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 243 11 JUNE 2014 PAGES 30619 TO 30782



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1	[PROCEEDINGS ON 11 JUNE 2014]	1	we arrived mostly at the same time.
2	[09:18] CHAIRPERSON: The Commission resumes	2	MR CHASKALSON SC: And that was after the
3	somewhat later than anticipated because I understand Adv	3	shooting incident with the charging strikers east of the
4	Baloyi was involved in a rather awkward and unpleasant	4	koppie?
5	traffic jam and we're very pleased to see that she's	5	COLONEL MODIBA: That's correct,
6	finally arrived. Colonel, you're still under oath.	6	Chairperson.
7	KAIZER NTLOU MOBIDA: s.u.o.	7	MR CHASKALSON SC: Did you say anything
8	CHAIRPERSON: Mr Chaskalson.	8	to General Naidoo?
9	CROSS-EXAMINATION BY MR CHASKALSON SC (CONTD.):	9	COLONEL MODIBA: I didn't say anything.
10	Thank you, Chairperson. Colonel, I must begin by	10	MR CHASKALSON SC: Can I take you to what
11	correcting something I put to you yesterday. You'll recall	11	General Naidoo said about this, and it's in the transcript
12	that I asked you if you knew Constable Mabasa and I	12	of the 4th of March, page 23809, if we get 23809 of 4 March,
13 14	mentioned that his cartridges had been found in the area	13	he was talking about approaching NIU members in that area.
14 15	from which NIU members were shooting. You said you didn't recognise him. In fact I've given you the wrong name. I	14 15	"Now the members you approached, I presume you're talking
15	read the reference as 14.5, which is Constable Mabasa. The	15	about the NIU members?" "That's correct, Chair." "Colonel Modiba?" "I can't specifically remember him mentioning
17	correct reference is 14.6, that's Constable Poshwa. Do you	17	anything specific. As I indicated, I arrived by his side
18	recognise Constable Poshwa as a member of the NIU?	18	and I discussed, I spoke to him and his members. So who
19	COLONEL MODIBA: That's correct,	19	said a few strikers I can't really specifically indicate,
20	Chairperson. Poshwa is stationed at NIU.	20	but it was the members that I arrived at who were trying to
21	MR CHASKALSON SC: I apologise for the	21	indicate to me what happened, yes." I said to him, "But
22	confusion around Mabasa. I want to move now to paragraph	22	presumably you'd have gone to the commander to get a report
23	13 of your December 2013 statement, ZZZ4, if we could call	23	on what had taken place." "That's correct, Chair." "And
24	that up. We've gone past it, paragraph 13. And in the	24	that would have been Colonel Modiba or Colonel Nkebe?" "It
25	first part of this paragraph you describe the confrontation	25	was Colonel Modiba who I arrived at and he never indicated
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	Page 30620 with the charging strikers. I want to pick it up about	1	Page 30622
1 2	with the charging strikers. I want to pick it up about eight lines down at the end of the line and it's after the	1 2	a crowd. He said some strikers, and as I said his member were also alongside him saying 'Yes, there are a few
2	confrontation. "I moved in the direction of the big rock	2	strikers that charged us and we had to defend ourselves."
4	in front. Some members swept bushes and rock to right. I	4	That's where the word "few" comes to mind.
5	noticed General Naidoo to my left. General Naidoo climbed	5	So General Naidoo testified about asking you for
6	over rocks to left of big rock. I went to right in between	6	a report on what had happened there and having some sort of
7	it and bushes, looked at body A; he did not look dead.	7	conversation with you. Did that not happen?
8	There were three or four bodies by body A. They could have	8	COLONEL MODIBA: Chairperson, if I can
9	been injured but they were lying there on instructions of	9	recall very well there was no discussion between myself and
10	members. When I passed them SAPS members were attending to	10	General Naidoo and take into account that the situation was
11	them, miners sweeping through bushes to my right because	11	so volatile, there was no time actually to stand there and
12	there were still miners in those bushes. I could see to	12	discuss anything before the threat was actually addressed.
13	the west some miners were charging and running and heard	13	MR CHASKALSON SC: So you didn't say
14	gunshots coming from there, then I lowered down, shooting	14	anything to General Naidoo?
15	then stopped," and on you go.	15	COLONEL MODIBA: No, I did not say
16	My question is when you were in that area just to	16	anything to him.
17	the east of the big rock, did you actually meet up with	17	MR CHASKALSON SC: If we can then go to
18	General Naidoo and discuss the situation with him, or did	18 10	another aspect - or well, before we get there, if I
19 20	you just see him in that vicinity? COLONEL MODIBA: Chairperson, there was	19 20	understood your evidence correctly, after you saw General Naidoo he went up over the rocks to your left and you went
20	no discussion between myself and General Naidoo. I just	20	right around the bottom of the big rock to go to those
22	happened to link up with him at that spot.	22	bushes, go behind those bushes at the koppie. Is that
23	MR CHASKALSON SC: Now when you say "link	23	correct? You parted ways; he went over the rock, you went
24	up with him," what you mean by link up?	24	around the front of the rock.
25	COLONEL MODIBA: We almost, I should say	25	COLONEL MODIBA: That's correct,
10	ARCHIVE FOR JUSTICE		
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1	Chairperson.	1	who was with us had a handgun only." Now were you with
2	MR CHASKALSON SC: Can I put to you	2	General Naidoo when he went over those rocks?
3	something else from his evidence, and that's from page	3	COLONEL MODIBA: It is not true that I
4	24075 on the 7th of March. 24075, and it's with reference	4	went up with him. I did not take to that direction when I
5	to a photograph KKK16.5130, so if we could get that as	5	moved from that big rock.
6		6	MR CHASKALSON SC: Can I ask you about
7 8	COMMISSIONER HEMRAJ: While you're	7 8	your movements and his movements? He went over the rocks,
0 9	getting that, at the time that you saw the General was	0 9	you went around the front of the rocks. Is there a reason
9 10	anyone else with you from your unit? COLONEL MODIBA: Can I get the question?	9 10	that you chose to go around the front of the big rock rather than going over the big rock at the time?
11	COMMISSIONER HEMRAJ: Yes, at the time	11	COLONEL MODIBA: The obstruction maybe
12	you came across General Naidoo at the scene, were other	12	could be that big rock, but I still wanted to make sure
13	members of the unit with you?	13	that the bush on my right was cleared, so that is why among
14	COLONEL MODIBA: That's correct. I was	14	other things I decided to turn right there.
15	with my members.	15	MR CHASKALSON SC: As I understand it,
16	COMMISSIONER HEMRAJ: Do you know if any	16	you were the most senior tactical commander in that
17	of them spoke to General Naidoo?	17	immediate vicinity. Is that correct?
18	COLONEL MODIBA: It could be possible	18	COLONEL MODIBA: It could be correct.
19	that he spoke to some of them, but specific with me, that I	19	I'm not sure of others that, of other units, if that is the
20	cannot attest to it.	20	case that on that, at that vicinity, the scene, that I was
21	COMMISSIONER HEMRAJ: You didn't see	21	the only one. Remember there were a number of disciplines
22	anyone speak with him from your unit?	22	there operating on the day.
23	COLONEL MODIBA: I didn't, but it could	23	MR CHASKALSON SC: I'm talking about
24	be that there was such a communication, but to remember now	24	tactical. So you were the most senior NIU commander in
25	as I indicated earlier to say the area was so volatile,	25	that presence, in that immediate vicinity.
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1	COLONEL MODIBA: Chairperson, if we can	1	COLONEL MODIBA: No. No, I did not. I
2	look at that bush, it still need to be cleared, swept and	2	guess they were at my back. They were, my back was facing
3	take whoever was there, because the threat was not yet	3	them, so I was focussing what was going on in that bush on
4	cleared, as I mentioned earlier on that the armed strikers	4	my right.
5	were hiding behind those rocks, so that bush was still	5	MR CHASKALSON SC: But you'd have heard
6	dangerous for us.	6	17 R5 shots from that vicinity. Wouldn't you have turned
7	MR CHASKALSON SC: So that had to be	7	around to look to see what was going on?
8	attended to first before it would be appropriate to go over	8	COLONEL MODIBA: You know, tactically,
9	the rocks, was your assessment?	9	Chairperson, it could not be a good option to turn around
10	COLONEL MODIBA: To go over the rock was	10	while you are still facing with danger ahead of you. So
11	not an option. If someone could remember the situation at	11	you still need to proceed with what you are busy with in
12	that time, the bush still posed threat and then it was also	12	such circumstances.
13	not wise of me going over the rock because I could still, I	13	MR CHASKALSON SC: Chairperson, I'm told
14	could then be visible for any person who could, perhaps	14	that my time is now up.
15	wanted to attack me, so the best option was to clear that	14	CHAIRPERSON: How much more do you need
16	bush, make sure that it was safe.	16	actually? Do you have a number of topics to deal with
17	MR CHASKALSON SC: If we can briefly then	17	still?
18	go to ZZZ5 and annexure C again, because I want to deal	17	MR CHASKALSON SC: No, I'm cutting my
19	with you, raise with you now what happened with the people	19	cloth too - but maybe 10 minutes?
20	who did go over those rocks, and if we can zoom onto the	20	CHAIRPERSON: Yes, I'll give you 10
20 21	big rock and what you'll see is that from the big rocks	20	minutes.
21		21	
22	there was a fair amount of shooting that took place. If I	22	5 .
	can – there's the big rock. Can we just move this picture		Chairperson. And you never go a report from any of your
24 25	a little bit left so that we – these are the cartridges	24 25	officers about the shooting from the top of the rocks,
25	that were found on top of the big rock and –	25	about the circumstances in which they shot?
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1	Page 30628 CHAIRPERSON: The cartridges you indicate	1	Page 30630 COLONEL MODIBA: No, there was no report
2	are those under the description "Rifle carts T1, 2, 3."	2	that was made available for me except the members declaring
3	MR CHASKALSON SC: Yes, Chairperson, and	3	as to who shot, what number of shots were fired, so that
4	if I can just briefly run through to you whose cartridges	4	was the only time I could know that so-and-so has fired
5	they were. One of them was from General Naidoo's 9	5	with this calibre and so on.
6	millimetre pistol. Eight were from Constable Ngwaleni of	6	MR CHASKALSON SC: Can we go to the
7	the NIU, three were from Constable Mogele, four were from	7	exhibit B, which is – sorry, annexure B to this exhibit,
8	Lieutenant Ndlela, one was Constable Dubeni, and one was	8	which is the preceding annexure. This annexure shows the
9	Constable Spanyetso. Did you see any of these members	9	positions of the people who were killed. I just want to
10	shooting from the top of the big rocks?	10	point out to you here are the big rocks.
11	COLONEL MODIBA: No, Chairperson, I did	11	[09:38] There were 17 R5 shots, cartridges, from your
12	not see them.	12	members found on top of these big rocks.
13	MR CHASKALSON SC: Can you explain why	13	CHAIRPERSON: The big rocks are the rocks
14	that would have been the case?	14	which are to the left of bodies B and A on the slide.
15	COLONEL MODIBA: As I mentioned earlier,	15	MR CHASKALSON SC: And I'm now circling
16	I did not go over that rock, so my immediate turn was to	16	an area just to the left or to the sort of south-west of
17	go, was my right and my focus was always in that bush. So	17	the big rocks where a great number of people were killed.
18	what on the other side of the rock, it wasn't something	18	CHAIRPERSON: Yes, E and D are at the top
19	that I was focussing at.	19	of the area you're circling.
20	MR CHASKALSON SC: So you couldn't see	20	MR CHASKALSON SC: And there were in fact
21	them on top of the rock from where you were?	21	10 people killed in this area which has a radius of no more
22	COLONEL MODIBA: No, I could not see	22	than 15 metres and which is just below the big rocks to the
23	them. I can –	23	left –
24	MR CHASKALSON SC: You couldn't see them	24	CHAIRPERSON: - I count nine.
25	shooting on top of the rock from where you were?	25	MR CHASKALSON SC: There is a tenth
A	RCHIVE FOR JUSTICE		

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1	Page 30631	1	Page 30633
1	person because –	1	could be the momentum of the events, what was happening
2	CHAIRPERSON: I'm not quarrelling with	2	there, that led them to take that direction. So it was out
3	you on that but there are nine letters there in the middle	3	of their good initiatives with Lieutenant Ndlele to go to
4	of red stars –	4	that direction.
5	MR CHASKALSON SC: Indeed, Chairperson,	5	COMMISSIONER HEMRAJ: Thank you.
6	you will recall from when we dealt this with Major-General	6	CHAIRPERSON: Never mind their good
7	Naidoo that between bodies E and K was where Mr Mogae* was	7	initiatives and the momentum and so on, surely at the
8	shot and he died en route to hospital later, so he, so Mr	8	debriefing when it was all over they should have said to
9	Mogae is not mentioned here but he is almost equidistant	9	you, they should have told you what happened when they went
10	between E and K. So there were 10 people killed in this	10	there. Isn't that right?
11	area within a radius of 15 metres, just below the point at	11	COLONEL MODIBA: That's correct,
12	which your members fired 17 R5 shots. Have you not	12	Chairperson, I don't dispute that. They did relate as to
13	received any explanation from any of your members in	13	what made them to go there. As I mentioned, that the
14	relation to how these 10 people could have died?	14	momentum of the events could have led them to take that
15	COLONEL MODIBA: No, Chairperson, I was	15	direction. They did explain that situation. I guess that
16	not on that side where these members were, were walking.	16	should be perhaps in their statements as to what happened,
17	CHAIRPERSON: We know you weren't there	17	what they saw, what made them to heed to that direction,
18	but did you not have some kind of debriefing afterwards	18	Chairperson.
19	with your members? They told you what shots they'd fired,	19	CHAIRPERSON: But sorry, I don't
20	there was a discharge statement completed I take it, but	20	understand. When they were there, did they tell you they
21	did you not have a debriefing with them and say, what	21	fired these shots that we can see that fired from the
22	happened, how did you fire these shots, in what	22	cartridge cases that were found on the ground?
23 24	circumstances? COLONEL MODIBA: That's correct,	23	COLONEL MODIBA: I'm just talking under correction that if we can – I don't want to make
24 25	COLONEL MODIBA: That's correct, Chairperson, there was a debriefing held where each member	24 25	speculation now. I cannot recall, this is a long way back
20	chairperson, there was a deprening heid where each member	25	speculation now. I cannot recail, this is a long way back
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1	was saying what has transpired there and I cannot dispute	1	incident, that so and so told me he fired so many rounds at
2	that those members that were there did not declare the	2	this point, that we could perhaps look into their statement
3	shooting that took place that side. I cannot recollect now	3	that it will – the statement will definitely tell us, to
4	as to who said what but the members that were in that	4	clarify that point. It is difficult for me now to really
5	direction, if we can revisit their statements we will be	5	speculate, Chairperson.
6	able to know as to how many shots were fired there by who.	6	CHAIRPERSON: Mr Chaskalson, is this
7	COMMISSIONER HEMRAJ: Colonel, the	7	incident 9 that's dealt with in slide 232 or mentioned in
8	members that were on the top of the rock, they were under	8	slide 232?
9	your immediate command on the day.	9	MR CHASKALSON SC: I'm not sure, is the
10	COLONEL MODIBA: They were not under my	10	answer, Chairperson. Certainly the shooting of, there's no
11 12	immediate command. However, I want to point out that they	11	attempt – incident 9 may conceivably be, account for the
12	were with one of my commissioned officers. You know, I was	12	killing of Mr Xalabile who is body O but there's no
13 14	flanked with officers from national intervention so then I	13	explanation in any of the SAPS statements or in the
14 15	made to understand or to be aware that they were with Lieutenant Ndlele who is also an officer in the national	14 15	presentation of the deaths of the 10 people in that area of the 15 metre radius.
16	intervention. That is one of my platoon commanders on the	16	CHAIRPERSON: Just for when we read the
17		17	record later, incident 9 according to slide 232 is
18	ground. COMMISSIONER HEMRAJ: Given that, that	17	described as follows, "NIU members of the sweep line on
19	your intention was to attend to the miners that might have	10	southern side positioned on top of the large rock fire
20	been in the bush above B on the slide, how is it that part	20	shots at protesters between the rocks and bushes on the
21	of the contingent ended up on the top of the rock and on	20	south-western side of the koppie when they see a firearm."
22	whose instructions were they going in that direction	22	MR CHASKALSON SC: But I think that, on
23	instead of the direction that you wanted to explore?	23	the south-western side of the koppie is not – I understand
100			
24	COLONEL MODIBA: I want to make a point	24	that to be -
24 25	and the burner the second seco	24 25	that to be – CHAIRPERSON: On top of the large rock.

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1	MR CHASKALSON SC: Yes.	1	Scott said, or at the briefing people were informed that
2	CHAIRPERSON: Positioned on the top of	2	the national management had instructed that the police must
3	the large rock.	3	act against the armed strikers. Do you recall any of that
4	MR CHASKALSON SC: Yes. I understand	4	from the briefing from Lieutenant-Colonel Scott at 2:30,
5	that shooting to be in the direction down towards the	5	that national management had instructed that action had to
6	bottom of this page, not across to the left. Certainly	6	be taken against the strikers?
7	there's an arrow in one of the diagrams of exhibit L which	7	COLONEL MODIBA: No, I don't remember
8	makes that point.	8	those remarks made by him like that.
9	CHAIRPERSON: Unless I read it	9	MR CHASKALSON SC: You didn't hear any
10	incorrectly, I couldn't find a detailed account of incident	10 11	reference to national management, any decision from
11 12	9 in exhibit L but anyway I won't interrupt your cross- examination, I just mention it while we were dealing with	12	national management? COLONEL MODIBA: No, that I haven't
13	people, NIU people firing from the top of the large rock.	12	heard. All what I could hear was just we need to, they
14	Anyway the witness presumably can't help us on that, can	14	need to be dispersed and disarmed.
15	you? You were at Roots, weren't you? Were you at Roots?	15	MR CHASKALSON SC: Thanks, Colonel, those
16	COLONEL MODIBA: Chairperson?	16	are all of my questions.
17	CHAIRPERSON: Were you at the conference	17	CHAIRPERSON: Thank you, Mr Chaskalson.
18	at Roots when the police presentation was compiled?	18	I think you're next, Mr Ntsebeza.
19	COLONEL MODIBA: Yes, I did attend at	19	CROSS-EXAMINATION BY MR NTSEBEZA SC:
20	Roots.	20	Yes, Mr Chairman. Colonel, I've had the privilege of
21	CHAIRPERSON: There were breakaway groups	21	sitting here and listening to your evidence in chief and
22	-	22	particularly also to the cross-examination by Mr Chaskalson
23	COLONEL MODIBA: That's correct, Chair.	23	and before I put questions to you relevant to the material
24	CHAIRPERSON: - dealt with various	24	that *11-32 I just want to find out, I'm trying to
25	aspects and one of the breakaway groups must have been	25	understand what you understood your mission to be on the
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1	Page 30636 devoted to, perhaps more than one, devoted to what happened	1	Page 30638 day. Perhaps there are certain things that we can agree
2	at scene 2.	2	on. The first one is that when the shooting at scene 1
3	COLONEL MODIBA: That is true,	3	took place you saw what happened there from the position
4	Chairperson, there were a lot of discussions there during	4	which you indicated to the Commission you were at when
5	the Roots.	5	those people were shot at near the kraal, is that right?
6	CHAIRPERSON: Now in exhibit L, which is	6	You saw the shooting at scene 1.
7	the results of Roots, the Roots conference, there's mention	7	COLONEL MODIBA: That's correct,
8	of an incident 9 and you heard me read out what it says.	8	Chairperson.
