

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 247

23 JUNE 2014

PAGES 31013 TO 31140



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1 [PROCEEDINGS ON 23 JUNE 2014]
 2 [09:11] CHAIRPERSON: The Commission resumes. We
 3 had a little bit of housekeeping to attend to this morning,
 4 which explains our late start, for which I apologise.
 5 We received notice yesterday that Mr Mpofo on
 6 behalf of the injured and arrested persons wishes to bring
 7 an application. Yes, Mr Mpofo? [Microphone off,
 8 inaudible] necessary for the, for us to be able to see Mr X
 9 while the application is being argued, or –
 10 MR MPOFU: No.
 11 CHAIRPERSON: - for Mr X to be able to
 12 see us. So I suggest that be turned off.
 13 MR MPOFU: Thank you. Thank you very
 14 much –
 15 CHAIRPERSON: Yes, Mr Mpofo?
 16 MR MPOFU: Thank you very much,
 17 Chairperson. Chairperson, over the weekend we received
 18 instructions to bring this application and so as not to
 19 catch people by surprise we, with the kind assistance of Ms
 20 Pillay, as you indicated, Chairperson, we sent a message so
 21 that both the Commissioners and the parties would be
 22 appraised of our intentions.
 23 CHAIRPERSON: Now have you got any
 24 document on which you rely for your application, or are you
 25 just making it orally without any supporting document of

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1 any kind?
 2 MR MPOFU: Chairperson, I'd like to make
 3 a –
 4 CHAIRPERSON: Like a notice of motion
 5 or –
 6 MR MPOFU: Yes. No, it's a bit of both
 7 actually.
 8 CHAIRPERSON: Do you have something, or
 9 must I write it out in longhand as you speak?
 10 MR MPOFU: Chairperson, if you can just
 11 bear with me. I'm going to make the application orally.
 12 However, there is a document that is being prepared –
 13 CHAIRPERSON: Okay, sorry, you bring an
 14 application for what? What is the relief that you seek?
 15 MR MPOFU: Okay, yes.
 16 CHAIRPERSON: Just tell me so I can write
 17 it down in my notebook.
 18 MR MPOFU: Alright. Well, such relief,
 19 Chairperson, is that Mr X should be prohibited from giving
 20 any further evidence until his mental state has been
 21 determined, more particularly his competence and capability
 22 as a witness.
 23 CHAIRPERSON: I don't know whether the
 24 witness sitting wherever he is sitting can hear this. I
 25 know we can't see him, but – we can see him again. I think

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1 both the audio and the visual should be closed down. What
 2 I've written down is that he should be prohibited from
 3 giving any further evidence until his mental state has been
 4 determined, more particularly – that's where I stopped
 5 writing. What did you say, more particularly what?
 6 MR MPOFU: Yes, I said more particularly,
 7 Chairperson, his competence and capability as a witness.
 8 CHAIRPERSON: Yes, sorry.
 9 MR MPOFU: Yes, there is – as I said,
 10 Chairperson, there is a document which I will present,
 11 which is both a notice of application as well as a
 12 supporting affidavit from my attorneys, but that will be
 13 just for completion. I might break down the relief more
 14 specifically when the document is here, but that's the
 15 essence of the relief that we –
 16 CHAIRPERSON: I've never heard of an
 17 application being argued before the notice of application
 18 is before the Court. I know this is not a court, so things
 19 happen here that don't happen in courts, but I've never
 20 heard of an application being brought on the basis of a
 21 document which is going to come, which may contain other
 22 relief or be broken down further. I mean shouldn't we have
 23 the document before the application is argued?
 24 MR MPOFU: Well, I'm in your hands,
 25 Chairperson. The document, I tried my best to have it

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1 ready by now, but my PA has promised me that it might be
 2 ready within about half an hour.
 3 CHAIRPERSON: So what you propose doing
 4 is arguing in the meanwhile, provided you do so on the
 5 basis of what the document is going to say when it comes,
 6 so we won't waste any time. Now where do I get the power
 7 from – before we discuss the merits, if we're ever going to
 8 get there, where do I get the power from to make the order
 9 that you seek?
 10 MR MPOFU: Well, Chairperson, the power
 11 you derive of course from the, it's the same prescripts
 12 that we discussed yesterday in the context of the other
 13 application, which –
 14 CHAIRPERSON: [Microphone off, inaudible]
 15 here yesterday when you were discussing matters.
 16 MR MPOFU: Oh ja –
 17 CHAIRPERSON: With whom were you
 18 discussing things yesterday?
 19 MR MPOFU: Ja well, okay Chairperson.
 20 Ja, the previous application which has obviously been
 21 superseded by this one now, but the power really derives
 22 from your power as a commission to determine your own
 23 procedure, which is the general power, and then the other
 24 power derives from regulation 11, which we quoted in a
 25 different context last week, which says that whenever there

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1 might be prejudice to somebody – I'm paraphrasing -
 2 whenever there be evidence that might be prejudicial to a
 3 person in other proceedings, and so on, then you have a
 4 discretion on how you receive that evidence.
 5 What I've decided to do, Chairperson, is – and I
 6 don't want to hear anyone telling me that this is not a
 7 court of law or this is not a criminal case, what not, I
 8 know that. I'm just saying that for the sake of
 9 convenience I'm going to make reference in this application
 10 to section 194 of the Criminal Procedure Act and the reason
 11 I'm doing that, Chairperson, is because what I'm really
 12 after, as I say, is not a literalist interposition of –
 13 CHAIRPERSON: 194?
 14 MR MPOFU: 194 of –
 15 CHAIRPERSON: Of the CPA?
 16 MR MPOFU: Of the CPA, yes, Chairperson,
 17 and as I say –
 18 CHAIRPERSON: If I may –
 19 MR MPOFU: Sorry.
 20 CHAIRPERSON: - respond to that as
 21 follows; the Criminal Procedure Act applies to criminal
 22 trials. The Criminal Procedure Act to some extent codifies
 23 the common law which would be otherwise applicable. There
 24 is common law in relation to competency to testify and I
 25 can't remember whether the Civil Evidence Act has a section

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1 which is similar to 194 of the Criminal Procedure Act – it
 2 probably does. I'm informed it does, but that wouldn't
 3 apply to a commission either unless the commission is
 4 covered by the Civil Evidence Act, in which case the common
 5 law would apply.
 6 As far as I can see, having had a look at 194
 7 before we came into the chamber this morning, it seems to
 8 me to be very largely in line with what the common law was,
 9 but in order to get the legal basis for the argument right
 10 we should be referring not to the section then in an act
 11 that doesn't apply, but to the common law which does, I
 12 would have thought. So there may well be differences.
 13 The Criminal Procedure Act does seem to take the
 14 whole aspect of – I think the correct word would be
 15 testatory capacity - a bit further than the common law did
 16 and it might be juridically sounder to approach the matter
 17 on the correct basis, namely the common law. What exactly
 18 is the common law on the point?
 19 MR MPOFU: Thank you, Chairperson.
 20 You've taken the words from my mouth, and that's what I was
 21 saying that any reference that will be made to section 194
 22 must be in the context that what we are after is not
 23 juxtaposing the criminal law situation to this, criminal
 24 procedure situation to this, but merely the underlying
 25 principles of section 194, which as you correctly point out

