

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 244

12 JUNE 2014

PAGES 30783 TO 30873



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1 [PROCEEDINGS ON 12 JUNE 2014]
 2 [09:42] CHAIRPERSON: The Commission resumes. I
 3 apologise to those who have been kept waiting since 9
 4 o'clock. There were housekeeping matters that had to be
 5 attended to. We haven't quite finished with them yet but
 6 it's obviously sensible for us to start in the meanwhile.
 7 You're still under oath, Colonel.
 8 KAIZER TLOU MODIBA: (s.u.o.)
 9 CHAIRPERSON: Mr Mpofo?
 10 CROSS-EXAMINATION BY MR MPOFU (CONTD.):
 11 Thank you, Chairperson. Good morning, Colonel.
 12 COLONEL MODIBA: Good morning.
 13 MR MPOFU: Ja.
 14 CHAIRPERSON: You got it right this time.
 15 MR MPOFU: Yes. We were still busy, I
 16 don't want us to waste time on the slides that we were busy
 17 with yesterday. You now accept, after we went through
 18 that, the version of the police is that the people depicted
 19 in that slide were departing towards Nkaneng, right?
 20 COLONEL MODIBA: Ja, on that picture I
 21 saw the direction which the red, the yellow, I mean the
 22 white line was showing. That was one of the routes leading
 23 to Nkaneng.
 24 MR MPOFU: No, that's not my question,
 25 I'm not asking you about routes. Do you now accept that

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1 according to the police version those people were using
 2 that road and departing towards Nkaneng?
 3 COLONEL MODIBA: That is my
 4 understanding.
 5 MR MPOFU: Yes, and you've already
 6 testified that you can't dispute that those people who
 7 managed to beat the Nyala must have proceeded towards
 8 Nkaneng, okay?
 9 COLONEL MODIBA: That's correct.
 10 MR MPOFU: And I've told you that there
 11 is oral evidence from at least two of the people who were
 12 in that group that they were on their way to Nkaneng, you
 13 can accept that as a fact, okay.
 14 CHAIRPERSON: Accept as a fact that
 15 there's oral evidence.
 16 MR MPOFU: Yes, that's what I –
 17 CHAIRPERSON: Not that the contents of
 18 the oral evidence is necessarily –
 19 MR MPOFU: No, that's not what I'm
 20 saying.
 21 CHAIRPERSON: No, I'm just – what you
 22 said was ambiguous, that's why I'm just clarifying.
 23 MR MPOFU: Okay, can you answer the
 24 question as rephrased by the Chairperson?
 25 COLONEL MODIBA: Can you repeat –

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1 CHAIRPERSON: Do you accept that there is
 2 evidence on record to the effect from members of the main,
 3 what one can call the main group, that they were proceeding
 4 towards Nkaneng. That's their evidence. Whether it's to
 5 be accepted or not is a matter we'll decide at the end of
 6 the inquiry but there is such evidence on record, you can
 7 take it from me that that's so.
 8 COLONEL MODIBA: Yes, Chairperson.
 9 MR MPOFU: Yes. Now, there is also
 10 evidence that, from one of the leaders of the group, when
 11 they left the mountain they had agreed that they must walk
 12 towards Nkaneng. You can also accept that there is that
 13 evidence, not whether it's true or not.
 14 COLONEL MODIBA: I don't know that
 15 evidence.
 16 CHAIRPERSON: Again that's correct, that
 17 was evidence that was given. Whether we will accept it at
 18 the end is a matter we don't know ourselves yet, we'll only
 19 know at the end of the inquiry.
 20 MR MPOFU: Okay. And you yourself, I'm
 21 sure you will accept that when you say these people were
 22 rushing or racing against the Nyala towards where it closed
 23 – towards the kraal, you'll accept that they were actually
 24 not going to the kraal itself. I think that's obvious.
 25 COLONEL MODIBA: No, it is not true,

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1 Chairperson. The group that I saw racing alongside the
 2 Nyala, that was the same group that ran around the kraal
 3 and charged at the police.
 4 MR MPOFU: No, just listen to the
 5 question, okay. Do you accept that when the people, if
 6 that Nyala had not closed them off – or let me put it this
 7 way, as you say they were rushing towards the kraal, that
 8 they were not rushing to the kraal itself, they must have
 9 been proceeding somewhere else. They were not rushing just
 10 to go and gather inside the kraal.
 11 CHAIRPERSON: Can I put it slightly
 12 differently? You are of the view and you've told us why,
 13 that these people were intending to attack the police.
 14 That's what you have said. Mr Mpofo's case is, that's not
 15 correct, they were on their way to Nkaneng. Now you can
 16 agree to differ on that point for the moment. He's busy
 17 with another point. He says one thing seems clear, they
 18 weren't on their way to the kraal, they weren't intending
 19 to go to the kraal. They were either intending to go to
 20 Nyala, he says, or they were intending to attack the police
 21 as you say. That's correct, isn't it?
 22 COLONEL MODIBA: I'm testifying about the
 23 group that I saw running towards the kraal and charged the
 24 police from the side of the kraal. I'm referring to that
 25 group.

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1 CHAIRPERSON: No, I think the point is,
 2 what Mr Mpofo is saying is they weren't going to the kraal
 3 and intending to stay at the kraal. The kraal wasn't their
 4 destination.
 5 MR MPOFU: Mm.
 6 CHAIRPERSON: Their destination was
 7 either Nyala, as he says, or the police line so they could
 8 attack the police, which is what you say.
 9 MR MPOFU: That's correct, Chair.
 10 CHAIRPERSON: That must be right,
 11 Colonel, surely? The destination wasn't the kraal. It was
 12 either Nyala or an attack on the police. That's right,
 13 isn't it?
 14 COLONEL MODIBA: It could be either way.
 15 CHAIRPERSON: Yes, well, that's the
 16 point.
 17 COLONEL MODIBA: Ja.
 18 CHAIRPERSON: Thanks.
 19 MR MPOFU: Thank you very much. And at
 20 the very least from your evidence, their destination must
 21 have been the same as those who were not as unfortunate as
 22 them to have been closed off by Nyala 4. In other words,
 23 the ones who succeeded - they were all going in one group,
 24 some succeeded, some failed but they had the same intent of
 25 where they were going, either to attack –

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1 CHAIRPERSON: Why does that follow and
 2 how can the witness say, that it's possible there were a
 3 group of people wanting to go to Nkaneng, it's possible
 4 that another group was intending to attack the police. How
 5 can he –
 6 MR MPOFU: No, Chairperson –
 7 CHAIRPERSON: - how can he put them
 8 altogether in one group and ascribe one intent to them?
 9 MR MPOFU: Chairperson, you were not
 10 there, I was not there, he was there. He has said that he
 11 learnt, he read so many things from the way they were
 12 walking, he even read that they must have been warned. How
 13 can you, Chairperson, say that he can't now say whether
 14 they were moving with, as a singular group with one intent
 15 or not. He may, he may not –
 16 CHAIRPERSON: I can –
 17 MR MPOFU: We don't know that, neither do
 18 I.
 19 CHAIRPERSON: I can say it and I have
 20 said it but never mind, let's get his answer to the
 21 question.
 22 MR MPOFU: Listen Colonel, it's a very
 23 simple question. From your observation of the group which
 24 you analysed in many ways that we spoke about yesterday,
 25 when they were rushing alongside the Nyala they were as one

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1 composite group with the same intent of wherever they were
 2 going, either to attack or to go to Nkaneng, correct?
 3 COLONEL MODIBA: They looked the same
 4 way.
 5 MR MPOFU: Yes, thank you. Chairperson,
 6 ja, he does know. He says they did look the same way, ja.
 7 So from that we can then deduce that the – as I say, in
 8 this monolithic group that had the same intent, as it were,
 9 those who were unfortunate to be blocked by – or let's
 10 start with the first group. Those who were fortunate to
 11 beat Nyala 4 would have proceeded to do what the ones who
 12 failed had done, it follows, correct?
 13 COLONEL MODIBA: No, I don't get the
 14 question, Chairperson.
 15 MR MPOFU: Okay, let me ask it
 16 differently. Do you accept that the people who went around
 17 the kraal went around the kraal because Nyala 4 had blocked
 18 their way?
 19 COLONEL MODIBA: I cannot say it's
 20 because Nyala 4 blocked their way.
 21 MR MPOFU: Well, but those ones who were
 22 not blocked, according to you, simply proceeded. They
 23 didn't, despite the fact that the road was not blocked just
 24 go around the kraal. So there was nothing magical about
 25 the kraal.

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1 COLONEL MODIBA: In my –
 2 MR MPOFU: The only reason why the group
 3 that you say went around the kraal was because Nyala 4 had
 4 blocked them.
 5 COLONEL MODIBA: In my testimony,
 6 Chairperson, I said that among the group that ran around
 7 the kraal –
 8 MR MPOFU: Some managed to go –
 9 COLONEL MODIBA: - some, which could be
 10 two persons, that managed.
 11 MR MPOFU: Yes.
 12 COLONEL MODIBA: And the group that could
 13 not make it before the Nyala, they ran around the kraal and
 14 charged at the police –
 15 MR MPOFU: Yes.
 16 COLONEL MODIBA: That was my position.
 17 MR MPOFU: Yes, Colonel, but that very
 18 language of managed, you say some of them managed to go
 19 through, okay? In other words, the others did not manage
 20 to go through. Isn't that obvious? Answer the question.
 21 COLONEL MODIBA: The question is not
 22 clear to me.
 23 MR MPOFU: Is this not obvious, from your
 24 own language when you say some of them managed to go
 25 through, that others did not manage to go through?

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1 COLONEL MODIBA: That's correct,
 2 Chairperson.
 3 MR MPOFU: Yes. So from that then it's
 4 clear that those who did not manage to go through, the only
 5 reason they did not go through is because Nyala 4 won the
 6 race and closed them off. Isn't that also obvious?
 7 COLONEL MODIBA: Yes, it is true,
 8 Chairperson.
 9 MR MPOFU: Thank you. Okay, therefore
 10 what I'm going to argue, which you may or may not comment,
 11 whatever you want to do, what I'm going to argue at the end
 12 of the case is therefore that from all these factors that
 13 I've listed for you, the fact that there was an agreement
 14 by them to go to Nyala, one; two, the fact that they have
 15 testified that they were going to Nkaneng; three, the fact
 16 that they were obviously not going to the kraal, which
 17 you've conceded; four, the fact that those who managed to
 18 go through must have proceeded to Nkaneng; five, the fact
 19 that the only reason that they went around the kraal was
 20 because they were blocked by Nyala 4, it is indisputable
 21 that they were on their way to Nkaneng like those who
 22 managed and those that you saw in slide 191. Do you have
 23 any comment?
 24 COLONEL MODIBA: Chairperson, I just want
 25 to highlight that looking at the conduct of the group that

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1 were racing against the Nyala, it was very clear that they
 2 had common intent –
 3 MR MPOFU: Yes.
 4 COLONEL MODIBA: - of doing something,
 5 which at a later stage I observed that as they were running
 6 they immediately turned towards the direction of the
 7 police, charging while wielding their dangerous weapons.
 8 MR MPOFU: No – no, that's afterwards or
 9 after they'd gone around the kraal, according to your
 10 evidence. We'll come to that. I'm saying the common
 11 intent which they had was executed by those who managed to
 12 go through, which was to go home.
 13 CHAIRPERSON: Do you agree with that or
 14 do you not agree with it or are you not able to comment?
 15 COLONEL MODIBA: No, I cannot comment on
 16 that. I was very clear with my position, to say the group
 17 that went around the kraal had an intent – actually the
 18 group that ran alongside the Nyala had looked to have the
 19 same common intent as the group that ran around the kraal,
 20 charging at the police.
 21 MR MPOFU: Yes, that's the point and they
 22 also had the same common intent as the ones that managed to
 23 go through and actually must have gone to Nkaneng.
 24 COLONEL MODIBA: I don't know.
 25 MR MPOFU: But those people who went

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1 through were part of the same group that you say had the
 2 common intent didn't they? Were they not part –
 3 COLONEL MODIBA: I'm not sure if that
 4 group proceeded – I'm talking of one or two, I'm not sure
 5 if they managed to, they proceeded to Nkaneng or they
 6 joined up with the group that charged at the police.
 7 MR MPOFU: But how could they join up
 8 with that group? That group went around the kraal. Do you
 9 think they went there and they sommer waited for them?
 10 They couldn't, because Nyala 4 had blocked their way back,
 11 do you understand?
 12 COLONEL MODIBA: This was a fluent
 13 movement. There was no time that you, there was no time
 14 that these striking miners waited and then started to
 15 regroup. They proceeded in a fluent movement.
 16 MR MPOFU: No, that's not true.
 17 According to the police there was 90 seconds between the
 18 closing of the gap and the group coming through from the
 19 other side. So are you saying those others who went
 20 through were sommer, for that 90 seconds, idling there,
 21 waiting to attack?
 22 COLONEL MODIBA: They could have joined
 23 with them.
 24 MR MPOFU: How?
 25 COLONEL MODIBA: When they attacked the

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1 police –
 2 MR MPOFU: How could they join with them
 3 when Nyala 4 had closed the way?
 4 COLONEL MODIBA: I'm talking of the two
 5 that I said they might have managed –
 6 MR MPOFU: Yes.
 7 COLONEL MODIBA: - in front. Those that
 8 ran around the kraal, it did not take time for them, it
 9 couldn't take time for them to link up and do that, the
 10 same common purpose, yes.
 11 MR MPOFU: So are you disputing the
 12 police evidence that it took time, it took about one and a
 13 half minutes?
 14 COLONEL MODIBA: I was there. That was
 15 my observation.
 16 MR MPOFU: Ja. So since you were there,
 17 whoever says it took one and a half minutes must have been
 18 lying or mistaken.
 19 COLONEL MODIBA: It's just an estimation.
 20 CHAIRPERSON: Not necessarily a lie. It
 21 could be –
 22 MR MPOFU: Whatever.
 23 CHAIRPERSON: - inaccurate advice –
 24 MR MPOFU: I said or mistaken, that means
 25 not necessarily a lie. Were they lying or mistaken?