9	It's talking about NIU people on the top of the large rock,	9	MR NTSEBEZA SC: And my sense, and you'll
10	firing. Can you tell us anything about that? Do you know	10	correct me if I'm wrong here, certainly from some of the
11	anything about that?	11	footages that we have seen, is that after that shooting the
12	COLONEL MODIBA: Chairperson, I don't	12	protesters fled to the koppies and the bushes. Do you
13 14	want to make a mistake. I'm still sticking to my guns to	13	agree with that?
14 15	say the statements of those individuals that fired from that point, if we can extract that evidence from the	14 15	COLONEL MODIBA: Ja, fled and regrouping. I understood it, I understand it that they did regroup, not
16	statements then that is when now I can be restful to say	16	fled. Fled, we are referring to flee, flee, running away.
17	yes.	17	MR NTSEBEZA SC: No, let – we will
18	CHAIRPERSON: I understand, I understand	18	probably argue that at the end but are you saying that the
19	that's – sorry, Mr Chaskalson, forgive me for interrupting	19	protesters who were not killed and injured and/or arrested
20	you.	20	at scene 1, decided to stay there and fight it out with
21	MR CHASKALSON SC: Chairperson, I think,	21	those who had shot them or are you denying the fact that
22	in fact I have one last question. Colonel, we have seen -	22	they ran for the koppies? In fact most of the footage
23	it takes us back to the briefing at 2:30 at forward holding	23	shows them not only running but a Scorpion. There was this
24	area 1 - we have seen a statement from Captain Nhlati of	24	- did you see a Scorpion on the day which had that big gun?
25	the NIU which says that at that briefing Lieutenant-Colonel	25	I see you smile and you nod, you saw the Scorpion that day,
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1	didn't you?	Tuge 50057	1	understand those answers, your assessment or your answer
2	COLONEL MODIBA:	You're referring to the	2	would be that it was part of their combat plan. You are of
3	STF vehicle, Chairperson?		3	the view that those who got killed in scene 1 were killed
4	MR NTSEBEZA SC:	Yes.	4	because they were attacking the police, is that your
5	COLONEL MODIBA:	Ja, I saw it.	5	position?
6	MR NTSEBEZA SC:	Yes and it had that big	6	COLONEL MODIBA: That's correct.
7	gun at the back of it, not so?		7	MR NTSEBEZA SC: The police acted in
8	COLONEL MODIBA:	I know it was equipped	8	self-defence against mineworkers who were attacking them,
9	with some sort of firearm or so	mething.	9	is that your position?
10	MR NTSEBEZA SC:	Yes and in some of the	10	COLONEL MODIBA: It is, Chairperson.
11	footage which we could show y	•	11	MR NTSEBEZA SC: And you would then say,
12	you wanted to, you will see that	• •	12	having failed to inflict any fatalities on the police, they
13	protesters who are running tow		13	then decided on a tactical move to flee into the mountain
14	bushes. Do you still disagree w		14	as a combat move to regroup and continue their fight or
15	shootings the remainder of the	•	15	attacks against the police. Would that be a fair summary
16	not been, who had not been kil	•	16	of what you are thinking?
17	kraal and who had not been arr	ested near that kraal, fied	17	COLONEL MODIBA: Yes, and as for the fact
18 19	to the mountain? COLONEL MODIBA:	Chairporcon L connot	18	that at the time they were regrouping they still had their
20	say they fled. My –	Chairperson, I cannot	19 20	dangerous weapons, that could be the idea of still fight. MR NTSEBEZA SC: Yes. And as I
20	MR NTSEBEZA SC:	Are you suggesting –	20	understood it, the tenor of your evidence both in chief and
22	COLONEL MODIBA:	My observation, they	22	in cross-examination was that those who got killed in scene
23	regrouped into koppie 2 first ar	• •	23	1 and in scene 2 – you didn't put it in so many words but
24	we were forming up outside the	-	24	the tenor of your evidence seems to suggest that they only
25	of national intervention, then the		25	have themselves to blame. All that the police wanted was
		5		
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1	3. It was not in a way that the		1	for them to give up what you call dangerous weapons,
2	were walking while still armed w		2	assegais and spears, surrender themselves and submit
3	dangerous weapons to koppie 3		3	themselves to arrest. Is that a fair summary of what the
4	MR NTSEBEZA SC:	So as I understand that	4	police attitude was? Those who do not want to be injured
5	answer, if we argue and submit		5	must surrender their weapons because they were illegal
6	people were fleeing, you would	, , ,	6	weapons, and then submit themselves to arrest. Was that
7	tactical move on their part, they	• • • •	7	the attitude of the police? COLONEL MODIBA: Chairperson, I think we
8 9	were still hell-bent to fight it ou Would that be your answer?	t with the police.	8	COLONEL MODIBA: Chairperson, I think we
10	3		0	pood to look this thing in two ways. The first is that had
11	COLONEL MODIRA	That is exactly what I	9	need to look this thing in two ways. The first is that had
	COLONEL MODIBA:	That is exactly what I the fact that at the time they	10	those armed striking miners surrendered their armaments,
12	can say at the moment, even th	e fact that at the time they	10 11	those armed striking miners surrendered their armaments, just laid them down, there was no point that the police
12 13	can say at the moment, even th were regrouping, this still on th	e fact that at the time they e way to regroup in koppie	10 11 12	those armed striking miners surrendered their armaments, just laid them down, there was no point that the police would still arrest such people. And secondly, the arrest
	can say at the moment, even th	e fact that at the time they e way to regroup in koppie as a tactical way of	10 11	those armed striking miners surrendered their armaments, just laid them down, there was no point that the police
13	can say at the moment, even th were regrouping, this still on th 3, they still set the veld on fire a	he fact that at the time they e way to regroup in koppie as a tactical way of to conceal their movements.	10 11 12 13	those armed striking miners surrendered their armaments, just laid them down, there was no point that the police would still arrest such people. And secondly, the arrest only came when they were still resistant in giving up the
13 14	can say at the moment, even th were regrouping, this still on th 3, they still set the veld on fire a gaining cover and concealment	he fact that at the time they e way to regroup in koppie as a tactical way of to conceal their movements.	10 11 12 13 14	those armed striking miners surrendered their armaments, just laid them down, there was no point that the police would still arrest such people. And secondly, the arrest only came when they were still resistant in giving up the arms that they were carrying.
13 14 15	can say at the moment, even the were regrouping, this still on the 3, they still set the veld on fire a gaining cover and concealment So you can see they knew what	te fact that at the time they e way to regroup in koppie as a tactical way of to conceal their movements. they were doing. And then I'm sure you	10 11 12 13 14 15	those armed striking miners surrendered their armaments, just laid them down, there was no point that the police would still arrest such people. And secondly, the arrest only came when they were still resistant in giving up the arms that they were carrying. MR NTSEBEZA SC: Oh, I see. Maybe let me
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 13 14 15 16 17 18 19 20 21 22 23 24 	can say at the moment, even the were regrouping, this still on the 3, they still set the veld on fire a gaining cover and concealment So you can see they knew what MR NTSEBEZA SC: are saying that not on the basis have heard from any of the peo You are not basing there on sor arrested and detained and who your assessment of what you sa COLONEL MODIBA: also, Chairperson, involved thos regrouped in koppie 3, those the	the fact that at the time they e way to regroup in koppie as a tactical way of to conceal their movements. they were doing. And then I'm sure you of any evidence that you ple who were involved there. the of the people who were *17-25 in the koppies. It's aw on the day, is that right? That's correct and it the mining strikers that at were arrested.	10 11 12 13 14 15 16 17 18 19 20 21 22 23 24	those armed striking miners surrendered their armaments, just laid them down, there was no point that the police would still arrest such people. And secondly, the arrest only came when they were still resistant in giving up the arms that they were carrying. MR NTSEBEZA SC: Oh, I see. Maybe let me rephrase that. Are you saying that when you, as a commander of the NIU line that was going to, that was following those who fled into the koppies – I understand that, you know, generally you were going to sweep the area in order to find out whether there are any dangerous weapons there and retrieve those and I assume you would arrest those who still resisted or didn't drop their weapons or whatever. What was your mission in following those protesters who had fled into the mountain?
 13 14 15 16 17 18 19 20 21 22 23 	can say at the moment, even the were regrouping, this still on the 3, they still set the veld on fire a gaining cover and concealment So you can see they knew what MR NTSEBEZA SC: are saying that not on the basis have heard from any of the peo You are not basing there on sor arrested and detained and who your assessment of what you sa COLONEL MODIBA: also, Chairperson, involved thos	the fact that at the time they e way to regroup in koppie as a tactical way of to conceal their movements. they were doing. And then I'm sure you of any evidence that you ple who were involved there. the of the people who were *17-25 in the koppies. It's aw on the day, is that right? That's correct and it the mining strikers that	10 11 12 13 14 15 16 17 18 19 20 21 22 23	those armed striking miners surrendered their armaments, just laid them down, there was no point that the police would still arrest such people. And secondly, the arrest only came when they were still resistant in giving up the arms that they were carrying. MR NTSEBEZA SC: Oh, I see. Maybe let me rephrase that. Are you saying that when you, as a commander of the NIU line that was going to, that was following those who fled into the koppies – I understand that, you know, generally you were going to sweep the area in order to find out whether there are any dangerous weapons there and retrieve those and I assume you would arrest those who still resisted or didn't drop their weapons or whatever. What was your mission in following

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1	beginning the approach was we would allow them to lay down	1	MR NTSEBEZA SC: And I just want to be
2	their arms.	2	very clear that that is the tenor of your evidence over the
3	MR NTSEBEZA SC: Yes.	3	last two, three days. Are you saying those that got killed
4	COLONEL MODIBA: And that failed and then	4	especially in koppies 1 – in scene 2, were those that
5	after they charged at the police and, for that matter, the	5	attacked the police?
6	whole situation changed now, that arrests still need to be	6	COLONEL MODIBA: Most probably,
7	made because already the crime was committed. So the	7	Chairperson.
8	follow-up to koppie 3 where they regrouped was to clear it	8	MR NTSEBEZA SC: No, you were there. I
9	and effect arrests, Chairperson.	9	wasn't there. And you have made statements there that
10	MR NTSEBEZA SC: So the follow-up to	10	there were people who charged at police lines and the
11	koppies 2 and 3 was to clear the koppie, clear of? Clear	11	police, acting in self-defence, fired at them. I want you
12	the koppie of what?	12	to tell the Commission whether it is your evidence that
13	COLONEL MODIBA: Clear the area where	13	whoever got killed there by the police who was a protester
14	they ran to, that is scene 2, koppie 3. To clear it and	14	was killed because they were attacking the police because
15	effect arrests –	15	they had not put down their weapons. Is that your case?
16	MR NTSEBEZA SC: Now what –	16	COLONEL MODIBA: Yes, Chairperson.
17	COLONEL MODIBA: - they still went there	17	MR NTSEBEZA SC: And you say so even in
18	being armed.	18	respect of those like Thelejane and Mdizeni whom it
19	MR NTSEBEZA SC: Yes, I just want to	19	appeared from Mr Chaskalson's cross-examination you either
20	understand what you want to, what I must understand by your	20	didn't see being killed or given the wounds that were
21	testimony that you were to clear koppies 1 and 2.	21	inflicted upon them that caused their deaths, it is
22	COLONEL MODIBA: To explain the clear	22	unlikely that they were attacking the police at the time
23	part of it, as I mentioned yesterday in my testimony, was	23	they died. Are you saying that evidence of yours applies
24	that our task as national intervention was to clear koppie	24	also to those cases?
25	1, to clear meaning to retrieve firearms, dangerous weapons	25	COLONEL MODIBA: Chairperson, all those
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1	Page 30644 and those that could still be hiding in those, in that	1	Page 30646 striking miners that regrouped at koppie 3, it could be
2	area, koppie 1, to clear that mountain safe.	2	that some of them were still in hiding and others charged
3	MR NTSEBEZA SC: Yes, to make the	3	at the police and if there was a shooting directed, the
4	mountain safe and the way you would do it would be ask them	4	shooting directed into the ground as a way of giving
5	to drop their weapons and thereafter you would arrest them	5	warning shots. The warning shots could possibly catch who
6	when you felt it was safe for you to go and retrieve those	6	- due to ricochet action of the bullet - could catch anyone
7	weapons. I'm just paraphrasing, I'm trying to understand	7	who was in that area.
8	what you mean by clear.	8	MR NTSEBEZA SC: No, Colonel, I am not, I
9	COLONEL MODIBA: I explain it two ways,	9	am going to resist all endeavours to traverse ground that
10	that initially we were hoping that the striking miners were	10	was traversed by Adv Chaskalson. It is clear, and we will
11	going to lay down because we still had to convey that	11	argue this, that in respect of one body you didn't even
12	intention from the police, it was still to be conveyed to	12	know it was there or you claim you didn't know it was there
13	say lay down your arms.	13	when you did your clockwise circling of that bushy area.
14	MR NTSEBEZA SC: Yes.	14	You claim that you saw it only when you came back, so you
15	COLONEL MODIBA: And if that failed then	15	can't make that claim and also the nature of his injuries
16	there was again a further attempt of dispersing, dispersing	16	are inconsistent with the claims that you make. So I'm not
17			
18	and encircling and disarm them.	17	going to get into a debate with you there, I'm simply
	and encircling and disarm them. MR NTSEBEZA SC: Yes.	18	putting it to you that your generalised statement that
19	and encircling and disarm them. MR NTSEBEZA SC: Yes. COLONEL MODIBA: So as I mentioned, the	18 19	putting it to you that your generalised statement that those who got killed by the police in the koppies were
19 20	and encircling and disarm them. MR NTSEBEZA SC: Yes. COLONEL MODIBA: So as I mentioned, the complexion of the whole idea was changed after the attack	18 19 20	putting it to you that your generalised statement that those who got killed by the police in the koppies were killed because they were charging at the police with
19 20 21	and encircling and disarm them. MR NTSEBEZA SC: Yes. COLONEL MODIBA: So as I mentioned, the complexion of the whole idea was changed after the attack from the miners at the police: So then -	18 19 20 21	putting it to you that your generalised statement that those who got killed by the police in the koppies were killed because they were charging at the police with dangerous arms and weapons is not true.
19 20 21 22	and encircling and disarm them. MR NTSEBEZA SC: Yes. COLONEL MODIBA: So as I mentioned, the complexion of the whole idea was changed after the attack from the miners at the police: So then - MR NTSEBEZA SC: I see. Okay.	18 19 20 21 22	putting it to you that your generalised statement that those who got killed by the police in the koppies were killed because they were charging at the police with dangerous arms and weapons is not true. COLONEL MODIBA: Chairperson, I said
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 19 20 21 22 23 24 	and encircling and disarm them. MR NTSEBEZA SC: Yes. COLONEL MODIBA: So as I mentioned, the complexion of the whole idea was changed after the attack from the miners at the police. So then - MR NTSEBEZA SC: I see. Okay. COLONEL MODIBA: Then it was just about to effect arrest to those that, to effect the arrest of	18 19 20 21 22 23 24	putting it to you that your generalised statement that those who got killed by the police in the koppies were killed because they were charging at the police with dangerous arms and weapons is not true. COLONEL MODIBA: Chairperson, I said probably it could be the case. MR NTSEBEZA SC: I don't want you to
 19 20 21 22 23 	and encircling and disarm them. MR NTSEBEZA SC: Yes. COLONEL MODIBA: So as I mentioned, the complexion of the whole idea was changed after the attack from the miners at the police. So then - MR NTSEBEZA SC: I see. Okay. COLONEL MODIBA: Then it was just about	18 19 20 21 22 23	putting it to you that your generalised statement that those who got killed by the police in the koppies were killed because they were charging at the police with dangerous arms and weapons is not true. COLONEL MODIBA: Chairperson, I said probably it could be the case.

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1	is seeking to do. The Commission wants to be able to be	1	MR NTSEBEZA SC: I want you to – I don't
2	assisted by people like you who were there, who have made	2	want to determine anything, I just want you to confirm
3	statements in August 2012 where the workers, the strikers	3	whether you, to confirm that that is the arsenal -
4	have been demonised as the people who were the aggressors	4	CHAIRPERSON: Well, he said that. He
5	and you are one of those who, in a bland way in your	5	said it in his statement.
6	statements, continues to say those who got killed were	6	MR NTSEBEZA SC: Yes.
7	killed because they were attacking the police. I'm simply	7	CHAIRPERSON: Those are all the – he took
8	saying to you it is just not true, certainly in the cases	8	77 members of the NIU, 19 stayed behind in koppie 1. In
9	which have been canvassed with you by Mr Chaskalson.	9	total these were the rifles, this is a list of the rifles
10	CHAIRPERSON: Forgive me, Mr Ntsebeza, Ms	10	and ammunition in their possession. That's conceded, I
11	Baloyi has turned her light on. Yes, Ms Baloyi?	11	mean you don't have to underline that again.
12	MS BALOYI: Chairperson, the witness has	12	MR NTSEBEZA SC: Now in relation to that,
13	not made, in any of his statements and in his evidence in	13	Colonel, was it your instruction and I'll tell you why I
14	chief and even under cross-examination by Mr Chaskalson he	14	ask the question, was it your instruction to your members
15	has not made a statement that the people that were killed	15	as you left scene 1 for scene 2 that they would be
16	at koppie 3 were killed because they attacked the police.	16	justified in using those kinds of firearms when they meet
17	That's not his evidence, Chair as I understand it.	17	the strikers in the mountain? Let's just look at the
18	CHAIRPERSON: Yes, what do you say about	18	rifles themselves, 86 R5 rifles. Now we have been told
19	that, Mr Ntsebeza?	19	that – ja, let me ask you a question. Was it your
20	MR NTSEBEZA SC: Maybe, maybe the Colonel	20	instruction to them that they would be at liberty to use
21	must tell us if I have been very – I don't know what this	21	those weapons in an encounter with striking miners?
22	statement is, there have been many of these statements,	22	CHAIRPERSON: These were the weapons they
23	there's a statement here at paragraph – MMM23, the reason	23	had in their possession. Did you give them any
24	for discharging, paragraph 9, out of the 5 130 R5 rounds	24	instructions about the use of those weapons when they went
25	issued, 68 rounds were discharged by 17 members. Out of	25	to koppie 3?
Tel: 011	021 6457 Fax: 011 440 9119 RealTime Transcriptions Email: realtime@mweb.co.za	Tel: 011	021 6457 Fax: 011 440 9119 RealTime Transcriptions Email: realtime@mweb.co.za
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1	Page 30648		Page 30650
	the 2 929 distol 9 millimetre rounds issued. 12 rounds were	1	COLONEL MODIBA: Chairperson, I want to
2	the 2 929 pistol 9 millimetre rounds issued, 12 rounds were discharged by four members. Two deaths appear –	1 2	COLONEL MODIBA: Chairperson, I want to point out to say these firearms that are on the slide.