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1 both derive from the common law. So it's the underlying
 2 logic of the issue of compellability which comes from the
 3 common law that I seek to rely on. So any reference to 194
 4 will be merely in that context.
 5 CHAIRPERSON: Before we move further on
 6 the subject of power, where do I get the power from – I can
 7 determine procedure, or my colleagues and I can determine
 8 the procedure, I can't do it myself alone, but where would
 9 I get the power from, even if my colleagues and I were
 10 disposed to confer it upon me, to force the witness to
 11 undergo examination as to his mental capacity? There are
 12 provisions, as you know, in the Criminal Procedure Act
 13 which –
 14 MR MPOFU: Section 77.
 15 CHAIRPERSON: That's right, which can be
 16 used generally in respect of accused persons, not in
 17 respect of witnesses, but where would I get the power from
 18 to make the kind of order that you seek to make?
 19 MR MPOFU: Well Chairperson –
 20 CHAIRPERSON: If I haven't got the power
 21 but you persuade me and my colleagues to confer the power
 22 on me, assuming that the procedural provision in the
 23 Commissions Act, or in our regulations is wide enough to
 24 confer a power of the kind we're discussing, assuming all
 25 that happens and the police are dissatisfied with any order

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1 I make, they take me on review and the court holds that I
 2 haven't got the power to make it, then this whole exercise
 3 would be a waste of time, wouldn't it?
 4 MR MPOFU: Ja –
 5 CHAIRPERSON: So you've got to satisfy
 6 me, before we move any further, that I have the power to
 7 make the kind of order that you seek me to make.
 8 MR MPOFU: No, of course. Of course,
 9 Chairperson. Of course, Chairperson. What I – let's start
 10 right at the beginning. Both starting, one can say your
 11 powers, Chairperson, from the Constitution itself, to the
 12 Commissions Act and then the regulations, and then of
 13 course the regulation that says the Commission has the
 14 power to determine its own procedures in my respectful
 15 submission is wide enough, Chairperson, to encompass a
 16 situation such as this, and that is why the Chairperson
 17 when somebody's cell phone rings here orders them out of
 18 the auditorium –
 19 CHAIRPERSON: I've never ordered them
 20 out. I've threatened them out.
 21 MR MPOFU: Yes, fair enough.
 22 CHAIRPERSON: I asked myself several
 23 times what would happen if I were actually to do that –
 24 MR MPOFU: Yes, maybe –
 25 CHAIRPERSON: - what would happen, but

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1 I'm happy to hear that you would support me in saying that
 2 I have the implied power to do that.
 3 MR MPOFU: Yes, Chairperson, ja, I mean
 4 your, the several final warnings which have not yet been –
 5 CHAIRPERSON: I'm not sure it's the same
 6 person every time.
 7 MR MPOFU: Yes, thank you, Chairperson.
 8 But yes, I'm just making that simple example to illustrate
 9 even to the people in the auditorium that, you know, when
 10 the Chairperson does that it is, one cannot then say that
 11 person, the cell phone holder stands up and say well,
 12 Chairperson, where do you get the power to take me out of
 13 the auditorium. That power drives automatically and
 14 inherently from the general powers which are imbued on the
 15 Commission to determine its own procedures and processes.
 16 Now coming closer home, the logic of such a power
 17 must of course extend to the manner in which a witness –
 18 let's remember the core business of the Commission is the
 19 establishment of the truth and to dispense justice. Now in
 20 that context it should follow that anything that has the
 21 potential either of not yielding the truth, as we all
 22 understand what that means, or of yielding an injustice to
 23 persons, which is something I'm going to address now and
 24 again, would naturally fall into the inherent powers that
 25 the Commission has to determine its own procedures.

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1 Chairperson, again at it's a broad –
 2 CHAIRPERSON: It's not inherent power to
 3 determine procedure. A commissioner is to some extent a
 4 creature of statute.
 5 MR MPOFU: Sure.
 6 CHAIRPERSON: The powers flow, as far as
 7 procedure is concerned, from the presidential proclamation.
 8 I'm not sure that commissioners have inherent powers at
 9 all. I mean they may have, but certainly the power to
 10 determine the procedure is not an inherent power, it's a
 11 power specifically vested in the Commission by the
 12 foundational documents which give rise to the Commission.
 13 MR MPOFU: Yes. No, no, fair enough,
 14 Chairperson. Maybe the word "inherent" is not appropriate.
 15 What I'm trying to say is that yes, you have the power to
 16 determine procedure. What I'm saying is that the power
 17 that I am fashioning in respect of this application is
 18 inherent in that power of determining your own procedure as
 19 to how the Commission would be conducted, and I say that,
 20 Chairperson, for the simple reason that again while taking
 21 it to the absurd, let's again take an absurd but simple
 22 example. If, Chairperson, I were to call Mr Phatsha or Mr
 23 Magidiwana or whoever, and it becomes clear that he is
 24 heavily intoxicated while giving evidence and whatever
 25 questions we put to him or the Chairperson puts to him is

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1 just, he blabs around whatever he thinks, then obviously
 2 the part of what is inherent in your powers of how the
 3 proceedings are conducted would be to either say well, Mr
 4 Mpofo, I'm kicking out your witness, or let him come back
 5 later when he's sober, or whatever. Nobody in their right
 6 mind would then say well show me exactly where in the
 7 regulations it says that you must remove this intoxicated
 8 person. Because clearly that flows directly from the fact
 9 that your duty is to determine the truth and in your view,
 10 or in everybody's view at least it will be clear that this
 11 person is not going to assist the Commission in its core
 12 function, which is the determination of the truth of what
 13 happened. This is exactly that kind of situation, and it
 14 is in that context that I was saying that the one power
 15 flows from the other.
 16 Indeed to illustrate that very point, the wording
 17 of section 194, which I said I'd use as a reference point,
 18 talks about mental illness – it says, we might as well just
 19 read it out, "No person appearing or proved to be afflicted
 20 with mental illness or to be labouring under any imbecility
 21 of mind due to intoxication or drugs or the like and who is
 22 thereby deprived of the proper use of his reason shall be
 23 competent to give evidence whilst so afflicted or
 24 disabled."
 25 Now the nub of that whole section is not so much

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1 all these examples, because it can't give examples of what
 2 it is that might induce the state. The nub of the section
 3 is that if there is an appearance that the person is
 4 deprived of the proper use of his reason, whether that is
 5 caused by mental illness, temporary intoxication, drugs,
 6 whatever, it's really, one can say those are just examples
 7 of the situations that might arise. The principle is the
 8 ability to be helpful to the forum as it were, to put it
 9 simplistically and colloquially. If there's a likelihood
 10 that the evidence is not going to be helpful at all for any
 11 of those reasons, then why must we sit here for weeks and
 12 weeks listening to it? That's really the point.
 13 CHAIRPERSON: Anticipating the time limit
 14 that I –
 15 MR MPOFU: Thank you, Chairperson.
 16 Sorry, Chairperson, I didn't get that fully.
 17 CHAIRPERSON: I said you're anticipating
 18 the time limit that I may fix for his evidence. You say
 19 weeks and weeks and weeks, so –
 20 MR MPOFU: Yes, well even if it was two
 21 minutes, Chairperson. Two minutes wasted is two minutes
 22 wasted. The point I'm making is that –
 23 CHAIRPERSON: Well, if we can encourage
 24 people to cross-examine witnesses in two minutes –
 25 MR MPOFU: Thank you, Chairperson. So

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1 that's the point, Chairperson, but what I'm going to argue
 2 is that if that was the only defect that we are fearing,
 3 for example that well, this might just be a waste of time
 4 because the evidence would be worthless, and so on, that
 5 would be something debatable. But the thrust of our
 6 objection is not even that. The thrust of our objection is
 7 the impact, the injustice that will be meted out on the
 8 people that we represent should this evidence be accepted
 9 willy nilly.