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1 COLONEL MODIBA: I cannot dispute an
 2 estimation of an individual.
 3 MR MPOFU: Alright. The next issue that
 4 I'm going to canvass with you is that you say the reason
 5 that you can't give us – the reason that you can't give us
 6 an exact number of the number of people who went through
 7 was because you were about 100 metres away, correct?
 8 COLONEL MODIBA: That's correct,
 9 Chairperson.
 10 MR MPOFU: So you couldn't see properly
 11 from that distance obviously, correct?
 12 COLONEL MODIBA: However, I could still
 13 estimate that it could be one or two persons that made it
 14 there.
 15 MR MPOFU: Yes, but you said you can't
 16 tell us the exact number because you were far away –
 17 COLONEL MODIBA: Not precise, that's
 18 correct, Chairperson.
 19 MR MPOFU: Yes, ja. Now if you couldn't
 20 see properly from 100 metres away what was happening on the
 21 southern side of the kraal, then I put it to you that it's
 22 even more unlikely that you could see what was happening
 23 when the people emerged from the kraal, which is another 20
 24 metres or so away.
 25 COLONEL MODIBA: I saw the events. That

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1 group, there was no way that I could avoid to keep my
 2 observation at them because the group was very much
 3 aggressive, so I observed that. I was so careful in doing
 4 my observation.
 5 MR MPOFU: Okay. You were so careful.
 6 Well, for starters, let me tell you that that group, that
 7 group has been estimated at about 200 or 300 people so
 8 maybe you read it somewhere but you misread it. You have
 9 estimated them at 20 to 30 and that supports the view that
 10 you did not, you could not observe properly.
 11 COLONEL MODIBA: No, the 20 and 30, it's
 12 a good observation according to me.
 13 MR MPOFU: So anyone who says there were
 14 a couple of hundred would be lying or mistaken?
 15 COLONEL MODIBA: No, that I cannot attest
 16 to it.
 17 MR MPOFU: I also put it to you that you
 18 also testified that there were, these people, there were
 19 three lines there, in effect. Correct?
 20 COLONEL MODIBA: The lines were not, were
 21 not yet concluded at the time the group charged. We were
 22 still preparing to get ourselves ready there. We were
 23 still going to make the formation, as instructed.
 24 MR MPOFU: So are you saying there were
 25 no three lines?

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1 COLONEL MODIBA: It could have been three
 2 lines. Already TRT was there and then we were also
 3 following, preparing ourselves to form up, to conclude the
 4 instruction as given.
 5 MR MPOFU: So you couldn't see properly
 6 whether there were two lines or there lines?
 7 COLONEL MODIBA: We were still preparing
 8 ourselves, Chairperson, to complete the formation.
 9 MR MPOFU: Yes, but are you, Colonel
 10 Modiba, in a position to assist the Commission as to
 11 whether there were two lines or three lines? Yes, no or I
 12 don't know?
 13 COLONEL MODIBA: Chairperson, there was
 14 already one line of POP and TRT. The only third line that
 15 was still preparing to get there was NIU.
 16 CHAIRPERSON: You say there was one line
 17 of POP and TRT and then –
 18 MR MPOFU: No, he said two, Chairperson.
 19 CHAIRPERSON: No, I understood him to say
 20 one. Do you mean there was one line of POP and another
 21 line of TRT.
 22 [10:02] Or was there just one line of TRT and POP
 23 together? What you said isn't too clear to me.
 24 COLONEL MODIBA: Chairperson, we were
 25 still preparing to take up our position. POP was also

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1 around there where the formation were to be made, and TRT
 2 was also there and then only NIU was still preparing
 3 because at that time I decided to move forward and just to
 4 check the situation before I could let my members to join.
 5 CHAIRPERSON: Yes, I understand the NIU
 6 line was still going to form up. Was that going to form up
 7 behind the TRT line, or was it going to be part of that
 8 line?
 9 COLONEL MODIBA: It was going to form up
 10 behind TRT.
 11 CHAIRPERSON: I see. Alright, now, so
 12 the NIU line was still busy being formed up. Ahead of you
 13 were there two lines, two parallel lines, one of POP and
 14 one of TRT, or was there one line? What was the position?
 15 COLONEL MODIBA: They were not standing
 16 behind each other. POP, Public Order Policing was more on
 17 the left and TRT was on the right.
 18 MR MPOFU: So in effect your line would
 19 have been the third line. That's what you're saying?
 20 COLONEL MODIBA: That's correct,
 21 Chairperson.
 22 MR MPOFU: And according to you the –
 23 alright, so the plan was that there will be three lines
 24 behind each other?
 25 COLONEL MODIBA: That's correct,

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1 Chairperson.

2 MR MPOFU: But your purpose was to

3 protect people who might have been attacked on one of those

4 lines, correct? On the first line, I suppose, obviously.

5 COLONEL MODIBA: It couldn't just be on

6 the first line. Remember the plan was POP would go on with

7 the dispersal and then backed up by the TRT and then NIU

8 along with Special Task Force.

9 MR MPOFU: Yes, but what I'm saying is if

10 someone was attacking the POP, you would have had to shoot

11 through the TRT line as it were.

12 COLONEL MODIBA: That's not correct. TRT

13 would still have to deal with the situation before we get

14 involved.

15 MR MPOFU: I see. So your members were

16 not going to be involved in the protection of POP?

17 COLONEL MODIBA: We only – Chairperson,

18 we only get involved if the first respondent, or the one

19 before us couldn't manage the situation. That is when now

20 would National Intervention get in, intervene, take over.

21 So in that regard we never did it. It was the exercise

22 between Public Order Policing and TRT.

23 MR MPOFU: Okay, so you dispute my

24 assertion that your estimation of the numbers of the people

25 is further evidence that you could not from where you were

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1 100 metres away see properly what was happening. You

2 dispute that?

3 COLONEL MODIBA: I don't just get your

4 question. I want to be clear as to what you are referring

5 to.

6 MR MPOFU: No, I'm just rounding off a

7 point that we dealt with. I'm saying you dispute – I've

8 said to you one of the reasons that I'm going to use to

9 argue that you are right actually, I'm going to agree with

10 you that from where you were, 100 metres away, you could

11 not see properly what was happening. One of the reasons

12 I'm going to use in support of that, apart from your own

13 evidence, is the fact that you severely miss –

14 underestimated the number of people who went around the

15 kraal.

16 COLONEL MODIBA: It could not be

17 severely.

18 MR MPOFU: Well, it's severe if it's – if

19 you say there were 20 and there were 200, that's like 10%,

20 that's more than severe.

21 COLONEL MODIBA: I cannot be 200. That

22 was a reasonable group of people. That was a formed group.

23 It was not a group of hundred, as you are saying. It was a

24 formed group of between 20 and 30.

25 MR MPOFU: Yes, what you are doing now is

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1 exactly to do what I'm saying you're doing. You're

2 disputing the fact that there were a couple of hundred

3 people, correct?

4 COLONEL MODIBA: I'm still not clear with

5 what you're saying.

6 MR MPOFU: No, if I say to you there were

7 200 to 300 people and you say there were 20 to 30, then you

8 are disputing my assertion. That's what it's called.

9 COLONEL MODIBA: That's correct.

10 MR MPOFU: Ja. You also testified that

11 you saw the miners firing at the police, correct?

12 COLONEL MODIBA: I said in my statement

13 that I heard shots. There were shots of course all over

14 because at the time they were running, racing with the

15 Nyala. There were stun grenades that were thrown and

16 rubber bullets that were fired by POP and then also there

17 were shots all over.

18 MR MPOFU: Ja.

19 COLONEL MODIBA: Even I guess from the

20 group that was running towards there, the police.

21 MR MPOFU: No, that's correct. That's

22 the point I'm making. There were shots all over. You were

23 more than a hundred metres away. Are you saying that you

24 saw shots that came from the group of strikers or not?

25 COLONEL MODIBA: I could not specifically

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1 see the shots, but I could still make a sense that there

2 was as well firing from the group.

3 MR MPOFU: Yes, but that's the point.

4 That's your imagination flying ahead again. So from,

5 without seeing anything, with shots all over, with you

6 being more than a hundred metres away, you somehow worked

7 out that there must be shots coming from the group. I mean

8 what is that?

9 COLONEL MODIBA: That was possible.

10 MR MPOFU: And with the combination of

11 all these things that I've said to you, the argument will

12 be that your evidence that you saw the strikers attacking

13 the police is just another fabrication and the product of

14 your fertile imagination.

15 COLONEL MODIBA: That is incorrect,

16 Chairperson. It's no fabrication. That what happened, the

17 charging of the armed strike, miners, it indeed happened.

18 They did charge at the police. There's no fabrication

19 there.

20 MR MPOFU: Well, that's not the point I'm

21 making. They may or may not have charged at the police.

22 The point I'm simply making is that from where you were,

23 you were not in a position to observe any of it.

24 COLONEL MODIBA: I managed –

25 MR MPOFU: Sorry, and I'm going to argue

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1 that your evidence is just a concoction of things that you
2 heard from people and all sorts of anecdotal things, but
3 it's not something that you observed, as you would like the
4 Commission to believe. Do you understand?
5 COLONEL MODIBA: Chairperson, it is
6 exactly what I observed. I was there on the day at the
7 time the, these events unfolded. My estimation, my
8 assumption, it shouldn't be an issue in this regard. I was
9 there; I saw it. I could have missed the numbers, but the
10 fact that those aggressive armed strikers that ran along
11 the Nyala, they eventually came around the kraal, charging
12 at the police. That I have seen it, Chairperson.
13 MR MPOFU: How far were they from the
14 police who killed them?
15 COLONEL MODIBA: I'm not sure with the
16 distance how far between them and the police. I could
17 still make an estimation of the distance could have been
18 between 10 to 20, between, in between.
19 MR MPOFU: Between them and their killers
20 there was about 20, 20 metres?
21 COLONEL MODIBA: Between them and the
22 police, not the killers, the police.
23 MR MPOFU: The police are the killers.
24 It's the same thing. It's a synonym.
25 COLONEL MODIBA: You cannot be –

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1 MR MPOFU: They were killed by the
2 police.
3 COLONEL MODIBA: You cannot be so robust
4 to say the police are the killers.
5 MR MPOFU: Who killed them?
6 COLONEL MODIBA: You cannot say that.
7 MR MPOFU: Who killed them, Colonel
8 Modiba? Who killed those 18 people there next to that
9 kraal? Who?
10 COLONEL MODIBA: I'm not prepared to –
11 MR MPOFU: Are these the boy scouts –
12 COLONEL MODIBA: I'm not prepared –
13 MS BALOYI: Chairperson –
14 COLONEL MODIBA: - to entertain –
15 CHAIRPERSON: People in the audience are
16 making noises and commenting. They're here to listen, not
17 to participate or make remarks.
18 MR MPOFU: Thanks, Chairperson.
19 CHAIRPERSON: Anyone who makes remarks I
20 will have to ask to leave. That's the first point. The
21 second point is, Colonel, it's common cause that the
22 strikers who died and those who were injured at what we
23 call scene 1 were, died or were injured as a result of
24 shots fired by members of the police service. The issue
25 before us has been explained very clearly by the police

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1 counsel. The question is whether the police acted in self-
2 defence or in private defence. The fact that they
3 physically were responsible for firing the bullets which
4 caused the deaths and injuries is not disputed. So in that
5 sense, in the physical sense some at least of the members
6 of the police who fired killed some of the strikers and
7 injured others. But whether they killed them unlawfully,
8 whether it amounted to an offence or even a civil wrong
9 which can give rise to a damages claim, that is the matter
10 in dispute. So we have to investigate whether in the
11 circumstances the killings and the injuries were committed
12 in circumstances where the police were acting either in
13 private defence or in self-defence. So it is correct to
14 say that the people who fired the shots were killers, or
15 some of them, some of them, but whether it was an unlawful
16 killing or justifiable homicide is a matter we have to
17 debate. So I think we don't have to get bogged down on
18 that issue. Anyway –
19 COLONEL MODIBA: Chairperson, I
20 understand.
21 MR MPOFU: Okay –
22 COLONEL MODIBA: With due respect, I
23 wouldn't really want to entertain insensitive utterances
24 that he has made.
25 CHAIRPERSON: You know in the popular

