carry on with your cross-examination.
 13 MR BIZOS SC: - what I was given, but in
 14 view of what has been said I am prepared, subject to your
 15 concurrence and at the request of my, some of the other
 16 representatives, I am prepared to go on for longer in order
 17 to fill up the day because –
 18 CHAIRPERSON: I don't think you should go
 19 on just –
 20 MR BIZOS SC: - cross-examination in
 21 order that time is not wasted if they are not ready, Mr
 22 Chairman.
 23 CHAIRPERSON: The words "fill up the day"
 24 caused me some concern, but you're not just trying to fill
 25 up the day, you're going to cross-examine on matters which

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1 may be relevant for others but anyway, I think stick to
 2 half an hour for the moment and we'll review the situation
 3 after half an hour.
 4 MR BIZOS SC: Well, I'll try and do my
 5 best for that period, Mr Chairman.
 6 CHAIRPERSON: In fact, you can cross-
 7 examine till lunch time. It's now 25 past 12 so you get a
 8 bit of Mr Wesley's five minutes. Cross-examine till lunch
 9 time and then we'll review the situation. Yes, Mr
 10 Chaskalson?
 11 MR CHASKALSON SC: Sorry, Chairperson,
 12 before Mr Bizos starts I want to pre-empt any concerns on
 13 the part of the parties. The list of witnesses that was
 14 sent erroneously did not include Mr X. Mr X is certainly
 15 going to be called and has provisionally be allocated five
 16 days. That must be added. There is also one other witness
 17 who the evidence leaders would like to be subjected to
 18 interrogatories, that is Brigadier Victor.
 19 CHAIRPERSON: Visser? Is it Brigadier
 20 Victor or Brigadier Visser, Mr Chaskalson? Is it Visser or
 21 Victor?
 22 MR CHASKALSON SC: Victor.
 23 CHAIRPERSON: Victor, thank you.
 24 MR CHASKALSON SC: Colonel Visser is on
 25 the list.

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1 CHAIRPERSON: Mr Bizos, you can start, as
 2 I've told you.
 3 MR BIZOS SC: Thank you.
 4 CHAIRPERSON: Then I understand Ms Le
 5 Roux will cross-examine after lunch for the period that we
 6 allocated to her, if she needs that full period.
 7 CROSS-EXAMINATION BY MR BIZOS SC:
 8 Captain, on the 16th were you one of the commanders armed
 9 with R5s?
 10 CAPTAIN LOEST: Mr Chair, I was a
 11 commander on the 16th but I was not armed with an R5.
 12 MR BIZOS SC: No, personally you may not
 13 be but you were one of the commanders of the people armed
 14 with R5s.
 15 CAPTAIN LOEST: That's correct, Chair.
 16 MR BIZOS SC: Yes. Now, Captain, have
 17 you had any training whatsoever about crowd management?
 18 CAPTAIN LOEST: Yes, I have, sir.
 19 MR BIZOS SC: You have. And are you
 20 aware of the provisions of standing order sub (5) of
 21 section 11 and I'll read it to you, "Force may only be used
 22 on the command or instruction of the CJOC or operational
 23 commander, if appointed." Were you one of the operational
 24 commanders so appointed for the 16th?
 25 CAPTAIN LOEST: That's correct, Chair, I

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1 was.
 2 MR BIZOS SC: Thank you. "Members may
 3 never act individually without receiving a command from
 4 their commander." Does that refer to, were you one of the
 5 commanders that the people had to obey?
 6 CAPTAIN LOEST: That is correct, Chair.
 7 MR BIZOS SC: Yes. I am not unmindful –
 8 CHAIRPERSON: I'm sorry to interrupt you,
 9 that can't be right. It talks about CJOC, that was General
 10 Mpembe, and operational commander, that was Brigadier
 11 Calitz. Isn't that right?
 12 CAPTAIN LOEST: Mr Chair, yes,
 13 operational commander overall was Brigadier Calitz in
 14 charge of the whole operation but we refer to the junior
 15 officers who have members with them also as and being an
 16 ops commander of that specific group.
 17 MR BIZOS SC: Yes, thank you. So the
 18 four of you were the commanders that are referred to in
 19 sub-order (5) of order 11, do you agree?
 20 MR SEMENYA SC: Chair –
 21 CAPTAIN LOEST: That's correct, Chair.
 22 MR SEMENYA SC: Chair, just out of
 23 fairness, we did not receive documents which my learned
 24 friend was going to use in cross and so the witness is not
 25 sighted, what standing order 262 is. Extracts from –

<p style="text-align: right;">Page 28365</p> <p>1 MR BIZOS SC: Have you got a copy of them 2 in your file? 3 CAPTAIN LOEST: That's correct, Chair. 4 MR BIZOS SC: Correct? And you've read 5 it - 6 CHAIRPERSON: - in your career as a 7 member of the police service before you retired, is that 8 right?, standing order 262? 9 CAPTAIN LOEST: Chair, yes. I'm very 10 familiar with standing order 262. 11 CHAIRPERSON: I thought so. 12 MR BIZOS SC: Yes. 13 CHAIRPERSON: Objection unnecessary, Mr 14 Semenya. Carry on, Mr Bizos. 15 MR BIZOS SC: Thank you. Now, "Members 16 may never" - and I underline the word "never" - "act 17 individually without receiving a command from their 18 commander." They, on the face of it and I'll come to 19 another sub-order and we'll talk about it later but you are 20 the commander referred to in these particular circumstances 21 that the individual, the people cannot act individually 22 without receiving a command from their commander. Do you 23 know that? 24 CAPTAIN LOEST: That's correct, Chair. 25 MR BIZOS SC: Yes. And in fact, just in</p>	<p style="text-align: right;">Page 28367</p> <p>1 that private defence and self-defence would fall within the 2 ambit of paragraph 4 sub (7) section, section (7). 3 MR BIZOS SC: Yes, but you are expected 4 to know the common law principles that are required for a 5 lawful self-defence. 6 CAPTAIN LOEST: That is correct, Chair. 7 MR BIZOS SC: Yes. Which safeguards do 8 you know of in the common law? 9 CAPTAIN LOEST: Mr Chair, I would not - 10 MR SEMENYA SC: No, Chair - 11 MR BIZOS SC: I beg your pardon? 12 MR SEMENYA SC: The witness can't be 13 asked to give a legal opinion. 14 MR BIZOS SC: No, with respect, why not, 15 Mr Chairman? 16 CHAIRPERSON: No - no, we decide what the 17 law is. I can understand a contention that what he 18 understood the legal provisions to be may have some 19 relevance in relation to assessing what he did or didn't do 20 but reformulate, restate the question so that I can focus 21 on this point - 22 MR MPOFU: Chairperson, if I may because 23 we have an interest in this question, maybe before the 24 ruling is made - 25 CHAIRPERSON: I'm not giving a ruling</p>
<p style="text-align: right;">Page 28366</p> <p>1 case my learned friend is concerned, in paragraph 138 of 2 exhibit L under "Delegation, neutral area response team" 3 and under the subheading "Commander details - Captain 4 Loest." Do you accept that you were in that position on 5 the 16th? 6 CAPTAIN LOEST: I do, Chair. 7 MR BIZOS SC: Now, in view of a previous 8 reminder by the Commissioner, sub-order (7) reads, "Common 9 law principles of self-defence or private defence are not 10 affected by this order." Are you familiar with that? 11 CAPTAIN LOEST: Yes, I am, Mr Chair. 12 MR BIZOS SC: Now I'd like to know from 13 you, Captain, what common law principles of self-defence do 14 you know of - 15 CHAIRPERSON: Mr Bizos, you don't expect 16 him to sort of repeat from his, into the record, what would 17 amount to the contents of a chapter on the law of criminal 18 law in relation to defence, surely? That question is far 19 too wide, I think it must be restricted. 20 MR BIZOS SC: Well, let me put some 21 individual things, some individual things in relation to 22 the common law which I think that anybody that is in charge 23 of a number, so many people with R5s, should be familiar 24 with, Mr Chairman. 25 CAPTAIN LOEST: Mr Chair, I'm fairly sure</p>	<p style="text-align: right;">Page 28368</p> <p>1 until Mr Bizos has repeated the question. So let's hear 2 his formulation, reformulation of the question - 3 MR MPOFU: Yes. 4 CHAIRPERSON: - and then if necessary you 5 may - I'm not stopping you but let's just, premature 6 objection, you see. Right, Mr Bizos. 7 MR BIZOS SC: Yes. The question was what 8 common law principles of self-defence were you familiar 9 with? I'm entitled to ask that question, Mr Chairman. 10 CHAIRPERSON: Yes, yes. You don't have 11 to state the principle, you know. You don't have to write 12 an essay or give an oral essay on what the law of self- 13 defence is, the common law principles, but you can tell us 14 by referring to sort of headings what principles you are 15 familiar with. 16 CAPTAIN LOEST: Mr Chair, basically like 17 I said, self-defence, private defence and then what the 18 requirements are for that, proportionality, things like 19 that, the imminent threat - 20 MR BIZOS SC: Well, you hit a good one - 21 CHAIRPERSON: Don't interrupt him, he is 22 giving his answer. 23 MR BIZOS SC: Sorry. 24 CHAIRPERSON: Carry on? You say 25 proportionality, things like that and then you were going</p>

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1 to say something else?

2 CAPTAIN LOEST: The imminent threat.

3 CHAIRPERSON: Yes.

4 MR BIZOS SC: Well, let's deal with

5 proportionality. How many people were killed at scene 1 on

6 the 16th?

7 CAPTAIN LOEST: I stand corrected, Mr

8 Chair, I think it's 18.

9 MR BIZOS SC: Was there a single scratch

10 on any one policeman that shot?

11 CAPTAIN LOEST: Not as far as I bear

12 knowledge, Mr Chair.

13 MR BIZOS SC: Is that proportional?

14 MR SEMENYA SC: No, Chair, that is a

15 question to be answered by the Commission.

16 MR BIZOS SC: With the greatest respect,

17 Mr Chairman, with the greatest respect, I can understand

18 that my learned friend wants to inform the witness to avoid

19 the question. I submit –

20 CHAIRPERSON: I don't think that's a

21 proper –

22 MR BIZOS SC: - with respect –

23 CHAIRPERSON: I don't think that's a

24 proper comment. The question is a simple question, whether

25 what is proportional amounts to a legal opinion which is

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1 for us to give or a factual point in respect of which the

2 witness can give his views. That's the point raised and

3 what answer do you give to the objection raised?

4 MR BIZOS SC: I'm sorry, Mr Chairman, is

5 it directed to me?

6 CHAIRPERSON: Mr Semanya objected to your

7 question.

8 MR BIZOS SC: Yes.

9 CHAIRPERSON: On the grounds that you

10 were asking the witness to give a legal opinion. What is

11 your answer to the objection –

12 MR BIZOS SC: No, it's not a legal

13 opinion, Mr Chairman –

14 CHAIRPERSON: What is your answer to the

15 objection?

16 MR BIZOS SC: It's not a legal opinion,

17 with respect. What does he understand, let me put it this

18 way, what does he understand by proportional? He used the

19 word.

20 CHAIRPERSON: Okay, let him give that

21 answer.

22 CAPTAIN LOEST: Mr Chair, I would like to

23 respond by saying that each member on that scene acted by

24 himself. So each, each member will have his own discretion

25 in his mind how he would deal with the specific threat that

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1 is posed towards him.

2 CHAIRPERSON: I understand that but the

3 law of – what the law is, the law isn't that someone is

4 entitled to do something in self-defence in his discretion

5 and he hasn't got a discretion as to what's proportional,

6 that's something which is an objective test. So it's a

7 dangerous notion, if it is a notion out there, that self-

8 defence vested a discretion on the person under attack to

9 do, to act in a particular way. He's got to act

10 proportionally, his response has got to be proportional but

11 he isn't the judge of what's proportional. He hasn't got a

12 discretion to decide what's proportional. So that's the

13 point you see, but Mr Bizos is trying to suggest to you

14 that in order to assess whether the requirement of

15 proportionality has been complied with, you have regard to

16 the injuries received by the threatener, if one can call

17 him that, the assailant, the attacker, and you have regard

18 to the absence of injuries on the part of the person under

19 attack. Now I'm not sure that that's the correct test,

20 this is a legal matter as well. If you come, try to attack

21 me and it's necessary for me to kill you in order to stop

22 you attacking me, I can shoot you and I can kill you. I

23 may have no scratch at all but the question as to whether I

24 acted in accordance with the doctrine of proportionality

25 won't depend upon whether I didn't get any injuries and you

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1 died, it would depend upon whether in the circumstances it

2 was necessary for me to do what I did. And that is, that

3 question is not answered by having regard to my absence of

4 injuries and the fact that you died, so perhaps I've taken

5 over the answer to the question because it's essentially a

6 legal question and I think I have, I hope I've given the

7 correct legal answer to it.

8 [12:40] MR BIZOS SC: You know, we're not dealing

9 with one individual against another, the one armed and the

10 other unarmed. We are dealing with numbers. Are you

11 suggesting, Captain, that the – bear with me – sorry, yes,

12 the 46 persons under your command simultaneously within a

13 period of seconds, proportionally shot at 18 people and

14 killed them? Is that what you are saying?

15 CAPTAIN LOEST: No, Mr Chair, that's not

16 what I'm saying.

17 MR BIZOS SC: Not what you're saying. So

18 that –

19 CHAIRPERSON: I think he's entitled to

20 tell us what he is saying. What are you saying, Captain?

21 CAPTAIN LOEST: Mr Chair, we were armed,

22 they were armed. They attacked us and we responded.

