

# 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 240

5 JUNE 2014

PAGES 30112 TO 30304



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Page 30112

1 [PROCEEDINGS ON 5 JUNE 2014]  
 2 [09:18] CHAIRPERSON: The Commission resumes. I  
 3 apologise for those who've been waiting here since 9  
 4 o'clock. We've had housekeeping matters to consider in  
 5 chambers. Some of the things we discussed are the subject  
 6 of an announcement I'm now going to make. After lunch  
 7 we're going to have an application from the SAPS in  
 8 relation to the position as to what we're to do, if  
 9 anything, next week and what time is required before Mr X  
 10 can give evidence, what time other people may require for  
 11 other things. That is going to be argued as I said after  
 12 lunch.  
 13 What I would also wish to announce is that we  
 14 would like a meeting of those who are going to cross-  
 15 examine – this witness is going to be cross-examined  
 16 further by Mr Budlender for about 26 minutes, I'm informed.  
 17 Thereafter Mr Bizos is going to cross-examine him for  
 18 something in the nature of quarter of an hour. Thereafter,  
 19 although he indicates he may not need that full time.  
 20 Thereafter Mr Tip is going to cross-examine on behalf of  
 21 NUM. He estimates, and I've gone through his list of  
 22 topics and I think he's correct, he needs about two hours.  
 23 So I've granted him that.  
 24 As far as the other parties are concerned who  
 25 will be cross-examining I would think from a slightly

Page 30113

1 different angle from that from which Mr Tip will be cross-  
 2 examining, I'd like them to come and see me in chambers  
 3 during the first comfort break, the first break, when we  
 4 can discuss how long they require and the allocation of  
 5 their time.  
 6 I've also received a request from Lonmin to come  
 7 and see me in relation to the dates for the resumption of  
 8 the Lonmin evidence and I would like Mr Bham and his  
 9 colleagues to come and see me together with Mr Budlender  
 10 during the tea break later in the morning.  
 11 I've recently received a letter in which  
 12 contention was advanced, which in my view I without  
 13 foundation, that when I have meetings with people to  
 14 discuss when their witnesses will give evidence and the  
 15 dates previously arranged are changed, they are regarded in  
 16 some quarters as being privileged people, having a  
 17 privileged discussion, and everybody should be present. I  
 18 just want to make it clear, I haven't done it up to now. I  
 19 don't propose doing it in future. I'm not going to have a  
 20 plenary session every time someone wants to come see me  
 21 about the date upon which their witness will be called. If  
 22 I consider there's merit in the application for the change  
 23 of date or the fixing of a date, that will be communicated  
 24 to the parties and if they wish to object they have the  
 25 fullest right to do so and that's what we've done up to

Page 30114

1 now, and I'm not going to deviate from that practice and I  
 2 want to make it clear that anyone who thinks that  
 3 privileges are being afforded to those who are not entitled  
 4 to privileges are wrong. You're still under oath, Mr Da  
 5 Costa.  
 6 MICHAEL GOMES DA COSTA: Yes, Chair.  
 7 CHAIRPERSON: Mr Budlender.  
 8 MR NTSEBEZA SC: Mr Chairman, can I just  
 9 raise an issue, just on privilege, Mr Chairman.  
 10 CHAIRPERSON: I'm told, before Mr  
 11 Ntsebeza speaks, someone's got their headphones on very  
 12 loudly. I can hear it now. It's very distracting to hear  
 13 some noises coming from people's headphones. That's not  
 14 necessary. The volume can be turned down. It makes it  
 15 very difficult for us to concentrate. I particularly want  
 16 to concentrate on what Mr Ntsebeza has to say. Yes, Mr  
 17 Ntsebeza.  
 18 MR NTSEBEZA SC: Thank you, Mr Chairman.  
 19 Mr Chairman, I just wanted to know whether there is no room  
 20 for the application to be heard in the morning rather than  
 21 in the afternoon.  
 22 CHAIRPERSON: May I suggest that – it may  
 23 well be that what underlies the application, sorry, your  
 24 application, is something that I should know but it isn't  
 25 necessarily of a nature that can appropriately be put into

Page 30115

1 the public domain at this stage. Can we discuss it during  
 2 the first break, and if you may be able to persuade me that  
 3 we hear the application after tea?  
 4 MR NTSEBEZA SC: I have an arrangement  
 5 with SARS, Mr Chairman.  
 6 CHAIRPERSON: Would that be satisfactory?  
 7 MR NTSEBEZA SC: Yes, I have to go to  
 8 Randburg –  
 9 CHAIRPERSON: Yes, you're talking about  
 10 the application for the postponement.  
 11 MR NTSEBEZA SC: Yes, Mr Chairman.  
 12 CHAIRPERSON: And you'd like that not  
 13 after lunch, as I suggested, but at some stage in the  
 14 morning.  
 15 MR NTSEBEZA SC: At some stage in the  
 16 morning, Mr Chairman.  
 17 CHAIRPERSON: I'm suggesting to come and  
 18 see me in the first tea break, first break, the –  
 19 MR NTSEBEZA SC: Comfort break.  
 20 CHAIRPERSON: - comfort break, and when I  
 21 talk to the people also about the allocation of time for  
 22 the further cross-examination of this witness we can deal  
 23 with that shortly and then if you persuade me we'll do it  
 24 after tea.  
 25 MR NTSEBEZA SC: No, I'm sure the taxman

Page 30116

1 will understand. I have to go and see the tax officials  
 2 and we had an arrangement for 11- for 12. For 12.  
 3 CHAIRPERSON: I see. Alright. Well, Mr  
 4 Bizos, would you mind if we deferred your cross-examination  
 5 slightly and allowed this application to be heard after Mr  
 6 Budlender's finished his cross-examination?  
 7 MR BIZOS SC: I've got no objection, Mr  
 8 Chairman.  
 9 CHAIRPERSON: I don't know to what  
 10 extent, if at all, the application is going to be opposed,  
 11 but if it is going to be opposed are those who are  
 12 proposing to oppose it in a position to do so? Are they  
 13 ready to do so?  
 14 MR BUDLENDER SC: Chair, can I ask that  
 15 if it's not going to be done after lunch, it be done after  
 16 one of the breaks this morning, because the evidence  
 17 leaders need to discuss their position in the light of the  
 18 application we've just received.  
 19 CHAIRPERSON: Okay, we'll hear it after  
 20 the first comfort break. Your appointment is at 12  
 21 o'clock, Mr Ntsebeza, so if we hear it after the break we  
 22 take at half past 10 you should be able to get to the FISC  
 23 in time.  
 24 MR NTSEBEZA SC: Yes, Mr Chairman. Look,  
 25 I think it can even survive me being there at 2 o'clock

Page 30117

1 rather than later than 2.  
 2 CHAIRPERSON: Alright, okay. Alright.  
 3 Anyway, we will then decide when precisely it will be done  
 4 after the first break because the evidence leaders may by  
 5 that time be in a position to take a position, but they may  
 6 also need time to sort of collect their thoughts and so on,  
 7 in regard to what they're going to put before us. But  
 8 anyway, so if the FISC will be happy, will be prepared to  
 9 wait until 2 o'clock to see you, we may well be able to do  
 10 it after the tea break.  
 11 MR NTSEBEZA SC: Thank you, Mr Chairman.  
 12 CHAIRPERSON: It's a long time ago that I  
 13 reminded you you're still under oath. I remind you again  
 14 you're still under oath. Mr Budlender.  
 15 CROSS-EXAMINATION BY MR BUDLENDER SC (CONTD.):  
 16 Thank you, Chair. Good morning, Mr Da Costa.  
 17 MR DA COSTA: Good morning.  
 18 MR BUDLENDER SC: I hope I'm not going to  
 19 be very long. You'll recall, Mr Da Costa, that on Tuesday  
 20 we had some discussion about whether the strikers had made  
 21 an inflexible demand of R12 500 a month. You remember that  
 22 discussion?  
 23 MR DA COSTA: I do, yes.  
 24 MR BUDLENDER SC: Yes, and as I  
 25 understood your evidence – you'll correct me if I'm wrong,

Page 30118

1 but as I understood your evidence your understanding, what  
 2 you were told was that the strikers insisted on 12 500 and  
 3 were not prepared to discuss anything else.  
 4 MR DA COSTA: That was my understand,  
 5 yes.  
 6 MR BUDLENDER SC: Yes, who gave you that  
 7 information? Can you recall?  
 8 MR DA COSTA: I can't recall anybody, I  
 9 can't recall that it was given to me by anybody  
 10 specifically, but that was the sort of feedback that we  
 11 were getting during our management briefings at the time.  
 12 MR BUDLENDER SC: Yes, I understand.  
 13 It's a long time ago. It would have been from someone in  
 14 Lonmin that you received that information?  
 15 MR DA COSTA: Yes, that's correct.  
 16 MR BUDLENDER SC: And of course we know  
 17 that no-one from Lonmin went to the koppie and actually  
 18 spoke to and listened to the strikers.  
 19 MR DA COSTA: No, nobody from Lonmin went  
 20 to the koppie to speak to the strikers. So, I mean I was  
 21 involved in one meeting with some officials from the AMCU  
 22 head office on the 13th of August on – it was the Monday,  
 23 where they had gone to the koppie to speak to the people  
 24 there and when they came back to give feedback to the  
 25 management group I was part of that management group that

Page 30119

1 listened to the feedback, and I recall them saying to us  
 2 that, you know, if you want the strike to end just give the  
 3 people what they're looking for, give them the R12 500 and  
 4 it will be over. So –  
 5 MR BUDLENDER SC: I understand.  
 6 CHAIRPERSON: That didn't mean that if  
 7 you offer them 11 500 it might also be over. I mean  
 8 obviously, you know, you make an opening bid, don't you?  
 9 You don't stop with your bottom line. So it may well be  
 10 that it's not a question of an opening bid in the bottom  
 11 line. Your point is they're one and the same, but you  
 12 don't know that from what they told you. Is that right?  
 13 MR DA COSTA: Ja, that may be so.  
 14 MR BUDLENDER SC: Now I want to show you  
 15 what Mr Mathunjwa says about that issue. Could we have  
 16 exhibit NN on the screen, please? It is Mr Mathunjwa's  
 17 statement which is evidence before this Commission. Could  
 18 we have exhibit NN, paragraph 75. There we go. Now the  
 19 context I can tell you, Mr Da Costa, is that Mr Mathunjwa  
 20 is talking there about the first occasion on which he went  
 21 to the koppie on the 16th and he says, the last sentence of  
 22 74 contextualises it. "I said that AMCU did not want  
 23 people killed but rather that their demands be addressed,"  
 24 and then paragraph 75 he says, "The workers responded to me  
 25 by saying that we should go and get management to come and

Page 30120

1 speak to them and listen to their grievances. They said  
2 that they were aware that management might not have R12 500  
3 from the start but perhaps such a position could be  
4 achieved through a process and over some time. The workers  
5 responded by people getting up and speaking to the crowd.  
6 I did not know these workers." You see that? That's what  
7 Mr Mathunjwa in his statement says the workers asked him to  
8 convey to management.

9 MR DA COSTA: Yes, I see that. I'm not  
10 sure what day that was on.

11 MR BUDLENDER SC: That's Thursday the  
12 16th. It's the morning meeting on Thursday the 16th.

13 MR DA COSTA: Yes, okay.

14 MR BUDLENDER SC: And then can we get  
15 from the transcript day 22, page 2362, and then I'll read  
16 from line 6. Again it's, Mr Mathunjwa's giving evidence in  
17 relation to his first visit on the 16th. Mr Bruinders says  
18 to him, "Now Mr Mathunjwa, moving away from music, after  
19 the address was over did some of the strikers on the koppie  
20 take the opportunity to speak?" Mr Mathunjwa, "Yes,  
21 indeed." Mr Bruinders, "Did more than one speak?" Mr  
22 Mathunjwa, "Yes, I recall more than one." Mr Bruinders,  
23 "What was the thrust of what they were saying? Mr  
24 Mathunjwa, "They were simply saying would you please go  
25 back" – and I think that should be "call the employer in

Page 30122

1 it's your account of what somebody else told you and that  
2 person would have got it from somebody else. Somebody who  
3 heard from the strikers, or says he heard from the  
4 strikers, or she heard from the strikers that they were  
5 going to be inflexible told that to someone in Lonmin who  
6 told that to you. Now I want to suggest to you that we  
7 should accept that on the evidence so far before the  
8 Commission Mr Mathunjwa's evidence is direct evidence of  
9 what happened. Yours is double hearsay by two people you  
10 can't identify.

11 MR DA COSTA: Well, you know, as I say I  
12 wasn't directly involved in engagements with the, either  
13 the AMCU representatives or the NUM representatives at that  
14 point in time. The only engagement that I had personally  
15 with them was on the 13th and during that engagement they  
16 only thing they mentioned was that the 12 500 would sort  
17 this out and at that point they, Mr Munroe asked them if  
18 they were tabling a demand on behalf of the strikers and  
19 the answer was no, they weren't.

20 MR BUDLENDER SC: Okay.

21 MR DA COSTA: They were simply relaying a  
22 message. So you know, that, whether Mr Mathunjwa put this  
23 attitude or view of the strikers to anybody else in  
24 management at a later stage, I'm not aware. That I did not  
25 hear.

Page 30121

1 order for the employer to address them and further they did  
2 say that they are quite aware that the employer might not  
3 have their demand of R12 500, but if the employer will come  
4 and engage with them for the process how to end up  
5 receiving such R12 500, so therefore we ask you again to go  
6 and tell the employer that we ask him to come and address  
7 us." And that was Mr Mathunjwa's evidence, his oral  
8 evidence, and as far as I know – and my colleagues will  
9 correct me if I'm wrong – the correctness of Mr Mathunjwa's  
10 evidence in this regard has never been challenged.

11 So now we know that Mr Mathunjwa, unlike Lonmin,  
12 actually went to the koppie, spoke to the strikers and  
13 listened to what they had to say. So he gives firsthand  
14 evidence of what their attitude was. Correct?

15 MR DA COSTA: Yes, certainly their  
16 attitude towards them, yes.

17 MR BUDLENDER SC: Yes, and what they said  
18 their demand of the employer was. They were going to try  
19 for 12 500 but they realised they might not get it right  
20 away.

21 MR DA COSTA: Yes, I see that.

22 MR BUDLENDER SC: Yes, now we have on the  
23 one hand Mr Mathunjwa's evidence under oath of what he  
24 personally heard, which is apparently not challenged. On  
25 the other hand we have your account, which I can understand

Page 30123

1 MR BUDLENDER SC: His evidence was that  
2 he had, I think was that he attempted to do so but was not  
3 able to do so. But in any event, I'll leave the point  
4 there.

5 COMMISSIONER HEMRAJ: Mr Budlender, this  
6 is alleged to have taken place on the 15th or the 16th?

7 MR BUDLENDER SC: 16th.

8 COMMISSIONER HEMRAJ: The 16th, yes, thank  
9 you.

10 MR BUDLENDER SC: The morning of the –  
11 the first conversation on the 16th.

12 CHAIRPERSON: Mr Budlender, could you  
13 remind me, there also of course were discussions from the  
14 Tuesday with the police, with Lieutenant-Colonel McIntosh  
15 and the strikers also told him that they wanted the  
16 employer to come and speak to them already on the Tuesday.  
17 Can you recall whether this aspect of the matter was dealt  
18 with at all in that evidence?

19 MR BUDLENDER SC: I can't recall any  
20 evidence of, by Colonel McIntosh that they said 12 500 or  
21 bust, and I'm told via messages passed to me that Mr Mpofo  
22 says Mr Magidiwana gave evidence which is similar to the  
23 evidence of Mr Mathunjwa as to what the attitude of the  
24 strikers was.

25 CHAIRPERSON: [Microphone off, inaudible]

Page 30124

1 point I suppose is what Lonmin thought the attitude of the  
 2 strikers was and there may also be questions as to whether  
 3 they should have been certain that their impression was  
 4 correct before they took an obdurate stance, but what the  
 5 witness can tell us about is what Lonmin thought –  
 6 MR BUDLENDER SC: Yes.  
 7 CHAIRPERSON: - based upon the  
 8 information they had.  
 9 MR BUDLENDER SC: Yes, that –  
 10 CHAIRPERSON: And the mere fact that  
 11 Magidiwana says what the attitude was doesn't prove that  
 12 Lonmin knew what their attitude was.  
 13 MR BUDLENDER SC: No, that's precisely  
 14 the point I was coming to, Chair, that I accept that this  
 15 was what Lonmin thought, but what I want to put to you is  
 16 that whoever conveyed that to Lonmin was not somebody who  
 17 was at the koppie, therefore didn't speak to the strikers  
 18 directly and therefore was probably wrong.  
 19 CHAIRPERSON: That's not what Mr Da Costa  
 20 says. The evidence was that on the Monday – Mr Mathunjwa  
 21 says this – they sent two high officials of AMCU to  
 22 Marikana and they went to the koppie and they spoke to the  
 23 miners and then they came back and spoke to Lonmin. So I  
 24 think to be fair to him they got the information from AMCU,  
 25 who had been to the koppie, but again the point I think is

Page 30125

1 that what was conveyed to Lonmin by the AMCU  
 2 representatives on the Monday wasn't, as you put it, 12 500  
 3 or bust. It was give them 12 500 and that's the end of the  
 4 strike. It doesn't mean if you offer them a lesser amount  
 5 that the strike will necessarily carry on.  
 6 MR BUDLENDER SC: Well, that's precisely  
 7 the point, Chair, with respect. Well, let's move on to  
 8 another subject, Mr Da Costa. I do want to move forward  
 9 and all of this is a matter for argument really at the end.  
 10 I don't think we can debate it further. Now you I take it  
 11 would be aware of the wage structure of the employees who  
 12 work at the mine shaft?  
 13 MR DA COSTA: Yes, I have an idea.  
 14 MR BUDLENDER SC: Yes, I don't want to  
 15 ask you detailed questions about it. It wouldn't be fair  
 16 and it's not relevant. Are you aware, or am I correct in  
 17 believing that in 2011 and 2012 the rock drill operators  
 18 were paid more than other employees who were on the same  
 19 grade?  
 20 MR DA COSTA: Yes, that's right. Their  
 21 basic pay was a little more.  
 22 MR BUDLENDER SC: Yes, and are you aware  
 23 that the NUM's position in the 2011 wage negotiations at  
 24 Lonmin was that it wanted equalisation, or what it called  
 25 harmonisation of the pay at each grade, or within each

Page 30126

1 grade? Are you aware of that?  
 2 MR DA COSTA: I was part of those wage  
 3 negotiations. I was part of the management team. I don't  
 4 recall that – I remember there was discussions around rock  
 5 drill operator remuneration and so on. I can't remember  
 6 exactly –  
 7 MR BUDLENDER SC: Alright. No well then  
 8 I won't ask you more about it. Are you aware of what the  
 9 position was that the NUM took up - or let me take a step  
 10 back. You pointed out on Tuesday that the mining companies  
 11 have networks of people in the HR division who exchange  
 12 information when it's required.  
 13 MR DA COSTA: Yes, that's correct.  
 14 MR BUDLENDER SC: Now are you aware of  
 15 what the position was that NUM took up in the wage  
 16 negotiations at Amplats with regard to rock drill  
 17 operators?  
 18 [09:38] MR DA COSTA: Not so much at Amplats but  
 19 at Impala.  
 20 MR BUDLENDER SC: I beg your pardon,  
 21 Impala. Impala, yes, at Impala.  
 22 MR DA COSTA: Yes. No, I was aware of  
 23 their position there, yes.  
 24 MR BUDLENDER SC: And let me just read to  
 25 you, there's a new exhibit, Chair, it's the affidavit of Mr

Page 30127

1 Patel.  
 2 CHAIRPERSON: I don't think it's been  
 3 given an exhibit number yet.  
 4 MR BUDLENDER SC: No, it doesn't have an  
 5 exhibit number.  
 6 CHAIRPERSON: No, shall we give it an  
 7 exhibit number? This would be XXX5, I think, if Ms Pillay  
 8 will give me the necessary permission.  
 9 MR BUDLENDER SC: XXX5, Chair.  
 10 CHAIRPERSON: XXX5, affidavit by Mohamed  
 11 Patel.  
 12 MR BUDLENDER SC: Now Mr Patel is the  
 13 human resource executive, mining, at Impala. Have you seen  
 14 this document? This was one of the documents –  
 15 MR DA COSTA: Yes, yes, I've seen that  
 16 document.  
 17 MR BUDLENDER SC: And his affidavit is in  
 18 response to an issue around what was said during the wage  
 19 negotiations at Impala and in particular the correctness of  
 20 two articles written by Ms Carol Pate.  
 21 MR DA COSTA: Yes.  
 22 MR BUDLENDER SC: If you'll go to page 2  
 23 of that document, paragraph 7, there she refers or he  
 24 refers, I beg your pardon, to the extract from Ms Paton's  
 25 article in Business Day, quote, "Impala executive director

Page 30128

1 Paul Dunn says that during the talks management put a  
 2 proposal on the table that rock drill operators, who are  
 3 more skilled and who are at risk of resigning for better  
 4 jobs, be given a higher increment. We recognised that we  
 5 were out of step with the rest of the industry in both job  
 6 grading and in pay. It would have been pre-emptive to stop  
 7 them from leaving but that suggestion never found its way  
 8 into the final agreement." And then the extract from  
 9 Mining News, next paragraph, "Impala management's executive  
 10 director Paul Dunn has suggested to NUM that rock drill  
 11 operators, who have the hardest job of all underground  
 12 machine operators, be given a differential increase but the  
 13 union had refused. We recognised that we were out of step  
 14 with the rest of the industry" and it goes on as before.  
 15 CHAIRPERSON: Mr Mpofo – sorry, Mr  
 16 Budlender, I see there's a confirmatory affidavit by Mr  
 17 Dunn which is annexed to Mr Patel's affidavit. I take it  
 18 that we can make that XXX6.  
 19 MR BUDLENDER SC: Well, yes. Then could  
 20 we go to – sorry.  
 21 MR TIP SC: Chair?  
 22 CHAIRPERSON: Yes.  
 23 MR TIP SC: Whilst we are making those  
 24 documents exhibits, there is an affidavit also by Mr Tansy  
 25 of the NUM and in fact Patel's affidavit was produced in

Page 30129

1 response to that.  
 2 CHAIRPERSON: Do you want to put that in  
 3 too?  
 4 MR TIP SC: I don't have a copy of that  
 5 but could –  
 6 CHAIRPERSON: Do you want to put that in  
 7 too? Do you want to put it in now or when you cross-  
 8 examine?  
 9 MR TIP SC: No, I think let us put it in  
 10 now and keep it all in sequence.  
 11 CHAIRPERSON: XXX7 –  
 12 MR TIP SC: I don't have the document  
 13 with me but it deals with the same topic.  
 14 CHAIRPERSON: Well, we will reserve the  
 15 marking XXX7 for Mr Tansy's affidavit when it appears, it  
 16 arrives.  
 17 MR TIP SC: Thank you, Chair.  
 18 MR BUDLENDER SC: Then Mr Da Costa, can  
 19 we go to paragraph 26 on page 7? Mr Patel says, "The NUM  
 20 at no stage accepted Impala's proposal that the pay  
 21 differential on band A4 which would have ensured a higher  
 22 wage for RDOs should remain in place and insisted that the  
 23 harmonisation demand be met. The NUM simply refused  
 24 Impala's offer to retain the pay differential on the A4  
 25 band." And then could we go to the next page paragraph 30

Page 30130

1 where Mr Patel says, "It is evident from the contents of  
 2 the minutes of the wage negotiations as summarised above  
 3 that Impala at all times attempted to retain the wage  
 4 differential between RDOs and the remainder of the  
 5 employees employed in other positions on the A4 band which  
 6 would have resulted in a higher wage for RDOs. This was  
 7 simply not accepted by the NUM who insisted by the  
 8 implementation of the harmonisation demand." Then  
 9 paragraph 32 he says, "It follows that the statements by  
 10 Dunn as reported by Paton are factually correct in the  
 11 context of the harmonisation demand." Now that's a long  
 12 preamble just to say, to ask you this question, were you  
 13 aware that during the Impala wage negotiations in 2011 the  
 14 NUM opposed a differential between RDOs and other employees  
 15 on the same grade?  
 16 MR DA COSTA: Yes, we had been aware of  
 17 that, yes.  
 18 MR BUDLENDER SC: So what you knew was  
 19 that if the Lonmin RDOs had asked NUM to negotiate higher  
 20 wages for them, the NUM would have said no, that's not our  
 21 position, we're in favour of equalisation across the grade.  
 22 Is that not correct?  
 23 MR DA COSTA: I don't know that I made  
 24 that connection at that time.  
 25 MR BUDLENDER SC: Well, doesn't it flow

Page 30131

1 logically? NUM took, had a principled position that all  
 2 workers on the same grade should be paid at the same level.  
 3 It follows that if the RDOs had said well, we want  
 4 something more, NUM wouldn't have supported that proposal  
 5 because it would have been inconsistent with the principle  
 6 which they have consistently adopted.  
 7 MR DA COSTA: It may be that that would  
 8 have been the case.  
 9 MR BUDLENDER SC: Yes.  
 10 CHAIRPERSON: May be – I mean isn't it  
 11 pretty certain that would have been the case? I mean how  
 12 can you expect NUM, who have taken up this principled  
 13 position, to come along and negotiate on behalf of the RDOs  
 14 for something to which they are opposed in principle? I  
 15 mean the very best they could do is, this is what the RDOs  
 16 say but we must tell you we don't support it because we've  
 17 got this principle that if there are going to be increases  
 18 they're going to be right through the grade. I mean that's  
 19 the most that could have happened in negotiations if they'd  
 20 taken place. Isn't that right?  
 21 MR DA COSTA: It would make sense that  
 22 that would be the position, yes.  
 23 MR BUDLENDER SC: Now I want to just, I  
 24 really want to conclude now, I just want to clarify the  
 25 position of AMCU at Lonmin at the time in question. At the

Page 30132

1 time of these events in August 2012 AMCU had organisational  
 2 rights at Lonmin but not bargaining rights, is that  
 3 correct?  
 4 MR DA COSTA: They had organisational  
 5 rights at Karee Mine.  
 6 MR BUDLENDER SC: At Karee.  
 7 MR DA COSTA: At the Karee portion of the  
 8 Lonmin operations, yes.  
 9 MR BUDLENDER SC: But they had no  
 10 bargaining rights anywhere at Lonmin?  
 11 MR DA COSTA: That's correct.  
 12 MR BUDLENDER SC: And so they were  
 13 therefore not part of wage negotiations.  
 14 MR DA COSTA: That's correct.  
 15 MR BUDLENDER SC: They were in fact very  
 16 keen to obtain these negotiating rights and according to Mr  
 17 Seedat, Mr Mathunjwa said he would get the workers off the  
 18 koppie if he was given a place at the bargaining table. Mr  
 19 Mathunjwa denies that but that's what Mr Seedat says.  
 20 MR DA COSTA: Ja, there was, there was  
 21 quite a lot of debate going on around – and in fact AMCU  
 22 was challenging Lonmin on their definition of a workplace.  
 23 MR BUDLENDER SC: Ja.  
 24 MR DA COSTA: And they were insisting  
 25 that a workplace should be defined by the operational area

Page 30133

1 as being Karee, Western Platinum, Eastern Platinum, where  
 2 our workplace was defined as the Marikana area. So in  
 3 terms of the entire Marikana complex they did not have  
 4 sufficient membership to gain those bargaining rights.  
 5 MR BUDLENDER SC: No, I understand that.  
 6 Lonmin's position was that the recognised union for  
 7 bargaining purposes at Lonmin was the NUM.  
 8 MR DA COSTA: The NUM was the recognised  
 9 union based on a recognition agreement which we had with  
 10 them as a result of the choice of the employees, which  
 11 union they belong to, yes.  
 12 MR BUDLENDER SC: Yes, that's right and  
 13 Lonmin's position was that it would not bargain over wages  
 14 with AMCU, correct?  
 15 MR DA COSTA: Well, our position was that  
 16 we would only bargain wages with a recognised union. AMCU  
 17 was not a recognised union.  
 18 MR BUDLENDER SC: Therefore Lonmin would  
 19 not bargain with AMCU over wages.  
 20 MR DA COSTA: Yes.  
 21 MR BUDLENDER SC: Yes. And so, and we've  
 22 been through this before, I think there's no dispute about  
 23 it but just to clarify, saying we will talk through the  
 24 recognised channels meant only NUM, it excluded talking  
 25 through AMCU and it excluded speaking directly to

Page 30134

1 representatives of the strikers. We went over that on  
 2 Tuesday.  
 3 MR DA COSTA: Yes.  
 4 MR BUDLENDER SC: That's correct?  
 5 MR DA COSTA: Yes.  
 6 MR BUDLENDER SC: So in effect what  
 7 Lonmin said to its employees on the koppie was the  
 8 following. It said, we will speak to you only through  
 9 people whom you do not trust because we've established that  
 10 they had no trust in NUM, correct?  
 11 MR DA COSTA: Well, you know, after the  
 12 fact it was clear that they had no trust in the NUM, yes.  
 13 MR BUDLENDER SC: But you knew that at  
 14 the time. You knew that they were at loggerheads with NUM.  
 15 MR DA COSTA: We knew that the group of  
 16 employees who were on the koppie were at loggerheads with  
 17 NUM, yes.  
 18 MR BUDLENDER SC: Yes, they had no  
 19 confidence in NUM. You said to them, despite that, you  
 20 said you must negotiate with us through NUM, is that  
 21 correct?  
 22 MR DA COSTA: We did say that, yes.  
 23 MR BUDLENDER SC: And you said to them,  
 24 we will only speak to you through people with whom you are  
 25 currently in a situation of violent conflict, is that

Page 30135

1 correct?  
 2 MR DA COSTA: Well, we didn't say that in  
 3 – say it like that, we said we'd speak to them through the  
 4 recognised structures.  
 5 MR BUDLENDER SC: You said we will speak  
 6 to you only through NUM and the effect of that was to say  
 7 you would only speak to them through people with whom they  
 8 were in violent conflict, is that correct?  
 9 MR DA COSTA: As I said, we said we'd  
 10 speak to them through the recognised structures –  
 11 MR BUDLENDER SC: And they were in –  
 12 MR DA COSTA: - which was NUM.  
 13 MR BUDLENDER SC: And they were in  
 14 violent conflict with the NUM, we agreed that on Tuesday?  
 15 MR DA COSTA: there had been conflict  
 16 between AMCU and them.  
 17 MR BUDLENDER SC: Violent conflict,  
 18 violent physical conflict. Yes?  
 19 MR DA COSTA: There had been, yes.  
 20 MR BUDLENDER SC: Yes and the effect of  
 21 what you were saying to them, you weren't saying it in  
 22 these words, the effect of what you were saying to them  
 23 was, we will speak to you only through people who don't  
 24 actually represent them. Isn't that correct?  
 25 MR DA COSTA: Well, you know, I'm not

Page 30136

1 sure that I would agree with that because you know at that  
 2 time there were a lot of people who were also sitting on  
 3 the koppie who were still members of the NUM.  
 4 MR BUDLENDER SC: But most of them were  
 5 not, we know that and we know they were very angry with the  
 6 NUM, we went through that on Tuesday.  
 7 MR DA COSTA: Yes, but you know to say  
 8 that those people don't represent you, I don't think there  
 9 was clear confirmation of the fact that the NUM didn't  
 10 represent those people, those – all, you know those people  
 11 and that there were a lot of other employees who were not  
 12 attending work at the same time who were not sitting on the  
 13 koppie.  
 14 MR BUDLENDER SC: No, but we're talking  
 15 about the strikers, Mr Da Costa. Is it your evidence under  
 16 oath that Lonmin thought that the NUM represented the  
 17 strikers on the koppie? Is that your evidence under oath,  
 18 that Lonmin thought that the NUM represented the strikers  
 19 on the koppie?  
 20 MR DA COSTA: I think at that stage we  
 21 weren't quite sure who represented the employees on the  
 22 koppie.  
 23 MR BUDLENDER SC: But you knew that it  
 24 wasn't the NUM. Whoever it was, you knew it wasn't the  
 25 NUM. The NUM was trying to break the strike and they were

Page 30137

1 having physical conflict with the NUM.  
 2 MR DA COSTA: There was a lot of  
 3 animosity from the group on the koppie towards NUM.  
 4 MR BUDLENDER SC: Yes. And you were also  
 5 saying to them in effect, not in these words, you were  
 6 saying to them we will speak to you only through NUM who in  
 7 fact won't support your demand because it's contrary to  
 8 their principles.  
 9 MR DA COSTA: I'm sorry, just repeat that  
 10 question?  
 11 MR BUDLENDER SC: You were saying to  
 12 them, in effect, we will speak to you only through – well,  
 13 you were saying it directly, we will speak to you only  
 14 through NUM and the effect of what you were saying was, we  
 15 will speak to you only through people who we know as a  
 16 matter of principle will not support your demands.  
 17 MR DA COSTA: I don't think that we could  
 18 have inferred that.  
 19 MR BUDLENDER SC: Well, you knew what had  
 20 happened at Impala, that the NUM was opposed to special  
 21 deal – special increases for rock drill operators, as a  
 22 matter of principle.  
 23 MR DA COSTA: Yes, but that is now also  
 24 making the assumption that everybody sitting on that koppie  
 25 was rock drill operators but by this time it was not just

Page 30138

1 rock drill operators, it was general employees –  
 2 CHAIRPERSON: The demand that you were  
 3 confronted with was a demand for R12 500 for rock drill  
 4 operators, wasn't it?  
 5 MR DA COSTA: Initially, but later on –  
 6 CHAIRPERSON: Later on when?  
 7 MR DA COSTA: Later on in the process of  
 8 the strike.  
 9 CHAIRPERSON: When?  
 10 MR DA COSTA: Well, you know, as –  
 11 CHAIRPERSON: In fact the agreement that  
 12 was ultimately concluded related to the position of the  
 13 rock drill operators, didn't it? They were raised, their  
 14 grade was raised, they were given extra payments and so on.  
 15 So it was the rock drill operators' demand –  
 16 MR DA COSTA: Ja, but –  
 17 CHAIRPERSON: - that was on the table,  
 18 wasn't it?  
 19 MR DA COSTA: Sorry Chair, the agreement  
 20 that was reached at the end actually involved other groups  
 21 of employees as well. It involved upgrading the A3  
 22 employees to A4 level, it involved giving an additional 3%  
 23 increase across the board to all employees and it involved  
 24 specific increases for rock drill operators. So the final  
 25 negotiation was actually, actually involved the entire work

Page 30139

1 force and –  
 2 CHAIRPERSON: That is correct, that's in  
 3 terms of exhibit OO10 where –  
 4 MR DA COSTA: I'm not sure what –  
 5 CHAIRPERSON: - general workers were  
 6 promoted from grade A, Paterson grade A3 to A4, all rock  
 7 drill operators were promoted from Paterson grade A4 to B1  
 8 and they were then paid the drilling allowance as well.  
 9 MR DA COSTA: That's correct.  
 10 CHAIRPERSON: You are correct –  
 11 MR DA COSTA: That's correct, so when  
 12 those negotiations took place with which, the negotiations  
 13 which eventually resulted in a conclusion to the strike, it  
 14 was on behalf of all employees, not just rock drill  
 15 operators. So you know certainly the understanding within  
 16 Lonmin is that as the events progressed, this demand became  
 17 not only a rock drill operators' demand, it became a demand  
 18 for all wks.  
 19 MR BUDLENDER SC: Well, let me just  
 20 summarise. I don't want to debate – but let me just put  
 21 one thing on record. We do know that this whole incident  
 22 was initiated by rock drill operators and it was led by  
 23 rock drill operators, is that correct?  
 24 MR DA COSTA: I think that is correct,  
 25 yes.



Page 30140

1 MR BUDLENDER SC: Yes. Well, I want to  
 2 put it to you that what Lonmin was really saying to the  
 3 strikers on the koppie was, we will speak to you only  
 4 through people whom you don't trust, whom you don't trust.  
 5 We will speak to you only through people with whom you are  
 6 in violent physical conflict, we will speak to you only  
 7 through people who we know you have an antagonism with and  
 8 who don't represent you and that in truth, the insistence  
 9 on speaking to the strikers only through the NUM was  
 10 entirely cynical because what Lonmin was really saying was,  
 11 we won't talk to you. Would you like to respond to that?  
 12 MR DA COSTA: I think that's your  
 13 interpretation of it. I don't think that was Lonmin's  
 14 intention.  
 15 MR BUDLENDER SC: Well –  
 16 MR DA COSTA: Lonmin's intention was to  
 17 stay within the established bargaining structures that were  
 18 in play at the time –  
 19 MR BUDLENDER SC: And the consequence of  
 20 that – sorry to interrupt you but the consequence of that  
 21 was that there could never be any effective discussion  
 22 between Lonmin and the strikers. As long as Lonmin said we  
 23 will only speak to you through the NUM there could never be  
 24 any effective communication between Lonmin and the  
 25 strikers. Do you agree with that?

Page 30141

1 MR DA COSTA: As I said in my previous  
 2 evidence, our position was that the environment was not a  
 3 good one, it was not conducive to engaging, to negotiating  
 4 anything. So that was why the position was, please lay  
 5 down the weapons, stop the violence, come off the koppie,  
 6 go back to work and then we can engage through the  
 7 recognised structures. And I made the point that those  
 8 recognised structures could have been changed in an orderly  
 9 way and I conceded that it would take some time to take  
 10 those structures. I did concede that, I accept that –  
 11 MR BUDLENDER SC: But – sorry.  
 12 MR DA COSTA: - but the position was that  
 13 to do that, and then we could engage.  
 14 MR BUDLENDER SC: I want to put to you  
 15 again the question I asked you, to which that was the  
 16 answer. I put it to you that Lonmin's insistence on  
 17 speaking to the strikers only through the NUM meant that  
 18 there could be no effective communication with the strikers  
 19 and Lonmin knew it. Would you like to comment on that?  
 20 MR DA COSTA: I've commented. I don't  
 21 think –  
 22 MR BUDLENDER SC: Do you agree or  
 23 disagree with the proposition that Lonmin knew that its  
 24 insistence that it would speak to the strikers only through  
 25 the NUM meant that there would not be any effective

Page 30142

1 communication between Lonmin and the strikers? Do you  
 2 agree or disagree with that statement?  
 3 CHAIRPERSON: I'm waiting for your  
 4 answer.  
 5 MR DA COSTA: I don't agree with that.  
 6 CHAIRPERSON: Why not? What are your  
 7 reasons for your disagreement?  
 8 MR DA COSTA: I've said I think our  
 9 intention was to, that if we were going to engage we did  
 10 not want to collapse the established bargaining structures  
 11 that were in place and therefore we wanted to engage  
 12 through the established structures.  
 13 CHAIRPERSON: But you knew that engaging  
 14 through the established structures would, could never  
 15 satisfy the strikers because the established structures  
 16 necessarily involved their representation by the union in  
 17 whom they had no confidence, who had already indicated that  
 18 as a matter of principle they were opposed to the very  
 19 demand that the strikers were making and which they were  
 20 expected to present on the strikers' behalf to Lonmin.  
 21 That's right, isn't it?  
 22 MR DA COSTA: That is true.  
 23 [09:57] MR BUDLENDER SC: That being so, I put it  
 24 to you again that Lonmin's – whatever Lonmin may say about  
 25 not wanting to collapse, establish negotiating structures

Page 30143

1 which I understand. A statement that we will negotiate  
 2 with you only through the NUM was actually entirely  
 3 cynical, because of this statement we won't negotiate with  
 4 you at all. Would you like to comment on that?  
 5 MR DA COSTA: It was a statement that?  
 6 MR BUDLENDER SC: A statement we will  
 7 negotiate with you only through the NUM was entirely  
 8 cynical, in fact it was a statement, in effect it was a  
 9 statement we won't negotiate with you at all and Lonmin  
 10 knew that. Would you like to agree or disagree with that?  
 11 MR DA COSTA: Ja, you know to put it  
 12 like, it is difficult for me to disagree with it.  
 13 CHAIRPERSON: It is correct, isn't it?  
 14 It may be hard to admit that, but that is true, isn't it?  
 15 MR DA COSTA: I –  
 16 CHAIRPERSON: You know you're obviously  
 17 an honest witness, I may say –  
 18 MR DA COSTA: I don't think that –  
 19 CHAIRPERSON: – and I being an honest  
 20 witness, you can't really deny that, can you?  
 21 MR DA COSTA: No, Chair, I don't think it  
 22 was Lonmin's intention that we never wanted to engage with  
 23 the people or we did not want to speak to them. It was, as  
 24 I said you know there were a number of things to consider  
 25 at that point in time. One of them was that we did not

Page 30144

1 want to collapse the structures that were in place but –  
 2 MR BUDLENDER SC: Thank you, Chair, I  
 3 have no further questions. Thank you, Mr Da Costa.  
 4 CHAIRPERSON: Ms Hemraj wished to ask  
 5 questions?  
 6 COMMISSIONER HEMRAJ: Mr Da Costa, were  
 7 you informed of the essence of what transpired in various  
 8 meetings held with certain members of management of Lonmin  
 9 and the two union leaders in the process with the police or  
 10 in the radio interviews?  
 11 MR DA COSTA: No, not at the time. You  
 12 know the radio interview was obviously in public, so I knew  
 13 some aspects of that but the meetings between some of our  
 14 senior Human Capital managers and executives and union  
 15 leaders and the police, I wasn't involved at that time and  
 16 I wasn't privy to what was going on there, no.  
 17 COMMISSIONER HEMRAJ: Did you become  
 18 aware at all at any stage as to what either or both of the  
 19 union leaders said about the membership of the persons on  
 20 the koppie?  
 21 MR DA COSTA: I think there was some, you  
 22 know the NUM, was saying that there is a lot of AMCU  
 23 members there, Joseph Mathunjwa was saying that there was a  
 24 lot of NUM members there, so it was clear that there were  
 25 members of both unions at the koppie.

Page 30145

1 COMMISSIONER HEMRAJ: Yes, thank you.  
 2 CHAIRPERSON: Mr Bizos?  
 3 CROSS-EXAMINATION BY MR BIZOS SC: Thank  
 4 you, Mr Chairman. Mr Da Costa, representatives of the  
 5 workers came to you on the 21st of May, you say, - the 21st  
 6 of June 2012, I think that was?  
 7 MR DA COSTA: Ja, that's correct, yes.  
 8 MR BIZOS SC: Did you take their concerns  
 9 about their wages seriously?  
 10 MR DA COSTA: Yes, I did.  
 11 MR BIZOS SC: Now I'm going to cut short  
 12 because many of the things that I would have asked you,  
 13 they were already being asked our learned friend, Mr  
 14 Budlender, but I just want to underline a couple important  
 15 things with you and may I say with respect to you that you  
 16 seem to be finding yourself in difficulties in admitting  
 17 the obvious. I appeal to you to answer the few questions  
 18 that I have to put to you, to try and answer them without  
 19 any fear or favour, will you do that?  
 20 MR DA COSTA: Yes, I will.  
 21 MR BIZOS SC: Now from the 21st of June to  
 22 the day that 34 people were killed and 76 were seriously  
 23 injured, there is a span of over 50 days, do you agree with  
 24 that?  
 25 MR DA COSTA: Yes, I do.

Page 30146

1 MR BIZOS SC: Now do you not think that  
 2 the conduct of Lonmin was to say the least, tardy in  
 3 actually meeting the demands of the workers.  
 4 MR DA COSTA: I wouldn't say it was  
 5 tardy, I think the demands were tabled at the executive,  
 6 the executive took some time to do benchmarking in the  
 7 industry and so on. They took time to debate it and come  
 8 to a decision as to what to do as far as the demand was  
 9 concerned.  
 10 MR BIZOS SC: Couldn't they have acted  
 11 more speedily? It was a matter of considerable urgency to  
 12 the workers, their colleagues in other mines have received  
 13 substantial increases, they considered their conditions of  
 14 their employment very unsatisfactory and did you not inform  
 15 your executive or whoever was finally responsible, that  
 16 this is an urgent matter, we haven't got time to postpone  
 17 it sine die, if I may use the expression. Did anybody say  
 18 that this is an urgent matter which requires immediate  
 19 response?  
 20 MR DA COSTA: Ja, I think I did highlight  
 21 the urgency of the matter to the executive, however making  
 22 these decisions is not, it is not a simple and quick  
 23 decision to make. At the executive level they need to  
 24 weigh up the consequences of making these changes that,  
 25 they need assess what's going around them, how that affects

Page 30147

1 other players in the industry and that sort of thing.  
 2 MR BIZOS SC: The question –  
 3 MR DA COSTA: So it takes some time.  
 4 MR BIZOS SC: The question is, could it  
 5 have been done with more deliberate speed or not?  
 6 MR DA COSTA: In hindsight it could have  
 7 been, in hindsight it could have been done.  
 8 MR BIZOS SC: Yes, -  
 9 MR DA COSTA: A bit faster.  
 10 MR BIZOS SC: Well, hindsight does help  
 11 in establishing what the truth may be. Your company's  
 12 attitude was that, don't be in a hurry, we an agreement  
 13 until 2013 and this is an agreement, never mind what they  
 14 say, never mind what effect the increases that the other  
 15 mines may have, never mind about their being wet at work,  
 16 we must take time to examine the matter, time is on our  
 17 side.  
 18 MR DA COSTA: Mr Chair, I don't think  
 19 that that was the position or the attitude. As I said in  
 20 hindsight it may well have happened faster, but the  
 21 attitude was not, you know kicking the can down the road  
 22 and hopefully this goes away. I mean there was some  
 23 urgency in getting to some sort of resolution of the matter  
 24 that was brought to me.  
 25 MR BIZOS SC: Who was the man or woman

Page 30148

1 that actually called the shots in Lonmin?  
 2 MR DA COSTA: The CEO.  
 3 CHAIRPERSON: Who called the shots in  
 4 respect of an issue like this?  
 5 MR BIZOS SC: Yes, on this issue.  
 6 CHAIRPERSON: Ja, there may have been  
 7 various shot callers in other issues –  
 8 MR BIZOS SC: Yes –  
 9 CHAIRPERSON: - but on this issue?  
 10 MR BIZOS SC: Yes, thank you for the  
 11 clarification.  
 12 MR DA COSTA: No, no –  
 13 MR BIZOS SC: Who called the shots on  
 14 this issue that was raised by the workers?  
 15 MR DA COSTA: Well, as I said previously  
 16 generally these decisions were made in the Executive  
 17 Committee and that committee was chaired by the –  
 18 MR BIZOS SC: Well, have you –  
 19 MR DA COSTA: - Chief Executive officer  
 20 who was Ian Farmer at that time.  
 21 MR BIZOS SC: Yes, is he still in the  
 22 employ of Lonmin?  
 23 MR DA COSTA: No, he is not.  
 24 MR BIZOS SC: Who was his/her deputy?  
 25 MR DA COSTA: Well, normally the Chief

Page 30149

1 Financial officer deputises, so it was Simon Scott.  
 2 MR BIZOS SC: Who was that?  
 3 MR DA COSTA: Simon Scott.  
 4 MR BIZOS SC: Who else was on this  
 5 committee and I'll tell you why I'm asking this question,  
 6 it is the function of the Commission as to may be in part  
 7 or in whole to blame. We want to know or want the  
 8 Commission to know that if there was any responsibility,  
 9 was it your responsibility.  
 10 MR DA COSTA: Well, is the question, who  
 11 were the other members on the Executive Committee?  
 12 MR BIZOS SC: We have the names as a  
 13 matter of record or do you want to repeat them for us?  
 14 MR DA COSTA: If you're satisfied that  
 15 they're on record then I wouldn't repeat them unless you  
 16 want me to, Chair?  
 17 MR BIZOS SC: Yes, well, we can save time  
 18 because you have already made mention of it. I want to put  
 19 to you, Mr Da Costa, that your attitude that we won't have  
 20 any regard to the increases given by others, we are going  
 21 to stick to the letter of the 2013 –  
 22 MR BHAM SC: Mr Chairman, sorry, the  
 23 witness said in granting the allowance –  
 24 CHAIRPERSON: Yes, I was going to take –  
 25 MR BHAM SC: For granting the allowance

Page 30150

1 he said and the evidence was –  
 2 CHAIRPERSON: I don't think –  
 3 MR BHAM SC: They did have regard to what  
 4 –  
 5 CHAIRPERSON: Let's not speak over each  
 6 other. My impression was that he didn't say that they had  
 7 no regard, in fact they were doing what he called a  
 8 benchmarking exercise in respect of what was happening  
 9 elsewhere in the industry. He took time, he conceded that  
 10 in hindsight it should have been done more, should or could  
 11 have been done more quickly but he didn't say, we weren't  
 12 interested at all in what was happening, we were sticking  
 13 to the letter of agreement, that's not his evidence. I  
 14 think you should reformulate the question, was that your  
 15 objection, Mr Bham? Was that your objection, Mr Bham?  
 16 MR BHAM SC: Definitely, Mr Chairman.  
 17 CHAIRPERSON: Yes, I uphold it. Please  
 18 reformulate your question?  
 19 MR BIZOS SC: Yes. Did anyone during  
 20 this period of over 50 days say that this is an urgent  
 21 matter, did anyone say it, of those responsible, did anyone  
 22 say that it is an urgent matter, the workers are concerned  
 23 about the fact that their complaint is not being seriously  
 24 considered?  
 25 MR DA COSTA: Yes, I impressed on the

Page 30151

1 executive that it was a serious matter and my understanding  
 2 is that they were dealing with it as a fairly serious and  
 3 urgent matter.  
 4 MR BIZOS SC: Yes. Now the unfortunate  
 5 differences between NUM and AMCU, we will deal with others.  
 6 If I were to put to you that you as an employer, rather  
 7 than regretting the differences between the unions, you may  
 8 have been happy that they exploited those differences and  
 9 said, let us not do anything. They are not united, if they  
 10 want to strike let them strike, we are not going to do  
 11 anything about it as a matter of urgency. What do you say  
 12 to that?  
 13 MR DA COSTA: No, I don't think that was  
 14 the case, Chair. The fact that there were these divisions  
 15 and that there tensions between the two unions made it  
 16 difficult from an operational perspective to engage and to  
 17 find solutions to issues and so on, but I think  
 18 particularly in the instance of Karee, I was and my  
 19 management team was trying very hard to get some sort of  
 20 conciliation between the two unions, so that we could in  
 21 fact engage on a proper basis and on a proper level in  
 22 order to move thing forward in general.  
 23 MR BIZOS SC: Now do you agree that  
 24 labour disputes can be settled if there is good faith and  
 25 respect for the rights of the workers and the rights of the

Page 30152

1 employer?  
 2 MR DA COSTA: Yes, I do.  
 3 MR BIZOS SC: And you need good  
 4 negotiators in order to try and settle the differences  
 5 between the two?  
 6 MR DA COSTA: Yes, you do and I think  
 7 sometimes you even need good mediators and people who are  
 8 able to bring parties together, yes.  
 9 MR BIZOS SC: Now you see would you agree  
 10 that the employers have the money and they have a duty to  
 11 their shareholders, we know all that, but the workers have  
 12 only one trump card, if I may use the expression, and that  
 13 is to withhold their labour. Would you agree with that?  
 14 MR DA COSTA: I agree with that the trump  
 15 card in the hands of the workers is to withhold their  
 16 money, - I mean to withhold their labour, my apologies.  
 17 The -  
 18 MR BIZOS SC: That's enough.  
 19 MR DA COSTA: No, I just need to -  
 20 CHAIRPERSON: To introduce a  
 21 qualification, I think, we must give him a chance.  
 22 MR DA COSTA: Yes.  
 23 CHAIRPERSON: What qualification do you  
 24 want to -  
 25 MR DA COSTA: Yes, the perception that

Page 30153

1 the employers are always sitting on a big bag of money is  
 2 not always true, so ja, I just wanted to qualify that.  
 3 MR BIZOS SC: To say whilst the dispute  
 4 is going on and there is a strike to say, come back to work  
 5 and then we will talk to you, as happened here, do you  
 6 reasonably expect workers to throw that trump card away and  
 7 come back to work without any prospect of using that card  
 8 in order to get more money? Is it fair to say, go away, we  
 9 will not talk to you until you come back to work, is that  
 10 fair and a just way in which to negotiate with workers?  
 11 MR DA COSTA: Mr Chair, I think this  
 12 whole, the whole situation around strikes and how they  
 13 should happen and how labour, how employees have the right  
 14 to play that trump card in withdrawing their labour is all  
 15 governed by legislation. So in the case of a protected  
 16 strike it would be unfair to say to people, go back to work  
 17 before I talk to you and before you've reached a, you know  
 18 before the dispute has been concluded through some sort of  
 19 signed agreement, but in this case the strike was  
 20 unprotected. There was a court interdict in the conduct of  
 21 the employees, so I wouldn't say it was unfair to say,  
 22 return to work.  
 23 MR BIZOS SC: Well, I want to remind you  
 24 with the answer that you gave to my learned friend, Mr  
 25 Budlender, that you were prepared to negotiate after the

Page 30154

1 extra 34 people died, why was it, - was it not unfair to do  
 2 that before the 34 people died?  
 3 MR DA COSTA: Mr Chair, I did say earlier  
 4 on in response to Mr Budlender that after the events of the  
 5 afternoon of the 16th of August, all parties softened their  
 6 positions.  
 7 [10:17] There were mediators that came in. There were  
 8 people, a lot of - I shouldn't say a lot, but a number of  
 9 parties who intervened in the process to get the parties  
 10 closer together, and that really culminated in the  
 11 negotiation process that concluded the impasse.  
 12 MR BIZOS SC: If I understood your  
 13 evidence correctly you suggested that the workers should be  
 14 given an extra R750 a months. Did I understand you  
 15 correctly?  
 16 CHAIRPERSON: No, no, no, he suggested a  
 17 thousand.  
 18 MR BIZOS SC: I beg your pardon?  
 19 CHAIRPERSON: He suggested a thousand and  
 20 if you look at the - it's in exhibit XXX3 there's a  
 21 document which is headed 448, which is the internal  
 22 pagination of Lonmin in their documents, it's a memorandum  
 23 the witness wrote on the 27th of June 2012 to the EXCO, in  
 24 which he deals fully with the matter and makes his  
 25 proposals, and his proposal was R1 000 per month for

Page 30155

1 single-handed drillers, R800 per month for drillers who are  
 2 assisted, and R500 per month for the assistants. His  
 3 proposal spells out the financial implications.  
 4 MR DA COSTA: Yes.  
 5 CHAIRPERSON: EXCO didn't accept his  
 6 proposal in its entirety and came up with the -  
 7 MR BIZOS SC: Yes, I recall that.  
 8 CHAIRPERSON: - came up with the 750  
 9 figure. So what you put isn't correct.  
 10 MR BIZOS SC: Well, the figures I was  
 11 reminded were slightly different to the figures that I put  
 12 to you, but having regard to those figures, did I  
 13 understand you correctly that your proposal was rejected by  
 14 the executive, was it?  
 15 MR DA COSTA: Ja, the proposal wasn't  
 16 rejected in its entirety. They did not agree with the  
 17 amounts that I was proposing, but I think they did, they  
 18 more or less went ahead with the - I'd given them two  
 19 proposals, but they then accepted the one proposal and  
 20 amended the amounts -  
 21 CHAIRPERSON: They did make other - you  
 22 did make other proposals too, didn't you? You proposed  
 23 that the EXCO should engage both NUM and AMCU at a national  
 24 level to inform them of this development and to solicit  
 25 their opinion on the matter - I don't think that was done -

Page 30156

1 and then you went on to say, "Given the fact that both  
 2 Impala and Anglo American Platinum have increased their  
 3 rock drill operators' wages, it will be extremely difficult  
 4 for Lonmin to resist for very long without some level of  
 5 labour unrest developing," therefore you proposed a  
 6 drilling bonus be increased by 20% and then you also  
 7 proposed the allowance. They accepted that part of your  
 8 proposal.  
 9 MR DA COSTA: Ja, the –  
 10 CHAIRPERSON: What happened to the other  
 11 proposal?  
 12 MR DA COSTA: I was proposing that it was  
 13 either the 20% or, either the bonus increment or the  
 14 allowance.  
 15 CHAIRPERSON: Yes, it's ambiguous but it  
 16 could mean – you were the author; it could mean what you  
 17 say.  
 18 MR DA COSTA: That's –  
 19 CHAIRPERSON: But the first part, the  
 20 engaging both NUM and AMCU at a national level –  
 21 MR DA COSTA: Ja.  
 22 CHAIRPERSON: - to inform them of the  
 23 developments and solicit their opinion, was that  
 24 implemented?  
 25 MR DA COSTA: I think it was. I don't

Page 30157

1 know for sure from a EXCO perspective, but you know,  
 2 certainly at an operational level where I was we did, we  
 3 did engage them, yes.  
 4 MR BIZOS SC: Finally, Sir, the tragic  
 5 results that we well know, do you or Lonmin feel that if  
 6 they had acted with greater consideration for the rights of  
 7 workers and not setting up conditions, or not coming back  
 8 with any compromise figure earlier on, may have avoided the  
 9 tragedy?  
 10 MR BHAM SC: Sorry, Mr Chair, it's not an  
 11 objection, it's just a request for clarification in the  
 12 question. The very last part of the question was "and not  
 13 coming up with a comprise figure any earlier." I'm not  
 14 sure if my learned friend Mr Bizos is referring to the  
 15 allowance that was granted or something else, because the  
 16 events from the 9th occurred after the allowance was  
 17 granted.  
 18 CHAIRPERSON: I think he's referring to  
 19 exhibit OO10, which is the addendum to the wage agreement,  
 20 which was dated 18 September 2012. Am I right, Mr Bizos?  
 21 MR BIZOS SC: Yes.  
 22 CHAIRPERSON: Does that give you the  
 23 clarity you seek?  
 24 MR BHAM SC: I just think the witness  
 25 should know exactly what –

Page 30158

1 CHAIRPERSON: Yes, yes, well he does  
 2 know, doesn't he? The witness can answer the question.  
 3 You understand the question, Mr Da Costa?  
 4 MR DA COSTA: I'm sorry, I've been  
 5 distracted now. If you don't mind repeating it –  
 6 CHAIRPERSON: Mr Bizos should repeat his  
 7 question. He's referring to something that was done after  
 8 an agreement, and he's suggesting it could have been done  
 9 earlier before the agreement. Mr Bham raised the question  
 10 what agreement is being referred to and I said as I  
 11 understand it, it was reference to the so-called addendum  
 12 to the wage agreement which was concluded after those  
 13 intermediaries and other people intervened, was concluded  
 14 on the 18th of September 2012.  
 15 MR DA COSTA: Yes.  
 16 CHAIRPERSON: And I understood Mr Bizos  
 17 to accept that that's what you meant. So you now  
 18 understand the question. Mr Bizos, repeat the question for  
 19 the witness. There's been a bit of water under the bridge  
 20 since you first asked it.  
 21 MR BIZOS SC: Yes, if Lonmin had come off  
 22 its high horse and negotiated with the workers earlier on  
 23 instead of saying we will not talk to you, might the  
 24 tragedy have been avoided?  
 25 MR DA COSTA: Ja, I guess when you, you

Page 30159

1 know, again with the benefit of hindsight that's a fair  
 2 question, but you know, at the time and before the events  
 3 of the 16th there were a lot of different considerations and  
 4 there were considerations of, you know, if we had engaged  
 5 with delegates from the striking workers on the koppie and  
 6 they, we weren't able to accede to the demand of 12 500 and  
 7 they then went back to the koppie and they gave that sort  
 8 of feedback that management couldn't accede, would that not  
 9 have angered the people more? What would the consequences  
 10 of that have been? And for us to foresee that there would  
 11 be a consequence of so many people losing their lives in  
 12 such a tragic way was difficult. I think I said earlier on  
 13 in my testimony that in my wildest imagination I didn't  
 14 think that anything like that could ever possibly happen.  
 15 So you know, it's – again I'm saying that hindsight is a  
 16 great thing, but at the time, difficult to concede to  
 17 something like that.  
 18 MR BIZOS SC: Finally, did it come across  
 19 to you that the workers did not want police intervention in  
 20 the dispute between Lonmin and them?  
 21 MR DA COSTA: I'm sorry, did it come  
 22 across –  
 23 CHAIRPERSON: He wants to know whether  
 24 did it ever come across to you –  
 25 MR DA COSTA: Did it come across –

Page 30160

1 CHAIRPERSON: - or ever occur to you,  
 2 whether you ever realised that the workers, as he puts it,  
 3 didn't want police intervention in the dispute? That's the  
 4 question. Is that right, Mr Bizos?  
 5 MR BIZOS SC: The intermediaries, the  
 6 police to be intermediaries –  
 7 CHAIRPERSON: Ja.  
 8 MR BIZOS SC: - between them and your  
 9 company.  
 10 MR DA COSTA: I think by some of the  
 11 actions from the striking workers who were on the koppie,  
 12 their actions and their animosity towards the police would  
 13 have suggested that they didn't want the police there, but  
 14 you know, I mean the situation was fairly – I hesitate to  
 15 say out of control, but it was lawless. There was, there  
 16 were a lot of assaults taking place, a lot of murders  
 17 taking place. I think the police had to be there to  
 18 address those issues.  
 19 CHAIRPERSON: A follow-up question to Mr  
 20 Bizos's question is, because of the stance adopted by  
 21 Lonmin didn't that put the police in a very difficult  
 22 position, because they were in effect obliged to try to act  
 23 as some kind of intermediary to get some movement because  
 24 of the stance that Lonmin adopted? What do you say to  
 25 that?