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1 mind the word "killer" does conjure up pictures or
2 impressions of unlawful killing, but technically speaking
3 the word "killer" is neutral, simply means someone who has
4 killed, whether it's justifiable or unjustifiable. Perhaps
5 you could avoid using that word because of the associations
6 it has. I've made the point, I hope quite clearly. It's
7 not in dispute that those people, the people who died, died
8 as a result of actions of the police. It's not in dispute
9 that those who were injured were injured as a result of
10 actions of the police. The only question is – there are
11 two questions really; one is whether it was lawful, and the
12 other one whether there was culpability. But those are the
13 only matters we have to investigate, and even there the
14 issue is narrowed by the assertion by the police at the
15 very beginning of this Commission that –
16 MR MPOFU: I think I know –
17 CHAIRPERSON: - they rely on certain –
18 MR MPOFU: I know the definition of
19 killing, Chairperson. I happen to know it, and so you
20 accept the explanation given by the Chairperson?
21 COLONEL MODIBA: My position as I pleaded
22 with the Chairperson to say I'm not interested, not going
23 to entertain the insensitive utterances you are making
24 about labelling the police as the killers.
25 MR MPOFU: Which one is the –

<p style="text-align: right;">Page 30807</p> <p>1 COLONEL MODIBA: So –</p> <p>2 MR MPOFU: Which one is insensitive; to</p> <p>3 say that the people were killed by the police, or to aim</p> <p>4 R5s at them and shoot them in their heads until their</p> <p>5 breath is off, until they are dead? Which one do you think</p> <p>6 is insensitive in the –</p> <p>7 COLONEL MODIBA: Insensitive –</p> <p>8 CHAIRPERSON: I don't think –</p> <p>9 COLONEL MODIBA: - labelling the police</p> <p>10 as the killers –</p> <p>11 CHAIRPERSON: I don't think we need hear</p> <p>12 the witness's answer to that. I don't –</p> <p>13 MR MPOFU: Well, then he mustn't tell me</p> <p>14 that I'm insensitive, Chairperson. The police killed these</p> <p>15 people. They murdered them in my –</p> <p>16 CHAIRPERSON: No –</p> <p>17 MS BALOYI: Objection, Chairperson.</p> <p>18 CHAIRPERSON: Mr Mpofu –</p> <p>19 MR MPOFU: They did –</p> <p>20 CHAIRPERSON: Mr Mpofu –</p> <p>21 MR MPOFU: That is what I've argued in my</p> <p>22 opening statement. They murdered them. They murdered</p> <p>23 them. They murdered them.</p> <p>24 CHAIRPERSON: Mr Mpofu, please calm –</p> <p>25 MR MPOFU: But I'm being kind and saying</p>	<p style="text-align: right;">Page 30809</p> <p>1 CHAIRPERSON: Mr Mpofu –</p> <p>2 MR MPOFU: If he is emotional he should</p> <p>3 not have taken part in killing the people.</p> <p>4 CHAIRPERSON: Mr Mpofu, are you going to</p> <p>5 make a speech, or are you going to carry on asking</p> <p>6 questions?</p> <p>7 MR MPOFU: No, Chairperson, really, we</p> <p>8 can't –</p> <p>9 CHAIRPERSON: Will you please carry on</p> <p>10 asking questions?</p> <p>11 MR MPOFU: Yes.</p> <p>12 CHAIRPERSON: And don't make speeches.</p> <p>13 You can make speeches at the end. You'll have ample –</p> <p>14 MR MPOFU: Well, I'm responding to your</p> <p>15 speech, Chairperson.</p> <p>16 CHAIRPERSON: No, I'm not making a</p> <p>17 speech, I'm just telling you my –</p> <p>18 MR MPOFU: Oh, okay.</p> <p>19 CHAIRPERSON: - the attitude I'm adopting</p> <p>20 here.</p> <p>21 MR MPOFU: Thank you.</p> <p>22 CHAIRPERSON: We're trying to ascertain</p> <p>23 from the witness what he remembers about what he saw and to</p> <p>24 ascertain whether what he tells us can be accepted as</p> <p>25 reliable. Please –</p>
<p style="text-align: right;">Page 30808</p> <p>1 they killed them.</p> <p>2 CHAIRPERSON: Mr Mpofu, please calm down.</p> <p>3 We are here to decide whether the police were guilty of</p> <p>4 murder or guilty of culpable homicide or there was –</p> <p>5 MR MPOFU: Well, my case is that they</p> <p>6 murdered them.</p> <p>7 CHAIRPERSON: No, I know that's your</p> <p>8 case. I've known that from the beginning. You don't have</p> <p>9 to remind me of it. The question is whether your case is</p> <p>10 correct, whether the police case is correct, or whether –</p> <p>11 MR MPOFU: Yes.</p> <p>12 CHAIRPERSON: - there's some other</p> <p>13 possibility –</p> <p>14 MR MPOFU: That's why I used the word</p> <p>15 "kill."</p> <p>16 CHAIRPERSON: The issue is fairly narrow.</p> <p>17 I explain to you the word "kill," in the technical sense</p> <p>18 you used it correctly, but there are emotional associations</p> <p>19 with the word, which is why the witness was not happy with</p> <p>20 it. But anyway –</p> <p>21 MR MPOFU: Ja, I'm not here to guard the</p> <p>22 emotions of the police persons who killed the people.</p> <p>23 CHAIRPERSON: Yes –</p> <p>24 MR MPOFU: I'm not, and that's not my</p> <p>25 job. That's not what I'm here for.</p>	<p style="text-align: right;">Page 30810</p> <p>1 MR MPOFU: Thank you.</p> <p>2 CHAIRPERSON: Please proceed with that</p> <p>3 cross-examination and don't go down emotional byways which</p> <p>4 are not going to assist us to answer the questions we're</p> <p>5 called upon to answer, but will merely raise the</p> <p>6 temperature, which will not be conducive to a proper</p> <p>7 hearing of the witness's evidence. So please carry on</p> <p>8 asking questions.</p> <p>9 MR MPOFU: Well okay, Chairperson, what</p> <p>10 I'm not going to allow is to be insulted by a witness and</p> <p>11 be called insensitive by him. Do you accept that from the</p> <p>12 explanation given by the Chairperson the people in your</p> <p>13 group also killed Mr Mdizeni and Mr Thelejane?</p> <p>14 COLONEL MODIBA: As I explained yesterday</p> <p>15 to say it could have happened after they fired warning shot</p> <p>16 that could have perhaps ricocheted.</p> <p>17 MR MPOFU: And killed them.</p> <p>18 COLONEL MODIBA: I also addressed the</p> <p>19 issue of the intent as to the firing, if you look at the</p> <p>20 intent at the time when they were firing, the intent was to</p> <p>21 discharge the warning shots, that could have resulted in</p> <p>22 injuring or killing them.</p> <p>23 MR MPOFU: Anyway –</p> <p>24 CHAIRPERSON: But Mr Mpofu's question</p> <p>25 isn't directed to intent, you see. He uses the expression</p>

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1 "killed" in the neutral sense and it is – I'm not sure it's
 2 your group, it may have been one of the other groups that
 3 was at koppie 2 - at scene 2, but it does, I think it's
 4 clear the police admit that, that the people who died at
 5 scene 2 died as a result of shots fired by the police.
 6 Whether they died because the shots were fired with intent
 7 to kill, or whether they died because the shots, albeit
 8 even though they weren't fired with the intent to kill in
 9 fact had the result of killing them, is one of the other
 10 matters we have to investigate. But the factual allegation
 11 that Mr Mpfu makes to you that the people concerned who
 12 died at scene 2, koppie 3, died as a result of police fire
 13 is common cause, as I understand it.

14 MR MPOFU: Thank you, Chairperson. And
 15 I'm talking to you as somebody who has described himself as
 16 having an extensive knowledge of law, with special emphasis
 17 on criminal law. So you know these things that the
 18 Chairperson is just revising, refreshing your memory. But
 19 you have extensive knowledge in those issues, isn't it?

20 COLONEL MODIBA: I do have a knowledge,
 21 Chairperson.

22 MR MPOFU: Now I'm saying – okay, the
 23 real issue I was saying, was asking you was to estimate
 24 between the group of police and the strikers and you said
 25 you couldn't. You think it might have been between 10 or

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1 20 metres, correct?

2 COLONEL MODIBA: It is correct,
 3 Chairperson.

4 MR MPOFU: And therefore you can't say
 5 whether they were at a distance where the threat was
 6 permanent or not because of where you were?

7 COLONEL MODIBA: I could deduct that they
 8 were indeed faced with imminent attack. The threat was
 9 imminent, due to the fact that the armed striking miners
 10 were charging at them, yielding those assegais, knobkieries
 11 and so –

12 MR MPOFU: Yes.

13 COLONEL MODIBA: So according to me in my
 14 view there was an imminent attack at them.

15 MR MPOFU: Yes, but you must admit,
 16 Colonel, that the imminence of the attack in those
 17 circumstances is related to the distance. If they were 500
 18 metres away the attack might not be imminent, but if they
 19 are five metres away the attack might be imminent. The
 20 question of distance is relevant, isn't it?

21 COLONEL MODIBA: It is relevant –

22 MR MPOFU: Yes.

23 COLONEL MODIBA: - and the action of the
 24 attack is relevant.

25 MR MPOFU: Yes. Yes, that's correct, and

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1 since you cannot tell what the distance was between the two
 2 groups, at least on that aspect of the relevance of the
 3 distance you cannot assist us because you were far away.

4 COLONEL MODIBA: I can still estimate
 5 that between 10 and 20.

6 MR MPOFU: Well, and if it was 20 you
 7 think it would be the same thing as if it was 10?

8 COLONEL MODIBA: I'm talking of between
 9 10 and 20.

10 MR MPOFU: Yes, which means maximum is
 11 20, minimum is 10. I know what "between" means.

12 COLONEL MODIBA: Yes.

13 MR MPOFU: I'm saying if it was 20 or 10,
 14 does that make no difference to you?

15 [10:22] Yes, it makes no difference.

16 COLONEL MODIBA: Yes, Chairperson.

17 MR MPOFU: Yes and do you know whether
 18 like your group at scene 2, these people who shot the
 19 miners fired warning shots?

20 CHAIRPERSON: Why at scene 2?

21 MR MPOFU: No, no I'm still at scene 1.

22 CHAIRPERSON: Still at scene 1.

23 MR MPOFU: It's actually at scene 2 that
 24 it happened.

25 CHAIRPERSON: No, no I understand that

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1 but in order to understand the witnesses answer you're
 2 still talking about scene 1.

3 MR MPOFU: Yes, yes thank, Chairperson,
 4 yes I didn't make that clear. Do you know whether the
 5 people – we're talking about scene 1 so forget my reference
 6 to scene 2, do you know whether people who shot those
 7 miners also fired warning shots or did they just fire at
 8 the people?

9 COLONEL MODIBA: I can suggest they would
 10 have probably fired warning shots before they – but if they
 11 decided to opt for the second action other than warning
 12 shot it's also possible.

13 MR MPOFU: No, Colonel, we're busy
 14 testing your observations here. I don't want these
 15 inferences of yours or must have or possibly or whatever.
 16 Do you know whether the people fired warning shots or not
 17 on that day, at that time before they killed the people?

18 COLONEL MODIBA: I did not speak to the
 19 shottist that fired at that point and get to know whether
 20 it was warning shot or it was straight shot. I did not
 21 really have a session with them.

22 MR MPOFU: No, but that's exactly the
 23 point. I don't want you to come and testify about things
 24 that might have come from sessions. The fact that you did
 25 not have a session with them is irrelevant. I'm asking you

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1 of what you observed. While you were standing there 100
 2 metres away do you know whether the people shot warning
 3 shots or whether they fired at the people and killed them?
 4 MR MPOFU: That could be out of their own
 5 decisions. I do not know –
 6 MR MPOFU: You don't know.
 7 COLONEL MODIBA: The decision would
 8 dictate to them as to whether they were to fire warning
 9 shots or straight shots it all depends on what they were
 10 faced with.
 11 MR MPOFU: Yes, yes which you don't know.
 12 That's the point, the point I'm making, you and I agreed
 13 yesterday that whether or not somebody fires warning shots
 14 or fires directly at the people is determined by the
 15 imminence of the threat. That's obvious, correct?
 16 COLONEL MODIBA: That's correct.
 17 MR MPOFU: Yes, but since you don't know
 18 about the distance, you don't know how imminent the threat
 19 was, you can't know whether they had even the opportunity
 20 to fire warning shots or whether indeed they did. You
 21 don't know, you were too far, I accept that.
 22 COLONEL MODIBA: It was up to them to
 23 decide how to handle that situation so –
 24 MR MPOFU: I know it was up to them.
 25 COLONEL MODIBA: I cannot make a

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1 deduction to say it was warning shot or it was a straight
 2 shot.
 3 MR MPOFU: I'm not asking you –
 4 CHAIRPERSON: What have you been trying
 5 to ascertain from him? Whether he can possibly state that
 6 they all fired warning shots first and the answer is he
 7 can't. He says it was up to them to decide and he can't
 8 tell us whether they did or they didn't. So I think you've
 9 made the point you were setting out to make so perhaps you
 10 can move onto the next one.
 11 MR MPOFU: All right, so anyway look
 12 again. I think from all those, I won't list them like the
 13 last time, from all those indications, I'm going to argue
 14 that either because of the distance your evidence as to the
 15 so-called attack on the police should be kicked out of the
 16 window because you did not observe any such thing. It's
 17 just a concoction of anecdotes and sessions as you call it
 18 which might have happened afterwards. And you know the
 19 imagination and deduction, all the words that you've used,
 20 you did not observe any attack on the police.
 21 COLONEL MODIBA: Chairperson, I
 22 definitely observed the attack, the miners charging at the
 23 police, attacking the police with assortments of dangerous
 24 weapon. I show it, I've got no doubt about it,
 25 Chairperson.