23 MR MPOFU: Chairperson, may I – I don't

24 want to interrupt the cross-examination but maybe with the

25 assistance of the Chairperson, my take on this question and

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1 I'll request the Chairperson maybe to extract that from the
 2 witness, is simply as follows. If you have a standard
 3 procedure that says common law principles of self-defence
 4 or private defence are not affected by the order, then
 5 surely it's important to know whether, you know, if
 6 Constable Mpofo knows what those common law principles are
 7 but Constable Wesley doesn't, then to me I'll know exactly
 8 what that means, that Constable Wesley is just gobbledy-
 9 gook, it means nothing, it says common law principles of
 10 self-defence are not affected. So I think it's important
 11 to interrogate to what extent the people, the readers, in
 12 other words the members, would make sense of sub-paragraph
 13 (7) depending on their own knowledge of those common law –
 14 CHAIRPERSON: It's not normally regular
 15 to allow another counsel to intervene but you did ask
 16 nicely for permission.
 17 MR MPOFU: Thank you, sir.
 18 CHAIRPERSON: You heard the point Mr
 19 Mpofo made, rather irregularly but never mind. He says –
 20 I'm not sure that you can answer it but he said that
 21 assuming there were two constables in the TRT, you heard
 22 what he said, Constable Mpofo apparently he claims is a
 23 very bright constable who knows the law and Constable
 24 Wesley who unfortunately didn't do too well in his criminal
 25 law exam and he says you have varying knowledge, degrees of

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1 knowledge and so on and he's interested in the standard of
 2 knowledge that would've been had by the various people in
 3 that basic line. Now are you able to help us on that?
 4 CAPTAIN LOEST: Mr Chair, according to –
 5 CHAIRPERSON: It depends on the training
 6 and so on that the members of the TRT undergo and what you
 7 have to do, what you have to pass or what knowledge you
 8 have to show that you have in order to be admitted to the
 9 ranks of the TRT.
 10 CAPTAIN LOEST: Mr Chair, I think all
 11 these things are addressed during basic training in the
 12 various training institutions where members of SAPS are
 13 trained.
 14 MR BIZOS SC: Well, I don't know whether
 15 you've answered the question. Do you want to try and do
 16 it?
 17 CHAIRPERSON: Hasn't he answered by
 18 implication? He said that all these matters are dealt with
 19 in basic training and I take it what he's saying is, by
 20 implication, he would assume that you won't be entrusted
 21 with an R5 rifle as a member of the TRT unless you've shown
 22 that you have a basic knowledge of the principles that are
 23 to be applied.
 24 CAPTAIN LOEST: That's correct.
 25 CHAIRPERSON: And therefore he assumes

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1 they have the knowledge but without having personally
 2 examined each of them as to their knowledge, he can't
 3 answer the question. Is that –
 4 CAPTAIN LOEST: That's correct, Chair.
 5 CHAIRPERSON: I know I'm taking over a
 6 bit but it seems to be inherently what you are saying.
 7 CAPTAIN LOEST: That is correct, what I'm
 8 saying, sir.
 9 MR BIZOS SC: Yes. You told us that you
 10 thought proportionality was part of the answer. Can you
 11 think of any other, any other common law principle of
 12 self-defence or private defence that you as commander and
 13 those under you had to obey, any other common law principle
 14 that you can think of, having regard to the fact that you
 15 know the standing orders and you've had some training.
 16 Give us another example of the common law principle that
 17 you had in mind, you should have had in mind.
 18 CAPTAIN LOEST: Mr Chair, once again I'm
 19 not a legal person so I'm going to refrain from answering
 20 any of these type of questions, sorry.
 21 MR BIZOS SC: Have you not heard that it
 22 is a duty of the commander or the possible victim to give a
 23 warning before shooting to kill? Have you not heard that
 24 as one of the requirements of the common law?
 25 CAPTAIN LOEST: Yes, I have, Chair –

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1 MR SEMENYA SC: No, Chair, that is not
 2 the correct legal position.
 3 CHAIRPERSON: My understanding is that's
 4 not – certainly, it's not my understanding of the law, you
 5 don't have to give a warning. In certain circumstances you
 6 have to give a warning.
 7 MR BIZOS SC: Yes.
 8 CHAIRPERSON: In other circumstances it
 9 may not be practical to give a warning.
 10 MR BIZOS SC: Well –
 11 CHAIRPERSON: And so to state as a
 12 general proposition, apparently without exception, that you
 13 have to give a warning is not an accurate formulation of
 14 the question but I take it you're aware of the fact that,
 15 in general, if you can give a warning you should give a
 16 warning. I take it you know that.
 17 CAPTAIN LOEST: That is correct, Chair.
 18 CHAIRPERSON: Right.
 19 MR BIZOS SC: Yes. Is there any other
 20 common law principle that you have come across?
 21 CAPTAIN LOEST: Mr Chair, once again like
 22 I said, I am not a legal expert so at this stage I can't
 23 really think of anything that comes to mind that I can
 24 answer immediately.
 25 MR BIZOS SC: Have you not heard of the

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1 common law principle that you should try and avoid lethal
2 shots to sensitive parts of the body?
3 MR SEMENYA SC: Chair, there are no such
4 principles. I think it is unfair to the witness.
5 CHAIRPERSON: No, I think it is correct.
6 You should avoid, if you can defend yourself without
7 killing the person that you're dealing with, which means
8 firing a lethal shot, then you should do so. That's basic
9 –
10 MR BIZOS SC: Yes, but this is what I'm
11 asking the witness. What is the objection, Mr Chair?
12 CHAIRPERSON: I'm dealing with Mr
13 Semenya's objection, I'm not talking to you.
14 MR BIZOS SC: I'm sorry.
15 CHAIRPERSON: You're doing what other
16 people do sometimes, delivering a concurring judgment to
17 what I have to say but we don't need that either. It is a
18 basic principle, is it not, that if you can defend yourself
19 without killing your assailant, you must do so. That's
20 right, isn't it?
21 CAPTAIN LOEST: That's correct, Chair.
22 CHAIRPERSON: That's your understanding,
23 yes. Now the question is, I suppose, there are two
24 questions that follow from this. One is, could you have
25 given - no warning was directly given, is that correct?

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1 CAPTAIN LOEST: No Chair, it was not.
2 CHAIRPERSON: Now the question is, could
3 a warning have been given, should a warning have been
4 given, was it possible to give a meaningful warning in the
5 circumstances with which you were faced?
6 CAPTAIN LOEST: Mr Chair, no, I don't
7 think so.
8 MR BIZOS SC: Have you not heard that
9 there must be minimum and necessary force, minimum and
10 necessary force? Have you not heard that as one of the
11 common law principles?
12 CAPTAIN LOEST: Yes, I have, Mr Chair.
13 MR BIZOS SC: I beg your pardon?
14 CAPTAIN LOEST: Yes, I have, Mr Chair.
15 MR BIZOS SC: Yes. Now, we have a list
16 of the people that were really killed on that day. Three
17 were killed from back, from the back to the front, the
18 bullet travelled from the back to the front. Assume that
19 to be correct according to the experts that have filed the
20 reports. Will you accept that as a fact?
21 CAPTAIN LOEST: Yes, I will, Mr Chair.
22 MR BIZOS SC: Yes. Have you ever seen
23 anybody being, who is attacking, to be shot in the back?
24 CAPTAIN LOEST: No, I would not, Mr
25 Chair.

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1 MR BIZOS SC: Yes. The people were
2 actually, according to the video that we have, videos that
3 we have seen, were running not facing the people with R5s
4 but the R5s, your line was on the side and as a result of
5 that nine of the people were killed dead from wounds on the
6 side. Will you accept that as a fact?
7 CAPTAIN LOEST: Mr Chair, if the reports
8 state that, yes, then I accept it.
9 MR BIZOS SC: Now does that sound like
10 self-defence?
11 CHAIRPERSON: I think that's a question
12 that can't really be asked of the witness. That again is a
13 legal matter unless, of course, you can give us from your
14 knowledge of circumstances which might explain, in the
15 context of a self-defence situation, people being shot in
16 the side or in the back. Are you able to do that from your
17 knowledge of what happened?
18 CAPTAIN LOEST: No, Mr Chair.
19 MR BIZOS SC: Have you heard of the
20 common law principle that you should shoot low and not on
21 the head and the neck? Have you heard that?
22 CAPTAIN LOEST: Correct, Mr Chair.
23 MR BIZOS SC: Eight of the people that
24 died were shot in the head or the neck. Was that in
25 accordance with the principles of the common law?

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1 MR SEMENYA SC: Again, Chair –
2 CHAIRPERSON: That again sounds like a
3 legal question you're asking the witness. Can you think of
4 circumstances, based on your knowledge of what happened, in
5 terms whereof people might have been shot through the head
6 or the neck where it was done in self-defence? In other
7 words it was necessary, the way things turned out, for them
8 to be so shot.
9 CAPTAIN LOEST: Mr Chair, no. Like I
10 said, I cannot at any stage give any comment with regard to
11 individual people or members that shot, I can't.
12 MR BIZOS SC: But you see we have a
13 totality, Captain. You tell us that Brigadier or is it
14 General, I forget, anyway senior officer Calitz said to you
15 and presumably those armed with R5s that self-defence was
16 their own decision, is that correct?
17 CAPTAIN LOEST: That is correct.
18 MR BIZOS SC: I have a problem with that
19 which I will deal with, but did Mr Calitz say to you or to
20 those carrying the R5s that are deadly weapons, be careful,
21 there are common law principles, you can't just make a
22 decision to shoot to kill? Did he say that as a warning?
23 CAPTAIN LOEST: No, Mr Chair.
24 MR BIZOS SC: As an instruction to
25 perhaps the not so well-trained constables that were armed

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1 with these weapons, did he say that?

2 CAPTAIN LOEST: Mr Chair, we all undergo

3 the same training with regard to legal principles and

4 common law and - law, so I think all of us have got the

5 same knowledge with regard to that matter.

6 CHAIRPERSON: I think you told us that

7 when you – I'm not sure if that's orally, it's in your

8 written statement, one of your statements, that Brigadier

9 Calitz in effect, when he gave the briefing – I don't think

10 you used these words but it amounts to the same thing,

11 explained or said that the rules of engagement would apply.

12 Would that be correct? I don't think you used those words,

13 I think that's a summary of what you said, is that correct?

14 CAPTAIN LOEST: Mr Chair, yes. Brigadier

15 Calitz explicitly said that us members of TRT carrying

16 sharp ammunition will not get an order to shoot and that

17 the principles of common and private law would apply.

18 CHAIRPERSON: Is that all he said or did

19 he give a more expansive or extensive explanation than

20 that?

21 CAPTAIN LOEST: That was all that he

22 said.

23 MR BIZOS SC: Yes. You made four

24 statements, Captain.

25 CAPTAIN LOEST: That is correct, Mr

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1 Chair.

2 MR BIZOS SC: In the fourth one in

3 paragraph 7 you say this –

4 CHAIRPERSON: Can we have it on the

5 screen so that we can follow it? What is the exhibit

6 number?

7 MR BIZOS SC: SSS3.

8 CHAIRPERSON: SSS3, what paragraph

9 number?

10 MR BIZOS SC: 7.

11 CHAIRPERSON: Thank you.

12 MR BIZOS SC: The last sentence, "After

13 the briefing of Colonel Scott, Brigadier Calitz made it

14 clear to the TRT commanders that no instruction for the use

15 of live ammunition will be given by any commander and that

16 each member will have his own decision in deciding if his

17 life is in danger to justify acting in self-defence." That

18 is in your last statement.

19 CAPTAIN LOEST: That's correct, Mr Chair.

20 MR BIZOS SC: It's a very important

21 statement in these proceedings, is it not?

22 CHAIRPERSON: The answer to that must be

23 yes, it's obviously important.

24 CAPTAIN LOEST: Obviously yes.

25 CHAIRPERSON: Now you then, you were one

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1 of the TRT commanders of whom you were speaking and did you

2 then convey that instruction in some or other form to those

3 under your command?

4 CAPTAIN LOEST: That's correct, Mr Chair.

5 I conveyed this message verbally to all the members under

6 my command during my briefing toward them.

7 CHAIRPERSON: Now how did you, can you

8 perhaps, it may not be easy but can you perhaps tell us

9 what you said when you conveyed in your own words that

10 instruction to those under your command?

11 CAPTAIN LOEST: Mr Chair, as it's written

12 in my statement, I specifically said what Brigadier Calitz

13 said and I also –

14 MR BIZOS SC: No – no.

15 CAPTAIN LOEST: - instructed the members

16 that they will have to act in self-defence as soon as they

17 feel that their lives are in danger and that none of the

18 commanders amongst us will issue an instruction to shoot

19 and that the members will have to act either in self- or

20 private defence.

21 MR BIZOS SC: This statement contained in

22 this statement was signed by you on the 14th day of April

23 2014 and it's not in any of your previous statements,

24 Captain.

25 CHAIRPERSON: No – no, Mr Bizos, I fear

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1 that there's been a communication problem which we can't

2 blame on the radio. This statement was made on the 25th of

3 January 2014. The year is the same but the month and the

4 date are wrong.

5 MR BIZOS SC: Yes. Thank you, Mr

6 Chairman. It was made a couple of months, a few months ago

7 although your previous three statements were made, if I

8 remember correctly all three of them, in 2012.

9 CHAIRPERSON: Mr Bizos, the witness

10 explained that this statement was made, if I remember

11 correctly, in response to queries that he received from the

12 evidence leaders who wanted an amplified statement dealing

13 with certain topics. Did I –

14 CAPTAIN LOEST: That's correct, Mr

15 Chairman.

16 CHAIRPERSON: - understand correctly? So

17 that's why you made this statement.

18 CAPTAIN LOEST: That's correct.

19 MR BIZOS SC: Now the question is, Mr

20 Chairman, why this important statement was not made in the

21 previous statements.

22 CHAIRPERSON: What's your answer to that?

23 CAPTAIN LOEST: Mr Chair –

24 CHAIRPERSON: Mr Bizos says that is

25 important and it obviously is an important factor. Why did

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1 you not mention it in your earlier statements? That's what
2 he wants to know.