2 3	discharged by four members. Two deaths appear –	2	point out to say these firearms that are on the slide,
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	Page 30651		Page 30653
1	Criminal Procedure Act?	1	slowly to you what section 49 of the Criminal Procedure Act
2	COLONEL MODIBA: Yes Chairperson, I was	2	says. Its heading is "The use of force in effecting
3	referring to the proportionality of – if you were to	3	arrest." "The use of force in effecting arrest. For
4	negotiate a threat that an individual is faced with, as to	4	purposes of this section 'arrester' means any person
5	take cognisance of the provision of section 49 in that	5	authorised under this act to arrest or to assist in
6	whenever there's a threat and then you have to deal with	6	arresting a suspect; and
7	it, it must be –	7	(b), 'suspect' means any person in respect of
8	[10:18] The amount of force that you are going to use	8	whom an arrester has or had a reasonable suspicion that
9	must be proportionate to the level of threat, so that's	9	such person is committing or has committed an offence. If
10	what I was just explaining to them.	10	any arrester attempts to arrest a suspect and the suspect
11	MR NTSEBEZA SC: Is that what you	11	resists the attempt or flees, or resists the attempt and
12	understand section 49 to mean?	12	flees when it is clear than an attempt to arrest him or her
13	COLONEL MODIBA: That's correct,	13	is being made and the suspect cannot be arrested without
14	Chairperson.	14	the use of force, the arrester may in order to effect the
15	MR NTSEBEZA SC: Are you saying it deals	15	arrest use such force as may be reasonably necessary and
16	with threat when the police are doing what? Are being	16	proportional in the circumstances to overcome the
17	attacked?	17	resistance or to prevent the suspect from fleeing, provided
18	COLONEL MODIBA: I'm talking of if in the	18	that the arrester is justified in terms of this action in
19	event that an officer has to use force, it must be	19	using deadly force that is intended or is likely to cause
20	proportionate to the level of threat that he's faced with.	20	death or grievous bodily harm to a suspect only if he or
21	It shouldn't be excessive in that regard. That is my	21	she believes on reasonable grounds –
22	understanding of section 49.	22	(a), that the force is immediately necessary for
23	MR NTSEBEZA SC: Use of force in doing	23	the purposes of protecting the arrester, any person
24	what?	24	lawfully assisting the arrester, or any other person from
25	COLONEL MODIBA: If you have to resort to	25	imminent or future death or grievous bodily harm;
Tel: 011	021 6457 Fax: 011 440 9119 RealTime Transcriptions Email: realtime@mweb.co.za	Tel: 011	021 6457 Fax: 011 440 9119 RealTime Transcriptions Email: realtime@mweb.co.za
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			Page 30654
1	Page 30652 use force one way or the other –		Paue 30034
2	5	1	•
	MR NTSEBEZA SC: In doing what?	1 2	(b), that there is a substantial risk that the
3	C C	-	(b), that there is a substantial risk that the suspect will cause imminent or future death or grievous
	č	2	(b), that there is a substantial risk that the
3	COLONEL MODIBA: In defending yourself or	2 3	(b), that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed, or that the offence
3 4	COLONEL MODIBA: In defending yourself or other's lives.	2 3 4	(b), that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed, or that the offence for which the arrest is sought is in progress and is of a
3 4 5	COLONEL MODIBA: In defending yourself or other's lives. MR NTSEBEZA SC: Is that what you told	2 3 4 5	(b), that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed, or that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life-
3 4 5 6	COLONEL MODIBA: In defending yourself or other's lives. MR NTSEBEZA SC: Is that what you told your members there, that section 49 deals with a situation	2 3 4 5 6	(b), that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed, or that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life- threatening violence or a strong likelihood that it will
3 4 5 6 7	COLONEL MODIBA:In defending yourself orother's lives.Is that what you toldMR NTSEBEZA SC:Is that what you toldyour members there, that section 49 deals with a situationwhere you use force in defending yourself?	2 3 4 5 6 7	(b), that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed, or that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life- threatening violence or a strong likelihood that it will cause grievous bodily harm."
3 4 5 6 7 8	COLONEL MODIBA: In defending yourself or other's lives. MR NTSEBEZA SC: Is that what you told your members there, that section 49 deals with a situation where you use force in defending yourself? COLONEL MODIBA: I mentioned specifically	2 3 4 5 6 7 8	(b), that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed, or that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life- threatening violence or a strong likelihood that it will cause grievous bodily harm." Will you agree with me that the tenor of this
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	Page 30655		Page 30657
1	CHAIRPERSON: Yes, I think the point in	1	words to say during the process of effecting arrest use
2	fact is that whatever version of the section one uses,	2	deadly force. This is a legislation that I pointed out in
3	there had been an amended. I'm not sure if actually it was	3	terms of applying force, if it has to be applied. So I was
4	enforced yet on the 16th of August 2012, but the point is	4	just quoting to them the relevant legislation that needs to
5	that I think what's common to all the versions of the	5	be adhered to.
6	section is it does deal with the situation where an arrest	6	MR NTSEBEZA SC: Now when you were being
7	is being effected.	7	cross-examined by Mr Chaskalson he dealt with the deaths of
8	MR NTSEBEZA SC: That's the point.	8	Mdizeni and Thelejane.
9	CHAIRPERSON: It's justifiable –	9	CHAIRPERSON: Are you now moving on to
10	MR NTSEBEZA SC: That's the only point	10	topics covered by your application?
11	that I'm raising, Mr Chairman.	11	MR NTSEBEZA SC: Yes, Mr Chairman.
12	CHAIRPERSON: - justifiable homicide in	12	CHAIRPERSON: I think it's appropriate
13	the context of arrests.	13	then for us to take the first break. You can proceed with
14	MR NTSEBEZA SC: Yes.	14	that after the first break has been taken.
15	CHAIRPERSON: I think that's the answer	15	[COMMISSION ADJOURNS COMMISSION RESUMES]
16	to your point, Ms Baloyi. Well, let's just ask the	16	[10:49] CHAIRPERSON: The Commission resumes.
17	witness. You understand what counsel is putting to you?	17	Colonel, you're still under oath.
18	Section 49, whatever version was in force at the time,	18	KAIZER NTLOU MOBIDA: s.u.o.
19	dealt with arrests and in circumstances in which force,	19	CHAIRPERSON: Mr Ntsebeza.
20	even deadly force could be used in the circumstances of the	20	CROSS-EXAMINATION BY MR NTSEBEZA SC (CONTD.):
21	effecting of an arrest. That's correct, is it not? Mr	21	Thank you very much, Mr Chairman. Now Colonel, the one
22	Chaskalson, your light is on.	22	thing that was not explored with you, which I want to put
23	MR CHASKALSON SC: Chairperson, the	23	to you would be if the two protesters Thelejane and Mdizeni
24	amendment came into effect on the 25th of September 2012.	24	were attacking the police at the time that they were shot
25	CHAIRPERSON: Yes, that's the point.	25	and killed, there would have been evidence of their weapons
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ICI. UTI	021 6457 Fax: 011 440 9119 RealTime Transcriptions Email: realtime@mweb.co.za	Tel: 011	021 6457 Fax: 011 440 9119 RealTime Transcriptions Email: realtime@mweb.co.za
	June 2014 Marikana Commission of Inquiry Pretoria		June 2014 Marikana Commission of Inquiry Pretoria
11th	June 2014 Marikana Commission of Inquiry Pretoria Page 30656	11th	June 2014 Marikana Commission of Inquiry Pretoria Page 30658
11th 1	June 2014 Marikana Commission of Inquiry Pretoria Page 30656 MR CHASKALSON SC: We can get the text of	11th 1	June 2014 Marikana Commission of Inquiry Pretoria Page 30658 in the area of their bodies when they were found. Would
11th	June 2014 Marikana Commission of Inquiry Pretoria Page 30656 MR CHASKALSON SC: We can get the text of the pre-amended version.	11th	June 2014 Marikana Commission of Inquiry Pretoria Page 30658 in the area of their bodies when they were found. Would you agree with that?
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11th	June 2014 Marikana Commission of Inquiry Pretoria	11th	June 2014 Marikana Commission of Inquiry Pretoria
	Page 30659		Page 30661
1	weapons, with a weapon or weapons. You agree with that?	1	there were dangerous weapons that were lying around in that
2	COLONEL MODIBA: I just want to clear	2	area, and –
3	this in that he could be one of those. We would recall,	3	MR NTSEBEZA SC: Did you see –
4	Chairperson, that the dangerous weapons that the armed	4	COLONEL MODIBA: I did not see anybody
5	strikers had were taken away by some of the officials,	5	removing that, but I want to confirm that they were there
6	police officials, so it could have been the situation that	6	before.
7	he had one and it was taken away when other fellow mine,	7	MR NTSEBEZA SC: Yes. Ja, so we would
8	striking miners were cleared in that area.	8	have to deal with what Captain Mohlaki says and what you
9	MR NTSEBEZA SC: Yes. Now there is	9	speculate about what could have happened. Is that a
10	evidence about this and we could show it up to you. It's	10	summation of what your answers are, that we must accept
11	day 7, it's the evidence of Captain Mohlaki, T706, lines 1	11	what Mr – he's positive, he says that there were no
12	to 6, if you could put that up for the Colonel to see. Now	12	traditional weapons. "No, body A and body B, there were
13	Captain Mohlaki, you know Captain Mohlaki, do you?	13	no," or he says there was, "There were no close traditional
14	COLONEL MODIBA: I guess he's a	14	weapons that were found by myself." And he had arrived at
15	detective, Chairperson.	15	the scene shortly after they had been shot. Do you
16	MR NTSEBEZA SC: Yes. Now he testified	16	understand?
17	to the Commission that there were no traditional weapons	17	COLONEL MODIBA: I do understand,
18	found near either Mdizeni or Thelejane. "Captain, did you	18	Chairperson. Shortly, it means that he was there,
19	find any traditional weapons close to bodies A and B, and	19	immediately after the shooting he was already there, so of
20	perhaps because close to may be a relative term, say within	20	which I know for a fact that detectives were not there when
21	four metres of the spot where you found them, were there	21	the shooting occurred. They only came afterwards. So I
22	any traditional weapons?" Captain Mohlaki, "No, body A and	22	cannot dispute that at the time he came at the scene he
23	body B, there was no close traditional weapons that were	23	couldn't find any dangerous weapon in that area.
24	found by myself." You see that?	24	MR NTSEBEZA SC: Now I would like us to
25	COLONEL MODIBA: Yes, I see the phrase	25	look at exhibit L, slides 244, which refers to an incident
Tel: 011	021 6457 Fax: 011 440 9119 RealTime Transcriptions Email: realtime@mweb.co.za	Tel: 011	021 6457 Fax: 011 440 9119 RealTime Transcriptions Email: realtime@mweb.co.za
11th	June 2014 Marikana Commission of Inquiry Pretoria Page 30660	11th	June 2014 Marikana Commission of Inquiry Pretoria Page 30662
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	Page 30663		Page 30	0665
1	MR NTSEBEZA SC: Yes, I suspected that	1	MR NTSEBEZA SC: Yes.	
2	that might be your answer, so is it then your evidence that	2	COLONEL MODIBA: I said I only realised	
3	you are not able to enlighten the Commission with respect	3	later that there were members that deviated to the left	
4	to the deaths of Xalabile and Pato?	4	from the rock –	
5	COLONEL MODIBA: That's correct,	5	MR NTSEBEZA SC: Yes.	
6	Chairperson.	6	COLONEL MODIBA: - with Lieutenant	
7	MR NTSEBEZA SC: Because it's an area	7	Ndlela, but now that there was a lieutenant who is a	
8	that you yourself – to use your phrase – strategically or	8	commissioned officer, one of my officers, as a platoon	
9	tactically decided you wouldn't be going to and you decided	9	commander, I then became comfortable to say that whate	ever
10	to do the clockwise movement around the bushy area and you	10	happened there, he would still take control of the	
11	came back to where you had started, and you never went to	11	situation, Chairperson.	
12	the southwest side there. Is that correct?	12	MR NTSEBEZA SC: As I understand it,	
13	COLONEL MODIBA: It is correct,	13	these being the bodies of Mdizeni and Thelejane, your	1/100
14 15	Chairperson. MR NTSEBEZA SC: Now Mr Chairman, if we	14 15	evidence was that you went around this bushy area – and pointing to the bush to the north of the body of Thelejane	
16	could put up just for orientation before I leave this	16	 and you went in a clockwise direction around the bushy 	
17	subject, which might in fact be cutting short my cross-	17	area and you came back, that is the area you traversed.	
18	examination in view of what the witness is saying, there	18	You remember it was, it's just a reorientation of what you	
19	was that annexure B, ZZZ5, annexure B to ZZZ5. Now if I	19	said relevant to another picture, but that more or less is	
20	understand you well, if I understood your evidence, if we	20	what you said you did.	
21	get orientation from this photograph, now these are the	20	COLONEL MODIBA: Yes, Chairperson, I	
22	deaths for which you say you cannot give an account because	22	confirm this assertion.	
23	they happened in an area, and these – I'm pointing at that	23	MR NTSEBEZA SC: Yes, and were you	
24	cluster of red dots from the bottom of the picture and you	24	walking? You were not driving, you were on your feet?	
25	say you cannot give an account of these deaths. Do I	25	COLONEL MODIBA: Yes, I was walking,	
Tel: 011	021 6457 Fax: 011 440 9119 RealTime Transcriptions Email: realtime@mweb.co.za	Tel: 011	1 021 6457 Fax: 011 440 9119 RealTime Transcriptions Email: realtime@mv	veb.co.za
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	Page 30664		Page 30	0666
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2	understand you also to say you cannot give an account of the death of Mr Xalabile, who in this picture is designated	2	Chairperson. MR NTSEBEZA SC: Yes, but I would like to	0666
2 3	understand you also to say you cannot give an account of the death of Mr Xalabile, who in this picture is designated as O?	-	Chairperson. MR NTSEBEZA SC: Yes, but I would like to explore just a little the questions that were begun to be	
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1	going to rely on?	1	be asking. This is a slide which tells us where the body
2	MR NTSEBEZA SC: I believe there are	2	of Mr Xalabile was found. We say there, viewed from the
3	three, Mr Chairman.	3	top of the rock looking south, Xalabile's body was at the
4	CHAIRPERSON: You rely on – insofar as	4	foot of the tree and the cartridges were found away from,
5	you rely on documents that are already before us, obviously	5	if you look from Mr Xalabile's body, 2.8 metres. Do you
6	they were exhibits, but –	6	see that? Do you see that, Colonel?
7	MR NTSEBEZA SC: No, I think there are	7	COLONEL MODIBA: I'm looking at the
8	three statements. My junior can enlighten –	8	slide.
9	CHAIRPERSON: I seem to remember that, I	9	MR NTSEBEZA SC: Yes.
10	do remember in fact that Ms Lewis came to see us yesterday	10	COLONEL MODIBA: And with what you were
11	morning and gave us three statements which were new. Is	11	reading –
12	that right?	12	CHAIRPERSON: They appear to be, I think
13	MS LEWIS: That's correct, Chair, and –	13	they're the yellow cones. Can you see the yellow cones?
14	CHAIRPERSON: Okay, so what are they –	14	Do you see the yellow cones?
15	MS LEWIS: And they are new exhibits.	15	MR NTSEBEZA SC: You did get these
16	CHAIRPERSON: So what are they?	16	materials –
17	MS LEWIS: It's the statement of Mogele,	17	CHAIRPERSON: Look at the screen.
18	is the first one that we would need to make an exhibit.	18	Colonel, look at the screen. You see Mr Xalabile's body is
19	[11:09] CHAIRPERSON: Ja, that'll be ZZZ6,	19	at the foot of the tree, that's indicated and then there's
20	statement of – he's a constable.	20	a rectangle with some writing in it, "Rifle cartridges V1
21	MS LE ROUX: That's correct.	21	to V3 were 2.8 metres away from and above Mr Xalabile's
22	CHAIRPERSON: Mokhele, okay. I shall	22	body" and there's a yellow cone there, do you see that, to
23	mark that ZZZ6. Then the next one I take it is – they're	23	which the arrow points. Now I'm not sure, though I suspect
24	all stapled together – the next one is this Ntsweleni, am I	24	that the other two yellow cones we see are probably V2 and
25	right?	25	V3. I may be wrong in that but certainly the main point is
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1	MS LE ROUX: Chair, I think it's	1	that the first yellow cone that's got the arrow pointing at
2	Ngwaleni, an IPID statement.	2	it, it is said was 2.8 metres away from and above Mr
3	CHAIRPERSON: Oh, N-G not S.	3	Xalabile's body. Do you see that? That's what Mr Ntsebeza
4	MS LE ROUX: Yes.	4	is talking about.
5	CHAIRPERSON: Okay. So it's ZZZ7 is the	5	MR NTSEBEZA SC: I'm pointing at the
6	statement of – is he also a constable?	6	slide. Do you see where we say "Rifle cartridges V1 to
7	MS LE ROUX: As far as I know, Chair,	7	V3," then there is a yellow cone that points, yes. Do you
8	yes.	8	see that?
9	CHAIRPERSON: Of Constable N-G-W-A-L-E-N-	9	COLONEL MODIBA: Yes, I can see that,
10	I and that will be ZZZ7 and then we have another one, it	10	Chairperson.
11	looks like –	11	MR NTSEBEZA SC: Ja, we canvassed this at
12	MS LE ROUX: Also Constable Ngwaleni.	12	length with General Naidoo. We are simply saying there is,
13	It's his further statement.	13	in the material that you got some two hours ago which we
14	CHAIRPERSON: Oh, I see and that – so	14	provided to you, you'll find that at the bottom, which is
15	we'll make them ZZZ7.1 and ZZZ7.2 further statement of	15	why the caption says Xalabile's body was at the foot of the
16	Constable N-G-W-A-L-E-N-I. Right?	16	tree. The tree here, and at the bottom about 2,8 metres
17	MS LE ROUX: Thank you, Chair.	17	down, that sort of ridge area, you will find his body and
18	CHAIRPERSON: Are those the three	18	we are saying there are cartridges here at that yellow cone
19	statements?	19	which we will argue are from rifles or from people who shot
20	MR NTSEBEZA SC: Thank you, Mr Chairman,	20	at Mr Xalabile at the bottom of the tree whilst they
21	may proceed?	21	themselves were standing there. Do you see what I'm
22	CHAIRPERSON: Yes, sorry.	22	getting to?
23	MR NTSEBEZA SC: Thank you, Mr Chairman.	23	COLONEL MODIBA: Yes, Chairperson.
24	Now before we – can we turn to exhibit MMM47, slide 30	24 25	MR NTSEBEZA SC: In fact, if we turn to
25	thereof, just to give context to the questions that we will	25	FFF8 and entry 8 thereof, that is the discharge sheet,
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1	scene 2 – we want to look at entry number 8 there, scene 2	1	that, how Constable Mokhele or Mokhele is linked to those
2	entry number 8. Number 8, you can see there it says	2	cartridges by the ballistic analysis of what was found?
3	Mokhele.	3	COLONEL MODIBA: Yes, Chairperson. What
4	COLONEL MODIBA: I can see it,	4	I see here is a sketch that indicates the cartridge that
5	Chairperson. MR NTSEBEZA SC: Yes.	5	was fired out of his R5, which doesn't tell me to say his
6		6	R5 was responsible for the death of Mr Xalabile.
7 8	CHAIRPERSON: If you then go from there to annexure C which is part of the –	7 8	MR NTSEBEZA SC: I wouldn't expect to tell you that but the links are that what you see there is
0 9	COLONEL MODIBA: I've got it with me,	9	cartridge cases V1 to V3, are actually linked ballistically
10	Chairperson.	10	to Constable TG Mokheli. Are you contending with that? I
11	CHAIRPERSON: - ZZZ5, ZZZ5. You've got	11	don't think you are contending that the ballistic
12	that? You see that? Now you'll see there the big rock is	12	information is incorrect.
13	depicted, do you see? Perhaps someone could put that up on	13	COLONEL MODIBA: No, I contest that fact.
14	the screen for us. The big rock is depicted there. No –	14	MR NTSEBEZA SC: Yes. Now I want to look
15	no, we don't have to be – no, a little bit, let's zoom, ja.	15	at his statement where he talks about this incident, ZZZ6.