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1 MR MPOFU: Ja, but you have doubt as to
 2 how many there were.
 3 CHAIRPERSON: I think you've made your
 4 points, you can form the basis of your argument later.
 5 It's no good -
 6 MR MPOFU: That's why I was giving him
 7 what I'm going to argue.
 8 CHAIRPERSON: No I understand, you've
 9 done that, he's had an opportunity to deal with it and he's
 10 chosen not to. So that's his business, you can carry on
 11 with the next point.
 12 MR MPOFU: Thanks, Chairperson. Just the
 13 last thing on scene 1. You see I'm going to argue, you
 14 must listen carefully, I'm going to argue that the reason –
 15 you remember you said that you went through the mistake as
 16 you call it, where you say that the people were told to
 17 disarm and disperse and they resisted and you said it was a
 18 mistake. Do you remember that?
 19 COLONEL MODIBA: That's correct,
 20 Chairperson.
 21 MR MPOFU: Yes now I'm going to argue
 22 that the reason you made that mistake is because it's the
 23 logical thing to do, that it would have been the right
 24 thing to do to say to them put your arms down and so on and
 25 so on. And only if they resist you can use force against

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1 them. That's why you made that deduction as you would call
 2 it, it's because that's the right thing to do, correct?
 3 COLONEL MODIBA: I cannot say it's the
 4 right to do. My mistake was out of the reaction that I saw
 5 from the striking miners because at the time we were still
 6 assembling there. I saw them breaking away in the mob
 7 formation, running around the barbed wire then it came to
 8 my mind that it could have been that the order hasn't
 9 reached them or it was not accepted.
 10 MR MPOFU: No I understand that, Colonel,
 11 I'm saying that you can't, even with your imagination, you
 12 can't just from the way that people are walking know that
 13 they have been warned. I'm saying the reason why you made
 14 that mistake is because it would have been the right thing
 15 to do. It's not because of the way they were walking or
 16 the way they were talking. I mean that's nonsense, with
 17 respect, because you knew that logically that is what
 18 should have been done.
 19 COLONEL MODIBA: I knew it was going to
 20 happen, it was going to be handled that way.
 21 MR MPOFU: Yes, and it's the right thing
 22 to do.
 23 COLONEL MODIBA: Of course it's the right
 24 thing to give a person a chance.
 25 MR MPOFU: Absolutely, yes and in fact we

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1 know that you may not know – do you know Captain Kidd?
 2 COLONEL MODIBA: Yes I know him,
 3 Chairperson.
 4 MR MPOFU: Yes, in fact we know that
 5 Captain Kidd did exactly what your imagination told you
 6 which was to say to the people please lay down the arms and
 7 then you'll be allowed to proceed to the residential area.
 8 And according to him he had 100% success rate. So not only
 9 is it the right thing to do it actually happened on the
 10 other side of the mountain with great success, nobody was
 11 killed there. I'm just saying that shows that it's the
 12 right thing to do and when it's done it succeeds.
 13 COLONEL MODIBA: And I still want to put
 14 it to say this is what the police negotiators had been
 15 doing throughout the week.
 16 MR MPOFU: Yes.
 17 COLONEL MODIBA: So I cannot dispute that
 18 that is the right thing. Of course we were doing the right
 19 thing and as it happened the whole week.
 20 MR MPOFU: Yes right. The other point is
 21 that again your objective evidence would show us that it
 22 was foreseeable, not only foreseeable, actually foreseen by
 23 the police that the people would disperse to the
 24 residential areas. Hence Captain Kidd's group on the west
 25 end of the residential area and the manner in which the

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1 barbed was going to be deployed it was obvious that they
 2 will want to go to their residential area wasn't it?
 3 COLONEL MODIBA: I cannot be specific on
 4 that as to they would like to go to residential area from
 5 the point where they assembled.
 6 MR MPOFU: Well if you go L148, L148. Do
 7 you see the yellow double line in front of the koppies?
 8 COLONEL MODIBA: Yes, Chairperson.
 9 MR MPOFU: And you see behind that yellow
 10 double line, or let's put it this way, effectively the
 11 double line which was the line of the – the planned line of
 12 the barbed wire is situated is that the concave line is put
 13 specifically between the koppies and Nkaneng, do you see
 14 Nkaneng, that's the red part?
 15 COLONEL MODIBA: Yes, Chairperson.
 16 MR MPOFU: And the koppies are the blue
 17 part.
 18 COLONEL MODIBA: Yes, Chairperson.
 19 MR MPOFU: Yes, and do you see the yellow
 20 line between there is literally interposed between the
 21 residential area and the koppies. So it was foreseeable
 22 that's where the people would disperse to.
 23 COLONEL MODIBA: Yes, Chairperson.
 24 MR MPOFU: The other thing that – okay
 25 let me say this one was unforeseen improperly so, but I'll

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1 explain that later, the police had the idea that the people
 2 will be dispersed while they were on the hills, correct?
 3 COLONEL MODIBA: No, I cannot attest to
 4 that.
 5 MR MPOFU: And the police, when they say
 6 to us the plan was disrupted it's simply because they did
 7 not foresee that the people would voluntarily disperse as
 8 soon as the barbed wire was being stretched. And then
 9 because the police failed to foresee such an easily
 10 foreseeable thing then they had not planned for a situation
 11 where the people are voluntarily leaving towards the
 12 settlement.
 13 COLONEL MODIBA: Chairperson, maybe we
 14 should first look at what the police wanted to achieve.
 15 Our first achievement, we wanted the armed strikers to lay
 16 down their arms and peacefully disperse. That was the
 17 objective.
 18 MR MPOFU: Yes, no, no that I accept,
 19 Colonel. All I'm saying is that what you failed to
 20 contemplate, even senior people like you, or let me put it
 21 this way, you foresaw the dispersal happening at the
 22 mountain hill, correct?
 23 COLONEL MODIBA: That would be the point
 24 of departure where they assembled.
 25 MR MPOFU: Yes. So I'm right then,

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1 that's where you –
 2 COLONEL MODIBA: With my explanation that
 3 the dispersal would have started from the mountain where
 4 they assembled.
 5 MR MPOFU: Yes, but lo and behold the
 6 miners chose to disperse voluntarily towards the informal
 7 settlements as you and I have explained and everything was
 8 thrown into disarray. There was no-one to be dispersed on
 9 the hills, they were empty.
 10 CHAIRPERSON: Also when laying down their
 11 arms, of course. The police plan was two-fold to get them
 12 to lay down their arms, in other words to disarm them and
 13 then to disperse them. The disarming never happened and a
 14 number of these strikers went off into various directions.
 15 I would take it we can assume without any difficulty they
 16 were all on their way to informal settlements or formal
 17 settlements possibly in some cases and the group that
 18 advanced on the police –
 19 MR MPOFU: No there was no group, which
 20 group advanced on the police?
 21 CHAIRPERSON: - the group which advanced on the
 22 police at scene 1, whether they were in fact simply going
 23 to go through the police line to Nkaneng or whatever or
 24 whether they were attacking the police is the one of the
 25 issues we have to decide.

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1 MR MPOFU: Anyway I'm busy dealing with
2 something different. Do you accept the fact that both the
3 disarming and the dispersal of the people was intended to
4 happen at the koppie?
5 COLONEL MODIBA: That was the central
6 point where it would have started.
7 MR MPOFU: Okay start, finish or middle
8 the point of the matter is that in actual fact by the time
9 you took your action there was nobody there. So whether it
10 was disarming or dispersal nothing could happen on the hill
11 involving human beings because there were no human beings
12 there.
13 COLONEL MODIBA: Chairperson, at that
14 time there were still remains of people on top of the
15 mountain and the majority was on the ground between the
16 barbed wire and the mountain but they were there.
17 MR MPOFU: Well I'm not even going to
18 show you the pictures that show that there was nobody
19 there. Let's go with your saying the vast majority of the
20 people did not behave in the way that you as the police had
21 anticipated. They voluntarily dispersed.
22 COLONEL MODIBA: Those that have
23 dispersed, Chairperson that didn't have a problem with us,
24 the problem it was those that remained behind that did not
25 want to come.

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1 MR MPOFU: Okay look let's short circuit
2 this. Go to paragraph 3 of ZZZ2.2. This is the correct
3 state of affairs isn't it? It says here "The briefing was
4 given by Lieutenant-Colonel Scott of Special Task Force.
5 During the briefing it was mentioned that the striking
6 miners should be disarmed and dispersed from the mountain
7 hill." That is how your briefing was, that is what was
8 intended to be done. It just didn't turn out that way.
9 Isn't that correct?
10 COLONEL MODIBA: Chairperson, there is no
11 different between being on top of the mountain hill itself
12 of the bottom or in the surrounding of the mountain. The
13 issue here is the unlawful gathering which we were dealing
14 with.
15 MR MPOFU: Colonel Modiba, please, I'm
16 saying to you I know you were dealing with what you call an
17 unlawful gathering. But I'm saying to you it's important
18 for us to understand what it is that you were going to do
19 and in what senses you had to improvise because of failure
20 to anticipate certain things. It's a very simple point.
21 When you were briefed by Lieutenant-Colonel Scott and what
22 your intention was it was that such dispersal or disarming
23 that was going to happen would happen at the hill as you
24 have indicated in your statement, yes, no?
25 CHAIRPERSON: I don't think the witness

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1 is – I think you're probably talking past each other.
2 MR MPOFU: The -
3 CHAIRPERSON: Give me a chance to
4 explain. I don't think he understands fully what you're
5 putting and I'm not sure you understand fully what he's
6 saying in reply. The plan was obviously to disperse them
7 at or near the hill, it wasn't an integral part –
8 MR MPOFU: No there's no at on here, he
9 says from the hill.
10 CHAIRPERSON: I know he says that –
11 MR MPOFU: It's the first time we at or
12 near.
13 CHAIRPERSON: - and they must be disarmed
14 and dispersed from the mountain hill is the other phrase
15 used. The point was, it wasn't, as I understand it, it
16 wasn't integral that someone should actually be standing on
17 the hill when the disarming and dispersing could take
18 place, it was also envisaged that he might be standing in
19 front of the hill, in the vicinity of the hill. Nothing
20 turned on that, it's not relevant for your point either
21 because your point is they anticipated it would happen in
22 the vicinity of the hill. The incident which we're
23 investigating as far as scene 1 is concerned took place a
24 considerable distance from the hill. So that's why you're
25 talking past each other. The plan was – it was thought

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1 that the dispersal and disarmament would take place at or
2 near the hill even though the word or near isn't there but
3 it didn't happen that way because, as you've explained, the
4 people concerned didn't stay there, at or near the hill.
5 You remember some of the people were in front of the hill
6 anyway, on the flat part of the ground. They moved forward
7 to the area where – they moved forward ultimately to scene
8 1.
9 [10:42] Where the events happened that we're
10 investigating. So let's not waste time on at or near, the
11 main point you make is a correct one and I take it the
12 witness has been listening and he understands the point
13 that I've put to you. In other words there was, there
14 appears to have been an alteration from what the police
15 thought would happen. The police thought the disarmament
16 and dispersal would take place at or near the hill. Some
17 people were standing on the flat area in front of the hill,
18 other people were actually on the hill. The police
19 thought, and that was the plan, to disarm and disperse
20 those people there in the vicinity. It didn't happen that
21 way. The actual scene 1 events took place not at or near
22 the hill but at the spot that we've seen on the photographs
23 in the vicinity of the kraal. That's right, isn't it?
24 COLONEL MODIBA: Chairperson, I would say
25 we should be concentrating from the hill because of course

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1 at the time when the briefing was given to the various
 2 disciplines, the striking miners were still gathering at
 3 the hill.
 4 CHAIRPERSON: What you're saying is
 5 really, really admitting that – you're merely agreeing with
 6 Mr Mpfu without realising it – at the time the briefing
 7 was given, the miners, the strikers were at or near the
 8 hill. They were, some of them were standing in front of
 9 the hill, some of them were on the hill and that was what
 10 the plan was about.
 11 COLONEL MODIBA: That's correct.
 12 CHAIRPERSON: And that's where it was
 13 envisaged the disarming and dispersal would happen, but it
 14 didn't turn out that way because when the incidents that
 15 happened at scene 1 occurred, they'd left the area at or
 16 the near the koppie and they'd moved forward and ended up
 17 in the vicinity of the kraal, isn't that right?
 18 COLONEL MODIBA: That's correct,
 19 Chairperson.
 20 CHAIRPERSON: That's Mr Mpfu's point, as
 21 I understand it. Is that right, Mr Mpfu?
 22 MR MPOFU: It was, Chairperson, yes. I
 23 am moving on. Are you aware of any controversy back at
 24 work involving you having participated in the killings?
 25 CHAIRPERSON: Repeat the question again,