10 [09:31] Without, and taking the necessary precautions to
 11 ensure its quality which is again another underlying
 12 principle of the rules of competence. And the irony in
 13 that, Chairperson, is the very fact that Mr X is a very
 14 important witness and the issues upon which he is
 15 pronouncing are issues which are, in everybody's language,
 16 of a very serious nature and the allegations he makes in
 17 respect of various persons also have far-reaching
 18 implications. So the rights of people which must be
 19 protected by instituting an investigation into Mr X's state
 20 of mind, mental or psychological state, attach directly to
 21 the protection of – or rather, ja, the rights that are to
 22 be protected of the other people and his rights, by the
 23 way, which I'll talk about later include the right of those
 24 persons about whom he is testifying not to be defamed or
 25 have their dignity impaired if it's going to turn out later

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1 that the person who was making those allegations, or the
 2 allegations are not worth the paper they're written on, as
 3 it were. And so, and more particularly and Mr Ntsebeza no
 4 doubt will deal with this, Chairperson, if you consider
 5 that some of those –

6 CHAIRPERSON: Is he going to argue the
 7 application as well? I was informed the application was to
 8 be brought on behalf of injured and arrested persons.

9 MR MPOFU: Oh yes, sorry, in the
 10 forthcoming documents there's an indication that at least
 11 some of the parties will support, not –

12 CHAIRPERSON: Let's hear now who the
 13 parties are –

14 MR MPOFU: Okay.

15 CHAIRPERSON: - who are going to support
 16 the application.

17 MR NTSEBEZA SC: The families will
 18 support the application, Mr Chairman.

19 CHAIRPERSON: Who are the other parties
 20 who will support the application?

21 MR MOSIKILI: Chair, on behalf of AMCU,
 22 AMCU will also be supporting the –

23 CHAIRPERSON: AMCU?

24 MR MOSIKILI: AMCU.

25 CHAIRPERSON: Parties to support,

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1 supporting the application are AMCU, yes, who else? The
 2 families? I've got AMCU. AMCU, families and who else,
 3 anybody else? So there are three parties effectively, the
 4 injured and arrested persons, families, that's the families
 5 who are legally aided, you know, with the support of the
 6 Legal Aid Board for whom Mr Ntsebeza and Ms Lewis appear
 7 and then AMCU. Is that right? Thank you.

8 MS PILLAY: Chair, the evidence leaders
 9 are unable to take a position on the application, given
 10 that we haven't actually seen the application and the
 11 underlying argument –

12 CHAIRPERSON: - wait till you see the
 13 application.

14 MS PILLAY: That –

15 CHAIRPERSON: Alright, let Mr Mpofo
 16 continue in the meanwhile. I understand it's difficult for
 17 you to take a stance until you know what exactly the basis
 18 of the application is, but that Mr Mpofo is endeavouring to
 19 explain to us.

20 MR NTSEBEZA SC: Chair, I just wanted to
 21 point out that Ms Lewis is not here. Ms Motloeny,
 22 however, is here.

23 CHAIRPERSON: Well, I'm pleased to see
 24 her supporting you and assisting you in the matter.

25 MR MPOFU: Thank you. Thank you,

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1 Chairperson. Oh, I was saying, Chairperson, that if –

2 CHAIRPERSON: Please go –

3 MR MPOFU: Chairperson, can I ask that,
 4 I'm just going to make this last point, if I may, then can
 5 I ask us to stand down because we're just printing the
 6 document.

7 CHAIRPERSON: Well, make your last point
 8 and then we'll stand down.

9 MR MPOFU: And then, yes. I was saying,
 10 Chairperson, that ja, in the context of the rights that I
 11 mentioned, the Chairperson – and I was saying Mr Ntsebeza
 12 no doubt will dwell on that – remember that some of the
 13 people whose rights are to be protected, the rights that
 14 I'm talking about, of dignity, who are implicated by Mr X,
 15 are people who are deceased and therefore cannot answer for
 16 themselves. So the –

17 CHAIRPERSON: They haven't then got
 18 rights anymore if they're deceased.

19 MR MPOFU: Well –

20 CHAIRPERSON: I can understand their, I
 21 mean their estates haven't got rights to dignity. I can
 22 understand, however, that their relations and their
 23 children and so on –

24 MR MPOFU: Yes –

25 CHAIRPERSON: - might well have, I'm not

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1 sure whether dignity is the right word but would certainly
 2 have certain rights associated with seeking to prevent
 3 unjustified and unjustifiable attacks being made upon their
 4 deceased loved ones.

5 MR MPOFU: Yes, that is –

6 CHAIRPERSON: But not to dignity, the
 7 rights to dignity of the deceased, that's a legal
 8 proposition that is not sustainable.

9 MR MPOFU: Well, that's another debate
 10 which I won't have with you, Chairperson. There's law on
 11 it that dignity, the right to dignity survives death but I
 12 don't have to bother with it. It's sufficient to say that
 13 –

14 CHAIRPERSON: Vested in which person? I
 15 understand family and loved ones and so forth of the –

16 MR MPOFU: Ja, let's confine it to that.

17 CHAIRPERSON: - of the deceased persons
 18 would have certain rights flowing from attacks on –

19 MR MPOFU: On their person.

20 CHAIRPERSON: - on the deceased persons,
 21 but the deceased persons themselves no longer have any
 22 rights and rights of that kind wouldn't vest in their
 23 estates, I would have thought, but anyway let's not get
 24 involved in that –

25 MR MPOFU: No, no, it's not necessary,

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1 Chairperson. The very reason that I made reference to Mr
 2 Ntsebeza is exactly that Mr Ntsebeza represents the
 3 families of those persons, so strictly speaking you are
 4 right, Chairperson, that it is the rights, those rights
 5 that flow into their families really that are at issue, but
 6 the point remains is that neither the deceased persons nor
 7 those family members are in a position, as it were, to
 8 refute some of the evidence that Mr X might be giving about
 9 their loved ones and therefore the danger, insofar as it
 10 might be – what I'm anticipating, Chairperson, is that one
 11 might say, well, if he says outrageous things about living
 12 persons then they have the facility of countering that or
 13 cross-examination and those kinds of things but in respect
 14 to the families of those who are deceased that is cold
 15 comfort, as it were.

16 CHAIRPERSON: - unless they can consult
 17 with survivors, living persons who were present at the time
 18 when things allegedly happened and they're not entirely
 19 defenceless at all.

20 MR MPOFU: Not entirely.

21 CHAIRPERSON: No.

22 MR MPOFU: Not entirely but they are
 23 more, and the point I am making is that they are more
 24 vulnerable to those, to the impairment of their rights than
 25 people who might be able to come and say, no, I was not

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1 there or I was at work, here is my clock card, whatever,
 2 you know those kinds of things. These people agree, not
 3 entirely but the prejudice upon them would be much more
 4 severe than those who might be able to answer for
 5 themselves. Yes, Chairperson, that was the point I wanted
 6 to make. If you can indulge me with –

7 CHAIRPERSON: We'll stand down now. How
 8 long?

9 MR MPOFU: Let me – about 10, 15 minutes,
 10 Chairperson.

11 CHAIRPERSON: Let's say I'll give you 20
 12 minutes. If you're ready before that, please call me.

13 MR MPOFU: Then I'll call you. Thank
 14 you, Chairperson.

15 [COMMISSION ADJOURNS COMMISSION RESUMES]

16 [10:04] CHAIRPERSON: The Commission resumes.
 17 During the adjournment Mr Mpofu very kindly brought us
 18 copies of the notice of application and the founding
 19 affidavit which we've had the opportunity to reading before
 20 coming back into the chamber. Yes, Mr Mpofu.

21 MR MPOFU: Thank you very much,
 22 Chairperson, for the indulgence. Apologies again. What
 23 I'll do, Chairperson, I'll just follow the affidavit but
 24 I'll jump those sections that we've already dealt with. I
 25 was busy at it were with the material that's on – firstly a

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1 correction, Chairperson, you'll see that in paragraph –

2 CHAIRPERSON: Before you carry on, I did
 3 indicate previously that the microphones shouldn't be
 4 turned on, well the audio and the visual equipment
 5 shouldn't be operating so that we can see Mr X and he can
 6 see and hear us while the application is being argued. And
 7 previously they were turned off, they've been turned on
 8 again. They must please turned off before Mr Mpofu
 9 continues.