Page 30161

1 MR DA COSTA: Ja, I don't think the – I  
 2 don't think Lonmin's intention or request from the police  
 3 was ever to act as some sort of intermediary in terms of  
 4 solving the impasse.  
 5 CHAIRPERSON: No, I don't think anyone  
 6 would suggest the contrary, but what I'm asking you is were  
 7 the police not – and this is just a prima facie perception,  
 8 it may be wrong, that's why I'm putting it to you. The  
 9 impression I get is the police were put in a very invidious  
 10 position. There was a law and order problem. People were  
 11 being killed. People had been injured. Properties had  
 12 been damaged. There had been intimidation and so forth. The  
 13 unprotected strike was being enforced by violence and  
 14 intimidation as far as we can see from the evidence. The  
 15 police had to come to stop the violence and the  
 16 intimidation, but because as long as the labour dispute  
 17 continued, the wage dispute or whatever one wants to call  
 18 it continued, and as long as Lonmin were adopting the  
 19 attitude we'll only negotiate with NUM – and Mr Budlender  
 20 has gone into all of that – there wasn't going to be any  
 21 movement and in order to try to bring the breach of the law  
 22 and the disorder to a stop the police were forced almost to  
 23 act in two capacities – negotiators in relation to the  
 24 weapons and so forth, and intermediaries, because no-one  
 25 else was an intermediary, between the strikers and the

Page 30162

1 employer. Isn't that right?  
 2 MR DA COSTA: They may well have been in  
 3 a difficult position. I think all parties were in a  
 4 difficult position under those circumstances. These were  
 5 pretty unprecedented circumstances. You know this level of  
 6 anger and violence and so on had not been seen in a  
 7 protected or unprotected strike in the industry for many,  
 8 many years. So –  
 9 CHAIRPERSON: Yes.  
 10 MR DA COSTA: So it, I think everybody  
 11 was in a difficult position at that point in time.  
 12 CHAIRPERSON: Yes, well of course we may  
 13 have evidence about to what extent the action of Lonmin was  
 14 preceded or unprecedented in similar circumstances, but  
 15 I want to ask you another question before we take the short  
 16 adjournment, and that is I referred to the memorandum you  
 17 wrote to EXCO on the 27th of June 2012, which is exhibit  
 18 XXX3 and it's headed 448, which I think is an internal  
 19 Lonmin number, I take it you've got that file in front of  
 20 you.  
 21 MR DA COSTA: I have it somewhere.  
 22 CHAIRPERSON: On page 449 you set out  
 23 your proposal, and I've read part of it already, "Engage  
 24 both NUM and AMCU at national level to inform them of this  
 25 development, solicit their opinion on the matter." Then

Page 30163

1 you say, "Given the fact both Impala and Anglo American  
 2 Platinum have increased their rock drill operators' wages,  
 3 it will be extremely difficult for Lonmin to resist for  
 4 very long without some level of labour unrest developing.  
 5 Therefore, first proposal is increase the drilling bonus by  
 6 20%." I'm not sure that's a proposal that is the wages,  
 7 but the drilling bonus.  
 8 Then you go on, "Consider the payment of a rock  
 9 drill operator allowance rather than a straightforward  
 10 increase in wages." So I'm not sure that's an alternative  
 11 to increasing the drilling bonus, but we don't have to  
 12 debate that, but I'll just tell you I revise my opinion, I  
 13 don't think what you said earlier was right.  
 14 But then you go on to say this on the next page,  
 15 and this is the last point in your proposal and before I  
 16 read it to you I remind you the stance that Lonmin adopted,  
 17 we're not prepared to allow AMCU to be involved in  
 18 discussions relating to the wages, they haven't got  
 19 negotiating rights, they won't have a seat at the table  
 20 when the wages are discussed. So only NUM can be there.  
 21 What you say in your last paragraph of your proposal – have  
 22 you got it in front of you now?  
 23 MR DA COSTA: Yes, sorry.  
 24 CHAIRPERSON: "Engage with the NUM and  
 25 AMCU at Marikana to reach an agreement on the matter." So

Page 30164

1 you were proposing in fact a departure from the strict line  
 2 that was later taken by Lonmin, AMCU's not welcome to be  
 3 part of the negotiation or discussions about wages; you in  
 4 fact proposed, if I may say so very sensibly, that Lonmin  
 5 should engage in discussions at Marikana with both NUM and  
 6 AMCU. In retrospect do you think that if your proposal in  
 7 that regard had been accepted a lot of trouble might have  
 8 been avoided?  
 9 MR DA COSTA: Well, I think just to  
 10 clarify that proposal, when I, what I was saying there is  
 11 that we should engage with NUM and AMCU at Marikana, so  
 12 AMCU had representation at Karee at that stage, to engage  
 13 with them and get agreement on the implementation of the  
 14 allowance, not necessarily on the amount of the allowance  
 15 and so on, but on the implementation of the allowance.  
 16 CHAIRPERSON: [Microphone off, inaudible]  
 17 extra money being paid to the workers. Whether it's  
 18 categorised as allowance or wages or salary or whatever,  
 19 it's remuneration. They wouldn't have bothered what you  
 20 called it, as long as you gave it to them. Isn't that  
 21 right? The point is – sorry, you don't have to answer the  
 22 question. I'll take it the answer is an implicit yes. The  
 23 point is that AMCU's rights were fairly limited. They had  
 24 rights to do various things, which are spelt out in the  
 25 agreement that was concluded with them, but it didn't

Page 30165

1 include any involvement in relation to discussing salaries  
 2 or wages. Isn't that right?  
 3 MR DA COSTA: No, they didn't have  
 4 bargaining rights, so –  
 5 CHAIRPERSON: That's right.  
 6 MR DA COSTA: They weren't involved in  
 7 discussions around wage increases and that sort of thing.  
 8 So –  
 9 CHAIRPERSON: Exactly.  
 10 MR DA COSTA: My proposal here, and I did  
 11 it, I mean I – before the allowance was communicated,  
 12 before it was implemented I met with a representative from  
 13 the NUM and I met with representatives from AMCU and I  
 14 shared with them that I had had this approach from the rock  
 15 drill operators, that this is how I'd approached the  
 16 executive; the executive had made a decision to implement  
 17 this rock drill operator bonus and that we were now going  
 18 to – sorry, not bonus, rock drill operator allowance, and  
 19 that we were now going to implement it. So I actually did  
 20 what I was proposing there.  
 21 CHAIRPERSON: Yes, but you weren't  
 22 engaging with NUM and AMCU at Marikana to reach an  
 23 agreement on the matter, were you? You were only dealing  
 24 with the rock drill operators at Karee. Is that right?  
 25 And you were dealing with the demands you got from the

Page 30166

1 Karee people. Is that right?  
 2 MR DA COSTA: Yes, my discussions were –  
 3 yes, I mean I was speaking to those representatives from  
 4 the union from a Karee perspective.  
 5 CHAIRPERSON: Yes, that's right, and did  
 6 you engage with the NUM and AMCU at Marikana, to quote your  
 7 words, to reach an agreement on the matter, or just to  
 8 explain it to them?  
 9 MR DA COSTA: Well, to explain it to them  
 10 and hopefully they would say yes, we agree, implement the  
 11 bonus.  
 12 CHAIRPERSON: I see, thank you. We'll  
 13 now take the first comfort break. As I've said, I'd like  
 14 to have a short meeting with the other parties proposing to  
 15 cross-examine now, just to discuss the time. Mr Wesley  
 16 must please accompany me, and thereafter I understand the  
 17 evidence leaders want to have a discussion among themselves  
 18 relating to the application and then we will resume. So we  
 19 probably won't take just quarter of an hour, we may take  
 20 slightly longer, but we'll obviously come back as soon as  
 21 we can.  
 22 [COMMISSION ADJOURNS COMMISSION RESUMES]  
 23 [11:00] CHAIRPERSON: The Commission resumes.  
 24 The application will be argued after tea. Mr Da Costa,  
 25 you're still under oath.

Page 30167

1 MR DA COSTA: Yes, Chair.  
 2 MICHAEL GOMES DA COSTA: (s.u.o.)  
 3 CHAIRPERSON: Mr Bizos, I understand  
 4 you've got two or three, you weren't quite sure which, two  
 5 or three questions to ask the witness. I thought you'd  
 6 finished but please carry on, then Mr NUM – sorry Mr Tip  
 7 will cross-examine on behalf of NUM.  
 8 CROSS-EXAMINATION BY MR BIZOS SC (CONTD.):  
 9 Mr Da Costa, either on the 14th, the 15th or the 16th of  
 10 August did any police negotiator come to Lonmin to say that  
 11 I am the negotiator and I want to negotiate a possible  
 12 solution to the problem that we are facing? Did that  
 13 happen at all?  
 14 MR DA COSTA: I'm not aware of any  
 15 approach as far as that is concerned. It may have  
 16 happened, you know, with one of our other executives or so  
 17 on but I am not aware of it.  
 18 MR BIZOS SC: It certainly didn't come to  
 19 your attention.  
 20 MR DA COSTA: No.  
 21 MR BIZOS SC: Would you have expected to  
 22 have been informed if such a request was made?  
 23 MR DA COSTA: Not necessarily. I wasn't,  
 24 at that point I wasn't directly involved with what was  
 25 going on as far as that was concerned.

Page 30168

1 MR BIZOS SC: Who was involved in those  
 2 days?  
 3 MR DA COSTA: I think it was some of our  
 4 senior HR executives, so most likely Barnard Mokwena and –  
 5 MR BIZOS SC: Please give us a name or  
 6 two.  
 7 CHAIRPERSON: He's given a name, he said  
 8 Barnard Mokwena.  
 9 MR DA COSTA: Most likely Barnard Mokwena  
 10 -  
 11 CHAIRPERSON: He's going to give another  
 12 name as well, you said Barnard Mokwena and, and then you  
 13 were interrupted. Was it just Barnard Mokwena?  
 14 MR DA COSTA: Ja, I would think it was  
 15 him.  
 16 MR BIZOS SC: Now –  
 17 CHAIRPERSON: If there's someone who has  
 18 got a cell phone on, would that person please leave. Carry  
 19 on, Mr Bizos.  
 20 MR BIZOS SC: Now were you informed that,  
 21 specifically informed that the strikers did not want the  
 22 police to negotiate on their behalf, they wanted direct  
 23 contact with Lonmin? Were you ever told that on those  
 24 three dates?  
 25 MR DA COSTA: I personally was not

Page 30169

1 specifically informed about any request like that or any  
 2 issue as far as that is concerned.  
 3 MR BIZOS SC: Finally, was there a cosy  
 4 relationship, Lonmin and the police on those days?  
 5 MR DA COSTA: I'm not sure what is meant  
 6 by a cosy relationship.  
 7 MR BIZOS SC: Well, let me give you what  
 8 the evidence seems to suggest, that your security men  
 9 worked in close co-operation with the police and it may be  
 10 shown that they actually may have taken part in the  
 11 shooting on the 16th.  
 12 MR BHAM SC: Sorry, Mr Chairman, I don't  
 13 think there's any evidence which suggests that Lonmin  
 14 security took part in the shooting on the 16th. If there  
 15 is, it should be pointed out –  
 16 CHAIRPERSON: You dropped your voice so  
 17 please repeat the last sentence? No evidence that?  
 18 MR BHAM SC: That Lonmin security took  
 19 part in the shooting on the 16th. If there is any such  
 20 evidence we should be pointed out to that.  
 21 CHAIRPERSON: Well, I think he's right,  
 22 Mr Bizos.  
 23 MR BIZOS SC: No, I recollect that the  
 24 ballistics people have indicated that some of the  
 25 cartridges or bullets came from non-police arms. This is

Page 30170

1 my recollection, I don't remember –  
 2 CHAIRPERSON: Yes, but you put the  
 3 proposition more widely than that. The truth of the matter  
 4 is that some of the cartridges, particularly in relation to  
 5 I think it was pellets, were not official police issue. It  
 6 doesn't – there are two, there are a number of  
 7 possibilities, the two main ones are that it was possibly  
 8 Lonmin people, Lonmin security people who fired –  
 9 MR BIZOS SC: That's what I'm putting –  
 10 CHAIRPERSON: The other possibility is  
 11 that some overzealous policeman, dissatisfied at the ban on  
 12 the use of pellets, official ban on pellets by the police,  
 13 did what some other policemen did subsequently in the  
 14 course of this year, acquired his own pellets, took them  
 15 along and put them in his shotgun which he's supposed to  
 16 use for firing rubber balls. So I'm not sure which of  
 17 those two is correct but I think they're both possibilities  
 18 on the table. You can put it to the witness on a  
 19 restricted basis which captures that in its entirety, then  
 20 there won't be a problem but Mr Bham's complaint was that  
 21 you put it virtually as an accepted fact, which is not so.  
 22 MR BIZOS SC: This is the way that I  
 23 think, if I remember correctly, I said a suggestion has  
 24 been made that some of your security people may have taken  
 25 part in the shooting.

Page 30171

1 CHAIRPERSON: What's the question that  
 2 you attach to that proposition? Do you ask him just to  
 3 comment on that?  
 4 MR BIZOS SC: To comment.  
 5 CHAIRPERSON: How do you comment, are you  
 6 able to comment –  
 7 MR DA COSTA: I understood the question  
 8 was if Lonmin was in a cosy relationship with the South  
 9 African Police Services and my answer to that is no, I  
 10 don't think so.  
 11 MR BIZOS SC: You see it isn't only that,  
 12 a helicopter owned or hired by Lonmin was used during the  
 13 operation.  
 14 MR BHAM SC: Again Mr Chairman, I don't  
 15 recall that evidence. If I'm wrong then –  
 16 CHAIRPERSON: It was the Protea Coin  
 17 helicopter –  
 18 MR BHAM SC: Yes –  
 19 CHAIRPERSON: - which was there, which  
 20 was paid for by Lonmin which was made available to the  
 21 police at a certain stage. That evidence is correct.  
 22 MR BHAM SC: That's a slightly different  
 23 proposition.  
 24 CHAIRPERSON: Well, I don't know. I  
 25 thought that's the proposition – but anyway I've now



Page 30172

1 clarified what the proposition is so carry on with the  
 2 question, Mr Bizos, and let's get the witness's answer.  
 3 MR BIZOS SC: Well, the question is, did  
 4 you know that a helicopter which was paid for by Lonmin was  
 5 used in the operation on the 16th?  
 6 MR DA COSTA: No, I know that there was a  
 7 Protea helicopter on hire that the government was paying  
 8 for. Its main purpose was for our people to do fly-overs  
 9 and for use as surveillance and mapping out what was going  
 10 out on the ground.  
 11 MR BIZOS SC: That was in conjunction  
 12 with the police operation.  
 13 MR DA COSTA: Well, as I said, for the  
 14 period leading up to the 16th that helicopter was available  
 15 for our security personnel to do observations from the air  
 16 and to serve as a reconnaissance and information for us.  
 17 If it was then used by the SAPS on the 16th, that may well  
 18 be. So our co-operation with the SAPS was to make  
 19 facilities available, I know we made some office space  
 20 available for them to use as a joint operating centre, that  
 21 sort of thing. That was our level of co-operation with the  
 22 police as far as I know.  
 23 MR BIZOS SC: Did it occur to anybody in  
 24 Lonmin that in providing space for police tents on their  
 25 premises, making a helicopter available, making

Page 30173

1 interpreters available, may have sent the wrong message to  
 2 the people that considered Lonmin their adversary in this  
 3 dispute?  
 4 MR DA COSTA: I don't know if I'm able to  
 5 answer you, whether that was considered, but you know given  
 6 the level of violence and I'm almost tempted to say anarchy  
 7 that was taking place at the time, I think, I think Lonmin  
 8 was of the view that if it was, you know, if making  
 9 facilities available on the mine would make it easier for  
 10 the South African Police to do what they – to address the  
 11 situation, then I think it was done more out of the point  
 12 of view of trying to assist really.  
 13 CHAIRPERSON: That was your final  
 14 question, Mr Bizos. Are we going to have final question  
 15 third series now?  
 16 MR BIZOS SC: Thank you, Mr Chairman, I  
 17 have no further questions.  
 18 CHAIRPERSON: Thank you, Mr Bizos. Mr  
 19 Tip?  
 20 MR TIP SC: Thank you, Mr Chair. Before  
 21 I begin with the cross-examination of Mr Da Costa I want  
 22 briefly to deal with a matter which I touched on earlier  
 23 today and that is the position at Impala. I don't propose,  
 24 Chair, to cross-examine Mr Da Costa on the Impala  
 25 negotiations, there's enough for us to do in respect of the

Page 30174

1 events at Lonmin but I had indicated that the –  
 2 CHAIRPERSON: I'm sorry to interrupt you,  
 3 Mr tip, it may shorten things. You indicated you wanted to  
 4 hand in Mr Tansy's affidavit. We need it, in fact, because  
 5 the affidavit of Mr Patel refers to it.  
 6 MR TIP SC: Yes.  
 7 CHAIRPERSON: And incorporates, as it  
 8 were by reference, a number of things that are part of that  
 9 affidavit. So that's why we need it. That's why I was  
 10 happy to mark it, I didn't know we didn't have copies to  
 11 mark but you've now got copies and they will be received as  
 12 exhibit XXX6.  
 13 MR TIP SC: Yes, thank you, Chair. We  
 14 don't have copies for all the parties, we hadn't  
 15 anticipated that this might come up today but we will  
 16 certainly by Monday –  
 17 CHAIRPERSON: Alright, I don't think  
 18 unless it's important for the purpose of your cross-  
 19 examination, you don't need to hand them in now and at a  
 20 later date, possibly tomorrow or after that you can hand  
 21 the copies in but I think you should make them available to  
 22 everybody because –  
 23 MR TIP SC: We will, Chair.  
 24 CHAIRPERSON: I'm sure you will. So  
 25 anyway –

Page 30175

1 MR TIP SC: But may I –  
 2 CHAIRPERSON: - your right to put it in  
 3 has already been established. It's already been given an  
 4 exhibit number, it's deemed to be here and the deemed  
 5 presence will be followed up by actual presence as soon as  
 6 you can arrange it.  
 7 MR TIP SC: I want to do one further  
 8 thing with it which will not constitute cross-examination  
 9 but passages have been read onto the record by my learned  
 10 friend Mr Budlender from the Patel affidavit and in order  
 11 to ensure a balanced record I propose to read one or two  
 12 sentences from Tansy's affidavit which, as you've observed,  
 13 is the precursor to the Patel affidavit. Tansy's affidavit  
 14 includes a full set of the minutes of the negotiations at  
 15 Impala and –  
 16 CHAIRPERSON: Those were things that Mr  
 17 Patel incorporates, as it were by reference –  
 18 MR TIP SC: He does.  
 19 CHAIRPERSON: - in his affidavit.  
 20 MR TIP SC: He does, and at paragraph 10,  
 21 paragraph 11, Mr Tansy says "As is apparent from the  
 22 summary" – those are the minutes – "there was at no stage  
 23 an offer by Impala of an additional increase for RDOs that  
 24 was refused by NUM." I think that that should be on record  
 25 so that, at this stage –

Page 30176

1 CHAIRPERSON: It now is.  
 2 MR TIP SC: It is, yes, good. And then  
 3 it also reflects that in fact the agreement that was  
 4 concluded involved a differential of 5 400 for RDOs and  
 5 5 100 for other employees in that category but I have one  
 6 full set, may I hand that up –  
 7 CHAIRPERSON: Thank you, hand the full  
 8 set in now and then make sure that other people get copies  
 9 later on.  
 10 MR TIP SC: The others will get that at a  
 11 later stage -  
 12 CHAIRPERSON: I'll mark that XXX6 in the  
 13 meantime.  
 14 CROSS-EXAMINATION BY MR TIP SC: Thank  
 15 you, Chair. Now, Mr Da Costa, I act for NUM, as you have  
 16 heard. I also act for Mrs Fundi and I intend to put  
 17 questions to you not only on behalf of NUM in that sense  
 18 but also on behalf of Mrs Fundi who of course has a  
 19 particular concern with the events of 12 August 2012 where  
 20 her husband lost his life.  
 21 CHAIRPERSON: I'm sorry to interrupt you.  
 22 Is it possible for those responsible for this room to turn  
 23 the air conditioning on? I think it makes things a bit  
 24 easier for everybody. Anyway, perhaps that message can be  
 25 conveyed to those responsible for these matters. Mr Tip,

Page 30177

1 I'm sorry to have interrupted you.  
 2 MR TIP SC: Now, one of the particular  
 3 concerns that arise is what the circumstances were relating  
 4 to the deployment of Mr Fundi and his colleagues to that  
 5 scene on 12 August, do you follow me?  
 6 MR DA COSTA: Yes, I do.  
 7 MR TIP SC: And the particular aspect of  
 8 that that I want to begin with, to seek your assistance on,  
 9 is what the level was of the training and equipment and  
 10 instructions that accompanied that deployment? I'll put  
 11 specific questions to you, I'm just setting that out by way  
 12 of background and I will, in order to perhaps illustrate  
 13 and to some extent anchor these concerns I'm going to refer  
 14 you to the statement of Mr Motlagewa who was one of the  
 15 security officers there, which is in exhibit XX2 at page  
 16 84. I'd ask that that be placed on the screen.  
 17 CHAIRPERSON: I think you said 84, didn't  
 18 you?  
 19 MR TIP SC: 84, yes.  
 20 CHAIRPERSON: What paragraph of the  
 21 affidavit are you referring to?  
 22 MR TIP SC: It is the –  
 23 CHAIRPERSON: That's 83, we need 84 on  
 24 the screen please, sorry. We need 84. We don't need 84,  
 25 84 is just a signature basically. What page is it then?

Page 30178

1 MR TIP SC: It is, Chair, I'm looking at  
 2 our paginated XX2 which bears numbers on the top right-hand  
 3 corner.  
 4 SPEAKER: Sorry Craig, try 85.  
 5 MR TIP SC: Yes, thank you.  
 6 CHAIRPERSON: We've got 86 at the moment.  
 7 The suggestion is we look at 85. Which paragraph number?  
 8 MR TIP SC: This is the typed pagination.  
 9 I don't know whether the –  
 10 MR DA COSTA: The page number 84 is in  
 11 the top left-hand corner.  
 12 MR TIP SC: Yes. Just go up to the top  
 13 if you can. Well, that's 83. We've got the –  
 14 CHAIRPERSON: We need the next page.  
 15 MR TIP SC: Yes, 84.  
 16 CHAIRPERSON: Which paragraph number?  
 17 MR TIP SC: It is paragraph 12.  
 18 CHAIRPERSON: I see, thank you.  
 19 MR TIP SC: I'll read it out, if I may.  
 20 "Superintendent Mabelane, who was in charge of our group,  
 21 gave instruction that we must stop the protesters not to go  
 22 and burn NUM offices. He ordered us to block the road in  
 23 such a way that the protesters cannot move forward, meaning  
 24 parking our security vehicles across the road in one line.  
 25 I informed him that 'let us not block the road on line

Page 30179

1 because if there is a need to escape it will be difficult  
 2 to escape.'" Then the next paragraph, "All the vehicles of  
 3 my colleagues parked facing opposite direction for in case  
 4 if there is a need to escape from the protesters as they  
 5 were many, it will be easy for us to do so." Now what I'm  
 6 going to put to you arising from that is that the  
 7 superintendent, the person who is in charge gives an  
 8 instruction about how vehicles are to be parked, another  
 9 security officer queries it and says that that will leave  
 10 us with no escape possibility which, in the circumstances,  
 11 was a very, very important consideration and I am using  
 12 that, as I said, as an illustration of the need to  
 13 understand what the training was that had been offered by  
 14 Lonmin in how to deal with a situation of that kind. Do  
 15 you follow that?  
 16 MR DA COSTA: I do.  
 17 MR TIP SC: And in order to facilitate  
 18 your answer to the question, I'm going to give you the  
 19 second example that I want to draw from this statement.  
 20 [11:20] And that is in paragraph 14 a call is made to the  
 21 advancing protesters to stop and then says Mr Motlagewa,  
 22 "The protesters ignored our call and kept coming closer and  
 23 closer on us with pangas, knobkieries and other sharp  
 24 dangerous weapons. As the protesters were marching closer  
 25 and closer, being very aggressive, Mr Mabelane ordered us

Page 30180

1 to shoot at the protesters with rubber bullets. We shot  
 2 with rubber bullets, without success in scaring them away  
 3 and the protesters kept coming on us and there was no sign  
 4 of them being affected by our attempt to shoot them with  
 5 stun guns and trying to stop them. We all decided to run  
 6 away.”  
 7 Now as we know some 10 of those managed to run  
 8 away. Mr Mabelane and Mr Fundi were not successful and  
 9 died. You're familiar with all that?  
 10 MR DA COSTA: Yes, I am.  
 11 MR TIP SC: Yes, and the point that I'm  
 12 now placing before you for your assistance, please, is  
 13 whether these security officers and Superintendent Mabelane  
 14 in particular would have received proper training in  
 15 respect of how to deal with a crowd of this nature, and in  
 16 particular whether part of that training would have been  
 17 that rubber bullets should be used on the basis that that  
 18 would be effective in containing that situation.  
 19 MR DA COSTA: Ja, I'm not well positioned  
 20 to answer that question because I wasn't involved with the  
 21 security and the management of the security, so  
 22 unfortunately I think it would be better placed to place a  
 23 question to one of our security managers.  
 24 MR TIP SC: Yes, Mr Da Costa, I entirely  
 25 accept that that's an appropriate answer from you. The

Page 30181

1 point of raising those examples was to underline the  
 2 necessity for this Commission to be properly informed by  
 3 persons from Lonmin who can deal comprehensively with the  
 4 issue of the training of the security officers, the  
 5 planning that went into the deployment of a dozen people to  
 6 deal with that situation. Now who would that person or  
 7 persons be?  
 8 MR DA COSTA: It would most likely be the  
 9 security manager, Henry Blaauw, I would suggest is a person  
 10 who would be in a position to give that evidence.  
 11 CHAIRPERSON: What about Mr Sinclair?  
 12 Would he be able to help us?  
 13 MR DA COSTA: He may be able to. He was  
 14 the emergency and disaster management manager at that point  
 15 in time.  
 16 CHAIRPERSON: Did security fall under  
 17 him?  
 18 MR DA COSTA: Yes, it did. It –  
 19 CHAIRPERSON: We have been waiting –  
 20 MR DA COSTA: Security reported in to  
 21 Henry Blaauw, which reported in to Mr Sinclair.  
 22 CHAIRPERSON: Yes, yes, I understand.  
 23 We've been waiting for a statement from Mr Sinclair. I  
 24 don't think it's come yet, has it, Mr Budlender?  
 25 MR TIP SC: Mr Chair, it hasn't and if I

Page 30182

1 may pursue that with Mr Da Costa, Mr Sinclair was indeed  
 2 the head of security and his name appears from time to time  
 3 in the statements that we do have, including yours. It was  
 4 Mr Sinclair who dealt with you during the critical events,  
 5 and not Mr Blaauw, correct?  
 6 MR DA COSTA: Yes, that's correct.  
 7 MR TIP SC: Yes, now are you able to tell  
 8 us why at this stage some 20, 21 months after this  
 9 Commission began its work, it still has not received a  
 10 statement from the head of security at Lonmin where a  
 11 number of persons lost their lives, including many  
 12 employees of Lonmin?  
 13 MR DA COSTA: I'm not at – I'm not sure  
 14 why he hasn't submitted a statement, no.  
 15 MR TIP SC: When you were preparing to  
 16 give evidence was there not any discussion about who else  
 17 would testify in this Commission?  
 18 MR DA COSTA: There was. As far as I was  
 19 aware there's a possibility of Mr Seedat testifying and  
 20 then a number of security officials, including Mr Blaauw,  
 21 and a possibility of Mr Sinclair, but I didn't know that he  
 22 would testify for sure.  
 23 MR TIP SC: Well, let us narrow this  
 24 notion of the possibility of Mr Sinclair. You were at the  
 25 time the vice president for Karee.

Page 30183

1 MR DA COSTA: That's correct, yes.  
 2 MR TIP SC: Were you the most senior of  
 3 the managers at Karee?  
 4 MR DA COSTA: Yes, that's right.  
 5 MR TIP SC: And some of your employees at  
 6 Karee died during these events.  
 7 MR DA COSTA: Yes, they did.  
 8 MR TIP SC: Including on the 12th of  
 9 August at K4 Shaft.  
 10 MR DA COSTA: Yes.  
 11 MR TIP SC: Now as the senior manager at  
 12 Karee were you not concerned that you should learn at least  
 13 about such employees precisely what the circumstances that  
 14 had led to their loss of life?  
 15 MR DA COSTA: Yes, I was.  
 16 MR TIP SC: Were you not of a mind that  
 17 you should for that purpose receive a full account from the  
 18 security of Lonmin and why events of that kind had taken  
 19 place and why employees had lost their lives?  
 20 MR DA COSTA: I was. I mean I was  
 21 briefed on it, not, there's no report as such, but I was  
 22 briefed on what occurred there.  
 23 MR TIP SC: Well yes, I'm not sure what  
 24 you mean by briefed. I'm not going to take time to ask  
 25 you, unless you want to add. I'm asking for the moment a

Page 30184

1 specific question, that you should in my suggestion to you  
 2 have made it your business to obtain a full account from  
 3 the most senior person in Lonmin's security establishment  
 4 as to why these events had taken place; how could people  
 5 have died going to work at your shaft. You should have  
 6 made sure that you got that report. That's what I'm  
 7 putting to you.

8 MR DA COSTA: Yes, I received a verbal  
 9 report or briefing on what occurred there.

10 MR TIP SC: From whom?

11 MR DA COSTA: From Mr Sinclair.

12 MR TIP SC: What did he tell you?

13 MR DA COSTA: Well, that –

14 MR TIP SC: Well, let me just – before I  
 15 go there, let me be a bit more specific. Did you receive  
 16 an oral report from Mr Sinclair in respect of the events of  
 17 12 August?

18 MR DA COSTA: The events of –

19 CHAIRPERSON: I'm sorry, what do you mean  
 20 by events of 12 August? Remember 12 August there were  
 21 events in the morning where Mr Fundi and Mr Mabelane were  
 22 killed, isn't it?

23 MR TIP SC: Forgive me, Chair. Thank  
 24 you, yes –

25 CHAIRPERSON: And there were also

Page 30185

1 incidents that evening –

2 MR TIP SC: Yes.

3 CHAIRPERSON: - when people were killed  
 4 at, or one man was killed at Karee, another man I think was  
 5 killed either on the way to or on the way from. So you've  
 6 got to make it clear which events on the 12th you're  
 7 referring to.

8 MR TIP SC: I appreciate that, Chair.  
 9 Thank you. I'm confining that question for the moment to  
 10 the incident in which your security officers Mabelane and  
 11 Fundi were killed.

12 MR DA COSTA: Ja, on the 12th of August,  
 13 it was a Sunday, I was at home and I was telephoned to go  
 14 out to the mine because this incident had happened. So  
 15 when I arrived at the mine –

16 MR TIP SC: Mr Da Costa, forgive me for  
 17 interrupting you. I'm not wanting you to repeat what you  
 18 set out in your statement.

19 MR DA COSTA: Okay.

20 MR TIP SC: I'm pursuing a specific  
 21 question. I want to know, to put it bluntly, whether  
 22 Lonmin investigated that incident in which those two  
 23 security officers lost their lives, whether it did so  
 24 comprehensively and fully, and whether it produced a  
 25 written report on it so that all managers in Lonmin could

Page 30186

1 have the benefit of a proper analysis of the circumstances,  
 2 understand what had taken place and inter alia take steps  
 3 to ensure that nothing like that could occur again. Did  
 4 that happen?

5 MR DA COSTA: Yes, there was a full, what  
 6 we call an ICAM conducted, which is an incident analysis  
 7 methodology that we use in the, in mining operations to get  
 8 to the bottom of safety incidents, so one of those  
 9 investigations was conducted. The report, there was a  
 10 report produced, which I don't have with me right now, but  
 11 there was something like that produced, yes.

12 MR TIP SC: Right, now my understanding -  
 13 and my colleagues, my learned friends, the evidence leaders  
 14 in particular, will correct me if I'm wrong – I have not  
 15 seen such a report as part of the documentation that has  
 16 been handed in to this Commission. Are you able to tell us  
 17 whether that is correct or not?

18 MR BHAM SC: Mr Chairman, the ICAM report  
 19 has been made available to the evidence leaders.

20 COMMISSIONER HEMRAJ: Was that done very  
 21 recently –

22 MR BUDLENDER SC: That has recently  
 23 happened, yes.

24 COMMISSIONER HEMRAJ: Yes.

25 CHAIRPERSON: It stayed with the evidence

Page 30187

1 leaders so far. It's not been seen by the representatives  
 2 of NUM who have an interest in the matter – or not, I beg  
 3 your pardon, not the representatives of NUM, but the  
 4 representatives of Mr Fundi.

5 MR WESLEY: Yes Chair, if I can just  
 6 place on record, the report has been made available now by  
 7 us to the parties. The report contains approximately three  
 8 lever arch files of annexures. We have not distributed  
 9 those yet. We've been requested by Lonmin for some more  
 10 time before they give their okay that that can be  
 11 distributed, for their own business safety reasons, but we  
 12 have them. That will be copied and distributed as soon as  
 13 we get a nod.

14 CHAIRPERSON: The Commission started  
 15 hearing evidence about November 2012, didn't it?

16 MR WESLEY: That's correct, Chair.

17 CHAIRPERSON: Ja, I see. Interesting,  
 18 that.

19 MR TIP SC: Chair, this is of course  
 20 startling information. I confirm that we were advised this  
 21 morning by email from Ms Pillay, and my learned friend Mr  
 22 Wesley indicated that as well, that there was now  
 23 additional material and we could download it. I have not  
 24 seen that. It is frankly extraordinary that that should  
 25 arise on this day so deep into the Commission's work. But

Page 30188

1 for me to cross-examine properly on this really important  
 2 topic is with respect very, very problematic –  
 3 CHAIRPERSON: No, Mr Tip, what you say is  
 4 obviously correct, but there is a rider and that is this  
 5 witness doesn't know much about it anyway. Clearly Lonmin  
 6 will have to call more direct evidence on this point and  
 7 the arrangements that were made were they were giving  
 8 evidence in July, it was because of problems in relation to  
 9 the availability of Mr X that Lonmin agreed to help us out  
 10 and lead, make some evidence available, or lead some  
 11 evidence this week. I have no doubt that by the time the  
 12 witnesses to whom you can direct questions on the merits as  
 13 it were of the issue you're now touching on, by the time  
 14 they come you will have had opportunity to study the  
 15 documents. It is a matter for comment perhaps. We haven't  
 16 had them earlier, but it's water under the bridge. We've  
 17 got to move ahead and try to do our work as best as we can.  
 18 Yes, it's suggested to me that you might wish of  
 19 course to put to this witness, who was after all in charge  
 20 of Karee, certain things resulting from that investigation,  
 21 in which case it's difficult for you to do it not knowing  
 22 what the results of the investigation were, but if that's  
 23 so then it may be necessary for this witness to come back  
 24 at a later stage when you're ready to do that.  
 25 Alternatively, you may be able to get what you want from

Page 30189

1 other witnesses. But the point you raise is not lacking in  
 2 validity.  
 3 MR MPOFU: Chairperson, for what it's  
 4 worth I wanted to put on the record that we have an obvious  
 5 and clear interest in that report as well, for the same  
 6 reason –  
 7 CHAIRPERSON: I understood it was going  
 8 to be, in the process of being sent to the parties, which  
 9 includes your clients.  
 10 MR MPOFU: Well, you only mentioned one  
 11 party.  
 12 CHAIRPERSON: Yes, but anyway, but not  
 13 the annexures. We won't debate the annexures now. There  
 14 may be no issue in the end, but anyway, the point you make  
 15 is obviously also not without validity, but these matters  
 16 can be dealt with in due course.  
 17 MR BHAM SC: Mr Chairman, just so that I  
 18 can place this on record, you've already explained the  
 19 circumstances in which Mr Da Costa has come to testify. We  
 20 hadn't anticipated it; it came up because there was a gap  
 21 in the Commission's calendar and we sought to assist them  
 22 there. It's precisely why we have engaged with the  
 23 evidence leaders and have asked to engage with the  
 24 Commissioners to set the block of time when Lonmin witness  
 25 will come and talk, and those include security witnesses,

Page 30190

1 and we've done that so that we can ensure that the  
 2 logistics, including any documents that need to be  
 3 produced, is done in good time and parties are not placed  
 4 in this position. This witness has come at this stage –  
 5 MR MPOFU: Chairperson –  
 6 MR BHAM SC: Sorry, I'm not finished yet,  
 7 Chairperson –  
 8 MR MPOFU: Oh, I'm sorry.  
 9 CHAIRPERSON: Mr Mpofo, please behave in  
 10 accordance with the standard you normally do.  
 11 MR MPOFU: No, Chairperson, I thought Mr  
 12 Bham was finished obviously.  
 13 CHAIRPERSON: Let him finish. When he's  
 14 turned his red light off you can start talking.  
 15 MR BHAM SC: Mr Da Costa came at this  
 16 point in time, and for a long time we had no idea when  
 17 Lonmin witnesses are going to come. We're trying to sort  
 18 that out so we know exactly when they're going to come and  
 19 we can sort out the preparation without prejudice being  
 20 caused to anybody. He came in the circumstances you've  
 21 already explained. But once we've sorted out the schedule  
 22 of Lonmin witnesses we will make sure that the  
 23 documentation which is required and relevant to them will  
 24 be before the Commission and sent out to all parties.  
 25 CHAIRPERSON: Yes, thank you, I'll accept

Page 30191

1 that assurance. Mr Mpofo, in the light of the assurance do  
 2 you have to say anything further at this point?  
 3 MR MPOFU: I'll defer to Mr Tip on that  
 4 point, Chair.  
 5 CHAIRPERSON: Alright Mr Tip, carry on.  
 6 MR TIP SC: Chair, I do need to say  
 7 something about what Mr Bham has just advised you on, and  
 8 that relates to an approach to the work of this Commission.  
 9 Lonmin is a major player in all of this and its security  
 10 arrangements, its personnel, its security activities have  
 11 always been of very great importance to a proper  
 12 understanding of all the other events and acts of other  
 13 parties. It is with great respect to my learned friend Mr  
 14 Bham, not satisfactory for us to be told that because the  
 15 Lonmin witnesses are now about to arrive here to assist the  
 16 Commission, this additional information is being made  
 17 available. That information should have been made  
 18 available 20 months ago so that this Commission and all the  
 19 parties before it would have had a proper opportunity to  
 20 consider it, to analyse it, to form views, to undertake  
 21 supplementary investigations of their own, and for this to  
 22 be done on the basis well, we had to rush Mr Da Costa here,  
 23 this is at very latter stages of the Commission, now you  
 24 get this information.  
 25 And let me just add, if I may, Chair, that it is

Page 30192

1 from Mrs Fundi's particular point of view a matter of real  
2 importance obviously for a full understanding of how her  
3 husband came to be in that line on that day in those  
4 circumstances, and for us as her legal advisors to be in  
5 the position to say to her in an informed way, this is what  
6 Lonmin has said about it, should we obtain expert opinion  
7 on whether that is satisfactory, for example, as a question  
8 that might arise. That sort of investigation at this stage  
9 may not be feasible anymore, so really I know that this is  
10 water under the bridge, but it cannot be allowed to pass  
11 without commentary on the unsatisfactory nature of when  
12 that water is passing us.

13 CHAIRPERSON: Right, your comments are  
14 now on the record and you may proceed with your cross-  
15 examination.

16 MR TIP SC: Mr Da Costa, in the light of  
17 this information about reports and the like I'm not going  
18 to take you any further on the detail for the moment on  
19 events of that kind, incidents of that kind, but as the  
20 Chairman has indicated, it may well be necessary for you to  
21 return to deal with additional questions.

22 MR DA COSTA: That's fine.

23 MR TIP SC: I'm going to look then at  
24 another aspect of your evidence and that relates to what  
25 Lonmin ought to have expected in the circumstances that

Page 30193

1 surrounded these events and the demands that were made to  
2 you from June 2012. I'm aware that my learned friend Mr  
3 Budlender has dealt with a lot of that and I'm going to try  
4 by all means not to duplicate it, but what I'm going to  
5 just perhaps put by way of summary to you is that there was  
6 some history even at Karee of incidents of violence in  
7 circumstances where there were disputes about  
8 representation, union representation, and matters such as  
9 the [indistinct] shift that you dealt with in your  
10 statement. Correct? There were numerous incidents of  
11 intimidation, violence, and even one death in relation to  
12 that.

13 MR DA COSTA: Yes, there was.

14 [11:40] MR TIP SC: And that and similar  
15 incidents must have conveyed to Lonmin that when there were  
16 demands that were placed before it that weren't met, then  
17 there was the likelihood of intense dissatisfaction which  
18 could again produce a level of violence, is that fair?

19 MR DA COSTA: There was.

20 MR TIP SC: And in fact it was quite  
21 early in the day that you said that security had to be  
22 placed on full alert, do you recall that in your statement?

23 MR DA COSTA: Yes, I recall it, I think.

24 I think that was somewhere around the 9th, I think.

25 MR TIP SC: Well, it was – let me, sorry

Page 30194

1 I'm just trying to find my own way here. It was at the  
2 stage towards the end of July when it was clear to you and  
3 it may even have been as late as the 31st of July when it  
4 was clear to you that the RDO representatives who had come  
5 to speak to you were not satisfied with Lonmin's response  
6 to their demand for R12 500. You then say in your  
7 statement that there was a level of aggression for the  
8 first time and that there was a prospect of strike action  
9 quite clearly. And before you answer, I'm indebted to my  
10 learned friend Mr Mpfu, if you look at paragraph 4.5 of  
11 your initial statement exhibit OO17, it was in fact on the  
12 24th of July 2012 and where you reported to Munro. You  
13 alerted him to the unhappiness and then you say in that  
14 paragraph, "I also spoke to Lonmin security and asked that  
15 they be on high alert." So that's 24 July. Now I want you  
16 to assist the Commission. What does that actually mean if  
17 the vice-president at Karee says high alert? What is the  
18 security establishment supposed to do that it hasn't been  
19 doing before?

20 MR DA COSTA: I would have wanted them to  
21 be more vigilant, take careful note of what is happening on  
22 the surveillance infrastructure and you know, make sure  
23 that the guarding and everything at the shafts is at the  
24 level that it should be.

25 MR TIP SC: Well, you're repeating a

Page 30195

1 statement that doesn't really advance it. The levels that  
2 it should be, I'm really asking you to put some content to  
3 that. High alert, what – let me repeat the question. What  
4 does that entail that had not been in place before that  
5 day, before that instruction?

6 MR DA COSTA: All it entailed was that  
7 they are extra-vigilant, that their vigilance is  
8 heightened.

9 MR TIP SC: You speak about surveillance  
10 structures. Can you tell the Commission a little about the  
11 extent of that?

12 MR DA COSTA: Well, there's basically  
13 networks of cameras that are deployed around our  
14 operations, some within the shaft areas, some around the  
15 general area of our operations and so on where you can  
16 observe movement of people, observe to see if there is any  
17 incidents of intimidation starting to develop, that sort of  
18 thing.

19 MR TIP SC: And would that mean that  
20 there would be extra care taken to ensure that all these  
21 cameras were functioning properly?

22 MR DA COSTA: Well, yes, they should have  
23 inspected that, yes.

24 MR TIP SC: Well, that would have been  
25 more important and particularly once the strike had been

Page 30196

1 embarked upon it would be crucial to do that, is that  
 2 right?  
 3 MR DA COSTA: I would have expected that  
 4 that surveillance equipment was in good operating order,  
 5 yes.  
 6 MR TIP SC: And there is also, you also  
 7 have the facility of information gathering.  
 8 MR DA COSTA: There is, there is that,  
 9 yes. We have the ability to gather information.  
 10 MR TIP SC: Yes, let's be candid about  
 11 that because we have seen several reports in the  
 12 documentation that we have thus far received from Lonmin of  
 13 reports from security officers in respect of what has taken  
 14 place at meetings of workers, correct?  
 15 MR DA COSTA: Yes.  
 16 MR TIP SC: Yes and that is done as an  
 17 important part of information gathering for Lonmin  
 18 management to have access to.  
 19 MR DA COSTA: That's right.  
 20 MR TIP SC: And would've been in place  
 21 throughout the events that this Commission is dealing with.  
 22 MR DA COSTA: Yes, it would have been.  
 23 CHAIRPERSON: I want to take the tea  
 24 adjournment now and after that we'll have the application  
 25 argued. I take it this is a convenient stage in your

Page 30197

1 cross-examination for an interruption of that kind.  
 2 MR TIP SC: Very much so, Chair –  
 3 CHAIRPERSON: But I just want to ask you  
 4 one question, really a couple of questions on one topic. I  
 5 take it a strike is what you call industrial action.  
 6 MR DA COSTA: Yes, Chair.  
 7 CHAIRPERSON: And labour unrest means a  
 8 situation where there is violence, intimidation and so on,  
 9 is that correct?  
 10 MR DA COSTA: Ja, generally, I mean  
 11 industrial action is not necessarily accompanied by labour  
 12 unrest, but yes.  
 13 CHAIRPERSON: You see in the document I  
 14 referred you to earlier as part of exhibit XXX3 page 449,  
 15 this is the letter you wrote to the EXCO –  
 16 MR DA COSTA: Yes.  
 17 CHAIRPERSON: - on the 27th of June when  
 18 you talked about the desirability of dealing with this  
 19 request for an increase for the rock drill operators, you  
 20 said that, "Given the fact that both Impala and Anglo  
 21 American Platinum have increased their rock drill  
 22 operators' wages it will be extremely difficult for Lonmin  
 23 to resist for very long without some level of labour unrest  
 24 developing." And therefore you made proposals, but what  
 25 did you envisage by that phrase "some level of labour

Page 30198

1 unrest," what did you envisage might develop if this  
 2 problem wasn't, in relation to the request for an increase,  
 3 if that wasn't addressed appropriately?  
 4 MR DA COSTA: Well, you know, my sort of  
 5 reference base at that point in time was, I was thinking in  
 6 terms of – you know, often when there are these disputes  
 7 and so on going on, there's go-slows underground where  
 8 people work, they work slower, don't complete their work in  
 9 a particular day, there's strained relations between  
 10 employees and supervisors. It can get to the point, as we  
 11 saw with the overtime issue, that there's intimidation,  
 12 that people are assaulted and that, you know, a certain  
 13 position of the parties that are aggrieved is enforced in  
 14 that way. So you know those are the sort of things I was  
 15 thinking of.  
 16 CHAIRPERSON: Was that the level, the  
 17 last part that you were talking about, was that the level  
 18 of labour unrest that you anticipated might develop if this  
 19 problem in relation to the request of the RDOs for an  
 20 increase wasn't dealt with?  
 21 MR DA COSTA: I thought it might develop.  
 22 CHAIRPERSON: We'll take the tea  
 23 adjournment at this point. It's now 10 to 12, so we'll be  
 24 back at five past so we can then have the application  
 25 argued.

Page 30199

1 [COMMISSION ADJOURNS COMMISSION RESUMES]  
 2 [12:16] CHAIRPERSON: The Commission resumes.  
 3 I'm afraid my prediction that we could deal with the  
 4 business we had to deal with in chambers by five past 12  
 5 wasn't correct. I apologise to those who have been waiting  
 6 since then in the chamber. Mr Da Costa, you're excused for  
 7 the moment. Don't go too far away, we're now going to hear  
 8 an application and we'll resume your evidence once the  
 9 application has been argued and Mr Tip will continue with  
 10 his cross-examination. We have here a supporting affidavit  
 11 in respect of the SAPS application for the evidence of Mr X  
 12 to be presented on the 19th of June, an affidavit made by Mr  
 13 Frikkie Pretorius. I take it I should make it – should I  
 14 make it an exhibit probably? I'll make it exhibit Y. Oh  
 15 yes, sorry, that'll be YYY. We've already got a Y. Now  
 16 let me just ascertain what the position is. This is an  
 17 affidavit filed or presented by the SAPS, that means that  
 18 the SAPS will be moving the application and Mr Mathibedi, I  
 19 understand you will be arguing it on behalf of the SAPS.  
 20 MR MATHIBEDI SC: That's correct, Chair.  
 21 CHAIRPERSON: Which parties, if any, will  
 22 be supporting the application? So it'll be the I and APs,  
 23 the injured and arrested persons – any other parties  
 24 support the application?  
 25 MR NTSEBEZA SC: Mr Chairman, we will

Page 30200

1 support the application subject to –

2 CHAIRPERSON: Alright, the families as

3 well.

4 MR NTSEBEZA SC: - some submissions we'll

5 make in regard to what happens next week.

6 CHAIRPERSON: The families as well, thank

7 you. Anyone oppose the application?

8 MR TIP SC: Chair, sorry –

9 CHAIRPERSON: Sorry?

10 MR TIP SC: Can I just say that –

11 CHAIRPERSON: Mr Tip, I beg your pardon,

12 sorry. You turned your light on.

13 MR TIP SC: I've just turned it on, my

14 apologies. Rather similarly, subject to what is said in

15 the course of this hearing, there is every prospect that we

16 too would support it but not having been party to any

17 discussions beforehand, it's a little difficult for us to

18 say definitively now.

19 CHAIRPERSON: Mr Bizos, I understand you

20 turned your light on also?

21 MR BIZOS SC: Yes, Mr Chairman, we have

22 no objection to the application subject to bringing to the

23 court's, to the Commission's attention that we thought we

24 had a binding agreement that the experts would be called on

25 the 23rd of June.

Page 30201

1 CHAIRPERSON: Mr Bizos, you're now in

2 effect addressing the merits of the matter. So what you're

3 saying is you don't object to the objection – sorry, you

4 don't object to the application but subject to the rider

5 that you would insist that whatever happens, the experts

6 should give evidence in the week beginning the 23rd.

7 MR BIZOS SC: Of the 23rd.

8 CHAIRPERSON: Yes.

9 MR BIZOS SC: Subject to that, we will

10 abide the decide the decision of the court, Mr Chairman –

11 of the Commission.

12 MR BUDLENDER SC: Chairperson, the

13 evidence leaders oppose this application.

14 CHAIRPERSON: Yes, and Mr Gotz, you've

15 turned your light on?

16 MR GOTZ: Yes. Similarly to the Legal

17 Resources Centre, we abide the decision, ultimate decision

18 as to whether or not the evidence should commence on the

19 19th, subject to some qualifications and exceptions.

20 CHAIRPERSON: Yes. Anybody else wish to

21 indicate, any other party wish to indicate a stance?

22 Lonmin, have you got a stance –

23 MR BURGER SC: We, too, abide.

24 CHAIRPERSON: Anybody, any other party

25 wish to –

Page 30202

1 MS LE ROUX: Yes, Chair, the Human Rights

2 Commission. The Human Rights Commission has a very similar

3 position to the LRC that we would abide by this. We don't

4 oppose it but subject to the exception that the experts be

5 called to give evidence in the week of the 23rd.

6 CHAIRPERSON: Thank you. Anybody else

7 wish to say anything before we – I'm just ascertaining who

8 is on what side, as it were. So we've now ascertained

9 that. Alright, Mr Mathibedi?

10 MR MATHIBEDI SC: Thanks, Chairperson.

11 Chair, the South African Police Services applies for a

12 ruling that the evidence of Mr X be presented on the 19th of

13 June 2014 instead of the 9th of June but however, Chair, we

14 have no problem if the ruling is made in favour of the

15 South African Police subject to the rider suggested by Adv

16 Bizos.

17 Chair, in the event that a ruling is granted in

18 favour of the South African Police Services, we submit that

19 for next week Captain Kidd and Lieutenant-Colonel Modiba

20 are available to, you know, occupy part of the week but

21 however, Chairperson, it is critical to state at this stage

22 that the Commission is not only about the witnesses of the

23 South African Police Services. We submit, Chair, that Mr X

24 is a very important witness for the South African Police

25 Services who, at the same time, will play a critical role

Page 30203

1 in enabling the Commission to understand the mindset of

2 some of the protesters and the events that unfolded during

3 the period of the unprotected strike. Mr X will no doubt

4 shed light on some of the issues that were raised during

5 the cross-examination of the SAPS witnesses and are germane

6 to the issues to be determined by the Commission.