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1 I didn't quite understand it.
 2 MR MPOFU: Are you aware of any
 3 controversy involving some of the members of the NIU
 4 alleging that you were involved in the killings?
 5 COLONEL MODIBA: I'm not aware of that.
 6 MR MPOFU: You're not? There's no –
 7 where's your firearm PX?
 8 COLONEL MODIBA: At work.
 9 MR MPOFU: PX122, 172E.
 10 COLONEL MODIBA: It's at work,
 11 Chairperson.
 12 MR MPOFU: What happened to it shortly
 13 after the killings?
 14 COLONEL MODIBA: The firearm,
 15 Chairperson, was handed to IPID, which was eventually sent
 16 to ballistic for tests as a normal procedure and it was
 17 eventually returned back to me.
 18 MR MPOFU: And are you aware that some of
 19 your members were implicated in the cold-blooded execution,
 20 alleged cold-blooded execution of one of the people where
 21 the words, "They deserve to die" were uttered?
 22 COLONEL MODIBA: I'm not aware. It's
 23 only, if I can make sense of what you are saying, that's
 24 the statement made by this certain Warrant Officer Myburgh.
 25 MR MPOFU: Yes, that's why I used the

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1 word "alleged" because it's a statement made by somebody.
 2 I'm saying are you aware that some of your members were
 3 implicated in the alleged cold-blooded execution of a
 4 person involving the use of the words "They deserve to
 5 die?"
 6 COLONEL MODIBA: Chairperson, that I read
 7 in the statement of Myburgh. Other than that, during the
 8 testimony of the police National Commissioner, along the
 9 cross-examine, something of that nature came out.
 10 MR MPOFU: Yes.
 11 COLONEL MODIBA: Then when I came to
 12 prepare for this hearing I was handed with the statement.
 13 That was the first time to go through the contents.
 14 MR MPOFU: Yes. So the answer is yes,
 15 you are aware.
 16 COLONEL MODIBA: I'm trying to explain as
 17 to when did this thing come to my knowledge.
 18 CHAIRPERSON: Ja, but I don't think that
 19 Mr Mpfu is so concerned about when it came to your
 20 knowledge. He's concerned about the fact that you are
 21 aware of the fact that an allegation was made that a member
 22 or members of the national intervention unit had been
 23 involved in the events which Warrant Officer Myburgh deals
 24 with in his statement and the allegations he makes and you
 25 are aware of that. You became aware of it, you said, at

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1 the time you were preparing to give evidence before the
 2 Commission but as you sit there now, you do know that those
 3 allegations were made by Myburgh. Whether they're right or
 4 not is not relevant at this stage. That is so, you do
 5 know, as you've told us, that those allegations were made.
 6 I think that's all Mr Mpfu is trying to ascertain, am I
 7 right, at this point?
 8 MR MPOFU: That is correct, Chairperson.
 9 COLONEL MODIBA: At this point in time I
 10 am aware of that, there are those allegations.
 11 MR MPOFU: Thank you. And they involved
 12 members of your unit, have you taken any steps to ascertain
 13 who might have done this or said this, as you were the
 14 overall leader of the NIU?
 15 COLONEL MODIBA: Chairperson, the
 16 allegation, I got to understand the allegations after I
 17 received the documentation and so far I haven't done
 18 anything about those allegations.
 19 MR MPOFU: Is that because – well, let's
 20 start here. Do these allegations which, if true, are very
 21 serious, you would agree that it's very serious if one of
 22 your members said citizens of South Africa deserve to die,
 23 that would be a serious allegation?
 24 COLONEL MODIBA: Chairperson, it is true
 25 that could be very much serious.

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1 MR MPOFU: Yes.

2 COLONEL MODIBA: I'm a little bit

3 disturbed, Mr Chairperson, with the person who made the

4 allegation because when going through in his statement it

5 doesn't tell as to who the suspect was.

6 MR MPOFU: Yes.

7 COLONEL MODIBA: He doesn't know who the

8 suspect was and I also fail to understand further that him,

9 as a Warrant Officer, he failed to do the legal duty that

10 has been placed upon his shoulders. He could not do

11 anything and then he also failed to report that incident

12 immediately to me as the commander of the national

13 intervention. And then I further want to comment to say

14 that up to this stage I'm not even sure as to whether it

15 was indeed a member from national intervention.

16 MR MPOFU: Yes, you are not sure so maybe

17 it's not true, but maybe it's true.

18 COLONEL MODIBA: It could not be true.

19 CHAIRPERSON: It sounds as if you don't

20 believe it but of course that doesn't mean it isn't

21 necessarily true, but the question I want to ask you is,

22 was it your function as the commander of that group, unit

23 of the NIU, was it your function to investigate the

24 allegation when it was made or was it something to be

25 investigated by other and not by you?

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1 COLONEL MODIBA: If those allegations

2 were brought to my attention I would have escalated that to

3 my higher authorities, the section head of national

4 intervention would have known about that.

5 MR MPOFU: Yes. That's exactly why I

6 asked you the first question I asked you. Are you aware of

7 it? Yes, I'm aware. Have you done anything? No, I've

8 done nothing. I didn't ask you specifically about

9 investigations or what-what. I'm just saying as someone

10 who is aware of a serious allegation made about a unit of

11 which you were head at a particular operation, have you

12 done anything? And you said effectively you've done

13 nothing because you don't believe the allegation.

14 COLONEL MODIBA: Chairperson –

15 MS BALOYI: Chairperson, objection. He

16 didn't say I didn't do anything because I don't believe the

17 allegation.

18 MR MPOFU: Well –

19 MS BALOYI: He didn't say that.

20 MR MPOFU: Okay, well, he said both

21 things. He said he didn't –

22 MS BALOYI: He didn't say that,

23 Chairperson.

24 COLONEL MODIBA: Chairperson, let me –

25 CHAIRPERSON: Let's have some order here.

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1 MR MPOFU: Yes, Chairperson.

2 CHAIRPERSON: I understood him to say two

3 things. He said he didn't believe it but I didn't

4 understand him to say that that wasn't the reason that he

5 did nothing about it. Perhaps we can ask him -

6 MR MPOFU: What other question did I ask

7 him except why he didn't do anything?

8 CHAIRPERSON: Perhaps we can ask the

9 question again that you've asked. You say you did nothing

10 yourself about it. Now can you tell us what the reason was

11 for your not doing anything personally about the matter?

12 COLONEL MODIBA: Chairperson, as I

13 mentioned, that I only got this statement when I came to

14 prepare for the Commission so there was no time absolutely.

15 I would still do something after I finish with my

16 testimony.

17 MR MPOFU: So why then did you give this

18 long explanation about, for starters the person did not, as

19 a Warrant Officer they did not do this and they should have

20 done this and what – what was the purpose of that if the

21 simple reason you didn't do it was because you had no time

22 - actually you desired to do something but you had no time

23 - if that is now the new reason? For what purpose were you

24 enlightening the Commission about how incredible this whole

25 business is?

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1 COLONEL MODIBA: I was trying to show the

2 Commission to say that the very same warrant failed to

3 report the matter to me at the time when it happened, so I

4 would have done something long time ago but now that it

5 only came to my attention now, so I haven't got time to

6 attend to it. That will only, that will happen after I've

7 finished with the Commission.

8 MR MPOFU: Now –

9 CHAIRPERSON: Mr Mpofo, are you going to

10 be much longer? The reason I ask that is that the time I

11 think I allocated to you is virtually up but I was

12 proposing to take a short break round about now, but if you

13 are very close to ending then you can end and then we can

14 take the short break. I don't think you've got much time

15 left but how do you respond to what I put to you?

16 MR MPOFU: I think let's take the break,

17 Chairperson.

18 CHAIRPERSON: How much longer do you

19 think you're going to be – that's if I allow you to carry

20 on much longer?

21 MR MPOFU: If you allow me, Chairperson,

22 I think until the tea break, Chairperson.

23 CHAIRPERSON: No – no, hang on. If we

24 take the short break now, we're taking the tea break about

25 12 o'clock.

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1 MR MPOFU: What time is it now?
 2 CHAIRPERSON: It's now about 10 to 11.
 3 Let's ask Mr Wesley. Mr Wesley, you're the timekeeper
 4 here, how much time has Mr Mpofu got left?
 5 MR WESLEY: Chair, he has got 27 minutes
 6 left.
 7 CHAIRPERSON: We'll take the short
 8 adjournment now and we'll give him half an hour after we
 9 resume.
 10 MR MPOFU: I said that's the half an hour
 11 that I have, Chairperson, or half an hour –
 12 CHAIRPERSON: - an extra three minutes.
 13 MR MPOFU: Thank you.
 14 [COMMISSION ADJOURNS COMMISSION RESUMES]
 15 [11:14] CHAIRPERSON: The Commission resumes.
 16 Colonel, you're still under oath.
 17 KAIZER NTLOU MOBIDA: s.u.o.
 18 CHAIRPERSON: Mr Mpofu.
 19 MR MPOFU: Thank you, Chairperson.
 20 Chairperson, before I start, resume my cross-examination, I
 21 want to put something on record regarding the exchange that
 22 we had before tea, namely that I've been instructed to
 23 point out, Chairperson, that there's a complaint about the
 24 unevenness of treating the parties in this Commission,
 25 where it started with the use of certain words, even when

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1 they are explained, and in that regard, Chairperson, I'd
 2 like to point out that although we, as I said earlier one
 3 has been careful for example in the context of the police
 4 to use the word that they killed as opposed to murdered,
 5 because that's the very question that the Commission is
 6 saddled to deal with, and I appreciate that for laypeople
 7 those fine distinctions, Chairperson, might not make sense,
 8 but because this witness had purported to be one who's
 9 averse with the intricacies of criminal law.
 10 But the point, Chairperson, the real point is
 11 that if you go to – the real complaint that I've been asked
 12 to convey is that the Commission doesn't seem to have
 13 problems when the same terms are used in relation to
 14 actions which are alleged to have been committed by them.
 15 Again the Commission still has to determine all those
 16 issues, and the example is on L105, Chairperson. In L105
 17 there's a slide there, and the heading is "The crime scene
 18 of the murdered supervisor," and if there's evenness then
 19 SAPS must withdraw that slide, or change that description.
 20 CHAIRPERSON: I don't understand that.
 21 Firstly, I don't propose going –
 22 MR MPOFU: Can I finish? If I may just
 23 finish –
 24 CHAIRPERSON: You may proceed, yes, but –
 25 MR MPOFU: Yes, just so that the

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1 Chairperson – the same with slide L82 where it says
 2 something with regard to "Suspects linked to murders or
 3 whereabouts of the stolen firearms taken from the murdered
 4 mine security and police official." So if police officials
 5 can be murdered but other people, the lives of police
 6 officials and of the other mineworkers must weigh the same
 7 in this Commission, Chairperson. So if the others are
 8 merely killed with long explanations but others are
 9 murdered, then it means we are discriminating between human
 10 beings pre-emptively. So what's good for the goose must be
 11 good for the gander, and that's all I want to say,
 12 Chairperson.
 13 CHAIRPERSON: Well, you've made the
 14 point, which is on record. I don't propose going through
 15 exhibit L or all the other exhibits, censoring them at this
 16 stage. I was concerned with oral evidence that was given.
 17 I'm not sure that it's contended that Mr Twala wasn't
 18 murdered. Who murdered him maybe is another matter, I
 19 understand, but it doesn't look like a justifiable homicide
 20 to me, or even a culpable homicide, and similarly I take it
 21 that this bullet point that you're referring to on slide 82
 22 relates to the death of Mr Fundi and his colleague on
 23 Sunday morning –
 24 MR MPOFU: They are not police officials,
 25 yes.

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1 CHAIRPERSON: No, they're mine security –
 2 oh, and police officials, yes. It is certainly, I take it,
 3 one of the issues we have to decide, whether what happened
 4 on the 13th, which I presume is the only other reference to
 5 police –
 6 MR MPOFU: 12th and 13th, yes.
 7 CHAIRPERSON: No, no, mine officials, the
 8 mine security is the 12th.
 9 MR MPOFU: Yes.
 10 CHAIRPERSON: The police died on the 13th.
 11 MR MPOFU: Yes, 12th and 13th.
 12 CHAIRPERSON: We've investigated the
 13 events of the 13th in some depth. Whether the reaction of
 14 the strikers which led to the deaths of the police can be
 15 categorised as murder, regard being had to the spark that
 16 came from the police side initially, is one of the matters
 17 we'll have to decide, and certainly we cannot accept it as
 18 common cause at this stage that they constituted murder.
 19 Whether the bounds of self-defence were exceeded is a
 20 matter we'll have to consider, but as I say, and the point
 21 you make is recorded.
 22 MR MPOFU: Thank you.
 23 CHAIRPERSON: But I want to make it
 24 clear, as far as oral evidence is concerned I'll endeavour
 25 to make sure that language is not used which presupposes a

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1 finding which we may or may not make at the end, but I
 2 don't propose going through exhibit L or any other document
 3 or exhibit and censoring it at this stage in the interest
 4 of advancing that point. I think it's quite clear, I hope
 5 it's clear and I hope those who are present in the chamber
 6 and who have given you instructions can understand what I'm
 7 saying, and if they can't I hope it will be explained to
 8 them that we are endeavouring to keep an open mind on these
 9 issues. We haven't got a clear impression at this stage
 10 what the findings will be and all these matters will have
 11 to be considered at the end, and that will be our approach
 12 right up until the end.