3 CAPTAIN LOEST: Mr Chair, questions were
4 asked to me, I gave the answers and that is where this
5 statement related.

6 [12:59] CHAIRPERSON: No – no, I understand that.
7 He's actually busy with another point. He says, we know
8 now why you said it this statement but he says why, he says
9 it's important and he says why didn't you mention it in
10 your earlier statements? It wasn't the first statement you
11 made, this was the last statement you made. When you made
12 your earlier statements dealing with this very important
13 matter, why didn't you include that point in your earlier
14 statements? That's what Mr Bizos wants to know. What's
15 your answer to that?

16 CAPTAIN LOEST: Mr Chair, I can really
17 not recall why this was now brought up and not in the
18 earlier statement, I really can't remember.

19 MR BIZOS SC: You see, we tried to trace
20 throughout the evidence of Brigadier Calitz and we couldn't
21 find any statement to the effect that you said in your
22 fourth statement.

23 CHAIRPERSON: That's not a question,
24 that's just a comment. Tell me, have you been at briefings
25 before where instructions have been given to TRT members in

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1 regard to how they are to behave in circumstances where
2 they have R5 rifles in their possession and they, as it
3 happened, had to use them? Have you been in that kind of
4 situation before?

5 CAPTAIN LOEST: Yes, Mr Chair, I have.

6 MR MPOFU: Mr Chairperson?

7 CHAIRPERSON: Yes?

8 MR MPOFU: I'm sorry, I think in fairness
9 to the witness, in this first statement, I think it's
10 SSS1.1 at paragraph 11 there is a reference to him giving
11 the instructions, not so much about Calitz here.

12 CHAIRPERSON: Thank you, Mr Mpofo. Have
13 you got that, Mr Bizos?

14 MR BIZOS SC: Yes, Chair.

15 CHAIRPERSON: "I instructed the members
16 in the basic line to watch the group when they were
17 approaching and while in the briefing to only act in self-
18 defence when their lives were in danger." That was
19 mentioned earlier in your – is this your first statement?

20 CAPTAIN LOEST: That's correct, Chair.

21 CHAIRPERSON: So the question falls away,
22 Mr Bizos. He did, admittedly in different words –

23 MR BIZOS SC: No, no –

24 CHAIRPERSON: But he did make the point.

25 MR BIZOS SC: No, no. He didn't mention

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1 that this was an instruction from Brigadier Calitz –

2 CHAIRPERSON: Well, I'm not sure that he
3 had to. Was he not simply conveying to the members and
4 everybody would have so understood it, what he had in turn
5 received at the briefing at the forward holding area? A
6 man goes to the forward holding area for a briefing, he
7 comes back and he then talks to his men. Clearly, in the
8 context, he must be repeating to them what he'd heard. He
9 doesn't have to say, by the way, please take note of this,
10 write it down, this is what Brigadier Calitz told me and
11 I'm repeating to you. In the circumstances it must be
12 obvious to everybody that what he's saying is what he has
13 in turn been told and what he's passing on to his men.
14 That must be right, surely.

15 MR BIZOS SC: How, what position did you
16 stand at –

17 CHAIRPERSON: Mr Bizos, are you moving on
18 to another point?

19 MR BIZOS SC: Yes.

20 CHAIRPERSON: Your time has expired. We
21 will take the lunch adjournment.

22 [COMMISSION ADJOURNS COMMISSION RESUMES]

23 [14:10] CHAIRPERSON: The Commission resumes.
24 Captain, you're still under oath.

25 PAUL BISMARCK LOEST: (s.u.o.)

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1 CHAIRPERSON: Ms Le Roux, you have an
2 hour, as I understand it. An hour and a half, sorry, I beg
3 your pardon. You have an hour and a half. Five minutes
4 before the end the timekeeper, who is Mr Mojapelo, will
5 indicate –

6 MR WESLEY: Chair, no sorry, I'm doing
7 the timekeeping.

8 CHAIRPERSON: Are you the timekeeper?

9 MR WESLEY: She has an hour.

10 CHAIRPERSON: Sorry?

11 MR MPOFU: It is an hour.

12 CHAIRPERSON: It is an hour?

13 MR WESLEY: Yes, Chair.

14 CHAIRPERSON: I thought it was an hour.
15 It will be an hour. You will give us the five-minute
16 warning before the end of the hour, Mr Wesley.

17 MR WESLEY: I will do so, Chair.

18 MR GOTZ: Chair, well in the light of
19 that then I have to sacrifice some of my time to Ms Le
20 Roux. We've had discussions over the lunch period and in
21 terms of the cross-examination that Ms Le Roux needs, she
22 needs more than an hour and we'd understood that she would
23 be permitted to go for the rest of the afternoon and that
24 was understood with the –

25 CHAIRPERSON: How long did I give you?

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1 MR GOTZ: - with the evidence leaders,
 2 but –
 3 CHAIRPERSON: How long did I give you?
 4 MR GOTZ: I beg your pardon?
 5 CHAIRPERSON: How long did I give you?
 6 MR GOTZ: 45 minutes.
 7 MS LE ROUX: Chair, as I indicated this
 8 morning the Human Rights Commission asked for two and a
 9 half hours for Captain Loest.
 10 CHAIRPERSON: Ja, I know you did but –
 11 MS LE ROUX: I've limited my cross-
 12 examination significantly. I think I can get through most
 13 of it and we have discussed with my learned friend for SERI
 14 issue allocation. I do think if I have the rest of the day
 15 I should be able to cover most of the topics –
 16 CHAIRPERSON: Ja, alright, well then, so
 17 we'll bear in mind that that comes off the SERI time then.
 18 Alright, you may begin.
 19 MS LE ROUX: Chair, I think we'll have to
 20 address it in chambers at the end of the day because there
 21 are five topics –
 22 CHAIRPERSON: No, no. No, no, I'm sorry.
 23 The idea was the parties would have discussions and
 24 allocate issues and so on, and then those who have time
 25 that they don't need because they're not dealing with an

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1 issue, they're passing on to somebody else or it's being
 2 covered by somebody else, will then donate that time as it
 3 were to the person to whom it's given, and Mr Gotz
 4 indicated that he's prepared to give some of his time to
 5 you. So on that basis we will proceed.
 6 MR GOTZ: Chair, I should just place on
 7 record, effectively then the objection that the five
 8 parties made this morning has been overruled. You've ruled
 9 against us. We'd indicated the prejudice and the
 10 unfairness and the effect of your –
 11 CHAIRPERSON: What you submit to be
 12 unfairness.
 13 MR GOTZ: I beg your pardon?
 14 CHAIRPERSON: I'm not prepared to be
 15 unfair to anybody, but I have to decide what's fair and
 16 reasonable and obviously I've taken into account what's
 17 been said. But anyway, let's not waste time that could be
 18 spent in cross-examination. Let's proceed in the meanwhile
 19 and then at the end of the day we can take stock who's left
 20 to cross-examine, because we're not going to use up – I'd
 21 hoped we could finish the witness in a day but we can't
 22 because of the time that's been spent on other matters. So
 23 we can take stock again at the end of the day, but let Ms
 24 Le Roux proceed on the basis that I have indicated.
 25 MS LE ROUX: Chair, then let me just

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1 state for the record that based on my discussions with the
 2 SERI teams as well as my learned friend Mr Mpofu, covering
 3 the content of what we wanted to do in the time we
 4 understand to be available, that if I could finish by the
 5 end of today the SERI teams could start in the morning and
 6 finish before lunch and then Mr Mpofu could start his
 7 cross, and we do expect that Captain Loest could be
 8 finished during the course of tomorrow.
 9 CHAIRPERSON: You're in effect overruling
 10 the allocation that I made. You haven't got the power to
 11 do that –
 12 MS LE ROUX: No, Chair –
 13 CHAIRPERSON: And I won't allow you do
 14 it. Let's just carry on. Let's not waste time now. Let's
 15 carry on with the cross-examination.
 16 MS LE ROUX: Chair, I will carry on, but
 17 I must just again note the formal objection of the Human
 18 Rights Commission to this aspect of the cross-examination –
 19 CHAIRPERSON: I note your formal
 20 objection.
 21 CROSS-EXAMINATION BY MS LE ROUX: Captain
 22 Loest, good afternoon. I'm the advocate for the Human
 23 Rights Commission in this process. Captain, I'd like to
 24 start with a topic that flows from the questioning by my
 25 learned friend Mr Bizos this morning, and if I can

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1 orientate you, we'll be, I'll be concentrating on if you
 2 can cast your mind back to the events of the 16th and
 3 specifically the moment at which the TRT opened fire on the
 4 strikers. We will, it's a matter of undisputed fact from
 5 the videos and the photographs that are before the
 6 Commission that the strikers that were shot were under fire
 7 with rubber bullets from the POP members, from Papas 2, 3,
 8 5 and 9. They were affected by teargas that was designed
 9 to blur their vision and they were affected by the effect
 10 of stun grenades which were designed to disorientate them.
 11 So do you accept the possibility, and this relates to, in
 12 evidence-in-chief this morning you said that you observed
 13 the strikers come around the kraal, crouching in a tight
 14 formation. Do you accept that there's a possibility that
 15 what you observed was in fact the miners crouching and
 16 close to each other, which is a posture consistent with
 17 them being shot by rubber bullets and trying to shrink away
 18 from where the rubber bullets were coming, but getting
 19 pushed up against the kraal, that their vision was impaired
 20 because of the teargas and that may explain why some of
 21 them were hunkered down, looking down, shielding their
 22 faces, and that they were disoriented from stun grenades at
 23 the same time? Do you accept the possibility that what you
 24 observed was the effect of the three less than lethal POP
 25 mechanisms that were used against them?

<p style="text-align: right;">Page 28393</p> <p>1 MR SEMENYA SC: Chair, I will never be 2 able to understand the answer the witness will give. The 3 question is loaded with so many concepts in it. Can my 4 learned friend just break it down into single set questions 5 so that we can follow the answers? 6 MS LE ROUX: Chair, this is one of the 7 difficulties of limited time. The – 8 CHAIRPERSON: No, no, it may be an idea 9 just to put the question in, three parts of the question in 10 three questions. 11 MS LE ROUX: Captain Loest, do you accept 12 that a person being shot with rubber bullets from the side, 13 the intended effect of those rubber bullets and how crowds 14 generally respond is that people shrink away from where the 15 rubber bullets are being fired at them? Is that your 16 experience? 17 CAPTAIN LOEST: That's correct, Mr Chair. 18 MS LE ROUX: Is it also your experience 19 that when people are being, people have had teargas fired 20 at them, that it eliminates or severely compromises their 21 vision and that they can't see as clearly as they could 22 before the teargas? 23 CAPTAIN LOEST: Mr Chair yes, to a 24 certain extent. 25 MS LE ROUX: Once they've been subject to</p>	<p style="text-align: right;">Page 28395</p> <p>1 from where the rubber bullets are coming and people that 2 have had teargas fired at them generally have a posture of 3 looking down or touching their faces, do you accept the 4 possibility that some of the strikers coming around the 5 kraal were in the posture they were in because of the 6 effect of the rubber bullets and the teargas, that it's a 7 possibility that some of them are in the posture we observe 8 in the videos because of rubber bullets and teargas? 9 CAPTAIN LOEST: Yes, Mr Chair, I accept 10 that fact. 11 MS LE ROUX: Thank you, Captain. I'd now 12 like to move on to some aspects that Mr Bizos covered 13 before lunch, but obviously different aspects of the issue 14 of proportionality, and I should state that the Human 15 Rights Commission will obviously argue that every shot 16 fired at a striker at scene 1 was unlawful. But I'd like 17 you to assume for the purposes of my cross-examination that 18 the first few shots may have been justified, and so what 19 I'd like to do is explore with you whether the duration of 20 the shots and the number of shots were proportionate to any 21 perceived threat. 22 Chair, I'd like to do this by showing in a frame 23 by frame slow motion, on slow motion play the TRT volley at 24 scene 1, which obviously then requires a warning to the 25 chamber beforehand. I'd like to use, if we could use</p>
<p style="text-align: right;">Page 28394</p> <p>1 the effects of teargas, do you typically see people 2 touching their faces, crouching down, they're not standing 3 up straight the way they may otherwise have been? Once 4 they've had teargas fired at them. 5 CAPTAIN LOEST: In general, yes. 6 MS LE ROUX: And finally do you accept 7 that one of the effects you would observe of someone who 8 had suffered the disorientating effect of a stun grenade is 9 that they may be crouching down or looking down? 10 CAPTAIN LOEST: According to my 11 experience, Mr Chair, that is not what happens when a stun 12 grenade is deployed close to a person. It completely 13 disorients you, so you won't be in a position to 14 function like that. 15 MS LE ROUX: In your experience what do 16 you observe a person doing after they've had a stun grenade 17 deployed near them? What is their posture? 18 CAPTAIN LOEST: Mr Chair, exactly what 19 the stun grenade says, it stuns you, disorients you 20 completely. You are not functioning like a normal human 21 being would function and that was not my experience on the 22 day of the 16th. 23 MS LE ROUX: But Captain Loest, given 24 that you accept on the first two propositions that people 25 who have been shot with rubber bullets generally move away</p>	<p style="text-align: right;">Page 28396</p> <p>1 exhibit RRR17 – 2 CHAIRPERSON: I don't know if there's 3 anybody left in the chamber who needs the warning, but just 4 in case there are, we're going to see a video clip which 5 will show some of the people who were killed at Marikana on 6 the 16th. Seeing them on the screen may cause emotional 7 distress to those who were their relatives and loved ones 8 and I ask that this clip not be shown until 30 seconds have 9 expired from the time that I stop talking. 10 MS LE ROUX: And to our ever helpful 11 colleague in the corner, if we could use in fact RRR17, 12 which is the Reuters clip but with the timestamp running on 13 the bottom of the screen. 14 CHAIRPERSON: Yes, sorry Ms Le Roux, 15 before we get there, I want to ask the witness something. 16 We have been told about your own condition. Do you think 17 that seeing the picture will cause you emotional distress 18 and – 19 CAPTAIN LOEST: Mr Chair, I'm fine. 20 CHAIRPERSON: You're fine, alright. I 21 think you can now proceed. I think half a minute has 22 expired. 23 MS LE ROUX: Thank you, Chair, and if we 24 could, the TRT volley starts at 15:53:50, which is 22 25 seconds into this video. If we could then play it frame by</p>