7 Chair, you will bear in mind and this is also

8 what transpired today during the cross-examination of Mr Da

9 Costa, that members of the families would like to

10 establish, would like to find out the circumstances

11 surrounding the death of their loved one and it is hoped,

12 Mr Chair, that the evidence of Mr X will deal with this

13 aspect. It is hoped that the evidence of Mr X will enable

14 the families affected by the killings of their loved ones

15 to find closure. We respectfully submit, Chair, that –

16 CHAIRPERSON: Those are all arguments as

17 to why Mr X must give evidence. No-one disputes that. The

18 real question is, should he give evidence – I mean you

19 originally undertook that he was going to give evidence,

20 the original proposal was seven days after you had complied

21 with the requirements set out in the ruling. You asked for

22 the parties to waive the 14 day requirement in the order,

23 in the ruling, and they declined. So you then said fine,

24 on the 14th day we'll lead his evidence. Then we were told

25 no – no, he can't come on that day because you require



1 consent from the Provincial Director of Public Prosecutions  
 2 to make certain dockets available and we were told as soon  
 3 as those, you get that consent, you can go ahead. Well,  
 4 consent was then given but we were told you were making  
 5 preparations already so that the dockets that were the  
 6 subject of the request to the DPP could be made available  
 7 immediately.

8 Well, I still haven't got the dockets. You got  
 9 permission last Friday and you will understand we are  
 10 operating on a very tight schedule at the moment. Even if  
 11 we get the extension, we're not sure – sorry, even if we  
 12 get the extension we'll still have to operate on a tight  
 13 schedule but not quite as tight as the one at the moment.  
 14 Of course it would be irresponsible for us to assume we  
 15 will get the extension because if we don't get then we'll  
 16 be in very great difficulty in dealing with the matter so  
 17 what I'm saying to you, the question is not whether Mr X  
 18 must come, clearly Mr X must come. Clearly Mr X's  
 19 evidence, if believed, will be very important on a number  
 20 of issues. Insofar as his evidence will be adverse to the  
 21 case of some of the parties, they'll want to cross-examine  
 22 him thoroughly, I understand that too but it doesn't help,  
 23 with respect, to tell me that X is an important witness, we  
 24 all know that. The question is, on what basis are we able  
 25 to grant you the relief you seek, what are the consequences

1 of that, particularly in regard to the fact that there's  
 2 this time limit and there are very, very strict problems  
 3 that we have to deal with in order to try to finish our  
 4 work before the, as far as hearing evidence and argument is  
 5 concerned, before the end of July. So as I say, we can't  
 6 assume the extension will be granted. It would be  
 7 irresponsible for us to plan on the basis that it will be.

8 MR MATHIBEDI SC: Thanks, Chairperson.  
 9 We are not submitting that that is the only consideration  
 10 that has to be taken into account. I have already  
 11 indicated, Chair, that for next week Colonel Modiba and  
 12 Captain Kidd are available to testify. And the other  
 13 aspect is the fact that we are not only dealing with the  
 14 witness of the South African Police Services. Other  
 15 parties are obliged and can make witnesses available to  
 16 deal with this issue and that will –

17 CHAIRPERSON: Which parties are you  
 18 referring to and which witnesses are you referring to?

19 MR MATHIBEDI SC: Chair –

20 CHAIRPERSON: As far as the injured and  
 21 arrested persons are concerned, they have indicated they  
 22 can call three witnesses. These are all witnesses who, I  
 23 would imagine, would be witnesses who would more  
 24 appropriately give evidence after X has testified otherwise  
 25 they'd have to be called back anyway after he has given

1 evidence, I would think, if he implicates them. So my mind  
 2 is not closed to the prospect of their coming earlier but  
 3 that is a factor we have to consider. What other witnesses  
 4 are there? The two ministers, I understand arrangements  
 5 have been made for them to come in July, they are people  
 6 with busy programmes, we have difficulty in getting dates  
 7 when they will be available. The Lonmin witnesses are  
 8 coming in July. The reason for that is that quite a long  
 9 time ago they were told this was the plan and they all made  
 10 their arrangements on the basis of that and we can't go  
 11 back on that. They have agreed to help us this week as far  
 12 as the present witness is concerned and Mr Seedat, if  
 13 there's time for him, but the Lonmin witnesses, I don't  
 14 think there's any realistic possibility of them coming  
 15 before July. The same applies to the ministers. What  
 16 other witnesses are you talking about who can come? The  
 17 experts we've heard about and you've indicated that you,  
 18 you as the SAPS, wouldn't object to the experts coming from  
 19 I think it's the week of the 23rd, is that correct?

20 MR MATHIBEDI SC: That's correct, Chair.

21 CHAIRPERSON: But effectively the  
 22 question is what do we do from the end of tomorrow until  
 23 the 19th? Do we just – I know we can all sit in chambers  
 24 and read reports and statements and that kind of thing but  
 25 the fact of the matter is sitting time will be lost and if

1 we – so we have to be able to deal appropriately with that.  
 2 Anyway you say next week Colonel Modiba can come. How long  
 3 is he likely to be, about two days I believe? Captain Kidd  
 4 is nearly finished. He mainly stood over for the evidence  
 5 leaders to lead him. We'll hear in a moment from Mr  
 6 Chaskalson about that – to be cross-examined, I think, by  
 7 the evidence leaders. What other witnesses do you have in  
 8 mind?

9 MR MATHIBEDI SC: Chair, you'll bear in  
 10 mind that the witnesses of SAPS that have already  
 11 indicated, it was put to them that if the need arises that  
 12 they should be called then that will happen. So assuming  
 13 the witnesses of Mr Mpofu, if he's ready, they come and  
 14 testify, then if there is any evidence that implicates them  
 15 there's nothing that precludes Mr Mpofu making an  
 16 application that the witnesses be recalled, but nonetheless  
 17 even if we are going to have two days open, Chairperson, we  
 18 respectfully submit that that time can be fruitfully used  
 19 by the legal teams in preparing for Mr X.

20 Chair, you will bear in mind that we have a  
 21 situation wherein the legal practitioners during the course  
 22 of the day are taking part in the proceedings of the  
 23 Commission which means that after hours and over weekends  
 24 preparations, consultations, perusal of documents will have  
 25 to take place. So we respectfully submit that that period

1 can be fruitfully utilised, you know, by the parties in  
 2 consulting with their  
 3 witnesses.  
 4 The important aspect, Chairperson, is the reality  
 5 is that we had situations wherein SAPS witnesses were given  
 6 documents which were used for their cross-examination  
 7 whilst they were under cross-examination. That had the  
 8 challenges of witnesses having to read statements and  
 9 documents, apply their minds to information that they saw  
 10 for the first time when they were under cross-examination.  
 11 Now the difficulty with that, I remember even during the  
 12 evidence of Captain Thupe the Chairperson even had to bend  
 13 the rules, give SAPS legal team an indulgence to consult  
 14 with Captain Thupe whilst he was under cross-examination.  
 15 We respectfully submit that that kind of situation is  
 16 unbearable. Not only that but it is also prejudicial to  
 17 the party who is busy presenting his case because we  
 18 respectfully submit that prior notice should be given to  
 19 the parties to know what documents or evidence other  
 20 parties are going to rely on.  
 21 The important aspect is that X is not that kind  
 22 of witness who can be given documents and be expected that  
 23 he should read and understand the contents thereof. It's a  
 24 situation wherein the legal team will have to sit with him  
 25 because of his level of education unfortunately, that each

1 and every document, each and every page should be read to  
 2 him, not only that he should grasp that and there is also a  
 3 barrier language that has to be taken into consideration,  
 4 that the services of a person who is fluent and acquainted  
 5 with the language that he speaks should assist during the  
 6 consultation.  
 7 It is also important, Chairperson, that a  
 8 consultation should take place with him with all the  
 9 necessary documents that other parties are going to rely on  
 10 for his cross-examination. That should take place prior to  
 11 the commencement of his evidence. And I respectfully  
 12 submit that the problem also will be experienced by the  
 13 other practitioners, that they would like to know which  
 14 documents and exhibits inside the documents – sorry, inside  
 15 the dockets – reliance is going to be placed on during the  
 16 evidence of Mr X. That will give them an idea, they will  
 17 be in a position to can know which witnesses they should  
 18 call, which witnesses they should consult with.  
 19 Chairperson, I am – we are mindful of the fact  
 20 that there are time constraints within which we have got to  
 21 operate but at the same time it is in the interests of the  
 22 public at large, the role players, that a proper and full  
 23 ventilation of the issues on which the Commission should  
 24 make a finding should be dealt with. We cannot have a  
 25 situation unfortunately, Chairperson, wherein things are

1 being merely done so that the Commission should conclude  
 2 its work because at the end of the day we expect the  
 3 Commission to come out with a report that will be helpful,  
 4 that will be meaningful going forward. And also we  
 5 respectfully submit that we need to have a situation  
 6 wherein if the loved ones of the victims have to find  
 7 closure, they have got to do that, Chairperson.  
 8 We respectfully submit that it is not in the  
 9 interests of this Commission and all the role players that  
 10 Mr X should not testify until that he is ready to testify  
 11 and all the other parties whose clients are affected are in  
 12 a meaningful position to can deal with the evidence to be  
 13 presented by Mr X. That is our submission, Chairperson.  
 14 CHAIRPERSON: What you're telling me, as  
 15 I understand, is there are basically two aspects that you  
 16 rely on in support of your contention that he should only  
 17 give evidence on the 19th. The first is the period of time  
 18 which will be required by the parties to go through these  
 19 dockets and other documents you're making available, to  
 20 identify those they want to rely on for the purposes of  
 21 cross-examining him. That's the first period and also  
 22 presumably to take instructions from their clients in  
 23 respect of some of the things he may say in the statement  
 24 that was provided previously which had blanks in it. I  
 25 take it you're now giving a statement in which the blanks

1 are filled in. Anyway, that's the first period. Then the  
 2 second period is the period that you require to sit down,  
 3 you or those assisting you, to sit down with Mr X, to take  
 4 him through the documents which are going to be relied on  
 5 in cross-examination.  
 6 [12:36] Take him through them in the sense that read them  
 7 out to him, translate them into his home language. So  
 8 that's the second period that is part of the period between  
 9 now and the 19th. Is that correct?  
 10 MR MATHIBEDI SC: That's correct, Chair.  
 11 CHAIRPERSON: Now how are we able to  
 12 quantify that? On what basis do we say well today is the  
 13 5th, so we would be sitting tomorrow, that's effectively  
 14 from the 7th through to the 18th that you will be available  
 15 for this purpose, and I understand that the 16th and the  
 16 18th we won't be sitting anyway because the 16th is a public  
 17 holiday and the 18th this chamber won't be available, but on  
 18 what basis do I arrive at the 19th, apart from those two  
 19 dies non, the 19th as being the day from which, to which you  
 20 ask that his examination-in-chief be held over?  
 21 MR MATHIBEDI SC: Chairperson, at this  
 22 stage we have already started consulting with Mr X and we  
 23 have to a certain extent identified some of the documents  
 24 that we seek to rely on.  
 25 CHAIRPERSON: I have difficulty in

Page 30212

1 understanding on what basis you could have thought you  
 2 could have led him seven days after you complied with the  
 3 facts as set out in the ruling and thereafter say well you  
 4 could lead him 14 days after that. Then you, that I think  
 5 was last Wednesday. You were only waiting for permission  
 6 from the DPP in order to put these documents up, but what  
 7 have you been doing all this time? Were you not conscious  
 8 of the time constraints that are applicable to this  
 9 Commission?  
 10 MR MATHIBEDI SC: Chairperson, we are  
 11 very conscious of the time constraints applicable to this  
 12 Commission, but when we made the first indication that X  
 13 could be led after the expiry of 14 days – seven days,  
 14 Chairperson unfortunately at that stage we expected that we  
 15 would have obtained the permission from the Director of  
 16 Public Prosecution North West, but however, one aspect that  
 17 cropped up is that the person who's dealing with the  
 18 dockets, Adv Carpenter, we are being advised that he's ill  
 19 now, it's been for quite some time and probably somebody  
 20 who was not dealing with the dockets had to peruse the  
 21 dockets and find out what is contained in the dockets, and  
 22 we could not afford a situation wherein we make dockets  
 23 available or distribute them without the necessary consent  
 24 of the Director of Public Prosecutions –  
 25 CHAIRPERSON: Yes.

Page 30213

1 MR MATHIBEDI SC: But however –  
 2 CHAIRPERSON: I'm sorry to interrupt you.  
 3 Did you have the dockets in your possession?  
 4 MR MATHIBEDI SC: Not all the dockets,  
 5 Chairperson.  
 6 CHAIRPERSON: You see, what I don't  
 7 understand is I was under the impression that you'd already  
 8 photostatted the documents, you had them ready, you were  
 9 just waiting for the consent of the DPP. Once the consent  
 10 of the DPP was available, which was last Friday, I expected  
 11 to get the documents that day, or the day after, but I'm  
 12 still in the position, I haven't got them. I was hoping  
 13 that I'd get them yesterday so I could look at them to see  
 14 what time I thought was reasonably required in order to  
 15 peruse them to do what is required in what I call the first  
 16 period, but I still haven't got them. So what's been  
 17 happening? Or not happened, as the case may be.  
 18 MR MATHIBEDI SC: Chairperson, we did not  
 19 have all the dockets with us.  
 20 CHAIRPERSON: How many of them did you  
 21 have?  
 22 MR MATHIBEDI SC: We have about 11  
 23 dockets.  
 24 CHAIRPERSON: Was nothing done to  
 25 photostat those during that period?

Page 30214

1 MR MATHIBEDI SC: Chairperson –  
 2 CHAIRPERSON: As soon as the DPP gave his  
 3 permission, could those 11 not have been provided on the  
 4 basis that more are coming?  
 5 MR MATHIBEDI SC: Chairperson,  
 6 unfortunately probably we were naïve. We thought that we  
 7 should make all the dockets available, but we respectfully  
 8 submit that the dockets have been photocopied. The  
 9 Chairperson will have to bear in mind that there are 20  
 10 dockets and we've got to make four copies, two for the  
 11 Commissioners, one for the Chairperson and one for the  
 12 assistant of the Commission. So there are also logistical  
 13 problems, Chairperson.  
 14 CHAIRPERSON: What about the parties?  
 15 Isn't the arrangement that the parties are supposed to see  
 16 these documents? They are the ones after all who've got to  
 17 go through them and decide what documents, if any, in these  
 18 dockets they wish to rely on in cross-examination.  
 19 MR MATHIBEDI SC: Chairperson, I'm  
 20 advised that some of the dockets have already been made  
 21 available to the evidence leaders and have been  
 22 distributed.  
 23 CHAIRPERSON: Electronically?  
 24 MR MATHIBEDI SC: Electronically. They  
 25 were made available.

Page 30215

1 CHAIRPERSON: [Microphone off, inaudible]  
 2 that?  
 3 MR MATHIBEDI SC: No, they were made  
 4 available on Monday to evidence leaders. The last two I  
 5 think were sent yesterday, Chairperson.  
 6 COMMISSIONER HEMRAJ: Mr Mathibedi,  
 7 someone mentioned to us that these 20 dockets run into some  
 8 15 lever arch files. Is that correct?  
 9 MR MATHIBEDI SC: That's correct,  
 10 Chairperson, we're talking about –  
 11 MR CHASKALSON SC: Chairperson, we've  
 12 counted the pages, they're 1034, the majority of which are  
 13 old documents that have appeared on the SAPS hard drive and  
 14 have been in possession of the parties for the better part  
 15 of two years.  
 16 CHAIRPERSON: So I've asked you my  
 17 question. Is there anything you wish to add, Mr Mathibedi?  
 18 MR MATHIBEDI SC: Chairperson, I also  
 19 would like the Chairperson to take into account that Mr X  
 20 is currently in witness protection programme, so whenever  
 21 consultations are to be held with him security  
 22 considerations also play a very important role because it's  
 23 not a situation wherein we can willy-nilly consult with him  
 24 after hours or over weekends, but at the current moment  
 25 arrangements, solid arrangements and firm arrangements have

Page 30216

1 been made available for consultations with him.  
 2 CHAIRPERSON: Thank you. Who else wishes  
 3 to speak in support of the application?  
 4 MR MPOFU: Thank you, Chairperson. Well,  
 5 I just want to preface my address by saying I never thought  
 6 the day will come, but I support the SAPS application.  
 7 Chairperson, I think there are two issues, or two topics  
 8 that I want to address. One I will call the big elephant  
 9 and the other one the small elephant.  
 10 I'll start with the small elephant, which is the  
 11 issue of this application, but I must mention that in my  
 12 view the real issue here is this imposed deadline of the  
 13 31st of July. That's the real big elephant behind what is  
 14 happening here.  
 15 But let me start with the application itself.  
 16 Chair, we support the application for some of the reasons  
 17 advanced by SAPS. We obviously differ with some of the  
 18 reasons that they have advanced, or are neutral. For  
 19 example as to whether it's their own fault that they are  
 20 not ready and so on, between them and the NPA and so on,  
 21 that it might well be so, but the fact that it's their own  
 22 fault doesn't mean that the consequences of that are not  
 23 felt adversely by parties like ourselves.  
 24 Chairperson, you correctly said - and it doesn't  
 25 even need to be repeated - that Mr X is a very important

Page 30217

1 witness particularly for the parties that I represent. He,  
 2 as is suggested in the SAPS affidavit, makes quite serious  
 3 allegations - some of them outrageous, but still serious -  
 4 about some of the victims of the tragedy, or massacre,  
 5 whether they are survivors or whether they are deceased. I  
 6 don't think I've got all the documents from what Mr  
 7 Chaskalson and Mr Mathibedi have said, but I have some of  
 8 the dockets, I suspect, and in between preparing for the  
 9 cross-examination of Mr Da Costa I paged through some of  
 10 the dockets yesterday and I found that there are quite  
 11 serious statements which contain serious allegations  
 12 against some of the people I represent, which will  
 13 necessitate that I do some thorough consultations before I  
 14 can, well either before Mr X is called or secondly before I  
 15 can be in a position to cross-examine him.  
 16 CHAIRPERSON: Can I ask you a question  
 17 about that?  
 18 MR MPOFU: Yes.  
 19 CHAIRPERSON: I can understand the  
 20 serious allegations that Mr X makes, but if there are other  
 21 serious allegations made by other witnesses, the mere fact  
 22 that the documents have been put before us would not be a  
 23 basis necessarily for us to rely on them. It would depend  
 24 I suppose on the circumstances, but clearly you don't have  
 25 to challenge any statements made by other, serious

Page 30218

1 allegations against your clients made by other witnesses  
 2 which are not supported by X's own evidence.  
 3 MR MPOFU: No, fair enough, Chair.  
 4 That's true, but one has to presume that the purpose of  
 5 producing those dockets prior to Mr X's testimony is  
 6 exactly so that those allegations are either going to be  
 7 tested or confirmed with him. That can be the only reason  
 8 why the two things are linked, and therefore naturally  
 9 flowing from whatever he's going to say about those  
 10 allegations, what will flow is cross-examination on those  
 11 issues by those people who represent the people against  
 12 whom such allegations are made.  
 13 To borrow Mr Semenya's expression, just to  
 14 complicate it even further, Chairperson, the one person  
 15 that I was able to even do a telephonic consultation with  
 16 who is seriously implicated in the dockets, told me that  
 17 those are statements that were extracted by means of  
 18 torture and that that is one of the people, you'll  
 19 remember, Chair, round about October when there was a group  
 20 of people who were arrested and we came to report for the  
 21 record one of them had soiled himself, another one, his  
 22 ears were affected, and so on. He's one of those people.  
 23 So there's no way that I can even allow those statements to  
 24 be canvassed with Mr X if indeed it turns out that they  
 25 were extracted by means of torture. So that's just a side

Page 30219

1 complication. As I say -  
 2 CHAIRPERSON: Sorry, I don't understand.  
 3 How can the statements be canvassed by Mr X? Assuming  
 4 you've got a docket, it contains a statement by Mr X who  
 5 makes certain allegations -  
 6 MR MPOFU: Ja.  
 7 CHAIRPERSON: You've then got a  
 8 statements by two other people -  
 9 MR MPOFU: Sure.  
 10 CHAIRPERSON: - who make other  
 11 allegations. Now there's no way those allegations can be  
 12 canvassed with Mr X, and remember we have a rule in this  
 13 Commission that you're supposed to lead in chief, you're  
 14 supposed to give a statement in advance of the evidence to  
 15 be led in chief, and that's a rule that hasn't always been  
 16 strictly adhered to but as far as Mr X is concerned, as far  
 17 as I'm concerned it's going to be strictly adhered to. It  
 18 would be very inappropriate for extra stuff to come from Mr  
 19 X's mouth in chief in respect of which there's no statement  
 20 from him beforehand.  
 21 MR MPOFU: Yes.  
 22 CHAIRPERSON: So in the hypothetical case  
 23 I put to you of a docket, three statements, one by X,  
 24 obviously the material there can be dealt with.  
 25 MR MPOFU: Sure.

Page 30220

1 CHAIRPERSON: And I would assume that  
 2 that would be in his statement anyway. As far as the other  
 3 statements are concerned, that material can't be canvassed  
 4 with him and so I don't quite see how there's a problem in  
 5 that regard.  
 6 MR MPOFU: Well, Chairperson, that's the  
 7 point; it's the chicken and egg. To answer even the  
 8 questions that you are raising, you are posing to me, one  
 9 has to go through the dockets and be able to isolate which  
 10 statements are Mr X, which ones are by the alleged person,  
 11 the perpetrator himself, which ones are by someone about  
 12 the perpetrator, and all that. That's exactly the point  
 13 that one has to go through those statements carefully and  
 14 meticulously to even make those challenges or objections,  
 15 such as the one that the Chairperson is raising now.  
 16 CHAIRPERSON: You were touching on the  
 17 problem that I'd put to Mr Mathibedi that the period from  
 18 the end of tomorrow to the 19th is effectively only  
 19 justifiable on the basis that it consists of two periods,  
 20 the one when the preparation is done to indicate what  
 21 matters will be covered with him in cross-examination, and  
 22 secondly time then spent in dealing, in discussing these  
 23 with him, reading them to him and consulting with him on  
 24 those points. Now Mr Mathibedi couldn't tell me how long  
 25 either of those two periods would be. Are you able to

Page 30221

1 assist me?  
 2 MR MPOFU: No, well, I can't put an exact  
 3 time, Chair. All I can say is simply this; if Mr Mathibedi  
 4 has a problem with what he calls an uneducated witness who  
 5 has to go through these files and so on, all I can say is  
 6 that well, in my case multiply that by 300. You know, how  
 7 am I supposed to consult with hundreds of people – as he  
 8 correctly says, these are not the kinds of witnesses that  
 9 you can just dump arch lever files and memory sticks, you  
 10 know, and then say I'll come back and get your comments.  
 11 This is going to be a painstaking exercise of ensuring that  
 12 I'm able, assuming, despite what the Chair has said, that  
 13 some of those statements somehow find their way into the  
 14 evidence of Mr X, I must be in a position to have consulted  
 15 with the affected persons, even as I say for the purposes  
 16 of object, as the Chair has hinted, as to whether is this  
 17 relative, can it be used, and so on and so on. All that is  
 18 matter that needs to be considered only after I've gone  
 19 through the 1034 pages, and also consulted with the  
 20 affected persons.  
 21 But Chairperson, putting that aside; to  
 22 complicate it even further, we are sitting here, I'm  
 23 sitting here right now with a statement of Mr X that  
 24 doesn't have names. I mean, Chairperson, with the greatest  
 25 respect, I just – if you'll allow me, Chair, I'll read you

Page 30222

1 paragraph 17 of Mr X's statement as it stands now. "On  
 2 Monday, on the 13th, the early hours of the morning, the  
 3 committee decided that we must proceed to Eastern Platinum.  
 4 Members of the committee, makarapa and other striking  
 5 miners went to the Eastern Platinum Shaft to stop people  
 6 from working. We were a group of 600 people. From the  
 7 group I remember the following people who were present,  
 8 that is," blank, blank, blank, blank, blank, and Mr Blank.  
 9 CHAIRPERSON: Yes, I understand that, Mr  
 10 Mpofo, by am I correct in thinking that one of the  
 11 paragraphs in the ruling was that before the 14-day period  
 12 started running you had to be given certain information –  
 13 MR MPOFU: That's correct.  
 14 CHAIRPERSON: - which included full  
 15 statements with the blanks filled in?  
 16 MR MPOFU: Absolutely.  
 17 CHAIRPERSON: So you've been in  
 18 possession of that information for more than 14 days.  
 19 MR MPOFU: No. Well, Chairperson, that  
 20 would be –  
 21 CHAIRPERSON: Is that right?  
 22 MR MPOFU: No. That's the whole point,  
 23 Chairperson. It means if there was such a ruling I wasn't  
 24 even aware of it. Well, the news I'm telling you is that  
 25 it has not been complied with because all I know is that it

Page 30223

1 says "Mr [blank] is well-known to me. His real name is  
 2 [blank]." So how are we going to even begin to engage with  
 3 this witness given this situation? And as I say,  
 4 Chairperson, I'm not in the realm of whose fault it is.  
 5 The point is that that is what I'm faced with now, with a  
 6 situation where I –  
 7 CHAIRPERSON: I understand whoever's  
 8 fault it is, well particularly if it's the fault of the  
 9 police, should have given you the information earlier.  
 10 Your clients can't be prejudiced because of that.  
 11 MR MPOFU: That's the bottom line, thank  
 12 you, Chairperson, yes. And then, Chairperson, just lastly  
 13 on this; so, Chairperson, to cut it short, I mean even the  
 14 19th, to be honest with you, Chair, I'm not sure that I  
 15 would be in a position to cross-examine, so I suppose my  
 16 take is that it cannot happen before the 19th. If it can  
 17 possibly even happen thereafter, well depending on what  
 18 arrangements can be reached. I've had some discussion with  
 19 Mr Chaskalson, he'll mention some of the variations when he  
 20 speaks, but the point of the matter is that certainly by  
 21 next Monday, which was the date that was put, one won't  
 22 even be able to make head or tail of this evidence, if,  
 23 let's just take one example, these blanks have not been  
 24 filled.  
 25 CHAIRPERSON: Have you not yet been given

Page 30224

1 a statement which fills in the blanks?  
 2 MR MPOFU: No, Chairperson.  
 3 CHAIRPERSON: Why is that not – you  
 4 didn't need the permission of the DPP of North West to give  
 5 a statement with the blanks filled in to Mr Mpofu, did you?  
 6 MR MATHIBEDI SC: Chairperson, the  
 7 statement, it's a 204 statement.  
 8 CHAIRPERSON: So?  
 9 MR MATHIBEDI SC: So we respectfully  
 10 submit that we required the permission to make that  
 11 available.  
 12 CHAIRPERSON: We saw the statement long  
 13 ago. I understand it may have been part of a docket, but  
 14 it's been taken out of the docket and copies had been made  
 15 available with blanks long ago in this Commission. So it  
 16 was no longer in the docket. So are you suggesting that  
 17 you needed the permission of the DPP to fill the blanks in  
 18 as well? And if you got the permission last Friday, why  
 19 didn't you have the statement ready because you knew the  
 20 permission was coming, and make it available that very day  
 21 to Mr Mpofu?  
 22 MR MATHIBEDI SC: Chairperson, I've  
 23 already indicated that we had some logistical challenges,  
 24 but we undertake that –  
 25 [12:55] CHAIRPERSON: - in regard to the

Page 30225

1 statement that we've had for months and months, I think  
 2 well over a year, with the blanks in it. You had a  
 3 logistical problem, you couldn't get, you couldn't prepare  
 4 his statement in advance with the names filled in, give it  
 5 to Mr Mpofu immediately, you got the permission – is that  
 6 what you're seriously suggesting?  
 7 MR MATHIBEDI SC: Chairperson, the  
 8 problem does not only relate to this statement. It relates  
 9 to making available the documents, all documents to Mr – to  
 10 the other parties.  
 11 CHAIRPERSON: I understand that but Mr  
 12 Mpofu presumably needed the statement with the blanks  
 13 filled in as soon as possible so he could start consulting  
 14 with the people identified as being effectively the blanks,  
 15 so that he could get their response to the allegations  
 16 made. Surely it wasn't sensible to say he could only get  
 17 that statement when all the other dockets were available,  
 18 was it?  
 19 MR MATHIBEDI SC: Chairperson, unless I'm  
 20 mistaken Mr Mpofu does not say that is the only document  
 21 that he requires to consult with the witnesses but  
 22 nonetheless that statement will be made available today to  
 23 Mr Mpofu.  
 24 CHAIRPERSON: [Microphone off, inaudible]  
 25 – the question and the answer that you've given me I've

Page 30226

1 heard. Yes, please carry on, Mr Mpofu.  
 2 MR MPOFU: Thank you. Thank you,  
 3 Chairperson. Chairperson, I now then move – well, save to  
 4 say that even if Mr Mathibedi was correct that I'll get the  
 5 statement today, does that only – I don't have to repeat  
 6 what the implications of that alone would be to the  
 7 question of Monday, which is in a few days' time and as the  
 8 Chairperson correctly said, the blank statements, and we  
 9 raised these objections in Rustenburg already that the  
 10 original blank statements were given in October/November  
 11 last year so there can't be any – presumably those names  
 12 were there and they were blanked out at that point so I  
 13 can't understand why we could not simply have been given  
 14 these at least in the past few weeks. But Chairperson, I  
 15 said with respect the real issue here is this issue of the  
 16 31st of July. You know –  
 17 CHAIRPERSON: Before we get to the 31st of  
 18 July –  
 19 MR MPOFU: Yes.  
 20 CHAIRPERSON: - which, as you know, is  
 21 something that I can do, all that I can do about it is what  
 22 I did, which was to apply to the President for an  
 23 extension.  
 24 MR MPOFU: I know.  
 25 CHAIRPERSON: And I understand the reason

Page 30227

1 they fixed the date was based inter alia on financial  
 2 considerations but anyway, be that as it may, we put an  
 3 application up to the President, more than that we can't  
 4 do. We can't assume he will grant our application. He may  
 5 take the view that there were good reasons why he fixed the  
 6 31st of July and those reasons still exist. That's a matter  
 7 that I can't do anything more about so the 31st July is, at  
 8 the moment, what I have to bear in mind. It's  
 9 irresponsible for me to assume that the President will  
 10 necessarily give the extension I've asked for.  
 11 MR MPOFU: I accept that.  
 12 CHAIRPERSON: But let me ask you my  
 13 question before you get to the 31st of July.  
 14 MR MPOFU: Yes.  
 15 CHAIRPERSON: What Mr Mathibedi suggested  
 16 was, it's not a total loss of sitting days because in the  
 17 interim while we're waiting for Mr X to come on the 19th,  
 18 assuming that's the date that's granted, we can hear the  
 19 evidence of Colonel Modiba and if necessary we can hear the  
 20 continued cross-examination of Captain Kidd whose evidence  
 21 stands over for cross-examination by the evidence leaders.  
 22 I don't know whether they're going to avail themselves of  
 23 that reservation but that is the position as it stands at  
 24 the moment. Colonel Modiba is quite an important witness  
 25 because while there is a certain degree, a certain lack of

Page 30228

1 clarity in respect of a good deal of what happened at scene  
 2 2, there are three discreet incidents which took place  
 3 almost on the periphery of scene 2 in respect of which  
 4 there is evidence. We've heard the evidence of two of  
 5 those. The last one relates to the evidence of Colonel  
 6 Modiba who was the commander as I understand it, of the NIU  
 7 unit which approached from, I think the north-east and to  
 8 which General Naidoo referred in his evidence. His  
 9 evidence is quite important.

10 Now, and in order for us to do justice to what  
 11 happened at scene 2 insofar as one can do it on the  
 12 evidence there is, Colonel Modiba seems to me to be quite  
 13 an important witness and what Mr Mathibedi suggests is that  
 14 at least some of the days between now and the 19th will not  
 15 be wasted if we spend those days listening to Colonel  
 16 Modiba's evidence and, if necessary, the resumed cross-  
 17 examination of Captain Kidd. Now what is your response to  
 18 that?

19 MR MPOFU: Chairperson, unfortunately my  
 20 response to that is that that's not helpful to me, to my  
 21 cause because as you correctly point out, Colonel Modiba is  
 22 an important witness so I'm going to have to be here.  
 23 Remember that I'm working under very extreme conditions, I  
 24 don't even want to go there. You know, we haven't even  
 25 been paid since March of last year and I'm working on my

Page 30229

1 own and those are conditions that –

2 CHAIRPERSON: There was a court order in  
 3 your favour that you get legal aid –

4 MR MPOFU: Well –

5 CHAIRPERSON: - and I don't know whether  
 6 you've submitted a fee list to the Legal Aid Board but if  
 7 you have I would have expected them to have paid you.

8 MR MPOFU: Well, I can assist you, I'll  
 9 help you. Well, Chairperson, you are incorrect in that.  
 10 If you think we're deliberately getting ourselves into this  
 11 difficulty then you are wrong –

12 CHAIRPERSON: No – no.

13 MR MPOFU: I'll tell you what happened.  
 14 Let me tell you –

15 CHAIRPERSON: I said I don't know if  
 16 you've submitted a fee list. I didn't make any positive –

17 MR MPOFU: Ja, well, I might as well,  
 18 since you've raised it, tell you that despite the judgment  
 19 in our favour – and I didn't want to get into this because  
 20 I'm actually tired of it – despite the judgment in our  
 21 favour, both the Legal Aid Board and the government have  
 22 been so obstructive. Obviously they resent the fact that  
 23 we got that judgment in our favour. The reality of the  
 24 situation, to cut it short, is that as from the 10th of  
 25 March 2013 this team has not been paid one cent, one penny.

Page 30230

1 We've been working under very extreme conditions and it's  
 2 certainly not of our own making, that I can assure you, but  
 3 that's not even what I'm addressing. All I'm saying is  
 4 that because of those conditions I can't be everywhere. I  
 5 have to be either – it's disgraceful conduct really on the  
 6 part of the authorities to put us in this position but we  
 7 have no choice, we can't abandon these people now. The  
 8 point of the matter is that if Colonel Modiba is being  
 9 called, Chairperson, then I again on my own have to be  
 10 here, prepare for his cross-examination, give you an  
 11 application with the questions and the documents and all  
 12 that goes with all this rushed situation that we have been  
 13 placed into and at the same time –

14 CHAIRPERSON: I'm sorry – why is that,  
 15 because Colonel Modiba in fact testifies as to some people  
 16 who were killed and arrangements have been made in the past  
 17 for not only sharing cross-examination but one party  
 18 dealing with cross-examination, others not. Now I would  
 19 expect that Mr Ntsebeza would be cross-examining Colonel  
 20 Modiba. I would imagine he'll be cross-examining him  
 21 fairly fully because it would relate to the deceased  
 22 persons whose family members he represents. So it's not  
 23 immediately apparent to me why arrangements couldn't be  
 24 made with him for him to deal with that aspect because I  
 25 wouldn't imagine that you and he would wish to repeat your

Page 30231

1 cross-examination and such points as you've got you could  
 2 put to him. So I don't understand that, I'm afraid.

3 MR MPOFU: Well, Chairperson, you may not  
 4 understand it but my instructions are to be here, to hear  
 5 witnesses and to cross-examine them insofar as it is  
 6 necessary and I intend to carry out that. The fact that  
 7 I'm the only person who works on my own without any juniors  
 8 is not of my making. I'm just telling you my situation as  
 9 it is. The point of the matter is that in the middle of  
 10 all that, I'm also going to have to go and meet with, I  
 11 don't know even how many people, let's say 10 or 20 people  
 12 under the conditions that I've described, give them files,  
 13 do – I must do all these things that have been explained  
 14 here of being the interpreter and this and all that and  
 15 then be in a position next Monday to deal with the evidence  
 16 of Mr X. That is simply, in one word, impossible  
 17 Chairperson. That's what I'm trying to explain to you. As  
 18 I say, I'm not, I don't want to apportion blame as to – or  
 19 I'm not fishing for sympathy from anyone but I'm telling  
 20 you the objective situation of what I'm facing and that it  
 21 is impossible to perform.

22 CHAIRPERSON: What you've put to me isn't  
 23 entirely correct because the proposal is that X, Mr X gives  
 24 evidence from the 19th which is the Thursday of the week  
 25 following next week and so it's not correct to say you've

Page 30232

1 got to be ready on Monday. Anyway Monday the 16th is a  
 2 public holiday in any event.  
 3 MR MPOFU: No, I'm talking about the 9th.  
 4 The application is to move it from the 9th, if you've  
 5 forgotten Chair –  
 6 CHAIRPERSON: No – no, I'm fully aware of  
 7 that. Thank you for reminding me of something I'm aware of  
 8 already but still thank you. I was asking you about an  
 9 alternative aspect of the matter and that is, the first  
 10 thing is whether the application should be granted as asked  
 11 for by the police. The second question is what does that  
 12 mean to the sitting of the Commission? Does it mean the  
 13 Commission just doesn't sit between now and the 19th or does  
 14 it mean the Commission uses the time or some of the time  
 15 that would otherwise be lost in other matters?  
 16 MR MPOFU: Yes.  
 17 CHAIRPERSON: And it's in the context of  
 18 that that I put the question to you about Colonel Modiba.  
 19 MR MPOFU: No, I accept that –  
 20 CHAIRPERSON: And Captain Kidd.  
 21 MR MPOFU: Yes. Thank you, Chairperson,  
 22 I accept that. I think, well, in one sentence what I'm  
 23 saying is if that period is used or rather is used for  
 24 other witnesses, the only implication for me is that I will  
 25 have to miss out on all that because I can't be in two

Page 30233

1 places at one time. I can't be bridging the gap that is  
 2 caused by the delays of Mr X and at the same time  
 3 participate in the Commission –  
 4 CHAIRPERSON: Sorry to interrupt you –  
 5 MR MPOFU: Sorry.  
 6 CHAIRPERSON: - what I'm asking you is  
 7 why do you have to participate in the evidence of Colonel  
 8 Modiba if your learned colleague who is sitting on your  
 9 left who represents the families will obviously have to  
 10 deal fully with Colonel Modiba's evidence because Colonel  
 11 Modiba talks about people who were killed at scene 2. Why  
 12 is it necessary for you to come along and either repeat the  
 13 cross-examination, which I won't allow you to do anyway,  
 14 alternatively to deal with other matters relating to his  
 15 evidence which can as easily be dealt with by Mr Ntsebeza?  
 16 MR MPOFU: Well, Chairperson, you can't  
 17 expect me to answer that question off the cuff. I would  
 18 have to make that determination. All I'm saying is  
 19 whatever is happening in the Commission, if in your view  
 20 it's something that doesn't concern us, well, that may well  
 21 be so but I would have to make that determination in order  
 22 to discharge my professional duties. I can't just accept  
 23 that there's nothing that I want to put to Colonel Modiba  
 24 just because you say so, Chair, with respect. Anyway, the  
 25 point of the matter is this, and also I don't know why the

Page 30234

1 Lonmin witnesses can also not fill the gap if the gap has  
 2 to be filled but – ja. Well, just because of prior  
 3 arrangements, we all have to twist our prior arrangements.  
 4 The point, Chairperson, is that –  
 5 CHAIRPERSON: I'm sorry, Mr Mpofo, how  
 6 long are you likely to be?  
 7 MR MPOFU: I'll be short, I'll be short  
 8 because I'm going to –  
 9 CHAIRPERSON: I propose to take the  
 10 adjournment when you've finished.  
 11 MR MPOFU: Yes, Chairperson. Let me  
 12 rather –  
 13 CHAIRPERSON: While you're speaking to  
 14 your attorney, one of the matters I'd like you to deal with  
 15 is the suggestion Mr Bizos made that the experts then come  
 16 and give evidence from the 23rd, which of course you  
 17 understand would involve, presumably, the calling of the  
 18 experts after Mr X has finished in chief.  
 19 MR MPOFU: Yes.  
 20 CHAIRPERSON: I'd like to hear your  
 21 submissions on that.  
 22 MR MPOFU: Thank you, Chairperson, yes.  
 23 That is, if we can jump to that quickly, that is a matter  
 24 that is also a subject of what I alluded to of the  
 25 discussion, short discussion I had with Mr Chaskalson. It

Page 30235

1 might well work in my favour in the sense that if there is  
 2 that interposition before my cross-examination occurs, then  
 3 it would, as I've alluded earlier, even give me more time,  
 4 more time beyond the 19th to do the things that I've just  
 5 mentioned. So I'm not averse to that suggestion, ja. The  
 6 only – so as I've said, for me the 19th or after the 19th is  
 7 good. What I'm busy debating about is the 9th. So  
 8 anything, if it's the 19th or six months after that, I'm not  
 9 particularly affected, the longer the better.  
 10 Chairperson, I know and as you correctly said  
 11 that the matter of the date is something that is beyond  
 12 your control but what I do want to place is that when  
 13 President Zuma set this date of the 31st of July, clearly it  
 14 was not done with, you know, with applying his mind to the  
 15 realities. Let's assume you are right, Chairperson, that  
 16 it was for financial considerations, well that is also,  
 17 that is –  
 18 CHAIRPERSON: [Microphone off, inaudible]  
 19 - my understanding is at least in part –  
 20 MR MPOFU: Yes, no, no -  
 21 CHAIRPERSON: - entirely, I don't know  
 22 but –  
 23 MR MPOFU: - fair enough. No, no, I know  
 24 -  
 25 CHAIRPERSON: - of the President at all.



Page 30236

1 MR MPOFU: No, no, I accept that.  
 2 CHAIRPERSON: Financial aspects were  
 3 mentioned to me after the decision was made.  
 4 MR MPOFU: Yes.  
 5 CHAIRPERSON: Which I can understand.  
 6 MR MPOFU: No, yes Chairperson, I am not  
 7 saying you are privy to the real reasons but I'm saying,  
 8 I'll give you an illustration. Well, my suspicion is that  
 9 it is for financial reasons. My clients' suspicion is that  
 10 this is for political reasons, so we won't go there.  
 11 Whatever it is, it is something that is unjustifiable  
 12 because we cannot, when we get to this stage of the  
 13 Commission when, and as my clients put it, when the  
 14 employer must now face the music and when the ministers and  
 15 the politicians have to face the music then we'll press the  
 16 fast forward button so that we can't hear the song, as it  
 17 were. It's not going to –  
 18 CHAIRPERSON: Our ministers will face the  
 19 music, if there will be music forthcoming –  
 20 MR MPOFU: In fast forward.  
 21 CHAIRPERSON: - they will come, and they  
 22 don't have to be exposed to an ordeal by exhaustion, I'm  
 23 quite sure that pertinent, well-posed questions can be  
 24 asked in the time they can make available and they will be,  
 25 their versions will be adequately tested before the

Page 30237

1 Commission. You can give the clients the assurance that  
 2 there's no reason to fear in that regard.  
 3 MR MPOFU: Well, that assurance will not  
 4 hold any water, Chairperson, to my clients to say the  
 5 ministers and the other politicians will not be subjected  
 6 to an ordeal by exhaustion when they, the people I'll be  
 7 talking to, were subjected to exactly that exhaustion.  
 8 That's not going to hold any water to them. That's exactly  
 9 their point that when they had to face the music here they  
 10 were grilled, as maybe they should have, but now when it's  
 11 the friends of the President, the President puts the fast  
 12 forward button. That's their view. I'm not saying I share  
 13 it. My view is that it's the, it's financial reasons but  
 14 whether it's me or the clients who are right, both those  
 15 reasons are bad in law because they do not apply their  
 16 minds to the interests of fairness and justice and the  
 17 finding of the truth and the closure that these families  
 18 and these injured people must have because you can't just  
 19 put money – if we want to save money, Chairperson, let's  
 20 stop this Commission right now. Why must we waste the next  
 21 two months with a fast forwarded farce of a process just so  
 22 that we can say we've finished? Let's stop now and save  
 23 the money of the taxpayer and go home.  
 24 We cannot have a situation where we countenance a  
 25 truncated – you said, Chairperson, very correctly one day

Page 30238

1 one of this Commission that we have to balance the  
 2 interests of expedition with the interests of fairness and  
 3 justice. That's what you said to us on the first day in  
 4 Rustenburg and we cannot have then a situation where  
 5 expedition is just pushed and the issues of fairness and  
 6 justice are completely pushed aside. That balance has got  
 7 to be adhered to and if, for what it is worth and I don't  
 8 think, Chairperson, there's any party – if there's any  
 9 party in this room or anybody in this room who thinks that  
 10 this Commission can be finished on the 31st of July and we  
 11 do justice to it, that person must say so now. I don't  
 12 think there's a single person, except for the President,  
 13 who thinks that this Commission can finish on the 31st of  
 14 July and therefore my view is that – and that's why we are  
 15 even here, about this application. The Commission, the  
 16 Arms Commission, the Pistorius trial, all sorts of things,  
 17 they stand down when fairness demands, so why are we having  
 18 this heavy weather about a standing down that is necessary?  
 19 It's because of the 31st of July. If there was no 31st of  
 20 July we would have stood this –  
 21 CHAIRPERSON: I think you've made that –  
 22 MR MPOFU: Thank you, Chairperson.  
 23 CHAIRPERSON: I think you've made that  
 24 point with sufficient clarity for me to understand it.  
 25 MR MPOFU: Yes. No –

Page 30239

1 CHAIRPERSON: But how it helps me in  
 2 regard to the present application, I don't understand.  
 3 MR MPOFU: Well, Chairperson, I've just –  
 4 if you don't understand it, you don't understand it. I've  
 5 just said there would be no so-called present application  
 6 if there was no 31st of July, so if that connection is not  
 7 clear, it's not clear. I can't make it clearer than that.  
 8 We wouldn't be having this debate if there was no imposed  
 9 date of the 31st of July. The connection is very clear.  
 10 Anyway, those are my -  
 11 CHAIRPERSON: I understand the connection  
 12 but how it helps me to decide the application is another  
 13 matter but anyway, I've heard what you have to say. Mr  
 14 Ntsebeza –  
 15 MR MPOFU: Those are my submissions.  
 16 CHAIRPERSON: Thank you, yes. I think  
 17 we'll now take the lunch adjournment. I think we must try  
 18 to come back at quarter to two. I know it's only half an  
 19 hour but I think there are reasons why we should do it that  
 20 way. [Microphone off, inaudible] – Mr Ntsebeza?  
 21 MR NTSEBEZA SC: Mr Chairman, I've been  
 22 given some lease of life where Randburg says as long as I  
 23 get there between three and four. They close at 4 o'clock.  
 24 CHAIRPERSON: Yes, I understand but how  
 25 long are you going to be arguing? The fact that the

Page 30240

1 Receiver of Revenue has given you time doesn't meant you've  
 2 got to use all the time you're given by us.  
 3 MR NTSEBEZA SC: No. Well, Mr Chairman,  
 4 I think my position is clear.  
 5 [13:15] It seems to me that the concern is about what is  
 6 going to happen next week if we adjourn to the 19th, and my  
 7 sense is that adjournment shouldn't be the consideration.  
 8 I think we must determine whether –  
 9 CHAIRPERSON: I understand. I was simply  
 10 asking how long are you going to argue after lunch?  
 11 MR NTSEBEZA SC: Well, as long as I just  
 12 indicated what my position is. Mr Chairman –  
 13 CHAIRPERSON: Alright, okay.  
 14 MR NTSEBEZA SC: I think I will take the  
 15 longest 15 minutes, if I have to.  
 16 CHAIRPERSON: I see, alright. Well, I  
 17 suppose we'd better than take the adjournment till 2  
 18 o'clock. It gives us three-quarters of an hour. You can  
 19 marshal your thoughts and hopefully shorten what you have  
 20 to say, otherwise – I know it's easier to make a short  
 21 prepared speech than a short unprepared speech. And who  
 22 else wants to address me in support of the application? I  
 23 know Mr Chaskalson, that you go against. I picked that up,  
 24 yes, but who wants to address me against the application?  
 25 I knew the view has been expressed by Mr Bizos that the

Page 30241

1 expert should come on the 23rd, and I think some of the  
 2 others have indicated already they agree with that also,  
 3 but who else wishes to speak after Mr Ntsebeza?  
 4 MR GOTZ: Chair, we intend to address you  
 5 for a minute or two at most on the conditions that we have  
 6 in relation to our position.  
 7 CHAIRPERSON: Alright, anybody else?  
 8 MS LE ROUX: Chair, similarly Human  
 9 Rights Commission, but also for two minutes, not longer.  
 10 CHAIRPERSON: I see, alright. Alright,  
 11 and that's it, and then Mr Chaskalson, we will see how long  
 12 he takes. Alright, we'll adjourn now till 2 o'clock.  
 13 [COMMISSION ADJOURNS COMMISSION RESUMES]  
 14 [14:02] CHAIRPERSON: The Commission resumes,  
 15 yes, Mr Ntsebeza?  
 16 MR NTSEBEZA SC: Thank you, Mr Chairman  
 17 and Commissioners. Mr Chairman, the families will not be  
 18 able to cross-examine Mr X next week, so I want to come up  
 19 front and say we will not be in a position to do so. If  
 20 for no other reason but for the reason that as late as on  
 21 the 4th of June, which was yesterday, there is an email that  
 22 one of my juniors was sending out requesting the attorneys  
 23 who instruct us to urgently require the SAPS to provide us  
 24 with statements from Mr X wherein Mr X fills in the gaps of  
 25 people who it is clear, maybe one of those who died in the

Page 30242

1 events that the Commission is traversing. The only person  
 2 who has been mentioned incidentally in the statements that  
 3 I am aware of is Mr Noki, Mguneni Noki, sometimes referred  
 4 to as Mambush. So whatever happens, if the order is that  
 5 we should hear Mr X next week I give an indication now that  
 6 it will be probably evidence in chief that will be led and  
 7 we will not be able to cross-examine him. So whatever  
 8 happens we will not be in a position.  
 9 Mr Chairman, I think it is important for us to  
 10 remind ourselves again, what is important for the 33  
 11 families whom appear before this Commission, the same  
 12 passion with which we addressed your good selves at the  
 13 beginning of it when it appeared that there was no  
 14 sensitivity that had been given by those in authority in  
 15 getting the families to be present when you're proceedings  
 16 are taking place, is the same kind of passion that we see  
 17 with the manner in which things are now happening. Mr  
 18 Chairman, we are not in the blaming game but the truth of  
 19 the matter is that we seem to have moved from one extreme  
 20 to the other to provide some form of accommodation for the  
 21 circumstances in which we find ourselves. We have moved  
 22 from a situation where Magidiwana would be cross-examined  
 23 by my colleague, Mr Ngalwana for five days on end, to one  
 24 where you are lucky if you get two hours of cross-  
 25 examination. I understand why it is happening, but Mr

Page 30243

1 Chairman, let's not forget, the families who are here want  
 2 four things. They want the truth, they want justice, they  
 3 want fairness but above all they want closure.  
 4 Now scene 1 is where the first volley of shots  
 5 took place and where 17 people were killed, and in relation  
 6 to scene 1 there has been independent and objective  
 7 footage, even before your Commission started there was  
 8 television coverage of what had happened and there was a  
 9 lot of views, even for the families, those who then became  
 10 aware and were able to look at what happened. They at  
 11 least could form their own opinions, which may or may not  
 12 be the kinds of opinions that you will reach at the end,  
 13 which is why you and your Commissioners are seized with  
 14 this task, but at least we have got that other evidence  
 15 which is not dependent on any other person which we can  
 16 always go to. Now scene 2 is unique in the sense that the  
 17 media were not there and therefore there is more that –  
 18 CHAIRPERSON: The police videographers  
 19 weren't there either.  
 20 MR NTSEBEZA SC: Indeed, so it seems to  
 21 us that scene 2 relies on your, Captain, - Colonel  
 22 Vermaak's videos and a lot of other sort of objective  
 23 evidence which is why we have been irritating your good  
 24 selves and everybody else by presentations and all of  
 25 those.

Page 30244

1 CHAIRPERSON: We weren't irritated by the  
 2 presentations, if we gave that impression it was erroneous.  
 3 MR NTSEBEZA SC: No, Mr Chairman, the  
 4 context is this, one would - the presentation because one  
 5 is conscious of time and there are some aspects of  
 6 presentations which we didn't pursue when, for instance we  
 7 have a witness who will not see what you would like the  
 8 witness to see, probably justifiably, but with a little bit  
 9 of patience you would have got to where you wanted to get  
 10 to, but those things didn't happen and it is all because  
 11 there was premium put on now having to do things more  
 12 expeditiously than they ever had been done before. And  
 13 therefore there was an understanding that we should hasten,  
 14 but the balance was becoming difficult to now strike the  
 15 balance between what is fair because, Mr Chairman, you are  
 16 going to have us as representatives of the parties at the  
 17 end of it, making submissions and you are going to be at  
 18 loggerheads with us when we say, this objective evidence  
 19 leads to this conclusion and then you will say, but it was  
 20 never put to witness but then we will say, -  
 21 CHAIRPERSON: We already indicated that  
 22 that's not going to happen, the mere fact that, if there is  
 23 objective evidence, the fact that it wasn't put to a  
 24 witness in the circumstances in which we've been operating  
 25 will not be held against you. If - makes the point it

Page 30245

1 makes the point.  
 2 MR NTSEBEZA SC: Yes.  
 3 CHAIRPERSON: Where the witness might  
 4 have said something differently and whether we have been  
 5 foolish enough to contradict the objective evidence that is  
 6 another matter.  
 7 MR NTSEBEZA SC: Yes, yes, Mr Chairman.  
 8 Well, that's reassuring to the extent that I had forgotten  
 9 that that was the position, but the long and short of it is  
 10 this. There are witnesses who for us are critical,  
 11 relevant to scene 2 and they are named there. Well, to all  
 12 the scenes, Mr Modiba as the chair has indicated. Now I  
 13 don't know how to pronounce this word, whether it is Mphe,  
 14 or Mere, M-E-R-E, Mere -  
 15 CHAIRPERSON: But M-E-R-E, isn't it?  
 16 Well, r may actually a "G" which you pronounced properly.  
 17 MR NTSEBEZA SC: We hold something that  
 18 there is merit in us seeking Mr Kuhn to be called.  
 19 CHAIRPERSON: Oh, but there is a very  
 20 serious possibility that Warrant-Officer Kuhn will not be  
 21 able to be called on medical grounds, the final word has  
 22 not been spoken on that. I think I'm correct in saying, if  
 23 I'm wrong I'll be corrected, that the evidence leaders have  
 24 been invited to have an interview with him, is that right,  
 25 Mr Budlender?

Page 30246

1 MR BUDLENDER SC: That's correct, Chair.  
 2 CHAIRPERSON: I think, he doesn't want to  
 3 disclose matters that invade his privacy but I understand  
 4 he hasn't been well for some time and there are serious  
 5 concerns he won't be able to give evidence, is that  
 6 correct?  
 7 MR BUDLENDER SC: That is correct, Chair.  
 8 MR NTSEBEZA SC: Mr Chair, -  
 9 CHAIRPERSON: He is obviously an  
 10 important witness, if it is at all possible to give  
 11 evidence he should and I understand that, but I'm just  
 12 mentioning to you that he may not come for reasons beyond  
 13 our control.  
 14 MR NTSEBEZA SC: Ja, Mr Chair, thanks  
 15 very much for that, but the long and short of it all is  
 16 this, that to the extent that there may be on the part of  
 17 the evidence leaders a concern that a week might go if Mr X  
 18 is not called on Monday and we've already put our position  
 19 as families clear, what is going to happen, we'll make an  
 20 application for us to be given an opportunity to go and  
 21 prepare. We would benefit if he was called because at  
 22 least we would have heard him in chief, but that's not what  
 23 we are stating for, we are simply saying, we will not, even  
 24 as we sit they will not be able to cross-examine him  
 25 properly. But if then the evidence leaders have a concern

Page 30247

1 that we will have a week going by we say it seems to us  
 2 that in the unsatisfactory way in which things are now  
 3 happening, you know putting, calling a witness and then  
 4 interposing others and what have you, it is not ideal but  
 5 it has worked because all of us are trying to meet an  
 6 exigency. Now to that extent I think next week can be  
 7 utilised, instead of it being an adjournment -  
 8 CHAIRPERSON: Utilised in what way?  
 9 MR NTSEBEZA SC: In the way, in the sense  
 10 of calling Mr Modiba and calling Mr Mere, Captain Kidd, I  
 11 know there is a disinclination on the part of my colleague  
 12 or not a disinclination, but a view that it is not  
 13 necessary for him.  
 14 CHAIRPERSON: But he was quite  
 15 comprehensively cross-examined by the various parties and  
 16 if there is anything that Mr Chaskalson wants to ask him he  
 17 has got to consider whether -  
 18 MR NTSEBEZA SC: Well, we'll be honoured  
 19 if Mr Chaskalson -  
 20 CHAIRPERSON: You can take your time on  
 21 that, I don't know what point -  
 22 MR NTSEBEZA SC: - that we did -  
 23 CHAIRPERSON: I don't know what point, if  
 24 any he still has but he was quite thoroughly cross-examined  
 25 on a number of points by various people.