13 MR MPOFU: Thank you, Chairperson.

14 CHAIRPERSON: They do not have to fear
 15 any kind of prejudgment or anything of that kind, and
 16 certainly they must also understand that it's not practical
 17 to go through all the documentary evidence before us at
 18 this stage and censor them on the basis of keeping points
 19 open that they can be assured are being kept open in our
 20 minds and will be until the end.

21 MR MPOFU: Yes, thank you, Chairperson.

22 CHAIRPERSON: Okay?

23 MR MPOFU: Thank you, ja.

24 CHAIRPERSON: Carry on. You may now
 25 proceed with your cross-examination.

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1 MR MPOFU: Thank you, Chairperson. Well,
 2 I have to say that –

3 CHAIRPERSON: Your time will start
 4 running now. We won't deduct this point –

5 CROSS-EXAMINATION BY MR MPOFU (CONTD.):
 6 Thank you, Chairperson. Colonel, just something I need
 7 clarity on; when your group shot at the advancing strikers
 8 – we're now dealing with scene 2, understand? You
 9 understand? Ja –

10 COLONEL MODIBA: I'm following,
 11 Chairperson.

12 MR MPOFU: Ja, when that group fired,
 13 because again I'm going to argue at the end that just as
 14 you misconstrued, or misconceived what you call the attack
 15 at scene 1, which you and I have dealt with earlier this
 16 morning, I'm going to argue that it's the same thing that
 17 happened even when you were involved at scene 2. I'm sure
 18 you'll disagree with that, but I'm just giving you the
 19 background of my next question.

20 When you perceived an attack or whatever, a
 21 threat – let's call it that – before you fired the warning
 22 shots, what was the threat?

23 COLONEL MODIBA: Chairperson, the armed
 24 strikers emerged behind the rocks as we were moving,
 25 advancing the koppie 3.

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1 MR MPOFU: Yes.

2 COLONEL MODIBA: They therefore came
 3 charging at our basic line, brandishing dangerous weapons
 4 that they had in their hands, and as they were charging I
 5 shouted at them to say stop, stop, stop, and they
 6 persistently came forward. That's where now I fired
 7 warning shots in the air. That was the threat which –

8 MR MPOFU: Was imminent.

9 COLONEL MODIBA: The threat, it was, it,
 10 there was a threat on our way.

11 MR MPOFU: Yes, yes. No –

12 COLONEL MODIBA: It could ended up being
 13 so imminent.

14 MR MPOFU: Yes. No, I understand. It
 15 was not yet imminent, but it could have been imminent,
 16 correct?

17 COLONEL MODIBA: Had we not fired warning
 18 shots, yes.

19 MR MPOFU: It would have been imminent?

20 COLONEL MODIBA: That's correct,
 21 Chairperson.

22 MR MPOFU: Yes, okay. Now we are fine.
 23 So that deals with its imminence, but what I'm interested
 24 in is the nature of the threat. What is it that you were
 25 fearing was going to become imminent? What were they going

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1 to do? They were either going to throw stones at you or
 2 hit you with their fists? What was the nature of the
 3 threat?

4 COLONEL MODIBA: Chairperson, the threat
 5 was that they would eventually stab us, hack us with the,
 6 with those dangerous weapons they had. They had axes,
 7 spears and all that, so that could have happened if we did
 8 not resort to fire warning shots, Chairperson.

9 MR MPOFU: Yes, and that's all the threat
 10 that there was? The threat was confined to their use of
 11 the traditional and other dangerous weapons?

12 COLONEL MODIBA: Dangerous weapons,
 13 Chairperson.

14 MR MPOFU: Okay, at that stage there was
 15 no threat of them shooting at you?

16 COLONEL MODIBA: As I said, Chairperson,
 17 there was a shooting from the mountain. There was a
 18 shooting on the southern side of the mountain as well. So
 19 there was a shooting in the process when they were charging
 20 at us.

21 MR MPOFU: Yes. No, I'll come to that.
 22 The police have said it might have been friendly fire or
 23 whatever. All I'm saying to you is that at that time you
 24 yourself did not observe that group, apart from them
 25 holding those arms, you didn't observe them firing at you

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1 or holding anything more dangerous than the axes and things
2 like that?

3 COLONEL MODIBA: Chairperson, I couldn't
4 specifically identify one carrying a firearm, except this,
5 what you call dangerous weapons that they had.

6 MR MPOFU: Yes, that's fine. So then why
7 did you under oath testify – or not testify, attest, depose
8 to the fact that these people were firing at you if you
9 didn't observe such a thing?

10 COLONEL MODIBA: There was a shooting
11 coming from the koppie where they were coming from,
12 charging from. There was also firing, so that made me to
13 believe that they were firing at us.

14 MR MPOFU: Well Colonel, please, and what
15 changed your mind? A few minutes ago you've just said very
16 candidly that you were concerned about their axes and so
17 on. You did not observe anyone of them carrying a firearm.
18 You did not observe them firing at you. Yes, you did say
19 that there was firing on the southern side, I'll grant you
20 that –

21 COLONEL MODIBA: You mean the firing from
22 the mountain, Chairperson.

23 MR MPOFU: Yes, from the mountain –

24 COLONEL MODIBA: Where they were coming
25 from, there was also firing towards our direction. That's

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1 what I said.

2 MR MPOFU: Yes, but you specifically said
3 you did not observe them firing at you, or holding
4 anything more dangerous than the axes and the assegais and
5 so on. You accept that that's what you said just now, a
6 few minutes ago?

7 COLONEL MODIBA: Chairperson, if I could
8 reiterate what I said, that at the time the armed strikers
9 were coming at us they were brandishing dangerous weapons
10 they had in their hands and in the process there was a
11 shooting coming from their direction as well, although I
12 could not see specific if there was one holding a firearm
13 or carrying a firearm, other than the dangerous weapons
14 that they had.

15 MR MPOFU: So again it's your imagination
16 running ahead of you. You assumed, or your assumption,
17 your well-known assumption, you yourself had no ground to
18 say that apart from the axes and assegais and so on, which
19 you've described as the threat, there was in addition to
20 that shots being fired at you by that group. I accept that
21 you say from their direction, from the southern side and so
22 on, but you couldn't say that as a fact, that they were
23 firing at you.

24 COLONEL MODIBA: As a matter of fact,
25 Chairperson, there was a firing from the mountain where

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1 they were running, coming from towards our direction.

2 MR MPOFU: Yes, that –

3 COLONEL MODIBA: There was a shooting
4 towards our direction.

5 MR MPOFU: Yes, let's assume that is so,
6 but the threat that you are explaining is not a threat from
7 a mountain. Do you understand that? You are saying that
8 there's a group of people, about 15 or 20 I think, if I'm
9 not mistaken, who were coming at you. That particular
10 group – forget the mountain, forget the southern side and
11 what have you. I accept what you're saying, but from that
12 group that was coming to you, the attack was confined to
13 axes and assegais and so on, correct?

14 COLONEL MODIBA: That's correct,
15 Chairperson.

16 MR MPOFU: Yes, now if that is correct
17 then why do you say under oath, if you've now agreed with
18 me why do you say under oath – go to paragraph 7 of
19 ZZZZ.2 –

20 CHAIRPERSON: Paragraph 7, please.

21 MR MPOFU: 7, yes, thank you,
22 Chairperson. Why do you say the exact opposite in
23 paragraph – "I therefore shouted at them by saying 'Stop,
24 stop, stop,' while firing warning shots from my pistol
25 number PX17722E into the ground. At that time there were

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1 shots fired from the group towards our team."

2 COLONEL MODIBA: Chairperson, it is –

3 MR MPOFU: As a fact.

4 COLONEL MODIBA: Chairperson, it's
5 exactly what I said that there was shots firing from the
6 direction where the team, the protesters were coming. So
7 that made me to believe that they were firing at us. I
8 said so.

9 MR MPOFU: No –

10 CHAIRPERSON: [Microphone off, inaudible]

11 the words Mr Mpofo is focussing on are the words "from the
12 group."

13 MR MPOFU: Yes.

14 CHAIRPERSON: I can understand shots were
15 being fired from that general direction and there may have
16 been members of the police on the other side of the hill
17 firing, but what you said was not that. You said "At that
18 time there were shots fired from the group towards our
19 team." That conveys the message to us that the shots that
20 were fired towards your team came from the group, and
21 you've just described earlier what the group was that you
22 were concerned about, those who came – in line 3, "Those
23 who came, warriors who came from hiding behind the rocks,"
24 armed with all these weapons that you describe, "at a
25 distance of about 12 metres, charging at us." That's

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1 really the point that Mr Mpofo is concentrating on.
 2 Perhaps you can give us your explanation about that.
 3 COLONEL MODIBA: Chairperson, the shots
 4 could as well be from the group that was charging at us,
 5 and it could also be from the direction of the mountain
 6 where they were coming from, charging at us. So I could
 7 not be sure to say one of the group member had a firearm
 8 with him, but I could hear the gunshots from the mountain
 9 where they were coming from. It could be from amongst them
 10 that there was one carrying a firearm which I could not see
 11 but there was shot, there were shots fired to our
 12 direction.
 13 CHAIRPERSON: So what it amounts to
 14 really is that that expression, shots fired "from the
 15 group" is a bit unhappy because it really means, as I
 16 understand you, there were shots fired either from the
 17 group towards us, or from other people elsewhere on the
 18 koppie who were firing towards us, but who were not
 19 actually members of the group who were charging at us.
 20 That's an amplification of what's in your statement, but in
 21 summary of what you've told us in your evidence. Would you
 22 agree with that?
 23 COLONEL MODIBA: Yes, Chairperson, it
 24 could be from the group or from the mountain. That is my
 25 position in this regard.

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1 MR MPOFU: Yes, which is different from
 2 what you – okay, let me put it this way. After this
 3 exchange between myself and you and the Chairperson and so
 4 on we now come to what you've just said. Would you agree
 5 that someone who was reading your statement before this
 6 cross-examination would be left with the impression that
 7 there were people firing from the group? There's no this
 8 or maybe this or – do you accept that at least? If someone
 9 from outside was just reading your statement in paragraph
 10 7, the impression they'd be left with is that the group
 11 that was advancing towards you was firing shots at you.
 12 [11:34] Do you accept that?
 13 COLONEL MODIBA: Any inference is subject
 14 to clarification. If I have to clarify, I have to – as
 15 I've done now but I had a belief. As there were shots
 16 fired from the direction where the group was coming from,
 17 that made me to believe that they were firing at, that was,
 18 the group was firing at us. It could be from the group
 19 that charged at us or from the mountain where they were
 20 emerging from.
 21 CHAIRPERSON: Are you telling us that you
 22 thought on the 25th of August 2012 when you made your
 23 statement that the shots were fired from the group but,
 24 having thought about it in the light of the information
 25 that you now have and the questions you were asked and so

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1 on, you think that that statement you made requires
 2 qualification, which is the qualification you've expressed?
 3 Is that what you're telling us?
 4 COLONEL MODIBA: Yes, Chairperson, it
 5 qualifies what I'm saying now. As I said, I believe that I
 6 still need to clarify. If there is any uncertainty I
 7 should be given an opportunity to clarify what I mean in
 8 that paragraph.
 9 MR MPOFU: Okay. So on the 25th of August
 10 when you made the statement you were not certain that the
 11 shots came from the group.
 12 COLONEL MODIBA: I was certain that the
 13 shots, the group that charged at us –
 14 MR MPOFU: Yes.
 15 CHAIRPERSON: - at the time, in the
 16 process there were shots fired.
 17 MR MPOFU: By the group?
 18 COLONEL MODIBA: That could be from the
 19 group, even from the mountain –
 20 MR MPOFU: Yes.
 21 COLONEL MODIBA: - either way –
 22 MR MPOFU: That's the point I'm making,
 23 so the Chairperson is not correct. Your position on the
 24 25th –
 25 CHAIRPERSON: It's not a question of

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1 being correct, I'm just asking the question and got an
 2 answer.
 3 MR MPOFU: Yes. No, well, you put it as
 4 a statement, Chairperson, which you wanted him to confirm
 5 or not. On the assumption made by the Chairperson, that's
 6 not correct. Your position on the 25th of August and now is
 7 the same. On both dates you were under the impression that
 8 the shots came from the direction or you were under the
 9 impression that they came from the group itself, it's one
 10 of the two.
 11 COLONEL MODIBA: That's correct.
 12 MR MPOFU: Nothing has changed.
 13 COLONEL MODIBA: That's correct,
 14 Chairperson.
 15 MR MPOFU: Thank you. Thank you, thank
 16 you for that. And this was not, it's not just an
 17 allegation that you make, it's an important allegation
 18 because you want the reader, the reader of your statement
 19 must link, must link this fact to your claims of self-
 20 defence. That was really the intention. Firstly, you
 21 understand that it's different – if you are facing a threat
 22 from people coming, you remember the discussion we had in
 23 the morning where distance is important and so on and so on
 24 – but if the people were shooting at you, that would be all
 25 irrelevant. Do you understand that? Because whether they