<p style="text-align: right;">Page 28397</p> <p>1 frame, and if you could actually pause after the first two 2 seconds so that –</p> <p>3 CHAIRPERSON: What time are you starting? 4 MS LE ROUX: At 22 seconds into the clip, 5 which I 15:53:50. That's where the TRT volley commences. 6 CHAIRPERSON: I know. Wouldn't it be 7 sensible, if I may say so, to start 10 seconds earlier so 8 that one sees the build-up? 9 MS LE ROUX: Yes, Chair, that's fine. 10 CHAIRPERSON: It's just an extra 10 11 seconds. 12 MS LE ROUX: Captain Loest, if I could 13 just explain what I'd like you to pay particular attention 14 to, it's two things. The first is if you could take note 15 of where you are, if you appear on screen. We have an idea 16 of who we think you are on the video, but if you could keep 17 an eye out to identify yourself, we think you're in one of 18 the helmets positioned in the front of the bakkie that we 19 see, and if you could, so keep in mind that to identify, 20 and secondly what I'd like you to pay particular attention 21 to is whether you can identify any threat that you see from 22 the strikers in the first two seconds that we're going to 23 watch now closely frame by frame, if you could pay 24 particular attention to the movement of the strikers so 25 that you could let us know and any observations you have as</p>	<p style="text-align: right;">Page 28399</p> <p>1 second question, in that two seconds were you able to 2 recall or observe any threat from the strikers during that 3 two seconds? 4 CAPTAIN LOEST: What I can recall from 5 that specific day was during the period that the strikers 6 came around the kraal they started revealing their weapons. 7 That was at that stage, before they came we couldn't see 8 anything, but as they came around the corner of the kraal 9 they started revealing their pangas, assegais, etcetera. 10 MS LE ROUX: When you say they started 11 revealing them, could you describe for the Commission what 12 they were physically doing when you say revealing their 13 weapons? 14 CAPTAIN LOEST: Mr Chair, as they came 15 around the corner they were crouched together and the 16 blankets were held closed. So in other words you couldn't, 17 all you could see was people walking in this crouched 18 manner with their blankets closed, but as they came towards 19 us some of the strikers started opening up their blankets 20 and the weapons was revealed. 21 MS LE ROUX: Could we then play the video 22 again in slow motion from 15:53:52 until 15:53:54? So this 23 is now, we've had two seconds after the volley commences. 24 Now we're going to show the next two seconds. 25 [VIDEO IS SHOWN]</p>
<p style="text-align: right;">Page 28398</p> <p>1 to what the threat was that you observed in that two 2 seconds. So if we could play now and then pause at 24 3 seconds into the video, which is 15:53:52. So if we could 4 play it and then pause at 15:53:52. Sorry, could we have 5 the sound and –</p> <p>6 CHAIRPERSON: You'd better go back to the 7 beginning and have the sound from the start. 8 [VIDEO IS SHOWN] 9 MS LE ROUX: So first of all, Captain 10 Loest, can you identify yourself in that clip of the video? 11 CAPTAIN LOEST: Yes, Mr Chair, I can. 12 MS LE ROUX: Could you indicate to us 13 which member you are, or – 14 CAPTAIN LOEST: Mr Chair, if they can 15 move the video back about two seconds then I will identify 16 myself. 17 MS LE ROUX: Okay. Thank you, Captain, 18 that was our – 19 CHAIRPERSON: [Microphone off, inaudible] 20 MS LE ROUX: - suspicion. Chair, to 21 record for the record, at 15:53:58:02 on RRR17 Captain 22 Loest has indicated that he is the member to the extreme 23 right of the three members that we see leaning against the 24 front of the bakkie, the soft-skin vehicle. He's got a 25 helmet on his head with goggles on. Captain Loest, to my</p>	<p style="text-align: right;">Page 28400</p> <p>1 If we could play it all the way through to – 2 [VIDEO IS SHOWN] 3 Captain Loest, the Human Rights Commission will 4 argue to the Commission that after four seconds you can't 5 see the protesters because of the cloud of dust that's been 6 kicked up, and that therefore from this point onwards, four 7 seconds into the TRT volley onwards no shots could possibly 8 have been aimed at any specific threat because the TRT line 9 simply couldn't see any threat because of the dust cloud. 10 So we will submit that any shots after the first four 11 seconds were simply fired recklessly into a dust cloud. Do 12 you agree with that? 13 CAPTAIN LOEST: Mr Chair, like I said 14 from my perception that is why at that specific stage I 15 shouted "Cease fire," but I cannot comment on any other 16 people that shot from different angles. I couldn't see 17 what they were seeing. 18 MS LE ROUX: Captain Loest, can I ask you 19 to then turn to exhibit JJJ198 – 20 CHAIRPERSON: I'm sorry, before you move 21 on, is it possible for us to ascertain from the video 22 material at what point, at what time precisely the witness 23 said "cease fire"? Can you help us on that? If you can't, 24 I suppose it's something that can be ascertained later. 25 MS LE ROUX: Chair no, it's 15:53:59, so</p>

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1 it's right –

2 CHAIRPERSON: So he's right –

3 MS LE ROUX: If you play the video now,

4 it's right now.

5 CHAIRPERSON: So he called "cease fire"

6 at the time –

7 MS LE ROUX: So he's the second "cease

8 fire" call.

9 CHAIRPERSON: Ja, thank you.

10 MR BIZOS SC: Mr Chairman, may I draw

11 attention that the man who is shooting, whose hand is

12 clearly in his finger, is behind the people who are not

13 shooting, if that could be noted, Mr Chairman.

14 CHAIRPERSON: You see, the man to the –

15 in fact it looks as if two men to the side, to the left-

16 hand side of the vehicle as one faces forward, and they

17 are, as you say, a metre, they're a metre or so behind the

18 people at the front of the vehicle, but they are to the

19 side of the vehicle. So they're not directly behind, they

20 are – but they are, I suppose diagonally behind.

21 MR BIZOS SC: They are almost a car-

22 length behind, Mr Chairman.

23 CHAIRPERSON: No, but the three people

24 are leaning against the front of the vehicle. These people

25 are at the side of the vehicle. That's why they are

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1 diagonally behind, but we can see what we can see. You've

2 drawn our attention to the point. We'll bear it in mind.

3 MS LE ROUX: Chair, if we play the video

4 through, at 15:53:59, one second's time, we'll see Captain

5 Loest raise his fist in the air as he shouts "cease fire."

6 So perhaps we just play that short clip and then pause.

7 [VIDEO IS SHOWN]

8 And now, Chair, I'm going to go out of order but

9 since the video is up it will be convenient to do it this

10 way. Could we actually just play the video through now for

11 the next few seconds, and if we follow where Captain Loest

12 goes, he comes around the vehicle and climbs into it, and

13 if we could then pause at that point.

14 [14:30] So since we have the video clip up, could we

15 perhaps go back to 15:53 and then just play it through

16 until we see Captain Loest get into the vehicle? So if we

17 could play it, and in slow motion, because it does slip out

18 of frame a few times.

19 CHAIRPERSON: From 15:53:55?

20 MS LE ROUX: Yes.

21 CHAIRPERSON: Ja.

22 [VIDEO IS SHOWN]

23 MS LE ROUX: Captain Loest, first of all

24 the vehicle you climb into, is that the vehicle that you

25 were in that you've pointed out this morning on the aerial

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1 photograph? Is that the same vehicle? Is that your

2 vehicle?

3 CAPTAIN LOEST: That's correct, Mr Chair.

4 MS LE ROUX: And Captain Loest, did you

5 get into the vehicle so that you could use the radio that

6 was installed in the vehicle, and is this the point in time

7 that you then tried to make contact with the JOC and then

8 use your cell phone to contact Brigadier Pretorius that you

9 testified about when Mr Wesley was asking you questions

10 this morning?

11 CAPTAIN LOEST: No, Mr Chair, my sole

12 purpose for getting inside that vehicle was to remove the

13 vehicle further back from the scene so that whatever

14 happened in front we could preserve and that we could form

15 a perimeter where we actually stood just after we shout,

16 when I shouted "cease fire." At that stage I did not make

17 contact with anyone. I had still an active crime scene

18 that I had to attend to, so that was not a priority at that

19 stage.

20 MS LE ROUX: So you reversed the vehicle

21 and then what did you do?

22 CAPTAIN LOEST: Mr Chair, then I got out

23 the vehicle and then we regrouped the members and I gave

24 instruction that search teams and protection teams must

25 form up and we must go through the scene, remove all

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1 dangerous weapons and put them in one specific area, and

2 then after that we could inform the necessary authorities

3 to send in the medical personnel to attend to the injured.

4 MS LE ROUX: Now Captain Loest, another

5 question arises from what we've just seen of your movement

6 around. In your consolidated statement at paragraph 11,

7 and then again this morning you said that you were only

8 armed with a pistol, but we see you with a rather large R5

9 rifle in the video clip. Would you care to comment on

10 that?

11 CAPTAIN LOEST: Mr Chair yes, for that

12 specific time I had a firearm with me, but it was only for

13 that period. The firearm was never used at all. It was

14 handed, nothing out of the ordinary.

15 MS LE ROUX: When you say you only had it

16 for "this period," which period are you referring to?

17 CAPTAIN LOEST: Basically, Mr Chair,

18 during the line-up. Mr Chair, during the line-up when we

19 formed the basic line.

20 MS LE ROUX: And then what did you do

21 with your R5 after this point in time? Once you'd reversed

22 your vehicle backwards, what did you do with the R5? Did

23 you take it out with you when you returned to the scene?

24 CAPTAIN LOEST: Mr Chair, I basically –

25 the vehicle was right behind me, so I left the firearm

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1 inside the vehicle.

2 MS LE ROUX: And then when you returned

3 to the scene you only had your 9 millimetre?

4 CAPTAIN LOEST: Mr Chair, yes, I can't

5 really remember – this is a part of the scene that there

6 are certain things that I, it's very blurry and that I

7 can't remember clearly.

8 MS LE ROUX: Okay. Captain Loest, if I

9 could ask you then to go to exhibit JJJ198, this is the

10 affidavit of Katherine Scott. We indicated to your legal

11 team yesterday which portions of it – I hope you've had an

12 opportunity to read it. Have you had an opportunity to

13 look at her statement?

14 CAPTAIN LOEST: Yes, Mr Chair, I did.

15 MS LE ROUX: Thank you, and if we look

16 page 9 of JJJ198, Katherine Scott, and if we go to page 9

17 of that, paragraph 36, here we see a summary of the

18 conclusions by Ms Scott, and Chair, I should just note that

19 what I'm going to read out is amended by Ms Scott in her

20 second affidavit, but I won't have the time to go there, so

21 I'll read it with the edit, which comes in, in the last

22 sentence where we've managed to nail down the time in the

23 edit of the Reuters clip.

24 So what Ms Scott concludes, if you read this as

25 amended with her second statement, is that "In summary,

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1 audible in the footage provided," and Captain Loest, she

2 was looking at the Reuters clip we've just looked at,

3 "following the initial call for cease fire are at least

4 eight apparent rifle discharges and seven other gunshots.

5 The eight discharges following the edit starting at 42:16

6 come," and then Chair, this is the clarification she

7 managed to seek, "approximately 55 seconds after the first

8 audible call for cease fire at 22:09 and include at least

9 four rifle discharges." And then, Captain Loest, if you

10 turn over the page Ms Scott set out in a timetable, in a

11 tabular format there the 41 shots that she was able to

12 identify, correlated to the time on the video. You'll note

13 just below the entry marked 18 is the TRT volley. Then we

14 have the first cease fire call, the second cease fire call

15 recorded there at 23:04 is yours and then you can count and

16 see we have a further eight apparent rifle discharges and

17 at least seven other gunshots.

18 Now from the time that you called for a

19 ceasefire, did you observe any threat that existed after

20 your first call of "cease fire" that necessitated the use

21 of either R5 rifles or 9 millimetre pistols? Did you

22 personally observe any threat?

23 CAPTAIN LOEST: No, nothing, Mr Chair.

24 MS LE ROUX: Captain Loest, then given

25 your nearly three decades of experience as a Public Order

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1 Police officer I must now ask you some questions going back

2 to the duration and extent of the fire of the TRT line at

3 scene 1, because as I've indicated we're interested in

4 exploring this issue of proportionality to any threat that

5 could be perceived from the strikers. In your experience

6 and from what you went through on the day, do you think it

7 was necessary for 47 TRT members to open fire at the same

8 time?

9 CAPTAIN LOEST: Mr Chair, once again

10 where I was situated in the line-up I cannot comment on

11 what other members saw and what they acted upon. So on

12 that question, it's very difficult for me to give an

13 objective answer as to what these members perceived as

14 being an immediate threat and how they dealt with it.

15 MS LE ROUX: Captain Loest, in your

16 opinion and based on your experience, do you believe that

17 it was necessary for TRT members to fire 57 9-millimetre

18 rounds and 233 R5 rounds? I'm interested in your response

19 to the number of shots that were fired. Do you think that

20 was necessary force?

21 CAPTAIN LOEST: Mr Chair, once again it's

22 very difficult for me to answer of what about approximately

23 80 members decided why they would open fire on that

24 specific area and why they did it. That is why I called

25 "cease fire" when I did, because the threat that I saw was

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1 over at that stage.

2 MS LE ROUX: And Captain Loest, I assume

3 I'll get a similar response, which I do understand, with

4 respect to the question of whether it was necessary for

5 live rounds to be fired more than a minute after the first

6 calls for ceasefire, and whether an individual member,

7 whether it would have been necessary for any individual

8 member to fire up to 24 shots with respect to any threat.