10 MR MPOFU: Yes sorry, Chairperson, before
 11 I get back to the application I just wanted a correction.
 12 On paragraph 3 –

13 CHAIRPERSON: It's still there, I
 14 indicated it must be turned off, we won't continue. If he
 15 were in the chamber I'd ask for him to leave the chamber,
 16 so I can't do that. You may now proceed.

17 MR MPOFU: Thanks, Chairperson, I just
 18 simply wanted to take you to paragraph 3 of the affidavit.
 19 Chairperson where it is said that the parties that were
 20 anticipated to support the application, 3.2, Chairperson,
 21 where we indicated the family of Mr Ledingwane who was
 22 killed on 15th of April that they have not been able to
 23 receive instructions yet. So 3.2 can be ignored or taken
 24 out.

25 CHAIRPERSON: - anticipated that they

<p style="text-align: right;">Page 31033</p> <p>1 would support, well anticipation hasn't been realised as of 2 yet.</p> <p>3 MR MPOFU: Thank you, Chairperson. And 4 going back to the issue of the nature of the application, 5 Chairperson, I'll just simply read paragraph 5 where it 6 says the nature and purpose of the application simply to 7 seek a ruling that Mr X's competence and capability to give 8 evidence as a witness in the Commission be investigated, 9 preferably by means of a medical inquiry into his mental 10 and or psychological state. And what I was busy with 11 before the break was paragraph 6 where I was saying at the 12 legal level the application is intended to protect various 13 rights of the affected parties including but not limited to 14 their right. 1, not to be defamed. 2, not to be falsely 15 implicated in serious crimes so as to expose them to 16 possible criminal prosecution. 3, not to be subjected to 17 gratuitous insults in the public domain and have their 18 dignity impaired with particular reference to those who are 19 unable to answer for themselves and to finality and closure 20 without an unnecessary waste of time. I've covered most of 21 those aspects, Chairperson. And paragraph 7 we've 22 discussed which is the context in which section 194 is 23 invoked. The most important issue which I'm going to get 24 into now is paragraph 8 which says that at the factual 25 level the application is premise upon the reasonable belief</p>	<p style="text-align: right;">Page 31035</p> <p>1 putting before the Commission.</p> <p>2 Number 12, we said when this occurred it could 3 observed, at least those who were watching the screen, that 4 Mr X touched his head in a manner which indicated some form 5 of physical pain or discomfort before uttering those words. 6 And we say that behaviour and those utterances are on their 7 own sufficient to cast sufficient doubt, we can't put it 8 higher than that, to cast sufficient doubt as to Mr X's 9 competency as a witness. Then we go number 14 where we say 10 there are other grounds as well and these are grounds that 11 have emanated mainly from consultations either before that 12 event or even after which is that Mr X is either paranoid 13 or hallucinatory and or delusional. And also assuming that 14 at some stage he was arrested, the people to whom he 15 referred last week their view that if he was arrested like 16 them then he may even be a victim of some other physical 17 trauma including possible torture which they experienced. 18 And they base that, among others, on the fact that 19 according to them he is prepared to testify about events 20 which happened in his absence as if he was present. The 21 only fact being to give false evidence and that he gives 22 false and farfetched accounts of certain events emanating 23 either from his own imagination or secondary accounts from 24 other people or urban legend. And in certain respects he 25 deviates from common cause evidence. And then on his</p>
<p style="text-align: right;">Page 31034</p> <p>1 on the part of the parties that prima facie there are 2 sufficient and reasonable grounds to believe that Mr X may 3 well not be a competent and capable witness. In which case 4 his evidence has only served to violate the aforesaid right 5 for no tangible benefit.</p> <p>6 Then I say, Chairperson, I jump to number 10 7 where I say the last – although there are other factors 8 which I'll go into, the last straw which triggered this 9 application were the utterances of Mr X on Friday and on 10 Friday he made a direct accusation against affected parties 11 by alleging that his physical or mental distress was caused 12 by their super-natural powers and actions directed at him. 13 And in that he accused specifically the people who were in 14 the auditorium. For that reason he made an application for 15 the Commission to be adjourned for an unspecified period so 16 that he could also consult his own Nyanga or as he put it, 17 his own Gogo. Presumably to either protect himself against 18 the perceived witchcraft or to bewitch the affected parties 19 back. Some kind of self defence I suppose. It would be 20 crucial to establish before any further evidence is led 21 what became of his proposed visit to his Gogo because in 22 the normal course of events, Chairperson, if he was 23 referring himself, as he was, to a medical practitioner we 24 would be favoured with a report of what became of that 25 which might well be relevant to the issues that we are now</p>	<p style="text-align: right;">Page 31036</p> <p>1 account at least he has personally participated or imagined 2 participation in quite traumatic events and horrific 3 activities which were bound to have affected his mental 4 state. And it cuts both ways. If he did indeed 5 participate in those activities even more, if he imagines 6 that participation, well I rest my case. And they say we 7 have been advised that one of the miners that knows him 8 well but which does not wish to be identified at this stage 9 that Mr X has a metal plate on his head which is possibly a 10 result of previous serious head or brain injury and that he 11 suffers from mood swings.</p> <p>12 CHAIRPERSON: What is the value of 13 anonymous hearsay of that kind?</p> <p>14 MR MPOFU: It is.</p> <p>15 CHAIRPERSON: I said what is the value of 16 anonymous hearsay of that kind?</p> <p>17 MR MPOFU: Well, Chairperson, if it comes 18 from a legal practitioner who say they've consulted with 19 someone the value is up to you really. But we're just 20 telling you –</p> <p>21 CHAIRPERSON: Oh I see -</p> <p>22 MR MPOFU: Thank you. And then Mr X, I 23 suppose the same comment could be said that according to – 24 if then - of one of the miners then "warned" the parents of 25 that person that their son was in danger and should be</p>

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1 recalled from the mine or words to that effect which turned
 2 out to be pure fantasy. And this happened after the
 3 Marikana massacre. And we also say that some of the
 4 accounts that he has given for example about human blood
 5 and human tissue, the killing of black and white sheep,
 6 which is quite outrageous, experiment on a tin box and the
 7 fact that he says that the miners are shot on the 11th by
 8 Lonmin security when it's common cause that that happened
 9 between the miners and NUM. Those are just examples and
 10 quite simply outrageous absurdities with no logical or
 11 factual basis. And they cite a good example of his
 12 delusions of grandeur as how he places himself as a leader
 13 of the protest and one of the so-called committee of 15
 14 when the real leaders are seeing him for the first time
 15 here on the police video links.

16 And we say, Chairperson, those are a part answer
 17 to the concern which you correctly raised. These are
 18 matters which you say should be viewed cumulatively rather
 19 than, you know, in isolation and more particularly it must
 20 be seen in conjunction with last Friday's behaviour. And
 21 again we were quite careful to say that they constitute
 22 sufficient grounds for doubting his competence as a
 23 witness. More particularly whether or not he has been
 24 deprived of his proper use of reason. Because we
 25 acknowledge that neither the Commission nor ourselves nor

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1 Mr X himself, even SAPS are suitably qualified to make a
 2 correct determination or diagnoses of his mental or
 3 psychological state. And we say then in the circumstances
 4 and given the dangers in allowing Mr X to continue making
 5 the utterances he has made, it would not only be prudent
 6 but highly desirable that any doubts about his competence
 7 and capabilities be investigated and either confirmed or
 8 removed. I would say such an investigation that we
 9 propose, Chairperson, would self evidently be in the
 10 interests of the affected parties, the Commission itself
 11 and the attainment of the objectives of the Commission,
 12 mostly justice and the truth I suppose. And we say
 13 ironically the outcomes of such an investigation might also
 14 turn out to be in the best interests of Mr X himself
 15 including his health and legal consequences which might
 16 otherwise attest to his self confessed criminal activities
 17 including multiple murders, serious assaults and arson, to
 18 mention a few.