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1 are 20 metres or 30 metres away, if they are shooting at
 2 you the threat is actually imminent. Do you accept that?
 3 COLONEL MODIBA: Where the firearms, it
 4 depends as to the nature of the object that is being used –
 5 MR MPOFU: Yes.
 6 COLONEL MODIBA: - at the moment, which –
 7 yes, if the firearm is being used at that time, it is
 8 imminent.
 9 MR MPOFU: Yes, that's the point I'm
 10 making. So it's a crucial thing because if I said to you,
 11 but the threat was not imminent because they were 30 metres
 12 away, I would be talking nonsense because we're not talking
 13 about stabbing here, we are talking about shooting so the
 14 30 metres is irrelevant. So it's a significant difference
 15 as to whether the threat poses itself in the form of
 16 stabbing or in the form of shooting, you would agree?
 17 COLONEL MODIBA: Chairperson, the manner
 18 in which the charging group conducted themselves posed
 19 danger to us –
 20 MR MPOFU: That's not my –
 21 COLONEL MODIBA: - and that, that I took
 22 it as a threat.
 23 MR MPOFU: Well, if it was already a
 24 threat you didn't have to exaggerate it. You see what I
 25 mean? I'm saying that the threat from stabbing and the

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1 threat from shooting are two different things because the
 2 one is distance related, the other one might not be at
 3 certain distances. Understand?
 4 COLONEL MODIBA: Yes, I'm following,
 5 Chairperson.
 6 MR MPOFU: Yes. And in fact the very
 7 next sentence after this you say, "Some of the members
 8 discharged their firearms with an effort to defend
 9 themselves." So you are linking this shootout or shooting
 10 from the strikers to your claims of self-defence, do you
 11 understand that?
 12 COLONEL MODIBA: I'm linking it with the
 13 charging of the striking miners and the warning shots that
 14 we have discharged.
 15 MR MPOFU: Yes.
 16 CHAIRPERSON: [Microphone off, inaudible]
 17 Mr Mpofu.
 18 MR MPOFU: Ja, well. Your imagination
 19 also goes further, you accept that – I'm sorry, I don't
 20 have the exhibit number. You remember you were shown the
 21 shooting, you were shown about where N, body N – I'm going
 22 to – and you claimed that you saw what happened there?
 23 COLONEL MODIBA: No, I did not. I said I
 24 saw the activities on the side where the body N was.
 25 MR MPOFU: Well, body N is on the western

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1 side. You said you saw what happened there.
 2 COLONEL MODIBA: No, I never said that,
 3 Chairperson.
 4 MR MPOFU: You never said you observed
 5 anything on the western side?
 6 COLONEL MODIBA: I said on the western
 7 side, as I was climbing on top of the rock, because there
 8 was still firing coming from that direction towards east I
 9 –
 10 MR MPOFU: Ja.
 11 COLONEL MODIBA: - I saw the police and
 12 the miners, that was the confrontation between the police
 13 and the miners.
 14 MR MPOFU: Yes.
 15 COLONEL MODIBA: That's what I said, not
 16 bodies.
 17 MR MPOFU: Yes, you said – okay, let's
 18 call it the confrontation but either Mr Chaskalson or Mr
 19 Ntsebeza actually pointed this out to you and it was indeed
 20 on the western side near the dam, the dry dam, do you
 21 remember that, where you saw this confrontation?
 22 COLONEL MODIBA: Ja, it was on the
 23 western side where the confrontations took place.
 24 MR MPOFU: Yes. Now, ja, I'm just trying
 25 to explain to you that from the movements that you

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1 explained, you could not have observed anything happening
 2 on that western side. You were on the south-eastern side,
 3 blocked by this big rock in front of you.
 4 COLONEL MODIBA: Chairperson, I was on
 5 the – on the east, eastern, east towards north.
 6 MR MPOFU: That's fine, yes –
 7 COLONEL MODIBA: Not south-east, more on
 8 the eastern side towards north.
 9 MR MPOFU: Okay, let's go to exhibit ZZ5,
 10 annexure A. Thank you, Ms Pillay. Is that the one? No,
 11 no. Maybe it's the same one but if you zoom, ja, zoom to
 12 koppie 3 - no, it's not this one. That one is actually
 13 marked western, annexure G with the markings of western and
 14 – yes, yes, that will be – you see where it shows body N on
 15 the western side right at the top of the picture, N is,
 16 there are two yellow lines going towards N right at the
 17 top.
 18 COLONEL MODIBA: Yes, Chairperson, I can
 19 see the –
 20 MR MPOFU: Ja. The point I'm making is
 21 that according to you, you were down here where there's A
 22 and B, do you understand that?
 23 COLONEL MODIBA: I was not down. I said
 24 I climbed on top of the rock, more –
 25 MR MPOFU: Ja, but –

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1 COLONEL MODIBA: - after I had gone
 2 through that big rock and the bushes on my right, I climbed
 3 on top of the rock.
 4 MR MPOFU: Yes and you moved clockwise,
 5 as you put it, towards the north.
 6 COLONEL MODIBA: That was before I moved
 7 clockwise towards the north. That's when I observed the
 8 confrontation, Chairperson.
 9 MR MPOFU: So from where you were next to
 10 that rock you observed things that happened right on the
 11 other extreme, which is the other end of the mountain, as
 12 it were. Is that what you're saying?
 13 COLONEL MODIBA: Yes, Chairperson, I saw
 14 the confrontation and it was a quick observation and I
 15 dropped because there was still firing that was taking
 16 place at that time.
 17 MR MPOFU: Oh, I see. So again, and I'm
 18 not – I promise you this is not scientific because – but
 19 you had rocks and all sorts of things in between and you
 20 say you saw some confrontation up there fleetingly, is that
 21 your evidence?
 22 COLONEL MODIBA: Yes, Chairperson, I did
 23 see the confrontation on the western side of the koppie.
 24 MR MPOFU: Fleetingly. You say it was a
 25 quick thing, you were looking at other things as well.

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1 COLONEL MODIBA: No, I checked because
 2 what made me to climb slightly on top of the rock was to
 3 check because there were still gunshots in the vicinity.
 4 So when I looked up I realised that there was still, there
 5 were confrontation on the western side of the koppie.
 6 MR MPOFU: Ja, so you are on top of the
 7 koppie in the middle of gunshots with guns, with guns, with
 8 bullets flying around you and somewhere in the horizon you
 9 saw that there was a confrontation, is that the position?
 10 COLONEL MODIBA: Ja, I could see that.
 11 MR MPOFU: Well, but could you see it in
 12 detail or did you just see it fleetingly?
 13 COLONEL MODIBA: It was a quick look.
 14 MR MPOFU: Yes.
 15 COLONEL MODIBA: Yes.
 16 MR MPOFU: Okay, from that quick look
 17 were you able to ascertain what the confrontation was
 18 about? Who was chasing who, who was hitting who at that
 19 time? That's what I mean by detailed observation, or did
 20 you just say, well, there's a confrontation?
 21 COLONEL MODIBA: Chairperson, I could
 22 observe and deduct that that was a commotion in the form of
 23 confrontation –
 24 MR MPOFU: Yes.
 25 COLONEL MODIBA: - between the police and

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1 strikers.
 2 MR MPOFU: But you couldn't determine the
 3 details of who is hitting who at what time or who is
 4 chasing who and that kind of thing because you were in the
 5 middle of bullets flying past your head.
 6 COLONEL MODIBA: I did not have that
 7 liberty of –
 8 MR MPOFU: Yes.
 9 COLONEL MODIBA: - consistently look,
 10 observing, that was also dangerous for me.
 11 MR MPOFU: And so you can't say at that
 12 particular point whether it was the police that were
 13 attacking the strikers or the strikers attacking the
 14 police. It was not that kind of observation where you -
 15 unlike at scene 1 where you say you were watching properly
 16 and so on. It was just a fleeting –
 17 COLONEL MODIBA: I came to a conclusion
 18 that that could be a similar, the confrontation could as
 19 well be a similar confrontation that we had –
 20 MR MPOFU: Aha.
 21 COLONEL MODIBA: - referring to the
 22 charging.
 23 MR MPOFU: Yes, that's the thing. So you
 24 used your imagination again to liken whatever it is that
 25 you were seeing on the horizon, it must be like the one

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1 that happened to you, without observing it yourself.
 2 COLONEL MODIBA: I saw the confrontation,
 3 the commotion. That was the confrontation between the
 4 police and the striking miners.
 5 MR MPOFU: Ja, what was the nature of the
 6 confrontation? Who was doing what at that particular time?
 7 Were the police chasing, were they beating up, were the
 8 miners stabbing or what?
 9 COLONEL MODIBA: There were movements of
 10 charging at, in a process, Chairperson.
 11 MR MPOFU: Who was charging?
 12 COLONEL MODIBA: The armed strikers were
 13 charging –
 14 MR MPOFU: Were charging.
 15 COLONEL MODIBA: - at the police.
 16 MR MPOFU: And the police were shooting
 17 at them.
 18 COLONEL MODIBA: And there was gunshots.
 19 That could probably be from the police, Chairperson.
 20 MR MPOFU: Okay, so you observed gunshots
 21 from the police, no gunshots from the strikers.
 22 COLONEL MODIBA: Look, it's not observing
 23 gunshots. I could, at that distance I could hear gunshots.
 24 MR MPOFU: Yes, but –
 25 COLONEL MODIBA: And movements of the

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1 objects in this format, being the police and the mining
 2 strikers –
 3 MR MPOFU: Yes.
 4 COLONEL MODIBA: - could be seen.
 5 MR MPOFU: Yes, that's fine. You heard –
 6 so far what you have said is commotion and movement and you
 7 heard gunshots coming from the police. All I was asking
 8 you is simply, you did not observe any gunshots coming from
 9 the strikers.
 10 COLONEL MODIBA: I could hear the
 11 gunshots at the time when the commotion was taking –
 12 CHAIRPERSON: Yes, I understand you could
 13 hear, you could hear gunshots.
 14 COLONEL MODIBA: That's correct,
 15 Chairperson.
 16 CHAIRPERSON: But you didn't know who was
 17 firing and what counsel is asking you, did you see? He's
 18 not only concerned with what you heard, did you see
 19 gunshots coming from the side of the strikers?
 20 COLONEL MODIBA: I couldn't see where,
 21 who was firing but the gunshots, I was able to hear the
 22 gunshots.
 23 CHAIRPERSON: Yes, I understand. You
 24 heard gunshots. There was no doubt that guns were fired,
 25 shots were being fired.

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1 COLONEL MODIBA: Yes.
 2 CHAIRPERSON: Who was responsible for
 3 that, at that stage you couldn't say because you didn't
 4 see, from what you tell us, you didn't see any of the
 5 strikers actually firing at that stage but – so all you can
 6 tell us is, there were gunshots at that stage. From where
 7 the gunshots came, you can't tell us. Is that an accurate
 8 –
 9 COLONEL MODIBA: That's correct,
 10 Chairperson.
 11 MR MPOFU: Okay. Then why again did you
 12 say under oath the exact opposite and exaggerate what
 13 happened there, because in paragraph 8 of your statement
 14 you say, "There were also members of POP that came from the
 15 western side of the mountains, also shooting at armed
 16 warriors who were shooting and attacking them." Why did
 17 you tell that untruth?
 18 CHAIRPERSON: You see – perhaps that
 19 could be put up on the screen, that ZZZ2.2 and it's
 20 paragraph 8, the second line. In fact what Mr Mpofo has
 21 done is, he's read effectively the first sentence, which I
 22 shall read again.
 23 MR MPOFU: yes.
 24 CHAIRPERSON: "There were also members of
 25 POP who came from the western side of the mountains, also

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1 shooting at the armed warriors who were shooting and
 2 attacking them." That's the sentence he relies on. In the
 3 light of what you've now told us it would seem that you
 4 can't persist in the statement you make that the armed
 5 warriors were shooting at the members of the POP, is that
 6 correct?
 7 COLONEL MODIBA: Chairperson, in my
 8 testimony earlier I said there was a shooting, in the
 9 process of that commotion between the armed –
 10 CHAIRPERSON: No – no, you said there was
 11 shooting but you told us you couldn't say who was doing the
 12 shooting, because you heard shooting and when you asked in
 13 terms, can you say that the armed – what you in your
 14 statement call the armed warriors, I think you talked about
 15 the strikers – can you say that the strikers were shooting
 16 at that point, responsible for the shooting? You said no,
 17 you couldn't. Now once you concede that, it seems to me
 18 that you can't persist in saying what you said in the first
 19 sentence of paragraph 8, namely that the armed warriors
 20 were shooting at the members of the POP. I take it the
 21 most you can say is, they may have been, you heard
 22 gunshots. Who was responsible for the gunshots you can't
 23 say, they may have been shooting at the warriors, at the
 24 strikers, but you can't be sure. Isn't that right?
 25 COLONEL MODIBA: That's correct,