9 I assume you have the same limitations in your answer.

10 CAPTAIN LOEST: Yes, I do.

11 MS LE ROUX: Okay. If I could then ask

12 you to turn to –

13 CHAIRPERSON: I'm sorry, could I just ask

14 a question before you – when you, from the time after you

15 called "cease fire," as far as we can see on the video

16 there were no further movement forward of any of the

17 strikers. Is that correct? The shots that were fired

18 appear to have certainly brought to an end the advance by

19 the strikers towards the TRT line. That's correct?

20 CAPTAIN LOEST: That's correct, Mr Chair.

21 CHAIRPERSON: So from the time you called

22 "cease fire" there were no further people advancing.

23 CAPTAIN LOEST: No, Mr Chair, not at all.

24 CHAIRPERSON: So one can draw one's own

25 inference as to whether it was appropriate to fire after

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1 that, but that's not a matter on which you prefer to give
2 an opinion. Is that right?

3 CAPTAIN LOEST: Yes, Mr Chair.

4 MS LE ROUX: Captain Loest, if I could
5 ask you to refer to the statement by the SAPS expert, Mr De
6 Rover, it's FFF11, and FFF11, if we go to page 17, page 17,
7 the two paragraphs that I've directed your attention to
8 through your legal team are 72 and 77 on the next page. 77
9 states, "Due to police training, conditioning and
10 indoctrination, discharge of a firearm by one police
11 officer against a perceived threat to life or serious
12 injury may well trigger support fire from other officers at
13 the scene, without they themselves at that stage having
14 fully perceived that threat themselves." He describes this
15 in brackets as "associative threat assumption." My
16 colleague is under attack; my duty is to back him or her up
17 in order to protect his or her life.

18 And then if we turn to the next page we'll see
19 paragraph 77 where Mr De Rover applies this concept of
20 associative threat assumption to scene 1 and says, "At
21 scene 1 a total of 53 SAPS officers discharges their
22 firearms, firing sharp ammunition, 9 millimetre and 5.56
23 millimetre. Combined they fired 328 rounds for an average
24 of 6.18 rounds per officer." He then says he does see
25 evidence in the scene for what is called associative threat

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1 perception, i.e. officers firing because others were,
2 without necessarily having perceived that threat
3 themselves.

4 So Captain Loest, this is the finding by the SAPS
5 own expert. Do you believe that some of the TRT members
6 fired shots because they saw others firing, rather than
7 because they saw any actual threats themselves?

8 CAPTAIN LOEST: Mr Chair, once again I
9 cannot speculate into what other members have thought in
10 their minds why did they fire. I cannot speculate on that.

11 MS LE ROUX: Captain Loest, in any
12 discussions you've had with any SAPS members who were there
13 on the day, did any of them indicate that they may have
14 been firing because their colleagues were firing?

15 CAPTAIN LOEST: No, Mr Chair, not at all.

16 MS LE ROUX: And Captain Loest, in terms
17 of your understanding of your training, would it be
18 permissible to fire your firearm just because other members
19 were firing?

20 CAPTAIN LOEST: Mr Chair, no.

21 MS LE ROUX: And I'm assuming that that's
22 because it's only permitted for a member to discharge their
23 firearm if they themselves see an imminent threat to their
24 own life or someone else's life?

25 CAPTAIN LOEST: I agree, Chair.

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1 MS LE ROUX: So Captain Loest, to round
2 all of this up, from the four seconds into the TRT volley
3 where you call "cease fire" because you couldn't perceive
4 any ongoing threat, do you accept that the shots that
5 followed after that – and I'm parking for now the
6 possibility that other SAPS members come and say they could
7 see some threat in the dust cloud, but based on your
8 perception, from the moment you call "cease fire" four
9 seconds into the TRT volley there could be no more threat
10 for anyone to defend themselves against?

11 CAPTAIN LOEST: Mr Chair, yes, from what
12 I saw, that is why I called the ceasefire, but once again
13 what other people or other members on that line saw, I
14 cannot comment and I'm not sure why they did fire, but I
15 called the ceasefire because at that stage the imminent
16 threat was not there anymore.

17 MS LE ROUX: Chair, I should just –

18 CHAIRPERSON: Sorry, that fits in with
19 the point that I put to you; if in fact we can't on the
20 video see anybody moving forward after that then, I know
21 you can't say what other people saw, but what you can say
22 is that there was nothing for them to see, based upon what
23 we see in the video. Is that right?

24 CAPTAIN LOEST: Mr Chair, that's correct,
25 and the members that were in my close proximity did not

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1 fire any further after I called the ceasefire.

2 MS LE ROUX: Chair, I must just correct
3 an error I made. Captain Loest called "cease fire" nine
4 seconds after the volley starts. Four seconds is the dust
5 cloud, there's a further five seconds and then he calls
6 "cease fire." So I must just correct that –

7 CHAIRPERSON: Five, when you said it was
8 four seconds, but I naturally accepted what you told us –

9 MS LE ROUX: I just correct that error.

10 CHAIRPERSON: - but I will bear in mind
11 your correction.

12 MS LE ROUX: Captain Loest, could I ask
13 you to go to the statement by Mr Gary White, who is the
14 Human Rights Commission's expert. That's exhibit JJJ178,
15 and if we could go to page 112, 112, Captain Loest, again
16 this was part of the documents that I had your attention
17 referred to. Have you had an opportunity to read the whole
18 of paragraph 7.5.10?

19 CAPTAIN LOEST: Yes, Mr Chair, I did.

20 MS LE ROUX: So let me take each point
21 then in order. Mr White in 7.5.10 states that "Although
22 there is evidence that there was a genuine threat posed to
23 the police at scene 1, particularly by the individuals who
24 was firing a handgun, but also potentially from those
25 carrying pangas and spears, the level of response from the

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1 SAPS was excessive and reckless.”

2 Mr White reaches that conclusion on the basis of

3 the following evidence, and Captain Loest, I’m going to ask

4 you to comment on each of the aspects that Mr White

5 highlights. So he firstly says, “On the SAPS own case 327

6 rounds of live ammunition,” that should be 328, Chair, from

7 the objective evidence that we now know, “328 rounds of

8 live ammunition were fired over the course of eight

9 seconds. That is a huge number of rounds fired over a long

10 period of time. Prima facie that constitutes a

11 disproportionate response to the perceived threat.”

12 Captain Loest, based on your experience, do you

13 believe that it was a huge number of rounds fired over a

14 long period of time, that would be a disproportionate

15 response to any perceived threat? Do you agree with Mr

16 White, and if you disagree, why do you disagree?

17 CAPTAIN LOEST: Mr Chair, once again I

18 read what he said here, but once again I cannot comment on

19 what other people saw. I cannot comment why a specific

20 member fired the amount of ammunition that he fired and the

21 reason why he fired so much. That’s something I cannot

22 comment on.

23 MS LE ROUX: But Captain Loest, based on

24 your extensive experience as a Public Order Police officer

25 did it surprise you that there were 328 rounds fired in a

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1 matter of seconds? Have you ever experienced any police

2 operation where that number of rounds was fired in that

3 short a time?

4 CAPTAIN LOEST: Mr Chair, no, I haven’t

5 experienced something like that before and I only found out

6 the amount of ammunition way later, but during that period

7 the threat was stopped and that is where I stopped. I

8 didn’t think about this any further because of the fact

9 that the situation was contained.

10 CHAIRPERSON: Yes, but of course one’s

11 got to bear in mind how many people fired. I can’t

12 remember, but we were given the figure a few minutes ago.

13 It was something over 50, I think. So, and there’s also a

14 figure given of the number of rounds fired on average per

15 person. Now just taking 50 as a rough figure – and I can’t

16 remember the exact figure – it’s just over six rounds per

17 person. Now it sounds a lot when you, but you’ve got to

18 bear in mind how many people were firing. Now when an R5

19 is fired is it like an automatic? Would you have to pull

20 your trigger, if you’re firing six rounds you’ve got to

21 pull your trigger six times? How do those work?

22 CAPTAIN LOEST: Mr Chair, with an R5, if

23 the firearm is placed on rapid fire each time you have to

24 pull the trigger to discharge one round. If it’s put on

25 automatic, if you squeeze the trigger and you keep it in it

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1 will fire until the magazine is empty.

2 CHAIRPERSON: But can you stop it firing

3 before the magazine is empty?

4 CAPTAIN LOEST: Mr Chair yes –

5 CHAIRPERSON: If you put it on

6 automatic –

7 CAPTAIN LOEST: Yes, you can, by just –

8 CHAIRPERSON: How do you stop it?

9 CAPTAIN LOEST: Just releasing your

10 finger and not pulling the trigger anymore.

11 CHAIRPERSON: I see, and how long does it

12 take for six, assuming six is an arbitrary figure, how long

13 does it take for six rounds to be fired if the firearm is

14 on automatic?

15 CAPTAIN LOEST: Mr Chair, I would presume

16 – I’m not a ballistic expert and I can’t remember the

17 figures offhand, but most probably less than a second.

18 CHAIRPERSON: Thank you.

19 MS LE ROUX: If we could then turn to

20 7.5.10B, and it may be easier to put up exhibit UU2 –

21 Chair, this again would necessitate a warning because it

22 shows where the bodies fell.

23 CHAIRPERSON: I’m told that we’re going

24 to be seeing a video clip in a moment which will, or may

25 well cause emotional distress to –

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1 MS LE ROUX: It’s a photograph.

2 CHAIRPERSON: - relatives and loved ones

3 of some of the people who can be seen on the clip, who’d

4 just been fired at by the police, and so I ask that that

5 clip not be shown until 30 seconds have expired after I’ve

6 finished speaking.

7 [14:49] I think the time is up. The clip can now be

8 shown.

9 MS LE ROUX: It’s a photograph, if we

10 could do UU2, image 4-5 –

11 CHAIRPERSON: Sorry, is it a photograph?

12 It’s a photograph, ja okay.

13 MS LE ROUX: Yes. UU2. That’s UU1.

14 Sorry, that’s UU2.1. We need UU2.2. Thank you. Now if we

15 zoom in, if we start off by zooming in on the top right-

16 hand corner of the kraal we’ll see – and this is what Mr

17 White is capturing in his paragraph B of 7.5.10. So you

18 see several bodies of protesters lying a considerable

19 distance, he estimates “more than 50 metres from the

20 shooting incident at the other side of the kraal. It’s

21 unclear how and why these people were shot. They could not

22 have been a part of the crowd that the police claim were

23 attacking them. I’ve not seen any other evidence from the

24 police suggesting that individuals were shot with live

25 ammunition in that location. If they were shot by stray

<p style="text-align: right;">Page 28417</p> <p>1 bullets from the shooting incident at scene 1, then that 2 supports my view that the shooting was reckless.” 3 So Chair, just to point out certain, what we can 4 see on the photograph, we see four bodies behind the kraal 5 there. We see one body inside the kraal, but right up 6 against it in that close proximity in the zoomed-in 7 portion. If we can then move down in zoomed section we see 8 another body on the right lower corner of the kraal, and 9 then if we move over to the left, within the kraal we see 10 one person, if we move a little bit more over to the right, 11 thank you, then we see one body that fell in the entrance 12 to the kraal, the mouth of the kraal, and if we zoom in on 13 the bottom left-hand corner, there we saw a group of bodies 14 piled up hard against the kraal. So we see the one body in 15 the mouth and then there's a pile-up of bodies and then we 16 see further bodies hard up against the edge of the kraal. 17 Chair, I won't have time to go there, but from 18 JJJ5.51 and 54, which are photographs that Captain Loest 19 took on the ground on the day, we've been able to ascertain 20 that there are 14 bodies hard up against the kraal there 21 and that one pile-up of bodies that we see just to the left 22 of the mouth of the kraal has 11 individuals in it. 23 Now when Mr White says at 7.5.10B that we see 24 bodies of protesters lying a considerable distance away 25 from the shooting scene, they were on the other side of the</p>	<p style="text-align: right;">Page 28419</p> <p>1 on for some distance and then collapsed. So one can only 2 make his finding, or can only rather accept his finding if 3 it's clear that these people died instantly, or virtually 4 instantly. That would be correct, I take it. 5 CAPTAIN LOEST: Yes, I agree, Mr Chair. 6 MS LE ROUX: Captain Loest, the objective 7 evidence before the Commission is at least two of those 8 people died instantly where we see them falling. In light 9 of that evidence do you accept that they were killed 10 because of stray bullets that went through the kraal from 11 the TRT line at scene 1, and do you accept Mr White's 12 criticism that that was reckless firing? 13 CAPTAIN LOEST: Mr Chair, once again I 14 cannot comment on this specific issue because where these 15 shots were fired from I don't know. How these people got 16 shot I don't know either. I do take cognisance of what Mr 17 White said in his report, but I reserve my comments with 18 regard to this. 19 MS LE ROUX: Captain Loest, from what you 20 observed on the day, you observed no threat from strikers 21 that were on the far side of the kraal, did you? 22 CAPTAIN LOEST: Could you please just 23 point out what do you mean by the far side of the kraal? 24 MS LE ROUX: Where we in this photograph 25 in the zoomed section, the top right-hand corner, or the</p>
<p style="text-align: right;">Page 28418</p> <p>1 kraal, one body shot within the kraal but on the far side, 2 we have the body at the bottom right corner, do you agree, 3 Captain Loest, with Mr White when he says it's unclear how 4 or why these people were shot because they couldn't have 5 been part of the crowd that was around the corner of the 6 kraal already, and that if they had been shot by stray 7 bullets from the shooting incident at scene 1, then he has 8 a view that that shooting was reckless? Do you have a 9 comment on the bodies that are on the far side of the 10 kraal? 11 CAPTAIN LOEST: Mr Chair, according to my 12 knowledge this was quite a large group and only a few came 13 around the corner of the kraal before the members felt 14 threatened and started shooting. So I'm unclear of how 15 many people were at that stage when the shooting started, 16 how many people were behind the kraal, still approaching 17 where the shooting incident actually took place. So it's 18 very difficult for me to make any assumption or speculation 19 with regard to the people at the back of the kraal, how and 20 in what way did they get injured or shot or killed. 21 CHAIRPERSON: Doesn't Mr White's 22 assumption or comment involve an assumption that the people 23 died instantly? They may well have died - we'll be able to 24 see from the post mortem reports if they did, but of course 25 if they didn't die instantly they might well have staggered</p>	<p style="text-align: right;">Page 28420</p> <p>1 right-hand side of the photograph. So it's the side of the 2 kraal that was furthest away from the TRT line. Did you 3 observe any threat from strikers in that location before 4 the shooting? 5 CAPTAIN LOEST: Mr Chair no, at that 6 stage that area where those three bodies are lying was not 7 in clear view at all, so I can really not say there was any 8 threat, but I didn't see any threat from that specific 9 area. 10 MS LE ROUX: Captain Loest, going back 11 into Mr White's statement to 7.5.10C, Mr White states 12 there, "In the Reuters footage of the shooting incident it 13 appears that after the initial burst of fire a large number 14 of shots continued to be fired into what was essentially a 15 dust cloud, without sight of any specific target." He 16 says, "This was reckless and cannot be justified," and then 17 on the next page he states, "One officer who I'm told is 18 Captain Loest," and I can happily confirm that we'd 19 identified you correctly, so Mr White had the correct 20 information, so "Captain Loest can be seen near the front 21 of the TRT line, but is not shooting his weapon when he 22 comes into frame. He confirms in his statement he did not 23 fire any shots at all. He can be seen waving his hands and 24 shouting 'cease fire' a number of times. Despite his calls 25 for ceasefire officers further back in the line continue to</p>