16	There we see the big rock, you see? You see to the left of	16	I don't know if we have a typed version but from the
17	the big rock you see body O, that's Mr Xalabile. Then you	17	written –
18	see on the rock a number of R5s are depicted and if you	18	CHAIRPERSON: Do you have a typed
19	look at the numbers given there you will see that, I think	19	version, you didn't give it to us.
20	358026 was Moleke*08-17. If I'm wrong I'll be corrected,	20	MR NTSEBEZA SC: No, we don't apparently,
21	but you see a number of your men were on that rock and the	21	Mr Chairman. Now if we could plot paragraph 5. He says,
22	body of Mr Xalabile was down below in the trees and they	22	"When we approached the hill in scene 2 they turned against
23	were obviously firing from above. I'm not sure in which	23	us and they approached us. I used an R5 rifle and
24	direction they were firing but they would appear to have	24	discharged four shots in the air but facing their
25	been firing from the rock above as the cartridges indicate.	25	direction." Do you see that?
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1	And you can see from the other exhibit we were looking at a	1	COLONEL MODIBA: Yes, Chairperson.
2	moment ago, if you compare the numbers of the firearms	2	MR NTSEBEZA SC: And then he says, the
3	which are visible here with the numbers of the firearms on	3	last sentence of that paragraph, "And as they were closer,
4	that other exhibit and we can see who the possessors, the	4	used R5 rifle and discharge four round and this time it was
5	wielders of those firearms were at the time and that is the	5	pointed at the ground." Do you see that? You did read
6	point being made to you by Mr Ntsebeza. Do you understand	6	this statement, didn't you?
7	the point?	7	COLONEL MODIBA: I did read it.
8	COLONEL MODIBA: Yes, Chairperson.	8	MR NTSEBEZA SC: And that's the only
9	MR NTSEBEZA SC: And - sorry, Mr Chair –	9	account that he gives of him having fired. He accounts for
10	and there ballistic – you see on this slide which is on now	10	eight shots, is that right?
11 12	there is also a legend there, "Ballistics conclusion of firearms involved" that was done by Colonel Pieterse. If	11 12	COLONEL MODIBA: I just want to make sure
13	firearms involved" that was done by Colonel Pieterse. If we scroll down we would come to where, 14.8, 14.8 of the	12	– MR NTSEBEZA SC: Four in the air and four
14	legend. Why doesn't it show on the screen? If you could –	14	in the ground. Now that I point it out to you, do you see
15	no, no, there do you see, there you are TG Mokheli –	15	that?
16	CHAIRPERSON: There we've got Mokheli,	16	COLONEL MODIBA: Yes, I can see that.
17	he's on the bottom left-hand corner of the slide.	17	MR NTSEBEZA SC: And the ballistic
18	MR NTSEBEZA SC: Thank you, Mr Chairman.	18	analysis says he discharged, fired nine shots. You saw
19	9 –	19	that, didn't you?
20	CHAIRPERSON: And his firearm you see was	20	COLONEL MODIBA: Yes, Chairperson.
21	358026. Now if you look at the rock and the firearms on	21	MR NTSEBEZA SC: So on his version, eight
22	the rock, you'll see the second one from the left is	22	of the nine shots he fired were fired as they were
23	358026. So that's where Constable Mokeli's cartridge cases	23	approaching scene 2 and as protesters were coming at them.
24	were found.	24	Do you agree?
25	MR NTSEBEZA SC: So – ja. Do you see	25	COLONEL MODIBA: According to how he
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1	related in this paragraph, it's four-four.	1	than just we hear the approach, whether you call it a small
2	CHAIRPERSON: The ninth shot is dealt	2	hill or the rock, we do not get the sense that they got to
3	with in paragraph 7 on the next page.	3	the top of the rock and fired from there as the ballistic
4	MR NTSEBEZA SC: Yes. In paragraph 7	4	evidence in ZZZ5 indicates.
5	where he says, "We proceeded with our task of clearing the	5	CHAIRPERSON: Yes. No, you are correct.
6	hill." Where does it deal with the ninth shot?	6	MR NTSEBEZA SC: Do you understand the
7	COLONEL MODIBA: It's paragraph 7 from	7	debate, Colonel?
8	the bottom.	8	COLONEL MODIBA: Yes, Chairperson, I'm
9	MR NTSEBEZA SC: Yes. You will correct	9	following.
10	me if I'm wrong, it doesn't appear that he says anything	10	MR NTSEBEZA SC: Mokhele doesn't seem to
11	about having fired from the top of the rocks of the koppie,	11	give an account of what, how will I use a material, a
12	his statement, where the Chairman showed you the cartridges	12	material fact and that is, they got on top of the rock,
13	which were found from on top of the rock. Correct me if	13	whether they call it a small hill, they got on top of the
14	I'm wrong, it doesn't –	14	rock and they fired from there. That is omitted from your
15	CHAIRPERSON: I'm sorry, Mr Ntsebeza. I	15	statement. Do you remember that even you yourself, and I
16	suspect that the top of the rock is what is described as	16	just digress a little bit just to orientate, even you
17	the smaller hill. If you look in para 5 he describes, you	17	yourself said the difference between you and General Naidoo
18	have a smaller hill. Look at para 5, the 13th line of para	18	was that when he did in fact go onto the rock, you yourself
19	5. If you go up a few lines above that you see he says, "I	19	never got onto the top of the rock. Now that is why we say
20	used R5 rifle, discharged four shots in the air but facing	20	that material fact is absent from Mokhele's statement. Do
21	their direction. Some of the miners ran away to the small	21	you agree with that?
22	hill and when we approached them they advanced," et cetera.	22	[11:29] COLONEL MODIBA: Chairperson, I don't
23	Now in the context it only makes sense, I would think, if	23	really get what the cross-examiner is saying, that the
24	the small hill is a reference to the rock because I mean	24	material doesn't get to -
25	there was no, it's not suggested he left - yes, "Some of	25	MR NTSEBEZA SC: Never mind that legal
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1	MR NTSEBEZA SC: He was the leader –	1	was shot. Slide B, I mean exhibit B slide 47 I'm sure
2	CHAIRPERSON: There's either an	2	shows it better. No – no, I don't want the guns. 47.
3	explanation he can give us or there isn't. He hasn't given	3	CHAIRPERSON: Do we need a warning at
4	us an explanation. You can argue at the end that	4	all?
5	something, it has some significance.	5	MR NTSEBEZA SC: No, Mr Chairman, it's
6	MR NTSEBEZA SC: Of course, of course, Mr	6	just an area which would –
7	Chairman. May I just make the point -	7	CHAIRPERSON: I see.
8	CHAIRPERSON: I don't think you can take	8	MR NTSEBEZA SC: Yes. On top of the
9	it further than that.	9	rocks, this point – do you see that? Yes.
10	MR NTSEBEZA SC: Mr Chairman, may I just	10	COLONEL MODIBA: Yes, I can see it.
11	make the point –	11	MR NTSEBEZA SC: So Ngwaleni was on top
12	CHAIRPERSON: Yes, of course.	12	of those rocks as well. Now he says, I mean he fired 25
13	MR NTSEBEZA SC: - and the point is this,	13	shots including the one –
14	that he is not just a colleague of these people. These are	14	CHAIRPERSON: Ms Baloyi has got her light
15	people under his direct command, he is in charge. They	15	on, Mr Ntsebeza.
16	give a statement to him which he does not seem to have	16	MS BALOYI: Chairperson, I don't know if
17	investigated for and then explored in the light of other	17	it is correct for Mr Ntsebeza to put it as a fact that
18	evidence like the ballistic evidence that there was there.	18	Constable Ngwaleni was on top of those rocks. We certainly
19	That's why therefore I was just putting it to him. It's	19	do have cartridges on the rocks. We don't have any
20	not the end of the world.	20	evidence that indicates he was on the rocks.
21	CHAIRPERSON: Did he say he was under his	21	CHAIRPERSON: We have cartridges,
22	direct command? Was Constable Mokhele under your direct	22	cartridge cases on the rock which were traced to his
23	command?	23	firearm, so that's a basis for suggesting that he was on
24	COLONEL MODIBA: Chairperson, I didn't	24	the rock but perhaps Mr Ntsebeza should put it less
25	get you?	25	categorically than he does, in which case you'll be
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1	CHAIRPERSON: Was Constable Mokhele under	1	satisfied.
2	your direct command?	2	MS BALOYI: Yes, Chair. It should be put
3	COLONEL MODIBA: Yes, Mokhele was under	3	as factually correct as we can.
4 5	my command. However at that time he was on the other side	4	MR NTSEBEZA SC: Yes, well Mr Chair, as –
5	of the big rock, the southern side where I wasn't, I	5	it's just that I was less cautious at this stage perhaps in
6	haven't gone there. So I believe at that time he was with	6	saying that objective evidence is what it says, we will
7	Lieutenant Njela but it is difficult for me now to explain	7	argue on the basis thereof –
8	the activities that occurred that side.	8	CHAIRPERSON: Mr Ntsebeza, let me
9 10	MR NTSEBEZA SC: No, I'm not, I'm not – I was obviously not asking you that. It's just that what I	9 10	interrupt you for a moment. The circumstantial evidence we have appears to indicate that Constable Ngwaleni was also
11	was obviously not asking you that. It's just that what i wanted to say is that he was in your unit.	11	on the rock because cartridge cases were found on the
12	COLONEL MODIBA: That's correct, he's	12	rocks, not all 25 that he admits he fired but some
13	from national intervention.	12	cartridge cases were found which came from his firearm. So
14	MR NTSEBEZA SC: Yes. Now I would like	14	that gives rise to what one can perhaps describe as a
14	to look at Ngalwana, I mean Ngwaleni. Now, let's look	14	strong indication that he was also on the rock. You
16	again at annexure B of ZZZ5 and annexure C. 14.2 of – you		understand the point that's being put?
		16 17	
17 18	see there in the legend, 14.2. There's a cursor which I'm using, or a pointer.	17	COLONEL MODIBA: Yes, Chairperson, I hear what you say. I still want to point out to say cartridges
10 19	COLONEL MODIBA: Yes, I can see it.	18 19	fly after being discharged. It can land anywhere.
20	MR NTSEBEZA SC: 25 cartridges and they	20	MR NTSEBEZA SC: Fly up a mountain or a
21	are listed there.	20 21	hill?
22	COLONEL MODIBA: Yes, I can see,	21	CHAIRPERSON: Ja, they do fly and
23			
	Chairperson	22	There's I think there's been some evidence about the
~	Chairperson. MR NTSEBEZA SC: Now U1 to U6 which we	23 24	there's, I think there's been some evidence about the maximum distance that they can travel. That's why I put it
24	MR NTSEBEZA SC: Now U1 to U6 which we	24	maximum distance that they can travel. That's why I put it
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1	appears to indicate. I understand your point, it's not	1	rifle." Unless there is somewhere else, but in this
2	watertight but I don't think Mr Ntsebeza now is putting it	2	statement he doesn't account for more than five shots.
3	on a watertight basis.	3	COLONEL MODIBA: Chairperson, I came
4	COLONEL MODIBA: Chairperson, I'm not	4	across one of his statements that made mention of the rifle
5	refuting the fact that the cartridge indicates that it was	5	that could have turned to automatic mode.
6	on top of that rock according to the sketch. I'm not	6	CHAIRPERSON: Yes, that statement is
7	refuting that one, I'm just making a statement to say what	7	ZZZ7.2.
8	position he was, B –	8	MR NTSEBEZA SC: Yes, we'll get there all
9	MR NTSEBEZA SC: Yes.	9	in good time but in this statement are we together, that in
10	COLONEL MODIBA: - what position he was,	10	this statement he accounts for five shots which he says
11	I cannot really be definite about it.	11	were discharged as they were approaching scene 2. Is that
12	MR NTSEBEZA SC: Yes.	12	correct?
13	COLONEL MODIBA: Because a cartridge,	13	COLONEL MODIBA: Yes, that is what is
14	when you fire it flies.	14	appearing in the statement.
15	MR NTSEBEZA SC: I'm happy with your	15	MR NTSEBEZA SC: In the statement. It's
16	response. I mean if I had more time we would get into a	16	certainly not an account –
17	verbal joust but, you know, we don't have - now can we look	17	CHAIRPERSON: I'm sorry to interrupt you
18	at his statement, Mr Ngwaleni? I'm not going to say he's	18	but I take it that if you've got an R5 and you think you're
19	my colleague. Mr Ngwaleni, Ngwaleni, the ZZZ7.1 statement	19	firing five warning shots in the air when in fact your
20	and paragraph 5 or at page 5, to the extent you can make	20	rifle is on automatic and you fire 25 shots, you're likely
21	out pages in these written statements but there is	21	to know that and not think you only fired five, isn't that
22	something where he says that "A couple of mine – strikers	22	right? I mean, isn't that correct? I mean you've fired an
23	charging to our direction with spears and pangas. I warned	23	R5 in your time, haven't you? Surely you know the
24	them to put their hands up. Some didn't comply. I fired	24	difference between firing automatic shots and firing, not
25	five warning shots on the air with an R5 rifle and that	25	firing automatic shots but firing what we can call ordinary
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1	Page 30684 instructing them, lie down and drop their weapons. No-one	1	Page 30686 shots and firing five. There's a difference, isn't there?
2	fell down or injured because of my discharge." Do you see	2	COLONEL MODIBA: It –
3	that?	3	CHAIRPERSON: It's difficult to
4	COLONEL MODIBA: Yes, I'm having the	4	understand how he could have thought he fired only five if
5	statement with me.	5	his rifle was on automatic and he fired, isn't that
6	MR NTSEBEZA SC: It seems to be an	6	correct?
7	account at scene 2, you would agree with that?	7	COLONEL MODIBA: Ja, that is why there is
8	COLONEL MODIBA: No, I don't want to put	8	assumption that it might have switched over to automatic
9	myself in a position of agreeing or disagreeing.	9	mode.
10	MR NTSEBEZA SC: Well, at some stage you	10	CHAIRPERSON: Without his being aware of
11	should unless you are being evasive.	11	it, while he thought he only fired five. That sounds a bit
12	CHAIRPERSON: No – no, I don't think	12	of a tall story, doesn't it?
13	that's an appropriate comment. There may be points, you're	13	MR NTSEBEZA SC: You see the point we are
14	putting the statement of a witness to him, he may be in	14	going to be making –
15	what one can, you can call an *11:29/12-06 sort of position	15	CHAIRPERSON: What's your answer?
16	where he can't really express an opinion as to what the	16	MR NTSEBEZA SC: Oh, sorry.
17	statement means. So I don't think you can accuse him –	17	CHAIRPERSON: What's your answer?
18	MR NTSEBEZA SC: Mr Chair, it's okay,	18	COLONEL MODIBA: Can I get the question,
19	it's okay Mr Chairman. I don't, I just wanted to avoid	19	Chairperson?
20	putting it to him at some stage that look, this is so clear	20	CHAIRPERSON: No, I said if you've got a
21	that if you don't agree you are being evasive, but let's	21	rifle, an R5 rifle and you're intending to fire five
22	leave it there. He seems to account in this statement, if	22	warning shots in the air and you think you've fired five
23	we are talking about what we saw at scene 2, he seems to	23	warning shots in the air but it turns out that you actually
24	account for only five shots. Do you see that in this	24	had your rifle on automatic and you fired 25 shots,
25	statement? "I fired five warning shots on there with that	25	wouldn't you be aware of that or would you still think that
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1	you only fired five shots? I asked you whether that's not	1	very clear, or it is arguable that what Ngwaleni is
2	a bit of a tall story.	2	referring to there can only have occurred at scene 2. He
3	COLONEL MODIBA: You would be aware,	3	can't be referring to scene 1. Do you see that?
4	that's correct.	4	COLONEL MODIBA: Yes, I read through
5	MR NTSEBEZA SC: In fact, in this	5	paragraph –
6	statement and I think that's one of the points that we are	6	MR NTSEBEZA SC: Paragraph 3.
7	dealing with, in this statement he does say it was five	7	COLONEL MODIBA: - 3.
8	shots that were discharged. In the next statement, the	8	MR NTSEBEZA SC: Paragraph 3 –
9	additional statement, he says that he discharged 25 rounds.	9	CHAIRPERSON: It obviously relates to
10		10	scene 2 because if you read on to 4 he talks about "After
11	CHAIRPERSON: He does say he thinks, his	11	the shots they surrender, we search them, handed them over
12	explanation for that is that he, as he –	12	to station, or local police, locked them in the truck.
13 14	MR NTSEBEZA SC: It's possible that his firearm was on automatic.	13 14	They were arrested. We carry on sweeping till our commander withdraw us in the area of koppies," so he's
14	CHAIRPERSON: I think I put a point on	14	quite clearly talking about scene 2.
16	the probabilities about that to the witness and I	16	MR NTSEBEZA SC: Yes. No, he was –
17	understood him to agree with me. Mr Ntsebeza, when you	17	CHAIRPERSON: I think you'll agree with
18	reach a convenient stage we'll take the tea adjournment and	18	that. That must be right, Colonel, surely? Obviously
19	I don't want to stop you at this stage if there are points	19	scene 2 is being talked about.
20	you still want to make on this aspect.	20	COLONEL MODIBA: Yes, Chairperson.
21	MR NTSEBEZA SC: No, we can take the tea	21	MR NTSEBEZA SC: Yes, thank you. Now the
22	adjournment now, Mr Chairman.	22	second issue I want to deal with you very quickly is the
23	CHAIRPERSON: Thank you, Mr Ntsebeza.	23	fact that in relation - we've established that in relation
24	We'll take the tea adjournment.	24	to Mogele, but also in relation to Ngwaleni when you read
25	MR NTSEBEZA SC: Thank you.	25	all his statements it is clear that none of them, and now
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1	Page 30688 [COMMISSION ADJOURNS COMMISSION RESUMES]	1	Page 30690 let's talk about Ngwaleni, that Ngwaleni also doesn't say
2	[12:17] CHAIRPERSON: The Commission resumes.	2	at any stage that he ever was on top of that hill and that
3	Sorry it took us longer than we thought it would, because	3	he fired from on top of that hill, and now we know, in
4	we had housekeeping matters to discuss which took longer	4	spite of the fact that we now know from ballistic evidence
5	than I anticipated. You're still under oath, Colonel.	5	that it is arguable that the cartridges being found on top
6	KAIZER NTLOU MOBIDA: s.u.o.	6	of that hill may suggest that they were fired by whoever
7	CHAIRPERSON: Mr Ntsebeza –	7	was using their weapon from on top of the hill. Now the
8	MR NTSEBEZA SC: Thank you very much, Mr	8	question to you is, do you see and confirm from your own
9	Chairman.	9	readings of all the statements that Ngwaleni does not say
10	CHAIRPERSON: I see a piece of paper on	10	that there was at any stage a moment when he was on top of
11	my desk headed "Standing Order (General)(251. Police	11	the hill from where he shot? You understand the question?