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1 Chairperson.
 2 CHAIRPERSON: Yes, shooting by the
 3 warriors at the POP members. You can't say that anymore,
 4 can you, in the light of what you've told us?
 5 COLONEL MODIBA: What I can say,
 6 Chairperson, is that in a process of the commotion there
 7 was a shooting. That's what I mean in that paragraph.
 8 CHAIRPERSON: So that first sentence
 9 there of paragraph 8 of ZZZ2.2 has to be qualified in the
 10 light of what you've now told us. That's correct, isn't
 11 it?
 12 COLONEL MODIBA: That's correct,
 13 Chairperson.
 14 CHAIRPERSON: Thank you. [Microphone
 15 off, inaudible] - Mr Mpofo, and as far as I can see you've
 16 covered all the topics in your list of topics that you gave
 17 us except para 12 which I don't think is going to help us
 18 anyway.
 19 MR MPOFU: No, Chairperson. That's as
 20 far as you can see, I suppose, but if you can give me just
 21 about 15 minutes, Chairperson.
 22 CHAIRPERSON: What about re-examination?
 23 I'll give you five.
 24 MR MPOFU: Chairperson?
 25 CHAIRPERSON: I'll give you five. You

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1 asked for three hours, you've had more than three hours but
 2 I'll give you another five minutes to round that –
 3 MR MPOFU: No, Chairperson, I've said
 4 this yesterday, I mean I don't want to go through the kind
 5 of witness that we are dealing with here and I know that
 6 people said they wanted hours but they were given more time
 7 –
 8 CHAIRPERSON: I gave you the full time
 9 that you asked for, three hours, and I'm giving you another
 10 five minutes, so use it.
 11 MR MPOFU: Chairperson, I must object to
 12 that because –
 13 CHAIRPERSON: The objection is noted and
 14 dismissed. Proceed.
 15 MR MPOFU: Well, Chairperson, I can't
 16 cross-examine the witness effectively –
 17 CHAIRPERSON: You're wasting your time
 18 that I've given you, Mr Mpofo, please carry on.
 19 MR MPOFU: No, Chairperson, I have to – I
 20 can't deal with this witness in five minutes and do
 21 justice.
 22 CHAIRPERSON: Well, it –
 23 MR MPOFU: Other cross-examiners were
 24 given extra hours and more time, why can't I be given 15
 25 minutes –

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1 [11:53] CHAIRPERSON: It depended on the matters
 2 which still had to be dealt with which they had indicated
 3 initially. Please carry on as I've instructed you to do.
 4 MR MPOFU: No, then I'll stop,
 5 Chairperson. There's no point, if I'm not going to cross-
 6 examine the witness effectively, what's the point?
 7 CHAIRPERSON: Once we introduced a regime
 8 of time limits in the interests of complying with our
 9 mandate in the time available to us, it has to be adhered
 10 to. I have –
 11 MR MPOFU: Ja, but it must be adhered to
 12 evenly against all cross-examiners –
 13 CHAIRPERSON: I understand, Sir. If you
 14 don't want to take the five minutes I'm making available to
 15 you, it's your decision, not mine. Thank you, that's the
 16 end of your cross-examination.
 17 MR MPOFU: No, Chairperson, it's not the
 18 end of my cross-examination. You have stopped me from
 19 cross-examining -
 20 CHAIRPERSON: It's ended –
 21 MR MPOFU: I want the record to show
 22 that.
 23 CHAIRPERSON: How the end came about is a
 24 matter which –
 25 MR MPOFU: Is another matter.

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1 CHAIRPERSON: - appears from the record.
 2 Are you in a position to re-examine shortly?
 3 MS BALOYI: I am, Chair.
 4 CHAIRPERSON: How long do you think
 5 you'll be?
 6 MS BALOYI: Less than 15 minutes, Chair.
 7 CHAIRPERSON: Alright.
 8 RE-EXAMINATION BY MS BALOYI: Thank you,
 9 Chair. Colonel, if we could look at exhibit MMM49, if we
 10 could have it shown on the screen, Chair, and you look at –
 11 it was put to you by Mr Chaskalson that you are a, you were
 12 first responder at the scene, at scene 2. You remember
 13 that, the eastern side where you were?
 14 MR CHASKALSON SC: Chair, I didn't put
 15 that to the witness.
 16 MS BALOYI: Chair, I will – I just want
 17 to clarify whether he is the first responder indeed and if
 18 this didn't arise in cross – if it wasn't suggested and put
 19 to him then I'll leave it, Chair.
 20 CHAIRPERSON: It doesn't matter whether
 21 it was specifically put. The question is, were you the –
 22 let's go a bit further down in the –
 23 MS BALOYI: Chair, it's 2.11 and 12 that
 24 I was going to look at, first member is 12.
 25 CHAIRPERSON: Were you the first member,

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1 would you regard yourself as the first member within the
 2 meaning of this policy document?
 3 COLONEL MODIBA: Chairperson, I wouldn't
 4 regard myself as the first member at that scene.
 5 MS BALOYI: Okay. Chair, I'll leave it
 6 at that. Perhaps let me proceed to my next question.
 7 CHAIRPERSON: I don't know who the first
 8 member was if it wasn't you, but it may well have been
 9 somebody else like General Naidoo or somebody like that but
 10 if no-one else on the scene was giving first aid and you
 11 arrived on the scene and you were in a position to give
 12 first aid because you had the necessary training and so on,
 13 are you suggesting that merely because you weren't the
 14 first member, you were entitled to stand on the scene with
 15 your arms folded and not give first aid? Is that your
 16 evidence?
 17 COLONEL MODIBA: Chairperson, if at that
 18 time I was in a position to give necessary first aid, I
 19 could but in that regard I still say that I shouldn't be
 20 regarded as the first member on the scene.
 21 CHAIRPERSON: No, I understand that. You
 22 may not be the first member but even if you're the 20th
 23 member but no-one was giving first aid and you were able to
 24 do so, then I take it inherent in the policy of the
 25 document is that police officials who are on the scene who

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1 have got the necessary skill, should give first aid. Would
2 you agree with that?

3 COLONEL MODIBA: That's correct,
4 Chairperson. If I had the necessary equipment I could try
5 to do that.

6 MS BALOYI: Colonel, if we could then
7 also look at exhibit L, slide 185 and the first bullet
8 point there. It records that at about 14:40 – can I please
9 confirm first with you that 14:40, this would have been
10 after your briefing by Colonel Scott, is that correct?

11 COLONEL MODIBA: That's correct,
12 Chairperson.

13 MS BALOYI: Yes, and it says, "The
14 president of AMCU returned to the koppie. The SAPS asked
15 the representatives of AMCU to request the protesters to
16 put their weapons down. This request was made in the
17 presence of the media at the koppie." Did you become aware
18 that that request after your briefing had been conveyed to
19 AMCU by the SAPS at the koppie?

20 COLONEL MODIBA: No, Chairperson.

21 MS BALOYI: In exhibit L if we could look
22 at slide 189, the first bullet point there, "At 15:35" –
23 this is after your briefing, it says, "the president of
24 AMCU and representatives of AMCU prepared to leave the
25 scene." And this is the part, "Mr Joseph Mathunjwa

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1 remarked to the protesters that they would die that day if
2 they continued with their course of action, to which they
3 responded that they were prepared to die there that day."
4 Do you see that?

5 COLONEL MODIBA: Yes, Chairperson.

6 MS BALOYI: Yes, and did you become aware
7 that at 15:35 or thereabouts Mr Mathunjwa did ask the
8 protesters to discontinue their course of action?

9 COLONEL MODIBA: Chairperson, I was not
10 aware of the representative of the group that gathered
11 there. I only knew about our police negotiators that
12 always tried in vain to have the group disperse from the
13 mountain.

14 MS BALOYI: Yes. Now in your description
15 of your observations at scene 1, moving away from the
16 slide, your description of your observation of the group
17 and their behaviour at scene 1, Mr Mpofu suggested to you
18 or put to you that the strikers that you saw running along
19 the Nyala and going across the kraal, they were in fact on
20 their way home to Nkaneng. They were walking peacefully on
21 their way to Nkaneng. You remember that was put to you?

22 COLONEL MODIBA: Yes, I do, Chairperson.

23 MS BALOYI: Now if you look at exhibit,
24 still L, 206. If you could look at that, that's a picture
25 and that exhibit to be considered – I will not ask for the

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1 video to be shown, but to be considered together with video
2 JJJ194.17 which captures this. Now you see the heading
3 there, it says "Scene 1 kraal area," that is 15:50, the
4 time given. It says, "Armed protesters approaching the
5 SAPS line. Firearm ringed in yellow," you see that?

6 COLONEL MODIBA: Yes, Chairperson.

7 MS BALOYI: Yes. Now even if you didn't
8 become aware of this, a firearm is pointed there and the
9 video shows that there's the striker shot, shows a striker
10 shooting. According to the Human Rights –

11 CHAIRPERSON: It doesn't show a striker
12 shooting. It simply shows, as far as this picture is
13 concerned, it simply shows that the person had concerned
14 had a firearm in his hand.

15 MS BALOYI: Chair, if I may, it does. In
16 fact the Human Rights Commission analysis led them to
17 conclude that he in fact shot into the ground, not at the
18 police.

19 CHAIRPERSON: It's put to me that it's
20 visible in the video. I see, alright. Well, let's carry
21 on then.

22 MS BALOYI: Yes. Now, with that
23 description that I've given you, what you see on this clip
24 and the video, is that consistent and taking into account
25 your observation –

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1 CHAIRPERSON: Isn't this just a matter
2 for argument? You're putting exhibits to the witness which
3 are before the Commission.

4 MS BALOYI: Yes.

5 CHAIRPERSON: So you'll be able to argue
6 at the end of the day whether it's consistent or
7 inconsistent. The witness has expressed an opinion. It
8 may well be that the points you're making confirm his
9 opinion, it may be that they're neutral but I mean does it
10 help to put them to the witness and say, does it confirm
11 your opinion? He presumably will say yes, but in any event
12 it's a point which can be argued later. You don't have to
13 put your arguments to the witness.

14 MS BALOYI: Chair, I accept that. It was
15 discussed with you also, the incident that was reported,
16 the alleged incident that was reported by - or the
17 allegations made by, I think it's Warrant Officer Myburgh,
18 if I'm not mistaken. Now -

19 CHAIRPERSON: You are correct.

20 MS BALOYI: Thank you, Chair. Now,
21 Colonel, when did you first become aware of this
22 allegation?

23 COLONEL MODIBA: Chairperson, I only
24 became aware at the time the National Commissioner was
25 testifying. I heard it in one of the cross-examination

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1 processes and then a second time is when I was issued with
 2 the file that I'm having here with me.
 3 MS BALOYI: Yes, and are you aware, did
 4 you become aware that this matter was discussed between
 5 Warrant Officer Myburgh, General Naidoo, the National
 6 Commissioner and the Provincial Commissioner at some point?
 7 COLONEL MODIBA: Only after I read the
 8 statement, Chairperson.
 9 MS BALOYI: Yes. And lastly, Colonel,
 10 the shooting at scene 2 where you describe, you described
 11 that there was shooting from the strikers, at the time that
 12 you described the strikers – this is scene 2 now when you
 13 approach on the eastern side – at the time that you
 14 describe the strikers as charging towards members of your
 15 line and you describe that there was firing coming from
 16 their direction, did you have any reason to believe that
 17 the shooting was not from the strikers that were
 18 approaching you?
 19 COLONEL MODIBA: No, Chairperson. I
 20 couldn't have a reason that it wasn't from them.
 21 MS BALOYI: Chair, those are my
 22 questions, thank you.
 23 CHAIRPERSON: Thank you. Thank you,
 24 Colonel, you're excused from further attendance on the
 25 basis that if some point arises which makes it necessary

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1 Those who are entitled to come must realise it will be on a
 2 first-come-first-serve basis, and must also be in
 3 possession of documents to prove their identity so as to
 4 prove that they are indeed entitled to be present. That's
 5 all the injured and – all the parties in other words, but
 6 so we're adjourning now until Thursday the 19th at 9AM.
 7 [COMMISSION ADJOURNED]
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1 for us to call you back, you'll come back without our
 2 having issue a subpoena against you. If you promise to
 3 come back if we ask you to come back, I'll discharge you
 4 from further attendance at this stage. Is that acceptable?
 5 COLONEL MODIBA: Yes, Chairperson.
 6 CHAIRPERSON: Alright, thank you.
 7 [NO FURTHER QUESTIONS – WITNESS EXCUSED]
 8 CHAIRPERSON: We're going to take an
 9 adjournment now. There's a housekeeping matter that I
 10 mentioned earlier that we want to discuss. Depending on
 11 how long it will take us to dispose of this matter, we'll
 12 come back as soon as we can. We're not likely to be back
 13 before 10 past and it may well be that at 10 past I'll
 14 simply announce that we postponing but we adjourn now until
 15 10 past or shortly thereafter.
 16 [COMMISSION ADJOURNS COMMISSION RESUMES]
 17 [12:21] CHAIRPERSON: I've come back to the
 18 chamber myself - the Commission itself is not resuming –
 19 just to announce that as a result of the housekeeping
 20 matters we discussed we will not be hearing the further
 21 evidence we anticipated we'd hear today from officials from
 22 the South African Police Service. Instead we will adjourn
 23 until Thursday the 19th at 9AM when it is anticipated that
 24 Mr X will be giving his evidence. There will be special
 25 arrangements in place in regard to access to this chamber.

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