19 And then again, Chairperson, we are acknowledging
 20 that the weight of some of the evidence, for various
 21 reasons, we explained this, should it become necessary and
 22 it also has some of the allegations contained were received
 23 in the professional consultation or are hearsay.
 24 Supporting and confirmation of evidence will provided
 25 orally or in writing subject to the discretion of the

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1 Commission and further legal argument. And the issue
 2 really there is the next sentence which is one of the
 3 reasons why we have not attached or named those persons is
 4 because it might not be advisable, in our view, to expose
 5 some of the persons or evidence which may well be used
 6 subsequently in the cross-examination of Mr X in the
 7 unlikely event of sanity being established.

8 CHAIRPERSON: I don't understand that
 9 last point. It's one of the practises of this Commission
 10 to insist that if material is going to be put to the
 11 witness in cross-examination either the documents upon
 12 which reliance will be placed or a statement by the witness
 13 whose evidence will be, or possible evidence will be the
 14 basis of the cross-examination must be filed with the
 15 Commission. And must be made available to the witness
 16 before the witness finished his evidence in chief. So I
 17 don't understand the last point at all.

18 MR MPOFU: Well then I don't understand
 19 then, Chairperson, why when we do that you withhold those
 20 questions that we give you to yourselves and not give them
 21 to everybody. The only reason you do that is exactly
 22 because you understand that it would be futile to have a
 23 cross-examination under conditions where people have been
 24 previously advised of such cross-examination. That's the
 25 only reason you do that.

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1 CHAIRPERSON: We don't require parties to
 2 disclose the questions they're going to ask and indeed when
 3 they apply for permission to cross-examine we ask that the
 4 topics be indicated and they get, if necessary, they get
 5 permission to deal with certain topics. But those are not
 6 disclosed to the party calling the witness. But if
 7 something is going to be put to the witness by way of a
 8 factual assertion of what someone says we require that
 9 statement to be filed and in fact to be made available to
 10 the witness beforehand. And if a document is going to be
 11 relied on we also require that. So I don't understand the
 12 last point.

13 MR MPOFU: Well, Chairperson, if you
 14 don't understand it there's nothing I can do. When I get
 15 instructions from people I can put the question to the
 16 witness for example sitting there and I say my instructions
 17 are this, that and the other. I don't have to say –

18 CHAIRPERSON: I don't know where you've
 19 been, Mr Mpofu.

20 MR MPOFU: But these are my instructions
 21 from Mr so and so.

22 CHAIRPERSON: Mr Mpofu, I don't want to
 23 be discourteous to you but in this Commission over the last
 24 year and a half a practise has been invariably followed
 25 that if a cross-examining counsel is going to put to a

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1 witness something another witness says we require a
2 statement from that witness to be filed beforehand and the
3 attention of the witness to be drawn to it. That's the
4 practise we followed invariably. If you are now asking or
5 seeking some kind of an exception to that then that's a
6 different matter but certainly what is stated here is
7 contrary to the practise which has been followed in this
8 Commission from the very beginning.

9 MR MPOFU: Ja all I'm saying,
10 Chairperson, is that the record will show the exact
11 contrary, that many people, including myself for that
12 matter, have put propositions to witnesses on the basis
13 that those are their instructions without being compelled
14 to identify who in SAPS or in my group or in any group who
15 said what on what day and what is their name and age and
16 address. If those are your instructions and the purposes
17 of a particular cross-examination you want to put to them
18 you put them to a witness. That happens in this Commission
19 and every court in this country.

20 CHAIRPERSON: I'm not interested in
21 courts in this country, this is not a court, this is a
22 commission with its own special rules and procedure and
23 that's the procedure which has been laid down.

24 MR MPOFU: Okay, Chairperson. The record
25 will speak for itself.

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1 CHAIRPERSON: If I can't understand and
2 there's nothing you can do about it I'm afraid I have to
3 return the compliment to you.

4 MR MPOFU: Ja, thank you. I can't do
5 better than that.

6 [10:24] but anyway the point here, Chairperson, is that
7 if the material that comes from SAPS consultations is put
8 at issue, we'll obviously see the evidence of, or rather
9 hear the argument of SAPS then we'll deal with that issue
10 but at this stage, for the reasons that we've explained,
11 some of the people, as we've said in the affidavit, do not
12 want to be identified. Let me just give you an example.
13 One of the persons, actually one of the reasons why we
14 don't identify one of the persons is also so that not to
15 jeopardise the Commission's ruling on anything that may
16 directly or indirectly disclose the identity of Mr X
17 because it – I'll give you, well, it's not an example, it's
18 the actual – if I say to you Mr X went to the village where
19 he comes from which is X village, and he says to the family
20 of Mr Y, this, that and the other, then the rest of the
21 people outside of this Commission might, from that
22 information, be able to work out at the very least where Mr
23 X comes from. So if we are going to be criticised for
24 trying to, as it were, respect the rulings of the
25 Commission then we'll accept that, but those are some of

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1 the reasons why we hold back because you know if we want to
2 be technical, in the interests of non-hearsay evidence, we
3 can put all those facts there but then we cause more, that
4 will cause more harm than good.

5 Yes, Chairperson, so to round off then, the issue
6 really is simply that there should be an investigation. An
7 investigation does not, obviously does not presuppose its
8 outcome. An investigation is exactly that, that's why it's
9 called an investigation. It might come back and say the
10 doubts are founded, it might come back and say the doubts
11 are unfounded, we don't know. The point of the matter at
12 this stage is simply that we must convince you that there
13 are reasonable grounds for having those doubts and you
14 know, this is what happens in other situations as well.
15 It's just ironical that at this time, just by pure
16 coincidence this issue has arisen in all its manifestations
17 in various other trials as well and those investigations
18 nobody can pre-empt, as it happened for example in the
19 Pistorius trial or the other one, Dewani case and so on.
20 It's an investigation and let's hear what happens from
21 those who are qualified. Neither, fortunately neither the
22 Commissioners nor ourselves are trained medical
23 practitioners. We don't have the competency, and we assume
24 neither does the Commission have, of making a finding one
25 way or the other and those who are suitably qualified to

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1 assist the Commission should be given the opportunity to do
2 so without jeopardising the rights of the affected persons.

3 That's really the gist of the application, Chairperson.

4 CHAIRPERSON: Mr Mpofu, are those your
5 submissions? Are those your submissions, Mr Mpofu?

6 MR MPOFU: Yes, Chairperson, thank you
7 very much.

8 CHAIRPERSON: Thank you, Mr Mpofu. Mr
9 Ntsebeza?

10 MR NTSEBEZA SC: Thank you, Mr Chairman,
11 members –

12 MR MPOFU: I'm sorry, I'm sorry,
13 Chairperson.

14 CHAIRPERSON: Yes.

15 MR MPOFU: I just want wanted to make
16 references of, a discussion of these issues in my favourite
17 book, Zeffert, it will be found on page 810 to 812,
18 Chairperson, and after quoting section 194 I'll just read a
19 short passage. It's traced back to English law where it
20 says, "At that time it was thought that any person who had
21 been adjudged a lunatic was automatically incompetent.
22 This view altered in 1851 when it was held that a person
23 who suffered from certain delusions but was rational on
24 other matters, could give evidence although he had been
25 committed to a mental institution." And then it evolved,

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1 as it were, to the current situation, Chairperson.