12	duties, duties of police, use of arms" – is this to do with	12	COLONEL MODIBA: I do understand. The
13	your cross-examination?	13	way I follow what you want to get is as if now I'm refuting
14 15	MR MPOFU SC: No, it's from me,	14 15	to what he's saying here, of which I'm not refuting to
15	Chairperson. I'll explain later.	15 14	that.
16 17	CHAIRPERSON: So we'll mark it when you start.	16 17	MR NTSEBEZA SC: I don't understand. Or I don't know if I understand what you are saying. The
18	MR MPOFU SC: Yes.	17	question I'm putting to you is a very straightforward one.
19	CHAIRPERSON: Yes, Mr Ntsebeza.	19	From all the statements that we have from Ngwaleni there is
20	MR MPOFU SC: Thank you, Chair.	20	nowhere where he says he was ever on top of that hill from
210	CROSS-EXAMINATION BY MR NTSEBEZA SC (CONTD.):	21	where he could have shot at whoever he shot at. In this
22	Thank you, Chair. Now Colonel, I just want to take you	22	case we are concerned about the deaths of Xalabile, Pato,
23	again to ZZZ7.1, the statement by Vuyisile Ngwaleni, and	23	and everybody else. Do you agree with me that in his
24	just reading paragraph 3 thereof, I just want you to look	24	statement he doesn't say there was ever at any stage that
25	at that carefully because what we will argue is that it is	25	he was on top of the hill where he shot at whoever that he
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	Dogo 20401		Dogo 20602
1	Page 30691 shot at with those ammunition whose cartridges were found	1	Page 30693 position. You say that the statement that I put to you is
2	on top of the mountain?	2	correct if the assumptions on which it is based are
3	COLONEL MODIBA: It is correct,	3	correct, but if they aren't, if the members and the
4	Chairperson; he hasn't mentioned the spot where he was at	4	attacking strikers were on top of the rock it would be a
5	that time, but the fact of the matter is the shooting did	5	different situation, and then your concession wouldn't
6	occur at scene 2, or koppie 3. That he does not dispute.	6	apply. That's right, isn't it?
7	The statement doesn't dispute that, Chairperson.	7	COLONEL MODIBA: Yes, Chairperson.
8	MR NTSEBEZA SC: It doesn't say he went	, 8	MR NTSEBEZA SC: Now we now know that 10
9	on top of the mountain. Like Mogele, the highest watermark	9	other people died in scene 2 and annexure B of ZZZ5
10	about their statements relative to that hill was, or rock,	10	indicated who we are talking about. You saw that slide
11	is that as they were approaching, they were approaching,	11	where there were red dots, many red dots, and you said you
12	they were approaching. There is nowhere where they say we	12	wouldn't be able to give an account about that because they
13	reached the stage, we climbed the mountain at the top,	13	were in a – yes, now can I safely proceed on the basis that
14	that's where we were at when we began to fire.	14	on the 16th you were aware that those people had died in
15	CHAIRPERSON: The witness agrees with you	15	that area? When you left that place you were aware that
16	on that. The point is of course, you see, that if they	16	there are 10 people who were also shot and killed in that
17	were being approached by people with spears and pangas and	17	area? Can I safely so assume?
18	people who were approaching them were down below and they	18	COLONEL MODIBA: I don't remember being
19	were up on the top of the rock, they weren't in immediate	19	on that site.
20	danger, were they? What he says in para 3 is, "During the	20	MR NTSEBEZA SC: No, I know you were not
20	approach a couple of mine strikers charged in our direction	20	on your evidence, but when you left that place as the
22	with spears and pangas. I warned they must drop weapons,	21	commander who had been leading a group of people to do the
22	put their hands up. Some didn't comply," and so on. Now	22	sweeping, now it's tjaila time, it's time for everybody to
23 24	if they were only being approached by people with spears	23 24	go; can I safely depart from the point that at the end of
24 25	and pangas and they were on top of the rock, they weren't	24 25	that day when you called your mission off you were aware
25	and pangas and they were on top of the fock, they weren't	20	that day when you called your mission off you were aware
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	Page 30695		Page 30697
1	those deaths?	1	saying they were responsible. He's saying they may have
2	COLONEL MODIBA: No, I'm not in a	2	been responsible. You were, we know that quite a number of
3	position to accept that, and then I also want to bring it	3	shots were fired by some of your people at scene 2. We
4	to the cross-examiner, Chairperson, that when I'm talking –	4	don't know whether they hit anybody or whether they missed.
5	MR NTSEBEZA SC: You can say Mr Ntsebeza,	5	We don't know whether if they did hit people, people died
6	it's okay, or if you said Ntsebeza, it's okay.	6	as a result of it, or were just injured. But the question
7	COLONEL MODIBA: Okay. When we proceeded	7	is put on the basis, all those shots were fired into the
8	to koppie 3, 19 was left at koppie 1, so if you can maybe	8	bush and in the direction of charging strikers. It is a
9	go through my statement, one of my statements, I mention 77	9	possibility that some or other of the bullets that were
10	that went, proceeded immediately to koppie 3. 19 was	10	fired actually did hit the target at which they were aimed.
11	behind at koppie 1, Chairperson.	11	That's the question. He's not asking you to concede that
12	MR NTSEBEZA SC: Well, it's a simple	12	they did. He's not even asking you, as I understand at
13	question I'm putting to you. It must, it can only be so	13	this point to concede it's probable. All he says is that
14	that whilst you were doing your walkabout, clockwise, as	14	it may have happened, and surely that must be right.
15	you testified, and your other 95 members whom you were in	15	MR NTSEBEZA SC: That must be right,
16	command of, whereas –	16	Colonel, isn't it?
17	CHAIRPERSON: No, no, no Mr Ntsebeza,	17	COLONEL MODIBA: I respect your
18	you're not understanding the point he's making. He had,	18	assumption.
19	was it 95 people or – how many did you have? 95 or 96?	19	CHAIRPERSON: Translated into English
20	COLONEL MODIBA: 95, with me 96, and then	20	that means you accept it is a possibility. Is that right?
21	77 was left at koppie –	21	It is right, isn't it? You'll forgive my saying this,
22	CHAIRPERSON: Okay, yes, yes, well that's	22	but –
23	the point I'm making. There were 96 altogether –	23	MR NTSEBEZA SC: I would complain that
24	COLONEL MODIBA: 96.	24	you are being –
25	CHAIRPERSON: 17 were left behind at	25	CHAIRPERSON: It's a straightforward
			3
Tel: 011	021 6457 Fax: 011 440 9119 RealTime Transcriptions Email: realtime@mweb.co.zz	Tel: 011	021 6457 Fax: 011 440 9119 RealTime Transcriptions Email: realtime@mweb.co.za
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	Page 30699		Page 30701
1	are now agreed it was in scene 2, and we have already	1	ballistic evidence, statements, the case was already being
2	explored where we felt some of what they say was not	2	handled by IPID, is that right? A docket had been opened
3	touching on material aspects, we're on top of the mountain,	3	by IPID. IPID were investigating. These members of yours
4	this, that, and the next thing. Now all I'm asking is	4	who had shot had been warned by IPID before statements were
5	didn't you feel that at least in respect of those at any	5	to be taken from them, is that right?
6	time, and especially if you saw the ballistic evidence,	6	COLONEL MODIBA: Chairperson –
7	didn't you think that you had a duty as a commander of that	7	CHAIRPERSON: It wasn't for you then to
8	unit on that day from whose activities a number of	8	usurp the functions of IPID and conduct a parallel
9	fatalities took place, or may have taken place, that you	9	investigation of your own, is that right? The matter was
10	needed more by way of an account from each one of them as	10	being investigated by IPID, not by you?
11	to what they did, what firearms they had, what they	11	COLONEL MODIBA: That is what, that is my
12	discharged, what was responsible, who do they think they	12	point here because according to Mr Ngabeza is that I would
13	killed? I'm just asking.	13	have initiated that to do some sort of connecting them with
14 15	COLONEL MODIBA: Chairperson, that was	14	the ballistic report, of which it's not what I would have
15	done, hence we are having in front of us the records that	15	done. It's out of my hands.
16 17	indicate as to who fired how many shots where, what	16 17	MR NTSEBEZA SC: I know that my surname is a bit difficult but it's Ntsebeza, just for the record,
17	happened, although there is nowhere in the statements that	17 18	-
18 19	says I take responsibility of body so-and-so. That we did. [12:37] MR NTSEBEZA SC: You recall that I said	10 19	okay? CHAIRPERSON: You did see the note that
20	to you that as a commander you had statements – I'm sure	20	Mr Wesley showed you, did you?
20 21	you were not seeing for instance Mokhele's statement and	20	MR NTSEBEZA SC: Yes, I did, Mr Chairman.
22	Ngwaleni's statement for the first time Yesterday or the	22	I'm just going to deal with the last one point per minute
23	day before yesterday. You were aware of what they were	23	depending on how we answer each other. There is evidence
24	saying about their participation in the advance on scene 2,	24	which I want to put to you which suggests that some of the
25	koppies 2 and 3. You have been aware since those events	25	people, protesters at scene 2, and we'll argue this, may
Tel: 011	021 6457 Fax: 011 440 9119 RealTime Transcriptions Email: realtime@mweb.co.za	Tel: 011	021 6457 Fax: 011 440 9119 RealTime Transcriptions Email: realtime@mweb.co.za
11th	June 2014 Marikana Commission of Inquiry Pretoria	11th	June 2014 Marikana Commission of Inquiry Pretoria
11th	Page 30700	11th	Page 30702
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1	MR NTSEBEZA SC: Yes, Mr Chairman.	1	statements were given to the witnesses, rather to the
2	CHAIRPERSON: We've looked at the first	2	witness, and perhaps if he could be specific as to what he
3	passage you put, now we've been taken to 5676. It looks,	3	is –
4	it'll be the next day, the day after the one we've been	4	CHAIRPERSON: Were the IPID statements in
5	shown. That's day 53, 5676. What line on page 5676?	5	which allegations of this kind were made ever shown to you
6	MR NTSEBEZA SC: 22 to 24.	6	at any stage?
7	CHAIRPERSON: If we could have that	7	COLONEL MODIBA: I never came across any
8	please. Yes, "That is where the real shooting took place."	8	statements with such allegations, Chair.
9	He talked about "I reached the small koppie, that's where	9	CHAIRPERSON: Yes. Mr Ntsebeza, carry
10	the real shooting took place and where people died, people	10	on.
11	raising their hands. Even if their hands were risen, they	11	MR NTSEBEZA SC: In our list of documents
12	were shot at."	12	I'm made to understand we referred to statements that would
13	MR NTSEBEZA SC: Do you see that,	13	be relied upon and one of them I've just indicated, exhibit
14	Colonel?	14	MMM48.1, the statement of Nkosikhona Mjuba, MMM48.2 the
15	CHAIRPERSON: In other words those two	15	statement by Zwelimangele Mvakalelwa, exhibit MMM48.3 a
16	passages that were put to you of evidence to the effect	16	statement by –
17	which, that people, as they were surrendering raising their	17	CHAIRPERSON: You've made your point, a
18	hands, were shot. Are you able to comment at all? Is that	18	number of statements contained –
19	evidence true to your knowledge or -	19	MR NTSEBEZA SC: Yes.
20	COLONEL MODIBA: Chairperson, I just want	20	CHAIRPERSON: You were given a list of
21	to orientate myself. Are we now referring to scene 1 or	21	documents to which the counsel for the families intended
22	scene 2?	22	referring in the course of your cross-examination, is that
23	CHAIRPERSON: It looks like scene 2	23	correct, and you were then given copies of the statements
24	because 21 on page 5676 says, "I then could run and reach	24	also to study.
25	the small koppie. That's where the real shooting took	25	COLONEL MODIBA: I should have the
			1 021 6457 Fax: 011 440 9119 RealTime Transcriptions Email: realtime@mweb.co.za
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1	place where people died, people raising their hands."	1	copies, Chairperson.
2	That's not a description of scene 1 at all, so it's clearly	2	CHAIRPERSON: Alright. What Mr Ntsebeza
3	a reference to scene 2 and what is alleged by this witness	3	is doing now is he's putting to you that at least three of
4	is that people were shot as they were surrendering, as they	4	the statements, there may be more but it's not the number
5	were raising their hands. Now are you able to help us on	5	that's important it's the facts, he says some of the
6	that, on that aspect? Can you deal with that allegation?	6	statements, at least three of the statements contained
7	COLONEL MODIBA: I haven't at any stage	7	allegations of the kind similar to the passage in the
8	witnessed someone being shot while raising his hands in the	8	evidence of Mr Phatsha that's been read to you. Is that
9	air. All what –	9	your point, Mr Ntsebeza?
10	MR NTSEBEZA SC: Did you get any reports	10	MR NTSEBEZA SC: Very much so, Mr
11	about this happening? Did you get any reports at all -	11	Chairman.
12	COLONEL MODIBA: No, I did not –	12	CHAIRPERSON: Would you like to take the
13		13	point to its conclusion and we can see if we can get an
14	MR NTSEBEZA SC: - where there were		answer?
	allegations about people – there are so many IPID	14	
15	allegations about people – there are so many IPID statements that I could give to you. I'm sure you were	15	MR NTSEBEZA SC: Now I assume you read
15 16	allegations about people – there are so many IPID statements that I could give to you. I'm sure you were given some. You read the ones that were given to you,	15 16	MR NTSEBEZA SC: Now I assume you read those statements or do you want me to remind you what they
15 16 17	allegations about people – there are so many IPID statements that I could give to you. I'm sure you were given some. You read the ones that were given to you, exhibit MMM48 –	15 16 17	MR NTSEBEZA SC: Now I assume you read those statements or do you want me to remind you what they say? My time is up but you know, the Chairman will give
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1	be your homework –	1	that I put to you is that if the Commission in the end
2	COLONEL MODIBA: Chairperson, I could be	2	accepts this statement, we would be able to argue that you
3	having a statement with me but I cannot say, be definite to	3	and the SAPS cannot claim that when people were shot in
4	say I recall such allegations.	4	those circumstances it was in self-defence. Do you want to
5	MR NTSEBEZA SC: Well, for instance MMM1,	5	-
6	MMM48.1 in paragraph 5 says, "Some mineworkers hid	6	CHAIRPERSON: That must be so. If that's
7	themselves" –	7	correct, if that's correct then you can't say that the
8	CHAIRPERSON: Mr Ntsebeza, he's got to be	8	police shot in self-defence because they were shooting
9	given a chance to find the statement in the bundle that	9	people who were surrendering and raising their hands, if
10	he's got. No, he's not – expect him to read from the	10	that's correct. But you say you weren't aware of conduct
11	screen. He's got a bundle of documents in front of him, a	11	of that kind on the part of police, members of the police
12	file. He's entitled to find his place there and then	12	in your presence, is that correct?
13	answer. Have you got a bundle of the statements or a file	13	COLONEL MODIBA: In all the statements
14	containing the statements to which Mr Ntsebeza referred,	14	that I came across on the side of the police or my members,
15	prepared for you I take it by the police attorney?	15	there was no-one who mentioned that he fired at some, at a
16	COLONEL MODIBA: I've only seen MMM –	16	miner who was raising his hands in the air.
17	MR NTSEBEZA SC: When you don't do your	17	CHAIRPERSON: It would have been
18	homework, Colonel, that's what happens.	18	surprising if they'd made that admission in a statement you
19	CHAIRPERSON: No, Mr Ntsebeza, let's not	19	saw, wouldn't it?
20	get involved with nonsense. MMM48.1 –	20	COLONEL MODIBA: No, that one I cannot
21	COLONEL MODIBA: Yes, I've got it. Thank	21	say yes, the witness here is correct with what he's saying
22	you, Chairperson.	22	because –
23	CHAIRPERSON: Alright, now if you look at	23	CHAIRPERSON: If you'd seen anything of
24	page 2 of that statement you'll see it says the following	24	that kind you'd have taken action. If that sort of thing
25	in paragraph 5. Have you got that in front of you, page 2?	25	had happened and you saw it -
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1	Page 2 of the statement, paragraph 5 reads as follows.	1	COLONEL MODIBA: Definitely –
2	"Some mineworkers hid themselves with trees and some under	2	CHAIRPERSON: - what would you have done
3	the rocks. The police officers started shooting the	3	about it?
4	mineworkers with long and short firearms. Some mineworkers	4	COLONEL MODIBA: Definitely I would have
5	put their hands on air to show they aren't	5	done something about it.
6	fighting/attacking the police officers but they were shot."	6	CHAIRPERSON: What would you have done?
7	That's the allegation that this witness, Mr Nkosikhona, or	7	COLONEL MODIBA: If I saw it, I happened
8	this deponent really, Mr Nkosikhona Mjuba made in his IPID	8	to see it, I would have done something about it.
9	statement. So did you have - I know you were given the	9	CHAIRPERSON: What would you have done?
10	file to read, did you, were you able to read it before you	10	COLONEL MODIBA: I would comply with the
11	came to give your evidence?	11	law.
12	COLONEL MODIBA: I did, I did see this	12	CHAIRPERSON: Which means? What would
13	statement before, Chairperson.	13	you have done?
14	CHAIRPERSON: There you have the	14	COLONEL MODIBA: If I saw a police
15	allegation that people were putting their hands in the air	15	official killing someone –
16	to show that they weren't fighting or attacking the police	16	CHAIRPERSON: Surrendering, if you saw a
17	but were nevertheless shot. So you did see that, did you?	17	policeman –
18	Just recently when you got the file of statements you did	18	COLONEL MODIBA: - surrendering –
19	see that?	19	CHAIRPERSON: - yes, what would you have
20	COLONEL MODIBA: Yes, Chairperson, I	20	done? What would you have done?
21	recall seeing this statement.	21	COLONEL MODIBA: I would take steps
22	CHAIRPERSON: Alright, Now Mr Ntsebeza	22	against that police official.
23	is going to ask you a couple of questions about that before	23	CHAIRPERSON: I take it you'd either
24 25	he ends his cross-examination. MR NTSEBEZA SC: No, the question really	24 25	arrest him yourself or have him arrested, is that right? COLONEL MODIBA: That's correct,
2.J A	R C H I V E F O R J U S T I C E	20	COLUMEL MODIDA. ITIALS COTTECL,
Tel: 011	021 6457 Fax: 011 440 9119 RealTime Transcriptions Email: realtime@mweb.co.za	Tel: 011	021 6457 Fax: 011 440 9119 RealTime Transcriptions Email: realtime@mweb.co.za

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1	Chairperson.	1	You wrote this CV yourself?
2	CHAIRPERSON: Okay. Sorry, Mr Ntsebeza,	2	COLONEL MODIBA: I did.
3	I took over your cross-examination. I'm not sure I helped	3	MR MPOFU SC: Yes.
4	you but anyway.	4	COLONEL MODIBA: My response to that, I
5	MR NTSEBEZA SC: Mr Chairman, you did and	5	say as far as possible I know the provision of the law.
6	in fact this would be a convenient stage to take the lunch	6	MR MPOFU SC: Oh, you don't have
7	adjournment because my cross-examination has come to an	7	extensive knowledge of law, as it says here?
8	end.	8	CHAIRPERSON: Before you get into the
9	CHAIRPERSON: You don't want to have the	9	subject of this witness's legal knowledge –
10	privilege of hearing Mr Mpofu for five minutes. Mr Mpofu,	10	MR MPOFU SC: Yes.