Page 30248

1 MR NTSEBEZA SC: We would be honoured to  
 2 think that Mr Chaskalson thinks that we did a very good job  
 3 or we did a job that was sufficient for purposes of cross-  
 4 examination that he doesn't need to do any, but if the  
 5 concern is that there is a week that may go unused then our  
 6 own submission will be that it should be utilised by  
 7 calling the witnesses that we have indicated. I  
 8 understand, there was merit in those words said, there is a  
 9 Mr Sinclair now that Mr Da Costa is on the stand it makes  
 10 sense that Mr Sinclair must be called, but I understand  
 11 that the availability or non-availability, to call it  
 12 correctly, of counsel for Lonmin is militating against that  
 13 being –  
 14 CHAIRPERSON: Yes, just to get your  
 15 proposal, what you're saying is that we can use the week by  
 16 calling Colonel Modiba, I can't remember his rank, I think,  
 17 is it Colonel Mere, and Kidd if Mr Chaskalson has got any  
 18 questions left to ask him.  
 19 MR NTSEBEZA SC: Yes.  
 20 CHAIRPERSON: After you've covered the  
 21 ground as thoroughly as you have, you and your colleagues.  
 22 MR NTSEBEZA SC: And Mr Kuhn, if he is  
 23 available.  
 24 CHAIRPERSON: Well, yes, whether, if  
 25 Kuhn, - well, it is a possibility, ja, but the other thing

Page 30249

1 is, you did say something about Mr X in chief?  
 2 MR NTSEBEZA SC: Yes, no, that would be  
 3 okay.  
 4 CHAIRPERSON: Now one of the points about  
 5 Mr X in chief is that this would be on the basis that,  
 6 would this be on the basis that the application for cross-  
 7 examination plus the documents to be relied on could be  
 8 made at the end of the week and the police would then have  
 9 the opportunity, assuming we didn't sit on Tuesday, to deal  
 10 with the matters that Mr Mathibedi referred to, on Monday,  
 11 Tuesday and Wednesday of the following week, so he would  
 12 then finish his examination in chief, to give such further  
 13 evidence as they considerate appropriate and rely to the  
 14 documents that, if they were going to be put to him in  
 15 cross-examination and he could then be cross-examined. Is  
 16 that what you're proposing?  
 17 MR NTSEBEZA SC: Mr Chair, I would like  
 18 to understand, is the proposal that at the end of this week  
 19 –  
 20 CHAIRPERSON: No, no, no, I didn't  
 21 express this clearly. I've got to find out what you are  
 22 proposing and I'm getting to some extent, that's why I'm  
 23 putting it to you because I may be wrong, but do I  
 24 understand you to be saying, we shouldn't have a problem,  
 25 he doesn't have to come on Monday, the application that he

Page 30250

1 is not called on Monday should be granted, instead the time  
 2 can be used by calling Colonel Modiba, calling Colonel  
 3 Mere, recalling Kidd if Mr Chaskalson has got any questions  
 4 left for him, calling Kuhn if he is medically fit and able  
 5 to do so, and then calling, if that doesn't use up the week  
 6 because some of them may not be available or needed, then  
 7 calling X say Thursday and Friday in chief on the  
 8 understanding that the applications to cross-examine  
 9 wouldn't be in yet. They would only be in at the end of  
 10 Friday perhaps or possibly over the weekend. The list of  
 11 documents to be relied on will equally be only available at  
 12 that stage.  
 13 That would give the police the opportunity to  
 14 spend Monday, Tuesday, Wednesday with him consulting,  
 15 reading and translating the documents to him, as Mr  
 16 Mathibedi very fairly said that that would be required and  
 17 that would obviously be quite a lengthy process, and then  
 18 the examination in chief on this approach, I'm not saying  
 19 it is the right approach, I'm just asking you if this is  
 20 what you're saying, the examination in chief could then be  
 21 concluded on the Thursday. That's the 19th and the cross-  
 22 examination could then begin, is that effectively what  
 23 you're suggesting?  
 24 MR NTSEBEZA SC: Mr Chairman, I wouldn't  
 25 go to war against that kind of –

Page 30251

1 CHAIRPERSON: No, well, I'm not asking  
 2 you to go to war.  
 3 MR NTSEBEZA SC: Well, Mr Chairman, I  
 4 have not really absolutely proposed that he must be called  
 5 in chief, that was not part of my proposal.  
 6 CHAIRPERSON: No, but you did mention –  
 7 MR NTSEBEZA SC: But if it is, I did  
 8 mention it.  
 9 CHAIRPERSON: Yes.  
 10 MR NTSEBEZA SC: I did mention it.  
 11 CHAIRPERSON: Alright.  
 12 MR NTSEBEZA SC: But, you know depending  
 13 on what SAPS feels about it, I mean that would be a  
 14 sensible way to go about.  
 15 CHAIRPERSON: Now a further question that  
 16 arises, I'm a little bit uncertain as to what exactly the  
 17 police's attitude on this is but I think to be fair to Mr  
 18 Mathibedi, I think it would only be fair to say a very  
 19 difficult case to argue and if I was a bit sharp with him I  
 20 apologise because it is nothing personal, I can see he has  
 21 been doing his best and such problems he may have, not of  
 22 his making but possibly his clients or some of his clients,  
 23 alright, he as usual was very fair and clear in his  
 24 argument, but one of the points that he did touch on, it  
 25 was in response to something Mr Bizos has said and Ms Hardy

Page 30252

1 has said, they feel that they would like the experts to be  
 2 interposed from the 23rd and there are apparently practical  
 3 reasons that were communicated to me outside the chamber  
 4 and bookings have been made and I think tickets have been  
 5 purchased and so forth. Now it is not normally advisable  
 6 to interpose witnesses like that, nor is it advisable in  
 7 the case of this kind to call the experts until all the  
 8 evidence is in so that they can give evidence on the basis  
 9 of that, but that's what would happen in an ideal world and  
 10 I fear we're not living in an ideal world.

11 So what is your attitude or let me ask this Mr  
 12 Mathibedi. Mr Mathibedi, is your applications suitably  
 13 amplified that Mr X not be called on Monday, that, with the  
 14 evidence in chief that you can deal with in reply, but are  
 15 you saying that you would not stand in the way of the  
 16 experts being interposed from the 23rd for that week? Is  
 17 that, I understood you to say that but I may misunderstood  
 18 you, how do you reply to that?

19 MR MATHIBEDI SC: That's correct,  
 20 Chairperson, we don't have a problem if his evidence is  
 21 interposed and then the experts are called on the 23rd.

22 CHAIRPERSON: What you were saying is,  
 23 even though his evidence would start later if your  
 24 application is granted, you accept that the consequence of  
 25 that would be that the experts could be interposed and

Page 30253

1 there might be a bit of inconvenience and so forth, but it  
 2 is something you'll be prepared to live with, is that  
 3 right?

4 MR NTSEBEZA SC: Mr Chairman, I don't  
 5 know, or Mr Mathibedi is still –

6 CHAIRPERSON: He is taking instructions,  
 7 I understand.

8 MR NTSEBEZA SC: No, -

9 CHAIRPERSON: He can reply to my question  
 10 and then we carry on. Yes, Mr Mathibedi?

11 MR MATHIBEDI SC: Chairperson, if the  
 12 week of the expert is to be respected, I don't think there  
 13 would be any harm, even if Mr X comes after the experts.

14 MR NTSEBEZA SC: Mr Chair, that's exactly  
 15 what I was going to propose, that Mr X can come in July for  
 16 all I, you know.

17 MR MATHIBEDI SC: No -

18 CHAIRPERSON: As far as –

19 MR NTSEBEZA SC: No, I'm very serious.

20 CHAIRPERSON: No, no, I'm serious too,  
 21 you know I'm serious too. You know the evidence leaders  
 22 are primarily responsible for determining who is called and  
 23 when, but they do share their concerns with me and I hope  
 24 one day you're called upon to sit in a commission like this  
 25 as the chairman because you will understand the problems

Page 30254

1 that one has.

2 [14:22] MR NTSEBEZA SC: As I said, having sat in  
 3 a taxi commission, Mr Chairman.

4 CHAIRPERSON: Yes, please accept my  
 5 commiserations. The position is this; the evidence leaders  
 6 have already indicated to Lonmin some time ago already that  
 7 they anticipated their witnesses would come in, as I said  
 8 earlier, in July, and Lonmin accepted that, made all the  
 9 arrangements on the basis. When it appeared that Mr X  
 10 couldn't come this week the evidence leaders appealed to  
 11 Lonmin to help us to fill the week, not waste it, hence Mr  
 12 Da Costa has come, but that is, as I understand it, is as  
 13 far as Lonmin can be pushed to helping us because of the  
 14 arrangements made and what was said before. So Mr X can't  
 15 come in July.

16 If the expert come, in view of the arrangements  
 17 and so on, that would be from the 23rd. We would have two  
 18 days, 19th and the 20th of the week before in which he could  
 19 give evidence and it presumably, I don't know when he  
 20 starts, but if he started then I take it he'd need two days  
 21 in chief. Then he could then, the expert could be  
 22 interposed. It's not always desirable, but as I said in an  
 23 un-ideal world one has to do things like that.

24 But what I'm really asking you is what your  
 25 attitude is. Mr Mathibedi has very fairly said he realises

Page 30255

1 the problems we have and he's prepared to make the  
 2 concession. What do you say about it?

3 MR NTSEBEZA SC: Well, Mr Chairman, we  
 4 are quite happy to accommodate all the other parties, and  
 5 if SAPS are quite comfortable with the experts being  
 6 interposed between what happens next weekend and when –

7 CHAIRPERSON: I don't think we should put  
 8 words in Mr Mathibedi's mouth. I don't think he agreed to  
 9 be quite comfortable, but I think he'd be prepared to say  
 10 he's prepared to make that concession, uncomfortable though  
 11 it may be. Is that right, Mr Mathibedi?

12 MR NTSEBEZA SC: Well, Mr Chairman, six  
 13 or half a dozen, it seems to me that – let us hear.

14 CHAIRPERSON: You're not quite  
 15 comfortable, but you're prepared to bear with the  
 16 discomfort. Is that a fair summary?

17 MR MATHIBEDI SC: Chairperson, may I  
 18 discuss it with Mr Semenya?

19 CHAIRPERSON: Yes, you may.

20 MR MATHIBEDI SC: Mr Chairperson, I've  
 21 already indicated the kind of witness we are dealing with,  
 22 so I think it is fair and best that, you know, his evidence  
 23 should flow uninterrupted.

24 CHAIRPERSON: So are you then withdrawing  
 25 your concession that the experts can be called for the 23rd?

Page 30256

1 MR MATHIBEDI SC: That's correct,  
 2 Chairperson.  
 3 CHAIRPERSON: I see, thank you. Yes,  
 4 sorry, Mr Ntsebeza.  
 5 MR NTSEBEZA SC: Mr Chair, the one last  
 6 point is that whilst it is prudent – and I'm sure the  
 7 Commission wants to be guided by prudence – whilst it is  
 8 prudent to prepare on the basis of what we have rather than  
 9 on what we might have or hope to have, and that is what we  
 10 have is 31st of July 2014 as being the termination date of  
 11 this Commission, it is not imprudent to indicate to the  
 12 powers that be – somebody said the powers that should not  
 13 be, but the powers that be –  
 14 CHAIRPERSON: No, you mustn't say that.  
 15 MR NTSEBEZA SC: - that this Commission  
 16 has already wasted millions of rands.  
 17 CHAIRPERSON: You say wasted.  
 18 MR NTSEBEZA SC: Or spent.  
 19 CHAIRPERSON: That money has been spent  
 20 on a very thorough investigation. In some ways it may have  
 21 been more thorough than was required, but there were  
 22 reasons why lengthy cross-examination was indulged then and  
 23 was not stopped.  
 24 MR NTSEBEZA SC: Yes.  
 25 CHAIRPERSON: Connected with, amongst

Page 30257

1 other things, the credibility of the Commission.  
 2 MR NTSEBEZA SC: Yes.  
 3 CHAIRPERSON: But a lot of money has been  
 4 spent. The argument would be that it would be rather  
 5 unfortunate if all that money were ultimately wasted  
 6 because the Commission ended in a position not able to deal  
 7 adequately with its terms of reference. So if that's the  
 8 point you're making, it's obviously correct.  
 9 MR NTSEBEZA SC: Mr Chairman, you've made  
 10 it better than I would have made it. So whilst one  
 11 understands that the 31st of July is a date by which we are  
 12 now bound, it will be unrealistic for us not to make the  
 13 submission that an approach be made - which we will fully  
 14 support – that the best possible result in the  
 15 circumstances, it will not be the best result but the best  
 16 possible result that we can have in the circumstances is  
 17 where we could now call all the evidence that we possibly  
 18 can call and do thorough justice in the best tradition of  
 19 investigations of this nature, presided by commissioners of  
 20 your calibre and integrity, and I say so, Mr Chairman, not  
 21 because I am aware that there is a World Cup that is  
 22 looming between the 10th of June and sometime in July. That  
 23 should not be seen to be something that we put into the  
 24 equation. I'm very serious about the fact that this  
 25 Commission will deliver a better result if it is able to

Page 30258

1 sit until the date in September that was –  
 2 CHAIRPERSON: I don't think there's any  
 3 point in our going back to the President. We sent him  
 4 application, which was fully motivated. I don't know if  
 5 any of the parties have communicated to him their attitude  
 6 in relation to the application, but he has it. I  
 7 understand the Minister has been briefed about it and it's  
 8 in their hands at the moment. I don't think there's  
 9 anything further that I can say or add to what's already  
 10 contained in the application. If you feel that you may be  
 11 able to assist by communicating directly with the office of  
 12 the Presidency and indicating such further considerations  
 13 as you wish, then obviously you're free to do so.  
 14 MR NTSEBEZA SC: Those are our  
 15 submissions, Mr Chairman.  
 16 CHAIRPERSON: Thank you, Mr Ntsebeza. Mr  
 17 Gotz, you said you had some things to say shortly?  
 18 MR GOTZ: Chair yes, just very briefly.  
 19 We do propose simply this, that to the extent that there is  
 20 a postponement of the evidence of Mr X, that that time be  
 21 utilised as fully as possible and we do support the  
 22 proposal that Colonel Modiba get called. We are very keen  
 23 to cross-examine Warrant Officer Kuhn and every effort  
 24 should be made to bring him. I think it is Colonel Mere as  
 25 well, is a witness that we would like to hear.

Page 30259

1 On the subject of Mr X's evidence-in-chief our  
 2 position is that we do believe that for two reasons we  
 3 think that it is desirable and indeed possible to hear the  
 4 evidence-in-chief of Mr X before and separate from the  
 5 cross-examination, and let me explain that, Chair. The  
 6 first reason is that it ameliorates many of the problems  
 7 that have been identified by the SAPS as well as my learned  
 8 friend Mr Mpofu. The second reason is that –  
 9 CHAIRPERSON: It's not just the evidence-  
 10 in-chief separate from the cross-examination. I take it  
 11 from what you say with regard to ameliorating problems that  
 12 you would accept that the notice of documents, etcetera, to  
 13 be relied on could be given at the end of his evidence-in-  
 14 chief –  
 15 MR GOTZ: Indeed.  
 16 CHAIRPERSON: - his main evidence-in-  
 17 chief.  
 18 MR GOTZ: Indeed.  
 19 CHAIRPERSON: But his evidence-in-chief  
 20 will not be regarded as having been terminated so that Mr  
 21 Mathibedi, if he's to call him, would be able to examine  
 22 him further in chief in relation to some of the documents  
 23 to be relied on.  
 24 MR GOTZ: Yes, indeed.  
 25 CHAIRPERSON: And the cross-examination

Page 30260

1 would begin thereafter.

2 MR GOTZ: Yes, indeed.

3 CHAIRPERSON: I think your –

4 MR GOTZ: And there will be an –

5 CHAIRPERSON: To be fair, if you didn't

6 do it that way you wouldn't really ameliorate the problems,

7 which the SAPS have I think validly raised as problems.

8 MR GOTZ: Indeed, Chair. There may be a

9 limited number of documents which we would have no

10 objection to Mr Mathibedi, my learned friend Mr Mathibedi

11 addressing with the witness.

12 The other reason, Chair, is that certainly our

13 team, you would know from the application to have Mr X's

14 evidence hear in camera, is somewhat sceptical about

15 whether this video link will in fact work practically and I

16 think we would get certainly an indication of whether it is

17 workable if we heard his evidence-in-chief in advance and

18 separately. It would also give us an opportunity to

19 understand how we might properly cross-examine him given

20 the disabilities that the video link might impose upon the

21 cross-examiners, and so we do believe that it will give a

22 useful trial run as to whether or not a video link is a

23 workable solution, or whether we need to approach you and

24 point out some of the difficulties, whether or not those

25 can be ameliorated or remedied for the purposes of cross-

Page 30261

1 examination we could then attempt to do, and failing that,

2 then we would approach you in the light of your order for a

3 different regime to be put in place. But it would give us

4 at least as it were a trial run and an opportunity to

5 assess whether or not the video link is to work.

6 So we would propose that the time be fully

7 utilised, in summary, the time be fully utilised with the

8 calling of those witnesses that we've proposed, then the

9 evidence of Mr X, if there's time available, and then of

10 course I think it's pretty well agreed by all parties at

11 the moment that the week of the 23rd should be utilised for

12 the purposes of the experts. Thank you, Chair.

13 CHAIRPERSON: Thank you, Mr Gotz. Ms

14 Hardy.

15 MS HARDY: Yes, thank you, Chair. Chair,

16 just to reiterate that the Human Rights Commission, I think

17 our position has been clear and that all parties are aware

18 of our position, that we don't oppose the application for

19 Mr X to give evidence later on the 19th of June on the

20 condition really that the 23rd of June be retained for the

21 experts.

22 Chairperson, the position for Mr White, our

23 policing expert in particular is that he is not available

24 in July. He will be travelling. We have actually spoken

25 to him subsequent to the conversation we had yesterday and

Page 30262

1 he has no availability during the course of July. So if we

2 are facing a deadline of the end of July the consequence of

3 not allowing the experts to be called in the week of the

4 23rd is essentially that the Commission will not have the

5 benefit of hearing the evidence of Mr White, and it's on

6 that basis the arrangements have been made, that week was

7 previously agreed to and our position is that we do not

8 oppose the application but on condition that the experts

9 give evidence in the week of the 23rd of June.

10 CHAIRPERSON: Yes, thank you. Can I ask

11 you a question flowing from that? Do you know whether he

12 is – Mr White – is available in August? The reason I ask

13 the question is that of course we are all considering this

14 application against the background of the present

15 situation, we will have to end on the 31st of July. If the

16 application for an extension is granted and if we learn

17 about it sooner rather than later, in other words before

18 the 23rd, what would then be an appropriate way of

19 proceeding would be to postpone the experts till say

20 August, if Mr White's not available in July, and carry on

21 with Mr X's evidence without interposition or interruption.

22 As you'd appreciate it's a hypothetical question, but I

23 hope the hypothesis is not so farfetched that we can reject

24 it out of hand. It may well be that you haven't canvassed

25 that with him, you've simply been told that he's travelling

Page 30263

1 in July, he's not available, but I would appreciate it if

2 you could tell me at some stage what the position would be

3 if the extension were granted and it would be possible to

4 have the experts give evidence in August. Would you be

5 prepared to do that?

6 MS HARDY: Yes, Chairperson, I would. I

7 unfortunately can't answer now whether he has any

8 availability in August. We haven't in fact canvassed that

9 with him on the basis of the current deadline, but I would

10 definitely be happy to. I would just request that – I mean

11 obviously it's out of our control, but if there is an

12 extension obviously sooner is better than later,

13 considering all the arrangements, the logistics and the

14 clearing of the diary that's already happened for, with the

15 experts.

16 CHAIRPERSON: No, I understand. Clearly

17 the sooner – if there is going to be an extension, the

18 sooner we know, the better, so that arrangements can be,

19 some of the existing arrangements can be changed and other

20 arrangements can be put in place and the sooner we do that,

21 the better. But obviously it's dependent upon our hearing

22 the fate of our application.

23 MS HARDY: Thank you, Chair.

24 CHAIRPERSON: Anybody else going to speak

25 before Mr Chaskalson? Mr Bizos.

Page 30264

1 MR BIZOS SC: Mr Chairman, I find it very  
 2 surprising to hear the representative of the South African  
 3 Police withdrawing the concession that he – well, the  
 4 conversation between the two of us on at least two  
 5 occasions that they had no objection to the experts being  
 6 called on the 23rd. I don't know the reasons why the  
 7 undertaking made earlier to you in the Commission and to me  
 8 privately at least twice before should now be withdrawn.  
 9 Mr Chairman, we have made arrangements for particularly Mr  
 10 Hendrickx to be here on the 23rd of July – I beg your  
 11 pardon, June.  
 12 I don't know the reason for the volte-face and I  
 13 submit that if we expect serious and world-renowned and  
 14 make an arrangement in concurrence with our colleagues,  
 15 that that should not be granted, Mr Chairman. I'm sorry to  
 16 use the word; we thought that we had a non-negotiable  
 17 alternative, but I can only repeat what I have said and I  
 18 don't wish to be dramatic, but if we expect an important  
 19 expert witness who has gone to the trouble to furnish a  
 20 document of about 120 pages and he isn't called, we don't  
 21 know whether there will be an extension to August and I  
 22 don't know that arrangements should be changed once there  
 23 was an agreement that the 23rd would be reserved, that  
 24 people can get out of it –  
 25 CHAIRPERSON: You know, Mr Bizos –

Page 30265

1 MR BIZOS SC: - in the middle of their  
 2 argument.  
 3 CHAIRPERSON: Mr Bizos, I don't think  
 4 you're understanding what I put to Ms Hardy. This is all  
 5 dependent upon what conclusion I ultimately come to, so  
 6 it's hypothetical on that basis. It's hypothetical on the  
 7 further basis that assuming we get the extension and we  
 8 know about it fairly soon – we don't know whether we'll get  
 9 it and we don't know if we'll get it soon, but on the  
 10 assumption that those things happen, and assuming we get it  
 11 before, far enough before the 23rd for the arrangements for  
 12 the 23rd to be cancelled and to be substituted by  
 13 arrangements for August, that is the question I asked.  
 14 Obviously if the arrangements can't be changed,  
 15 then the question falls away. Obviously, however, if they  
 16 can be changed, it would clearly desirably, I would think,  
 17 for the experts to come later, if that can be done, and  
 18 that was the basis on which the question was asked. Some  
 19 of the hypotheses on which the question is based may fall  
 20 away, and that I think is what you're addressing, but on  
 21 the assumptions that I put to you, then – and if Mr  
 22 Hendrickx can come in August and Mr White and Mr De Rover  
 23 can come in August, and if there's an extension which makes  
 24 it possible for them to come in August, what should happen?  
 25 That's the point –

Page 30266

1 MR BIZOS SC: On the assumption that he  
 2 may, even on the assumption that he may in some future  
 3 date, if we get an extension, he is able to come,  
 4 considerable expenses have been incurred for him to be here  
 5 on the 23rd of June and he is a person with an international  
 6 practice. He has set the week aside. I don't know whether  
 7 he would be prepared to put our funders to the expense of  
 8 paying double fees, Mr Chairman, for travelling and –  
 9 [14:42] CHAIRPERSON: What you're telling me is  
 10 it may not be possible –  
 11 MR BIZOS SC: It may not be possible –  
 12 CHAIRPERSON: - even if we get the  
 13 extension, to change the dates on which –  
 14 MR BIZOS SC: It would be very difficult,  
 15 Mr Chairman. You know my learned friends who charge fees,  
 16 sometimes if you have been booked and there are changes,  
 17 you want to charge. I don't know that we can approach an  
 18 international expert to do, to forego the time that he has  
 19 set aside even if we can fix a further date. I think that  
 20 it was agreed and it should be non-negotiable and there are  
 21 other alternatives of having Mr X in July, but let's keep  
 22 to what we have told Mr Hendrickx that he will be expected  
 23 to be here on the 23rd of June. And we beseech the  
 24 Commission not to set aside that understanding upon which  
 25 we made an arrangement with Mr Hendrickx to be here.

Page 30267

1 CHAIRPERSON: Mr Semenya, are you going  
 2 to reply or are you just going to say something before Mr  
 3 Mathibedi replies?  
 4 MR CHASKALSON SC: Sorry, Chairperson,  
 5 I'd like to have my say before people reply to me.  
 6 CHAIRPERSON: No, you're absolutely  
 7 right, it's obviously not a reply. You're quite right. Mr  
 8 Semenya, do you want to say something before Mr Chaskalson?  
 9 MR SEMENYA SC: It is clear to us that  
 10 there has been a misunderstanding. There is no  
 11 genuflecting or volte face on our part. We merely stated  
 12 that the week of the 23rd must still be maintained for the  
 13 experts. The only difference, we don't mind White coming  
 14 after that week. So there's no genuflection on our part.  
 15 [Microphone off, inaudible] X.  
 16 CHAIRPERSON: You say X can come after Y,  
 17 after the experts. [Microphone off, inaudible.] No – no,  
 18 I understand that but the point has been raised in some  
 19 circles that it's desirable the experts give evidence after  
 20 X but what you're saying is, you understand that but you  
 21 would be prepared to agree to a situation where he comes  
 22 after the experts. I understand. Alright, thank you. Mr  
 23 Chaskalson?  
 24 MR CHASKALSON SC: Thank you, Chair.  
 25 Chair, I've had the luxury of being away from the



Page 30268

1 Commission with pneumonia for some time so I haven't been  
 2 caught up in the day-to-day hearings of the Commission.  
 3 I've had the opportunity to take a bird's eye view of  
 4 matters and it's a very worrying view. And I want to give  
 5 some details here so that everybody understands the full  
 6 implications of the course of action suggested by SAPS and  
 7 doesn't bang into these implications when it's too late to  
 8 do anything about it.

9 The starting point, and I want to get into some  
 10 detail because one needs to understand the detail, the  
 11 starting point is that as things stand this Commission ends  
 12 on 31 July. We have to proceed on that basis. From Monday  
 13 next week we have 34 hearing days left, 34 hearing days  
 14 until the 31st July. Eight of those hearing days are  
 15 Fridays on which we sit for two hours less. That  
 16 translates to the loss of 16 hours, which is approximately  
 17 three ordinary days.

18 CHAIRPERSON: Except that that must be  
 19 read with the fact that we start earlier in the morning  
 20 that ordinary courts do, we normally take shorter lunch  
 21 breaks than ordinary courts do and as far as I understand,  
 22 if you take the two hours off on Friday you have got more  
 23 than enough credit for the extra time we've gained by  
 24 sitting the longer hours –

25 MR CHASKALSON SC: No, no, Chairperson,

Page 30269

1 the way we divide our time has a rationale to it. We sit  
 2 in a week more than the total number of hours that a court  
 3 sits but for the purposes of assessing how much time we  
 4 have left in terms of allocating days for witnesses when we  
 5 work notionally with an ordinary full day, when we say this  
 6 witness will take two days we mean two ordinary days.  
 7 Eight of those days that are available to us are Fridays  
 8 and those are not ordinary days, so in those eight days we  
 9 lose three ordinary days. So for the purpose of allocating  
 10 the time that remains we have 31 ordinary days left, 31  
 11 ordinary days left.

12 On our estimates, cutting things as fine as  
 13 possible, we have to use a minimum of 18 of those 31 days  
 14 for Mr X, the experts, the ministers, Mr Ramaphosa and the  
 15 recall of the National Commissioner and oral argument.

16 CHAIRPERSON: I didn't get that. You say  
 17 at least 18 days to be used for X, experts –

18 MR CHASKALSON SC: The ministers –

19 CHAIRPERSON: The ministers.

20 MR CHASKALSON SC: Mr Ramaphosa and the  
 21 National Commissioner.

22 CHAIRPERSON: The National Commissioner –

23 MR CHASKALSON SC: And oral argument.

24 And if I can break up how we get to 18 days and we do  
 25 believe that this is a very conservative estimate, five

Page 30270

1 days in total for Mr X, four days for the experts, four  
 2 days for the two ministers, Mr Ramaphosa and the National  
 3 Commissioner, given that those are witnesses who have  
 4 scheduling constraints and so they will probably spend – we  
 5 will have wasted chunks of days around them possibly – and  
 6 five days for oral argument. So that leaves us with a  
 7 maximum of 13 days to play with and that's assuming we have  
 8 no break at all between oral evidence and argument, no more  
 9 applications like the one we've had today. And let's see  
 10 what we have to fit in, into those 13 days. All of the  
 11 Lonmin witnesses other than Mr Da Costa and the way things  
 12 have run today I suspect Mr Da Costa will spill over onto  
 13 Monday now.

14 CHAIRPERSON: He won't be here on Monday  
 15 because his counsel won't be here.

16 MR CHASKALSON SC: Well, if he doesn't  
 17 spill over onto Monday then he'll have to spill over onto  
 18 some more time that is within the 13 days that are left.

19 CHAIRPERSON: Well, unless Mr Van As can  
 20 come and handle the –

21 MR CHASKALSON SC: - what we have to fit  
 22 into the 13 days.

23 CHAIRPERSON: No – no, I'm just thinking  
 24 aloud. Mr Van As nodded his head.

25 MR VAN AS: We'll have to take

Page 30271

1 instructions, Mr Chair.

2 CHAIRPERSON: I see.

3 MR CHASKALSON SC: Including the end of  
 4 Mr Da Costa's witness, evidence. Mr Mpofo's three  
 5 witnesses and the remaining SAPS witnesses apart from Mr X,  
 6 at least Mr Modiba, Colonel Modiba, if Warrant Officer Kuhn  
 7 is well enough, Warrant Officer Kuhn as well. We also have  
 8 to ensure that in those remaining 13 days we canvass in  
 9 evidence substantial sections of the work of the Commission  
 10 where there is, as things stand, very little evidence on  
 11 record and in many cases no evidence at all on record. Now  
 12 let me list some of the issues that I have in mind in this  
 13 regard. The background to the events of the week 9 to 16  
 14 August and the negotiations between Lonmin and the rock  
 15 drill operators in July 2012, there is now some from Mr Da  
 16 Costa. The initial organisation of the strike. The  
 17 attitude of AMCU to the strike and the actual involvement  
 18 or non-involvement of AMCU in its organisation. The point  
 19 at which the strike turned violent. The incidents where  
 20 Lonmin security shot at strikers on the evening or night of  
 21 the 10th of August. Why the strikers moved to the koppie.  
 22 The confrontation at the NUM office on the 11th of August.  
 23 The possibility of a 45th victim who may have been killed by  
 24 strikers on the 11th or 12th of August and is reported in  
 25 the Lonmin logbook as having been killed on the 11th or 12th

1 of August. The murder of the security guards on the 12th of  
 2 August. The murder of Mr Mabebe and the assaults and  
 3 destruction of property at K4 shaft on the night of the 12th  
 4 of August. The murder of Mr Langa on the morning of the  
 5 13th of August. The murder of Mr Twala on the 14th of  
 6 August. Any communications or instructions from members of  
 7 the National Executive to the National Commissioner on the  
 8 15th of August. Lonmin's involvement, if any, in the events  
 9 of the 16th of August.

10 CHAIRPERSON: There is another issue you  
 11 left out and that is the extent to which the proceeds, when  
 12 item 7 on the agenda was discussed at the national  
 13 management forum on the evening of the 15th and if it was  
 14 recorded, what happened to the recording?

15 MR CHASKALSON SC: That we may be able to  
 16 do without – that we may be able to do through  
 17 interrogatory without evidence but it would be ideal to do  
 18 it on evidence. And finally I should just point out that  
 19 we are assuming that there will be no evidence on the  
 20 surviving phase 2 issues, no evidence at all, no oral  
 21 evidence, it will all be on paper. What that means, Mr  
 22 Chairperson, is we just simply do not have the luxury of  
 23 being able to lose available hearing days through  
 24 postponements.

25 CHAIRPERSON: I'm sorry to interrupt you,

1 there's one other factor that occurs to me and that is it  
 2 may well be that Mr Mathunjwa will come back to deal with  
 3 some of the things Mr X says.

4 MR CHASKALSON SC: Yes. And the argument  
 5 that is being put forward by SAPS is in fact premised on a  
 6 false dichotomy because the choice is not between a better  
 7 process for the evidence of Mr X and a less desirable  
 8 process for the evidence of Mr X which doesn't have  
 9 consequences for the remainder of the work of the  
 10 Commission. In fact the choice is between a better process  
 11 for the evidence of Mr X and the overwhelming likelihood  
 12 that if there is a loss of three days next week, the  
 13 deadline of 31 July will arrive with the Commission unable  
 14 to say anything about a range of issues that fall squarely  
 15 within its terms of reference which were never addressed in  
 16 evidence. We're talking about losing roughly a quarter of  
 17 the time that is still available for us to deal with  
 18 matters that I've listed there.

19 And there's another risk which is, it's not just  
 20 that the Commission won't be able to say anything on a  
 21 range of issues because those issues will never have been  
 22 addressed in evidence, there'd be additional risk that in  
 23 respect of other issues the Commission will be limited to  
 24 the evidence of Mr X who is a self-confessed multiple  
 25 murderer who is utterly dependent on SAPS for his freedom

1 and wellbeing and whose evidence will suffer from all of  
 2 the disabilities that come with that sort of relationship  
 3 of dependence. One doesn't want to be in a situation where  
 4 one is utterly dependent on the evidence of that sort of a  
 5 witness. It goes further, Mr Chairperson, because – no,  
 6 no, it doesn't because Mr Semenya qualified Mr Mathibedi's  
 7 statement earlier.

8 It seems to me, Chairperson, that in response to  
 9 this application the Commission has to be guided by two  
 10 principles. The one now seems to be common cause, it  
 11 relates to the experts but I do want to emphasise that from  
 12 the perspective of the evidence leaders, the four days for  
 13 the experts should be treated as sacrosanct. And in this  
 14 regard I want to emphasise and in relation to the  
 15 recommendations that the Commission has to make - because  
 16 the Commission doesn't just make findings, it makes  
 17 recommendations – in relation to the recommendations, the  
 18 testimony of the experts and their cross-examination may  
 19 well turn out to be the most important testimony that is  
 20 heard by this Commission and we lost a great deal of value  
 21 if we don't have all four experts in the room together at  
 22 the same time so that that process of testing their  
 23 proposition on what recommendations this Commission is  
 24 going to make going forward about policing in South Africa,  
 25 are the best possible recommendations. So we have to treat

1 those four days as sacrosanct but the other principle is  
 2 that unless it is completely unavoidable, no hearing days  
 3 should be lost. We don't have hearing days to lose.

4 So how then do we deal with the problem? We  
 5 can't hear Lonmin witnesses next week because Lonmin  
 6 counsel are not available next week and in terms of the  
 7 timetable that was agreed with everyone, which had Mr X  
 8 testifying next week, they were given an assurance that  
 9 their witnesses would not be called next week. The  
 10 ministers and Mr Ramaphosa can't come next week. They have  
 11 busy schedules and the dates for their testimony have been  
 12 arranged for times other than next week. The experts are  
 13 not available next week. Mr Mpofo is clearly not  
 14 suggesting that his witnesses can fill the gap next week  
 15 and it wouldn't be fair to him to ask that, they weren't  
 16 supposed to come next week.

17 It's not clear to the evidence leaders that we  
 18 could serve any useful purpose cross-examining Captain Kidd  
 19 on issues which have not already been covered in his cross-  
 20 examination by the other parties. The only issues which I  
 21 would want to put to Captain Kidd are issues where I am of  
 22 the view that his testimony is at odds with objective  
 23 evidence and in terms of your indication earlier today and  
 24 on earlier occasions, Chairperson, it's not necessary to do  
 25 that. One can make the argument in oral argument, either

Page 30276

1 it stands up or it doesn't. At best, if I were to ask for  
 2 Captain Kidd to come back for cross-examination, I wouldn't  
 3 spend more than an hour with him.  
 4 The only witness who is clearly available and  
 5 necessary – the only witness who we have at our disposal  
 6 for next week other than Mr X is Colonel Modiba. He will  
 7 take probably less than two days, let's give him two days  
 8 which is a generous allocation. It's two out of a  
 9 remaining 13 days. That would leave us with three days  
 10 which are going to be wasted, a little bit less than three  
 11 because one of them is a Friday.  
 12 CHAIRPERSON: Sorry to interrupt, I know  
 13 he's on your list of witnesses to give oral evidence but it  
 14 was suggested by counsel that another witness who could  
 15 come or should come – Mr Ntsebeza said it and Mr Gotz  
 16 supported him – would be Colonel Mere. I know he's not on  
 17 your list and we have statements from him. His evidence, I  
 18 can see, is fairly important. There are a number of  
 19 matters that he could deal with that might well throw light  
 20 on some of the issues that are still unresolved. If he  
 21 gave evidence, I would think the evidence would probably be  
 22 about a day but I don't think it would necessarily be a day  
 23 wasted. I understand the argument about some, you know,  
 24 some –  
 25 MR CHASKALSON SC: Chairperson, our real

Page 30277

1 problem is –  
 2 CHAIRPERSON: So there is a proposition  
 3 that was put up by counsel so you must deal with it.  
 4 MR CHASKALSON SC: Yes, I will deal with  
 5 it, Chairperson. Our real problem is that we –  
 6 CHAIRPERSON: Sorry to interrupt you.  
 7 The other point which was suggested by Mr Gotz and some of  
 8 the other counsel as well was that Mr X could give evidence  
 9 in chief –  
 10 MR CHASKALSON SC: Yes.  
 11 CHAIRPERSON: - on say Thursday and  
 12 Friday, he could then stand over. That would give Mr Mpofu  
 13 and the others an opportunity to prepare lists of matters,  
 14 they apply for topics for cross-examination, prepare lists  
 15 of documents on which they'll be relying with which counsel  
 16 for SAPS could then consult with Mr X and particularly read  
 17 translations to him of the documents. So on Mr Gotz's  
 18 proposal we don't really lose any time at all because we –  
 19 MR CHASKALSON SC: Chair –  
 20 CHAIRPERSON: - five days or four and a  
 21 half, four and two-third days and we hear, and the only  
 22 difference is we have another witness who is not on your  
 23 lists, Mere, for about a day but he's not a witness whose  
 24 evidence would not add value to the sitting of the  
 25 Commission. That's Mr Gotz's argument and you're not

Page 30278

1 dealing with that -  
 2 MR CHASKALSON SC: I will deal with it  
 3 and –  
 4 CHAIRPERSON: - going on to the other  
 5 point.  
 6 MR CHASKALSON SC: - I have a more  
 7 radical proposal in relation to Mr X's evidence which I'll  
 8 get to in due course but our concern is, Mr Mere's evidence  
 9 – sorry, Colonel Mere's evidence would not be a waste of  
 10 time but the real lacuna, not the real lacuna, the real  
 11 problem that we face is we have had extensive evidence on  
 12 the 13th and the 16th. We have had very little evidence on  
 13 the other events of the week and in particular we've had  
 14 very little evidence on the issues that do not involve SAPS  
 15 directly and that's where we need to focus our available  
 16 time and calling Colonel Mere will leave us with the same  
 17 problem, that to address that long list of issues that I  
 18 read out, we have lost days from next week.  
 19 CHAIRPERSON: It sounded to me from what  
 20 you read, I was thinking, as you were reading the list, of  
 21 the kind of evidence that would be available to us on those  
 22 issues. A good deal of it, I think, would be forthcoming  
 23 from Lonmin so it would be dealt with in the Lonmin slots  
 24 which is in July.  
 25 [15:02] MR CHASKALSON SC: That's correct, but we

Page 30279

1 start losing – some of it will be dealt with in the Lonmin  
 2 slots, some of it will be dealt with in Mr Mpofu's  
 3 witnesses' slots but we start losing time for those slots  
 4 if we are not using next week, if we're using next week's  
 5 time for witnesses who aren't already on the list, as it  
 6 were. But what my proposal for next week is, is the  
 7 following. We have two days for Colonel Modiba who seems  
 8 to be a necessary witness. We have to work out how to  
 9 spend the other three days. My proposal is the following,  
 10 that Mr X should give his evidence in chief on Monday.  
 11 SAPS were urging us to hear his evidence several weeks ago  
 12 and indeed if they had their way Mr X would have long been  
 13 complete by now, so they can't complain that they are  
 14 prejudiced by leading him on Monday. They've also had  
 15 access to the documents, to the dockets that have recently  
 16 been made available for a long time and they're not the  
 17 ones who need time and I must also place on record here,  
 18 Chairperson, that the scares in relation to the bulk of  
 19 these dockets have been grossly exaggerated. I have spent  
 20 literally 15 minutes looking at the electronic files that  
 21 were sent to us in relation to the dockets and this is what  
 22 I found out in 15 minutes. There are 20 electronic files,  
 23 each purporting to be done docket. Six of the 20 are  
 24 duplicates or triplicates, so in fact six of the 20 are  
 25 duplicates or triplicates. So there are only 14 dockets.

Page 30280

1 Two of the 14 relate to matters which are completely beyond  
 2 the terms of reference of the Commission and have no  
 3 bearing on Mr X whatsoever. Docket number 208 relates to  
 4 the unlawful possession of a firearm on the 24th of October.  
 5 Document number 206, sorry, docket 206 –  
 6 CHAIRPERSON: [Microphone off, inaudible]  
 7 MR CHASKALSON SC: 208.  
 8 CHAIRPERSON: 208 and then 206.  
 9 MR CHASKALSON SC: Theft by false  
 10 pretences on the 26th August. Now let me read the  
 11 complainant's statement in docket 206. "On 26 August 2012  
 12 at about 5:45 I was at home and a man by the name of  
 13 Barker, who is working as a traditional leader, came to my  
 14 house. I know him because he was helping me doing my  
 15 rituals. He said to me that he came to collect the money  
 16 that I have in my bank account as he already knows that I  
 17 have money in my bank account even though I didn't tell him  
 18 about it." It gets better. "He came with a big pot and  
 19 told me to put my money inside that pot, claiming that the  
 20 ancestors want me to their hands, want to put their hands  
 21 on it so that it can be more. I did as he said and he put  
 22 an amount of R200 000 in the pot. He went home with the  
 23 pot and the money. On the next morning I went to his place  
 24 and he was nowhere to be found. That is all I can state."  
 25 CHAIRPERSON: All I can say is, all I can

Page 30281

1 say is I'm surprised that the Provincial Director of Public  
 2 Prosecutions gave permission for that docket to be made  
 3 available to this Commission.  
 4 MR CHASKALSON SC: There are 36 pages  
 5 devoted to this docket, none of them have any bearing  
 6 whatsoever on the matters of this Commission. We're down  
 7 now to 12 dockets. Many of these 12 dockets are identical  
 8 to the dockets that you will find on the SAPS hard drive  
 9 with nothing new in them. In relation to the dockets that  
 10 are not on the SAPS hard drive or that have been  
 11 supplemented since they were copied onto the SAPS hard  
 12 drive, you'll find massive duplication so that the same  
 13 statements appear in multiple dockets. I would be  
 14 extremely surprised if there are more than 150 pages in  
 15 total that are even remotely relevant to the evidence of Mr  
 16 X. That would be my – I would be very surprised if there  
 17 are more than 150 pages that can be shown to be relevant to  
 18 the evidence of Mr X.  
 19 The evidence leaders can do this exercise  
 20 overnight and can come back with some numbers, but if Mr X  
 21 gives his evidence in chief on Monday and we use Tuesday  
 22 and Wednesday for Colonel Modiba, we can then use Thursday  
 23 and Friday to allow the evidence leaders and all parties  
 24 other than Mr Mpofu's client to cross-examine Mr X because  
 25 Mr Mpofu and his clients are the only people who can

Page 30282

1 actually give instructions in relation to what Mr X has to  
 2 say. Nobody else has to take instructions in relation to  
 3 Mr X, nobody else can take instructions in relation to Mr  
 4 X. Mr Mpofu needs time, the rest of us do not. The rest  
 5 of us were in a position when –  
 6 CHAIRPERSON: That's not entirely  
 7 correct. Counsel for AMCU can take instructions from Mr  
 8 Mathunjwa.  
 9 MR CHASKALSON SC: That's correct, I –  
 10 but in relation to what is new and what hasn't been before  
 11 us for several weeks, I doubt very much whether there is  
 12 anything in these dockets that will require a response from  
 13 Mr Mathunjwa. The allegations in relation to Mr Mathunjwa  
 14 have been known for some time, but of course if counsel for  
 15 AMCU have a different view they can speak for themselves.  
 16 But if we were to proceed on this basis we would then use  
 17 all of the time next week without sacrificing any time that  
 18 is designated currently for the matters where we most need  
 19 evidence and we can set deadlines for the production of  
 20 documents –  
 21 CHAIRPERSON: I'm sorry, sorry, I seem to  
 22 have not written down anything that I need for your  
 23 argument. You say X on Monday?  
 24 MR CHASKALSON SC: Modiba,  
 25 Tuesday/Wednesday.

Page 30283

1 CHAIRPERSON: Modiba, Tuesday/Wednesday.  
 2 I see, that's it and then Thursday and Friday cross-  
 3 examination of X.  
 4 MR CHASKALSON SC: Cross-examination of X  
 5 by parties who aren't taking instructions.  
 6 CHAIRPERSON: No – no, let me get it down  
 7 first. There's a problem with that and that is if the  
 8 parties who are not taking instructions, as you put it, and  
 9 the evidence leaders wish to cross-examine on the basis of  
 10 documents which they find in the dockets then – or other  
 11 documents also for that matter – then they have to give  
 12 notice of that to SAPS and Mr Mathibedi has to have an  
 13 opportunity to consult with the witness on those –  
 14 MR CHASKALSON SC: Tuesday and Wednesday  
 15 is that opportunity, Chairperson.  
 16 CHAIRPERSON: No, but –  
 17 MR CHASKALSON SC: So notice has to be  
 18 given by Monday.  
 19 CHAIRPERSON: Yes?  
 20 MR CHASKALSON SC: Mr Mathibedi then has  
 21 the whole of Tuesday and Wednesday to put any documents  
 22 that have been –  
 23 CHAIRPERSON: This is while Colonel  
 24 Modiba is giving evidence.  
 25 MR CHASKALSON SC: Indeed. SAPS will

Page 30284

1 have to split their team.

2 CHAIRPERSON: Is it physically possible,

3 is it reasonable in fact to expect counsel for the other

4 parties to prepare their list of documents by Monday? I

5 understand if they could, what you say would be alright but

6 I'm not sure that that would be a reasonable burden to

7 impose upon them.

8 MR CHASKALSON SC: But Chairperson,

9 certainly from our perspective Mr X is not a witness in

10 respect of whom we plan to put a lot of documents –

11 CHAIRPERSON: That's why I said the other

12 parties –

13 MR CHASKALSON SC: Yes. All parties have

14 been preparing for the cross-examination of Mr X for

15 several weeks now and were expecting, until yesterday, Mr X

16 to testify next week. I would imagine, I mean my

17 colleagues can contradict me if I'm speaking out of turn

18 but I would imagine that save in respect of the dockets

19 that have recently arrived and which are less of a problem

20 than they might appear, most teams know at this stage which

21 documents, if any, they intend to put to Mr X. Certainly

22 by Monday they should be in a position to list those

23 documents. If parties feel that they're not going to be in

24 that position, parties other than Mr Mpofo, they will have

25 – obviously they must speak up now.

Page 30285

1 CHAIRPERSON: Then of course you've got

2 the further point that when Mr Mpofo comes up with his list

3 of documents then, while the witness is already under

4 cross-examination, the police then have to consult with him

5 again. Now I'm not suggesting for a moment that anything

6 improper would take place because we know counsel for the

7 police and we can rely on them absolutely not to do

8 anything improper but it is undesirable actually to have a

9 witness who has already been cross-examined to some extent,

10 being consulted with by counsel in relation to documents

11 and so on that are being relied on. So that is a problem

12 which we can't lightly brush from the table.

13 MR CHASKALSON SC: No, Chairperson, it

14 can't but - two responses. The first is it's a problem

15 that we have addressed and managed previously with a lot of

16 other witnesses but the second is, we're not in an ideal

17 world.

18 CHAIRPERSON: I don't know if it is with

19 a lot of witnesses. It happened with Captain Thupe but I

20 don't remember it happening with anybody else.

21 MR CHASKALSON SC: Lieutenant-Colonel

22 Vermaak, Brigadier Callitz, Colonel Scott, there have been a

23 series of situations where documents have been forthcoming

24 late in the process and SAPS has had to consult with their

25 witnesses in relation to the documents.

Page 30286

1 CHAIRPERSON: Well, my memory failed me

2 on that one. Are you going to be much longer because I was

3 proposing to take the tea adjournment and then presumably

4 those who disagree with your suggestion can say so and the

5 police would like to reply.

6 MR CHASKALSON SC: Chairperson –

7 CHAIRPERSON: I'm in your hands.

8 MR CHASKALSON SC: No, no, I'm right at

9 the end of the submissions. The only other detail that I

10 need to mention is that if we are to proceed on this basis

11 we will need a deadline for documents for Colonel Modiba

12 that would give SAPS the whole of Monday to consult with

13 him on the documents that he will be using on Tuesday and

14 Wednesday.

15 CHAIRPERSON: Well, you see the

16 alternative proposition I wanted to put to you is Mr Gotz's

17 proposition and that is that Colonel Modiba gives evidence

18 on Monday and Tuesday and the way you solve that one is the

19 time by which notice of documents is to be given is lunch

20 time on Friday, the police could then consult with him on

21 Friday afternoon, give him the documents to read over the

22 weekend. He is not in the same position as X because he

23 can read the documents. That way, the merit of Mr Gotz's

24 proposal is – I'm just expressing a prima facie view, you

25 understand, I haven't thought about these things in depth –

Page 30287

1 Modiba gives evidence Monday, Tuesday and then X gives

2 evidence towards, at the end of the week, leaving out the

3 question of whether Mere comes. Then he gives evidence in

4 chief at the end of the week, documents, notice of

5 documents is thereafter given, the police have the

6 opportunity to consult with him, translate the documents

7 and so on to – the first part of the next week, where both

8 the 16th and the 18th are days when we're not sitting anyway

9 and so we'll only lose the 18th by which, while they're

10 performing this process. That has advantages, I would

11 suggest or Mr Gotz I'm sure would suggest, over the

12 proposal that you're making. In other words, it

13 effectively saves most of the week but it avoids the

14 difficulty which has been put to you.

15 MR CHASKALSON SC: Chairperson, I didn't

16 follow that completely. Would, for instance, the evidence

17 leaders' cross-examination of Mr X then start on the

18 Thursday?

19 CHAIRPERSON: I take it the answer to

20 that – well, Mr X would give evidence presumably on

21 Wednesday then. Would the evidence leaders be relying on

22 documents for cross-examination of X? But you'd still have

23 the further problem that you would still have consultation

24 with him during cross-examination, once cross-examination

25 has begun. I haven't made up my mind finally and I'm just

Page 30288

1 putting it to you as a difficulty one has to wrestle with.  
 2 MR CHASKALSON SC: Two concerns that I  
 3 have with that proposal, the first is, Chairperson, we need  
 4 to try to use the whole of next week. So we do need to  
 5 ensure that Thursday and Friday get used for cross-  
 6 examination. The second is, Chairperson, I don't know  
 7 whether the parties are going to be able to meet a deadline  
 8 of Friday for documents for Colonel Modiba because nobody  
 9 was expecting to cross-examine Colonel Modiba on Monday  
 10 until possibly today or yesterday. The evidence leaders  
 11 could probably do that but I'm not sure whether the parties  
 12 could.  
 13 CHAIRPERSON: Anyway, if you've finished  
 14 what we can do is take the adjournment, the parties can  
 15 then think about it. They may come back and say we're  
 16 happy for Modiba to give evidence first as Mr Gotz  
 17 suggested and the problem you've suggested won't arise –  
 18 but anyway let them talk about it over a cup of tea and  
 19 we'll take the tea adjournment now.  
 20 [COMMISSION ADJOURNS COMMISSION RESUMES]  
 21 [15:40] CHAIRPERSON: Once again there were  
 22 housekeeping matters we had to attend to, for which I  
 23 apologise. I've indicated to Mr Da Costa's counsel that  
 24 we're unlikely to come back to him this afternoon because  
 25 Mr Tip tells me the next topic he's going to deal with,

Page 30289

1 with Mr Da Costa, is not a discrete topic which he can  
 2 dispose of by 4 o'clock, so he agreed with the suggestion  
 3 that he comes back tomorrow morning. So Mr Chaskalson, do  
 4 you have anything further you wish to say before I call  
 5 upon your colleagues who have anything to say flowing from  
 6 what you say, before I get the police reply?  
 7 MR CHASKALSON SC: Chairperson, I just  
 8 want to revert to my initial proposal about Mr X testifying  
 9 on Monday and Colonel Modiba coming Tuesday, Wednesday, and  
 10 then Mr X starting cross-examination on Thursday. I  
 11 anticipate that there may well be logistical problems in  
 12 getting parties ready for cross-examination of Colonel  
 13 Modiba on Monday and documents to SAPS in time because that  
 14 process of preparation hasn't yet begun. People were not –  
 15 we had a notional programme and it didn't include Colonel  
 16 Modiba coming to testify next week Monday. So if we can  
 17 buy an extra day in that regard, I would submit that it  
 18 would be a more convenient way of using the time.  
 19 CHAIRPERSON: What's your suggestion?  
 20 MR CHASKALSON SC: That Mr X gives  
 21 evidence-in-chief on Monday, that by Monday morning anyone  
 22 who wants to cross-examine Colonel Modiba has their  
 23 applications in with lists of documents. SAPS then has  
 24 Monday to deal with those documents with Colonel Modiba,  
 25 that by close of business on Monday anyone who wants to

Page 30290

1 refer to documents in the cross-examination of Mr X makes  
 2 them available, makes those lists of documents available to  
 3 SAPS. Colonel Modiba will be cross-examined on Tuesday and  
 4 Wednesday –  
 5 CHAIRPERSON: And give evidence-in-chief  
 6 too?  
 7 MR CHASKALSON SC: And give evidence-in-  
 8 chief. At the same time as that is happening the SAPS team  
 9 dealing with Mr X can then discuss any documents that need  
 10 to be put to him, or that will be put to him in cross-  
 11 examination, and that cross-examination of Mr X will start  
 12 on Thursday.  
 13 CHAIRPERSON: Thank you. Is there  
 14 anything further you wanted to submit?  
 15 MR CHASKALSON SC: No, Chairperson. That  
 16 is it.  
 17 CHAIRPERSON: Thank you. Before I call  
 18 on Mr Mathibedi to reply on behalf of SAPS, is there anyone  
 19 else who wishes to say anything flowing from what Mr  
 20 Chaskalson said? Mr Ntsebeza, you've got your hand up.  
 21 MR NTSEBEZA SC: Yes, Mr Chairman.  
 22 CHAIRPERSON: Mr Budlender's head was  
 23 hiding the fact that your light was on.  
 24 MR NTSEBEZA SC: I would trust Mr  
 25 Budlender to do that.