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1 fire for several seconds after his call. The call for
2 ceasefire [by yourself] must represent a considered
3 judgment that further firing is unjustified, but further
4 shots continue nonetheless." Do you have a comment on that
5 conclusion by Mr White?

6 CAPTAIN LOEST: Mr Chair, yes, like I
7 stated before, when I saw there was no imminent threat I
8 called the ceasefire, but once again there was a large
9 amount of members in line at that staged, so I cannot
10 comment why other members fired and carried on firing. I'm
11 not sure. They might have still seen a threat. That's the
12 only explanation that I can give at this stage.

13 CHAIRPERSON: What we've also heard is
14 that there were a number of calls of "cease fire," so
15 presumably there was a lot of noise going on. So the call
16 went down the line a bit. You were more or less in the
17 centre of the line, were you?

18 CAPTAIN LOEST: No, Mr Chair, that's not
19 correct. I was on the far left-hand side of the line.

20 CHAIRPERSON: Sorry, you were on the far
21 left, right. So you were on the far left and you were
22 asked, but I don't think you answered, do you know who
23 called "cease fire" first?

24 CAPTAIN LOEST: Mr Chair, no. All I can
25 remember is that he call for ceasefire came from the right-

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1 hand side of the line and as the call is called, then you
2 just carry on the command.

3 CHAIRPERSON: Yes, no the point that
4 concerns me is, is it possible, it may not be, but is it
5 possible that there were some people in the line who didn't
6 hear it because no-one near them said it and there was so
7 much noise going on that they couldn't hear people further
8 away calling it? Or is that a fanciful suggestion?

9 CAPTAIN LOEST: Mr Chair, it's possible,
10 but that is why that we repeat the command over and over
11 and over, and we keep the hand signal in place until such a
12 stage as you can ascertain that all the members in line has
13 actually heard and complied with that specific command.

14 COMMISSIONER HEMRAJ: And the reason it's
15 repeated down the line is to ensure that everyone hears it,
16 I expect?

17 CAPTAIN LOEST: Mr Chair, yes, under
18 tactical situations, specifically like something like this
19 it is very difficult to communicate. Therefore you have to
20 use all the possible senses of a human being to communicate
21 the message so it becomes loud and clear that each and
22 every individual understands exactly what the command was
23 given.

24 MS LE ROUX: Captain Loest, at paragraph
25 D on page 113 Mr White, just to summarise it so that I can

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1 try to speed up, he says that he hasn't seen a single
2 statement claiming any continuing threat beyond the initial
3 charge of protesters, nor any statements claiming any
4 warning shots. So I understand your evidence to be
5 essentially that – and I accept this – that you can't speak
6 for the other members of the TRT line what they were
7 seeing, what threat they might have perceived. We are
8 unlikely to get to hear their evidence because of the time
9 constraints the Commission is now under, but in any of the
10 statements that we have from the SAPS we don't have a
11 single statement saying there was any other threat other
12 than the initial movement, the initial charge, as it's
13 called by the SAPS. In light of that fact that we have no
14 evidence before the Commission of any other threat, do you
15 accept Mr White's criticism that there then could be no
16 justification for continued firearm use after that initial
17 charge was dealt with by the firing?

18 CAPTAIN LOEST: Mr Chair, like I've
19 explained I think in my statement that after the initial
20 volley of fire stopped a large amount of the protesters
21 turned around and they started running towards the north-
22 western side of the kraal and the power lines. I remained
23 behind with a few members to secure the scene and a large
24 amount of members then perceived, or pursued these, the
25 striking miners, going into the veld. What happened there

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1 I have no idea. I was not there. I've got no idea if
2 there was any threats, if some of the mineworkers turned
3 around or whatever, I've got no idea.

4 MS LE ROUX: Captain Loest, if we can
5 then move on to paragraph E, here Mr White addresses the
6 issue that –

7 CHAIRPERSON: I must tell you, you've got
8 five minutes.

9 MS LE ROUX: In this paragraph Mr White
10 addresses the fact that he says that it would be normal
11 policing practice to fire aimed shots at a group and that
12 the officers indicating that their weapons may have been on
13 automatic mode to explain why they under-counted shots, Mr
14 White says it's difficult to understand how those members
15 can justify each shot fired as necessary and proportionate
16 when they don't know how many shots were fired in the first
17 place. Captain Loest, given your experience, do you have
18 any comment on Mr White's conclusion that he can think of
19 no situation where the use of automatic weapons would be
20 necessary or appropriate in a crowd control situation?

21 CAPTAIN LOEST: Mr Chair, at this stage
22 this was no longer a crowd control operation. These miners
23 attacked the police line-up and that immediately escalated
24 this whole operation as not being a police operation where
25 less lethal means must be used to stop the protesters.

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1 This became a tactical operation because of the fact that
 2 we were fired upon and that the miners charged us.
 3 MS LE ROUX: Chair, I must just note that
 4 by my timekeeping we only started at quarter past, so I
 5 have 12 minutes left on my watch.
 6 CHAIRPERSON: I was misinformed. I was
 7 told we started at 5 past, but –
 8 MS LE ROUX: And I assume I have –
 9 CHAIRPERSON: I accept your timekeeping
 10 then.
 11 MS LE ROUX: And I assume I have a few
 12 more from the interventions from the Commissioners that I
 13 could hopefully add on.
 14 CHAIRPERSON: Let's take the tea
 15 adjournment now and we'll consult the official timekeeper
 16 and we'll carry on after that.
 17 [COMMISSION ADJOURNS COMMISSION RESUMES]
 18 [15:20] CHAIRPERSON: The Commission resumes.
 19 Captain, you're still under oath. Before you start, Mr
 20 Mpofo, I understand you can't be here till 10 o'clock
 21 tomorrow, is that right?
 22 MR MPOFU: Chair?
 23 CHAIRPERSON: I believe you can't be here
 24 until 10 o'clock.
 25 MR MPOFU: Until 10, yes, Chairperson.

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1 CHAIRPERSON: We will start 10 o'clock
 2 tomorrow.
 3 MR MPOFU: Thank you.
 4 CAPTAIN LOEST: (s.u.o.)
 5 CROSS-EXAMINATION BY MS LE ROUX (CONTD.):
 6 Captain, we're in Mr White's statement, page 114 and I must
 7 just put to you the point made in F3 where Mr White notes
 8 that "The statements made by some officers leave
 9 significant doubts over the proportionality of their
 10 actions" and then at 3 he notes that "The majority of
 11 statements are statements in which members who shot do not
 12 identify any specific target but instead admit merely to
 13 shooting or shooting at the crowd, the mob or similar." In
 14 your experience do you consider it acceptable and justified
 15 to shoot in the general direction of the crowd that
 16 approached the TRT or do you think that it would be
 17 justified to fire aimed shots at specific targets that
 18 posed an imminent threat, in your experience?
 19 CAPTAIN LOEST: Mr Chair, my experience,
 20 definite aimed shots would be preferred but once again I
 21 take cognizance of what Mr White says here in his statement
 22 and I'm not 100% sure what the members said in their
 23 statements as well but I have to concur that what he says
 24 here is in fact a probability.
 25 MS LE ROUX: Yes, Captain Loest, what Mr

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1 White means there is that the majority of statements don't,
 2 for example, identify – I saw a man in a brown shirt doing
 3 this, that's who I aimed at. They say there was a charging
 4 mob, there was a group, there was a warrior group, I fired
 5 at them. That's what he is capturing in summary there. If
 6 I can then just move on quickly to some points of principle
 7 that Mr White hopes you will agree with him. The first is
 8 whether you would agree that in all situations the use of
 9 live ammunition should be avoided at all costs unless
 10 there's absolutely no alternative and its use is necessary
 11 to combat an imminent threat to life. Do you accept that
 12 principle?
 13 CAPTAIN LOEST: Yes, I do, Mr Chair.
 14 MS LE ROUX: Do you accept that even
 15 where there is an imminent threat to life, it's not
 16 justified to fire recklessly in the general direction of a
 17 threat, it's only justified if each shot is aimed at a
 18 specific target that poses an imminent threat?
 19 CAPTAIN LOEST: I accept that, Mr Chair.
 20 MS LE ROUX: Do you accept that within a
 21 crowd there may be individuals who pose an imminent threat
 22 to life, for example because they're firing a pistol but
 23 those individuals may be standing beside many individuals
 24 who do not pose an imminent threat to life because they're
 25 simply part of the crowd?

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1 CAPTAIN LOEST: Mr Chair, like I stated
 2 before, a group of people stormed our line-up.
 3 MS LE ROUX: Captain Loest, I'm asking
 4 you at the level of principle, not with regard to what you
 5 observed on the 16th but at the level of principle do you
 6 agree that within a crowd there may be people who pose an
 7 imminent threat, for example who's got a pistol and that
 8 they're shooting but that the people standing around him
 9 who merely form part of a crowd, they wouldn't be an
 10 imminent threat?
 11 CAPTAIN LOEST: I agree on that, Mr
 12 Chair.
 13 MS LE ROUX: Do you agree that it is not
 14 justifiable therefore to shoot generally at a crowd simply
 15 because there are people within it who may pose a risk to
 16 life?
 17 CAPTAIN LOEST: Mr Chair, yes, in that
 18 regard I accept that principle as well.
 19 MS LE ROUX: And you would accept, based
 20 on your experience and training, that even in a crowd
 21 situation it remains the case that shots fired in self- or
 22 private defence are only justified if they are shots aimed
 23 at the specific target that poses an imminent threat to
 24 life.
 25 CAPTAIN LOEST: I accept that fact as

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1 well, Mr Chair.

2 MS LE ROUX: Do you accept that in a

3 crowd situation, even where shots are aimed at a specific

4 target, so even if we're in the scenario where we're

5 talking about aimed shots at a specific target that poses a

6 threat, there is still a high risk of injury or death to

7 bystanders because of the crowd?

8 CAPTAIN LOEST: Yes, Mr Chair, I accept

9 that as well.

10 MS LE ROUX: And therefore do you accept

11 there's a strong imperative to avoid the use of ammunition

12 at all costs because of that threat?

13 CAPTAIN LOEST: Mr Chair, yes, once again

14 it depends on the situation, situational appropriateness.

15 MS LE ROUX: Would you accept then that

16 it is appropriate and required for the police to plan an

17 operation carefully so as to minimise any risk of the need

18 to use live ammunition, that careful planning is essential

19 so that we can minimise the risk of harm to bystanders?

20 CAPTAIN LOEST: Yes, Mr Chair, I agree on

21 that.

22 MS LE ROUX: Do you agree that during an

23 operation the police should organise themselves in such a

24 way as to minimise the risk that live ammunition will be

25 necessary?

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1 CAPTAIN LOEST: Yes, I concur on that as

2 well.

3 MS LE ROUX: And do you agree that where

4 there is an imminent threat to life and live ammunition is

5 justified, only the minimum number of shots required to

6 eliminate or neutralise the threat should be fired?

7 CAPTAIN LOEST: I agree on that as well,

8 Mr Chair.

9 MS LE ROUX: Could I then ask you to turn

10 the page in Mr White to 115, paragraph 7.5.11 and 12. This

11 is where Mr White sets out his criticism relating to the

12 fact that the decision to send a baseline of approximately

13 60 TRT members armed with R5 rifles to confront a group of

14 protesters is a decision he simply cannot understand,

15 particularly in the context of the standing order 262

16 requirement to avoid the use of force at all costs and the

17 internationally accepted maxim, which you've agreed with me

18 now after the adjournment, that lethal force should only be

19 used when absolutely necessary. If we can skip, in the

20 interests of time, down to the bottom of that paragraph he

21 says that when he's planned for public order policing he's

22 deployed officers with firearms to provide protection from

23 a ballistic threat and he says typically he does this by

24 deploying specialist firearm teams at either end of a

25 public order shield line and depending on topography,

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1 situating officers who are trained as snipers. In

2 circumstances where the officers are faced with a threat to

3 life emanating from firearms or explosive devices, the

4 specialist firearms officers are trained to engage and

5 identify a target in order to neutralise the risk – sorry,

6 the threat. Through scenario based training and

7 intelligence led planning this would include the firearm

8 teams examining potential arcs of fire, working out in

9 advance their specific areas of responsibility and so that

10 the potential for the use of lethal force will be

11 minimised.