2 CHAIRPERSON: I think that's Hill's case.

3 MR MPOFU: Yes.

4 CHAIRPERSON: Hill is the man, in Hill's

5 case they led a witness who thought he was accompanied by a

6 number of devils who stood around the witness box.

7 MR MPOFU: Yes, that's correct.

8 CHAIRPERSON: And it was held that it

9 didn't affect his –

10 MR MPOFU: Yes, R v Hill and in South

11 Africa there was S v Kirsten where the Hill case was

12 debated, that's correct, Chairperson. And in one of those

13 cases it was a person who had delusions about seeing 20 000

14 people and those kinds of things but it was a similar type

15 of vision, as it were, as we have seen here. Thank you,

16 Chairperson. The rest is there, I don't have to read it.

17 CHAIRPERSON: No, thank you. Mr

18 Ntsebeza?

19 MR NTSEBEZA SC: Thank you, Mr Chair and

20 Commissioners. Mr Chair, as we indicated and as the

21 affidavit indicates, we would be supportive of the

22 application, either orally or in writing. We are doing so

23 orally, largely because we were not seized with the

24 documents, especially the affidavit but now that we have

25 even seen what is contained in the affidavit we associate

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1 ourselves with the sentiments expressed therein. At the

2 end of the day, Chair, the question is going to be whether

3 your findings, whatever the findings are going to be, are

4 going to be on fact or on fantasy. I was here, everybody

5 was here when Mr X, out of the turn firstly asked to take a

6 comfort break, that was okay, legitimate, there's nothing

7 wrong with that but it was in the middle of being led in

8 chief that he uttered the expressions that he did, which

9 have been captured in the affidavit, subject to anybody

10 having an objection to what is contained in the paragraph,

11 relevant paragraph in the affidavit. Those were my own

12 impressions as well, that he insinuated that those of the

13 mineworkers or those of Mr Mpofu's clients who are in the

14 auditorium here are working on him in ways that destabilise

15 him and therefore he needs to also go and get the advice of

16 what he called Ukoko or the support of what he called

17 Ukoko, which I understood that he wanted also to consult

18 his own inyanga.

19 Now in the ordinary course, Mr Chairman, it is

20 not for us to arrogate ourselves a competency to determine

21 whether, at a particular point, the witness is able to

22 proceed and give credible evidence and it is not something

23 that should be left to a stage when, under cross-

24 examination, we can show or seek to show the foibles of

25 what was demonstrated to the Commission as, and I can put

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1 it no higher than that, as a matter for concern. It is a

2 matter for concern for the families because he has

3 mentioned at least three of the mineworkers who were killed

4 on, particularly on the 16th, as having been participant in

5 some act of murder. The families are here, a part of their

6 closure is going to come from them being able to ascertain

7 whether in fact whom they thought was a normal relative,

8 who turned in fact to be a cold-blooded killer of the

9 nature that their relatives have been described by Mr X to

10 have been.

11 Now if they were cold-blooded - now if they were

12 what he describes them to be in the various statements that

13 have been made available to us, then the families will want

14 to come to terms with that and accept that whom they

15 thought was somebody else, actually was somebody else and

16 it is therefore critical that the evidence he gives in

17 chief as well as under cross-examination is beyond

18 reproach. I cannot say to the families whom I represent

19 that I am satisfied that a man who claims that even as they

20 sit here, they are in the process of causing him to be

21 destabilised mentally, I cannot with my clean conscience

22 sit here and say this is a person who must continue to give

23 evidence because I do not doubt that his evidence is his

24 own. Now if his evidence is also informed by voices that

25 he himself only experiences or by anything that causes him

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1 to touch his temples and tell you, as Commissioners, that

2 he is being worked on and he needs time, then we have a

3 problem.

4 The question, as you asked my learned friend, is

5 whether we have the power. I know that in your terms of

6 reference in paragraph 5 you have the power but it seems

7 when one looks at it in context, that is the power that you

8 have after you have come to the conclusions that you will

9 have come to, where you have the power to refer any part of

10 the investigation to any government agency or to any other

11 institution. It seems to me that's the power that you have

12 after the Commission has sat. But Mr Chair, Commissioners,

13 I am mentioning that as an indication that it seems to me

14 that you have a power of the nature that in a sui generis

15 kind of situation that you now find yourself, you could

16 exercise. For as long as the objective is that which is

17 envisaged in your terms of reference you are, together with

18 your Commissioners, empowered to establish the truth but it

19 is not the truth simply because evidence is being given, it

20 is the truth because there is credible evidence that's put

21 before you. Of course one can argue that credible evidence

22 can only be determined by you after you have heard evidence

23 in chief, cross-examination and after you have also put

24 your own questions, but this is a situation where there is

25 an appearance. You will know that in the case of an

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1 accused person in section 77 of the Criminal Procedure Act,
 2 where accused persons get referred for mental observation,
 3 it is in instances where the threshold is not even high.
 4 There has just to be, there has to be just an appearance,
 5 you know, that the person is not mentally stable and we are
 6 saying there has been enough demonstration from, for some.
 7 Right from the beginning there will be those who will say
 8 there was something very much amiss about the manner in
 9 which he gives evidence, but I think the high water mark
 10 was what happened on Friday and we say out of concern,
 11 firstly out of the quality of the evidence which this
 12 Commission would be now expected to rely on for purposes of
 13 determining whether or not the testimony given is of a
 14 nature that would allow it to come to the conclusions it
 15 wants to. We submit that, assuming that the Commission is
 16 with us, with Mr Mpofu as to the power that the Commission
 17 has in the interests of an investigation that would be
 18 credible, we submit that this is the stage where, before Mr
 19 X continues with his evidence, the Commission must be
 20 satisfied that he is actually competent to give the
 21 Commission facts which the Commission will feel are not
 22 intermingled with fantasy of a nature that would discredit
 23 the entirety of his evidence. And we believe that more
 24 time would have been wasted if you were not to grant the
 25 permission, I mean the application and insist on us

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1 continuing with the evidence of a person who has given
 2 indications that lead us to the conclusion that there is an
 3 appearance that he may not be mentally fit to give
 4 evidence.
 5 CHAIRPERSON: Thank you, Mr Ntsebeza. Is
 6 there going to be argument also on behalf of AMCU?
 7 MR MOSIKILI: Chair, for the record, my
 8 name is Teboho Mosikili.
 9 CHAIRPERSON: You have given me your name
 10 before but will you spell it again, please?
 11 MR MOSIKILI: Teboho, T-E-B-O-H-O.
 12 CHAIRPERSON: Sorry, M-O-T-H-E?
 13 MR MOSIKILI: No, no. T-E –
 14 CHAIRPERSON: T-E?
 15 MR MOSIKILI: B-O-H-O.
 16 CHAIRPERSON: B-O-H-O, yes?
 17 MR MOSIKILI: And then the surname is
 18 M-O-S-I-K-I-L-I.
 19 CHAIRPERSON: Yes, I remember, you did
 20 address us earlier.
 21 MR MOSIKILI: Indeed, Chair.
 22 CHAIRPERSON: But it was quite a long
 23 time ago. Anyway, you're the attorney for AMCU and you're
 24 arguing for AMCU.
 25 MR MOSIKILI: Indeed, Chair. We only