Page 30291

1 CHAIRPERSON: There's a lack of  
 2 transparency about that.  
 3 MR NTSEBEZA SC: In more ways than one.  
 4 Mr Chairman, if the Commission were inclined to agree with  
 5 Mr Chaskalson, I merely want to submit that the families  
 6 will still not be in a position to cross-examine Mr X next  
 7 week, which is where I started –  
 8 CHAIRPERSON: Or to give notice of the  
 9 document they rely on?  
 10 MR NTSEBEZA SC: Or to give notice of  
 11 documents on which we would rely. I think there should be  
 12 compliance with our request that the statements which Mr X  
 13 has made in relation to which there are gaps, and it is  
 14 clear that the gaps are reference to names who may be some  
 15 of the people who died, then to that extent we are not able  
 16 to deal with it, and a corollary –  
 17 CHAIRPERSON: Forgive me, Mr Ntsebeza.  
 18 Do I understand that you still haven't got the statement  
 19 with the names that were blank –  
 20 MR NTSEBEZA SC: No, we don't.  
 21 CHAIRPERSON: Well, Mr Mathibedi, may I  
 22 suggest that you raise it as a matter of urgency with those  
 23 instructing you that that omission should be rectified as  
 24 soon as possible?  
 25 MR MATHIBEDI SC: Chairperson, I

Page 30292

1 indicated that it will be made available today, but  
 2 unfortunately I am where I am, but I will make sure that  
 3 it's made available –  
 4 CHAIRPERSON: Thank you, I accept your  
 5 assurance. Thank you.  
 6 MR NTSEBEZA SC: Thank you, Mr Chairman,  
 7 for that undertaking from Mr Mathibedi. We therefore say  
 8 if Mr Chair and the Commissioners were inclined to then  
 9 adopt the line of action that Mr Chaskalson proposes, the  
 10 only error in his submissions – maybe he didn't mean it  
 11 that way, to say that there are parties who do not have to  
 12 consult. Well, we can't consult our clients, but it is  
 13 clear when once you get to know that the gap refers to  
 14 Mdizeni or Nqongophele or whoever it is, then in the  
 15 context of what is being said we are going to be in a  
 16 position to approach Mr Dali Mpofu and say look, obviously  
 17 your clients know this and in fact to the extent that your  
 18 clients are mentioned in the context of them being  
 19 mentioned here together with this, let's get an exercise.  
 20 So it seems to me –  
 21 CHAIRPERSON: It's a little bit more  
 22 complicated than that. Also there's a further point. When  
 23 you go through these dockets, and I accept that, I take it  
 24 we can provisionally accept that – perhaps provisionally is  
 25 an unhappy word – we can accept Mr Chaskalson's statement

Page 30293

1 that there are only about 150 pages that have to be read,  
 2 you may find in those 150 pages that X has said that  
 3 deceased number 4 did this, whereas there are a number of  
 4 statements in the dockets that indicate that what was  
 5 allegedly done by deceased number 4 was actually done by  
 6 somebody else, not even one of the deceased persons for  
 7 whose families you appear. So you're not only limited to  
 8 consulting with live witnesses as to what happened in  
 9 relation to allegations made against your clients, but also  
 10 the documentary material that's made available to you may  
 11 also yield points that you can put in cross-examination.  
 12 MR NTSEBEZA SC: That's exactly the  
 13 point, Mr Chairman.  
 14 CHAIRPERSON: Is that right?  
 15 MR NTSEBEZA SC: It seems to me therefore  
 16 that to the extent that there was a window that Mr  
 17 Chaskalson seems to have left for a later period of cross-  
 18 examination by counsel for the arrested, injured and  
 19 detained, Mr Mpofu, then we may have to be also at the time  
 20 that Mr Mpofu is called upon to do the cross-examination,  
 21 we can also be allotted that time. We would be ready, from  
 22 what my juniors tell me, to cross-examine Mr Modiba next  
 23 week in the manner proposed by Mr Chaskalson.  
 24 CHAIRPERSON: So you will be ready to  
 25 cross-examine Modiba on Tuesday?

Page 30294

1 MR NTSEBEZA SC: Yes, Mr Chairman.  
 2 CHAIRPERSON: Anything further you wish  
 3 to say?  
 4 MR NTSEBEZA SC: Do we have any hope that  
 5 there could be any recess between –  
 6 CHAIRPERSON: Sorry, I'm afraid I didn't  
 7 hear you. I said do you have anything further you wish to  
 8 say?  
 9 MR NTSEBEZA SC: Is there any hope that  
 10 there will be a recess at all?  
 11 CHAIRPERSON: I'd like to plead the fifth  
 12 amendment on this point, but seriously, obviously if we get  
 13 an extension it will be appropriate to grant a short recess  
 14 because we've been sitting for a long time without a  
 15 recess, but if we don't get the extension then it's a  
 16 matter I'd want to consider very carefully before agreeing  
 17 to it. I can't give you the answer now, I'm afraid.  
 18 MR NTSEBEZA SC: I understand, Mr  
 19 Chairman.  
 20 CHAIRPERSON: I'd like to give a recess,  
 21 but there are other factors that will have to be borne in  
 22 mind. Anybody else wishes to say anything?  
 23 MR GOTZ: Chair, just to say – in brief  
 24 response to my learned friend Mr Chaskalson's proposal –  
 25 that we would have unfortunately some difficulty in

Page 30295

1 providing documents for our cross-examination of Mr X by  
 2 Monday afternoon. I should also mention that we don't  
 3 intend to cross-examine Colonel Modiba, but that said, we  
 4 would be relatively comfortable cross-examining Mr X at a  
 5 relatively early stage, so we don't need an extensive time  
 6 for consultation and preparation.  
 7 CHAIRPERSON: You're not going to cross-  
 8 examine Modiba?  
 9 MR NTSEBEZA SC: They'll give us the time  
 10 that they would have used to cross-examine Mr Modiba.  
 11 CHAIRPERSON: You've answered the  
 12 question I was going to ask you. So you propose cross-  
 13 examining Modiba, alright. Anybody else want to tell me  
 14 whether they will or will not cross-examine Modiba? Yes,  
 15 Mr Mpofu. Sorry, is there anything further you wish to  
 16 say, Mr Gotz, before I move on to Mr Mpofu? Are you  
 17 finished? Mr Mpofu.  
 18 MR MPOFU: Thank you, Chairperson, just a  
 19 few points. Well, the first one is – and thank you for  
 20 allowing us to speak before Mr Mathibedi because he might  
 21 have to address some of these issues. This discussion now  
 22 is premised on some assumption that Mr X will be one day in  
 23 chief, which I must say I would like Mr Mathibedi to  
 24 express a view on that because I think that's way too  
 25 optimistic, even on fast-forward, because then the whole,

Page 30296

1 it will have a knock-on effect if we are all wrong in that  
 2 assumption.  
 3 The second issue was, well that we still don't  
 4 have the statement, but we'll accept our learned friend Mr  
 5 Mathibedi's assurance that it will be furnished sometime  
 6 today.  
 7 The third thing, Chair, which is quite important,  
 8 is the fact that despite what Mr, even accepting what my  
 9 learned friend Mr Chaskalson said about that the bulk of  
 10 these dockets might not necessarily contain a thousand  
 11 pages of relevant material, it's not so much the volume of  
 12 the documents that I'm concerned about. It's the  
 13 seriousness of the allegations contained in there. Even if  
 14 it's only a hundred pages that is relevant, what I've  
 15 already seen myself is sufficient to indicate that there  
 16 are new people who are implicated in quite serious ways,  
 17 which will require some careful consideration not only of  
 18 their evidence but as I indicated earlier, even of the  
 19 circumstances under which those statements were obtained.  
 20 So I just want to put that on the record that it's not just  
 21 about the bulk as much as the magnitude of what is  
 22 contained in this new material.  
 23 The last issue, Chairperson, I don't want to  
 24 sound like a broken record, but from what Mr Chaskalson's  
 25 analysis, I was listening carefully to his analysis of what

Page 30297

1 needs to be done on this 34 days that is remaining, and the  
 2 only conclusion one can reach is that it is nothing less  
 3 than impossible to finish all that work with all the issues  
 4 that Mr Chaskalson has raised in the time available in  
 5 relation to what I've already - which I don't want to  
 6 repeat. But I think I can now go as far as to say it's not  
 7 difficult, it's impossible that we can justifiably and  
 8 doing fairness, finish on the 31st of July, after listening  
 9 to Mr Chaskalson's analysis.  
 10 CHAIRPERSON: Thank you, Mr Mpofo.  
 11 Anyone else want to say anything before I ask Mr Mathibedi  
 12 to reply? I don't see any red lights - oh, Mr Bizos. Yes,  
 13 Mr Bizos?  
 14 MR BIZOS SC: We will be in a position in  
 15 my absence - I believe that Mr Brickhill will be able to  
 16 cross-examine the witness Modiba.  
 17 CHAIRPERSON: When?  
 18 MR BIZOS SC: Next week, probably  
 19 Tuesday.  
 20 CHAIRPERSON: I see. Thank you, Mr  
 21 Bizos. Mr Tip, I understood you might wish to say  
 22 something before I call on Mr Mathibedi's reply.  
 23 MR TIP SC: No, we have nothing of  
 24 substance to add. We'll be ready to deal with anything  
 25 that comes up next week, but we -

Page 30298

1 CHAIRPERSON: Do you propose cross-  
 2 examining Colonel Modiba?  
 3 MR TIP SC: We don't at all, Chair.  
 4 CHAIRPERSON: Thank you. Mr Mathibedi.  
 5 MR MATHIBEDI SC: Thanks, Chair. Chair,  
 6 the freedom of a section 204 witness is not dependent on  
 7 the police. It's dependent on whether the person during  
 8 the criminal trial gives evidence truthfully and honestly,  
 9 and at the end of the day it's the presiding officer who  
 10 must decide as to whether the person should be charged or  
 11 not. The other aspect is this Commission is not called  
 12 upon to determine the freedom of Mr X.  
 13 Now Chairperson, I think the contents of docket  
 14 208 clearly shows what kind of persons at times that we are  
 15 dealing with - people who will believe in what probably me  
 16 and you won't believe in, and this has a material bearing  
 17 on the mindset of some of the strikers who believed that  
 18 because they underwent, you know, rituals, muti rituals,  
 19 bullets won't penetrate their bodies.  
 20 Now this brings us back to the fact that it shows  
 21 what kind of person Mr X is. He is not a complicated  
 22 person. We cannot put him in the same league as General  
 23 Mpmembe, as the National Commissioner, as Brigadier Calitz,  
 24 people who were in a position to can go through documents  
 25 that were made available to them at, you know, at the last

Page 30299

1 minute. I think it's wrong if we are going to do a  
 2 comparison of the two.  
 3 Now Chairperson, whether the dockets that have  
 4 been made available, some of them -  
 5 CHAIRPERSON: Yes, I'm sorry, Mr  
 6 Mathibedi, I just thought of something else I'd like to ask  
 7 all the other counsel first and then you - I'll deal with  
 8 it now while I remember and then you can deal with it in  
 9 your reply if you wish. It occurs to me that it may be  
 10 that some of the parties may wish to draw the attention of  
 11 X to him on certain videos doing certain things, or not  
 12 doing certain things, as the case may be. I understand  
 13 that he is identified on some of the videos. Is that  
 14 correct? That information has been made available, he's  
 15 been identified -  
 16 MR MATHIBEDI SC: That's correct, it has  
 17 been made available.  
 18 CHAIRPERSON: Now I don't know whether  
 19 any of the cross-examination is going to be based upon the  
 20 video material, either the material, video material to  
 21 which the parties' attention has been drawn, or other video  
 22 material to which their attention has not been drawn, which  
 23 perhaps shows Mr X, even though it wasn't originally shown  
 24 to the parties.  
 25 So that's of course a further factor to be borne



Page 30300

1 in mind in the kind of notification which is required  
 2 before cross-examination. Can anyone answer that question?  
 3 Is that going to be done or not going to be done, or has it  
 4 not been considered?  
 5 MR NTSEBEZA SC: Mr Chairman, I think  
 6 there is, from what I have cursory read of the statements,  
 7 reference to the incident on the railway line where Mr X  
 8 does refer to certainly Mr Mgcineni Noki and therefore  
 9 there may well be a need to refer to that clip –  
 10 CHAIRPERSON: Yes, well I understand my  
 11 information, my understanding may be incorrect, but I  
 12 thought that's not – am I correct in saying that's not the  
 13 only reference to video material –  
 14 MR NTSEBEZA SC: Indeed.  
 15 CHAIRPERSON: - in which he is shown?  
 16 MR NTSEBEZA SC: No, it was just an  
 17 example.  
 18 CHAIRPERSON: Yes, no, no, sure. So  
 19 that's something else that will have to be considered  
 20 because it may well be that a cross-examiner will wish to  
 21 say look at this video, you say you did this, in fact this  
 22 video shows you didn't, or vice versa.  
 23 MR MPOFU: Yes, the same applies to us,  
 24 Chairperson.  
 25 CHAIRPERSON: Yes, so I don't know

Page 30301

1 whether it's an exercise you've already performed –  
 2 MR MPOFU: No, I –  
 3 CHAIRPERSON: If it isn't, it's going to  
 4 have to be, I would think.  
 5 MR MPOFU: Yes.  
 6 CHAIRPERSON: Okay, thank you. Sorry, Mr  
 7 Mathibedi, but that's a point that also has to be borne in  
 8 mind and you have to deal with in the course of your reply.  
 9 Thank you.  
 10 MR MATHIBEDI SC: Thanks, Chairperson.  
 11 Chairperson, once we were given the consent or go-ahead to  
 12 distribute dockets, it is not within our discretion to  
 13 decide which dockets we are going to make available and  
 14 which we are not going to make available, lest we will be  
 15 accused of, you know, suppressing information, which we  
 16 don't want to happen, and for one to be in a position to  
 17 can determine that a thousand and so odd pages or documents  
 18 are irrelevant, it means one must go through the docket,  
 19 and until such a time that we have gone through the docket,  
 20 Mr Chairperson, we cannot, you know, tell this Commission  
 21 that the chunk of the content of the docket, it's relevant.  
 22 [16:00] Even if we were to accept that only 150 or so  
 23 pages are relevant the fact remains that because of the  
 24 kind of person Mr X is, we will have to go, painstakingly  
 25 through those 150 pages with him, using an interpreter and

Page 30302

1 the other aspect is, I've already indicated, Chairperson,  
 2 that we do not choose as to where and when we can consult  
 3 with Mr X like, I mean we are faced with the weekend. We  
 4 don't know whether, I mean the arrangement that we've made  
 5 is to see him up until tomorrow, so we don't know whether  
 6 we can see him over the weekend or not without prior  
 7 arrangements. This is one fact that, or factors that  
 8 determine when and where a consultation is to take place  
 9 with Mr X.  
 10 Now on the aspect that Advocate Mpofu raised, I  
 11 am not in a position to can state that I'm going to lead X  
 12 for an hour or a day or two days, Chairperson. We  
 13 respectfully submit that this is a very important witness,  
 14 as I've already indicated. If it means I've got to lead  
 15 him for three days, so be it, three days, Chairperson. We  
 16 cannot have a situation wherein we are being told that X  
 17 should be led on Monday and then Tuesday and Wednesday  
 18 other parties should cross-examine him, and there is  
 19 already an indication from some of the legal  
 20 representatives who seek to cross-examined Mr X, that they  
 21 will not be in a position to can give us the relevant  
 22 documents on which they are going to rely on by at least  
 23 Monday. And, Chairperson, we respectfully submit that this  
 24 is the kind of witness that we should make sure that even  
 25 prior to him commencing with his evidence in chief, that

Page 30303

1 all the relevant documents have been discussed with him,  
 2 even those which the other legal representatives are going  
 3 to rely on.  
 4 Chairperson, the other aspect is that we've  
 5 already indicated through evidence leaders for the police  
 6 case Colonel Mtimkulu is a very important witness. The  
 7 evidence is that scene 1 he discharged a firearm which  
 8 indicated that he is one of the witnesses that we seek to  
 9 call, so if the view is that the evidence of Colonel Mere  
 10 is not relevant or it is not necessary, there is no reason  
 11 why Colonel Mtimkulu cannot be called to testify next week.  
 12 And we respectfully submit, Chairperson, that it is not in  
 13 the interest of this Commission and even of Mr X that he  
 14 should be led and from there other witnesses should be  
 15 called or his cross-examination should be deferred, because  
 16 we would not like to have a situation where in documents  
 17 are being made available at a later stage so that we should  
 18 consult with him.  
 19 We respectfully submit, Chairperson, that even we  
 20 are aware of the time constraints that we have to operate  
 21 with, but we respectfully submit, Chairperson, that that is  
 22 not a paramount consideration. A paramount consideration  
 23 is that evidence should be fairly and justly be led before  
 24 this Commission. Witnesses or parties should not be  
 25 prejudiced because of time constraints, Chairperson. If

1 the time arrives that not all the evidence have been placed  
2 before the Commission, Chairperson, it is just unfortunate,  
3 we would be faced with that. We respectfully submit that  
4 it is not in the interest of Mr X and this Commission that  
5 the witness, the evidence of Mr X should be tendered on the  
6 basis suggested by Mr Chaskalson. Chairperson, even at  
7 this stage, even the evidence leaders don't tell us that,  
8 which documents they are going to rely on in cross-  
9 examination, in cross-examining Mr X. We are not even  
10 advised as to when those documents can be made available to  
11 us, Chairperson.

12 This is a clear indication that although we wish  
13 that X should come on Monday, but the situation is such  
14 that it is practically impossible, Chairperson, unless the  
15 chairperson would like to hear me on a specific aspect  
16 that's my argument.

17 CHAIRPERSON: Thank you, Mr Mathibedi.  
18 Very well, I will take time to consider the ruling and I  
19 shall give it tomorrow morning when we recommence at nine  
20 o'clock. We will now adjourn.

21 [COMMISSION ADJOURNED]

22 .  
23 .  
24 .  
25 .



<p><b>A</b></p> <p><b>abandon</b> 30230:7</p> <p><b>abide</b> 30201:10,17,23 30202:3</p> <p><b>ability</b> 30196:9</p> <p><b>able</b> 30115:2 30116:22 30117:9 30123:3 30152:8 30159:6 30171:6 30173:4 30181:12,13 30182:7 30186:16 30188:25 30204:24 30207:1 30211:11 30218:15 30220:9,25 30221:12 30223:22 30241:18 30242:7 30243:10 30245:21 30246:5,24 30250:4 30257:6,25 30258:11 30259:21 30266:3 30272:15,16 30272:23 30273:20 30288:7 30291:15 30297:15</p> <p><b>absence</b> 30297:15</p> <p><b>absolutely</b> 30222:16 30251:4 30267:6 30285:7</p> <p><b>accede</b> 30159:6,8</p> <p><b>accept</b> 30122:7 30124:14 30141:10 30155:5 30158:17 30180:25 30190:25 30227:11 30232:19 30232:22 30233:22 30236:1 30252:24 30254:4 30259:12 30292:4,23,24,25 30296:4 30301:22</p> <p><b>accepted</b> 30129:20 30130:7 30155:19 30156:7 30164:7 30170:21 30254:8</p> <p><b>accepting</b> 30296:8</p> <p><b>access</b> 30196:18 30279:15</p> <p><b>accommodate</b> 30255:4</p> <p><b>accommodation</b> 30242:20</p> <p><b>accompanied</b> 30177:10 30197:11</p> <p><b>accompany</b> 30166:16</p> <p><b>account</b> 30121:25 30122:1 30183:17 30184:2 30205:10 30215:19 30280:16 30280:17</p> <p><b>accused</b> 30301:15</p> <p><b>achieved</b> 30120:4</p> <p><b>acquainted</b> 30209:4</p> <p><b>acquired</b> 30170:14</p> <p><b>act</b> 30160:22 30161:3 30161:23 30176:15 30176:16</p> <p><b>acted</b> 30146:10 30157:6</p>	<p><b>action</b> 30162:13 30194:8 30197:5,11 30268:6 30292:9</p> <p><b>actions</b> 30160:11,12</p> <p><b>activities</b> 30191:10</p> <p><b>acts</b> 30191:12</p> <p><b>actual</b> 30175:5 30271:17</p> <p><b>add</b> 30183:25 30191:25 30215:17 30258:9 30277:24 30297:24</p> <p><b>addendum</b> 30157:19 30158:11</p> <p><b>additional</b> 30138:22 30175:23 30187:23 30191:16 30192:21 30273:22</p> <p><b>address</b> 30120:19 30121:1,6 30160:18 30173:10 30216:5,8 30240:22,24 30241:4 30278:17 30295:21</p> <p><b>addressed</b> 30119:23 30198:3 30242:12 30273:15,22 30285:15</p> <p><b>addressing</b> 30201:2 30230:3 30260:11 30265:20</p> <p><b>adequately</b> 30236:25 30257:7</p> <p><b>adhered</b> 30219:16,17 30238:7</p> <p><b>adjourn</b> 30240:6 30241:12 30304:20</p> <p><b>ADJOURNED</b> 30304:21</p> <p><b>adjournment</b> 30162:16 30196:24 30198:23 30234:10 30239:17 30240:7,17 30247:7 30286:3 30288:14,19</p> <p><b>ADJOURNS</b> 30166:22 30199:1 30241:13 30288:20</p> <p><b>admit</b> 30143:14</p> <p><b>admitting</b> 30145:16</p> <p><b>adopt</b> 30292:9</p> <p><b>adopted</b> 30131:6 30160:20,24 30163:16</p> <p><b>adopting</b> 30161:18</p> <p><b>Adv</b> 30202:15 30212:18</p> <p><b>advance</b> 30195:1 30219:14 30225:4 30260:17</p> <p><b>advanced</b> 30113:12 30216:17,18</p> <p><b>advancing</b> 30179:21</p> <p><b>advantages</b> 30287:10</p> <p><b>adversary</b> 30173:2</p> <p><b>adverse</b> 30204:20</p> <p><b>adversely</b> 30216:23</p> <p><b>advisable</b> 30252:5,6</p> <p><b>advised</b> 30187:20</p>	<p>30191:7 30212:18 30214:20 30304:10</p> <p><b>advisors</b> 30192:4</p> <p><b>Advocate</b> 30302:10</p> <p><b>affidavit</b> 30126:25 30127:10,17 30128:16,17,24,25 30129:15 30174:4,5,9 30175:10,12,13,13,19 30177:21 30199:10 30199:12,17 30217:2</p> <p><b>afford</b> 30212:22</p> <p><b>afforded</b> 30114:3</p> <p><b>afraid</b> 30199:3 30231:2 30294:6,17</p> <p><b>Africa</b> 30274:24</p> <p><b>African</b> 30171:9 30173:10 30202:11 30202:15,18,23,24 30205:14 30264:2</p> <p><b>afternoon</b> 30114:21 30154:5 30286:21 30288:24 30295:2</p> <p><b>agenda</b> 30272:12</p> <p><b>aggression</b> 30194:7</p> <p><b>aggressive</b> 30179:25</p> <p><b>aggrieved</b> 30198:13</p> <p><b>ago</b> 30117:12 30118:13 30191:18 30206:9 30224:13,15 30254:6 30279:11</p> <p><b>agree</b> 30136:1 30140:25 30141:22 30142:2,5 30143:10 30145:23 30151:23 30152:9,13,14 30155:16 30166:10 30241:2 30267:21 30291:4</p> <p><b>agreed</b> 30135:14 30188:9 30206:11 30255:8 30261:10 30262:7 30266:20 30275:7 30289:2</p> <p><b>agreeing</b> 30294:16</p> <p><b>agreement</b> 30128:8 30133:9 30138:11,19 30147:12,13 30150:13 30153:19 30157:19 30158:8,9 30158:10,12 30163:25 30164:13 30164:25 30165:23 30166:7 30176:3 30200:24 30264:23</p> <p><b>ahead</b> 30155:18 30188:17 30204:3</p> <p><b>aid</b> 30229:3,6,21</p> <p><b>air</b> 30172:15 30176:23</p> <p><b>alert</b> 30193:22 30194:15,17 30195:3</p> <p><b>alerted</b> 30194:13</p> <p><b>alia</b> 30186:2 30227:1</p> <p><b>allegations</b> 30217:3,11 30217:20,21 30218:1 30218:6,10,12</p>	<p>30219:5,11,11 30225:15 30282:13 30293:9 30296:13</p> <p><b>alleged</b> 30123:6 30220:10</p> <p><b>allegedly</b> 30293:5</p> <p><b>allocating</b> 30269:4,9</p> <p><b>allocation</b> 30113:4 30115:21 30276:8</p> <p><b>allotted</b> 30293:21</p> <p><b>allow</b> 30163:17 30218:23 30221:25 30233:13 30281:23</p> <p><b>allowance</b> 30139:8 30149:23,25 30156:7 30156:14 30157:15 30157:16 30163:9 30164:14,14,15,18 30165:11,18</p> <p><b>allowed</b> 30116:5 30192:10</p> <p><b>allowing</b> 30262:3 30295:20</p> <p><b>alluded</b> 30234:24 30235:3</p> <p><b>aloud</b> 30270:24</p> <p><b>alright</b> 30116:3 30117:2,2 30126:7 30174:17 30191:5 30200:2 30202:9 30240:13,16 30241:7 30241:10,10,12 30251:11,23 30267:22 30284:5 30295:13</p> <p><b>alternative</b> 30163:10 30232:9 30264:17 30286:16</p> <p><b>alternatively</b> 30188:25 30233:14</p> <p><b>alternatives</b> 30266:21</p> <p><b>ambiguous</b> 30156:15</p> <p><b>AMCU</b> 30118:21 30119:22 30122:13 30124:21,24 30125:1 30131:25 30132:1,21 30133:14,16,19,25 30135:16 30144:22 30151:5 30155:23 30156:20 30162:24 30163:17,25 30164:6 30164:11,12 30165:13,22 30166:6 30271:17,18 30282:7 30282:15</p> <p><b>AMCU's</b> 30164:2,23</p> <p><b>ameliorate</b> 30260:6</p> <p><b>ameliorated</b> 30260:25</p> <p><b>ameliorates</b> 30259:6</p> <p><b>ameliorating</b> 30259:11</p> <p><b>amended</b> 30155:20</p> <p><b>amendment</b> 30294:12</p> <p><b>American</b> 30156:2 30163:1 30197:21</p> <p><b>amount</b> 30125:4 30164:14 30280:22</p>	<p><b>amounts</b> 30155:17,20</p> <p><b>Amplats</b> 30126:16,18</p> <p><b>amplified</b> 30252:13</p> <p><b>alleged</b> 30191:20</p> <p><b>analysis</b> 30186:1,6 30296:25,25 30297:9</p> <p><b>anarchy</b> 30173:6</p> <p><b>ancestors</b> 30280:20</p> <p><b>anchor</b> 30177:13</p> <p><b>anger</b> 30162:6</p> <p><b>angered</b> 30159:9</p> <p><b>angle</b> 30113:1</p> <p><b>Anglo</b> 30156:2 30163:1 30197:20</p> <p><b>angry</b> 30136:5</p> <p><b>animosity</b> 30137:3 30160:12</p> <p><b>annexed</b> 30128:17</p> <p><b>annexures</b> 30187:8 30189:13,13</p> <p><b>announce</b> 30112:13</p> <p><b>announcement</b> 30112:6</p> <p><b>answer</b> 30122:19 30141:16 30142:4 30145:17,18 30153:24 30158:2 30164:21,22 30171:9 30172:2 30173:5 30179:18 30180:20 30180:25 30194:9 30220:7 30225:25 30233:17 30263:7 30287:19 30294:17 30300:2</p> <p><b>answered</b> 30295:11</p> <p><b>antagonism</b> 30140:7</p> <p><b>anticipate</b> 30289:11</p> <p><b>anticipated</b> 30174:15 30189:20 30198:18 30254:7</p> <p><b>anybody</b> 30118:8,9 30122:23 30146:17 30172:23 30190:20 30201:20,24 30202:6 30238:9 30241:7 30263:24 30285:20 30294:22 30295:13</p> <p><b>anyone</b> 30192:9</p> <p><b>anyway</b> 30117:3,8 30171:25 30174:25 30176:24 30188:5 30189:12,14 30205:25 30207:2 30211:1,16 30220:2 30227:2 30232:1 30233:13,24 30239:10,13 30287:8 30288:13,18</p> <p><b>apart</b> 30211:18 30271:5</p> <p><b>apologies</b> 30152:16 30200:14</p> <p><b>apologise</b> 30112:3 30199:5 30251:20 30288:23</p> <p><b>apparent</b> 30175:21</p>
--	--	---	---	--

30230:23 <b>apparently</b> 30121:24 30252:2 <b>appeal</b> 30145:17 <b>appealed</b> 30254:10 <b>appear</b> 30242:11 30281:13 30284:20 30293:7 <b>appeared</b> 30215:13 30242:13 30254:9 <b>appears</b> 30129:15 30182:2 <b>applicable</b> 30212:8,11 <b>application</b> 30112:7 30113:22 30114:20 30114:23,24 30115:3 30115:10 30116:5,10 30116:18 30166:18 30166:24 30196:24 30198:24 30199:8,9 30199:11,18,22,24 30200:1,7,22 30201:4 30201:13 30207:16 30216:3,6,11,15,16 30227:3,4 30230:11 30232:4,10 30238:15 30239:2,5,12 30240:22,24 30246:20 30249:6,25 30252:24 30258:4,6 30258:10 30260:13 30261:18 30262:8,14 30262:16 30263:22 30274:9 <b>applications</b> 30250:8 30252:12 30270:9 30289:23 <b>applies</b> 30202:11 30206:15 30300:23 <b>apply</b> 30208:9 30226:22 30237:15 30277:14 <b>applying</b> 30235:14 <b>appointment</b> 30116:20 <b>apportion</b> 30231:18 <b>appreciate</b> 30185:8 30262:22 30263:1 <b>approach</b> 30165:14 30167:15 30191:8 30250:18,19 30257:13 30260:23 30261:2 30266:17 30292:16 <b>approached</b> 30165:15 30228:7 <b>appropriate</b> 30180:25 30249:13 30262:18 30294:13 <b>appropriately</b> 30114:25 30198:3 30205:24 30207:1 <b>approximately</b> 30187:7 30268:16 <b>APs</b> 30199:22 <b>arch</b> 30187:8 30215:8 30221:9	<b>area</b> 30132:25 30133:2 30195:15 <b>areas</b> 30195:14 <b>aren't</b> 30279:5 30283:5 <b>argue</b> 30240:10 30251:19 <b>argued</b> 30112:11 30166:24 30196:25 30198:25 30199:9 <b>arguing</b> 30199:19 30239:25 <b>argument</b> 30125:9 30205:4 30251:24 30257:4 30265:2 30269:15,23 30270:6 30270:8 30273:4 30275:25,25 30276:23 30277:25 30282:23 30304:16 <b>arguments</b> 30203:16 <b>arises</b> 30207:11 30251:16 <b>arising</b> 30179:6 <b>arms</b> 30169:25 30238:16 <b>arrange</b> 30175:6 <b>arranged</b> 30113:15 30275:12 <b>arrangement</b> 30115:4 30116:2 30214:15 30264:14 30266:25 30302:4 <b>arrangements</b> 30188:7 30191:10 30206:4,10 30215:25,25,25 30223:18 30230:16 30230:23 30234:3,3 30254:9,14,16 30262:6 30263:13,18 30263:19,20 30264:9 30264:22 30265:11 30265:13,14 30302:7 <b>arrested</b> 30199:23 30205:21 30218:20 30293:18 <b>arrive</b> 30191:15 30211:18 30273:13 <b>arrived</b> 30185:15 30284:19 <b>arrives</b> 30129:16 30304:1 <b>article</b> 30127:25 <b>articles</b> 30127:20 <b>ascertain</b> 30199:16 <b>ascertained</b> 30202:8 <b>ascertaining</b> 30202:7 <b>aside</b> 30221:21 30238:6 30266:6,19,24 <b>asked</b> 30120:7 30122:17 30130:19 30141:15 30145:12 30145:13 30158:20 30189:23 30194:14 30203:21 30215:16 30227:10 30232:10 30236:24 30265:13	30265:18 <b>asking</b> 30149:5 30161:6 30183:25 30195:2 30232:8 30233:6 30240:10 30250:19 30251:1 30254:24 <b>aspect</b> 30123:17 30177:7 30192:24 30203:13 30205:13 30208:4,21 30212:16 30230:24 30232:9 30298:11 30302:1,10 30303:4 30304:15 <b>aspects</b> 30144:13 30210:15 30236:2 30244:5 <b>assaulted</b> 30198:12 <b>assaults</b> 30160:16 30272:2 <b>assess</b> 30146:25 30261:5 <b>assessing</b> 30269:3 <b>assist</b> 30173:12 30189:21 30191:15 30194:16 30209:5 30221:1 30229:8 30258:11 <b>assistance</b> 30177:8 30180:12 <b>assistant</b> 30214:12 <b>assistants</b> 30155:2 <b>assisted</b> 30155:2 <b>assisting</b> 30211:3 <b>assume</b> 30204:14 30205:6 30220:1 30227:4,9 30235:15 <b>assuming</b> 30207:12 30219:3 30221:12 30227:18 30249:9 30265:7,10 30270:7 30272:19 <b>assumption</b> 30137:24 30265:10 30266:1,2 30295:22 30296:2 <b>assumptions</b> 30265:21 <b>assurance</b> 30191:1,1 30237:1,3 30275:8 30292:5 30296:5 <b>assure</b> 30230:2 <b>attach</b> 30171:2 <b>attempt</b> 30180:4 30261:1 <b>attempted</b> 30123:2 30130:3 <b>attend</b> 30288:22 <b>attending</b> 30136:12 <b>attention</b> 30167:19 30200:23 30299:10 30299:21,22 <b>attitude</b> 30121:14,16 30122:23 30123:23 30124:1,11,12 30147:12,19,21 30149:19 30161:19 30251:17 30252:11	30254:25 30258:5 30271:17 <b>attorney</b> 30234:14 <b>attorneys</b> 30241:22 <b>August</b> 30118:22 30132:1 30154:5 30167:10 30176:19 30177:5 30183:9 30184:17,20,20 30185:12 30262:12 30262:20 30263:4,8 30264:21 30265:13 30265:22,23,24 30271:14,21,22,24 30272:1,2,4,5,6,8,9 30280:10,11 <b>author</b> 30156:16 <b>authorities</b> 30230:6 <b>authority</b> 30242:14 <b>avail</b> 30227:22 <b>availability</b> 30188:9 30248:11 30262:1 30263:8 <b>available</b> 30171:20 30172:14,19,20,25 30173:1,9 30174:21 30186:19 30187:6 30188:10 30191:17 30191:18 30202:20 30204:2,6 30205:12 30205:15 30206:7 30210:19 30211:14 30211:17 30212:23 30213:10 30214:7,21 30214:25 30215:4 30216:1 30224:11,15 30224:20 30225:9,17 30225:22 30236:24 30248:23 30250:6,11 30261:9,23 30262:12 30262:20 30263:1 30269:7 30272:23 30273:17 30275:6,13 30276:4 30278:15,21 30279:16 30281:3 30290:2,2 30292:1,3 30293:10 30297:4 30298:25 30299:4,14 30299:17 30301:13 30301:14 30303:17 30304:10 <b>averse</b> 30235:5 <b>avoided</b> 30157:8 30158:24 30164:8 <b>avoids</b> 30287:13 <b>aware</b> 30120:2 30121:2 30122:24 30125:11 30125:16,22 30126:1 30126:8,14,22 30130:13,16 30144:18 30167:14 30167:17 30182:19 30193:2 30222:24 30232:6,7 30242:3 30243:10 30257:21 30261:17 30303:20	<b>A3</b> 30138:21 30139:6 <b>A4</b> 30129:21,24 30130:5 30138:22 30139:6,7 <hr/> <b>B</b> <hr/> <b>back</b> 30118:24 30120:25 30124:23 30126:10 30141:6 30153:4,7,9,16 30157:7 30159:7 30166:20 30188:23 30198:24 30205:25 30206:11 30221:10 30239:18 30258:3 30273:2 30276:2 30281:20 30288:15 30288:24 30289:3 30298:20 <b>background</b> 30177:12 30262:14 30271:13 <b>bad</b> 30237:15 <b>bag</b> 30153:1 <b>balance</b> 30238:1,6 30244:14,15 <b>balanced</b> 30175:11 <b>ballistics</b> 30169:24 <b>balls</b> 30170:16 <b>ban</b> 30170:11,12 <b>band</b> 30129:21,25 30130:5 <b>bang</b> 30268:7 <b>bank</b> 30280:16,17 <b>bargain</b> 30133:13,16 30133:19 <b>bargaining</b> 30132:2,10 30132:18 30133:4,7 30140:17 30142:10 30165:4 <b>Barker</b> 30280:13 <b>Barnard</b> 30168:4,8,9 30168:12,13 <b>barrier</b> 30209:3 <b>base</b> 30198:5 <b>based</b> 30124:7 30133:9 30227:1 30265:19 30299:19 <b>basic</b> 30125:21 <b>basically</b> 30177:25 30195:12 30210:15 <b>basis</b> 30151:21 30170:19 30180:17 30191:22 30204:24 30205:7 30206:10 30211:12,18 30212:1 30214:4 30217:23 30220:19 30249:5,6 30252:8 30254:9 30256:8 30262:6 30263:9 30265:6,7,18 30268:12 30282:16 30283:9 30286:10 30304:6 <b>bear</b> 30203:7 30207:9 30207:20 30214:9 30227:8 30255:15
--	--	---	---	--

<p><b>bearing</b> 30280:3 30281:5 30298:16</p> <p><b>bears</b> 30178:2</p> <p><b>becoming</b> 30244:14</p> <p><b>beg</b> 30126:20 30127:24 30154:18 30187:2 30200:11 30264:10</p> <p><b>began</b> 30182:9</p> <p><b>beginning</b> 30201:6 30242:13</p> <p><b>begun</b> 30287:25 30289:14</p> <p><b>behalf</b> 30112:20 30122:18 30131:13 30139:14 30142:20 30167:7 30168:22 30176:17,18 30199:19 30290:18</p> <p><b>behave</b> 30190:9</p> <p><b>believe</b> 30207:3 30259:2 30260:21 30269:25 30297:15 30298:15,16</p> <p><b>believed</b> 30204:19 30298:17</p> <p><b>believing</b> 30125:17</p> <p><b>belong</b> 30133:11</p> <p><b>benchmarking</b> 30146:6 30150:8</p> <p><b>bend</b> 30208:12</p> <p><b>benefit</b> 30159:1 30186:1 30246:21 30262:5</p> <p><b>beseech</b> 30266:23</p> <p><b>best</b> 30131:15 30188:17 30251:21 30255:22 30257:14,15,15,18 30274:25 30276:1</p> <p><b>better</b> 30128:3 30180:22 30215:14 30235:9 30240:17 30257:10,25 30263:12,18,21 30273:6,10 30280:18</p> <p><b>beyond</b> 30235:4,11 30246:12 30280:1</p> <p><b>Bham</b> 30113:8 30149:22,25 30150:3 30150:15,15,16 30157:10,24 30158:9 30169:12,18 30171:14,18,22 30186:18 30189:17 30190:6,12,15 30191:7,14</p> <p><b>Bham's</b> 30170:20</p> <p><b>bid</b> 30119:8,10</p> <p><b>big</b> 30153:1 30216:8,13 30280:18</p> <p><b>binding</b> 30200:24</p> <p><b>bird's</b> 30268:3</p> <p><b>bit</b> 30147:9 30158:19 30176:23 30184:15 30244:8 30251:16,19 30253:1 30276:10 30292:21</p>	<p><b>Bizos's</b> 30160:20</p> <p><b>Blaauw</b> 30181:9,21 30182:5,20</p> <p><b>blame</b> 30149:7 30231:18</p> <p><b>blaming</b> 30242:18</p> <p><b>blank</b> 30222:8,8,8,8,8,8 30223:1,2 30226:8,10 30291:19</p> <p><b>blanked</b> 30226:12</p> <p><b>blanks</b> 30210:24,25 30222:15 30223:23 30224:1,5,15,17 30225:2,12,14</p> <p><b>block</b> 30178:22,25 30189:24</p> <p><b>bluntly</b> 30185:21</p> <p><b>board</b> 30138:23 30229:6,21</p> <p><b>bodies</b> 30298:19</p> <p><b>bonus</b> 30156:6,13 30163:5,7,11 30165:17,18 30166:11</p> <p><b>booked</b> 30266:16</p> <p><b>bookings</b> 30252:4</p> <p><b>borne</b> 30294:21 30299:25 30301:7</p> <p><b>borrow</b> 30218:13</p> <p><b>bothered</b> 30164:19</p> <p><b>bottom</b> 30119:9,10 30186:8 30223:11</p> <p><b>bound</b> 30257:12</p> <p><b>breach</b> 30161:21</p> <p><b>break</b> 30113:3,3,10 30115:2,18,18,19,20 30116:20,21 30117:4 30117:10 30136:25 30166:13 30269:24 30270:8</p> <p><b>breaks</b> 30116:16 30268:21</p> <p><b>Brickhill</b> 30297:15</p> <p><b>bridge</b> 30158:19 30188:16 30192:10</p> <p><b>bridging</b> 30233:1</p> <p><b>brief</b> 30294:23</p> <p><b>briefed</b> 30183:21,22,24 30258:7</p> <p><b>briefing</b> 30184:9</p> <p><b>briefings</b> 30118:11</p> <p><b>briefly</b> 30173:22 30258:18</p> <p><b>Brigadier</b> 30285:22 30298:23</p> <p><b>bring</b> 30152:8 30161:21 30258:24</p> <p><b>bringing</b> 30200:22</p> <p><b>brings</b> 30298:20</p> <p><b>broken</b> 30296:24</p> <p><b>brought</b> 30147:24</p> <p><b>Bruinders</b> 30120:17,21 30120:22</p> <p><b>brush</b> 30285:12</p> <p><b>Budlender's</b> 30116:6 30290:22</p>	<p><b>bulk</b> 30279:18 30296:9 30296:21</p> <p><b>bullets</b> 30169:25 30180:1,2,17 30298:19</p> <p><b>burden</b> 30284:6</p> <p><b>BURGER</b> 30201:23</p> <p><b>burn</b> 30178:22</p> <p><b>business</b> 30127:25 30184:2 30187:11 30199:4 30289:25</p> <p><b>bust</b> 30123:21 30125:3</p> <p><b>busy</b> 30206:6 30208:17 30235:7 30275:11</p> <p><b>button</b> 30236:16 30237:12</p> <p><b>buy</b> 30289:17</p> <p><b>B1</b> 30139:7</p> <p style="text-align: center;"><b>C</b></p> <p><b>calendar</b> 30189:21</p> <p><b>calibre</b> 30257:20</p> <p><b>Calitz</b> 30285:22 30298:23</p> <p><b>call</b> 30120:25 30161:17 30179:20,22 30186:6 30188:6 30197:5 30205:22 30209:18 30213:15 30216:8 30248:11 30252:7 30257:17,18 30259:21 30289:4 30290:17 30297:22 30303:9</p> <p><b>called</b> 30113:21 30125:24 30148:1,3 30148:13 30150:7 30164:20 30200:24 30202:5 30205:25 30207:12 30217:14 30230:9 30245:18,21 30246:18,21 30248:10 30250:1 30251:4 30252:13,21 30253:22,24 30255:25 30258:22 30262:3 30264:6,20 30275:9 30293:20 30298:11 30303:11 30303:15</p> <p><b>callers</b> 30148:7</p> <p><b>calling</b> 30234:17 30247:3,10,10 30248:7,16 30250:2,2 30250:4,5,7 30261:8 30278:16</p> <p><b>calls</b> 30221:4</p> <p><b>camera</b> 30260:14</p> <p><b>cameras</b> 30195:13,21</p> <p><b>cancelled</b> 30265:12</p> <p><b>candid</b> 30196:10</p> <p><b>canvass</b> 30271:8</p> <p><b>canvassed</b> 30218:24 30219:3,12 30220:3 30262:24 30263:8</p> <p><b>can't</b> 30118:8,9</p>	<p>30122:10 30123:19 30126:5 30143:20 30220:3 30221:2 30223:10 30226:11 30248:16 30254:14 30263:7 30265:14 30292:12 30294:17</p> <p><b>capacities</b> 30161:23</p> <p><b>Capital</b> 30144:14</p> <p><b>Captain</b> 30202:19 30205:12 30207:3 30208:12,14 30227:20 30228:17 30232:20 30243:21 30247:10 30275:18 30275:21 30276:2 30285:19</p> <p><b>captures</b> 30170:19</p> <p><b>card</b> 30152:12,15 30153:6,7,14</p> <p><b>care</b> 30195:20</p> <p><b>careful</b> 30194:21 30296:17</p> <p><b>carefully</b> 30220:13 30294:16 30296:25</p> <p><b>Carol</b> 30127:20</p> <p><b>Carpenter</b> 30212:18</p> <p><b>carry</b> 30125:5 30167:6 30168:18 30172:1 30191:5 30226:1 30231:6 30253:10 30262:20</p> <p><b>cartridges</b> 30169:25 30170:4</p> <p><b>case</b> 30131:8,11 30151:14 30153:15 30153:19 30179:3 30188:21 30204:21 30208:17 30213:17 30219:22 30221:6 30251:19 30252:7 30299:12 30303:6</p> <p><b>cases</b> 30271:11</p> <p><b>categorised</b> 30164:18</p> <p><b>category</b> 30176:5</p> <p><b>caught</b> 30268:2</p> <p><b>cause</b> 30228:21 30274:10</p> <p><b>caused</b> 30190:20 30233:2</p> <p><b>cell</b> 30168:18</p> <p><b>cent</b> 30229:25</p> <p><b>centre</b> 30172:20 30201:17</p> <p><b>CEO</b> 30148:2</p> <p><b>certain</b> 30124:3 30131:11 30144:8 30171:21 30188:20 30198:12 30204:2 30211:23 30219:5 30222:12 30227:25 30227:25 30299:11 30299:11,12</p> <p><b>certainly</b> 30121:15 30139:15 30157:2 30167:18 30174:16</p>	<p>30223:20 30230:2 30260:12,16 30284:9 30284:21 30300:8</p> <p><b>chaired</b> 30148:17</p> <p><b>chairman</b> 30114:8,9,18 30114:19 30115:5,11 30115:16 30116:8,24 30117:11 30145:4 30149:22 30150:16 30169:12 30171:14 30173:16 30186:18 30189:17 30192:20 30199:25 30200:21 30201:10 30239:21 30240:3,12 30241:16 30241:17 30242:9,18 30243:1 30244:3,15 30245:7 30250:24 30251:3 30253:4,25 30254:3 30255:3,12 30257:9,20 30258:15 30264:1,9,15 30266:8 30266:15 30290:21 30291:4 30292:6 30293:13 30294:1,19 30300:5</p> <p><b>challenge</b> 30217:25</p> <p><b>challenged</b> 30121:10 30121:24</p> <p><b>challenges</b> 30208:8 30220:14 30224:23</p> <p><b>challenging</b> 30132:22</p> <p><b>chamber</b> 30199:6 30211:17 30252:3</p> <p><b>chambers</b> 30112:5 30113:2 30199:4 30206:23</p> <p><b>chance</b> 30152:21</p> <p><b>change</b> 30113:22 30266:13</p> <p><b>changed</b> 30113:15 30141:8 30263:19 30264:22 30265:14 30265:16</p> <p><b>changes</b> 30146:24 30266:16</p> <p><b>channels</b> 30133:24</p> <p><b>charge</b> 30178:20 30179:7 30188:19 30266:15,17</p> <p><b>charged</b> 30298:10</p> <p><b>Chaskalson</b> 30207:6 30215:11 30217:7 30223:19 30234:25 30240:23 30241:11 30247:16,19 30248:2 30248:17 30250:3 30263:25 30267:4,8 30267:23,24 30268:25 30269:18 30269:20,23 30270:16,21 30271:3 30272:15 30273:4 30276:25 30277:4,10 30277:19 30278:2,6 30278:25 30280:7,9</p>
--	---	--	---	---

<p>30281:4 30282:9,24 30283:4,14,17,20,25 30284:8,13 30285:13 30285:21 30286:6,8 30287:15 30288:2 30289:3,7,20 30290:7 30290:15,20 30291:5 30292:9 30293:17,23 30296:9 30297:4 30304:6 <b>Chaskalson's</b> 30292:25 30294:24 30296:24 30297:9 <b>chicken</b> 30220:7 <b>chief</b> 30148:19,25 30219:13,15,19 30234:18 30242:6 30246:22 30249:1,5 30249:12 30250:7,18 30250:20 30251:5 30252:14 30254:21 30259:14,17,22 30277:9 30279:10 30281:21 30287:4 30290:8 30295:23 30302:25 <b>choice</b> 30133:10 30230:7 30273:6,10 <b>choose</b> 30302:2 <b>chunk</b> 30301:21 <b>chunks</b> 30270:5 <b>circles</b> 30267:19 <b>circumstances</b> 30162:4 30162:5,14 30177:3 30179:10 30183:13 30186:1 30189:19 30190:20 30192:4,25 30193:7 30203:10 30217:24 30242:21 30244:24 30257:15 30257:16 30296:19 <b>claiming</b> 30280:19 <b>clarification</b> 30148:11 30157:11 <b>clarified</b> 30172:1 <b>clarify</b> 30131:24 30133:23 30164:10 <b>clarity</b> 30157:23 30228:1 30238:24 <b>clear</b> 30113:18 30114:2 30134:12 30136:9 30144:24 30185:6 30189:5 30194:2,4 30239:7,7,9 30240:4 30241:25 30246:19 30251:23 30261:17 30267:9 30275:17 30291:14 30292:13 30304:12 <b>clearer</b> 30239:7 <b>clearing</b> 30263:14 <b>clearly</b> 30188:5 30194:9 30204:18,18 30217:24 30235:13 30249:21 30263:16 30265:16 30275:13</p>	<p>30276:4 30298:14 <b>client</b> 30281:24 <b>clients</b> 30189:9 30210:11,22 30218:1 30223:10 30236:9,13 30237:1,4,14 30251:22,22 30281:25 30292:12 30292:17,18 30293:9 <b>clip</b> 30300:9 <b>close</b> 30169:9 30239:23 30289:25 <b>closed</b> 30206:2 <b>closer</b> 30154:10 30179:22,23,24,25 <b>closure</b> 30203:15 30210:7 30237:17 30243:3 <b>Coin</b> 30171:16 <b>collapse</b> 30142:10,25 30144:1 <b>colleague</b> 30233:8 30242:23 30247:11 <b>colleagues</b> 30113:9 30121:8 30146:12 30177:4 30179:3 30186:13 30248:21 30264:14 30284:17 30289:5 <b>collect</b> 30117:6 30280:15 <b>Colonel</b> 30123:20 30205:11 30207:2 30227:19,24 30228:5 30228:12,15,21 30230:8,15,19 30232:18 30233:7,10 30233:10,23 30243:21 30248:16 30248:17 30250:2,2 30258:22,24 30271:6 30276:6,16 30278:9 30278:16 30279:7 30281:22 30283:23 30285:22 30286:11 30286:17 30288:8,9 30289:9,12,15,22,24 30290:3 30295:3 30298:2 30303:6,9,11 <b>comes</b> 30253:13 30267:21 30285:2 30287:3 30289:3 30297:25 <b>comfort</b> 30113:3 30115:19,20 30116:20 30166:13 <b>comfortable</b> 30255:5,9 30255:15 30295:4 <b>coming</b> 30114:13 30124:14 30157:7,13 30179:22 30180:3 30206:2,8,14,18 30214:4 30224:20 30267:13 30289:9,16 <b>commander</b> 30228:6 <b>commence</b> 30201:18</p>	<p><b>commencement</b> 30209:11 <b>commencing</b> 30302:25 <b>comment</b> 30141:19 30143:4 30171:3,4,5 30171:6 30188:15 <b>commentary</b> 30192:11 <b>commented</b> 30141:20 <b>comments</b> 30192:13 30221:10 <b>commiserations</b> 30254:5 <b>Commissioner</b> 30123:5 30123:8 30144:6,17 30145:1 30186:20,24 30215:6 30269:15,21 30269:22 30270:3 30272:7 30298:23 <b>commissioners</b> 30189:24 30214:11 30241:17 30243:13 30257:19 30292:8 <b>Commission's</b> 30187:25 30189:21 30200:23 <b>committee</b> 30148:17,17 30149:5,11 30222:3,4 <b>common</b> 30274:10 <b>communicated</b> 30113:23 30165:11 30252:3 30258:5 <b>communicating</b> 30258:11 <b>communication</b> 30140:24 30141:18 30142:1 <b>communications</b> 30272:6 <b>companies</b> 30126:10 <b>company</b> 30160:9 <b>company's</b> 30147:11 <b>comparison</b> 30299:2 <b>complain</b> 30279:13 <b>complainant's</b> 30280:11 <b>complaint</b> 30150:23 30170:20 <b>complete</b> 30198:8 30279:13 <b>completely</b> 30238:6 30275:2 30280:1 30287:16 <b>complex</b> 30133:3 <b>compliance</b> 30291:12 <b>complicate</b> 30218:14 30221:22 <b>complicated</b> 30292:22 30298:21 <b>complication</b> 30219:1 <b>complied</b> 30203:20 30212:2 30222:25 <b>comprehensively</b> 30181:3 30185:24 30247:15 <b>comprise</b> 30157:13 <b>compromise</b> 30157:8</p>	<p><b>concede</b> 30141:10 30159:16 <b>conceded</b> 30141:9 30150:9 <b>concentrate</b> 30114:15 30114:16 <b>concern</b> 30176:19 30233:20 30240:5 30246:17,25 30248:5 30278:8 <b>concerned</b> 30112:24 30146:9 30150:22 30167:15,25 30169:2 30183:12 30205:5,21 30206:12 30219:16 30219:17 30220:3 30296:12 <b>concerns</b> 30145:8 30177:3,13 30246:5 30253:23 30288:2 <b>concession</b> 30255:2,10 30255:25 30264:3 <b>conciliation</b> 30151:20 <b>conclude</b> 30131:24 30210:1 <b>concluded</b> 30138:12 30153:18 30154:11 30158:12,13 30164:25 30176:4 30250:21 <b>conclusion</b> 30139:13 30244:19 30265:5 30297:2 <b>concurrence</b> 30264:14 <b>condition</b> 30261:20 30262:8 <b>conditioning</b> 30176:23 <b>conditions</b> 30146:13 30157:7 30228:23 30229:1 30230:1,4 30231:12 30241:5 <b>conducive</b> 30141:3 <b>conduct</b> 30146:2 30153:20 30230:5 <b>conducted</b> 30186:6,9 <b>confidence</b> 30134:19 30142:17 <b>confining</b> 30185:9 <b>confirm</b> 30187:20 <b>confirmation</b> 30136:9 <b>confirmatory</b> 30128:16 <b>confirmed</b> 30218:7 <b>conflict</b> 30134:25 30135:8,14,15,17,18 30137:1 30140:6 <b>confrontation</b> 30271:22 <b>confronted</b> 30138:3 <b>conjunction</b> 30172:11 <b>Connected</b> 30256:25 <b>connection</b> 30130:24 30239:6,9,11 <b>conscious</b> 30212:7,11 30244:5 <b>consent</b> 30204:1,3,4 30212:23 30213:9,9</p>	<p>30301:11 <b>consequence</b> 30140:19 30140:20 30159:11 30252:24 30262:2 <b>consequences</b> 30146:24 30159:9 30204:25 30216:22 30273:9 <b>conservative</b> 30269:25 <b>consider</b> 30112:4 30113:22 30143:24 30163:8 30191:20 30206:3 30247:17 30294:16 30304:18 <b>considerable</b> 30146:11 30266:4 <b>considerate</b> 30249:13 <b>consideration</b> 30157:6 30179:11 30205:9 30209:3 30240:7 30296:17 30303:22 30303:22 <b>considerations</b> 30159:3 30159:4 30215:22 30227:2 30235:16 30258:12 <b>considered</b> 30146:13 30150:24 30173:2,5 30221:18 30300:4,19 <b>considering</b> 30262:13 30263:13 <b>consistently</b> 30131:6 <b>consists</b> 30220:19 <b>constitute</b> 30175:8 <b>constraints</b> 30209:20 30212:8,11 30270:4 30303:20,25 <b>consult</b> 30208:13 30209:18 30215:23 30221:7 30225:21 30277:16 30283:13 30285:4,24 30286:12 30286:20 30287:6 30292:12,12 30302:2 30303:18 <b>consultation</b> 30209:6,8 30218:15 30287:23 30295:6 30302:8 <b>consultations</b> 30207:24 30215:21 30216:1 30217:13 <b>consulted</b> 30221:14,19 30285:10 <b>consulting</b> 30208:2 30211:22 30220:23 30225:13 30250:14 30293:8 <b>contact</b> 30168:23 <b>contain</b> 30217:11 30296:10 <b>contained</b> 30212:21 30258:10 30296:13 30296:22 <b>containing</b> 30180:18 <b>contains</b> 30187:7 30219:4 <b>CONTD</b> 30117:15</p>
---	---	--	--	--