11	have you got a five minute point? Thank you, Mr Ntsebeza.	11	CHAIRPERSON: - which I don't propose
12	You got a five minute point?	12	dealing with in the report at the end, but some
13	MR MPOFU SC: No, Chairperson, I think Mr	13	housekeeping; ZZZ8 is a document you handed us this
14	Ntsebeza was making that request on my behalf.	14	morning –
15	Chairperson, if I can have an indulgence, can we resume at	15	MR MPOFU SC: Yes, Chairperson.
16	two? There's a matter that I have to –	16	CHAIRPERSON: A portion from Standing
17	CHAIRPERSON: Alright, we'll resume at	17	Order (General) 251.
18	two.	18	MR MPOFU SC: 251, that's correct,
19	MR MPOFU SC: Thank you, Chairperson.	19	Chairperson. You make that ZZZ8, yes. In fact this
20	CHAIRPERSON: I'll write, I'll make a	20	question is related to that. Yes, and –
21	note in my book that you owe me 15 –	21	CHAIRPERSON: And the witness had an
22	MR MPOFU SC: Five minutes.	22	opportunity to read it, because I know, I take it police
23	CHAIRPERSON: 15.	23	officers should know the standing orders, but has he had an
24	MR MPOFU SC: Thank you, Chairperson.	24	opportunity to read this -
25	MR NTSEBEZA SC: Thank you, Mr Chair.	25	MR MPOFU SC: Yes. Yes, while we are on
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11th		11th	June 2014 Marikana Commission of Inquiry Pretoria
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1	Chairperson.	1	also goes in that order, correct?
2	MR MPOFU SC: And the planning,	2	COLONEL MODIBA: That's correct.
3	preparation and execution of medium to high-risk	3	MR MPOFU SC: Yes, and the so-called
4	operations, correct?	4	tactical units, TRT, NIU and STF, carry lethal weaponry,
5	COLONEL MODIBA: Correct, Chairperson.	5	yes?
6	MR MPOFU SC: Yes, alright. Now you do	6	COLONEL MODIBA: Lethal, are we then
7	understand that your evidence must be based mostly on	7	referring to rifle or –
8	things that you've observed, rather than your own	8	MR MPOFU SC: Lethal – no, ja, I'm
9	imagination or assumptions, correct?	9	talking things that can kill people. That's what lethal
10	COLONEL MODIBA: That's correct,	10	means.
11	Chairperson.	11	COLONEL MODIBA: I believe even 9
12	MR MPOFU SC: And would you agree with me	12	millimetre calibre can still kill.
13	that some of your evidence is largely based on assumptions	13	MR MPOFU SC: Ja, I'm including that
14	that you made and your imagination?	14	lethal –
15	COLONEL MODIBA: Chairperson, making	15	COLONEL MODIBA: That is the case,
16	assumption, imagination, cannot be wrong.	16	Chairperson. Even ordinary police officials at station
17	MR MPOFU SC: Okay, I'll come back to	17	level, they carry those firearms that you just mentioned.
18	that. Generally what is the purpose of the NIU, what is	18	MR MPOFU SC: Okay, no I'm not talking
19	its purpose?	19	about sidearms and all that. I'm talking about the tools
20	COLONEL MODIBA: Chairperson, when NIU	20	of trade. Your tools of trade are lethal weapons in those
21	was established there was a need about its establishment,	21	tactical units, correct?
22	particularly about the stabilising and combating the	22	COLONEL MODIBA: I don't just get the
23	serious and violent crimes, and also police the high-risk	23	question, Chairperson.
24	public violence, as well as rendering of specialised	24	CHAIRPERSON: It seems that it is a
25	operational support to other clients, including our own	25	little bit vague. Obviously a member of the police service
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1	Page 30716	1	Page 30718
1	forces.	1	in the course of carrying out his or her duties will be
2	MR MPOFU SC: Yes, and would it be	2	obliged from time to time –
3	correct generally speaking to say in terms of the levels of	3	MR MPOFU SC: We've dealt with that –
4	dangerousness, for lack of a better word, you would have,	4	CHAIRPERSON: - to use a firearm, and
5	POP would be where a situation is generally mild, normal	5	therefore the firearm is part of the ordinary equipment
6	crowd violence – sorry, crowd control with or without	6	which a member of the service uses every, potentially uses
7	violence, POP would usually suffice, correct?	7	every day. That's the point you're making.
8	COLONEL MODIBA: That's correct,	8	MR MPOFU SC: Yes, we've dealt with that.
9	Chairperson.	9	I've acknowledged that from the witness. I'm asking
10	MR MPOFU SC: And as it gets more and	10	something completely different now. I'm saying that part
11	more dangerous you might involve TRT, correct?	11	of the weaponry that they use in the execution of their
12	COLONEL MODIBA: That's correct.	12	duties, as opposed to the others who might have batons and
13	MR MPOFU SC: And if it gets even more	13	all things like that, theirs involve strictly lethal
14 15	dangerous then you might call NIU as well, correct?	14 15	weaponry. Is that correct?
15	COLONEL MODIBA: Yes, the situation would	15	COLONEL MODIBA: It's hard to say it is
16	always determine that, Chairperson.	16	correct to what - to make it simple to be understood is
17	MR MPOFU SC: Ja, that's what I'm saying.	17	that we do use firearms which are lethal.
18	COLONEL MODIBA: Yes.	18	MR MPOFU SC: Yes, thank you, and unlike
19	MR MPOFU SC: And if really now the world	19 20	POPS -
20	is going to come to an end, then you'd bring the ultimate,	20	CHAIRPERSON: I think he's busy – sorry,
21	the Special Task Force, the paramilitary force, correct?	21	I think Mr Mpofu is busy with another point. The ordinary
22	COLONEL MODIBA: That's the sequence of	22	constable has got a truncheon for example, a baton, right.
23	the components of ORS.	23	Ordinary constable has got a number of things that he or
24	MD MDOFIL CO	24	
	MR MPOFU SC: Yes, and that also in terms	24 25	she uses in the course of doing his or her work. A member
25 25	MR MPOFU SC: Yes, and that also in terms of their training and the capacity to use lethal force, it	24 25	she uses in the course of doing his or her work. A member of the NIU, what is the basic equipment NIU members use?

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1	COLONEL MODIBA: We use, Chairperson, we	1	Ja, no, I'm saying – I'm sorry – in case the protesters
2	use R5, which is also used at the station –	2	attacked the police, as they did on the 13th. That was your
3	CHAIRPERSON: Yes –	3	understanding.
4	COLONEL MODIBA: - as I mentioned to him.	4	COLONEL MODIBA: That is my
5	We also use side firearm. It's the same. We use same	5	understanding, looking at that one element of our mandate,
6	firearm.	6	rendering specialised operational support, yes.
7	CHAIRPERSON: Yes, but an ordinary	7	MR MPOFU SC: Yes.
8	constable doesn't use his or her firearm all the time. An	8	COLONEL MODIBA: It's in line with that.
9	ordinary constable uses a baton for example and handcuffs	9	MR MPOFU SC: Yes, so that was what I've
10	and things like that. Isn't that right?	10	called assumptions. That was one of the key assumptions
11	COLONEL MODIBA: No, Chairperson, that is	11	that you were operating under, was that the protesters had
12	the equipment which a member possess when executing duties.	12	attacked the police on the 13th.
13	It doesn't matter what the position, or the rank of that	13	COLONEL MODIBA: I cannot just say yes
14	particular member, but my response to the question is that	14	only the protesters if they attacked the police. Our
15	NIU uses R5, NIU uses pistol, the same as POPS that is	15	presence there among other things was to carry out that
16	using the same, anyone that use that. It could be that the	16	part of the mandate which I made in that statement, which
17	training is different. That is maybe the point.	17	it is similar of course with what happened on the 13th –
18	MR MPOFU SC: Ja. No, I think you know	18	MR MPOFU SC: Who told you what happened
19 20	exactly what I'm asking. I think you're just – can we go to exhibit Q, which is unfortunately not numbered. It's	19 20	on the 13th? COLONEL MODIBA: I know what, on the 13th
20	the 10th page from, after that $-ja$, the heading will say	20	COLONEL MODIBA: I know what, on the 13th the police were attacked and killed. So for me to be
21	"Selection phase 1, weapons phase." Carry on. Or I'm	21	there, I always had that in mind that this could happen.
23	sorry, the $-$ ja, go to page 69, I think, and then go 10	22	So –
24	pages after that. I suppose that's 79, ja. Ja, that one,	24	MR MPOFU SC: Ja.
25	yes. In your phase 1 of the training, are you trained for	25	COLONEL MODIBA: - there is nothing wrong
	5 5 1 5. 5		······································
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11th 1		11th 1	
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1	Page 30720 NIU in R5 assault rifles, pistols Z88 and PX4, submachine guns Uzi and mini-Uzi, R1 assault rifles and Musler shotguns? Is that what your phase 1 training involves?	1	Page 30722 with that. MR MPOFU SC: Exactly. Well, whether there's nothing wrong is another question, but you always
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	Page 30723		Page 30725
1	MR MPOFU SC: You did not know, ja. If	1	canister and thereafter another member fired one or two –
2	you knew that that event was sparked by the police, I'm	2	we won't bother about the numbers – stun grenades, and at
3	sure it would have affected your approach, correct? In	3	that point the strikers then turned around and attacked the
4	other words what you'd be guarding against would be that	4	police with pangas and so forth, and the result of it all
5	the police must not spark the violence as they sparked it	5	was that two policemen were killed, one on the scene and
6	on the 13th.	6	one after he got to hospital, and a third one was injured
7	COLONEL MODIBA: No, the police haven't	7	and some of the strikers also died in the ensuing events.
8	sparked the violence on the 13th.	8	But General Mpembe conceded in his evidence that the spark
9	MR MPOFU SC: No, Colonel Modiba, listen	9	that caused the trouble was the initial firing of the
10	to me very carefully. You were not there on the 13th. I'm	10	teargas and the stun grenade, and that is the evidence he
11	telling you that it is common cause from the police	11	gave. That's the basis, and obviously you didn't know that
12	themselves that the events of the 13th were sparked by them.	12	before, but that's the basis of Mr Mpofu's question. Is
13	So don't debate that with me. I'm not –	13	that correct?
14	COLONEL MODIBA: I did not have that	14	MR MPOFU SC: That's correct,
15	information that the police sparked the violence.	15	Chairperson. Okay, so now I've told you and the
16	MR MPOFU SC: Yes, I'm giving you that	16	Chairperson has told you, so let's put that aside. The
17	information now. The violence on the 13th was sparked by	17	only question I want to ask you is had you – and I accept
18 19	the police. Now all I'm asking you, if you knew that the violence on the 13th was sparked by the police, would that	18 19	that you didn't know because you've answered that question – had you known that the events of the 13th which obviously
20	have affected your approach, yes or no?	20	played a big role in your mind, as you've already
20	COLONEL MODIBA: I don't have an answer	20	testified, had you known that those had been sparked by the
22	for that.	22	police would that have affected your approach to the entire
23	MR MPOFU SC: Well, can you try?	23	operation or not?
24	COLONEL MODIBA: No, I don't have an	24	COLONEL MODIBA: No, I don't know if that
25	answer because already it's if you, when I start from the	25	would have affected, because I was sent to Marikana on
-	·		021 6457 Fax: 011 440 9119 RealTime Transcriptions Email: realtime@mweb.co.za
	·		
-	·		
-	June 2014 Marikana Commission of Inquiry Pretoria		June 2014 Marikana Commission of Inquiry Pretoria
11th	June 2014 Marikana Commission of Inquiry Pretoria Page 30724 point of that the police sparked the violence, then that I did not, I was not informed of that.	11th	June 2014 Marikana Commission of Inquiry Pretoria Page 30726 command, so if my authorities found it necessary that I go to Marikana, that means it was necessary for me to get to
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1	you and what the chairperson have told you. You would at	1	That's the information I got.
2	least agree with that, correct?	2	MR MPOFU SC: Ja not succeed means fail,
3	COLONEL MODIBA: No it was only informed	3	you know.
4	because I knew for a fact that there was fatalities on	4	COLONEL MODIBA: Yes.
5	Monday, if that was the case so, and I'm still saying that	5	MR MPOFU SC: Were you told that that
6	situation would tell to say this is how to go about. It	6	thing had not succeeded, in other words it had failed?
7	would dictate for me.	7	COLONEL MODIBA: That is correct,
8	MR MPOFU SC: Ja, but to the extent that	8	Chairperson.
9	you have now learned in the past five minutes new	9	MR MPOFU SC: Thank you. Alright, so
10	information as to how the thing started, you were	10	that was the other assumption you were labouring under as
11	misinformed or ill informed to that extent because you	11	you were approaching your mission, correct?
12	didn't know who had started the thing. Would you agree	12	COLONEL MODIBA: That is not assumption,
13	with that?	13	I'm talking of what I was informed about to say look, there
14	COLONEL MODIBA: Chairperson, I was not	14	have been negotiations. I knew about that. That the
15	at any stage brought and briefed about that this is what	15	negotiations did not succeed in getting the armed strikers
16	happened, except now that chairperson has explained -	16	to lay down their arms. It didn't succeed then -
17	MR MPOFU SC: So you're better -	17	MR MPOFU SC: Ja. Well - okay.
18	COLONEL MODIBA: - on some of the	18	COLONEL MODIBA: This is the way forward.
19 20	allegations, but I'm still saying that as an NIU, or an	19 20	So that is not an assumption. MR MPOFU SC: Alright, here we go again.
20 21	ordinary police official, I would always act according to the circumstances that I'm faced with. That is my position	20 21	MR MPOFU SC: Alright, here we go again. I'm telling you now that at that stage the effort by Mr
22	in that regard.	21	Mathunjwa was still ongoing. I can accept that you did not
22	MR MPOFU SC: Don't you also act	22	know that, do you understand, and that is what you were
23 24	according to the level of danger, or the potential of	23	told. That's why I'm calling it an assumption. You were
25	danger?	25	working on the assumption that what you were told was
20	a light in the second	20	
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1	COLONEL MODIBA: Chairperson, hence I'm	1	factually correct. Maybe let me put it that way. Correct?
2	saying the circumstances would tell how do you deal with	2	COLONEL MODIBA: I think what Colonel
3	the situation that you are faced with. That is -	3	Scott was referring, remember a day before there was an
4	MR MPOFU SC: Ja. No, but that's what	4	undertaking, or a promise from the armed striking miners to
5	I'm saying, the potential of danger. If you say you Mr	5	say they would lay down their arms. They would leave their
6	Modiba, Mr NIU, you are going to go, there's a bank	6	arms by the mountain. So they shouldn't brought that
7	robbery. There's one person carrying a knife or there are	7	because they would be holding some rituals in the night.
8	ten people carrying grenades, are you saying the level of	8	Night vigil. So that's where arms would be left. So the
9	danger of the mission makes no difference to you? Is that	9 10	police should not bother them, therefore in the morning, as expected, nothing of that happened and then still
10 11	what you're saying? Is that your evidence? COLONEL MODIBA: No obviously I'll be	10	negotiation went on. It could be that at the time when
12	knowing that I'm facing a dangerous situation.	12	Colonel Scott was giving the briefing of that nature, he
12	MR MPOFU SC: Alright. Okay, so the	13	was referring to the actual promise, the commitment that
14	other wrong assumption was that you were - or maybe this	14	was made by the armed strikers while Mathunjwa was busy
15	one was not your fault. Is it correct that Lieutenant-	15	with them.
16	Colonel Scott when he briefed you at about 2:30 or so on	16	MR MPOFU SC: When you were told that
17	the 16th he indicated that the Mathunjwa effort, for lack of	17	those talks had not succeeded, did you understand that
18	a better word, the effort to get the circle to disarm	18	there are prospects of the laying down of the arms had now
19	voluntarily, had failed.	19	dissipated - was done - and were now moving to another
20		20	phase so to speak.
20	COLONEL MODIBA: What I understood there	20	
21	COLONEL MODIBA: What I understood there is there was a loggerheads that the armed strikers, as it	20 21	COLONEL MODIBA: Chairperson, there was
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21	is there was a loggerheads that the armed strikers, as it	21	COLONEL MODIBA: Chairperson, there was
21 22	is there was a loggerheads that the armed strikers, as it was previously said that they would be laying down their arms - MR MPOFU SC: Ja.	21 22	COLONEL MODIBA: Chairperson, there was still another effort that would have been made by the
21 22 23	is there was a loggerheads that the armed strikers, as it was previously said that they would be laying down their arms -	21 22 23	COLONEL MODIBA: Chairperson, there was still another effort that would have been made by the operational commander at the time we were to arrive at

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1	was what I understood.	1	COLONEL MODIBA: Yes.
2	MR MPOFU SC: Please listen to me	2	MR MPOFU SC: And you were wrong in that
3	carefully. When you were briefed by Lieutenant-Colonel	3	assumption as well. I'm telling you that's the third
4	Scott, from his briefing, did you deduce that - the long	4	assumption on which you were wrong.
5	story that you've just said, the process of voluntary	5	COLONEL MODIBA: However it's not causing
6	laying down of arms from the promise of the previous day	6	a harm to me if I was wrong.
7	and so on and so on, that that had aborted?	7	MR MPOFU SC: Okay, but do you accept
8	COLONEL MODIBA: Ja with my understanding	8	that you were wrong in the assumption, even if it did not
9	there was still difficulties since we expected those arms	9	cause any harm?
10	to be laid by a certain time, which it never happened.	10	COLONEL MODIBA: No, I wasn't wrong
11	MR MPOFU SC: Alright. Ja. Okay. You	11	because there were -
12	also had an assumption that there were going to be	12	MR MPOFU SC: There were negotiations.
13	negotiations with the strikers, is that correct?	13	COLONEL MODIBA: - they were still at -
14	COLONEL MODIBA: Yes, which it was what I	14	my impression was they would still - the negotiations would
14	had in mind, that it would still carried on before -	14	still carry on before the final order.
16	MR MPOFU SC: Ja.	16	MR MPOFU SC: Yes, but they didn't, so
17	COLONEL MODIBA: - other approaches.	17	you were wrong. Agree?
18	MR MPOFU SC: Yes. No, that's what I	18	COLONEL MODIBA: I'm not sure if it
19	mean. When you say what I had in mind is an assumption,	19	wasn't done.
20	I'm saying - that was also as a matter of fact wrong.	20	MR MPOFU SC: I'm telling you I'm sure
20	There were no further negotiations with the strikers, but	20	that it wasn't done, so you're wrong.
21	you didn't know that, correct?	21	
22	COLONEL MODIBA: The strikers would still	22	COLONEL MODIBA: I can you tell you what
		23 24	
24 25	be addressed, Chairperson, in relation to the laying down		CHAIRPERSON: I take it he's got to take
25	of the arms. They would still be addressed. That was -	25	your word for it. I mean you tell him he is wrong, he must
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1	your - any mission. I'm sure that's something you teach to	1	MR MPOFU SC: Thank you. Just another
2	your people as well. Get all the facts correct. What are	2	quick point, the briefing, also for this kind of size,
3	we dealing with, what's the level of danger, that kind of	3	you've never seen any operation of this magnitude, correct?
4	thing. It's very important to have the basic facts	4	This is one of the biggest operations that you were
5	correct, isn't it?	5	involved in.
6	COLONEL MODIBA: Ja, when analysing the	6	COLONEL MODIBA: That's correct,
7	information we look at that that level.	7	Chairperson.
8	MR MPOFU SC: Ja. You agree. Do you	8	MR MPOFU SC: Ja, and you would agree
9	agree with me -	9	that for that - for someone in your position who had to
10	COLONEL MODIBA: Am I agreeing with the	10	brief 90 people, 70 people whatever, for an operation of
11	statement I'm making that when you get a task to perform -	11	this magnitude you would have needed time to do that so
12	MR MPOFU SC: Ja.	12	that you can take them through, particularly given that
13	COLONEL MODIBA: - a task to perform, you	13	some of them came from far away places, correct?
14	still have to analyse it to see if it can be performed or	14	COLONEL MODIBA: Maybe, Chairperson, we
15	not.	15	should look into that we have been there days before the
16	MR MPOFU SC: Okay, now you've answered	16	incident occurred. So everyone already had the background
17	your own question. Can you answer my question? Is it	17	of what was happening in Marikana. So for me to relay what
18	important for, when you're approaching an operation, to	18	decision taken at the briefing, where I attended the
19	have your basic facts and the basic parameters correct	19	briefing, it didn't need hours to carry it out or to be
20	rather than having them incorrect and working on incorrect	20	understood.