12 In 7.5.12 he sets out this application, the

13 application of these principles to the 16th of August where

14 he says, "This is stark contrast to an operation that was

15 planned, that a large crowd of people would very likely be

16 confronted by not one but two consecutive lines of police

17 officers with the front line made up of approximately 60

18 members armed with lethal weapons, each of whom had

19 discretion to fire live ammunition whenever an imminent

20 threat was perceived." The decision to configure the

21 tactical units in a baseline walking towards the protesters

22 in his view represents a reckless attitude with regard to

23 the potential for the use of lethal force and indeed the

24 duty of care in respect of the safety of the officers.

25 "This configuration that the SAPS implemented may explain

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1 why more than 300 live rounds were fired and why the funnel

2 of fire indicated on slide 209 of exhibit L is so wide."

3 Do you accept the criticism that Mr White makes of the

4 deployment of the TRT on the 16th of August? Essentially

5 it's saying you've got 60 members, each with a firearm,

6 each with discretion to shoot at a threat, as opposed to

7 what he described in 7.5.11 where you have designated

8 firearms officers whose job it is to neutralise an

9 identified threat. Obviously leave aside for now that

10 every member would have a self-defence prerogative but for

11 purposes of planning and deployment do you accept his

12 criticism that it would have been a better approach if

13 there were identified shooters in the TRT line whose job it

14 would be to neutralise threats, rather than 60 members each

15 with a firearm?

16 CAPTAIN LOEST: Mr Chair, yes, I accept

17 what Mr White says here but I need to point out that, as I

18 stated before, standing order 262 does not really apply to

19 this anymore because of the fact that this is not a crowd

20 management operation anymore. This mob that came towards

21 the TRT line-up were, I'm not sure but I'm 100, I can say

22 with very clarity that a lot of them were armed and that

23 posed a definite threat to the members in line.

24 CHAIRPERSON: There's a debate as to

25 whether 262 applies, which you and Ms Le Roux and the rest

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1 of us don't have to get involved in. It seems to me, if I
 2 can just put this to you, there are two ways, two aspects
 3 one has got to look at. There's the liability of the
 4 individual person who is in the baseline who feels, we will
 5 assume for good reason, that there is a reasonable
 6 possibility that he will be attacked and killed, in other
 7 words he feels himself under potential threat and he's got
 8 to act. It's all very well to say there are other people
 9 in the line but he doesn't know, he can't say I won't shoot
 10 because the guy next-door, the chap next-door to me will
 11 shoot because the chap next-door to him might not shoot
 12 because he thinks he's going to shoot. So one can
 13 understand why 60 people fired, if that is so. I'm not
 14 saying that that's necessarily a finding relating to the
 15 facts but in theory it's the case but of course – but the
 16 other angle, the other way of looking at it is, those who
 17 were planning the operation, the operation as we understand
 18 it was planned on the basis that the POP people were going
 19 to go first, they were going to use the force continuum,
 20 less than violent force, less than lethal force. If they
 21 got into trouble and it didn't work, they were going to
 22 retreat and the TRT were going to take over. They were
 23 firstly going to protect the POP and secondly, if the POP
 24 people got out of the way and got into Nyalas, then the TRT
 25 people would, as it were, be in the firing line. And it

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1 may well be argued, and this is something I'd like to hear
 2 what you have to say on, that the planners should have said
 3 look, it's not appropriate to have 60 people all
 4 potentially firing at an advancing mob if what happens is
 5 there is an advancing mob because that's the contingency
 6 they're planning for because the TRT are there because the
 7 mob may advance and may attack the people. So that's the
 8 contingency we're planning for. It may not be appropriate
 9 to have planned for 60 people all to fire because they
 10 individually regard themselves as under threat.
 11 Mr White seems to be saying that as a matter of
 12 sound police practice you shouldn't have that situation.
 13 You should have a couple of snipers, you should have a
 14 couple of people whose job it is to defend everybody. In
 15 other words, you don't have 60 people defending themselves,
 16 it would be enough if you had, say, four people there to
 17 defend the remaining, themselves and the remaining 56.
 18 That seems to be Mr White's point. Would you agree with
 19 that?
 20 CAPTAIN LOEST: Yes, Mr Chair, I would
 21 agree with that.
 22 MS LE ROUX: Captain Loest, do you agree
 23 with Mr White that –
 24 CHAIRPERSON: Mr Wesley has indicated
 25 you've got five minutes left but I understand that in five

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1 minutes' time you're going to go into some of the time that
 2 Mr Gotz has said you can use. Mr Gotz told me during the
 3 adjournment.
 4 MS LE ROUX: Yes, Chair. So I should
 5 record on the record my gratitude to my learned friend Mr
 6 Gotz for sacrificing his time so that we could complete our
 7 cross-examination by the end of the day but of course that
 8 severely prejudices his own clients and that is why this
 9 process is – causes us concern but let me move on.
 10 CHAIRPERSON: Well, that's a comment that
 11 you've made, that's a matter that we don't have to go into
 12 now.
 13 MS LE ROUX: Chair, I'm afraid it's a
 14 comment I'll continue to make until we get July extended.
 15 CHAIRPERSON: No – no, I don't think
 16 that's an appropriate approach to adopt. You've made your
 17 point, you don't have to go on making it. As you – I have,
 18 under the rules, the power to allocate times. I've
 19 allocated it. You haven't got the power to overrule me and
 20 we will just carry on in the normal way. You've made your
 21 protest, it's on record, it doesn't get any better by being
 22 repeated.
 23 MS LE ROUX: Captain Loest, are you aware
 24 of General Annandale's evidence that the JOC was unaware
 25 that anything had gone wrong at scene 1 until approximately

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1 16:20, so 20 past four which is almost 30 minutes after the
 2 TRT opened fire? On the basis of what you said on the
 3 radio and what you heard on the radio and what you said to
 4 Brigadier Pretorius and General Annandale on the phone, as
 5 you've set out in your statement, do you think there can be
 6 any doubt that the JOC knew earlier than 20 past four that
 7 something had gone wrong at scene 1?
 8 CAPTAIN LOEST: Mr Chair, according to
 9 the cell phone records that were entered into evidence, I
 10 think it was the second or maybe the third call that I made
 11 to Brigadier Pretorius, I also spoke to General Annandale
 12 and I gave him the sitrep of what was happening, what had
 13 happened at the scene.
 14 CHAIRPERSON: Looking at this exhibit
 15 JJJ188, you had a voice call for 46 seconds, that's the
 16 first one at five past four, 16:05:44. Perhaps if JJJ188
 17 is put on the screen then we'd all be able to follow.
 18 Right, now it's the three at the foot of the page we have
 19 to look at. The first one, 16:05:44, 46 seconds voice call
 20 to Brigadier Pretorius. The second one is three minutes
 21 later, 16:08:54 voice call one minute nine seconds from
 22 Brigadier Pretorius to you and then she phoned you again
 23 five minutes later, 16:13:52 and that's 40 seconds. Now
 24 can you tell us what happened at each – I think that's what
 25 Ms Le Roux is interested in. What happened in each of

<p style="text-align: right;">Page 28437</p> <p>1 these calls as far as you can recall?</p> <p>2 CAPTAIN LOEST: Mr Chair, as far as I can</p> <p>3 recall, the first call I made to Brigadier Pretorius</p> <p>4 because I received a missed call from her and during that</p> <p>5 period I gave her a quick sitrep. Then she phoned me back</p> <p>6 and I think during that second call, it is either the</p> <p>7 second or the third call, I requested medical personnel, I</p> <p>8 informed her that the scene was safe for the medical</p> <p>9 personnel to enter and like I said, I'm not 100% sure if it</p> <p>10 was the second or the third call which I then spoke to</p> <p>11 General Annandale as well and I gave him the sitrep as</p> <p>12 well.</p> <p>13 CHAIRPERSON: If you could tell, did she</p> <p>14 know there was a problem already? The reason I ask you</p> <p>15 that is that according to this exhibit, at 16:03:34 she</p> <p>16 sent an SMS to IPID and I understand, the evidence isn't</p> <p>17 before us yet but the SMS is fortunately still on the</p> <p>18 telephone, the cell phone of the person to whom it was sent</p> <p>19 and it indicates that IPID must come, things are very bad.</p> <p>20 So when she spoke to you did she indicate, did it appear</p> <p>21 that she knew there was a problem already?</p> <p>22 CAPTAIN LOEST: Mr Chair, I can't really</p> <p>23 recall. All I can recall is that at that stage I gave her</p> <p>24 information from my side of what was happening on the scene</p> <p>25 and what has happened.</p>	<p style="text-align: right;">Page 28439</p> <p>1 have time to go to but from the video footage we see the</p> <p>2 TRT line approaching the road with their firearms out,</p> <p>3 loaded, cocked. So you were in a state of readiness,</p> <p>4 prepared to use live ammunition, if necessary, as you moved</p> <p>5 up in the basic line, correct?</p> <p>6 CAPTAIN LOEST: That's correct, Mr Chair.</p> <p>7 MS LE ROUX: And what was it specifically</p> <p>8 about what you saw at this point in time that made you</p> <p>9 think you would need to use live ammunition against the</p> <p>10 crowd?</p> <p>11 CAPTAIN LOEST: Mr Chair, that is</p> <p>12 basically how the members of TRT are trained. When they</p> <p>13 deploy, that is how they deploy.</p> <p>14 MS LE ROUX: When you say that is how</p> <p>15 they deploy, they deploy with firearms cocked, ready to</p> <p>16 shoot.</p> <p>17 CAPTAIN LOEST: That is correct, Mr</p> <p>18 Chair.</p> <p>19 [15:40] MS LE ROUX: In your supplementary</p> <p>20 statement, paragraph 8 of your supplementary statement you</p> <p>21 say that you gave the order for members to form the basic</p> <p>22 line behind POP facing north and to move up to the kraal in</p> <p>23 a northerly direction. Now RRR11 which is the statement of</p> <p>24 Lieutenant-Colonel Claassen – again to save time we won't</p> <p>25 go there, for the record it's page 3 paragraph 9 –</p>
<p style="text-align: right;">Page 28438</p> <p>1 MS LE ROUX: Captain Loest, if we can</p> <p>2 move on to exhibit JJJ11.1515, this is a photograph taken</p> <p>3 at 15:51:47. I went through this in some detail with</p> <p>4 Captain Thupe during his cross-examination and we seem to</p> <p>5 have confirmation that this photograph is taken at the time</p> <p>6 that you ordered the TRT members to form a line and move in</p> <p>7 the direction of the kraal. Captain Thupe broadly</p> <p>8 confirmed that that was when the line was formed up and</p> <p>9 moved. Now what we see in JJJ11.1515 is the scene at the</p> <p>10 time that prompted your order to take your TRT members to</p> <p>11 form the basic line and move to the kraal. So what was it</p> <p>12 about the movement of the strikers that we see from the air</p> <p>13 in this photograph that made you believe that they were a</p> <p>14 threat to police rather than dispersing to Nkaneng along</p> <p>15 the path that the strikers who left before them, took.</p> <p>16 What was it about what you saw the strikers doing that made</p> <p>17 you think they weren't merely going home to Nkaneng?</p> <p>18 CAPTAIN LOEST: Mr Chair, according to</p> <p>19 me, each time the Nyala moved down with the barbed wire the</p> <p>20 protesters tried to get in front of the Nyala so as to</p> <p>21 enter the safety zone that we created between ourselves and</p> <p>22 the POP negotiation contingent that was faced towards the</p> <p>23 west of the koppie.</p> <p>24 MS LE ROUX: And we know that when you</p> <p>25 formed the baseline, from the video footage that we won't</p>	<p style="text-align: right;">Page 28440</p> <p>1 Lieutenant-Colonel Claassen says that he heard an order for</p> <p>2 the TRT to move in from Brigadier Calitz over the radio.</p> <p>3 Did you hear an order from Brigadier Calitz on the radio</p> <p>4 for TRT to move in?</p> <p>5 CAPTAIN LOEST: Mr Chair, that is most</p> <p>6 probably why I instructed my members to do the same because</p> <p>7 I would have not just instructed the members to move in and</p> <p>8 form a basic line unless I felt it would be necessary.</p> <p>9 MS LE ROUX: Captain Loest, sitting here</p> <p>10 today do you recall Brigadier Calitz giving that order over</p> <p>11 the radio for TRT to move in?</p> <p>12 CAPTAIN LOEST: Mr Chair, no,</p> <p>13 unfortunately like I said some instances within that</p> <p>14 specific day is a huge blank for me.</p> <p>15 MS LE ROUX: Captain Loest, I understand</p> <p>16 that. Sitting here today, what do you recall about the</p> <p>17 moment, the minute let's say, immediately before you</p> <p>18 started, you gave the instruction and got your members to</p> <p>19 form a line and move up? What do you remember seeing in</p> <p>20 the minute before you gave that instruction?</p> <p>21 CAPTAIN LOEST: Mr Chair, like I said</p> <p>22 before, I observed towards my left as we were facing north,</p> <p>23 the group of protesters moving down as the Nyala wire were</p> <p>24 deployed and during that time I felt it necessary to start</p> <p>25 deploying the members to get them ready because of, all my</p>

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1 members were deployed over a wide area and I had to get
 2 them together in a line so that they can form up and we can
 3 be ready for any situation.
 4 MS LE ROUX: Chair, if I could ask that
 5 we pull up exhibit JJJ194.15. This is a clip that starts
 6 at 15:51:38. Captain Loest, to orientate you, that's 12
 7 seconds before the TRT start moving so it's 12 seconds
 8 before your group moves up as we see them in the photograph
 9 we were just looking at, JJJ11.1515, and if we could – it's
 10 a very short clip, if we could play the clip all the way
 11 through and then play it through in slow motion and if I
 12 could ask you to concentrate on the strikers that you can
 13 see between the vehicles through the kraal, their movement.
 14 So if we just play it once through quickly and then in slow
 15 motion.
 16 [VIDEO IS SHOWN]
 17 MS LE ROUX: And if we could play it
 18 again in slow motion and if it's possible to zoom in on the
 19 strikers that we see through, in the background of the
 20 clip.
 21 [VIDEO IS SHOWN]
 22 MS LE ROUX: And Captain Loest, to help
 23 you, we see the group of strikers walking left to right on
 24 the screen, we see them carrying sticks and spears but not
 25 all of them seem to have a stick or a spear and then we see

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1 the group moving perpendicular to the Nyalas across the
 2 front of them, we don't see them turning in the direction
 3 of any of the Nyalas. So if we could play –
 4 CHAIRPERSON: Perpendicular or parallel?
 5 MS LE ROUX: We see them moving
 6 perpendicular to, across the front of them because they're
 7 facing this way. We see the strikers there, they're
 8 walking. And if we could go back and just do the little
 9 clip from six to seven seconds in slow motion we'll see a
 10 Nyala which is Papa10 which we can identify from the number
 11 plate BHL331B and then from the shadow in front of Papa10
 12 we see Papa5. If we just play that short portion slowly
 13 we'll be able to see the two shadows that show the two
 14 Nyalas. So we see the shadow of Papa10 and in front of it
 15 the shadow of Papa5 on the right-hand side of the screen
 16 there. So Captain Loest, given what we can see on the clip
 17 which, as I've said, is the strikers walking perpendicular
 18 across the front of the two Nyalas, not coming towards them
 19 and we see them walk left to right, what was it about the
 20 movement that you could observe? Did you see things other
 21 than what we can see on the video with respect to the
 22 movement of strikers which made you think we must move up
 23 in a basic line, get our guns ready? Did you see
 24 something? Did you see any members of the crowd doing
 25 anything other than what we see in this clip?