<p>30167:8  <b>content</b> 30195:2          30301:21  <b>contention</b> 30113:12          30210:16  <b>contents</b> 30130:1          30208:23 30298:13  <b>context</b> 30119:19          30130:11 30232:17          30244:4 30292:15,18  <b>contextualises</b>          30119:22  <b>continue</b> 30199:9  <b>continued</b> 30161:17,18          30227:20  <b>contradict</b> 30245:5          30284:17  <b>contrary</b> 30137:7          30161:6  <b>control</b> 30160:15          30235:12 30246:13          30263:11  <b>convenient</b> 30196:25          30289:18  <b>conversation</b> 30123:11          30261:25 30264:4  <b>convey</b> 30120:8  <b>conveyed</b> 30124:16          30125:1 30176:25          30193:15  <b>copied</b> 30187:12          30281:11  <b>copies</b> 30174:10,11,14          30174:21 30176:8          30214:10 30224:14  <b>copy</b> 30129:4  <b>corner</b> 30178:3,11  <b>corollary</b> 30291:16  <b>correct</b> 30112:22          30117:25 30118:15          30121:9,14 30124:4          30125:16 30126:13          30130:10,22 30132:3          30132:11,14          30133:14 30134:4,10          30134:21 30135:1,8          30135:24 30139:2,9          30139:10,11,23,24          30143:13 30145:7          30155:9 30170:17          30171:21 30182:5,6          30183:1 30186:14,17          30187:16 30188:4          30193:10 30196:14          30197:9 30199:5,20          30206:19,20 30211:9          30211:10 30215:8,9          30222:10,13 30226:4          30231:23,25          30245:22 30246:1,6,7          30252:19 30256:1          30257:8 30278:25          30282:7,9 30299:14          30299:16 30300:12  <b>corrected</b> 30245:23  <b>correctly</b> 30154:13,15</p>	<p>30155:13 30170:23          30216:24 30221:8          30226:8 30228:21          30235:10 30237:25          30248:12  <b>correctness</b> 30121:9          30127:19  <b>Costa's</b> 30271:4          30288:23  <b>cosy</b> 30169:3,6 30171:8  <b>couldn't</b> 30146:10          30159:8 30220:24          30225:3,3 30230:23          30254:10  <b>counsel</b> 30248:12          30270:15 30275:6          30276:14 30277:3,8          30277:15 30282:7,14          30284:3 30285:6,10          30288:23 30293:18          30299:7  <b>counted</b> 30215:12  <b>countenance</b> 30237:24  <b>couple</b> 30145:14          30197:4  <b>course</b> 30118:16          30123:13 30162:12          30170:14 30176:18          30187:19 30188:19          30189:16 30200:15          30204:14 30207:21          30234:16 30261:10          30262:1,13 30268:6          30278:8 30282:14          30285:1 30299:25          30301:8  <b>court</b> 30153:20          30201:10 30229:2          30269:2  <b>courts</b> 30268:20,21  <b>court's</b> 30200:23  <b>coverage</b> 30243:8  <b>covered</b> 30220:21          30248:20 30275:19  <b>co-operation</b> 30169:9          30172:18,21  <b>Craig</b> 30178:4  <b>credibility</b> 30257:1  <b>credit</b> 30268:23  <b>criminal</b> 30298:8  <b>critical</b> 30182:4          30202:21,25          30245:10  <b>cropped</b> 30212:17  <b>cross</b> 30112:14 30113:1          30129:7 30174:18          30192:14 30228:16          30242:24 30248:3          30249:6 30250:21          30260:25 30275:19          30283:2 30288:5          30290:10 30293:17          30295:7,12 30298:1          30304:8  <b>cross-examination</b>          30115:22 30116:4,6</p>	<p>30117:15 30145:3          30167:8 30173:21          30175:8 30176:14          30197:1 30199:10          30203:5,8 30208:6,7          30208:10,14          30209:10 30211:5          30214:18 30217:9          30218:10 30220:21          30227:20,21          30230:10,17,18          30231:1 30233:13          30235:2 30249:15          30256:22 30259:5,10          30259:25 30274:18          30276:2 30277:14          30283:4 30284:14          30285:4 30287:17,22          30287:24,24          30289:10,12 30290:1          30290:11 30293:11          30293:20 30295:1          30299:19 30300:2          30303:15  <b>cross-examine</b>          30112:17,20          30166:15 30167:7          30173:24 30188:1          30204:21 30217:15          30223:15 30231:5          30241:18 30242:7          30246:24 30250:8          30258:23 30260:19          30281:24 30283:9          30288:9 30289:22          30291:6 30293:22,25          30295:3,10,14          30297:16 30302:18  <b>cross-examined</b>          30112:15 30207:6          30242:22 30247:15          30247:24 30249:15          30285:9 30290:3          30302:20  <b>cross-examiner</b>          30300:20  <b>cross-examiners</b>          30260:21  <b>cross-examining</b>          30112:25 30210:21          30230:19,20          30275:18 30295:4          30304:9  <b>crowd</b> 30120:5          30180:15  <b>crucial</b> 30196:1  <b>cuff</b> 30233:17  <b>culminated</b> 30154:10  <b>cup</b> 30257:21 30288:18  <b>current</b> 30215:24          30263:9  <b>currently</b> 30134:25          30215:20 30282:18  <b>cursor</b> 30300:6  <b>cut</b> 30145:11 30223:13          30229:24</p>	<p><b>cutting</b> 30269:12  <b>cynical</b> 30140:10          30143:3,8  <hr/> <b>D</b>  <hr/> <b>Dali</b> 30292:16  <b>damaged</b> 30161:12  <b>dangerous</b> 30179:24  <b>date</b> 30113:21,23,23          30174:20 30223:21          30227:1,18 30235:11          30235:13 30239:9          30256:10 30257:11          30258:1 30266:3,19  <b>dated</b> 30157:20  <b>dates</b> 30113:7,15          30168:24 30206:6          30266:13 30275:11  <b>day</b> 30120:10,15          30127:25 30145:22          30187:25 30192:3          30193:21 30195:5          30198:9 30203:22,24          30203:25 30207:22          30210:2 30211:19          30213:11,11 30216:6          30224:20 30237:25          30238:3 30253:24          30269:5 30276:22,22          30277:23 30289:17          30295:22 30298:9          30302:12  <b>days</b> 30145:23          30150:20 30168:2          30169:4 30203:20          30207:3,17 30212:2,4          30212:13,13          30222:18 30226:7          30227:16 30228:14          30228:15 30242:23          30254:18,20          30268:13,13,14,17          30269:4,6,6,7,8,8,9          30269:10,11,13,17,24          30270:1,1,2,5,6,7,10          30270:18,22 30271:8          30272:23 30273:12          30274:12 30275:1,2,3          30276:7,7,9,9          30277:20,21          30278:18 30279:7,9          30287:8 30297:1          30302:12,15,15  <b>day-to-day</b> 30268:2  <b>De</b> 30265:22  <b>deadline</b> 30216:12          30262:2 30263:9          30273:13 30286:11          30288:7  <b>deadlines</b> 30282:19  <b>deal</b> 30115:22          30137:21 30151:5          30173:22 30179:14          30180:15 30181:3,6          30192:21 30199:3,4          30203:12 30205:3,16</p>	<p>30207:1 30210:12          30228:1 30230:24          30231:15 30233:10          30233:14 30234:14          30249:9 30252:14          30257:6 30273:2,17          30274:20 30275:4          30276:19 30277:3,4          30278:2,22 30288:25          30289:24 30291:16          30297:24 30299:7,8          30301:8  <b>dealing</b> 30151:2          30165:23,25          30196:21 30197:18          30204:16 30205:13          30212:17,20          30220:22 30230:18          30255:21 30278:1          30290:9 30298:15  <b>deals</b> 30129:13          30154:24  <b>dealt</b> 30123:17 30182:4          30189:16 30193:3,9          30198:20 30209:24          30219:24 30233:15          30278:23 30279:1,2  <b>death</b> 30193:11          30203:11  <b>debate</b> 30125:10          30132:21 30139:20          30146:7 30163:12          30189:13 30239:8  <b>debating</b> 30235:7  <b>deceased</b> 30217:5          30230:21 30293:3,5,6  <b>decide</b> 30117:3          30201:10 30214:17          30239:12 30298:10          30301:13  <b>decided</b> 30180:5          30222:3  <b>decision</b> 30146:8,23          30165:16 30201:10          30201:17,17 30236:3  <b>decisions</b> 30146:22          30148:16  <b>declined</b> 30203:23  <b>deemed</b> 30175:4,4  <b>deep</b> 30187:25  <b>defer</b> 30191:3  <b>deferred</b> 30116:4          30303:15  <b>defined</b> 30132:25          30133:2  <b>definitely</b> 30150:16          30263:10  <b>definition</b> 30132:22  <b>definitively</b> 30200:18  <b>degree</b> 30227:25  <b>delays</b> 30233:2  <b>delegates</b> 30159:5  <b>deliberate</b> 30147:5  <b>deliberately</b> 30229:10  <b>deliver</b> 30257:25  <b>demand</b> 30117:21</p>
--	---	--	---	---

<p>30121:3,18 30122:18 30129:23 30130:8,11 30137:7 30138:2,3,15 30139:16,17,17 30142:19 30146:8 30159:6 30194:6 <b>demands</b> 30119:23 30137:16 30146:3,5 30165:25 30193:1,16 30238:17 <b>denies</b> 30132:19 <b>deny</b> 30143:20 <b>departure</b> 30164:1 <b>depend</b> 30217:23 <b>dependence</b> 30274:3 <b>dependent</b> 30243:15 30263:21 30265:5 30273:25 30274:4 30298:6,7 <b>depending</b> 30223:17 30251:12 <b>deployed</b> 30195:13 <b>deployment</b> 30177:4,10 30181:5 <b>depth</b> 30286:25 <b>deputises</b> 30149:1 <b>deputy</b> 30148:24 <b>described</b> 30231:12 <b>designated</b> 30282:18 <b>desirability</b> 30197:18 <b>desirable</b> 30254:22 30259:3 30267:19 30273:7 <b>desirably</b> 30265:16 <b>despite</b> 30134:19 30221:12 30229:18 30229:20 30296:8 <b>destruction</b> 30272:3 <b>detail</b> 30192:18 30268:10,10 30286:9 <b>detailed</b> 30125:15 <b>details</b> 30268:5 <b>detained</b> 30293:19 <b>determination</b> 30233:18,21 <b>determine</b> 30240:8 30298:12 30301:17 30302:8 <b>determined</b> 30203:6 <b>determining</b> 30253:22 <b>develop</b> 30195:17 30198:1,18,21 <b>developing</b> 30156:5 30163:4 30197:24 <b>development</b> 30155:24 30162:25 <b>developments</b> 30156:23 <b>deviate</b> 30114:1 <b>devoted</b> 30281:5 <b>diary</b> 30263:14 <b>dichotomy</b> 30273:6 <b>didn't</b> 30119:6 30124:17 30135:2 30136:9 30138:13 30150:6,11 30155:5</p>	<p>30155:22 30159:13 30160:3,13,21 30164:25 30165:3 30167:18 30174:10 30174:10 30177:17 30182:21 30187:15 30224:4,19 30229:16 30229:19 30244:6,10 30249:9,20 30260:5 30269:16 30280:17 30287:15 30289:15 30292:10 30294:6 30300:22 <b>die</b> 30146:17 <b>died</b> 30154:1,2 30180:9 30183:6 30184:5 30241:25 30291:15 <b>dies</b> 30211:19 <b>differ</b> 30216:17 <b>difference</b> 30267:13 30277:22 <b>differences</b> 30151:5,7,8 30152:4 <b>different</b> 30113:1 30155:11 30159:3 30171:22 30261:3 30282:15 <b>differential</b> 30128:12 30129:21,24 30130:4 30130:14 30176:4 <b>differently</b> 30245:4 <b>difficult</b> 30114:15 30143:12 30151:16 30156:3 30159:12,16 30160:21 30162:3,4 30162:11 30163:3 30179:1 30188:21 30197:22 30200:17 30244:14 30251:19 30266:14 30297:7 <b>difficulties</b> 30145:16 30260:24 <b>difficulty</b> 30204:16 30206:6 30208:11 30211:25 30229:11 30287:14 30288:1 30294:25 <b>direct</b> 30122:8 30168:22 30188:6,12 <b>direction</b> 30179:3 <b>directly</b> 30122:12 30124:18 30133:25 30137:13 30167:24 30258:11 30278:15 <b>director</b> 30127:25 30128:10 30204:1 30212:15,24 30281:1 <b>disabilities</b> 30260:20 30274:2 <b>disagree</b> 30141:23 30142:2 30143:10,12 30286:4 <b>disagreement</b> 30142:7 <b>disaster</b> 30181:14 <b>discharge</b> 30233:22 <b>discharged</b> 30303:7</p>	<p><b>disclose</b> 30246:3 <b>discomfort</b> 30255:16 <b>discreet</b> 30228:2 <b>discrete</b> 30289:1 <b>discretion</b> 30301:12 <b>discuss</b> 30113:4,14 30115:1 30116:17 30118:3 30166:15 30255:18 30290:9 <b>discussed</b> 30112:5 30163:20 30272:12 30303:1 <b>discussing</b> 30165:1 30220:22 <b>discussion</b> 30113:17 30117:20,22 30140:21 30166:17 30182:16 30223:18 30234:25,25 30295:21 <b>discussions</b> 30123:13 30126:4 30163:18 30164:3,5 30165:7 30166:2 30200:17 <b>disgraceful</b> 30230:5 <b>disinclination</b> 30247:11 30247:12 <b>disorder</b> 30161:22 <b>disposal</b> 30276:5 <b>dispose</b> 30289:2 <b>dispute</b> 30133:22 30153:3,18 30159:20 30160:3 30161:16,17 30173:3 <b>disputes</b> 30151:24 30193:7 30198:6 30203:17 <b>dissatisfaction</b> 30193:17 <b>dissatisfied</b> 30170:11 <b>distracted</b> 30158:5 <b>distracting</b> 30114:12 <b>distribute</b> 30212:23 30301:12 <b>distributed</b> 30187:8,11 30187:12 30214:22 <b>divide</b> 30269:1 <b>division</b> 30126:11 <b>divisions</b> 30151:14 <b>docket</b> 30219:4,23 30224:13,14,16 30279:23 30280:3,5 30280:11 30281:2,5 30298:13 30301:18 30301:19,21 <b>dockets</b> 30204:2,5,8 30209:15 30210:19 30212:18,20,21,21,22 30213:3,4,19,23 30214:7,8,10,18,20 30215:7 30217:8,10 30218:5,16 30220:9 30225:17 30279:15 30279:19,21,25 30281:7,7,8,9,13 30282:12 30283:10</p>	<p>30284:18 30292:23 30293:4 30296:10 30299:3 30301:12,13 <b>document</b> 30127:14,16 30127:23 30129:12 30154:21 30197:13 30209:1 30225:20 30264:20 30280:5 30291:9 <b>documentary</b> 30293:10 <b>documentation</b> 30186:15 30190:23 30196:12 <b>documents</b> 30127:14 30128:24 30154:22 30188:15 30190:2 30207:24 30208:6,9 30208:19,22 30209:9 30209:14,14 30210:19 30211:4,23 30212:6 30213:8,11 30214:16,17 30215:13 30217:6,22 30225:9,9 30230:11 30249:7,14 30250:11 30250:15 30259:12 30259:22 30260:9 30277:15,17 30279:15 30282:20 30283:10,11,21 30284:4,10,21,23 30285:3,10,23,25 30286:11,13,19,21,23 30287:4,5,6,22 30288:8 30289:13,23 30289:24 30290:1,2,9 30291:11 30295:1 30296:12 30298:24 30301:17 30302:22 30303:1,16 30304:8 30304:10 <b>doesn't</b> 30124:11 30125:4 30127:4 30130:25 30158:2 30170:6 30188:5 30195:1 30204:22 30216:22,24 30221:24 30232:13 30233:20 30240:1 30246:2 30248:4 30249:25 30250:5 30268:7 30270:16 30273:8 30274:3,6,16 30276:1 <b>doing</b> 30113:19 30150:7 30194:19 30212:7 30251:21 30280:14 30297:8 30299:11,12 <b>domain</b> 30115:1 <b>don't</b> 30113:19 30116:9 30119:8,9,12 30125:10,14 30126:3 30143:18,21 30147:12,18 30150:2 30151:13 30155:25</p>	<p>30156:25 30158:5 30161:1,2,5 30163:11 30163:13 30164:21 30174:14 30181:24 30186:10 30213:6 30217:6,24 30219:2 30220:4 30245:13 30247:21,23 30252:20 30253:4,12 30254:19 30255:7,8 30258:2,4,8 30261:18 30264:6,12,18,20,22 30265:3,8,9 30266:6 30291:20 30294:15 30295:2,5 30296:3,23 30297:5,12 30298:3 30299:18 30300:25 30301:16 30302:4,5 30304:7 <b>double</b> 30122:9 30266:8 <b>doubt</b> 30188:11 30203:3 30282:11 <b>download</b> 30187:23 <b>dozen</b> 30181:5 30255:13 <b>DPP</b> 30204:6 30212:6 30213:9,10 30214:2 30224:4,17 <b>dramatic</b> 30264:18 <b>draw</b> 30179:19 30299:10 <b>drawn</b> 30299:21,22 <b>drill</b> 30125:17 30126:5 30126:16 30128:2,10 30137:21,25 30138:1 30138:3,13,15,24 30139:7,14,17,22,23 30156:3 30163:2,9 30165:15,17,18,24 30197:19,21 30271:15 <b>drillers</b> 30155:1,1 <b>drilling</b> 30139:8 30156:6 30163:5,7,11 <b>drive</b> 30215:13 30281:8 30281:10,12 <b>dropped</b> 30169:16 <b>due</b> 30189:16 30278:8 <b>dump</b> 30221:9 <b>Dunn</b> 30128:1,10,17 30130:10 <b>duplicate</b> 30193:4 <b>duplicates</b> 30279:24,25 <b>duplication</b> 30281:12 <b>duties</b> 30233:22 <b>duty</b> 30152:10</p>
<b>E</b>				
<p><b>earlier</b> 30154:3 30157:8,13 30158:9 30158:22 30159:12 30163:13 30173:22 30188:16 30197:14 30206:2 30223:9 30235:3 30254:8</p>				



<p>30264:7 30268:19 30274:7 30275:23,24 30296:18 <b>early</b> 30193:21 30222:2 30295:5 <b>ears</b> 30218:22 <b>easier</b> 30173:9 30176:24 30240:20 <b>easily</b> 30233:15 <b>Eastern</b> 30133:1 30222:3,5 <b>easy</b> 30179:5 <b>education</b> 30208:25 <b>effect</b> 30134:6 30135:6 30135:20,22 30137:5 30137:12,14 30143:8 30147:14 30160:22 30201:2 30296:1 <b>effective</b> 30140:21,24 30141:18,25 30180:18 <b>effectively</b> 30206:21 30211:13 30220:18 30225:14 30250:22 30287:13 <b>effort</b> 30258:23 <b>egg</b> 30220:7 <b>eight</b> 30268:14 30269:7 30269:8 <b>either</b> 30122:12 30144:18 30156:13 30156:13 30167:9 30185:5 30217:14 30218:6 30220:25 30230:5 30233:12 30243:19 30275:25 30299:20 <b>electronic</b> 30279:20,22 <b>Electronically</b> 30214:23,24 <b>elephant</b> 30216:8,9,10 30216:13 <b>email</b> 30187:21 30241:21 <b>embarked</b> 30196:1 <b>emergency</b> 30181:14 <b>emphasise</b> 30274:11,14 <b>employ</b> 30148:22 <b>employed</b> 30130:5 <b>employees</b> 30125:11,18 30130:5,14 30133:10 30134:7,16 30136:11 30136:21 30138:1,21 30138:22,23 30139:14 30153:13 30153:21 30176:5 30182:12 30183:5,13 30183:19 30198:10 <b>employer</b> 30120:25 30121:1,2,3,6,18 30123:16 30151:6 30152:1 30162:1 30236:14 <b>employers</b> 30152:10 30153:1 <b>employment</b> 30146:14</p>	<p><b>enable</b> 30203:13 <b>enabling</b> 30203:1 <b>ended</b> 30257:6 <b>ends</b> 30268:11 <b>enforced</b> 30161:13 30198:13 <b>engage</b> 30121:4 30141:6,13 30142:9 30142:11 30143:22 30151:16,21 30155:23 30157:3 30162:23 30163:24 30164:5,11,12 30166:6 30189:23 30223:2 <b>engaged</b> 30159:4 30189:22 <b>engagement</b> 30122:14 30122:15 <b>engagements</b> 30122:12 <b>engaging</b> 30141:3 30142:13 30156:20 30165:22 <b>ensure</b> 30175:11 30186:3 30190:1 30195:20 30271:8 30288:5 <b>ensured</b> 30129:21 <b>ensuring</b> 30221:11 <b>entail</b> 30195:4 <b>entailed</b> 30195:6 <b>entire</b> 30133:3 30138:25 <b>entirely</b> 30140:10 30143:2,7 30180:24 30231:23 30235:21 30282:6 <b>entirety</b> 30155:6,16 30170:19 <b>entitled</b> 30114:3 <b>environment</b> 30141:2 <b>envisage</b> 30197:25 30198:1 <b>equalisation</b> 30125:24 30130:21 <b>equally</b> 30250:11 <b>equation</b> 30257:24 <b>equipment</b> 30177:9 30196:4 <b>erroneous</b> 30244:2 <b>error</b> 30292:10 <b>escape</b> 30179:1,2,4,10 <b>essence</b> 30144:7 <b>essentially</b> 30262:4 <b>establish</b> 30142:25 30203:10 <b>established</b> 30134:9 30140:17 30142:10 30142:12,14,15 30175:3 <b>establishing</b> 30147:11 <b>establishment</b> 30184:3 30194:18 <b>estimate</b> 30269:25 <b>estimates</b> 30112:21 30269:12</p>	<p><b>etcetera</b> 30259:12 <b>evening</b> 30185:1 30271:20 30272:13 <b>event</b> 30123:3 30202:17 30232:2 <b>events</b> 30132:1 30139:16 30154:4 30157:16 30159:2 30174:1 30176:19 30182:4 30183:6,18 30184:4,16,18,20,21 30185:6 30191:12 30192:19 30193:1 30196:21 30203:2 30242:1 30271:13 30272:8 30278:13 <b>eventually</b> 30139:13 <b>everybody</b> 30113:17 30137:24 30162:10 30174:22 30176:24 30243:24 30268:5 <b>evidence-in</b> 30259:13 30259:16 30290:7 <b>evidence-in-chief</b> 30259:1,4,19 30260:17 30289:21 30290:5 <b>evident</b> 30130:1 <b>exact</b> 30221:2 <b>exactly</b> 30126:6 30157:25 30165:9 30190:18 30218:6 30220:12 30237:7,8 30251:16 30253:14 30293:12 <b>exaggerated</b> 30279:19 <b>examination</b> 30174:19 30192:15 30228:17 30242:25 30248:4 30249:7,12 30250:18 30250:20,22 30261:1 30275:20 30283:3 30288:6 30290:11 30293:18 30304:9 <b>examination-in-chief</b> 30211:20 <b>examine</b> 30112:15 30129:8 30147:16 30259:21 30295:8 <b>examining</b> 30113:2 30295:13 30298:2 <b>example</b> 30179:19 30192:7 30216:19 30223:23 30300:17 <b>examples</b> 30181:1 <b>exception</b> 30202:4 <b>exceptions</b> 30201:19 <b>exchange</b> 30126:11 <b>excluded</b> 30133:24,25 <b>EXCO</b> 30154:23 30155:5,23 30157:1 30162:17 30197:15 <b>excused</b> 30199:6 <b>executive</b> 30127:13,25 30128:9 30146:5,6,15 30146:21,23</p>	<p>30148:16,19 30149:11 30151:1 30155:14 30165:16 30165:16 30272:7 <b>executives</b> 30144:14 30167:16 30168:4 <b>exercise</b> 30150:8 30221:11 30281:19 30292:19 30301:1 <b>exhaustion</b> 30236:22 30237:6,7 <b>exhibit</b> 30119:16,18 30126:25 30127:3,5,7 30139:3 30154:20 30157:19 30162:17 30174:12 30175:4 30177:15 30194:11 30197:14 30199:14 30199:14 <b>exhibits</b> 30128:24 30209:14 <b>exigency</b> 30247:6 <b>exist</b> 30227:6 <b>existing</b> 30263:19 <b>expect</b> 30131:12 30153:6 30210:2 30230:19 30233:17 30264:13,18 30284:3 <b>expected</b> 30142:20 30167:21 30192:25 30196:3 30208:22 30212:14 30213:10 30229:7 30266:22 <b>expecting</b> 30284:15 30288:9 <b>expedition</b> 30238:2,5 <b>expeditiously</b> 30244:12 <b>expense</b> 30266:7 <b>expenses</b> 30266:4 <b>experienced</b> 30209:12 <b>expert</b> 30192:6 30241:1 30253:12 30254:16 30254:21 30261:23 30264:19 30266:18 <b>experts</b> 30200:24 30201:5 30202:4 30206:17,18 30234:15,18 30252:1 30252:7,16,21,25 30253:13 30255:5,25 30261:12,21 30262:3 30262:8,19 30263:4 30263:15 30264:5 30265:17 30267:13 30267:17,19,22 30269:14,17 30270:1 30274:11,13,18,21 30275:12 <b>expiry</b> 30212:13 <b>explain</b> 30166:8,9 30231:17 30259:5 <b>explained</b> 30189:18 30190:21 30231:13 <b>exploited</b> 30151:8 <b>exposed</b> 30236:22 <b>express</b> 30249:21</p>	<p>30295:24 <b>expressed</b> 30240:25 <b>expressing</b> 30286:24 <b>expression</b> 30146:17 30152:12 30218:13 <b>extension</b> 30204:11,12 30204:15 30205:6 30226:23 30227:10 30262:16 30263:3,12 30263:17 30264:21 30265:7,23 30266:3 30266:13 30294:13 30294:15 <b>extensive</b> 30278:11 30295:5 <b>extent</b> 30116:10 30162:13 30177:13 30195:11 30211:23 30245:8 30246:16 30247:6 30249:22 30258:19 30272:11 30285:9 30291:15 30292:17 30293:16 <b>extra</b> 30138:14 30154:1 30154:14 30164:17 30195:20 30219:18 30268:23 30289:17 <b>extract</b> 30127:24 30128:8 <b>extracted</b> 30218:17,25 <b>extraordinary</b> 30187:24 <b>extra-vigilant</b> 30195:7 <b>extreme</b> 30228:23 30230:1 30242:19 <b>extremely</b> 30156:3 30163:3 30197:22 30281:14 <b>eye</b> 30268:3</p> <hr/> <p style="text-align: center;"><b>F</b></p> <p><b>face</b> 30236:14,15,18 30237:9 30267:11 30278:11 <b>faced</b> 30223:5 30302:3 30304:3 <b>facie</b> 30161:7 30286:24 <b>facilitate</b> 30179:17 <b>facilities</b> 30172:19 30173:9 <b>facility</b> 30196:7 <b>facing</b> 30167:12 30179:3 30231:20 30262:2 <b>fact</b> 30124:10 30128:25 30132:15,21 30134:12 30136:9 30137:7 30138:11 30143:8 30150:7,23 30151:14,21 30156:1 30163:1 30164:1,4 30170:21 30174:4 30176:3 30193:20 30194:11 30197:20 30205:1,13 30206:25 30209:19 30216:21</p>
--	---	---	---	---

<p>30217:21 30229:22 30230:15 30231:6 30239:25 30244:22 30244:23 30257:24 30260:15 30263:8 30268:19 30273:5,10 30279:24 30284:3 30290:23 30292:17 30296:8 30298:20 30300:21 30301:23 30302:7 <b>factor</b> 30206:3 30273:1 30299:25 <b>factors</b> 30294:21 30302:7 <b>facts</b> 30212:3 <b>factually</b> 30130:10 <b>failed</b> 30286:1 <b>failing</b> 30261:1 <b>fair</b> 30124:24 30125:15 30153:8,10 30159:1 30193:18 30218:3 30235:23 30244:15 30251:17,18,23 30255:16,22 30260:5 30275:15 <b>fairly</b> 30151:2 30160:14 30164:23 30230:21 30250:16 30254:25 30265:8 30276:18 30303:23 <b>fairness</b> 30237:16 30238:2,5,17 30243:3 30297:8 <b>faith</b> 30151:24 <b>fall</b> 30181:16 30265:19 30273:14 <b>falls</b> 30265:15 <b>false</b> 30273:6 30280:9 <b>familiar</b> 30180:9 <b>families</b> 30200:2,6 30203:9,14 30233:9 30237:17 30241:17 30242:11,15 30243:1 30243:9 30246:19 30291:5 30293:7 <b>family</b> 30230:22 <b>far</b> 30112:24 30121:8 30122:7 30146:8 30161:14 30167:15 30167:25 30169:2 30172:22 30182:18 30187:1 30196:12 30199:7 30205:4,20 30206:11 30219:16 30219:16 30220:2 30253:18 30254:13 30265:11 30268:21 30297:6 <b>farce</b> 30237:21 <b>farfetched</b> 30262:23 <b>Farmer</b> 30148:20 <b>fast</b> 30236:16,20 30237:11,21 <b>faster</b> 30147:9,20 <b>fast-forward</b> 30295:25</p>	<p><b>fate</b> 30263:22 <b>fault</b> 30216:19,22 30223:4,8,8 <b>favour</b> 30130:21 30145:19 30202:14 30202:18 30229:3,19 30229:21,23 30235:1 <b>fear</b> 30145:19 30237:2 30252:10 <b>feasible</b> 30192:9 <b>fee</b> 30229:6,16 <b>feedback</b> 30118:10,24 30119:1 30159:8 <b>feel</b> 30157:5 30252:1 30258:10 30284:23 <b>feels</b> 30251:13 <b>fees</b> 30266:8,15 <b>felt</b> 30216:23 <b>fifth</b> 30294:11 <b>figure</b> 30155:9 30157:8 30157:13 <b>figures</b> 30155:10,11,12 <b>file</b> 30162:19 <b>filed</b> 30199:17 <b>files</b> 30187:8 30215:8 30221:5,9 30231:12 30279:20,22 <b>fill</b> 30224:17 30234:1 30254:11 30275:14 <b>filled</b> 30211:1 30222:15 30223:24 30224:5 30225:4,13 30234:2 <b>fills</b> 30224:1 30241:24 <b>final</b> 30128:8 30138:24 30173:13,14 30245:21 <b>finally</b> 30146:15 30157:4 30159:18 30169:3 30272:18 30287:25 <b>financial</b> 30149:1 30155:3 30227:1 30235:16 30236:2,9 30237:13 <b>find</b> 30151:17 30194:1 30203:10,15 30210:6 30212:21 30221:13 30242:21 30249:21 30264:1 30281:8,12 30283:10 30293:2 <b>finding</b> 30145:16 30209:24 30237:17 <b>findings</b> 30274:16 <b>fine</b> 30192:22 30203:23 30269:12 <b>finish</b> 30190:13 30205:3 30238:13 30249:12 30297:3,8 <b>finished</b> 30116:6 30167:6 30190:6,12 30207:4 30234:10,18 30237:22 30238:10 30288:13 30295:17 <b>firearm</b> 30280:4 30303:7 <b>fired</b> 30170:8</p>	<p><b>firing</b> 30170:16 <b>firm</b> 30215:25 <b>first</b> 30113:3,3 30115:2 30115:18,18 30116:20 30117:4 30119:20 30120:17 30123:11 30156:19 30158:20 30163:5 30166:13 30194:8 30208:10 30210:17 30210:21 30211:1 30212:12 30213:15 30232:9 30238:3 30243:4 30259:6 30283:7 30285:14 30287:7 30288:3,16 30295:19 30299:7 <b>firsthand</b> 30121:13 <b>FISC</b> 30116:22 30117:8 <b>fishing</b> 30231:19 <b>fit</b> 30250:4 30270:10,21 <b>five</b> 30198:24 30199:4 30242:23 30269:25 30270:6 30277:20 <b>fix</b> 30266:19 <b>fixed</b> 30227:1,5 <b>fixing</b> 30113:23 <b>flow</b> 30130:25 30218:10 30255:23 <b>flowing</b> 30218:9 30262:11 30289:5 30290:19 <b>fluent</b> 30209:4 <b>fly-overs</b> 30172:8 <b>focus</b> 30278:15 <b>follow</b> 30177:5 30179:15 30287:16 <b>followed</b> 30175:5 <b>following</b> 30134:8 30222:7 30231:25 30249:11 30279:7,9 <b>follows</b> 30130:9 30131:3 <b>follow-up</b> 30160:19 <b>foolish</b> 30245:5 <b>footage</b> 30243:7 <b>force</b> 30139:1 <b>forced</b> 30161:22 <b>forego</b> 30266:18 <b>foresee</b> 30159:10 <b>forget</b> 30243:1 <b>forgive</b> 30184:23 30185:16 30291:17 <b>forgotten</b> 30232:5 30245:8 <b>form</b> 30191:20 30242:20 30243:11 <b>forth</b> 30161:12,24 30252:5 30253:1 <b>forthcoming</b> 30236:19 30278:22 30285:23 <b>forum</b> 30272:13 <b>forward</b> 30125:8 30151:22 30178:23 30210:4 30236:16,20</p>	<p>30237:12 30273:5 30274:24 <b>forwarded</b> 30237:21 <b>found</b> 30128:7 30217:10 30279:22 30280:24 <b>foundation</b> 30113:13 <b>four</b> 30214:10 30239:23 30243:2 30270:1,1 30274:12 30274:21 30275:1 30277:20,21 <b>frankly</b> 30187:24 <b>free</b> 30258:13 <b>freedom</b> 30273:25 30298:6,12 <b>Friday</b> 30204:9 30213:10 30224:18 30250:7,10 30268:22 30276:11 30277:12 30281:23 30283:2 30286:20,21 30288:5 30288:8 <b>Fridays</b> 30268:15 30269:7 <b>friend</b> 30145:13 30153:24 30157:14 30175:10 30187:21 30191:13 30193:2 30194:10 30259:8 30260:10 30294:24 30296:4,9 <b>friends</b> 30186:13 30237:11 30266:15 <b>Frikkie</b> 30199:13 <b>front</b> 30162:19 30163:22 30241:19 <b>fruitfully</b> 30207:18 30208:1 <b>full</b> 30112:19 30175:14 30176:6,7 30183:17 30184:2 30186:5 30192:2 30193:22 30209:22 30222:14 30268:5 30269:5 <b>fullest</b> 30113:25 <b>fully</b> 30154:24 30185:24 30230:21 30232:6 30233:10 30257:13 30258:4,21 30261:6,7 <b>function</b> 30149:6 <b>functioning</b> 30195:21 <b>funders</b> 30266:7 <b>Fundi</b> 30176:16,18 30177:4 30180:8 30184:21 30185:11 30187:4 <b>Fundi's</b> 30192:1 <b>furnish</b> 30264:19 <b>furnished</b> 30296:5 <b>further</b> 30112:16 30115:22 30121:1 30125:10 30144:3 30173:17 30175:7 30191:2 30192:18</p>	<p>30218:14 30221:22 30249:12 30251:15 30258:9,12 30259:22 30265:7 30266:19 30274:5 30285:2 30287:23 30289:4 30290:14 30292:22 30294:2,7 30295:15 30299:25 <b>future</b> 30113:19 30266:2</p> <hr/> <p style="text-align: center;"><b>G</b></p> <hr/> <p><b>G</b> 30245:16 <b>gain</b> 30133:4 <b>gained</b> 30268:23 <b>game</b> 30242:18 <b>gap</b> 30189:20 30233:1 30234:1,1 30275:14 30292:13 <b>gaps</b> 30241:24 30291:13,14 <b>gather</b> 30196:9 <b>gathering</b> 30196:7,17 <b>general</b> 30138:1 30139:5 30151:22 30195:15 30228:8 30298:22 <b>generally</b> 30148:16 30197:10 <b>generous</b> 30276:8 <b>genueflexion</b> 30267:11 <b>germane</b> 30203:5 <b>getting</b> 30118:11 30120:5 30147:23 30206:6 30229:10 30242:15 30249:22 30289:12 <b>give</b> 30112:10 30113:14 30118:24 30119:2,3 30125:3 30127:6,8 30152:21 30157:22 30168:5,11 30169:7 30179:18 30181:10 30182:16 30187:10 30201:6 30202:5 30203:17,18,19 30205:24 30208:13 30209:16 30210:17 30219:14 30224:4 30225:4 30227:10 30230:10 30231:12 30234:16 30235:3 30236:8 30237:1 30242:5 30246:5,10 30249:12 30250:13 30252:8 30254:19 30260:18,21 30261:3 30261:19 30262:9 30263:4 30267:19 30268:4 30276:7,13 30277:8,12 30279:10 30282:1 30283:11 30286:12,21 30287:20 30288:16</p>
---	---	--	---	---

<p>30290:5,7 30291:8,10 30294:17,20 30295:9 30302:21 30304:19 <b>given</b> 30118:9 30127:3 30128:4,12 30132:18 30138:14 30149:20 30154:14 30155:18 30156:1 30163:1 30168:7 30173:5 30175:3 30197:20 30204:4 30205:25 30208:5,18,22 30222:12 30223:3,9 30223:25 30225:25 30226:10,13 30239:22 30240:1,2 30242:14 30246:20 30259:13 30260:19 30270:3 30275:8 30283:18 30286:19 30287:5 30301:11 <b>gives</b> 30121:13 30179:7 30231:23 30240:18 30281:21 30286:17 30287:1,1,3 30289:20 30298:8 <b>giving</b> 30120:16 30138:22 30188:7 30210:25 30283:24 <b>go</b> 30115:7 30116:1 30119:18,25 30120:24 30121:5 30127:22 30128:20 30129:19,25 30141:6 30153:8,16 30163:8 30163:14 30178:12 30178:21 30184:15 30185:13 30199:7 30204:3 30206:10 30210:18 30214:17 30220:9,13 30221:5 30228:24 30231:10 30236:10 30237:23 30240:23 30243:16 30246:17,20 30248:5 30250:25 30251:2,14 30292:23 30297:6 30298:24 30301:18 30301:24 <b>goes</b> 30128:14 30147:22 30230:12 30274:5 <b>GOMES</b> 30114:6 30167:2 <b>good</b> 30117:16,17 30141:3 30151:24 30152:3,7 30176:2 30190:3 30196:4 30227:5 30228:1 30235:7 30242:12 30243:23 30248:2 30278:22 <b>Gotz</b> 30201:14,16 30241:4 30258:17,18 30259:15,18,24 30260:2,4,8 30261:13</p>	<p>30276:15 30277:7 30287:11 30288:16 30294:23 30295:16 <b>Gotz's</b> 30277:17,25 30286:16,23 <b>governed</b> 30153:15 <b>government</b> 30172:7 30229:21 <b>go-ahead</b> 30301:11 <b>go-slows</b> 30198:7 <b>grade</b> 30125:19,25 30126:1 30130:15,21 30131:2,18 30138:14 30139:6,6,7 <b>grading</b> 30128:6 <b>grant</b> 30204:25 30227:4 30294:13 <b>granted</b> 30112:23 30157:15,17 30202:17 30205:6 30227:18 30232:10 30250:1 30252:24 30262:16 30263:3 30264:15 <b>granting</b> 30149:23,25 <b>grasp</b> 30209:2 <b>great</b> 30159:16 30191:11,13 30204:16 30274:20 <b>greater</b> 30157:6 <b>greatest</b> 30221:24 <b>grievances</b> 30120:1 <b>grilled</b> 30237:10 <b>grossly</b> 30279:19 <b>ground</b> 30172:10 30248:21 <b>grounds</b> 30245:21 <b>group</b> 30118:25,25 30134:15 30137:3 30178:20 30218:19 30222:6,7 <b>groups</b> 30138:20 <b>guarding</b> 30194:23 <b>guards</b> 30272:1 <b>guess</b> 30158:25 <b>guided</b> 30256:7 30274:9 <b>guns</b> 30180:5</p> <hr/> <p style="text-align: center;"><b>H</b></p> <p><b>hadn't</b> 30174:14 30189:20 <b>half</b> 30116:22 30239:18 30255:13 30277:21 <b>hand</b> 30121:23,25 30174:4,19,20 30176:6,7 30262:24 30290:20 <b>handed</b> 30186:16 <b>handle</b> 30270:20 <b>hands</b> 30152:15 30258:8 30280:20,20 30286:7 <b>happen</b> 30153:13 30159:14 30167:13 30186:4 30207:12</p>	<p>30223:16,17 30240:6 30244:10,22 30246:19 30252:9 30265:10,24 30301:16 <b>happened</b> 30122:9 30131:19 30137:20 30147:20 30153:5 30156:10 30167:16 30185:14 30186:23 30213:17 30228:1,11 30229:13 30243:8,10 30263:14 30272:14 30285:19 30293:8 <b>happening</b> 30150:8,12 30194:21 30213:17 30216:14 30233:19 30242:17,25 30247:3 30285:20 30290:8 <b>happens</b> 30200:5 30201:5 30242:4,8 30255:6 <b>happy</b> 30117:8 30151:8 30174:10 30255:4 30263:10 30288:16 <b>hard</b> 30143:14 30151:19 30215:13 30281:8,10,11 <b>hardest</b> 30128:11 <b>Hardy</b> 30251:25 30261:14,15 30263:6 30263:23 30265:4 <b>harm</b> 30253:13 <b>harmonisation</b> 30125:25 30129:23 30130:8,11 <b>hasn't</b> 30181:25 30182:14 30194:18 30219:15 30246:4 30282:10 30289:14 <b>hasten</b> 30244:13 <b>haven't</b> 30113:18 30146:16 30163:18 30188:15 30204:8 30213:12,16 30228:24 30262:24 30263:8 30268:1 30286:25 30287:25 30291:18 <b>head</b> 30118:22 30182:2 30182:10 30223:22 30270:24 30290:22 <b>headed</b> 30154:21 30162:18 <b>headphones</b> 30114:11 30114:13 <b>hear</b> 30114:12,12 30115:3 30116:19,21 30122:25 30199:7 30207:5 30227:18,19 30231:4 30234:20 30236:16 30242:5 30255:13 30258:25 30259:3 30260:14 30264:2 30275:5 30277:21 30279:11</p>	<p>30294:7 30304:15 <b>heard</b> 30114:20 30116:5 30121:24 30122:3,3,4 30176:16 30206:17 30226:1 30228:4 30239:13 30246:22 30260:17 30274:20 <b>hearing</b> 30187:15 30200:15 30205:4 30262:5 30263:21 30268:13,13,14 30272:23 30275:2,3 <b>hearings</b> 30268:2 <b>hearsay</b> 30122:9 <b>heavy</b> 30238:18 <b>heightened</b> 30195:8 <b>held</b> 30144:8 30211:20 30215:21 30244:25 <b>helicopter</b> 30171:12,17 30172:4,7,14,25 <b>help</b> 30147:10 30181:12 30188:9 30204:22 30206:11 30229:9 30254:11 <b>helpful</b> 30210:3 30228:20 <b>helping</b> 30254:13 30280:14 <b>helps</b> 30239:1,12 <b>Hemraj</b> 30123:5,8 30144:4,6,17 30145:1 30186:20,24 30215:6 <b>Hendrickx</b> 30264:10 30265:22 30266:22 30266:25 <b>Henry</b> 30181:9,21 <b>hesitate</b> 30160:14 <b>he'd</b> 30254:20 30255:9 <b>he'll</b> 30223:19 30230:20 30270:17 <b>he's</b> 30112:22 30157:18 30158:7,8 30168:7,11 30169:21 30170:15 30190:13 30207:13 30212:18 30218:9,22 30255:1,10 30259:21 30262:25 30263:1 30276:13,16 30277:23 30288:25 30299:14 <b>hiding</b> 30290:23 <b>high</b> 30124:21 30158:22 30194:15 30194:17 30195:3 <b>higher</b> 30128:4 30129:21 30130:6,19 <b>highlight</b> 30146:20 <b>hindsight</b> 30147:6,7,10 30147:20 30150:10 30159:1,15 <b>hinted</b> 30221:16 <b>hire</b> 30172:7 <b>hired</b> 30171:12 <b>history</b> 30193:6 <b>his/her</b> 30148:24</p>	<p><b>hold</b> 30237:4,8 30245:17 <b>holiday</b> 30211:17 30232:2 <b>home</b> 30185:13 30211:7 30237:23 30280:12,22 <b>honest</b> 30143:17,19 30223:14 <b>honestly</b> 30298:8 <b>honoured</b> 30247:18 30248:1 <b>hope</b> 30117:18 30253:23 30256:9 30262:23 30294:4,9 <b>hoped</b> 30203:11,13 <b>hopefully</b> 30147:22 30166:10 30240:19 <b>hoping</b> 30213:12 <b>horse</b> 30158:22 <b>hour</b> 30112:18 30166:19 30239:19 30240:18 30276:3 30302:12 <b>hours</b> 30112:22 30207:23 30215:24 30222:2 30242:24 30268:15,16,22,24 30269:2 <b>house</b> 30280:14 <b>housekeeping</b> 30112:4 30288:22 <b>HR</b> 30126:11 30168:4 <b>human</b> 30127:13 30144:14 30202:1,2 30241:8 30261:16 <b>hundred</b> 30296:14 <b>hundreds</b> 30221:7 <b>hurry</b> 30147:12 <b>husband</b> 30176:20 30192:3 <b>hypotheses</b> 30265:19 <b>hypothesis</b> 30262:23 <b>hypothetical</b> 30219:22 30262:22 30265:6,6</p> <hr/> <p style="text-align: center;"><b>I</b></p> <p><b>Ian</b> 30148:20 <b>ICAM</b> 30186:6,18 <b>idea</b> 30125:13 30190:16 30209:16 <b>ideal</b> 30247:4 30252:9 30252:10 30272:17 30285:16 <b>identical</b> 30281:7 <b>identified</b> 30211:23 30225:14 30259:7 30299:13,15 <b>identify</b> 30122:10 30210:20 <b>ignored</b> 30179:22 <b>ill</b> 30212:18 <b>illustrate</b> 30177:12 <b>illustration</b> 30179:12 30236:8 <b>imagination</b> 30159:13</p>
---	---	---	---	--

<p><b>imagine</b> 30205:23 30230:20,25 30284:16,18 <b>immediate</b> 30146:18 <b>immediately</b> 30204:7 30225:5 30230:23 <b>Impala</b> 30126:19,21,21 30126:21 30127:13 30127:19,25 30128:9 30130:3,13 30137:20 30156:2 30163:1 30173:23,24 30175:15,23 30197:20 <b>Impala's</b> 30129:20,24 <b>impasse</b> 30154:11 30161:4 <b>implement</b> 30165:16 30165:19 30166:10 <b>implementation</b> 30130:8 30164:13,15 <b>implemented</b> 30156:24 30165:12 <b>implicated</b> 30218:16 30296:16 <b>implicates</b> 30206:1 30207:14 <b>implication</b> 30232:24 <b>implications</b> 30155:3 30226:6 30268:6,7 <b>implicit</b> 30164:22 <b>importance</b> 30191:11 30192:2 <b>important</b> 30145:14 30174:18 30179:11 30188:1 30195:25 30196:17 30202:24 30204:19,23 30208:4 30208:21 30209:7 30215:22 30216:25 30227:24 30228:9,13 30228:22 30242:9,10 30246:10 30264:18 30274:19 30276:18 30296:7 30302:13 30303:6 <b>impose</b> 30260:20 30284:7 <b>imposed</b> 30216:12 30239:8 <b>impossible</b> 30231:16,21 30297:3,7 30304:14 <b>impressed</b> 30150:25 <b>impression</b> 30124:3 30150:6 30161:9 30213:7 30244:2 <b>improper</b> 30285:6,8 <b>imprudent</b> 30256:11 <b>inappropriate</b> 30219:18 <b>inaudible</b> 30123:25 30164:16 30215:1 30225:24 30235:18 30239:20 30267:15 30267:17 30280:6 <b>incident</b> 30139:21</p>	<p>30185:10,14,22 30186:6 30300:7 <b>incidentally</b> 30242:2 <b>incidents</b> 30185:1 30186:8 30192:19 30193:6,10,15 30195:17 30228:2 30271:19 <b>inclined</b> 30291:4 30292:8 <b>include</b> 30165:1 30189:25 30289:15 <b>included</b> 30222:14 <b>includes</b> 30175:14 30189:9 <b>including</b> 30182:3,11 30182:20 30183:8 30190:2 30271:3 <b>inconsistent</b> 30131:5 <b>inconvenience</b> 30253:1 <b>incorporates</b> 30174:7 30175:17 <b>incorrect</b> 30229:9 30300:11 <b>increase</b> 30128:12 30138:23 30163:5,10 30175:23 30197:19 30198:2,20 <b>increased</b> 30156:2,6 30163:2 30197:21 <b>increases</b> 30131:17 30137:21 30138:24 30146:13 30147:14 30149:20 30165:7 <b>increasing</b> 30163:11 <b>increment</b> 30128:4 30156:13 <b>incurred</b> 30266:4 <b>indebted</b> 30194:9 <b>independent</b> 30243:6 <b>indicate</b> 30201:21,21 30220:20 30256:11 30293:4 30296:15 <b>indicated</b> 30142:17 30169:24 30174:1,3 30187:22 30192:20 30205:11,21 30206:17 30207:11 30224:23 30240:12 30241:2 30244:21 30245:12 30248:7 30254:6 30255:21 30288:23 30292:1 30296:18 30302:1,14 30303:5,8 <b>indicates</b> 30112:19 <b>indicating</b> 30258:12 <b>indication</b> 30212:12 30242:5 30260:16 30275:23 30302:19 30304:12 <b>indistinct</b> 30193:9 <b>indulged</b> 30256:22 <b>indulgence</b> 30208:13 <b>industrial</b> 30197:5,11 <b>industry</b> 30128:5,14</p>	<p>30146:7 30147:1 30150:9 30162:7 <b>inferred</b> 30137:18 <b>inflexible</b> 30117:21 30122:5 <b>inform</b> 30146:14 30155:24 30156:22 30162:24 <b>information</b> 30118:7 30118:14 30124:8,24 30126:12 30172:16 30187:20 30191:16 30191:17,24 30192:17 30196:7,9 30196:17 30208:9 30222:12,18 30223:9 30299:14 30300:11 30301:15 <b>informed</b> 30112:16 30144:7 30167:22 30168:20,21 30169:1 30178:25 30181:2 30192:5 <b>infrastructure</b> 30194:22 <b>initial</b> 30194:11 30271:16 30289:8 <b>Initially</b> 30138:5 <b>initiated</b> 30139:22 <b>injured</b> 30145:23 30161:11 30199:23 30205:20 30237:18 30293:18 <b>inside</b> 30209:14,14 30280:19 <b>insist</b> 30201:5 <b>insisted</b> 30118:2 30129:22 30130:7 <b>insistence</b> 30140:8 30141:16,24 <b>insisting</b> 30132:24 <b>insofar</b> 30204:20 30228:11 30231:5 <b>inspected</b> 30195:23 <b>instance</b> 30151:18 30244:6 30287:16 <b>instruct</b> 30241:23 <b>instructing</b> 30291:23 <b>instruction</b> 30178:21 30179:8 30195:5 <b>instructions</b> 30177:10 30210:22 30231:4 30253:6 30271:1 30272:6 30282:1,2,3 30282:7 30283:5,8 <b>integrity</b> 30257:20 <b>intend</b> 30176:16 30231:6 30241:4 30284:21 30295:3 <b>intense</b> 30193:17 <b>intention</b> 30140:14,16 30142:9 30143:22 30161:2 <b>inter</b> 30186:2 30227:1 <b>interdict</b> 30153:20 <b>interest</b> 30187:2</p>	<p>30189:5 30303:13 30304:4 <b>interested</b> 30150:12 <b>Interesting</b> 30187:17 <b>interests</b> 30209:21 30210:9 30237:16 30238:2,2 <b>interim</b> 30227:17 <b>intermediaries</b> 30158:13 30160:5,6 30161:24 <b>intermediary</b> 30160:23 30161:3,25 <b>internal</b> 30154:21 30162:18 <b>international</b> 30266:5 30266:18 <b>interpose</b> 30252:6 <b>interposed</b> 30252:2,16 30252:21,25 30254:22 30255:6 <b>interposing</b> 30247:4 <b>interposition</b> 30235:2 30262:21 <b>interpretation</b> 30140:13 <b>interpreter</b> 30231:14 30301:25 <b>interpreters</b> 30173:1 <b>interrogatory</b> 30272:17 <b>interrupt</b> 30140:20 30174:2 30176:21 30213:2 30233:4 30272:25 30276:12 30277:6 <b>interrupted</b> 30168:13 30177:1 <b>interrupting</b> 30185:17 <b>interruption</b> 30197:1 30262:21 <b>intervened</b> 30154:9 30158:13 <b>intervention</b> 30159:19 30160:3 <b>interview</b> 30144:12 30245:24 <b>interviews</b> 30144:10 <b>intimation</b> 30161:12 <b>intimidation</b> 30161:14 30161:16 30193:11 30195:17 30197:8 30198:11 <b>introduce</b> 30152:20 <b>invade</b> 30246:3 <b>investigated</b> 30185:22 <b>investigation</b> 30188:20 30188:22 30192:8 30256:20 <b>investigations</b> 30186:9 30191:21 30257:19 <b>invidious</b> 30161:9 <b>invited</b> 30245:24 <b>involve</b> 30234:17 30278:14 <b>involved</b> 30118:21 30122:12 30138:20</p>	<p>30138:21,22,23,25 30142:16 30144:15 30163:17 30165:6 30167:24 30168:1 30176:4 30180:20 <b>involvement</b> 30165:1 30271:17 30272:8 <b>in-chief</b> 30259:10 <b>irrelevant</b> 30301:18 <b>irresponsible</b> 30204:14 30205:7 30227:9 <b>irritated</b> 30244:1 <b>irritating</b> 30243:23 <b>isn't</b> 30114:24 30131:10,20 30143:13,14 30155:9 30162:1 30164:20 30165:2 30184:22 30214:15 30245:15 30264:20 30301:3 <b>isolate</b> 30220:9 <b>issue</b> 30114:9 30119:15 30127:18 30148:4,5,9 30148:14 30169:2 30170:5 30181:4 30188:13 30189:14 30198:11 30205:16 30216:11,12 30226:15,15 30272:10 30296:3,23 <b>issues</b> 30148:7 30151:17 30160:18 30203:4,6 30204:20 30209:23 30216:7 30218:11 30238:5 30271:12 30272:20 30273:14,21,21,23 30275:19,20,21 30276:20 30278:14 30278:17,22 30295:21 30297:3 <b>item</b> 30272:12 <b>it'll</b> 30199:22 <b>I'd</b> 30113:2 30155:18 30165:15 30166:13 30177:16 30213:13 30220:17 30294:11 30294:16,20 30299:6 <b>I'll</b> 30120:15 30123:3 30149:5 30163:12 30164:22 30176:12 30177:10 30178:19 30190:25 30191:3 30199:14 30216:10 30221:10,25 30226:4 30229:8,13 30234:7,7 30236:8 30237:6 30245:23 30278:7 30299:7 <b>I'm</b> 30112:6,16 30113:19 30114:1,10 30115:17,25 30117:18,25 30120:9 30121:9 30122:24 30123:21 30145:11 30149:5 30157:13</p>
--	--	--	--	--