21	assumptions. Is this something you teach to some of the	21	MR MPOFU SC: Okay maybe not hours but at
22	youngsters that you lead?	22	least an hour to do that to so many people, correct?
23	COLONEL MODIBA: What I can say,	23	COLONEL MODIBA: Fortunately, Chairperson, we had a background. There was no need for me
24 25	Chairperson, is you analyse the information you get. MR MPOFU SC: Yes, Colonel, again this is	24 25	to spend hours, even 30 minutes, because already we had -
20	WIR WIPOPU SC. Tes, COlonel, again this is	25	to spend hours, even so minutes, because already we had -
Tel: 011	021 6457 Fax: 011 440 9119 RealTime Transcriptions Email: realtime@mweb.co.za	Tel: 011	021 6457 Fax: 011 440 9119 RealTime Transcriptions Email: realtime@mweb.co.za
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			Page 30738
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1 2		1 2	•
	an obvious thing. I'm saying if there's a - let's use the		we were at a mission area. We knew, we had a background
2	an obvious thing. I'm saying if there's a - let's use the bank robbery again. If I say the bank robbery is in Fox	2	we were at a mission area. We knew, we had a background what happened previously, so -
2 3	an obvious thing. I'm saying if there's a - let's use the bank robbery again. If I say the bank robbery is in Fox Street and it turns out that it's on Main Street, is it	2 3	we were at a mission area. We knew, we had a background what happened previously, so - MR MPOFU SC: So how much time do you
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	Page 30739		Page 30741
1	there before, warra-warra and all that, given all that, how	1	the day.
2	much time do you think you needed to listen to Lieutenant-	2	MR MPOFU SC: Ja. Well, Mr Ntsebeza
3	Colonel Scott, understand what he's saying, go and relate	3	asked you I think about four times, the record will show,
4	to your people, give them an opportunity to ask questions	4	to say use of force in respect of what, what circumstances?
5	for clarification until you would be satisfied that they	5	And you never mentioned arrest, so now you're telling us
6	were ready to carry out this - one of the biggest	6	that you had actually applied yourself specifically to the
7	operations that you've been involved in, in your life.	7	fact of the applicability of section 49 to arrest. Is that
8	COLONEL MODIBA: Chairperson, I'm not	8	your evidence now, this afternoon, correct?
9	able to comment on the amount of time that I would needed	9	COLONEL MODIBA: It's not now, it was
10	because what I got during the briefing I was able to carry	10	always my take.
11	it over to the members.	11	MR MPOFU SC: Okay, even in the morning?
12	MR MPOFU SC: And Mr Ntsebeza has already	12	COLONEL MODIBA: The day I wrote it, the
13	asked you about section 49 which you said you people must	13	day I explained to my members, that was what was in my
14	take into account. Do you accept now that section 49 does	14	mind.
15	not relate to the issues that you thought it relate to?	15	MR MPOFU SC: Yes.
16	COLONEL MODIBA: No, I don't accept that.	16	COLONEL MODIBA: So it's not in the
17	I mention that section 49, that was relevant legislation	17	morning or today or tomorrow, I mean yesterday.
18 19	to consider when using the force. So that was related legislation. That was my point, Chairperson.	18 19	MR MPOFU SC: Yes. No – no, I know, your mind, we are dealing with it now and your imagination. I'm
20	MR MPOFU SC: But remember that you have	20	saying what you are saying to us now is that what you were
20	extensive knowledge of law, with special emphasis on	20	seeking to convey to your members when you said that they
22	criminal law and criminal procedures and the law of	21	must remember section 49 was specifically related to the
23	evidence. So I'm saying that do you accept that section 49	23	arrest part of the mission. Is that your evidence?
24	of the Criminal Procedure Act in respect of which you have	24	COLONEL MODIBA: That's correct,
25	extensive knowledge deals with situations where that force	25	Chairperson.
Tel: 011	021 6457 Fax: 011 440 9119 RealTime Transcriptions Email: realtime@mweb.co.za	Tel: 011	1 021 6457 Fax: 011 440 9119 RealTime Transcriptions Email: realtime@mweb.co.za
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1	assumption, Colonel, you know? Because of your observation	1	and teargas" and so on "with an effort to disperse the
2	you made the assumption that someone had told them when you	2	crowd." That's what you assumed to be the sequence of
3	saw them walking alongside that Nyala. You did not	3	events, correct?
4	actually see someone saying it, you assumed that it had	4	COLONEL MODIBA: That is exactly what you
5	happened, correct?	5	were saying, I assumed at that time.
6	COLONEL MODIBA: That's correct,	6	MR MPOFU SC: Yes.
7	Chairperson.	7	COLONEL MODIBA: But then all the forces
8	MR MPOFU SC: Yes. Well, again let me –	8	assembled there, if we look into that paragraph,
9	I'll tell you nicely that that assumption was also wrong.	9	Chairperson. So that was my explanation. All forces
10	Nobody at that point had done anything of the sort which	10	assembled there.
11 12	was resisted by the protesters. So you are wrong again, correct?	11 12	MR MPOFU SC: Yes. COLONEL MODIBA: At scene 1.
13	CHAIRPERSON: If your assumption, if what	12	MR MPOFU SC: And after that the crowd
14	you put to him correct.	14	was addressed to disperse, to lay down the – and so on and
15	MR MPOFU SC: Ja – ja, as usual. If I am	15	so on – and then there was resistance. That was your
16	correct you're wrong, correct?	16	understanding or assumption.
17	COLONEL MODIBA: As you say it's	17	COLONEL MODIBA: It could be my
18	assumption, assumption could be wrong, right.	18	assumption –
19	MR MPOFU SC: This one was wrong, right?	19	MR MPOFU SC: Yes.
20	COLONEL MODIBA: Chairperson, the thing	20	COLONEL MODIBA: - given what I saw on
21	what Mr Mpofu is going all along is about assumption,	21	the day when the protesters were running in a violent
22	assumption –	22	manner alongside the Nyala -
23	MR MPOFU SC: Not my assumption –	23	MR MPOFU SC: Yes, sir. Now –
24	CHAIRPERSON: Just to cut it short, if	24	COLONEL MODIBA: - that suggested to me
25	what he puts to you is correct then it follows that what	25	that that means it didn't work.
Tel: 011	021 6457 Fax: 011 440 9119 RealTime Transcriptions Email: realtime@mweb.co.za	Tel: 011	021 6457 Fax: 011 440 9119 RealTime Transcriptions Email: realtime@mweb.co.za
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1	Page 30744 you assume was wrong, but that depends upon whether on the	1	Page 30746 MR MPOFU SC: Ja, ja.
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1 2	Page 30744 you assume was wrong, but that depends upon whether on the	1 2	Page 30746 MR MPOFU SC: Ja, ja. COLONEL MODIBA: For them to lay down
1 2 3	Page 30744 you assume was wrong, but that depends upon whether on the first part of the statement, that if what he puts to you is correct then what you assumed was wrong. That is so. Of	1 2 3	Page 30746 MR MPOFU SC: Ja, ja. COLONEL MODIBA: For them to lay down their arms.
1 2 3 4	Page 30744 you assume was wrong, but that depends upon whether on the first part of the statement, that if what he puts to you is correct then what you assumed was wrong. That is so. Of course it doesn't follow that what he's putting to you is	1 2 3 4	Page 30746 MR MPOFU SC: Ja, ja. COLONEL MODIBA: For them to lay down their arms. MR MPOFU SC: Yes. No, I understand
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1	MR MPOFU SC: And if it was a mistake	1	mistake again. Sorry, Colonel. It was wrong. You are a
2	then it was wrong.	2	murder suspect, correct? You were told that you're a
3	CHAIRPERSON: That's what the word	3	suspect for murder and attempted murder?
4	"mistake" means. I don't think you'd have to worry -	4	CHAIRPERSON: I think the question is a
5	MR MPOFU SC: Ja, well, I want the	5	bit vague, but what Mr Mpofu means in the IPID
6	witness to answer the question. If it was a mistake it was	6	investigation into what happened at Marikana on the 16th a
7	wrong. You have to learn to accept when something is	7	number of members of the police service have been treated
8	wrong.	8	as suspects and you are one of them. Presumably it's
9	COLONEL MODIBA: Chairperson, I'm	9	because you fired shots.
10	comfortable in using the word "mistake" in with my	10	COLONEL MODIBA: Ja, by the virtue of
11	observation, not wrong.	11	having discharged my firearm, that's correct, Chairperson.
12	MR MPOFU SC: So it was not wrong?	12	MR MPOFU SC: Yes. No, it's not vague at
13	COLONEL MODIBA: There was a mistake with	13	all. It says, "I conducted an interview with a suspect,
14	my observation, Chairperson.	14 15	name Kaizer Ntlou Modiba." That's you, correct?
15	MR MPOFU SC: And was it right?	15	COLONEL MODIBA: Those are my
16	CHAIRPERSON: If it was a mistake it	16	particulars, Chairperson.
17	couldn't be right, could it? So if it wasn't right, it	17 10	MR MPOFU SC: Yes, so in this file of
18	must have been wrong. So I think we can move on, don't you	18 10	murder and attempted murder, when it says the suspect, it
19 20	think? You can't have a mistake that's right. The very	19 20	means you, correct?
	fact that it's a mistake means it's wrong. That is so, so	20 21	COLONEL MODIBA: The IPID file, yes. MR MPOFU SC: Yes, thank you. Now
21 22	we can move on, I think. COLONEL MODIBA: With the interpretation	21 22	-
22	I cannot contend it.	22 23	according to you, you fired five shots allegedly to the ground. Is that correct?
23 24	CHAIRPERSON: No – You've got a wrong	23 24	COLONEL MODIBA: That's correct,
24 25	mistake there, Mr Mpofu, you can carry on. I'm going to	24 25	COLONEL MODIBA: Mais correct, Chairperson.
20	Thistake there, will wipord, you can carry on. This yoing to	20	Chall person.
Tel: 011	021 6457 Fax: 011 440 9119 RealTime Transcriptions Email: realtime@mweb.co.za	Tel: 011	021 6457 Fax: 011 440 9119 RealTime Transcriptions Email: realtime@mweb.co.za
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1 2	Page 30748 take tea at about 3 o'clock but obviously I'll only do so once you tell me that it's convenient for the purposes of	1 2	Page 30750 MR MPOFU SC: And the people you were with also fired to the ground?
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	Page 30751		Page 30753
1	MR MPOFU SC: Yes. So to your knowledge	1	MR MPOFU SC: No, we don't need ballistic
2	none of your group fired at people's heads or bodies, they	2	evidence for that. We already know, you have already said
3	fired to the ground, and I think your explanation was that	3	that those people were killed by the shots which were fired
4	if they died as a result of that firing it might be because	4	by people, including yourself, to the ground. So we don't
5	the bullets might have, there would have been ricochet of	5	need ballistic evidence, because the ballistic evidence
6	the bullets, correct?	6	will also show the same thing, that they were killed by the
7	COLONEL MODIBA: That's correct,	7	bullets that came from your group. All I'm saying is that
8	Chairperson.	8	it is possible that from the five bullets you shot, two of
9	MR MPOFU SC: You're quite sure about	9	them could have killed the two people who died. It's
10	this?	10	possible. It might be somebody else, but it could be you,
11	COLONEL MODIBA: Yes, I'm sure with	11	correct?
12	what –	12	COLONEL MODIBA: It's possible.
13	MR MPOFU SC: Ja.	13	MR MPOFU SC: Thank you, and it is for
14	COLONEL MODIBA: - what I am suggesting.	14	that reason then, because of that possibility that you
15	MR MPOFU SC: Yes, correct.	15	would be a murder suspect.
16	COLONEL MODIBA: Yes, I'm –	16	COLONEL MODIBA: Being a murder suspect
17	MR MPOFU SC: So – sorry, sorry again.	17	is not an issue with me, it's a charge as it is –
18	So you can't say, let's assume that you're correct then	18	MR MPOFU SC: Yes.
19	that the ricochets caused the deaths of those two people,	19	COLONEL MODIBA: - because I was involved
20	you can't say which of the people who fired killed those	20	in the shooting, so –
21	people, correct?	21	MR MPOFU SC: And people died.
22	COLONEL MODIBA: Yes, Chairperson.	22	COLONEL MODIBA: So it could be described
23	MR MPOFU SC: It could be you. You could	23	that way, that I'm a murder suspect. It's nothing, there's
24 25	have killed those two people.	24 25	no harm with me being a suspect in that regard.
25	COLONEL MODIBA: No, with me I know my –	25	CHAIRPERSON: Mr Mpofu, we're talking
Tel: 011	021 6457 Fax: 011 440 9119 RealTime Transcriptions Email: realtime@mweb.co.ze	Tel: 011	021 6457 Fax: 011 440 9119 RealTime Transcriptions Email: realtime@mweb.co.za
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11th	Page 30752	111th	June 2014 Marikana Commission of Inquiry Pretoria Page 30754 about bodies A and B, I take it.
			Page 30754
1	Page 30752 as I say because of firing into the ground and then in a	1	Page 30754 about bodies A and B, I take it.
1 2	Page 30752 as I say because of firing into the ground and then in a rocky area, yes that could be the case, yes.	1 2	Page 30754 about bodies A and B, I take it. MR MPOFU SC: That's correct,
1 2 3	Page 30752 as I say because of firing into the ground and then in a rocky area, yes that could be the case, yes. MR MPOFU SC: Okay, yes. So you could	1 2 3	Page 30754 about bodies A and B, I take it. MR MPOFU SC: That's correct, Chairperson, it Mr Mdizeni and Thelejane, I think.
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	Page 30755		Page 30757
1	COLONEL MODIBA: I said I don't know if	1	MR MPOFU SC: Chairperson, with the
2	ballistic evidence could link my firearm. That was -	2	greatest respect, if I can be asked to ask my question.
3	MR MPOFU SC: You never said –	3	I'm not about any of this what Ms Baloyi is saying at all.
4	COLONEL MODIBA: That was my point. Now	4	I'm asking the witness whether before that explanation was
5	the Chairperson is saying that the ballistic evidence	5	given he had said it was possible that he's a killer or
6	suggests that it was high calibre, which could probably be	6	not.
7	R5, and I was not carrying R5.	7	CHAIRPERSON: And I take it the answer to
8	MR MPOFU SC: Yes, but you don't know if	8	that is yes, you did make that concession that it was a
9	they suffered any other wounds, do you?	9	possibility that couldn't be excluded, but in the light of
10	COLONEL MODIBA: I don't know,	10	the ballistic evidence to which your attention has now been
11	Chairperson.	11 12	drawn, do you wish to withdraw that concession?
12 13	MR MPOFU SC: Ja, okay, and you did earlier say it was possible that you could be the killer –	12	MR MPOFU SC: No, no, that's your question, Chairperson.
13 14	COLONEL MODIBA: But if I –	13 14	CHAIRPERSON: I know it is my question.
15	MR MPOFU SC: - before the Chairperson	15	MR MPOFU SC: I'll still ask mine.
16	intervened. Didn't you?	16	CHAIRPERSON: There's nothing wrong with
17	COLONEL MODIBA: No, I did not –	17	– I'm allowed to ask questions too. Thank you. You heard
18	MR MPOFU SC: You didn't?	18	my question. You made the concession, the possibility that
19	COLONEL MODIBA: I did not agree with you	19	one of your bullets or two of your bullets might have
20	that I could be a killer.	20	killed these two people could not be excluded, and you said
21	CHAIRPERSON: Mr Mpofu, Ms Baloyi wishes	21	yes, that was so. Your attention was then drawn to the
22	to say something.	22	fact that according to the post mortem reports these two
23	MS BALOYI: Thank you, Chairperson, we	23	men died as a result of high-velocity R5 bullets and you
24	have been referred to the medical records. Unless Mr Mpofu	24	said you didn't have an R5. Therefore do you withdraw the
25	wants to dispute what's contained there and then he wants	25	concession that you made?
Tel: 011	021 6457 Fax: 011 440 9119 RealTime Transcriptions Email: realtime@mweb.co.za	Tel: 011	021 6457 Fax: 011 440 9119 RealTime Transcriptions Email: realtime@mweb.co.za
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1	possibility that his bullets might have injured the people.	1	possibility that they were killed as a result of the bullet
2	That's all. A very simple question.	2	that ricocheted.
3	CHAIRPERSON: Which people are you	3	MR MPOFU SC: Yes, from the warning
4	talking about? We're talking about these –	4	shots.
5	MR MPOFU SC: The people you are talking	5	CHAIRPERSON: The proposition you put to
6	about.	6	him doesn't follow logically from what went before, that it
7	CHAIRPERSON: If we're talking about	7	was also possible that these persons were killed by, as a
8	these two people, there's no possibility because there's	8 9	result of shots fired from other members of the service –
9 10	no, the post mortem doesn't reveal any other injuries. MR MPOFU SC: Well, that doesn't mean	9 10	MR MPOFU SC: Ja, well there might be a million –
11	they were not injured, just because the post mortem doesn't	10	CHAIRPERSON: - who were not under the
12	say so.	12	command of this witness.
13	CHAIRPERSON: Well, you can argue that at	13	MR MPOFU SC: Ja, Chairperson, there
14	the end, if you like. Let's move on to something else.	14	might be a million other possibilities. I'm asking him
15	MR MPOFU SC: Anyway, the next point is	15	about a specific possibility that –
16	that you yourself, if anyone said that the group fired at	16	CHAIRPERSON: No, you put it on the basis
17	the protesters, that would be wrong; they fired to the	17	that if they were -
18	ground?	18	MR MPOFU SC: Killed by the group that
19	COLONEL MODIBA: That's according to the	19	he –
20	shottists.	20	CHAIRPERSON: If the bullets that were
21	MR MPOFU SC: Yes. And you would then	21	fired to the ground ricocheted, then –
22	accept that, or rather so those people who fired to the	22	MR MPOFU SC: Yes.
23	ground include those who fired with pistols, like you, and	23	CHAIRPERSON: - they were killed by them.
24	those who fired with R5, correct?	24	It follows that that possibility exists, but of course also
25	COLONEL MODIBA: I don't get the	25	a possibility they were killed by other members of the
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1	question. I need clarity.	1	service –
2	MR MPOFU SC: Did the group that you say	2	MR MPOFU SC: Ja, well –
3	fired to the ground include people who fired pistols and	3	CHAIRPERSON: - who were approaching from
4	those who fired R5s?	4	another angle to the koppie.
5	COLONEL MODIBA: That's correct,	5	MR MPOFU SC: Ja, well I don't know,
6	Chairperson.	6	maybe I didn't ask the question clearly. I did this
7	MR MPOFU SC: So the earlier evidence	7	deliberately just to avoid this kind of debate. If as we
8	that they might have been killed by ricochet bullets	8	accepted that these people were killed by members of your
9	includes from those members of your group that were firing	9	group, and if according to the shottists in your group
10	R5s, correct? Seeing that we know that they were killed by	10	everybody fired to the ground, including the R5-wielding people, then those people would have been killed in the
11 12	R5 rifle, correct? COLONEL MODIBA: There is such	11 12	course of warning shots, by warning shots. Is that correct
13	possibility, Chairperson.	13	or not correct, Colonel Modiba?
14	MR MPOFU SC: Yes, now if that is so you	14	COLONEL MODIBA: It could be as a result
15	would accept that what you were doing at that stage	15	of the ricochet from the warning shots.