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1 CAPTAIN LOEST: No, Mr Chair, not at all.
 2 MS LE ROUX: If we can then –
 3 CHAIRPERSON: You didn't answer the other
 4 part of the question. The question was why did you do what
 5 you do, do what you did, getting your members ready and
 6 guns cocked and so on, did you see anything? And you say
 7 no, you saw nothing. So the rest of the question then
 8 still stands. Why did you then give the instruction you
 9 gave?
 10 CAPTAIN LOEST: Mr Chair, like I said, I
 11 wasn't 100% sure what was the intention of this group but
 12 they started moving towards the north and it would, became
 13 very clear to me that at some stage these people might end
 14 up on the northern side and that was the obvious next place
 15 that we had to be in place if something did go wrong.
 16 CHAIRPERSON: Just to get clarity on
 17 that, of course the little kraal was in the way. The
 18 fourth Nyala raced ahead of the people and brought the wire
 19 to the left-hand side of the little kraal as you're facing
 20 the koppie, it closed that way off. So there was a barrier
 21 as far as the little kraal was concerned between the police
 22 and the strikers. The other side of the kraal of course
 23 was open, the barrier wasn't there. So is that where, is
 24 that where you – that we know is where the line formed up,
 25 the basic line. Did you order them to form up there?

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1 CAPTAIN LOEST: Mr Chair, yes. According
 2 to the plan there, to the southern part of the little kraal
 3 the members formed up.
 4 MS LE ROUX: Captain Loest, again I'm not
 5 going to be able to go there but if we – actually I can do
 6 it with the photographs so if we could call up JJJ10.4540,
 7 JJJ10.4540 and just to place on the record, we know from a
 8 video clip which is JJJ194.16, the TRT baseline heads
 9 directly to the road which passes between the kraal and the
 10 shack. You've confirmed that at paragraph 10 of your
 11 initial statement. If we look at this photograph we know
 12 that the TRT walked directly north from your starting
 13 position, you lined up along the road in the gap between
 14 the kraal and the shack. So on this photograph it's the
 15 road that is running on the far right-hand side of the
 16 picture. We see the kraal, then a little bit below that we
 17 see the light coloured square which is the shack and that's
 18 where the TRT line formed up on the other side of the road
 19 that we see there. Now you went directly in that
 20 direction, correct? You didn't, the entire TRT basic line
 21 moved to that position and formed up there.
 22 CAPTAIN LOEST: That is correct, Mr
 23 Chair, because at that stage our left flank was protected
 24 by the barbed wire and the members of POP were deployed
 25 there as well. So our left flank was safe and the northern

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1 area was our next area of concentration.
 2 MS LE ROUX: And you didn't go to the
 3 south-western corner of the kraal where Nyala 4 had
 4 reached, had touched the kraal? You didn't go in that
 5 direction, did you?
 6 CAPTAIN LOEST: No, Mr Chair, because of
 7 the kraal immediately formed a natural barrier as well, so
 8 we concentrated on the open area where there were no
 9 barriers whatsoever.
 10 MS LE ROUX: And Captain Loest, is it
 11 correct that you headed off to the north to form up in the
 12 gap between the kraal and the shack because it was clear to
 13 you that the strikers were coming around the kraal and that
 14 any threat would be in that gap as opposed to on the south-
 15 western corner of the kraal?
 16 CAPTAIN LOEST: That is correct, because
 17 like I said the Nyala blocked off the south-western corner
 18 of the kraal and the south-eastern corner and the rest of
 19 the kraal was then exposed and was open and that is why the
 20 members were formed up on the southern side of that little
 21 road running to the left of the kraal.
 22 MS LE ROUX: Now in all of your
 23 statements you make no mention of an alleged attack on
 24 police at the point where Nyala 4 touched the kraal, you
 25 don't say anything about that alleged attack. Did you

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1 witness any attack on police where Nyala 4 touches the
 2 kraal?
 3 CAPTAIN LOEST: Mr Chair, no. I don't
 4 bear any knowledge. What I do bear knowledge of was at
 5 that stage that the POP members already engaged the
 6 protesters and they were shooting rubber, CS as well as
 7 stun grenades.
 8 MS LE ROUX: But you didn't observe any
 9 alleged attack on Nyala 4?
 10 CAPTAIN LOEST: No, Mr Chair, not at all.
 11 CHAIRPERSON: Does that mean we can
 12 accept that there was no such attack or does it just mean
 13 that you can't help us on that because you weren't looking
 14 there or you were concentrating on something else or –
 15 CAPTAIN LOEST: No, Mr Chair –
 16 CHAIRPERSON: What does it mean.
 17 CAPTAIN LOEST: Mr Chair, no, I cannot -
 18 from my observation I didn't see any attack. I can't say
 19 that there wasn't an attack, but from my observation,
 20 nothing.
 21 MS LE ROUX: And you observed Nyala 4
 22 unfurling its barbed wire and reaching the kraal?
 23 CAPTAIN LOEST: Yes, Mr Chair.
 24 MS LE ROUX: Now in your statements we
 25 also don't see mention of the use of teargas, stun grenades

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1 or water to repel any attack at that position, the south-
 2 west corner of the kraal. Did you not see any teargas,
 3 stun grenades or water cannon spraying at the south-west
 4 corner where Nyala 4 reached the kraal? Did you not
 5 observe any of that?
 6 CAPTAIN LOEST: Mr Chair, at that stage
 7 when Nyala 4 arrived at the south-west corner of the kraal
 8 the members of POP already engaged. Like I said, they
 9 started shooting rubber, CS and a few stun grenades were
 10 thrown as well. So yes, that definitely took place when
 11 the Nyala reached that area.
 12 MS LE ROUX: Now Captain Loest, we will
 13 submit, and we have already, to the Commission that the
 14 objective evidence is conclusive and shows no teargas or
 15 stun grenades were used until 20 seconds before the TRT
 16 opened fire at scene 1. So there's no objective evidence
 17 on any of the videos or photographs before the Commission
 18 of teargas or stun grenades until 20 seconds before the TRT
 19 opened fire. When did you first see teargas and when did
 20 you first see stun grenades being used in relation to the
 21 TRT fire? Let's take each in turn. When did you first
 22 seeing teargas being used before the TRT opened fire?
 23 CAPTAIN LOEST: Mr Chair, I smelt the
 24 teargas so I can't say exactly when it was fired but I
 25 definitely did smell it.

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1 MS LE ROUX: And where were you when you
 2 smelt it?
 3 CAPTAIN LOEST: We were in the line
 4 already.
 5 MS LE ROUX: So you were at the road at
 6 the kraal already?
 7 CAPTAIN LOEST: That's correct, Mr Chair.
 8 MS LE ROUX: Did you smell it before you
 9 got to the road?
 10 CAPTAIN LOEST: Mr Chair, as I said, as
 11 we formed up in the line I smelt teargas.
 12 MS LE ROUX: But you don't recall
 13 smelling anything before you got to the line?
 14 CAPTAIN LOEST: No, not at all, Mr Chair.
 15 MS LE ROUX: And with respect to the stun
 16 grenades, did you hear them or see them or both?
 17 CAPTAIN LOEST: Mr Chair, yes. I can
 18 recall I did hear stun grenades. At which specific time I
 19 cannot recall.
 20 MS LE ROUX: So you're not sure when you
 21 heard the stun grenade relative to when you got to the
 22 road?
 23 CAPTAIN LOEST: Mr Chair, no.
 24 Unfortunately I don't but I do recall that as we were in
 25 the process of forming up I did hear stun grenades as well

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1 as the firing of rubber bullets.
 2 MS LE ROUX: Then –
 3 CHAIRPERSON: And when you were forming
 4 up you were, were you looking up what I have described as
 5 the corridor, you know, between the little kraal and that
 6 shack which is below it on this photograph?
 7 CAPTAIN LOEST: That's correct, Chair.
 8 CHAIRPERSON: There's a fence around it.
 9 So I've described the passages between the fenced area
 10 which contains the shack and the kraal as being a corridor.
 11 So where you looking up, down the corridor when you were
 12 forming up the line?
 13 CAPTAIN LOEST: That's correct, Chair.
 14 MS LE ROUX: Captain Loest, the objective
 15 evidence also shows that there was no water cannon, that no
 16 water sprayed from a water cannon until eight seconds
 17 before the TRT fire. When did you first see the water
 18 cannon being sprayed, if you saw water being sprayed?
 19 CAPTAIN LOEST: Mr Chair, I can recall
 20 about in that time the water cannon arrived but I cannot
 21 recall if the water cannon actually, actually at any stage
 22 sprayed any water.
 23 MS LE ROUX: When you say arrived, do you
 24 mean arrived at the road?
 25 CAPTAIN LOEST: Mr Chair, yes, basically

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1 to the left of where we were standing, Nyala, the water
 2 cannon arrived there.
 3 MS LE ROUX: But you don't recall the
 4 water cannon actually spraying, from what you remember?
 5 CAPTAIN LOEST: No, Mr Chair, I don't.
 6 MS LE ROUX: And neither of the two water
 7 cannons was there before the time that you observed it
 8 arrive at the road when you were at the road?
 9 CAPTAIN LOEST: No, not at all, Mr Chair.
 10 MS LE ROUX: Captain Loest, my final
 11 question just to give you an opportunity to comment, in
 12 light of your evidence that you didn't observe any attack
 13 on the south-western, on the police at the south-western
 14 corner of the kraal, that accords with our analysis of the
 15 objective evidence and we will submit that you went
 16 straight to the road at the eastern corner of the kraal
 17 because there was no attack on the police at the south-west
 18 corner. And this is what you say at paragraph 9 of your
 19 initial statement where you say, "The Nyala with the barbed
 20 wire drove and deployed the wire to the edge of the small
 21 kraal and the militant group was cut off. They regrouped
 22 and proceeded to move around the kraal." Do you have any
 23 comment on that?
 24 CAPTAIN LOEST: No, Mr Chair, I don't.
 25 MS LE ROUX: Thank you, Chair, I have no

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1 further questions.
 2 CHAIRPERSON: Thank you. Would you like
 3 to use five minutes, Mr Gotz?
 4 MR GOTZ: Chair, it's three minutes on my
 5 clock. I'm not sure that it makes much sense.
 6 CHAIRPERSON: I set my watch by the radio
 7 this morning. If you're not quite ready and you want to
 8 start tomorrow then I'll agree to that and I won't knock
 9 the five minutes off.
 10 MR GOTZ: Right, Chair, but there was
 11 just one further matter, if I can get clarity. When will
 12 the Commission make rulings on the McIntosh timing? We
 13 unfortunately –
 14 CHAIRPERSON: The proposal is that I meet
 15 with Adv Pillay immediately we adjourn now and so the
 16 rulings can then be sent electronically before the end of
 17 the day.
 18 MR GOTZ: And then, Chair, can I – I
 19 understand, remember when –
 20 CHAIRPERSON: Remember we're starting,
 21 sorry to interrupt you, we're starting at 10 tomorrow. Mr
 22 Mpfu indicated that he could only be here by 10 and
 23 there's other business we have to attend to in any event
 24 before that, so you will have time from the start of
 25 operations tomorrow until 10 to get yourself in line but in

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1 any event I take it this witness won't be finished by then.
 2 Is there something you wanted to ask me or some comment you
 3 wished to make?
 4 MR GOTZ: No Chair, we were going to
 5 offer to use up from nine to 10 tomorrow, the SERI teams
 6 are available to cross-examine.
 7 CHAIRPERSON: No, no, I understand that
 8 and that offer is appreciated but the fact that it can't be
 9 implemented is not your fault and that will also be borne
 10 in mind.
 11 MR GOTZ: Then we'll – thank you, Chair.
 12 CHAIRPERSON: With your permission, Mr
 13 Gotz, we can now adjourn.
 14 MR GOTZ: Thank you, Chair.
 15 CHAIRPERSON: We will adjourn till 10
 16 o'clock tomorrow.
 17 [COMMISSION ADJOURNED]
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