<p>30158:4 30159:15,21 30161:6,8 30163:6,10 30180:11,19 30182:13,13 30183:23,24,25 30184:6,19 30185:9 30185:17,20 30186:14 30190:6,8 30192:17,23 30193:2 30193:3,4 30213:2,11 30214:19 30219:17 30221:12,22 30222:24 30223:4,5 30223:14 30245:22 30245:23 30246:11 30249:22,22 30250:18,19 30251:1 30251:16 30253:19 30253:20,21 30254:24 30256:6 30257:24 30264:15 30294:6,17 30296:12 30299:5 30302:11 <b>I've</b> 30112:21,23 30113:6,11 30116:7 30127:15 30141:20 30142:8 30158:4 30162:23 30166:13 30171:25 30200:13 30215:16 30217:6 30221:18 30223:18 30224:22 30239:13 30249:21 30255:20 30288:23 30296:14 30297:5 30302:1,14 30302:14</p> <hr/> <p style="text-align: center;"><b>J</b></p> <p><b>ja</b> 30119:13 30132:20 30132:23 30138:16 30143:11 30145:7 30146:20 30148:6 30153:2 30155:15 30156:9,21 30158:25 30160:7 30161:1 30168:14 30180:19 30185:12 30187:17 30197:10 30219:6 30229:17 30234:2 30235:5 30246:14 30248:25 <b>job</b> 30128:5,11 30248:2 30248:3 <b>jobs</b> 30128:4 <b>joint</b> 30172:20 <b>Joseph</b> 30144:23 <b>judgment</b> 30229:18,20 30229:23 <b>July</b> 30188:8 30194:2,3 30194:12,15 30205:5 30206:5,8,15 30216:13 30226:16 30226:18 30227:6,7 30227:13 30235:13 30238:10,14,19,20 30239:6,9 30253:15</p>	<p>30254:8,15 30256:10 30257:11,22 30261:24 30262:1,2 30262:15,20 30263:1 30264:10 30266:21 30268:12,14 30271:15 30273:13 30278:24 30297:8 <b>jump</b> 30234:23 <b>June</b> 30112:1 30145:6 30145:21 30154:23 30162:17 30193:2 30197:17 30199:12 30200:25 30202:13 30202:13 30241:21 30257:22 30261:19 30261:20 30262:9 30264:11 30266:5,23 <b>juniors</b> 30231:7 30241:22 30293:22 <b>justice</b> 30228:10 30237:16 30238:3,6 30238:11 30243:2 30257:18 <b>justifiable</b> 30220:19 <b>justifiably</b> 30244:8 30297:7 <b>justly</b> 30303:23</p> <hr/> <p style="text-align: center;"><b>K</b></p> <p><b>Karee</b> 30132:5,6,7 30133:1 30151:18 30164:12 30165:24 30166:1,4 30182:25 30183:3,6,12 30185:4 30188:20 30193:6 30194:17 <b>keen</b> 30132:16 30258:22 <b>keep</b> 30129:10 30266:21 <b>kept</b> 30179:22 30180:3 <b>kicking</b> 30147:21 <b>Kidd</b> 30202:19 30205:12 30207:3 30227:20 30228:17 30232:20 30247:10 30248:17 30250:3 30275:18,21 30276:2 <b>killed</b> 30119:23 30145:22 30161:11 30184:22 30185:3,4,5 30185:11 30230:16 30233:11 30243:5 30271:23,25 <b>killings</b> 30203:14 <b>kind</b> 30160:23 30179:14 30183:18 30192:19,19 30197:1 30206:24 30208:15 30208:21 30242:16 30250:25 30252:7 30255:21 30278:21 30298:14,21 30300:1 30301:24 30302:24 <b>kinds</b> 30221:8</p>	<p>30243:12 <b>knew</b> 30124:12 30130:18 30134:13 30134:14,15 30136:23,24 30137:19 30141:19 30141:23 30142:13 30143:10 30144:12 30224:19 30240:25 <b>knobkieries</b> 30179:23 <b>knock-on</b> 30296:1 <b>knowing</b> 30188:21 <b>known</b> 30282:14 <b>knows</b> 30280:16 <b>koppie</b> 30118:17,20,23 30119:21 30120:19 30121:12 30124:17 30124:22,25 30132:18 30134:7,16 30136:3,13,17,19,22 30137:3,24 30140:3 30141:5 30144:20,25 30159:5,7 30160:11 30271:21 <b>Kuhn</b> 30245:18,20 30248:22,25 30250:4 30258:23 30271:6,7 <b>K4</b> 30183:9 30272:3</p> <hr/> <p style="text-align: center;"><b>L</b></p> <p><b>labour</b> 30151:24 30152:13,16 30153:13,14 30156:5 30161:16 30163:4 30197:7,11,23,25 30198:18 <b>lack</b> 30227:25 30291:1 <b>lacking</b> 30189:1 <b>lacuna</b> 30278:10,10 <b>Langa</b> 30272:4 <b>language</b> 30209:3,5 30211:7 <b>large</b> 30209:22 <b>lastly</b> 30223:12 <b>late</b> 30194:3 30241:20 30268:7 30285:24 <b>law</b> 30161:10,21 30237:15 <b>lawless</b> 30160:15 <b>lay</b> 30141:4 <b>LE</b> 30202:1 30241:8 <b>lead</b> 30188:10,10 30203:24 30207:5 30212:4 30219:13 30302:11,14 <b>leader</b> 30280:13 <b>leaders</b> 30116:17 30117:4 30144:9,15 30144:19 30166:17 30186:13,19 30187:1 30189:23 30201:13 30207:5,7 30214:21 30215:4 30227:21 30245:23 30246:17 30246:25 30253:21 30254:5,10 30274:12</p>	<p>30275:17 30281:19 30281:23 30283:9 30287:17,21 30288:10 30303:5 30304:7 <b>leading</b> 30172:14 30279:14 <b>leads</b> 30244:19 <b>league</b> 30298:22 <b>learn</b> 30183:12 30262:16 <b>learned</b> 30145:13 30153:24 30157:14 30175:9 30186:13 30187:21 30191:13 30193:2 30194:10 30233:8 30259:7 30260:10 30266:15 30294:24 30296:4,9 <b>lease</b> 30239:22 <b>leave</b> 30123:3 30168:18 30179:9 30276:9 30278:16 <b>leaves</b> 30270:6 <b>leaving</b> 30128:7 30287:2 <b>led</b> 30139:22 30183:14 30212:2,13 30219:15 30242:6 30302:17 30303:14,23 <b>left</b> 30233:9 30248:18 30250:4 30268:13 30269:4,10,11 30270:18 30272:11 30293:17 <b>left-hand</b> 30178:11 <b>legal</b> 30192:4 30201:16 30207:19,21 30208:13,24 30229:3 30229:6,21 30302:19 30303:2 <b>legislation</b> 30153:15 <b>lengthy</b> 30250:17 30256:22 <b>lesser</b> 30125:4 <b>lest</b> 30301:14 <b>letter</b> 30113:11 30149:21 30150:13 30197:15 <b>let's</b> 30125:7 30150:5 30172:2 30196:10 30223:23 30231:11 30235:15 30237:19 30237:22 30243:1 30266:21 30270:9 30276:7 30292:19 <b>level</b> 30131:2 30138:22 30146:23 30151:21 30155:24 30156:4,20 30157:2 30162:5,24 30163:4 30172:21 30173:6 30177:9 30193:18 30194:7,24 30197:23,25 30198:16,17 30208:25</p>	<p><b>levels</b> 30195:1 <b>lever</b> 30187:8 30215:8 30221:9 <b>Lieutenant-Colonel</b> 30123:14 30202:19 30285:21 <b>life</b> 30176:20 30183:14 30239:22 <b>light</b> 30116:17 30190:14 30191:1 30192:16 30200:12 30200:20 30201:15 30203:4 30261:2 30276:19 30290:23 <b>lightly</b> 30285:12 <b>lights</b> 30297:12 <b>likelihood</b> 30193:17 30273:11 <b>limit</b> 30205:2 <b>limited</b> 30164:23 30260:9 30273:23 30293:7 <b>line</b> 30119:9,11 30120:16 30164:1 30178:24,25 30192:3 30223:11 30292:9 30300:7 <b>link</b> 30260:15,20,22 30261:5 <b>linked</b> 30218:8 <b>list</b> 30112:21 30229:6 30229:16 30250:10 30271:12 30276:13 30276:17 30278:17 30278:20 30279:5 30284:4,22 30285:2 <b>listed</b> 30273:18 <b>listen</b> 30120:1 <b>listened</b> 30118:18 30119:1 30121:13 <b>listening</b> 30228:15 30296:25 30297:8 <b>lists</b> 30277:13,14,23 30289:23 30290:2 <b>literally</b> 30279:20 <b>little</b> 30125:21 30195:10 30200:17 30244:8 30251:16 30271:10 30276:10 30278:12,14 30292:21 <b>live</b> 30253:2 30293:8 <b>lives</b> 30159:11 30182:11 30183:19 30185:23 <b>living</b> 30252:10 <b>logbook</b> 30271:25 <b>loggerheads</b> 30134:14 30134:16 30244:18 <b>logically</b> 30131:1 <b>logistical</b> 30214:12 30224:23 30225:3 30289:11 <b>logistics</b> 30190:2 30263:13 <b>long</b> 30113:4 30117:12</p>
---	---	---	---	---

<p>30117:19 30118:13 30130:11 30140:22 30156:4 30161:16,18 30163:4 30164:20 30190:16 30197:23 30206:8 30207:2 30220:24 30224:12 30224:15 30234:6 30239:22,25 30240:10,11 30241:11 30245:9 30246:15 30278:17 30279:12,16 30294:14 <b>longer</b> 30166:20 30224:16 30235:9 30241:9 30268:24 30286:2 <b>longest</b> 30240:15 <b>Lonmin's</b> 30133:6,13 30140:13,16 30141:16 30142:24 30143:22 30161:2 30184:3 30194:5 30272:8 <b>look</b> 30116:24 30154:20 30178:7 30192:23 30194:10 30213:13 30243:10 30292:16 30300:21 <b>looking</b> 30119:3 30178:1 30279:20 <b>looming</b> 30257:22 <b>lose</b> 30269:9 30272:23 30275:3 30277:18 30287:9 <b>losing</b> 30159:11 30273:16 30279:1,3 <b>loss</b> 30183:14 30227:16 30268:16 30273:12 <b>lost</b> 30176:20 30182:11 30183:19 30185:23 30206:25 30232:15 30274:20 30275:3 30278:18 <b>lot</b> 30132:21 30136:2 30136:11 30137:2 30144:22,24 30154:8 30154:8 30159:3 30160:16,16 30164:7 30193:3 30243:9,22 30257:3 30284:10 30285:15,19 <b>loudly</b> 30114:12 <b>loved</b> 30203:11,14 30210:6 <b>LRC</b> 30202:3 <b>lucky</b> 30242:24 <b>lunch</b> 30112:6,12 30115:13 30116:15 30239:17 30240:10 30268:20 30286:19 <b>luxury</b> 30267:25 30272:22</p>	<p><b>Mabebe</b> 30272:2 <b>Mabelane</b> 30178:20 30179:25 30180:8,13 30184:21 30185:10 <b>machine</b> 30128:12 <b>Magidiwana</b> 30123:22 30124:11 30242:22 <b>magnitude</b> 30296:21 <b>main</b> 30170:7 30172:8 30259:16 <b>maintained</b> 30267:12 <b>major</b> 30191:9 <b>majority</b> 30215:12 <b>makarapa</b> 30222:4 <b>making</b> 30128:23 30137:24 30142:19 30146:21,24 30172:25,25 30173:8 30204:4 30207:15 30210:19 30225:9 30230:2 30231:8 30244:17 30251:22 30257:8 30287:12 <b>Mambush</b> 30242:4 <b>man</b> 30147:25 30185:4 30185:4 30280:12 <b>managed</b> 30180:7 30285:15 <b>management</b> 30118:11 30118:25,25 30119:25 30120:2,8 30122:24 30126:3 30128:1 30144:8 30151:19 30159:8 30180:21 30181:14 30196:18 30272:13 <b>management's</b> 30128:9 <b>manager</b> 30181:9,14 30183:11 <b>managers</b> 30144:14 30180:23 30183:3 30185:25 <b>manner</b> 30242:17 30293:23 <b>mapping</b> 30172:9 <b>March</b> 30228:25 30229:25 <b>marching</b> 30179:24 <b>Marikana</b> 30124:22 30133:2,3 30163:25 30164:5,11 30165:22 30166:6 <b>mark</b> 30174:10,11 30176:12 <b>marking</b> 30129:15 <b>marshal</b> 30240:19 <b>massacre</b> 30217:4 <b>massive</b> 30281:12 <b>material</b> 30187:23 30219:24 30220:3 30293:10 30296:11 30296:22 30298:16 30299:20,20,20,22 30300:13 <b>Mathibedi</b> 30199:18,20 30202:9,10 30205:8</p>	<p>30205:19 30206:20 30207:9 30211:10,21 30212:10 30213:1,4 30213:18,22 30214:1 30214:5,19,24 30215:3,6,9,17,18 30217:7 30220:17,24 30221:3 30224:6,9,22 30225:7,19 30226:4 30227:15 30228:13 30249:10 30250:16 30251:18 30252:12 30252:12,19 30253:5 30253:10,11,17 30254:25 30255:11 30255:17,20 30256:1 30259:21 30260:10 30260:10 30267:3 30283:12,20 30290:18 30291:21 30291:25 30292:7 30295:20,23 30297:11 30298:4,5 30299:6,16 30301:7 30301:10 30304:17 <b>Mathibedi's</b> 30255:8 30274:6 30296:5 30297:22 <b>Mathunjwa</b> 30119:15 30119:19 30120:7,18 30120:20,22,24 30121:11 30122:22 30123:23 30124:20 30132:17,19 30144:23 30273:2 30282:8,13,13 <b>Mathunjwa's</b> 30119:16 30120:16 30121:7,9 30121:23 30122:8 <b>matter</b> 30123:17 30125:9 30137:16,22 30142:18 30146:11 30146:16,18,21 30147:16,23 30149:13 30150:21 30150:22 30151:1,3 30151:11 30154:24 30155:25 30162:25 30163:25 30165:23 30166:7 30170:3 30173:22 30187:2 30188:15 30192:1 30201:2 30204:16 30206:25 30221:18 30223:20 30227:6 30230:8 30231:9 30232:9 30233:25 30234:23 30235:11 30239:13 30242:19 30245:6 30283:11 30291:22 30294:16 <b>matters</b> 30112:4 30176:25 30189:15 30193:8 30220:21 30232:15 30233:14 30234:14 30246:3</p>	<p>30249:10 30268:4 30273:18 30276:19 30277:13 30280:1 30281:6 30282:18 30288:22 <b>maximum</b> 30270:7 <b>McIntosh</b> 30123:14,20 <b>Mdizeni</b> 30292:14 <b>mean</b> 30118:20 30119:6,7 30125:4 30131:10,11,15,18 30147:22 30152:16 30156:16,16 30160:14 30165:11 30166:3 30183:20,24 30184:19 30194:16 30195:19 30197:10 30203:18 30216:22 30221:24 30223:13 30232:12,12,14 30251:13 30263:10 30269:6 30284:16 30292:10 30302:3,4 <b>meaning</b> 30178:23 <b>meaningful</b> 30210:4,12 <b>means</b> 30193:4 30197:7 30199:17 30207:23 30218:17,25 30222:23 30272:21 30301:18 30302:14 <b>meant</b> 30133:24 30141:17,25 30158:17 30169:5 30240:1 <b>media</b> 30243:17 <b>mediators</b> 30152:7 30154:7 <b>medical</b> 30245:21 <b>medically</b> 30250:4 <b>meet</b> 30231:10 30247:5 30288:7 <b>meeting</b> 30112:14 30118:21 30120:12 30146:3 30166:14 <b>meetings</b> 30113:13 30144:8,13 30196:14 <b>members</b> 30136:3 30144:8,23,24,25 30149:11 30203:9 30222:4 30230:22 30272:6 <b>membership</b> 30133:4 30144:19 <b>memorandum</b> 30154:22 30162:16 <b>memory</b> 30221:9 30286:1 <b>men</b> 30169:8 <b>mention</b> 30149:18 30216:11 30223:19 30251:6,8,10 30286:10 30295:2 <b>mentioned</b> 30122:16 30189:10 30215:7 30235:5 30236:3 30242:2 30292:18,19</p>	<p><b>mentioning</b> 30246:12 <b>mere</b> 30124:10 30217:21 30244:22 30245:14,14 30247:10 30248:17 30250:3 30258:24 30276:16 30277:23 30278:16 30287:3 30303:9 <b>merely</b> 30210:1 30267:11 30291:5 <b>Mere's</b> 30278:8,9 <b>merit</b> 30113:22 30245:18 30248:8 30286:23 <b>merits</b> 30188:12 30201:2 <b>message</b> 30122:22 30173:1 30176:24 <b>messages</b> 30123:21 <b>met</b> 30129:23 30165:12 30165:13 30193:16 <b>methodology</b> 30186:7 <b>meticulously</b> 30220:14 <b>Mgcineni</b> 30300:8 <b>Mguneni</b> 30242:3 <b>MICHAEL</b> 30114:6 30167:2 <b>Microphone</b> 30123:25 30164:16 30215:1 30225:24 30235:18 30239:20 30267:15 30267:17 30280:6 <b>middle</b> 30231:9 30265:1 <b>militating</b> 30248:12 <b>millions</b> 30256:16 <b>mind</b> 30116:4 30147:13 30147:14,15 30158:5 30183:16 30203:7 30206:1 30207:8,10 30207:20 30214:9 30227:8 30235:14 30267:13 30271:12 30287:25 30294:22 30300:1 30301:8 <b>mindful</b> 30209:19 <b>minds</b> 30208:9 30237:16 <b>mindset</b> 30203:1 30298:17 <b>mine</b> 30125:12 30132:5 30173:9 30185:14,15 <b>miners</b> 30124:23 30222:5 <b>mines</b> 30146:12 30147:15 <b>minimum</b> 30269:13 <b>mining</b> 30126:10 30127:13 30128:9 30186:7 <b>Minister</b> 30258:7 <b>ministers</b> 30206:4,15 30236:14,18 30237:5 30269:14,18,19 30270:2 30275:10</p>
---	---	--	--	--

M

<p><b>minute</b> 30241:5 30299:1 <b>minutes</b> 30112:16 30130:2 30175:14,22 30240:15 30241:9 30279:20,22 <b>mistaken</b> 30225:20 <b>misunderstanding</b> 30267:10 <b>misunderstood</b> 30252:17 <b>Modiba</b> 30202:19 30205:11 30207:2 30227:19,24 30228:6 30228:12,21 30230:8 30230:15,20 30232:18 30233:8,11 30233:23 30245:12 30247:10 30248:16 30250:2 30258:22 30271:6,6 30276:6 30279:7 30281:22 30282:24 30283:1,24 30286:11,17 30287:1 30288:8,9,16 30289:9 30289:13,16,22,24 30290:3 30293:22,25 30295:3,8,10,13,14 30297:16 30298:2 <b>Modiba's</b> 30228:16 30233:10 <b>Mohamed</b> 30127:10 <b>Mokwena</b> 30168:4,8,9 30168:12,13 <b>moment</b> 30178:6 30183:25 30185:9 30192:18 30199:7 30204:10,13 30207:5 30215:24 30227:8,24 30258:8 30261:11 30285:5 <b>Monday</b> 30118:22 30124:20 30125:2 30174:16 30215:4 30222:2 30223:21 30226:7 30231:15 30232:1,1 30246:18 30249:10,25 30250:1 30250:14 30252:13 30268:12 30270:13 30270:14,17 30279:10,14 30281:21 30282:23 30283:18 30284:4,22 30286:12,18 30287:1 30288:9 30289:9,13 30289:16,21,21,24,25 30295:2 30302:17,23 30304:13 <b>money</b> 30152:10,16 30153:1,8 30164:17 30237:19,19,23 30256:19 30257:3,5 30280:15,17,19,23 <b>month</b> 30117:21 30154:25 30155:1,2</p>	<p><b>months</b> 30154:14 30182:8 30191:18 30225:1,1 30235:8 30237:21 <b>morning</b> 30113:10 30114:20 30115:14 30115:16 30116:16 30117:16,17 30120:12 30123:10 30184:21 30187:21 30222:2 30268:19 30272:4 30280:23 30289:3,21 30304:19 <b>motivated</b> 30258:4 <b>Motlagewa</b> 30177:14 30179:21 <b>mouth</b> 30219:19 30255:8 <b>move</b> 30125:7,8 30151:22 30178:23 30188:17 30226:3 30232:4 30295:16 <b>moved</b> 30242:19,21 30271:21 <b>movement</b> 30160:23 30161:21 30195:16 <b>moving</b> 30120:18 30199:18 <b>Mpembe</b> 30298:23 <b>Mphe</b> 30245:13 <b>Mpofu's</b> 30271:4 30279:2 30281:24 <b>Mtimkulu</b> 30303:6,11 <b>multiple</b> 30273:24 30281:13 <b>multiply</b> 30221:6 <b>Munro</b> 30194:12 <b>Munroe</b> 30122:17 <b>murder</b> 30272:1,2,4,5 <b>murderer</b> 30273:25 <b>murders</b> 30160:16 <b>music</b> 30120:18 30236:14,15,19,19 30237:9 <b>mustn't</b> 30256:14 <b>muti</b> 30298:18 <b>M-E-R-E</b> 30245:14,15</p> <hr/> <p style="text-align: center;"><b>N</b></p> <p><b>Naidoo</b> 30228:8 <b>name</b> 30168:5,7,12 30182:2 30223:1 30280:12 <b>named</b> 30245:11 <b>names</b> 30149:12 30221:24 30225:4 30226:11 30291:14 30291:19 <b>narrow</b> 30182:23 <b>national</b> 30155:23 30156:20 30162:24 30269:15,21,22 30270:2 30272:7,7,12 30298:23 <b>naturally</b> 30218:8 <b>nature</b> 30112:18</p>	<p>30114:25 30180:15 30192:11 30257:19 <b>naïve</b> 30214:6 <b>nearly</b> 30207:4 <b>necessarily</b> 30114:25 30125:5 30142:16 30164:14 30167:23 30197:11 30217:23 30227:10 30276:22 30296:10 <b>necessary</b> 30114:14 30127:8 30188:23 30192:20 30209:9 30212:23 30227:19 30228:16 30231:6 30233:12 30238:18 30247:13 30275:24 30276:5 30279:8 30303:10 <b>necessitate</b> 30217:13 <b>necessity</b> 30181:2 <b>need</b> 30112:19 30116:17 30117:6 30146:23,25 30152:3 30152:7,19 30174:4,9 30174:19 30177:23 30177:24,24 30178:14 30179:1,4 30179:12 30190:2 30191:6 30207:11 30210:5 30216:25 30224:4 30248:4 30254:20 30260:23 30278:15 30279:17 30282:18,22 30286:10,11 30288:3 30288:4 30290:9 30295:5 30300:9 <b>needed</b> 30224:17 30225:12 30250:6 <b>needs</b> 30112:22 30221:18 30268:10 30282:4 30297:1 <b>negotiate</b> 30130:19 30131:13 30134:20 30143:1,3,7,9 30153:10,25 30161:19 30167:11 30168:22 <b>negotiated</b> 30158:22 <b>negotiating</b> 30132:16 30141:3 30142:25 30163:19 <b>negotiation</b> 30138:25 30154:11 30164:3 <b>negotiations</b> 30125:23 30126:3,16 30127:19 30130:2,13 30131:19 30132:13 30139:12 30139:12 30173:25 30175:14 30271:14 <b>negotiator</b> 30167:10,11 <b>negotiators</b> 30152:4 30161:23 <b>networks</b> 30126:11 30195:13</p>	<p><b>neutral</b> 30216:18 <b>never</b> 30121:10 30128:7 30140:21,23 30142:14 30143:22 30147:13,14,15 30216:5 30244:20 30273:15,21 <b>new</b> 30126:25 30281:9 30282:10 30296:16 30296:22 <b>news</b> 30128:9 30222:24 <b>Ngalwana</b> 30242:23 <b>night</b> 30271:20 30272:3 <b>nine</b> 30304:19 <b>NIU</b> 30228:6 <b>NN</b> 30119:16,18 <b>nod</b> 30187:13 <b>nodded</b> 30270:24 <b>noises</b> 30114:13 <b>Noki</b> 30242:3,3 30300:8 <b>non</b> 30211:19 <b>non-availability</b> 30248:11 <b>non-involvement</b> 30271:18 <b>non-negotiable</b> 30264:16 30266:20 <b>non-police</b> 30169:25 <b>normally</b> 30148:25 30190:10 30252:5 30268:20 <b>North</b> 30212:16 30224:4 <b>north-east</b> 30228:7 <b>note</b> 30194:21 <b>notice</b> 30208:18 30259:12 30283:12 30283:17 30286:19 30287:4 30291:8,10 <b>notification</b> 30300:1 <b>notion</b> 30182:24 <b>notional</b> 30289:15 <b>notionally</b> 30269:5 <b>November</b> 30187:15 <b>no-one</b> 30118:17 30161:24 30203:17 <b>NPA</b> 30216:20 <b>Nqongophele</b> 30292:14 <b>NUM</b> 30112:21 30122:13 30126:9,15 30128:10,25 30129:19,23 30130:7 30130:14,19,20 30131:1,4,12 30133:7 30133:8,24 30134:10 30134:12,14,17,19,20 30135:6,12,14 30136:3,6,9,16,18,24 30136:25,25 30137:1 30137:3,6,14,20 30140:9,23 30141:17 30141:25 30143:2,7 30144:22,24 30151:5 30155:23 30156:20 30161:19 30162:24</p>	<p>30163:20,24 30164:5 30164:11 30165:13 30165:22 30166:6 30167:6,7 30175:24 30176:15,17 30178:22 30187:2,3 30271:22 <b>number</b> 30127:3,5,7 30143:24 30154:8 30162:19 30170:6 30174:8 30175:4 30178:7,10,16 30182:11,20 30204:19 30247:25 30260:9 30269:2 30276:18 30280:3,5 30293:3,3,5 <b>numbers</b> 30178:2 30281:20 <b>numerous</b> 30193:10 <b>NUM's</b> 30125:23</p> <hr/> <p style="text-align: center;"><b>O</b></p> <p><b>oath</b> 30114:4 30117:13 30117:14 30121:23 30136:16,17 30166:25 <b>obdurate</b> 30124:4 <b>object</b> 30113:24 30201:3,4 30206:18 30221:16 <b>objection</b> 30116:7 30150:15,15 30157:11 30200:22 30201:3 30260:10 30264:5 <b>objections</b> 30220:14 30226:9 <b>objective</b> 30231:20 30243:6,22 30244:18 30244:23 30245:5 30275:22 <b>obliged</b> 30160:22 30205:15 <b>observations</b> 30172:15 <b>observe</b> 30195:16,16 <b>observed</b> 30175:12 <b>obstructive</b> 30229:22 <b>obtain</b> 30132:16 30184:2 30192:6 <b>obtained</b> 30212:15 30296:19 <b>obvious</b> 30145:17 30189:4 <b>obviously</b> 30119:8 30143:16 30144:12 30166:20 30188:4 30189:15 30190:12 30192:2 30216:17 30219:24 30229:22 30233:9 30246:9 30250:17 30257:8 30258:13 30263:11 30263:12,21 30265:14,15 30267:7 30284:25 30292:16</p>
--	---	---	--	--

<p>30294:12  <b>occasion</b> 30119:20  <b>occasions</b> 30264:5  30275:24  <b>occupy</b> 30202:20  <b>occur</b> 30160:1  30172:23 30186:3  <b>occurred</b> 30157:16  30183:22 30184:9  <b>occurs</b> 30235:2  30273:1 30299:9  <b>October</b> 30218:19  30280:4  <b>October/November</b>  30226:10  <b>odd</b> 30301:17  <b>odds</b> 30275:22  <b>offer</b> 30119:7 30125:4  30129:24 30175:23  <b>offered</b> 30179:13  <b>office</b> 30118:22  30172:19 30258:11  30271:22  <b>officer</b> 30148:19  30149:1 30179:9  30258:23 30271:6,7  30298:9  <b>officers</b> 30177:15  30180:13 30181:4  30185:10,23  30196:13  <b>offices</b> 30178:22  <b>official</b> 30170:5,12  <b>officials</b> 30116:1  30118:21 30124:21  30182:20  <b>oh</b> 30190:8 30199:14  30245:19 30297:12  <b>okay</b> 30116:19 30117:2  30120:13 30122:20  30185:19 30187:10  30240:13 30249:3  30301:6  <b>old</b> 30215:13  <b>omission</b> 30291:23  <b>once</b> 30190:21  30195:25 30199:8  30213:9 30264:22  30287:24 30288:21  30292:13 30301:11  <b>ones</b> 30170:7 30203:14  30210:6 30214:16  30220:10,11  30279:17  <b>OO10</b> 30139:3  30157:19  <b>OO17</b> 30194:11  <b>open</b> 30207:17  <b>opening</b> 30119:8,10  <b>operate</b> 30204:12  30209:21 30303:20  <b>operating</b> 30172:20  30196:4 30204:10  30244:24  <b>operation</b> 30171:13  30172:5,12</p>	<p><b>operational</b> 30132:25  30151:16 30157:2  <b>operations</b> 30132:8  30186:7 30195:14,15  <b>operator</b> 30126:5  30163:9 30165:17,18  <b>operators</b> 30125:17  30126:17 30128:2,11  30128:12 30137:21  30137:25 30138:1,4  30138:13,15,24  30139:7,15,17,22,23  30156:3 30163:2  30165:15,24  30197:19,22  30271:15  <b>opinion</b> 30155:25  30156:23 30162:25  30163:12 30192:6  <b>opinions</b> 30243:11,12  <b>opportunity</b> 30120:20  30188:14 30191:19  30246:20 30249:9  30250:13 30260:18  30261:4 30268:3  30277:13 30283:13  30283:15 30287:6  <b>oppose</b> 30116:12  30200:7 30201:13  30202:4 30261:18  30262:8  <b>opposed</b> 30116:10,11  30130:14 30131:14  30137:20 30142:18  <b>opposite</b> 30179:3  <b>optimistic</b> 30295:25  <b>oral</b> 30121:7 30184:16  30269:15,23 30270:6  30270:8 30272:20  30275:25 30276:13  <b>ordeal</b> 30236:22  30237:6  <b>order</b> 30121:1  30151:22 30152:4  30153:8 30161:10,21  30175:10 30177:12  30179:17 30196:4  30203:22 30205:3  30212:6 30213:14  30228:10 30229:2  30233:21 30242:4  30261:2  <b>ordered</b> 30178:22  30179:25  <b>orderly</b> 30141:8  <b>ordinary</b> 30268:17,20  30268:21 30269:5,6,8  30269:9,10,11  <b>organisation</b> 30271:16  30271:18  <b>organisational</b> 30132:1  30132:4  <b>original</b> 30203:20  30226:10  <b>originally</b> 30203:19  30299:23</p>	<p><b>ought</b> 30192:25  <b>outrageous</b> 30217:3  <b>outside</b> 30252:3  <b>overnight</b> 30281:20  <b>overtime</b> 30198:11  <b>overwhelming</b>  30273:11  <b>overzealous</b> 30170:11  <b>owned</b> 30171:12  <b>o'clock</b> 30112:4  30116:21,25 30117:9  30239:23 30240:18  30241:12 30289:2  30304:20</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p><b>page</b> 30120:15  30127:22 30129:19  30129:25 30162:22  30163:14 30177:15  30177:25 30178:10  30178:14 30197:14  30209:1  <b>paged</b> 30217:9  <b>pages</b> 30215:12  30221:19 30264:20  30281:4,14,17  30293:1,2 30296:11  30296:14 30301:17  30301:23,25  <b>paginated</b> 30178:2  <b>pagination</b> 30154:22  30178:8  <b>paid</b> 30125:18 30131:2  30139:8 30164:17  30171:20 30172:4  30228:25 30229:7,25  <b>painstaking</b> 30221:11  <b>painstakingly</b> 30301:24  <b>pangas</b> 30179:23  <b>paper</b> 30272:21  <b>paragraph</b> 30119:18  30119:24 30127:23  30128:9 30129:19,25  30130:9 30163:21  30175:20,21  30177:20 30178:7,16  30178:17 30179:2,20  30194:10,14 30222:1  <b>paragraphs</b> 30222:11  <b>paramount</b> 30303:22  30303:22  <b>pardon</b> 30126:20  30127:24 30154:18  30187:3 30200:11  30264:11  <b>parked</b> 30179:3,8  <b>parking</b> 30178:24  <b>part</b> 30118:25 30126:2  30126:3 30132:13  30149:6 30156:7,19  30157:12 30162:23  30164:3 30169:10,14  30169:19 30170:25  30174:8 30180:16  30186:15 30196:17</p>	<p>30197:14 30198:17  30202:20 30207:22  30211:8 30215:14  30224:13 30230:6  30235:19 30246:16  30247:11 30251:5  30267:11,14 30287:7  <b>participate</b> 30233:3,7  <b>particular</b> 30127:19  30176:19 30177:2,7  30180:14,16  30186:14 30192:1  30198:9 30261:23  30278:13  <b>particularly</b> 30114:15  30151:18 30170:4  30195:25 30205:1  30217:1 30223:8  30235:9 30264:9  30277:16  <b>parties</b> 30112:24  30113:24 30152:8  30154:5,9,9 30162:3  30166:14 30174:14  30187:7 30189:8  30190:3,24 30191:13  30191:19 30198:13  30199:21,23  30203:22 30204:21  30205:15,17 30208:1  30208:19,20 30209:9  30210:11,18  30214:14,15  30215:14 30216:23  30217:1 30225:10  30244:16 30247:15  30255:4 30258:5  30261:10,17  30275:20 30281:23  30283:5,8 30284:4,12  30284:13,23,24  30288:7,11,14  30289:12 30292:11  30299:10,21,24  30302:18 30303:24  <b>party</b> 30189:11  30200:16 30201:21  30201:24 30208:17  30230:17 30238:8,9  <b>pass</b> 30192:10  <b>passages</b> 30175:9  <b>passed</b> 30123:21  <b>passing</b> 30192:12  <b>passion</b> 30242:12,16  <b>Pate</b> 30127:20  <b>Patel</b> 30127:1,11,12  30129:19 30130:1  30174:5 30175:10,13  30175:17  <b>Patel's</b> 30128:17,25  <b>Paterson</b> 30139:6,7  <b>patience</b> 30244:9  <b>Paton</b> 30130:10  <b>Paton's</b> 30127:24  <b>Paul</b> 30128:1,10  <b>pay</b> 30125:21,25</p>	<p>30128:6 30129:20,24  <b>paying</b> 30172:7  30266:8  <b>payment</b> 30163:8  <b>payments</b> 30138:14  <b>pellets</b> 30170:5,12,12  30170:14  <b>penetrate</b> 30298:19  <b>penny</b> 30229:25  <b>people's</b> 30114:13  <b>perception</b> 30152:25  30161:7  <b>perform</b> 30231:21  <b>performed</b> 30301:1  <b>performing</b> 30287:10  <b>period</b> 30150:20  30172:14 30203:3  30207:25 30210:17  30210:21 30211:1,2,2  30211:8,8 30213:16  30213:25 30220:17  30222:11 30232:23  30293:17  <b>periods</b> 30220:19,25  <b>periphery</b> 30228:3  <b>permission</b> 30127:8  30204:9 30212:5,15  30214:3 30224:4,10  30224:17,18,20  30225:5 30281:2  <b>perpetrator</b> 30220:11  30220:12  <b>person</b> 30122:2  30168:18 30179:7  30181:6,9 30184:3  30209:4 30212:17  30218:14 30220:10  30231:7 30238:11,12  30242:1 30243:15  30266:5 30298:7,10  30298:21,22  30301:24  <b>personal</b> 30251:20  <b>personally</b> 30121:24  30122:14 30168:25  <b>personnel</b> 30172:15  30191:10  <b>persons</b> 30144:19  30181:3,7 30182:11  30199:23 30205:21  30221:15,20  30230:22 30293:6  30298:14  <b>perspective</b> 30151:16  30157:1 30166:4  30274:12 30284:9  <b>persuade</b> 30115:2,23  <b>pertinent</b> 30236:23  <b>perusal</b> 30207:24  <b>peruse</b> 30212:20  30213:15  <b>phase</b> 30272:20  <b>phone</b> 30168:18  <b>photocopied</b> 30214:8  <b>photostat</b> 30213:25  <b>photostatted</b> 30213:8</p>
--	--	--	--	--



<p><b>phrase</b> 30197:25  <b>physical</b> 30135:18  30137:1 30140:6  <b>physically</b> 30284:2  <b>picked</b> 30240:23  <b>Pillay</b> 30127:7  30187:21  <b>Pistorius</b> 30238:16  <b>place</b> 30123:6 30129:22  30131:20 30132:18  30139:12 30142:11  30144:1 30160:16,17  30173:7 30180:22  30183:19 30184:4  30186:2 30187:6  30189:18 30195:4  30196:14,20  30207:25 30209:8,10  30228:2 30235:12  30242:16 30243:5  30261:3 30263:20  30279:17 30280:23  30285:6 30302:8  <b>placed</b> 30177:16  30180:22 30190:3  30193:16,22  30209:15 30230:13  30304:1  <b>places</b> 30233:1  <b>placing</b> 30180:12  <b>plan</b> 30205:7 30206:9  30284:10  <b>planning</b> 30181:5  <b>Platinum</b> 30133:1,1  30156:2 30163:2  30197:21 30222:3,5  <b>play</b> 30140:18  30153:14 30202:25  30215:22 30270:7  <b>player</b> 30191:9  <b>players</b> 30147:1  30209:22 30210:9  <b>plead</b> 30294:11  <b>please</b> 30119:16  30120:24 30141:4  30150:17 30166:16  30167:6 30168:5,18  30169:17 30177:24  30180:12 30190:9  30226:1 30254:4  <b>plenary</b> 30113:20  <b>plus</b> 30249:7  <b>pneumonia</b> 30268:1  <b>point</b> 30119:11  30122:14,17 30123:3  30124:1,14,25  30125:7 30141:7  30143:25 30162:11  30163:15 30164:21  30164:23 30167:24  30173:11 30180:11  30181:1,14 30188:6  30189:1,14 30190:16  30191:2,4 30192:1  30198:5,10,23  30220:7,12 30222:22</p>	<p>30223:5,20 30226:12  30228:21 30230:8  30231:9 30233:25  30234:4 30237:9  30238:24 30244:25  30245:1 30247:21,23  30256:6 30257:8  30258:3 30260:24  30265:25 30267:18  30268:9,11 30271:18  30272:18 30277:7  30278:5 30285:2  30292:22 30293:13  30294:12 30301:7  <b>pointed</b> 30126:10  30169:15,20  <b>points</b> 30220:24  30231:1 30247:25  30249:4 30251:24  30293:11 30295:19  <b>police</b> 30123:14  30144:9,15 30159:19  30160:3,6,12,13,17  30160:21 30161:2,7,9  30161:15,22  30167:10 30168:22  30169:4,9 30170:5,12  30171:9,21 30172:12  30172:22,24  30173:10 30202:11  30202:15,18,23,24  30205:14 30223:9  30232:11 30243:18  30249:8 30250:13  30264:3 30285:4,7  30286:5,20 30287:5  30289:6 30298:7  30303:5  <b>policeman</b> 30170:11  <b>policemen</b> 30170:13  <b>police's</b> 30251:17  <b>policing</b> 30261:23  30274:24  <b>political</b> 30236:10  <b>politicians</b> 30236:15  30237:5  <b>portion</b> 30132:7  <b>posing</b> 30220:8  <b>position</b> 30112:8  30116:12,17 30117:5  30117:5 30120:3  30125:23 30126:9,15  30126:23 30130:21  30131:1,13,22,25  30133:6,13,15  30138:12 30141:2,4  30141:12 30147:19  30160:22 30161:10  30162:3,4,11  30173:23 30181:10  30190:4 30192:5  30198:13 30199:16  30202:3 30209:17  30210:12 30213:12  30217:15 30221:14  30223:15 30227:23</p>	<p>30230:6 30231:15  30240:4,12 30241:6  30241:19 30242:8  30245:9 30246:18  30254:5 30257:6  30259:2 30261:17,18  30261:22 30262:7  30263:2 30282:5  30284:22,24  30286:22 30291:6  30292:16 30297:14  30298:24 30301:16  30302:11,21  <b>positioned</b> 30180:19  <b>positions</b> 30130:5  30154:6  <b>positive</b> 30229:16  <b>possession</b> 30213:3  30215:14 30222:18  30280:4  <b>possibilities</b> 30170:7,17  <b>possibility</b> 30170:10  30179:10 30182:19  30182:21,24  30206:14 30245:20  30248:25 30271:23  <b>possible</b> 30167:11  30176:22 30225:13  30246:10 30257:14  30257:16 30258:21  30259:3 30263:3  30265:24 30266:10  30266:11 30269:13  30274:25 30284:2  30291:24  <b>possibly</b> 30159:14  30170:7 30174:20  30223:17 30250:10  30251:22 30257:17  30270:5 30288:10  <b>postpone</b> 30146:16  30262:19  <b>postponement</b>  30115:10 30258:20  <b>postponements</b>  30272:24  <b>pot</b> 30280:18,19,22,23  <b>powers</b> 30256:12,12,13  <b>practical</b> 30252:2  <b>practically</b> 30260:15  30304:14  <b>practice</b> 30114:1  30266:6  <b>practitioners</b> 30207:21  30209:13  <b>preamble</b> 30130:12  <b>precedented</b> 30162:14  <b>precisely</b> 30117:3  30124:13 30125:6  30183:13 30189:22  <b>precludes</b> 30207:15  <b>precursor</b> 30175:13  <b>prediction</b> 30199:3  <b>preface</b> 30216:5  <b>prejudice</b> 30190:19  <b>prejudiced</b> 30223:10</p>	<p>30279:14 30303:25  <b>prejudicial</b> 30208:16  <b>premised</b> 30273:5  30295:22  <b>premises</b> 30172:25  <b>premium</b> 30244:11  <b>preparation</b> 30190:19  30220:20 30289:14  30295:6  <b>preparations</b> 30204:5  30207:24  <b>prepare</b> 30225:3  30230:10 30246:21  30256:8 30277:13,14  30284:4  <b>prepared</b> 30117:8  30118:3 30153:25  30163:17 30240:21  30253:2 30255:1,9,10  30255:15 30263:5  30266:7 30267:21  <b>preparing</b> 30182:15  30207:19 30217:8  30284:14  <b>presence</b> 30175:5,5  <b>present</b> 30113:17  30142:20 30206:12  30222:7 30239:2,5  30242:15 30262:14  <b>presentation</b> 30244:4  <b>presentations</b> 30243:24  30244:2,6  <b>presented</b> 30199:12,17  30202:12 30210:13  <b>presenting</b> 30208:17  <b>presided</b> 30257:19  <b>Presidency</b> 30258:12  <b>president</b> 30182:25  30226:22 30227:3,9  30235:13,25  30237:11,11  30238:12 30258:3  <b>presiding</b> 30298:9  <b>press</b> 30236:15  <b>presumably</b> 30210:22  30225:12 30226:11  30234:17 30254:19  30286:3 30287:20  <b>presume</b> 30218:4  <b>pretences</b> 30280:10  <b>Pretorius</b> 30199:13  <b>pretty</b> 30131:11  30162:5 30261:10  <b>previous</b> 30141:1  <b>previously</b> 30113:15  30148:15 30210:24  30262:7 30285:15  <b>pre-emptive</b> 30128:6  <b>prima</b> 30161:7  30286:24  <b>primarily</b> 30253:22  <b>principle</b> 30131:5,14  30131:17 30137:16  30137:22 30142:18  30275:1  <b>principled</b> 30131:1,12</p>	<p><b>principles</b> 30137:8  30274:10  <b>prior</b> 30208:18  30209:10 30218:5  30234:2,3 30302:6,25  <b>privacy</b> 30246:3  <b>privately</b> 30264:8  <b>privilege</b> 30114:9  <b>privileged</b> 30113:16,17  <b>privileges</b> 30114:3,4  <b>privy</b> 30144:16  30236:7  <b>probably</b> 30124:18  30166:19 30199:14  30212:19 30214:6  30242:6 30244:8  30270:4 30276:7,21  30288:11 30297:18  30298:15  <b>problem</b> 30161:10  30167:12 30170:20  30198:2,19 30202:14  30209:12 30220:4,17  30221:4 30225:3,8  30249:24 30252:20  30275:4 30277:1,5  30278:11,17 30283:7  30284:19 30285:11  30285:14 30287:23  30288:17  <b>problematic</b> 30188:2  <b>problems</b> 30188:8  30205:2 30214:13  30251:21 30253:25  30255:1 30259:6,11  30260:6,7 30289:11  <b>proceed</b> 30192:14  30222:3 30268:12  30282:16 30286:10  <b>proceeding</b> 30262:19  <b>proceedings</b> 30112:1  30207:22 30242:15  <b>proceeds</b> 30272:11  <b>process</b> 30120:4  30121:4 30138:7  30144:9 30154:9,11  30189:8 30237:21  30250:17 30273:7,8  30273:10 30274:22  30285:24 30287:10  30289:14  <b>produce</b> 30193:18  <b>produced</b> 30128:25  30185:24 30186:10  30186:11 30190:3  <b>producing</b> 30218:5  <b>production</b> 30282:19  <b>professional</b> 30233:22  <b>programme</b> 30215:20  30289:15  <b>programmes</b> 30206:6  <b>progressed</b> 30139:16  <b>promoted</b> 30139:6,7  <b>pronounce</b> 30245:13  <b>pronounced</b> 30245:16  <b>proper</b> 30151:21,21</p>
---	--	--	---	---

<p>30180:14 30186:1 30191:11,19 30209:22 <b>properly</b> 30181:2 30188:1 30195:21 30245:16 30246:25 30260:19 <b>Properties</b> 30161:11 <b>property</b> 30272:3 <b>proposal</b> 30128:2 30129:20 30131:4 30154:25 30155:3,6 30155:13,15,19 30156:8,11 30162:23 30163:5,6,15,21 30164:6,10 30165:10 30203:20 30231:23 30248:15 30249:18 30251:5 30258:22 30277:18 30278:7 30279:6,9 30286:24 30287:12 30288:3 30289:8 30294:24 <b>proposals</b> 30154:25 30155:19,22 30197:24 <b>propose</b> 30113:19 30173:23 30175:11 30234:9 30253:15 30258:19 30261:6 30295:12 30298:1 <b>proposed</b> 30155:22 30156:5,7 30164:4 30251:4 30261:8 30293:23 <b>proposes</b> 30292:9 <b>proposing</b> 30116:12 30155:17 30156:12 30164:1 30165:20 30166:14 30249:16 30249:22 30286:3 <b>proposition</b> 30141:23 30170:3 30171:2,23 30171:25 30172:1 30274:23 30277:2 30286:16,17 <b>Prosecution</b> 30212:16 <b>Prosecutions</b> 30204:1 30212:24 30281:2 <b>prospect</b> 30153:7 30194:8 30200:15 30206:2 <b>Protea</b> 30171:16 30172:7 <b>protected</b> 30153:15 30162:7 <b>protection</b> 30215:20 <b>protesters</b> 30178:21,23 30179:4,21,22,24 30180:1,3 30203:2 <b>prove</b> 30124:11 <b>provide</b> 30241:23 30242:20 <b>provided</b> 30210:24 30214:3 <b>providing</b> 30172:24</p>	<p>30295:1 <b>Provincial</b> 30204:1 30281:1 <b>provisionally</b> 30292:24 30292:24 <b>prudence</b> 30256:7 <b>prudent</b> 30256:6,8 <b>public</b> 30115:1 30144:12 30204:1 30209:22 30211:16 30212:16,24 30232:2 30281:1 <b>purchased</b> 30252:5 <b>purporting</b> 30279:23 <b>purpose</b> 30172:8 30174:18 30183:17 30211:15 30218:4 30269:9 30275:18 <b>purposes</b> 30133:7 30210:20 30221:15 30248:3 30260:25 30261:12 30269:3 <b>pursue</b> 30182:1 30244:6 <b>pursuing</b> 30185:20 <b>pushed</b> 30238:5,6 30254:13 <b>puts</b> 30160:2 30237:11 <b>putting</b> 30161:8 30170:9 30184:7 30221:21 30247:3 30249:23 30288:1</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <p><b>qualification</b> 30152:21 30152:23 <b>qualifications</b> 30201:19 <b>qualified</b> 30274:6 <b>qualify</b> 30153:2 <b>quantify</b> 30211:12 <b>quarter</b> 30112:18 30166:19 30239:18 30273:16 <b>quarters</b> 30113:16 <b>queries</b> 30179:9 <b>question</b> 30119:10 30130:12 30131:25 30137:10 30141:15 30147:2,4 30149:5,10 30150:14,18 30157:12,12 30158:2 30158:3,7,9,18,18 30159:2 30160:4,19 30160:20 30162:15 30164:22 30171:1,7 30172:2,3 30173:14 30173:14 30179:18 30180:20,23 30184:1 30185:9,21 30192:7 30195:3 30197:4 30203:18 30204:17 30204:24 30206:22 30215:17 30217:16 30225:25 30226:7 30227:13 30232:11 30232:18 30233:17</p>	<p>30251:15 30253:9 30262:11,13,22 30265:13,15,18,19 30287:3 30295:12 30300:2 <b>questions</b> 30124:2 30125:15 30144:3,5 30145:17 30167:5 30173:17 30176:17 30177:11 30188:12 30192:21 30197:4 30220:8 30230:11 30236:23 30248:18 30250:3 <b>quick</b> 30146:22 <b>quickly</b> 30150:11 30234:23 <b>quite</b> 30121:2 30132:21 30136:21 30167:4 30193:20 30194:9 30204:13 30206:8 30212:19 30217:2,10 30220:4 30227:24 30228:9,12 30236:23 30247:14,24 30250:17 30255:4,5,9 30255:14 30267:7 30296:7,16 <b>quote</b> 30127:25 30166:6</p> <hr/> <p style="text-align: center;"><b>R</b></p> <p><b>r</b> 30245:16 <b>radical</b> 30278:7 <b>radio</b> 30144:10,12 <b>railway</b> 30300:7 <b>raise</b> 30114:9 30189:1 30291:22 <b>raised</b> 30138:13,14 30148:14 30158:9 30203:4 30226:9 30229:18 30260:7 30267:18 30297:4 30302:10 <b>raising</b> 30181:1 30220:8,15 <b>Ramaphosa</b> 30269:14 30269:20 30270:2 30275:10 <b>Randburg</b> 30115:8 30239:22 <b>rands</b> 30256:16 <b>range</b> 30273:14,21 <b>rank</b> 30248:16 <b>rationale</b> 30269:1 <b>RDO</b> 30194:4 <b>RDOs</b> 30129:22 30130:4,6,14,19 30131:3,13,15 30175:23 30176:4 30198:19 <b>reach</b> 30163:25 30165:22 30166:7 30243:12 30297:2 <b>reached</b> 30138:20 30153:17 30223:18</p>	<p><b>read</b> 30120:15 30126:24 30162:23 30163:16 30175:9,11 30178:19 30206:24 30208:8,23 30209:1 30211:6 30221:25 30268:19 30277:16 30278:18,20 30280:10 30286:21 30286:23 30293:1 30300:6 <b>reading</b> 30220:23 30250:15 30278:20 <b>ready</b> 30116:13 30188:24 30207:13 30210:10 30213:8 30216:20 30224:19 30232:1 30289:12 30293:21,24 30297:24 <b>real</b> 30192:1 30203:18 30216:12,13 30223:1 30226:15 30236:7 30276:25 30277:5 30278:10,10,10 <b>realised</b> 30121:19 30160:2 <b>realises</b> 30254:25 <b>realistic</b> 30206:14 <b>realities</b> 30235:15 <b>reality</b> 30208:4 30229:23 <b>really</b> 30125:9 30131:24 30140:2,10 30143:20 30154:10 30173:12 30188:1 30192:9 30195:1,2 30197:4 30230:5 30251:4 30254:24 30260:6 30261:20 30277:18 <b>realm</b> 30223:4 <b>reason</b> 30189:6 30206:8 30218:7 30226:25 30237:2 30241:20,20 30259:6 30259:8 30260:12 30262:12 30264:12 30303:10 <b>reasonable</b> 30284:3,6 <b>reasonably</b> 30153:6 30213:14 <b>reasons</b> 30142:7 30187:11 30216:16 30216:18 30227:5,6 30236:7,9,10 30237:13,15 30239:19 30246:12 30252:3 30256:22 30259:2 30264:6 <b>reassuring</b> 30245:8 <b>recall</b> 30117:19 30118:7,8,9 30119:1 30120:22 30123:17 30123:19 30126:4 30155:7 30171:15</p>	<p>30193:22,23 30269:15 <b>recalled</b> 30207:16 <b>recalling</b> 30250:3 <b>receive</b> 30183:17 30184:15 <b>received</b> 30113:6,11 30116:18 30118:14 30146:12 30174:11 30180:14 30182:9 30184:8 30196:12 <b>Receiver</b> 30240:1 <b>receiving</b> 30121:5 <b>recess</b> 30294:5,10,13 30294:15,20 <b>recognised</b> 30128:4,13 30133:6,8,16,17,24 30135:4,10 30141:7,8 <b>recognition</b> 30133:9 <b>recollct</b> 30169:23 <b>recollection</b> 30170:1 <b>recommence</b> 30304:19 <b>recommendations</b> 30274:15,17,17,23,25 <b>reconnaissance</b> 30172:16 <b>record</b> 30139:21 30149:13,15 30175:9 30175:11,24 30187:6 30189:4,18 30192:14 30218:21 30271:11 30271:11 30279:17 30296:20,24 <b>recorded</b> 30272:14 <b>recording</b> 30272:14 <b>rectified</b> 30291:23 <b>red</b> 30190:14 30297:12 <b>refer</b> 30177:13 30290:1 30300:8,9 <b>reference</b> 30158:11 30174:8 30175:17 30198:5 30257:7 30273:15 30280:2 30291:14 30300:7,13 <b>referred</b> 30158:10 30162:16 30197:14 30228:8 30242:3 30249:10 <b>referring</b> 30157:14,18 30158:7 30177:21 30185:7 30205:18,18 <b>refers</b> 30127:23,24 30174:5 30292:13 <b>reflects</b> 30176:3 <b>reformulate</b> 30150:14 30150:18 <b>refused</b> 30128:13 30129:23 30175:24 <b>regard</b> 30117:7 30121:10 30126:16 30149:20 30150:3,7 30155:12 30164:7 30200:5 30205:1 30220:5 30224:25 30237:2 30239:2 30259:11 30271:13</p>
---	--	--	---	---