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1 have one submission to make on behalf of AMCU. Chair,
 2 AMCU's direct interest in this, of course, is an allegation
 3 that Mr X makes in particular against Mr Mathunjwa. He
 4 specifically says that he saw Mr Mathunjwa at the koppie on
 5 a particular date and Mr Mathunjwa specifically says that
 6 I've never been to the koppie prior to that day and now
 7 because of that, Chair, I think you have also out of that,
 8 it might be possible that Mr Mathunjwa might be recalled.
 9 Now, Chair, our submission is that as an officer of the
 10 court, as AMCU's representatives we have an obligation to
 11 make sure or to protect Mr Mathunjwa and AMCU so that if he
 12 is recalled, he is recalled to come and answer to
 13 allegations that have substance. And further, Chair,
 14 because of the - allegations made by Mr X, we have now, we
 15 had to consult with Mr Mathunjwa on a number of occasions
 16 to say, you have to come up with an alibi, where were you
 17 on that day. Unfortunately for him, obviously he kept on
 18 saying look, that day was quite insignificant for me, you
 19 know, I was not there, that's one thing I know because I've
 20 never been there before in my life. The first time I went
 21 there was on this particular date. And we had to say, Mr
 22 Mathunjwa, that's not good enough, you know, you have to
 23 tell us where you were, you know. And unfortunately you
 24 know we have to embark on that exercise but if you don't
 25 have to, you don't have to. And Chair, right now it's

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1 quite difficult, as you can imagine, those consultations,
 2 because it appears as if now we're doubting Mr Mathunjwa.
 3 [10:44] You know as his legal representative to say you
 4 have to tell us where you were, because Mr X saw you there, and
 5 you know, his response will be exactly these words, Mr X is
 6 crazy, Mr X has never seen me there, I've never been to the
 7 koppie, and obviously now as to what has transpired in this
 8 Commission, Chair, we have an obligation to explore that
 9 possibility to say is he actually of the right mind to give
 10 evidence to this Commission or if his evidence should be
 11 treated with some level of caution, and Chair, those are
 12 our difficulties and direct interest, and our submission or
 13 conclusion, Chair, will be that if Mr X is sent obviously
 14 for a mental evaluation that might assist us, and it will
 15 assist the Commission of course, Chair, and he will
 16 obviously come back to this Commission if he is of the
 17 right mind and then as AMCU we'll deal with those
 18 allegations but as for now they remain ridiculous
 19 allegations made against our client and our client has said
 20 that –
 21 CHAIRPERSON: I didn't hear you say they
 22 remain some – you had – ridiculous? Ridiculous, sorry.
 23 MR MOSIKILI: Ridiculous allegations
 24 against Mr Mathunjwa, Chair. And Chair, our last
 25 submission is that indeed sending him for an evaluation

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1 might actually save us time, given the number of time that
2 has been given to cross-examine Mr X and it's time that
3 will be spent in entirety, and further and above, Chair, my
4 understanding is that the rest of this week it might not
5 necessarily be used for Mr X in any event. We might use
6 that time to start the process. It might take longer than
7 that, but at least, Chair, the process can be embarked on –

8 CHAIRPERSON: You say I should send him
9 for observation. Are you suggesting I should send him to
10 Weskoppies? I'm not – certain people seem to think that's
11 funny and laughing at it. It's not, to use your word, Mr
12 Mosikili, it's not a ridiculous question. You say he must
13 go for observation and I say are you asking that I send him
14 for observation to Weskoppies. That seems to be the place
15 where people go. He wouldn't go as a day, an outpatient, I
16 imagine, but is that what you're asking for?

17 MR MOSIKILI: Chair, I'm not sure if I
18 understand the question, but obviously our submission is
19 that he must be sent for observation and what we're saying
20 is that at least the next few days can start engaging on
21 that process. Where exactly, what might be appropriate is
22 another question.

23 CHAIRPERSON: I'm sorry, Mr Mosikili, you
24 don't know obviously what I mean by Weskoppies. Weskoppies
25 is a psychiatric hospital in Pretoria where persons accused

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1 of offences are sent for observation under the relevant
2 section of the Criminal Procedure Act. If there's a basis
3 for thinking that they are not criminally capable, or
4 alternatively capable of standing their trial they're sent
5 for observation there. There was a recent case where
6 someone was sent there on an outpatient basis, but I take
7 it you're not asking me to make a similar order in this
8 case.

9 MR MOSIKILI: Chair, whether the
10 institution is that or not, Chair, that's not the issue.
11 At bare minimum, Chair, some professional person should
12 consult with him, that we'll submit. Whether he goes to an
13 institution itself and be with the other people that we
14 know that are on the news, that's another question, but
15 we'll say at bare minimum he's supposed to have a
16 professional consultation to assist this Commission.

17 CHAIRPERSON: I just want to get clarity
18 on what you're asking for. Are you asking that he should
19 be sent so that he can have a consultation with a
20 psychiatrist, or are you asking that he should be sent for
21 observation for some period by a psychiatrist or
22 psychiatrists? What exactly are you asking for?

23 MR MOSIKILI: Chair, obviously we're of
24 the view that any professional assistance or consultation
25 assist, but as prayed by the applicants obviously an

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1 institution might be the most appropriate, but obviously we
2 have to take into account, you know, the length of the time
3 that might be needed, but obviously on that score alone,
4 Chair, we'll have to support the application as made by the
5 injured and the arrested.

6 CHAIRPERSON: I see. Is there anything
7 further you wish to say?

8 MR MOSIKILI: No, that will be the end of
9 our submissions, Chair. Thank you.

10 CHAIRPERSON: Thank you. Does the SAPS
11 oppose the application?

12 MR SEMENYA SC: We do, Chair.

13 CHAIRPERSON: Who is going to address me
14 in that regard?

15 MR SEMENYA SC: I'm assigned the
16 responsibility to do that, Chair.

17 CHAIRPERSON: Yes, Mr Semanya.

18 MR SEMENYA SC: Chair, there is a very,
19 very long line of Constitutional Court judgments that tell
20 us that the Commission can exercise no power unless that
21 power derives from law, and that's an interpretation of
22 section 1(3) of the Constitution which speaks to the
23 question of the rule of law. It is more particular in
24 relation to a commission, Chair, which is an exercise of an
25 executive power by the President in terms of section

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1 84(2)(f) of the Constitution.

2 Now we are not told where this Commission would
3 draw its power to refer anyone for observation or to intern
4 anybody for psychiatric evaluation or psychological
5 evaluation. We are not pointed to any such power which the
6 Commission has.

7 CHAIRPERSON: What is said is that we
8 have the power under the regulations to determine our own
9 procedure, which is a power which we exercised in your
10 application for the evidence of Mr X to be heard by way of
11 a video link, and what is contended therefore is that we
12 can use that power to fill the gap, as it were, to which
13 you are referring, and one of the questions of course is
14 whether that power would be wide enough to form the basis
15 for the exercise of the powers which would be required to
16 make the order sought. There may be a distinction between
17 the power which we as it were conferred on ourselves in an
18 exercise, or I then exercised in the video link
19 application. There may be a distinction between that power
20 and the power which would be required to make the order
21 sought here, but that's something that wasn't stressed on.