16	according to your evidence was to give warning shots,	16	MR MPOFU SC: Yes.
17	correct?	17	COMMISSIONER HEMRAJ: There is a
18	COLONEL MODIBA: That was the objective –	18	statement that says, Mr Mpofu, that one of the constables
19	MR MPOFU SC: Yes.	19	fired into the air as well. It's not only into the ground.
20	COLONEL MODIBA: - at the time when the	20	MR MPOFU SC: Yes, ja. Thank you, yes,
21	charging was taking place, yes Chairperson.	21	that's correct, Commissioner. We'll assume, we can forgive
22	MR MPOFU SC: Yes, so from your evidence	22	that one. If they fired to the air hopefully it was not in
23	so far we must accept that those people were killed by	23	the air that was around the people. So assuming, putting
24	warning shots.	24 25	that aside, the person who fired from the air, then those
25 A	COLONEL MODIBA: I said there could be a	25	people would have been killed in the course of warning
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1	shots. You and I have agreed at least, correct?	1	that your warning shot caused the death of the person who
2	COLONEL MODIBA: As I said, due to the	2	was charging, it could as well be justifiable looking at
3	ricochet, that is –	3	how the warning shots was fired, it will depend how the
4	MR MPOFU SC: Ja.	4	warning shot was fired, Chairperson.
5	COLONEL MODIBA: - the action of the	5	MR MPOFU SC: Yes, okay, that's good. So
6	bullet from the ground.	6	it will depend. So sometimes it would be justifiable,
7	MR MPOFU SC: Ja.	7	sometimes it won't be.
8	COLONEL MODIBA: It's possible, because	8	COLONEL MODIBA: We look at the
9	of the place was, this is a rocky area.	9	intention.
10	MR MPOFU SC: Ja. Now the purpose of	10	MR MPOFU SC SC: Ja.
11	warning shots as I understand it is when you see some	11	COLONEL MODIBA: Intention of discharging
12	danger you fire a warning shot, and if the danger persists	12	a fire.
13	you might fire at the person, correct?	13	MR MPOFU SC: Ja.
14	COLONEL MODIBA: That's correct,	14	COLONEL MODIBA: The intention would be a
15	Chairperson.	15	main factor yes, Chairperson.
16	MR MPOFU SC: But after you've fired	16	MR MPOFU SC: Yes, and in your case the
17	warning shots, if the danger does not persist then you	17	intention was to fire warning shots, correct?
18	wouldn't fire at the person, correct?	18	COLONEL MODIBA: That's correct,
19 20	COLONEL MODIBA: That's correct,	19 20	Chairperson. MR MPOFU SC: And that's what I'm trying
20 21	Chairperson. MR MPOFU SC: In other words the purpose	20	MR MPOFU SC: And that's what I'm trying to explain to you. So there's a difference between that
21	MR MPOFU SC: In other words the purpose of warning shots is to warn the person that should they	21	situation where you have an intention to fire warning shots
22	take another step then you might be forced to fire at them,	22	and by some misfortune they ricochet and kill a person.
23 24	correct?	23	That's different from a situation where your intention is
25	COLONEL MODIBA: That's correct,	24	to fire at the person because your life is threatened,
25		25	to file at the person because your file is threatened,
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1	Chairperson.	1	because sometimes you don't have the luxury of warning
2	MR MPOFU SC: Yes, so then we can accept	2	shots, we accept that, but do you understand the difference
3	that at the time that you are firing the warning shot - or	3	between those two situations?
4	let me put it this way; there are also situations that may	4	COLONEL MODIBA: Yes I do understand,
5	arise where you don't have time to fire warning shots,	5	Chairperson.
6	where the danger is just imminent, correct?	6	MR MPOFU SC: Yes. So in the one your
7	COLONEL MODIBA: That's correct.	7	intention is to fire to the ground, but unfortunately it
8	MR MPOFU SC: Yes, and those situations	8	ricocheted, in the other situation your intention is to
9	must be distinguished from the situation where you have an	9	kill the person but you have a legal justification. Do you
10	opportunity to fire warning shots, stage 1, and then see	10	understand that?
11	what happens, and then fire at the person, correct?	11	COLONEL MODIBA: Hence I said,
12	COLONEL MODIBA: Ja, it varies from	12	Chairperson, the situation is different.
13	situation to situation, correct.	13	MR MPOFU SC: Yes. I know, that's my
14	MR MPOFU SC: Yes. So if the person, if	14	whole point that it's different, but I'm saying your
15	you shoot a person, if that person dies as a result of the	15	situation was that you were firing on the ground with the
16	warning shot then it must be accepted that at that stage	16	other people and the R5 wielding people and maybe,
17	the danger was not so imminent that your life was	17	unfortunately, the people were killed by ricochet. It is
18	threatened at that stage. There was, it was the situation	18	not the other situation where you were firing at the
19	number 1 where you have an opportunity to fire warning	19	people.
20	shots, correct?	20 21	COLONEL MODIBA: No that was the - the
21	COLONEL MODIBA: No, the issue here is if you resort to firing warning shot, by so doing you are	21 22	intent was to fire warning shots. MR MPOFU SC: Yes.
22 23	trying to negotiate threat that is coming your way.	22	COLONEL MODIBA: Let alone how it
23	[15:43] MR MPOFU SC: Ja.	23 24	resulted - the result of the warning shot - but the intent
24 25	COLONEL MODIBA: And then, should it be	24 25	was to fire a warning shot.
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1	MR MPOFU SC: Yes.	1	COLONEL MODIBA: - I said a large crowd
2	COLONEL MODIBA: That is my base.	2	came around. That could be approximately 30 in number.
3	MR MPOFU SC: Yes. No, that I accept.	3	MR MPOFU SC: Yes, okay, the large group
4	We're not talking about intent, we're talking about	4	came around. Okay how many then managed, apart from the
5	unlawfulness since you are a legal expert. I'm saying to	5	group that went around the kraal? Estimate, obviously you
6	you the point of - your intention at that stage was to fire	6	didn't count them.
7	to the ground, it was not to fire at the person and defend	7	COLONEL MODIBA: Chairperson, I was not
8	yourself in that way, correct?	8	close as I mentioned in my statement that I was
9	COLONEL MODIBA: Firing a warning shot	9	approximately 80 to 100. I couldn't really have that good
10	could also be another method of defending myself because by	10	view to say so many managed, so many did not manage.
11	mere firing it could detain the attacker to change his	11	MR MPOFU SC: Yes. No I grant that. You
12	mind.	12	were far away and therefore I can't pin you down. You
13	MR MPOFU SC: Yes but, Colonel, I'm sure	13	can't say 26 and live or die by it, I'm just saying that
14	you understand what I'm saying. I'm saying to you there	14	small group that managed in your view, how many were they,
15	are two separate situations and you were in situation 1 as	15	roughly.
16	opposed to situation 2. The one situation is you fire a	16	COLONEL MODIBA: I'm not able to give
17	warning shot and whatever happens, happens. The other	17	estimate, Chairperson.
18	situation is you fire at the person to kill them, or maim them or whatever. You were in situation number 1. You	18 10	MR MPOFU SC: More than one?
19 20		19 20	COLONEL MODIBA: It could be one, it
20 21	were firing warning shots to the ground. COLONEL MODIBA: That's correct.	20 21	could be two, Chairperson. MR MPOFU SC: It could be two.
21	MR MPOFU SC: Thank you. Then let's just	21	COLONEL MODIBA: It could be one, it
22	go back to scene 1. We were dealing - before tea we were	22	could be two. I was -
23 24	dealing with the mistake and the assumption and all that.	23 24	MR MPOFU SC: It could be three.
24 25	After you saw the crowd running - I think your evidence was	24 25	COLONEL MODIBA: - I was far. My
20	Alter you saw the crowd running in think your evidence was	20	COLONEL WODDA. I was tal. my
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1	Page 30768 that they were moving parallel with Nyala number 4. You	1	Page 30770 distance was not -
1 2			Page 30770
	that they were moving parallel with Nyala number 4. You	1	Page 30770 distance was not -
2	that they were moving parallel with Nyala number 4. You might not have known the number then now, but what you now	1 2	Page 30770 distance was not - MR MPOFU SC: Ja.
2 3	that they were moving parallel with Nyala number 4. You might not have known the number then now, but what you now know is Nyala number 4. Do you remember that part?	1 2 3	Page 30770 distance was not - MR MPOFU SC: Ja. COLONEL MODIBA: I was not having a good
2 3 4	that they were moving parallel with Nyala number 4. You might not have known the number then now, but what you now know is Nyala number 4. Do you remember that part? COLONEL MODIBA: Yes I do remember,	1 2 3 4	Page 30770 distance was not - MR MPOFU SC: Ja. COLONEL MODIBA: I was not having a good view considering the fact that there were a lot of
2 3 4 5	that they were moving parallel with Nyala number 4. You might not have known the number then now, but what you now know is Nyala number 4. Do you remember that part? COLONEL MODIBA: Yes I do remember, Chairperson.	1 2 3 4 5	Page 30770 distance was not - MR MPOFU SC: Ja. COLONEL MODIBA: I was not having a good view considering the fact that there were a lot of movements there.
2 3 4 5 6	that they were moving parallel with Nyala number 4. You might not have known the number then now, but what you now know is Nyala number 4. Do you remember that part? COLONEL MODIBA: Yes I do remember, Chairperson. MR MPOFU SC: Ja, and your evidence was that, I think the chairperson put it appropriately, that effectively it was a race towards the kraal between the	1 2 3 4 5 6	Page 30770 distance was not - MR MPOFU SC: Ja. COLONEL MODIBA: I was not having a good view considering the fact that there were a lot of movements there. MR MPOFU SC: Ja, I accept that. So it could be five, it could be ten. COLONEL MODIBA: I'm saying my view was
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1	Roughly how many?	1	CHAIRPERSON: You're talking about the
2	COLONEL MODIBA: Chairperson, I would	2	ones who went round the kraal and came down on the right-
3	repeat again to say I cannot be specific because my view	3	hand side of the kraal, isn't that right? As you're facing
4	was not such good and if one managed, it couldn't be a lot.	4	the koppie you've got the kraal in front of you. Now on
5	It could be one or two.	5	the left-hand side, that's where the Nyala ended up with
6	MR MPOFU SC: So when you say in your	6	the barbed wire, and you say some people got through there
7	statement, "some managed to go through the gap between the	7	between the Nyala and the kraal, that's correct. Others
8	Nyala and the barbed wire", when you say "some" what would	8	went round the kraal and came down through, what we call
9	you wish to convey?	9	the corridor, on the right side of the kraal as you face
10	COLONEL MODIBA: Chairperson, some could	10	the koppie. That's correct isn't it? So you're talking,
11	be two people. Two persons.	11	as I understand it, about the ones who went round the kraal
12	MR MPOFU SC: I understand, but it could	12	and came down the right side. Mr Mpofu is talking about
13	also be 100 people. That's why, what I'm trying, Colonel	13	the ones who managed to get through between the Nyala and
14	Modiba, to really get you to assist the Commission. Some,	14	the left-hand wall of the kraal. You understand the point?
15	you're right, could mean two people, it could mean 2 000.	15	COLONEL MODIBA: I do get it,
16	COLONEL MODIBA: Ja, with my observation	16	Chairperson. As I mentioned to Mr Mpofu that my
17	if that some, I would have referred to a maximum of two.	17	observation on the day, I thought I was seeing one or two.
18	MR MPOFU SC: Ja. Alright fine. Those	18	If you can go back to my statement I said some, which could
19	who managed, two or so, or more or less, they proceeded	19	be two persons, and there were a lot of movement that could
20	towards Nkaneng I suppose, correct?	20	have distracted my view, but the large crowd that came
21	COLONEL MODIBA: Repeat your question?	21	around, that I'm certain what I'm saying.
22	MR MPOFU SC: Well those people who	22	MR MPOFU SC: Yes. No, I understand all
23	managed to go through, whatever their number is, managed to	23	that. I'm even prepared to accept, Colonel, that after
24	proceed to the squatter camp. You might not know its name.	24	those people made it through that gap something else
25	They carried on, correct?	25	distracted your attention. I'm not saying you had a duty
Tel: 011	021 6457 Fax: 011 440 9119 RealTime Transcriptions Email: realtime@mweb.co.za	Tel: 011	021 6457 Fax: 011 440 9119 RealTime Transcriptions Email: realtime@mweb.co.za
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			1 5
1	Page 30772	1	Page 30774
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2	COLONEL MODIBA: I didn't see what happened with the two if that was two or one, what I could	2	to look at what they were doing because, as you say, the situation was volatile. All I'm saying is that there's
2 3	COLONEL MODIBA: I didn't see what happened with the two if that was two or one, what I could see was the aggressive armed strikers that came around the	2 3	to look at what they were doing because, as you say, the situation was volatile. All I'm saying is that there's nothing that you know of that suggests that those people
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	Page 30775		Page 30777
1	MR MPOFU SC: Okay. I'm saying you and I	1	CHAIRPERSON: One of the routes to
2	have had a discussion about the people who were blocked by	2	Nkaneng.
3	Nyala 4, correct? Yes. I'm saying the evidence of some of	3	COLONEL MODIBA: As I said, it could be
4	those people who were blocked by Nyala 4 is that - like the	4	even furthest on the north of that kraal to go to Nkaneng.
5	ones, like all the others who had gone through that very	5	MR MPOFU SC: No.
6	same place before Nyala 4 closed it. They were proceeding	6	CHAIRPERSON: Doesn't it depend on which
7	towards Nkaneng. You can't dispute that.	7	part of Nkaneng you want to go to? Nkaneng runs all along
8	COLONEL MODIBA: I did not see anyone	8	there. We can't see it but it's below the bottom of the
9	proceeding to Nkaneng but what I saw, the large group that	9	screen, but Nkaneng runs all along there from one side to
10	came around the kraal, running. That's what drew my	10	the other you see, and depending which part of Nkaneng you
11	attention. The action of those that ran around drew my	11	were going to you might - if you're at the far end of
12	attention. Maybe those two that I mentioned could have -	12	Nkaneng you go on the northern side of the kraal, if you
13	could not be visible as to what they were doing there.	13	were on the side closer to the left-hand side of the
14	MR MPOFU SC: Alright, then can you go to	14	picture, you might go there. It depends on a number of
15	exhibit L191, or 193. 193. Okay, you can take it from me	15	factors isn't it?
16	that that is taken at 15:43 which is round about the time,	16	COLONEL MODIBA: Yes, Chairperson, it
17	or just before the time that you and I are discussing now,	17	could be one of the routes leading to Nkaneng.
18	and the police are saying that, "the protestors, organised	18	MR MPOFU SC: But the evidence is that -
19	group remained with the others in the koppies while a	19	CHAIRPERSON: Nkaneng is quite big
20	number of protestors are departing" and if you zoom into	20	actually. You have seen pictures of that. You were there
21	the long white line, that coincidentally happens to be	21	and you've also seen pictures of it. It's quite a big
22	where the other people were killed. That's where it's	22	area.
23	pointing - if you can zoom closer, you'll see that there	23	COLONEL MODIBA: But according to my
24	were people who were departing, using that very same place	24	observation, Chairperson, I doubt if there could be anyone
25	that you and I are talking about. Do you see that?	25	walking past there the way the situation was.
Tel: 011	021 6457 Fax: 011 440 9119 RealTime Transcriptions Email: realtime@mweb.co.za	Tel: 011	021 6457 Fax: 011 440 9119 RealTime Transcriptions Email: realtime@mweb.co.za
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2	Page 30776 COLONEL MODIBA: Yes I see, Chairperson. MR MPOFU SC: Yes. So you can accept	1 2	Page 30778 MR MPOFU SC: So you think that picture is lying?
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1	MR MPOFU SC SC: Yes, okay.	1	see the broken yellow lines, after the initial rollout of
2	MS BALOYI: Chair, it might be helpful	2	the barbed wire a number of the people started departing
3	perhaps if the witness could be directed to look at that	3	using that road, and as I say just by coincidence the arrow
4	clearer screen over there.	4	goes almost exactly to where the others were later killed.
5	CHAIRPERSON: Yes. Now you see what the	5	Do you accept that?
6	police inscription says is this.	6	COLONEL MODIBA: Chairperson, it could
7	[16:03] "Protester organised group remained with others	7	have been that there were those that already passed there
8	on the koppies," and then you see, and it goes on, "While a	8	before that Nyala came.
9	number of protesters are departing," now you'll see there	9	MR MPOFU SC: Thank you.
10	are, there's a red arrow which goes down to a circle and	10	CHAIRPERSON: Is this a note upon which
11	the police case is that those people in the red circle are	11	we can take the adjournment till tomorrow?
12	the so-called organised group.	12	MR MPOFU SC: Ja, I –
13	Then you've got two groups of people visible at	13	CHAIRPERSON: You have about an hour and
14	the heads of the yellow arrows. That the police say, or	14	a quarter left, I think.
15	those the police say are two other groups of strikers who	15	MR MPOFU SC: Well, Chairperson –
16	were staying near the koppie, on the koppies. Then they've	16	CHAIRPERSON: Is that right, Mr Wesley?
17	got the white arrow, which goes down to the bottom right-	17	MR MPOFU SC: Chairperson, I think we
18 19	hand corner of the photograph, and that deals with the	18 19	must take into account the rate at which answers are extracted, or obtained. But we can do that tomorrow.
20	number of protesters who are departing according to the writing at the top, and that is the, what the police say is	20	
20	depicted on this photograph, you see.	20	Thank you, Chairperson. CHAIRPERSON: [Microphone off, inaudible]
22	Now there are people, they're not just all	22	MR MPOFU SC: Thank you, Chairperson.
23	standing there on that road. Obviously they're walking	22	We'll deal with that – I'll do my best, Chairperson.
24	somewhere and the police say they are departing. So that	23	MR WESLEY: Chair, it's approximately an
25	does seem to indicate that there was a number of people who	25	hour and a half, one hour and 33 minutes.
20		20	
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1	were walking down along that road towards Nkaneng.	1	MR MPOFU SC: Thank you, Chairperson.
2	The police case, as I say, is that the organised	2	CHAIRPERSON: [Microphone off, inaudible]
3	lot, the ones with the dangerous weapons and so on, those	3	by the time we take the first break tomorrow [inaudible].
4	are the ones who stayed behind for a while, and there's a	4	MR MPOFU SC: Thank you, Chairperson.
5	lot of evidence in dispute actually about what exactly	5	CHAIRPERSON: [Microphone off, inaudible]
6	happened with them and what they were doing thereafter, but	6	[COMMISSION ADJOURNED]
7	this time, 15:43, is some time before the actual shooting,	7	
8	shows people departing along the road marked by the white	8	
9	arrow. Do you understand that? So that's to try to orient	9	
10	you.	10	
11	It's nearly 4 o'clock, Mr Mpofu. Would you like	11	·
12	to ask a couple of questions on this and then we'll take	12	
13 14	the adjournment until tomorrow morning? Because I've tried to put the witness in the picture.	13 14	
14	MR MPOFU SC: I'm indebted to you,	14	
16	Chairperson. If I can get an answer, then we might all –	16	
17	CHAIRPERSON: Ask the question and then	17	
18	see if you can get an answer.	18	
19	MR MPOFU SC: Yes. Do you accept that it	19	
20	is common cause that shortly before the events that you and	20	
210	I were discussing where Nyala 4 blocked that road and those	21	
22	lucky two people would have been the last ones to follow on	22	
23	these ones, actually the evidence is that this was the main	23	
24	access road towards the koppie and away from the koppie and	24	
25	that a number of people as depicted there, after, if you	25	
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