<p>30274:14 30289:17  <b>regarded</b> 30113:15  30259:20  <b>regime</b> 30261:3  <b>regretting</b> 30151:7  <b>reiterate</b> 30261:16  <b>reject</b> 30262:23  <b>rejected</b> 30155:13,16  <b>relate</b> 30225:8  30230:21 30280:1  <b>related</b> 30138:12  <b>relates</b> 30191:8  30192:24 30225:8  30228:5 30274:11  30280:3  <b>relating</b> 30163:18  30166:18 30177:3  30233:14  <b>relation</b> 30112:8  30113:7 30120:17  30161:23 30165:1  30170:4 30188:8  30193:11 30198:2,19  30241:6 30243:5  30258:6 30259:22  30274:14,17 30278:7  30279:18,21 30281:9  30282:1,2,3,10,13  30285:10,25  30291:13 30293:9  30297:5  <b>relations</b> 30198:9  <b>relationship</b> 30169:4,6  30171:8 30274:2  <b>relative</b> 30221:17  <b>relatively</b> 30295:4,5  <b>relaying</b> 30122:21  <b>relevant</b> 30125:16  30190:23 30245:11  30281:15,17  30296:11,14  30301:21,23  30302:21 30303:1,10  <b>reliance</b> 30209:15  <b>relied</b> 30211:4 30249:7  30250:11 30259:13  30259:23 30285:11  <b>relief</b> 30204:25  <b>relies</b> 30243:21  <b>rely</b> 30208:20 30209:9  30210:16,20  30211:24 30214:18  30217:23 30249:13  30285:7 30291:9,11  30302:22 30303:3  30304:8  <b>relying</b> 30277:15  30287:21  <b>remain</b> 30129:22  <b>remainder</b> 30130:4  30273:9  <b>remaining</b> 30271:5,8  30276:9 30297:1  <b>remains</b> 30269:10  30301:23  <b>remedied</b> 30260:25</p>	<p><b>remember</b> 30117:21  30126:4,5 30170:1,23  30184:20 30208:11  30218:19 30219:12  30222:7 30228:23  30248:16 30285:20  30299:8  <b>remind</b> 30117:13  30123:13 30153:23  30163:16 30242:10  <b>reminded</b> 30117:13  30155:11  <b>reminding</b> 30232:7  <b>remotely</b> 30281:15  <b>remuneration</b> 30126:5  30164:19  <b>repeat</b> 30137:9  30149:13,15 30158:6  30158:18 30169:17  30185:17 30195:3  30226:5 30230:25  30233:12 30264:17  30297:6  <b>repeated</b> 30216:25  <b>repeating</b> 30158:5  30194:25  <b>replies</b> 30267:3  <b>reply</b> 30252:14,18  30253:9 30267:2,5,7  30286:5 30289:6  30290:18 30297:12  30297:22 30299:9  30301:8  <b>report</b> 30183:21  30184:6,9,16  30185:25 30186:9,10  30186:15,18 30187:6  30187:7 30189:5  30210:3 30218:20  <b>reported</b> 30130:10  30181:20,21  30194:12 30271:24  <b>reports</b> 30192:17  30196:11,13  30206:24  <b>represent</b> 30135:24  30136:8,10 30140:8  30217:1,12 30218:11  <b>representation</b>  30142:16 30164:12  30193:8,8  <b>representative</b>  30165:12 30264:2  <b>representatives</b>  30122:13,13 30125:2  30134:1 30145:4  30165:13 30166:3  30187:1,3,4 30194:4  30244:16 30302:20  30303:2  <b>represented</b> 30136:16  30136:18,21  <b>represents</b> 30230:22  30233:9  <b>request</b> 30113:6  30157:11 30161:2</p>	<p>30167:22 30169:1  30197:19 30198:2,19  30204:6 30263:10  30291:12  <b>requested</b> 30187:9  <b>requesting</b> 30241:22  <b>require</b> 30112:10  30113:4 30203:25  30211:2 30241:23  30282:12 30296:17  <b>required</b> 30112:9  30126:12 30190:23  30210:18 30213:14  30213:15 30224:10  30250:16 30256:21  30300:1  <b>requirement</b> 30203:22  <b>requirements</b> 30203:21  <b>requires</b> 30146:18  30225:21  <b>resent</b> 30229:22  <b>reservation</b> 30227:23  <b>reserve</b> 30129:14  <b>reserved</b> 30264:23  <b>resigning</b> 30128:3  <b>resist</b> 30156:4 30163:3  30197:23  <b>resolution</b> 30147:23  <b>resource</b> 30127:13  <b>Resources</b> 30201:17  <b>respect</b> 30125:7  30145:15 30148:4  30150:8 30151:25  30173:25 30180:15  30184:16 30188:2  30191:13 30196:13  30199:11 30204:23  30210:23 30219:19  30221:25 30226:15  30228:1,3 30233:24  30273:23 30284:10  30284:18  <b>respected</b> 30253:12  <b>respectfully</b> 30203:15  30207:18,25  30208:15,18  30209:11 30210:5,8  30214:7 30224:9  30302:13,23  30303:12,19,21  30304:3  <b>respond</b> 30140:11  <b>responded</b> 30119:24  30120:5  <b>response</b> 30127:18  30129:1 30146:19  30154:4 30194:5  30225:15 30228:17  30228:20 30251:25  30274:8 30282:12  30294:24  <b>responses</b> 30285:14  <b>responsibility</b> 30149:8  30149:9  <b>responsible</b> 30146:15  30150:21 30176:22</p>	<p>30176:25 30253:22  <b>rest</b> 30128:5,14  30282:4,4  <b>restricted</b> 30170:19  <b>result</b> 30133:10  30257:14,15,16,25  <b>resulted</b> 30130:6  30139:13  <b>resulting</b> 30188:20  <b>results</b> 30157:5  30188:22  <b>resume</b> 30166:18  30199:8  <b>resumed</b> 30228:16  <b>resumes</b> 30112:2  30166:22,23 30199:1  30199:2 30241:13,14  30288:20  <b>resumption</b> 30113:7  <b>retain</b> 30129:24  30130:3  <b>retained</b> 30261:20  <b>retrospect</b> 30164:6  <b>return</b> 30153:22  30192:21  <b>Revenue</b> 30240:1  <b>revert</b> 30289:8  <b>revise</b> 30163:12  <b>rider</b> 30188:4 30201:4  30202:15  <b>right</b> 30113:25  30119:12 30121:19  30125:20 30131:18  30131:20 30133:12  30142:21 30153:13  30157:20 30160:4  30162:1 30163:13  30164:21 30165:2,5  30165:24 30166:1,5  30169:21 30175:2  30183:4 30186:10,12  30192:13 30196:2,19  30221:23 30222:21  30235:15 30237:14  30237:20 30245:24  30250:19 30253:3  30255:11 30267:7,7  30286:8 30293:14  <b>rights</b> 30132:2,2,5,10  30132:16 30133:4  30151:25,25 30157:6  30163:19 30164:23  30164:24 30165:4  30202:1,2 30241:9  30261:16  <b>right-hand</b> 30178:2  <b>risk</b> 30128:3 30273:19  30273:22  <b>rituals</b> 30280:15  30298:18,18  <b>road</b> 30147:21  30178:22,24,25  <b>rock</b> 30125:17 30126:4  30126:16 30128:2,10  30137:21,25 30138:1  30138:3,13,15,24</p>	<p>30139:6,14,17,22,23  30156:3 30163:2,8  30165:14,17,18,24  30197:19,21  30271:14  <b>role</b> 30202:25 30209:22  30210:9 30215:22  <b>room</b> 30114:19  30176:22 30238:9,9  30274:21  <b>roughly</b> 30273:16  <b>round</b> 30218:19  <b>ROUX</b> 30202:1  30241:8  <b>Rover</b> 30265:22  <b>rubber</b> 30170:16  30180:1,2,17  <b>rule</b> 30219:12,15  <b>rules</b> 30208:13  <b>ruling</b> 30202:12,14,17  30203:21,23 30212:3  30222:11,23  30304:18  <b>run</b> 30180:5,7 30215:7  30260:22 30261:4  30270:12  <b>running</b> 30222:12  <b>rush</b> 30191:22  <b>rushed</b> 30230:12  <b>Rustenburg</b> 30226:9  30238:4  <b>R1</b> 30154:25  <b>R12</b> 30117:21 30119:3  30120:2 30121:3,5  30138:3 30194:6  <b>R200</b> 30280:22  <b>R500</b> 30155:2  <b>R750</b> 30154:14  <b>R800</b> 30155:1</p> <hr/> <p style="text-align: center;"><b>S</b></p> <p><b>sacrificing</b> 30282:17  <b>sacrosanct</b> 30274:13  30275:1  <b>safety</b> 30186:8  30187:11  <b>salaries</b> 30165:1  <b>salary</b> 30164:18  <b>SAPS</b> 30112:7  30172:17,18  30199:11,17,18,19  30203:5 30206:18  30207:10 30208:5,13  30215:13 30216:6,17  30217:2 30241:23  30251:13 30255:5  30259:7 30260:7  30268:6 30271:5  30273:5,25 30277:16  30278:14 30279:11  30281:8,10,11  30283:12,25  30285:24 30286:12  30289:13,23 30290:3  30290:8,18  <b>SARS</b> 30115:5</p>
---	--	--	--	---

<p><b>sat</b> 30254:2  <b>satisfactory</b> 30115:6  30191:14 30192:7  <b>satisfied</b> 30149:14  30194:5  <b>satisfy</b> 30142:15  <b>save</b> 30149:17 30226:3  30237:19,22  30284:18  <b>saves</b> 30287:13  <b>saw</b> 30198:11 30208:9  30224:12  <b>saying</b> 30119:1,25  30120:23,24  30133:23 30135:21  30135:21,22 30137:5  30137:6,11,13,14  30140:2,10 30144:22  30144:23 30158:23  30159:15 30164:10  30201:3 30204:17  30216:5 30230:3  30232:23 30233:18  30236:7,7 30237:12  30245:22 30246:23  30248:15 30249:24  30250:18,20  30252:15,22  30267:20 30300:12  <b>says</b> 30119:15,21,24  30120:7,17 30122:3  30123:22 30124:11  30124:20,21 30128:1  30129:19 30130:1,9  30132:19 30175:21  30179:9,21 30194:17  30221:8 30223:1  30239:22 30273:3  <b>scares</b> 30279:18  <b>scaring</b> 30180:2  <b>scene</b> 30177:5 30228:1  30228:3,11 30233:11  30243:4,6,16,21  30245:11 30303:7  <b>scenes</b> 30245:12  <b>sceptical</b> 30260:14  <b>schedule</b> 30190:21  30204:10,13  <b>schedules</b> 30275:11  <b>scheduling</b> 30270:4  <b>Scott</b> 30149:1,3  30285:22  <b>screen</b> 30119:16  30177:16,24  <b>seat</b> 30163:19  <b>second</b> 30179:19  30211:2,8 30232:11  30259:8 30285:16  30288:6 30296:3  <b>secondly</b> 30217:14  30220:22  <b>section</b> 30298:6  <b>sections</b> 30271:9  <b>security</b> 30169:8,14,18  30170:8,24 30172:15  30177:15 30178:24</p>	<p>30179:9 30180:13,21  30180:21,23 30181:4  30181:9,16,20  30182:2,10,20  30183:18 30184:3  30185:10,23  30189:25 30191:9,10  30193:21 30194:14  30194:18 30196:13  30215:21 30271:20  30272:1  <b>see</b> 30113:2,7,9,20  30115:18 30116:1,3  30117:9 30120:6,9  30121:21 30128:16  30152:9 30161:14  30166:12 30171:11  30178:18 30187:17  30195:16 30197:13  30213:6,13 30214:15  30220:4 30240:16  30241:10,11  30242:16 30244:7,8  30251:20 30256:3  30270:9 30271:2  30276:18 30283:2  30286:15 30297:12  30297:20 30302:5,6  <b>Seedat</b> 30132:17,19  30182:19 30206:12  <b>seek</b> 30157:23 30177:8  30204:25 30211:24  30302:20 30303:8  <b>seeking</b> 30245:18  <b>seen</b> 30127:13,15  30162:6 30186:15  30187:1,24 30196:11  30257:23 30296:15  <b>seized</b> 30243:13  <b>self-confessed</b>  30273:24  <b>selves</b> 30242:12  30243:24  <b>Semenya</b> 30255:18  30267:1,8,9 30274:6  <b>Semenya's</b> 30218:13  <b>sending</b> 30241:22  <b>senior</b> 30144:14  30168:4 30183:2,11  30184:3  <b>sense</b> 30131:21  30176:17 30211:6  30235:1 30240:7  30243:16 30247:9  30248:10  <b>sensible</b> 30225:16  30251:14  <b>sensibly</b> 30164:4  <b>sensitivity</b> 30242:14  <b>sent</b> 30124:21 30173:1  30189:8 30190:24  30215:5 30258:3  30279:21  <b>sentence</b> 30119:21  30169:17 30232:22  <b>sentences</b> 30175:12</p>	<p><b>separate</b> 30259:4,10  <b>separately</b> 30260:18  <b>September</b> 30157:20  30158:14 30258:1  <b>sequence</b> 30129:10  <b>series</b> 30173:15  30285:23  <b>serious</b> 30151:1,2  30217:2,3,11,11,20  30217:21,25  30245:20 30246:4  30253:19,20,21  30257:24 30264:13  30296:16  <b>seriously</b> 30145:9,22  30150:23 30218:16  30225:6 30294:12  <b>seriousness</b> 30296:13  <b>serve</b> 30172:16  30275:18  <b>services</b> 30171:9  30202:11,18,23,25  30205:14 30209:4  <b>session</b> 30113:20  <b>set</b> 30162:22 30175:14  30176:6,8 30185:18  30189:24 30203:21  30212:3 30235:13  30266:6,19,24  30282:19  <b>setting</b> 30157:7  30177:11  <b>settle</b> 30152:4  <b>settled</b> 30151:24  <b>seven</b> 30203:20  30212:2,13  <b>shaft</b> 30125:12 30183:9  30184:5 30195:14  30222:5 30272:3  <b>shafts</b> 30194:23  <b>share</b> 30237:12  30253:23  <b>shared</b> 30165:14  <b>shareholders</b> 30152:11  <b>sharing</b> 30230:17  <b>sharp</b> 30179:23  30251:19  <b>shed</b> 30203:4  <b>shift</b> 30193:9  <b>shoot</b> 30180:1,4  <b>shooting</b> 30169:11,14  30169:19 30170:25  <b>short</b> 30145:11  30162:15 30166:14  30223:13 30229:24  30234:7,7,25  30240:20,21 30245:9  30246:15 30294:13  <b>shorten</b> 30174:3  30240:19  <b>shorter</b> 30268:20  <b>shortly</b> 30115:23  30258:17  <b>shot</b> 30148:7 30180:1  30271:20  <b>shotgun</b> 30170:15</p>	<p><b>shots</b> 30148:1,3,13  30243:4  <b>shouldn't</b> 30154:8  30240:7 30249:24  <b>show</b> 30119:14  <b>shown</b> 30169:10  30281:17 30299:23  30300:15  <b>shows</b> 30298:14,20  30299:23 30300:22  <b>side</b> 30147:17 30202:8  30218:25  <b>sign</b> 30180:3  <b>signature</b> 30177:25  <b>signed</b> 30153:19  <b>similar</b> 30123:22  30162:14 30193:14  30202:2  <b>similarly</b> 30200:14  30201:16 30241:8  <b>Simon</b> 30149:1,3  <b>simple</b> 30146:22  <b>simply</b> 30120:24  30122:21 30129:23  30130:7 30221:3  30226:13 30231:16  30240:9 30246:23  30258:19 30262:25  30272:22  <b>Sinclair</b> 30181:11,21  30181:23 30182:1,4  30182:21,24  30184:11,16 30248:9  30248:10  <b>sine</b> 30146:17  <b>single</b> 30238:12  <b>single-handed</b> 30155:1  <b>Sir</b> 30157:4  <b>sit</b> 30206:23 30208:24  30211:2,3 30232:13  30246:24 30249:9  30253:24 30258:1  30268:15 30269:1  <b>sits</b> 30269:3  <b>sitting</b> 30136:2,12  30137:24 30153:1  30206:25 30211:13  30211:16 30221:22  30221:23 30227:16  30232:12 30233:8  30268:24 30277:24  30287:8 30294:14  <b>situation</b> 30134:25  30153:12 30160:14  30173:11 30179:14  30180:18 30181:6  30197:8 30207:21  30208:15,24  30209:25 30210:5  30212:22 30215:23  30223:3,6 30229:24  30230:12 30231:8,20  30237:24 30238:4  30242:22 30262:15  30267:21 30274:3  30302:16 30303:16</p>	<p>30304:13  <b>situations</b> 30208:5  30285:23  <b>six</b> 30235:8 30255:12  30279:23,24  <b>skilled</b> 30128:3  <b>slightly</b> 30112:25  30116:5 30155:11  30166:20 30171:22  <b>slots</b> 30278:23 30279:2  30279:3,3  <b>slower</b> 30198:8  <b>small</b> 30216:9,10  <b>softened</b> 30154:5  <b>soiled</b> 30218:21  <b>solicit</b> 30155:24  30156:23 30162:25  <b>solid</b> 30215:25  <b>solution</b> 30167:12  30260:23  <b>solutions</b> 30151:17  <b>solve</b> 30286:18  <b>solving</b> 30161:4  <b>somebody</b> 30122:1,2,2  30124:16 30212:19  30256:12 30293:6  <b>someone's</b> 30114:11  <b>somewhat</b> 30260:14  <b>song</b> 30236:16  <b>soon</b> 30166:20 30175:5  30187:12 30204:2  30214:2 30225:13  30265:8,9 30291:24  <b>sooner</b> 30262:17  30263:12,17,18,20  <b>sorry</b> 30114:23  30128:15,20 30137:9  30138:19 30140:20  30141:11 30149:22  30157:10 30158:4  30159:21 30163:23  30164:21 30165:18  30167:6 30169:12  30174:2 30176:21  30177:1,24 30178:4  30184:19 30190:6,8  30193:25 30199:15  30200:8,9,12 30201:3  30204:11 30209:14  30213:2 30219:2  30230:14 30233:4,5  30234:5 30256:4  30264:15 30267:4  30272:25 30276:12  30277:6 30278:9  30280:5 30282:21,21  30294:6 30295:15  30299:5 30301:6  <b>sort</b> 30117:6 30118:10  30122:16 30147:1,23  30151:19 30153:18  30159:7 30161:3  30165:7 30172:21  30190:17,19 30192:8  30195:17 30198:4,14  30243:22 30274:2,4</p>
--	---	---	---	--

<p><b>sorted</b> 30190:21  <b>sorts</b> 30238:16  <b>sought</b> 30189:21  <b>sound</b> 30296:24  <b>sounded</b> 30278:19  <b>South</b> 30171:8  30173:10 30202:11  30202:15,18,23,24  30205:14 30264:2  30274:24  <b>so-called</b> 30158:11  30239:5  <b>space</b> 30172:19,24  <b>span</b> 30145:23  <b>speak</b> 30118:20,23  30120:1,20,21  30123:16 30124:17  30134:8,24 30135:3,5  30135:7,10,23  30137:6,12,13,15  30140:3,5,6,23  30141:24 30143:23  30150:5 30194:5  30195:9 30216:3  30241:3 30263:24  30282:15 30284:25  30295:20  <b>SPEAKER</b> 30178:4  <b>speaking</b> 30120:5  30133:25 30140:9  30141:17 30166:3  30234:13 30284:17  <b>speaks</b> 30114:11  30209:5 30223:20  <b>special</b> 30137:20,21  <b>specific</b> 30138:24  30177:11 30184:1,15  30185:20 30304:15  <b>specifically</b> 30118:10  30168:21 30169:1  <b>speech</b> 30240:21,21  <b>speed</b> 30147:5  <b>speedily</b> 30146:11  <b>spells</b> 30155:3  <b>spelt</b> 30164:24  <b>spend</b> 30228:15  30250:14 30270:4  30276:3 30279:9  <b>spent</b> 30220:22  30256:18,19 30257:4  30279:19  <b>spill</b> 30270:12,17,17  <b>split</b> 30284:1  <b>spoke</b> 30118:18  30121:12 30124:22  30124:23 30194:14  <b>spoken</b> 30245:22  30261:24  <b>squarely</b> 30273:14  <b>stage</b> 30115:1,13,15  30122:24 30129:20  30136:20 30144:18  30164:12 30171:21  30175:22,25  30176:11 30182:8  30188:24 30190:4</p>	<p>30192:8 30194:2  30196:25 30202:21  30211:22 30212:14  30236:12 30250:12  30263:2 30284:20  30295:5 30303:17  30304:7  <b>stages</b> 30191:23  <b>stance</b> 30124:4  30160:20,24  30163:16 30201:21  30201:22  <b>stand</b> 30238:17  30248:9 30252:15  30268:11 30271:10  30277:12  <b>standard</b> 30190:10  <b>standing</b> 30238:18  <b>stands</b> 30222:1  30227:21,23 30276:1  <b>start</b> 30120:3 30190:14  30216:10,15  30225:13 30252:23  30268:19 30279:1,3  30287:17 30290:11  <b>started</b> 30187:14  30211:22 30222:12  30243:7 30254:20  30291:7  <b>starting</b> 30195:17  30268:9,11 30289:10  <b>startling</b> 30187:20  <b>starts</b> 30254:20  <b>state</b> 30202:21  30280:24 30302:11  <b>stated</b> 30267:11  <b>statement</b> 30119:17  30120:7 30142:2  30143:1,3,5,6,8,9  30177:14 30179:19  30181:23 30182:10  30182:14 30185:18  30193:10,22 30194:7  30194:11 30195:1  30210:23,25 30219:4  30219:14,19 30220:2  30221:23 30222:1  30224:1,5,7,7,12,19  30225:1,4,8,12,17,22  30226:5 30274:7  30280:11 30291:18  30292:25 30296:4  <b>statements</b> 30130:9  30182:3 30206:24  30208:8 30217:11,25  30218:17,23 30219:3  30219:8,23 30220:3  30220:10,13  30221:13 30222:15  30226:8,10 30241:24  30242:2 30276:17  30281:13 30291:12  30293:4 30296:19  30300:6  <b>stating</b> 30246:23  <b>stay</b> 30140:17</p>	<p><b>stayed</b> 30186:25  <b>step</b> 30126:9 30128:5  30128:13  <b>steps</b> 30186:2  <b>stick</b> 30149:21  <b>sticking</b> 30150:12  <b>sticks</b> 30221:9  <b>stood</b> 30207:4  30238:20  <b>stop</b> 30119:9 30128:6  30141:5 30161:15,22  30178:21 30179:21  30180:5 30222:5  30237:20,22  <b>stopped</b> 30256:23  <b>straightforward</b>  30163:9  <b>strained</b> 30198:9  <b>strict</b> 30164:1 30205:2  <b>strictly</b> 30219:16,17  <b>strike</b> 30119:2 30125:4  30125:5 30136:25  30138:8 30139:13  30151:10,10 30153:4  30153:16,19  30161:13 30162:7  30194:8 30195:25  30197:5 30203:3  30244:14 30271:16  30271:17,19  <b>strikers</b> 30117:20  30118:2,18,20  30120:19 30121:12  30122:3,4,4,18,23  30123:15,24 30124:2  30124:17 30134:1  30136:15,17,18  30140:3,9,22,25  30141:17,18,24  30142:1,15,19,20  30161:25 30168:21  30271:20,21,24  30298:17  <b>strikes</b> 30153:12  <b>striking</b> 30159:5  30160:11 30222:4  <b>structure</b> 30125:11  <b>structures</b> 30135:4,10  30140:17 30141:7,8  30141:10 30142:10  30142:12,14,15,25  30144:1 30195:10  <b>study</b> 30188:14  <b>stuff</b> 30219:18  <b>stun</b> 30180:5  <b>subject</b> 30112:5  30125:8 30200:1,14  30200:22 30201:4,9  30201:19 30202:4,15  30204:6 30234:24  30259:1  <b>subjected</b> 30237:5,7  <b>submission</b> 30210:13  30248:6 30257:13  <b>submissions</b> 30200:4  30234:21 30239:15</p>	<p>30244:17 30258:15  30286:9 30292:10  <b>submit</b> 30202:18,23  30203:15 30207:18  30207:25 30208:15  30208:18 30209:12  30210:5,8 30214:8  30224:10 30264:13  30289:17 30290:14  30291:5 30302:13,23  30303:12,19,21  30304:3  <b>submitted</b> 30182:14  30229:6,16  <b>submitting</b> 30205:9  <b>subsequent</b> 30261:25  <b>subsequently</b> 30170:13  <b>substance</b> 30297:24  <b>substantial</b> 30146:13  30271:9  <b>substituted</b> 30265:12  <b>success</b> 30180:2  <b>successful</b> 30180:8  <b>suffer</b> 30274:1  <b>sufficient</b> 30133:4  30238:24 30248:3  30296:15  <b>suggest</b> 30114:22  30122:6 30161:6  30169:8 30181:9  30287:11,11  30291:22  <b>suggested</b> 30115:13  30128:10 30154:13  30154:16,19  30160:13 30188:18  30202:15 30217:2  30227:15 30268:6  30276:14 30277:7  30288:17,17 30304:6  <b>suggesting</b> 30115:17  30158:8 30224:16  30225:6 30250:23  30275:14 30285:5  <b>suggestion</b> 30128:7  30170:23 30178:7  30184:1 30234:15  30235:5 30286:4  30289:2,19  <b>suggests</b> 30169:13  30228:13  <b>suitably</b> 30252:12  <b>summarise</b> 30139:20  <b>summarised</b> 30130:2  <b>summary</b> 30175:22  30193:5 30255:16  30261:7  <b>Sunday</b> 30185:13  <b>superintendent</b>  30178:20 30179:7  30180:13  <b>supervisors</b> 30198:10  <b>supplementary</b>  30191:21  <b>supplemented</b>  30281:11</p>	<p><b>support</b> 30131:16  30137:7,16 30199:24  30200:1,16 30210:16  30216:3,6,16  30240:22 30257:14  30258:21  <b>supported</b> 30131:4  30218:2 30276:16  <b>supporting</b> 30199:10  30199:22  <b>suppose</b> 30124:1  30217:24 30223:15  30240:17  <b>supposed</b> 30170:15  30194:18 30214:15  30219:13,14 30221:7  30275:16  <b>suppressing</b> 30301:15  <b>sure</b> 30115:25  30120:10 30136:1,21  30139:4 30157:1,14  30163:6,10 30167:4  30169:5 30170:16  30174:24 30176:8  30182:13,22  30183:23 30184:6  30190:22 30194:22  30204:11 30219:9,25  30223:14 30236:23  30256:6 30284:6  30287:11 30288:11  30292:2 30300:18  30302:24  <b>Surely</b> 30225:16  <b>surprised</b> 30281:1,14  30281:16  <b>surprising</b> 30264:2  <b>surrounded</b> 30193:1  <b>surrounding</b> 30203:11  <b>surveillance</b> 30172:9  30194:22 30195:9  30196:4  <b>survive</b> 30116:25  <b>surviving</b> 30272:20  <b>survivors</b> 30217:5  <b>suspect</b> 30217:8  30270:12  <b>suspicion</b> 30236:8,9  <b>sympathy</b> 30231:19  <b>s.u.o</b> 30167:2</p> <hr/> <p style="text-align: center;"><b>T</b></p> <p><b>table</b> 30128:2 30132:18  30138:17 30163:19  30170:18 30285:12  <b>tabled</b> 30146:5  <b>tabling</b> 30122:18  <b>tail</b> 30223:22  <b>take</b> 30116:22 30117:5  30120:20 30125:10  30126:9 30128:17  30141:9,9 30145:8  30147:16 30149:24  30162:15,19  30164:22 30166:13  30166:19,19</p>
--	---	---	--	---

<p>30183:24 30186:2 30192:18 30194:21 30196:23,25 30197:5 30198:22 30199:13 30207:25 30209:8,10 30210:22,25 30211:3 30211:6 30215:19 30223:16,23 30227:5 30234:9 30239:17 30240:14,17 30247:20 30254:20 30259:10 30268:3,20 30268:22 30269:6 30270:25 30276:7 30282:2,3,7 30285:6 30286:3 30287:19 30288:14,19 30292:23 30302:8 30304:18 <b>taken</b> 30123:6 30131:12,20 30164:2 30169:10 30170:24 30183:18 30184:4 30186:2 30195:20 30196:13 30205:10 30209:3 30224:14 <b>takes</b> 30147:3 30241:12 <b>talk</b> 30115:21 30133:23 30140:11 30153:5,9 30153:17 30158:23 30189:25 30288:18 <b>talked</b> 30197:18 <b>talking</b> 30115:9 30119:20 30133:24 30136:14 30190:14 30198:17 30206:16 30215:10 30232:3 30237:7 30273:16 <b>talks</b> 30128:1 30233:11 <b>Tansy</b> 30128:24 30175:21 <b>Tansy's</b> 30129:15 30174:4 30175:12,13 <b>tardy</b> 30146:2,5 <b>task</b> 30243:14 <b>tax</b> 30116:1 <b>taxi</b> 30254:3 <b>taxman</b> 30115:25 <b>taxpayer</b> 30237:23 <b>tea</b> 30113:10 30115:3 30115:18,24 30117:10 30166:24 30196:23 30198:22 30286:3 30288:18,19 <b>team</b> 30126:3 30151:19 30208:13,24 30229:25 30260:13 30284:1 30290:8 <b>teams</b> 30207:19 30284:20 <b>telephoned</b> 30185:13 <b>telephonic</b> 30218:15 <b>television</b> 30243:8 <b>tell</b> 30119:19 30121:6 30124:5 30131:16 30149:5 30163:12</p>	<p>30182:7 30184:12 30186:16 30195:10 30204:23 30220:24 30229:13,14,18 30263:2 30280:17 30293:22 30295:13 30301:20 30304:7 <b>telling</b> 30210:14 30222:24 30231:8,19 30266:9 <b>tells</b> 30288:25 <b>tempted</b> 30173:6 <b>tendered</b> 30304:5 <b>tensions</b> 30151:15 <b>tents</b> 30172:24 <b>terminated</b> 30259:20 <b>termination</b> 30256:10 <b>terms</b> 30133:3 30139:3 30161:3 30198:6 30257:7 30269:4 30273:15 30275:6,23 30280:2 <b>tested</b> 30218:7 30236:25 <b>testified</b> 30205:24 <b>testifies</b> 30230:15 <b>testify</b> 30182:17,22 30189:19 30205:12 30207:14 30210:10 30210:10 30284:16 30289:16 30303:11 <b>testifying</b> 30182:19 30275:8 30289:8 <b>testimony</b> 30159:13 30218:5 30274:18,19 30275:11,22 <b>testing</b> 30274:22 <b>thank</b> 30114:18 30117:11,16 30123:8 30129:17 30144:2,3 30145:1,3 30148:10 30166:12 30173:16 30173:18,20 30174:13 30176:7,14 30178:5,18 30184:23 30185:9 30190:25 30200:6 30202:6 30216:2,4 30223:11 30226:2,2 30232:7,8 30232:21 30234:22 30238:22 30239:16 30241:16 30256:3 30258:16 30261:12 30261:13,15 30262:10 30263:23 30267:22,24 30290:13,17 30292:4 30292:5,6 30295:18 30295:19 30297:10 30297:20 30298:4 30301:6,9 30304:17 <b>thanks</b> 30202:10 30205:8 30246:14 30298:5 30301:10 <b>that'll</b> 30199:15 <b>Theft</b> 30280:9</p>	<p><b>thereof</b> 30208:23 <b>there'd</b> 30273:22 <b>there's</b> 30113:22 30126:25 30128:16 30133:22 30154:20 30158:19 30168:17 30169:13 30173:25 30182:19 30183:21 30195:12 30198:7,9 30198:11 30205:1 30206:13,14 30207:15 30218:23 30219:11,19 30220:4 30233:23 30237:2 30238:8,8,12 30258:2 30258:8 30261:9 30265:23 30267:14 30273:1,19 30283:7 30291:1 30292:22 <b>they'd</b> 30131:19 30205:25 <b>they'll</b> 30204:21 30277:15 30295:9 <b>they're</b> 30117:7 30119:3,11 30131:18 30149:15 30170:17 30190:18 30215:12 30227:22 30279:16 30284:23 30287:9 <b>They've</b> 30279:14 <b>thing</b> 30122:16 30139:21 30147:1 30151:22 30159:16 30165:7 30172:21 30175:8 30195:18 30206:24 30232:10 30248:25 30296:7 <b>things</b> 30112:5,11 30143:24 30145:12 30145:15 30164:24 30174:3,8 30175:16 30176:23 30188:20 30198:14 30209:25 30210:23 30218:8 30231:13 30235:4 30238:16 30242:17 30243:2 30244:10,11 30247:2 30254:23 30257:1 30258:17 30265:10 30268:11 30269:12 30270:11 30271:10 30273:3 30286:25 30299:11 30299:12 <b>thinking</b> 30198:5,15 30222:10 30270:23 30278:20 <b>thinks</b> 30114:2 30238:9 30238:13 30248:2 <b>third</b> 30173:15 30296:7 <b>thorough</b> 30217:13 30256:20,21 30257:18 <b>thoroughly</b> 30204:22 30247:24 30248:21 <b>thought</b> 30124:1,5,15</p>	<p>30136:16,18 30167:5 30171:25 30190:11 30198:21 30200:23 30212:1 30213:14 30214:6 30216:5 30264:16 30286:25 30299:6 30300:12 <b>thoughts</b> 30117:6 30240:19 <b>thousand</b> 30154:17,19 30296:10 30301:17 <b>three</b> 30167:4,5 30168:24 30187:7 30205:22 30219:23 30228:2 30239:23 30268:17 30269:9 30271:4 30273:12 30276:9,10 30279:9 30302:15,15 <b>three-quarters</b> 30240:18 <b>throw</b> 30153:6 30276:19 <b>thrust</b> 30120:23 <b>Thupe</b> 30208:12,14 30285:19 <b>Thursday</b> 30120:11,12 30231:24 30250:7,21 30277:11 30281:22 30283:2 30287:18 30288:5 30289:10 30290:12 <b>tickets</b> 30252:4 <b>tight</b> 30204:10,12,13 <b>till</b> 30240:17 30241:12 30262:19 <b>times</b> 30130:3 30275:12 30298:14 <b>timetable</b> 30275:7 <b>tired</b> 30229:20 <b>today</b> 30173:23 30174:15 30203:8 30211:12 30225:22 30226:5 30270:9,12 30275:23 30288:10 30292:1 30296:6 <b>told</b> 30114:10 30118:2 30119:12 30122:1,5,6 30123:15,21 30168:23 30191:14 30203:24 30204:2,4 30206:9 30218:16 30262:25 30266:22 30280:19 30302:16 <b>tomorrow</b> 30174:20 30206:22 30211:13 30220:18 30289:3 30302:5 30304:19 <b>top</b> 30178:2,11,12 <b>topic</b> 30129:13 30188:2 30197:4 30288:25 30289:1 <b>topics</b> 30112:22 30216:7 30277:14 <b>torture</b> 30218:18,25 <b>total</b> 30227:16 30269:2</p>	<p>30270:1 30281:15 <b>touch</b> 30251:24 <b>touched</b> 30173:22 <b>touching</b> 30188:13 30220:16 <b>tradition</b> 30257:18 <b>traditional</b> 30280:13 <b>tragedy</b> 30157:9 30158:24 30217:4 <b>tragic</b> 30157:4 30159:12 <b>training</b> 30177:9 30179:13 30180:14 30180:16 30181:4 <b>transcript</b> 30120:15 <b>translate</b> 30211:7 30287:6 <b>translates</b> 30268:16 <b>translating</b> 30250:15 <b>translations</b> 30277:17 <b>transparency</b> 30291:2 <b>transpired</b> 30144:7 30203:8 <b>travelling</b> 30261:24 30262:25 30266:8 <b>traversing</b> 30242:1 <b>treat</b> 30274:25 <b>treated</b> 30274:13 <b>trial</b> 30238:16 30260:22 30261:4 30298:8 <b>triplicates</b> 30279:24,25 <b>trouble</b> 30164:7 30264:19 <b>true</b> 30142:22 30143:14 30153:2 30218:4 <b>trump</b> 30152:12,14 30153:6,14 <b>truncated</b> 30237:25 <b>trust</b> 30134:9,10,12 30140:4,4 30290:24 <b>truth</b> 30140:8 30147:11 30170:3 30237:17 30242:18 30243:2 <b>truthfully</b> 30298:8 <b>try</b> 30121:18 30145:18 30152:4 30160:22 30161:21 30178:4 30188:17 30193:3 30205:3 30239:17 30288:4 <b>trying</b> 30136:25 30151:19 30173:12 30180:5 30190:17 30194:1 30231:17 30247:5 <b>Tuesday</b> 30117:19 30123:14,16 30126:10 30134:2 30135:14 30136:6 30249:9,11 30250:14 30281:21 30283:14 30283:21 30286:13 30286:18 30287:1 30289:9 30290:3</p>
--	---	---	--	--

<p>30293:25 30297:19 30302:17 <b>Tuesday/Wednesday</b> 30282:25 30283:1 <b>turn</b> 30176:22 30274:19 30284:17 <b>turned</b> 30114:14 30190:14 30200:12 30200:13,20 30201:15 30271:19 <b>turns</b> 30218:24 <b>Twala</b> 30272:5 <b>twice</b> 30264:8 <b>twist</b> 30234:3 <b>two</b> 30112:22 30122:9 30124:21 30127:20 30144:9 30151:15,20 30152:5 30155:18 30161:23 30167:4,4 30168:6 30170:6,7,17 30175:11 30185:22 30206:4 30207:3,17 30210:15 30211:18 30214:10 30215:4,15 30216:7,7 30218:8 30219:8 30220:19,25 30228:4 30232:25 30237:21 30239:18 30241:5,9 30242:24 30254:17,20 30259:2 30264:4,4 30268:15 30268:22 30269:6,6 30270:2 30274:9 30276:7,7,8 30279:7 30280:1 30285:14 30288:2 30299:2 30302:12 <b>two-third</b> 30277:21 <b>typed</b> 30178:8</p>	<p>30210:15 30211:15 30213:7 30217:19 30219:2 30222:9 30223:7 30224:13 30225:11 30226:13 30226:25 30228:6 30231:2,4 30234:17 30236:5 30238:24 30239:2,4,4,11,24 30240:9 30242:25 30246:3,11 30248:8 30248:10 30249:18 30249:24 30253:7,25 30254:12 30258:7 30260:19 30263:16 30267:18,20,22 30268:10,21 30276:23 30284:5 30286:25 30291:18 30294:18 30299:12 30300:10 <b>understanding</b> 30118:1 30139:15 30151:1 30186:12 30191:12 30192:2 30212:1 30235:19 30244:13 30250:8 30265:4 30266:24 30300:11 <b>understands</b> 30257:11 30268:5 <b>understood</b> 30117:25 30118:1 30154:12 30158:16 30171:7 30189:7 30252:17 30297:21 <b>undertake</b> 30191:20 30224:24 <b>undertaking</b> 30264:7 30292:7 <b>undertook</b> 30203:19 <b>underwent</b> 30298:18 <b>undesirable</b> 30285:8 <b>uneducated</b> 30221:4 <b>unfair</b> 30153:16,21 30154:1 <b>unfolded</b> 30203:2 <b>unfortunate</b> 30151:4 30257:5 30304:2 <b>unfortunately</b> 30180:22 30208:25 30209:25 30212:14 30214:6 30228:19 30263:7 30292:2 30294:25 <b>unhappiness</b> 30194:13 <b>unhappy</b> 30292:25 <b>uninterrupted</b> 30255:23 <b>union</b> 30128:13 30133:6,9,11,16,17 30142:16 30144:9,14 30144:19 30166:4 30193:8 <b>unions</b> 30144:25 30151:7,15,20 <b>unique</b> 30243:16</p>	<p><b>unit</b> 30228:7 <b>united</b> 30151:9 <b>unjustifiable</b> 30236:11 <b>unlawful</b> 30280:4 <b>unprecedented</b> 30162:5,14 <b>unprepared</b> 30240:21 <b>unprotected</b> 30153:20 30161:13 30162:7 30203:3 <b>unrealistic</b> 30257:12 <b>unresolved</b> 30276:20 <b>unrest</b> 30156:5 30163:4 30197:7,12,23 30198:1,18 <b>unsatisfactory</b> 30146:14 30192:11 30247:2 <b>unused</b> 30248:5 <b>un-ideal</b> 30254:23 <b>upgrading</b> 30138:21 <b>uphold</b> 30150:17 <b>urgency</b> 30146:11,21 30147:23 30151:11 30291:22 <b>urgent</b> 30146:16,18 30150:20,22 30151:3 <b>urgently</b> 30241:23 <b>urging</b> 30279:11 <b>use</b> 30146:17 30152:12 30170:12,16 30172:9 30172:20 30186:7 30240:2 30248:15 30250:5 30264:16 30269:13 30281:21 30281:22 30282:16 30288:4 <b>useful</b> 30260:22 30275:18 <b>uses</b> 30232:14 <b>usual</b> 30251:23 <b>utilised</b> 30208:1 30247:7,8 30248:6 30258:21 30261:7,7 30261:11 <b>utterly</b> 30273:25 30274:4</p>	<p><b>vice</b> 30182:25 30300:22 <b>vice-president</b> 30194:17 <b>victim</b> 30271:23 <b>victims</b> 30210:6 30217:4 <b>video</b> 30260:15,20,22 30261:5 30299:20,20 30299:21 30300:13 30300:21,22 <b>videographers</b> 30243:18 <b>videos</b> 30243:22 30299:11,13 <b>view</b> 30113:12 30122:23 30173:8,12 30192:1 30216:12 30227:5 30233:19 30237:12,13 30238:14 30240:25 30247:12 30254:16 30268:3,4 30275:22 30282:15 30286:24 30295:24 30303:9 <b>views</b> 30191:20 30243:9 <b>vigilance</b> 30195:7 <b>vigilant</b> 30194:21 <b>violence</b> 30141:5 30161:13,15 30162:6 30173:6 30193:6,11 30193:18 30197:8 <b>violent</b> 30134:25 30135:8,14,17,18 30140:6 30271:19 <b>virtually</b> 30170:21 <b>visit</b> 30120:17 <b>voice</b> 30169:16 <b>volley</b> 30243:4 <b>volte</b> 30267:11 <b>volte-face</b> 30264:12 <b>volume</b> 30114:14 30296:11</p>	<p>30153:2 30168:22 30174:3 30189:4 30194:20 30244:9 30286:16 30290:14 <b>wanting</b> 30142:25 30185:17 <b>wants</b> 30113:20 30159:23 30161:17 30240:22,24 30247:16 30256:7 30289:22,25 <b>war</b> 30250:25 30251:2 <b>Warrant</b> 30258:23 30271:6,7 <b>Warrant-Officer</b> 30245:20 <b>wasn't</b> 30122:12 30125:2 30144:15,16 30155:15 30161:20 30180:20 30222:23 30244:23 30299:23 <b>wasn't</b> 30136:24,24 30138:4,18 30167:23 30167:24 30198:2,3 30198:20 30199:5 30225:16 <b>waste</b> 30237:20 30254:11 30278:9 <b>wasted</b> 30228:15 30256:16,17 30257:5 30270:5 30276:10,23 <b>water</b> 30158:19 30188:16 30192:10 30192:12 30237:4,8 <b>way</b> 30128:7 30141:9 30153:10 30159:12 30170:22 30177:11 30178:23 30185:5,5 30192:5 30193:5 30194:1 30198:14 30218:23 30219:11 30221:13 30239:20 30247:2,8,9 30251:14 30252:15 30260:6 30262:18 30269:1 30270:11 30279:12 30286:18,23 30289:18 30292:11 30295:24 <b>ways</b> 30256:20 30291:3 30296:16 <b>weapons</b> 30141:5 30161:24 30179:24 <b>weather</b> 30238:18 <b>Wednesday</b> 30212:5 30249:11 30250:14 30281:22 30283:14 30283:21 30286:14 30287:21 30289:9 30290:4 30302:17 <b>week</b> 30112:9 30188:11 30200:5 30201:6 30202:5,19,20 30205:11 30206:11 30206:19 30207:2 30231:24,25 30240:6</p>
<p style="text-align: center;"><b>U</b></p> <p><b>ultimate</b> 30201:17 <b>ultimately</b> 30138:12 30257:5 30265:5 <b>unable</b> 30273:13 <b>unavoidable</b> 30275:2 <b>unbearable</b> 30208:16 <b>uncertain</b> 30251:16 <b>uncomfortable</b> 30255:10 <b>underground</b> 30128:11 30198:7 <b>underlies</b> 30114:23 <b>underline</b> 30145:14 30181:1 <b>understand</b> 30116:1 30118:4,12 30119:5 30121:25 30133:5 30143:1 30154:14 30155:13 30158:3,11 30158:18 30166:16 30167:3 30179:13 30181:22 30186:2 30199:19 30200:19 30203:1 30204:9,22 30206:4 30208:23</p>	<p style="text-align: center;"><b>V</b></p> <p><b>validity</b> 30189:2,15 <b>validly</b> 30260:7 <b>value</b> 30274:20 30277:24 <b>Van</b> 30270:19,24,25 <b>variations</b> 30223:19 <b>various</b> 30144:7 30148:7 30164:24 30247:15,25 <b>vehicles</b> 30178:24 30179:2,8 <b>ventilation</b> 30209:23 <b>verbal</b> 30184:8 <b>Vermaak</b> 30285:22 <b>Vermaak's</b> 30243:22 <b>versa</b> 30300:22 <b>versions</b> 30236:25</p>	<p style="text-align: center;"><b>W</b></p> <p><b>wage</b> 30125:11,23 30126:2,15 30127:18 30129:22 30130:2,3,6 30130:13 30132:13 30157:19 30158:12 30161:17 30165:7 <b>wages</b> 30130:20 30133:13,16,19 30145:9 30156:3 30163:2,6,10,18,20 30164:3,18 30165:2 30197:22 <b>wait</b> 30117:9 <b>waiting</b> 30112:3 30142:3 30181:19,23 30199:5 30212:5 30213:9 30227:17 <b>waive</b> 30203:22 <b>wanted</b> 30114:19 30123:15 30125:24 30142:11 30143:22</p>	<p style="text-align: center;"><b>W</b></p>	<p style="text-align: center;"><b>W</b></p>

<p>30241:18 30242:5 30246:17 30247:1,6 30248:5,15 30249:8 30249:11,18 30250:5 30252:16 30253:12 30254:10,11,18 30261:11 30262:3,6,9 30266:6 30267:12,14 30268:13 30269:2 30271:13 30273:12 30275:5,6,8,9,10,12 30275:13,14,16 30276:6 30278:13,18 30279:4,6 30282:17 30284:16 30287:2,4,7 30287:13 30288:4 30289:16 30291:7 30293:23 30297:18 30297:25 30303:11 <b>weekend</b> 30250:10 30255:6 30286:22 30302:3,6 <b>weekends</b> 30207:23 30215:24 <b>weeks</b> 30226:14 30279:11 30282:11 30284:15 <b>week's</b> 30279:4 <b>weigh</b> 30146:24 <b>welcome</b> 30164:2 <b>wellbeing</b> 30274:1 <b>well-known</b> 30223:1 <b>well-posed</b> 30236:23 <b>went</b> 30118:17,19 30119:20 30121:12 30124:22 30134:1 30136:6 30155:18 30156:1 30159:7 30181:5 30222:5 30280:22,23 <b>weren't</b> 30122:19 30135:21 30136:21 30150:11 30159:6 30165:6,21 30167:4 30193:16 30243:19 30244:1 30275:15 <b>Wesley</b> 30166:15 30187:5,16,22 <b>West</b> 30212:16 30224:4 <b>Western</b> 30133:1 <b>wet</b> 30147:15 <b>we'd</b> 30135:3,9 30240:17 <b>we'll</b> 30115:23 30116:19 30161:19 30166:12,20 30196:24 30198:22 30198:23 30199:8 30200:4 30203:24 30204:12,15 30207:5 30236:15 30239:17 30241:12 30246:19 30247:18 30265:8,9 30270:25 30287:9 30288:19 30296:4 30297:24</p>	<p><b>we're</b> 30112:7,8 30130:21 30136:14 30163:17 30190:17 30199:7 30204:11 30215:10 30227:17 30229:10 30252:10 30273:16 30279:4 30281:6 30285:16 30287:8 30288:15,24 <b>we've</b> 30112:4 30113:25 30116:18 30131:16 30133:21 30134:9 30178:6,13 30181:23 30187:9 30188:16 30190:1,21 30199:15 30202:8 30206:17 30214:10 30215:11 30225:1 30228:4 30230:1 30237:22 30244:24 30246:18 30261:8 30268:23 30270:9 30278:13 30294:14 30302:4 30303:4 <b>whatsoever</b> 30280:3 30281:6 <b>what's</b> 30146:25 30171:1 30213:16 30258:9 30289:19 <b>whilst</b> 30128:23 30153:3 30208:7,14 30256:6,7 30257:10 <b>White</b> 30261:22 30262:5,12 30265:22 30267:13 <b>White's</b> 30262:20 <b>whoever's</b> 30223:7 <b>who's</b> 30212:17 <b>who've</b> 30112:3 30214:16 <b>widely</b> 30170:3 <b>wildest</b> 30159:13 <b>willy-nilly</b> 30215:23 <b>window</b> 30293:16 <b>wish</b> 30112:13 30113:24 30188:18 30201:20,21,25 30202:7 30214:18 30215:17 30230:25 30258:13 30264:18 30283:9 30289:4 30294:2,7 30295:15 30297:21 30299:9,10 30300:20 30304:12 <b>wished</b> 30144:4 <b>wishes</b> 30216:2 30241:3 30290:19 30294:22 <b>withdrawing</b> 30153:14 30255:24 30264:3 <b>withdrawn</b> 30264:8 <b>withhold</b> 30152:13,15 30152:16 <b>witness</b> 30112:15 30113:21 30115:22 30124:5 30143:17,20</p>	<p>30149:23 30154:23 30157:24 30158:2,19 30167:5 30170:18 30188:5,19,23 30189:24 30190:4 30202:24 30204:23 30205:14 30206:12 30208:22 30215:20 30217:1 30221:4 30223:3 30227:24 30228:13,22 30244:7 30244:8,20,24 30245:3 30246:10 30247:3 30255:21 30258:25 30260:11 30264:19 30269:6 30271:4 30274:5 30276:4,5,14 30277:22,23 30279:8 30283:13 30284:9 30285:3,9 30297:16 30298:6 30302:13,24 30303:6 30304:5 <b>witnesses</b> 30113:14 30188:12 30189:1,25 30190:17,22 30191:15 30202:22 30203:5 30205:15,18 30205:22,22,23 30206:3,7,13,16 30207:7,10,13,16 30208:3,5,8 30209:17 30209:18 30217:21 30218:1 30221:8 30225:21 30231:5 30232:24 30234:1 30245:10 30248:7 30252:6 30254:7 30261:8 30269:4 30270:3,11 30271:5,5 30275:5,9,14 30276:13 30279:3,5 30285:16,19,25 30293:8 30303:8,14 30303:24 <b>witness's</b> 30172:2 <b>wks</b> 30139:18 <b>woman</b> 30147:25 <b>won't</b> 30126:8 30143:3 30143:9 30149:19 30163:19 30166:19 30189:13 30211:16 30211:17 30223:21 30246:5 30298:16,19 <b>word</b> 30231:16 30245:13,21 30264:16 30292:25 <b>words</b> 30135:22 30137:5 30166:7 30248:8 30255:8 30262:17 30287:12 <b>work</b> 30125:12 30136:12 30138:25 30141:6 30147:15 30153:4,7,9,16,22 30182:9 30184:5</p>	<p>30187:25 30188:17 30191:8 30198:8,8,8 30205:4 30210:2 30235:1 30260:15 30261:5 30269:5 30271:9 30273:9 30279:8 30297:3 <b>workable</b> 30260:17,23 <b>worked</b> 30169:9 30247:5 <b>workers</b> 30119:24 30120:4,6,7 30131:2 30132:17 30139:5 30145:5 30146:3,12 30148:14 30150:22 30151:25 30152:11 30152:15 30153:6,10 30154:13 30157:7 30158:22 30159:5,19 30160:2,11 30164:17 30196:14 <b>working</b> 30222:6 30228:23,25 30230:1 30280:13 <b>workplace</b> 30132:22,25 30133:2 <b>works</b> 30231:7 <b>world</b> 30252:9,10 30254:23 30257:21 30285:17 <b>world-renowned</b> 30264:13 <b>worrying</b> 30268:4 <b>worth</b> 30189:4 30238:7 <b>wouldn't</b> 30125:15 30146:4 30149:15 30153:21 30164:19 30250:9,24 30260:6 <b>wouldn't</b> 30131:4 30206:18 30230:25 30239:8 30275:15 30276:2 <b>would've</b> 30196:20 <b>wrestle</b> 30288:1 <b>written</b> 30127:20 30185:25 30282:22 <b>wrong</b> 30114:4 30117:25 30121:9 30124:18 30161:8 30171:15 30173:1 30186:14 30229:11 30245:23 30249:23 30296:1 30299:1 <b>wrote</b> 30154:23 30162:17 30197:15</p>	<p>30259:1 30260:13 30262:21 30278:7</p> <hr/> <p style="text-align: center;"><b>Y</b></p> <p><b>Y</b> 30199:14,15 30267:16 <b>year</b> 30170:14 30225:2 30226:11 30228:25 <b>years</b> 30162:8 30215:15 <b>yesterday</b> 30213:13 30215:5 30217:10 30241:21 30261:25 30284:15 30288:10 <b>yield</b> 30293:11 <b>you'd</b> 30115:12 30167:5 30213:7 30262:22 30287:22 <b>you'll</b> 30117:19,25 30127:22 30207:9 30218:18 30221:25 30253:2 30281:12 <b>you're</b> 30114:4 30115:9 30117:13,14 30143:16 30149:14 30166:25 30180:9 30185:6 30188:13,24 30194:25 30199:6 30201:1,2 30210:14 30210:19,25 30219:13,13 30225:6 30234:13 30240:2 30242:15 30248:15 30249:16 30250:20 30250:23 30253:24 30255:14,15 30257:8 30258:13 30265:4,20 30266:9 30267:6,7,20 30277:25 30287:12 30293:7 30295:7 <b>you've</b> 30153:17 30162:19 30167:4 30174:11 30175:12 30185:5 30189:18 30190:20 30201:14 30206:17 30219:4,7 30222:17 30229:6,16 30229:18 30231:1,22 30231:25 30232:4 30234:10 30238:21 30238:23 30240:1 30248:20 30257:9 30262:25 30285:1 30288:13,17 30290:20 30295:11 30301:1 <b>YYY</b> 30199:15</p> <hr/> <p style="text-align: center;"><b>Z</b></p> <p><b>Zuma</b> 30235:13</p> <hr/> <p style="text-align: center;"><b>0</b></p> <p><b>000</b> 30154:25 30280:22 <b>09:18</b> 30112:2 <b>09:38</b> 30126:18 <b>09:57</b> 30142:23</p>
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<b>1</b>	<p>30172:17 30211:15                  30211:16 30232:1                  30272:9 30278:12                  30287:8  <b>16:00</b> 30301:22  <b>17</b> 30222:1 30243:5  <b>18</b> 30157:20 30269:13                  30269:17,24  <b>18th</b> 30158:14                  30211:14,16,17                  30287:8,9  <b>19th</b> 30199:12                  30201:19 30202:12                  30206:23 30210:17                  30211:9,18,19                  30220:18 30223:14                  30223:16 30227:17                  30228:14 30231:24                  30232:13 30235:4,6,6                  30235:8 30240:6                  30250:21 30254:18                  30261:19</p>	<p>30265:12 30266:5,23                  30267:12  <b>2362</b> 30120:15  <b>24</b> 30194:15  <b>24th</b> 30194:12 30280:4  <b>26</b> 30112:16 30129:19                  30280:11  <b>26th</b> 30280:10  <b>27th</b> 30154:23                  30162:17 30197:17</p>	<b>8</b>		
<p><b>1</b> 30243:4,6 30303:7  <b>10</b> 30116:22 30175:20                  30180:7 30198:23                  30231:11  <b>10th</b> 30229:24                  30257:22 30271:21  <b>10:17</b> 30154:7  <b>100</b> 30176:5  <b>1034</b> 30215:12                  30221:19  <b>11</b> 30116:2 30119:7                  30175:21 30213:22                  30214:3  <b>11th</b> 30271:22,24,25  <b>11:00</b> 30166:23  <b>11:20</b> 30179:20  <b>11:40</b> 30193:14  <b>12</b> 30116:2,2,20                  30118:2 30121:19                  30122:16 30123:20                  30125:2,3 30159:6                  30176:19 30177:5                  30178:17 30184:17                  30184:20,20                  30198:23 30199:4                  30281:7,7  <b>12th</b> 30183:8 30185:6                  30185:12 30271:24                  30271:25 30272:1,3  <b>12:16</b> 30199:2  <b>12:36</b> 30211:6  <b>12:55</b> 30224:25  <b>120</b> 30264:20  <b>13</b> 30270:7,10,18,22                  30271:8 30276:9  <b>13th</b> 30118:22                  30122:15 30222:2                  30272:5 30278:12  <b>13:15</b> 30240:5  <b>14</b> 30179:20 30203:22                  30212:4,13 30222:18                  30279:25 30280:1  <b>14th</b> 30167:9 30203:24                  30272:5  <b>14-day</b> 30222:11  <b>14:02</b> 30241:14  <b>14:22</b> 30254:2  <b>14:42</b> 30266:9  <b>15</b> 30215:8 30240:15                  30279:20,22  <b>15th</b> 30123:6 30167:9                  30272:8,13  <b>15:02</b> 30278:25  <b>15:40</b> 30288:21  <b>150</b> 30281:14,17                  30293:1,2 30301:22                  30301:25  <b>16</b> 30268:16 30271:13  <b>16th</b> 30119:21                  30120:12,12,17                  30123:6,7,8,11                  30154:5 30159:3                  30167:9 30169:11,14                  30169:19 30172:5,14</p>	<b>2</b>	<p><b>2</b> 30116:25 30117:1,9                  30127:22 30228:2,3                  30228:11 30233:11                  30240:17 30241:12                  30243:16,21                  30245:11 30272:20  <b>20</b> 30182:8 30191:18                  30214:9 30215:7                  30231:11 30279:22                  30279:23,24  <b>20th</b> 30254:18  <b>20%</b> 30156:6,13                  30163:6  <b>2011</b> 30125:17,23                  30130:13  <b>2012</b> 30125:17 30132:1                  30145:6 30154:23                  30157:20 30158:14                  30162:17 30176:19                  30187:15 30193:2                  30194:12 30271:15                  30280:11  <b>2013</b> 30147:13                  30149:21 30229:25  <b>2014</b> 30112:1 30202:13                  30256:10  <b>204</b> 30224:7 30298:6  <b>206</b> 30280:5,5,8,11  <b>208</b> 30280:3,7,8                  30298:14  <b>21</b> 30182:8  <b>21st</b> 30145:5,5,21  <b>22</b> 30120:15  <b>23rd</b> 30200:25 30201:6                  30201:7 30202:5                  30206:19 30234:16                  30241:1 30252:2,16                  30252:21 30254:17                  30255:25 30261:11                  30261:20 30262:4,9                  30262:18 30264:6,10                  30264:23 30265:11</p>	<b>3</b>	<p><b>3%</b> 30138:22  <b>30</b> 30129:25  <b>300</b> 30221:6  <b>31</b> 30268:12 30269:10                  30269:10,13                  30273:13  <b>31st</b> 30194:3 30216:13                  30226:16,17 30227:6                  30227:7,13 30235:13                  30238:10,13,19,19                  30239:6,9 30256:10                  30257:11 30262:15                  30268:14 30297:8  <b>32</b> 30130:9  <b>33</b> 30242:10  <b>34</b> 30145:22 30154:1,2                  30268:13,13 30297:1  <b>36</b> 30281:4</p>	<b>9</b>
		<b>4</b>	<p><b>4</b> 30239:23 30289:2                  30293:3,5  <b>4th</b> 30241:21  <b>4.5</b> 30194:10  <b>400</b> 30176:4  <b>448</b> 30154:21 30162:18  <b>449</b> 30162:22 30197:14  <b>45th</b> 30271:23</p>		
		<b>5</b>	<p><b>5</b> 30112:1 30176:4,5  <b>5th</b> 30211:13  <b>5:45</b> 30280:12  <b>50</b> 30145:23 30150:20  <b>500</b> 30117:21 30118:2                  30119:3,7 30120:2                  30121:3,5,19                  30122:16 30123:20                  30125:2,3 30138:3                  30159:6 30194:6</p>		
		<b>6</b>	<p><b>6</b> 30120:16  <b>600</b> 30222:6</p>		
		<b>7</b>	<p><b>7</b> 30127:23 30129:19                  30272:12  <b>7th</b> 30211:14  <b>74</b> 30119:22  <b>75</b> 30119:18,24  <b>750</b> 30155:8  <b>76</b> 30145:22</p>		