22 MR SEMENYA SC: Indeed, Chair. The
23 relief which is sought, if I use the description in the
24 tramlines of the notice of motion, it's an application for
25 the referral of Mr X for mental observation and/or the

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1 determination of his competency as a witness. That's not a
 2 matter of –
 3 CHAIRPERSON: I'm sorry to interrupt you.
 4 The key paragraph is 3, read with 4. 3 is that he be
 5 subjected to the appropriate medical scrutiny in order to
 6 achieve the above and to report to the Commission, and 4,
 7 that until the report is obtained he be barred from giving
 8 any further evidence.
 9 MR SEMENYA SC: Yes, this is for there to
 10 be –
 11 CHAIRPERSON: Those seem to be the main
 12 paragraphs upon which the applicant relies.
 13 MR SEMENYA SC: If they were to have that
 14 relief, Chair –
 15 CHAIRPERSON: And then that's read with 2
 16 which says that all reasonable steps ought properly to be
 17 taken to investigate and/or ascertain his competency as a
 18 witness. But that's just a reason really, it ought to
 19 happen, and then what they ask for is that he be subjected
 20 to scrutiny and that he be barred from giving evidence
 21 until the report is obtained from the scrutineers.
 22 MR SEMENYA SC: Indeed, Chair. All of
 23 that will happen through your ruling. The question is do
 24 you have the power to make such a ruling, and in our
 25 submission we say you can exercise no power unless it is

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1 one conferred by law on you.
 2 Now Chair, there is a second argument that must
 3 be advanced in opposition of this application and there I
 4 go to section 15(1) of the Constitution –
 5 CHAIRPERSON: [Microphone off, inaudible]
 6 can you just help me on the previous point? I think when
 7 you argued the video link application you drew a
 8 distinction between how evidence can be obtained and cases
 9 which go beyond that. Now an order that Mr X be subjected
 10 to scrutiny, would that be an order relating to how
 11 evidence is to be received, or would it go beyond that? If
 12 it goes beyond that then prima facie at least the
 13 Commissioners' powers to make such an order, that's on the
 14 assumption – or my power to make such an order on the
 15 assumption that my colleagues and I agree to determine the
 16 appropriate procedure, that power couldn't be exercised
 17 because we wouldn't have the power to determine a procedure
 18 which goes beyond the how aspect of the matter to which you
 19 referred earlier. But if of course it's covered by the how
 20 then we would have the power to determine that procedure
 21 and in the appropriate case we obviously should do that and
 22 then obviously the power is then conferred, I would have
 23 the power to make the necessary order.
 24 So the key question on what one can call the
 25 power or the vires part of this case is whether the relief

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1 sought requires the determination of a procedure, and only
 2 that, or whether it requires something more which we
 3 haven't got the power to determine. Is there anything
 4 further you wish to say on that point? Because that may
 5 well be the nub of the matter certainly as far as your
 6 first submission was concerned.
 7 MR SEMENYA SC: No, we reiterate the
 8 arguments we made in relation to this matter earlier, as
 9 well as the ruling that was made subsequently, that the
 10 regulation directs matters of how. It does not give the
 11 Commission the power to refer people for medical scrutiny,
 12 as the relief is couched. That you do not have the power,
 13 with respect we submit, Chair.
 14 Chair, we also say the provisions of section
 15 15(1) of the Constitution is instructive, and I'm reading
 16 the section, Chair. It says, "Everyone has a right to
 17 freedom of conscience, religion, thought, belief and
 18 opinion." It's a constitutional right; whether we want to
 19 agree with it, Mr X says I believe in witchcraft. He's
 20 exercising a constitutional right, and the examples that
 21 have been given about his behaviour the last day of hearing
 22 past are just examples of a man who has a right to believe
 23 what he believes. That's a constitutional power under the
 24 Constitution.
 25 But Chair, there is even a fundamental reason why

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1 this application is misconceived. If you read the
 2 application, whatever its merits, they seem to move from a
 3 premise that the belief by an individual that somebody is
 4 afflicted with mental illness is a basis for the exercise
 5 of that power, if you had it. It does not matter what the
 6 clients of Mr Mpofo believe. It has absolutely nothing to
 7 do with it. What the law says is that it must either be
 8 proved that the person is suffering from mental illness or
 9 is afflicted by mental illness or is labouring under
 10 imbecility which is induced by drugs or intoxication or
 11 anything. If it is not proved it must appear to you,
 12 Chair, as the fact finder, or as the presiding officer, or
 13 as a presiding judge or magistrate. That it must appear to
 14 you. You don't have to have any reasonable belief or
 15 anything of the kind. That's what the law says.
 16 Now we are given a body of hearsay evidence,
 17 unconfirmed, that there is a belief which is harboured by
 18 some third parties. That's not the foundational base for
 19 the relief and the exercise of the power that is necessary.
 20 Now the question is did it appear to you, Chair,
 21 that Mr X is suffering from, or is afflicted by mental
 22 illness simply because of what happened on Friday?
 23 Certainly it is not a question, and this application is not
 24 founded on the other alternative basis, which is that he
 25 labours from some imbecility which is induced by one or

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1 other of those substances. So we must say the only leg
 2 that can be advanced is that he appeared to be suffering
 3 from some mental illness, and certainly you cannot be said
 4 to suffer from a mental illness because you are exercising
 5 a constitutional right of belief.
 6 The last ground, Chair, it's most undesirable to
 7 meet cases which are presented in this format. One, we are
 8 told we're not going to tell you who's telling us these
 9 things.
 10 CHAIRPERSON: Before you go on, is your
 11 recollection the same as mine that we have laid it down in
 12 this Commission – never mind what happened in ordinary
 13 courts – if you want to put a point in cross-examination
 14 based upon someone else's evidence there has to be a
 15 statement from that person which is before us. You said
 16 that. I said that didn't apply to you putting something
 17 based on circumstantial evidence, as long as the
 18 circumstances are before us, but positive assertions by a
 19 witness cannot be put in cross-examination to another
 20 witness unless there's a statement from that person. Mr
 21 Mpofo says there had been many exceptions to that, but I
 22 can't remember any. Can you?
 23 MR SEMENYA SC: No Chair, in fact part of
 24 the perennial objections we have been making when any
 25 cross-examination of that sort happened was we need a

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1 statement of a witness from whom such an assertion is made,
 2 and that has always been the basis of an objection where a
 3 statement, the positive fact is stated for which no
 4 document, or supporting document has been produced, and
 5 clearly we propose not to respond to the scathing
 6 adjectives that are used about Mr X, which are unjustified.
 7 They're unwarranted. They may differ with – and also
 8 gratuitous. They may differ with whether or not Mr X's
 9 evidence is believable or it should be accepted or stands
 10 to be cross-examined. That's entirely different, but this
 11 is ad hominem. It is an attack on the individual by people
 12 who are asserting to be exercising their own constitutional
 13 right, without respecting the constitutional right of the
 14 witness, and clearly we cannot deny them without ourselves
 15 producing the affidavits in denial of these allegations.
 16 Those are our submissions, Chair.
 17 CHAIRPERSON: Do the evidence leaders
 18 wish to say anything?
 19 [11:03] MS PILLAY: We do, Chair.
 20 CHAIRPERSON: Perhaps we can take the tea
 21 adjournment now and then after the tea adjournment you can
 22 give us the benefit of the evidence leaders' submissions,
 23 after which I'll call upon – does anyone else, let's get
 24 our housekeeping right, is there anyone else who wishes to
 25 speak in regard to this application apart from the evidence

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1 –
 2 MR TIP SC: Yes, Chair. We will also,
 3 after tea.
 4 CHAIRPERSON: Yes, you also, you oppose
 5 the application?
 6 MR TIP SC: We do.
 7 CHAIRPERSON: I see. Anyone else wish to
 8 oppose the application? No, very well, we'll take the tea
 9 adjournment, thereafter we'll – sorry, I beg your pardon.
 10 SPEAKER: Sorry, Mr Chair, my mike's not
 11 working. We'll take an instruction and revert after tea.
 12 CHAIRPERSON: Just as well we're taking
 13 the tea adjournment now then. We'll take the tea –
 14 SPEAKER: [Microphone off, inaudible]
 15 CHAIRPERSON: Alright, you will actually
 16 oppose the application – from a working microphone,
 17 presumably. We'll take the tea adjournment now for 15
 18 minutes.
 19 [COMMISSION ADJOURNS COMMISSION RESUMES]
 20 [11:33] CHAIRPERSON: The Commission resumes.
 21 I'm happy to see that the previously malfunctioning
 22 microphones appear now to be working, so we can proceed.
 23 Ms Pillay, you're going to argue first and thereafter Mr
 24 Tip, and thereafter – there were others who were taking
 25 instructions. Have the instructions now been received?

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1 MR GUMBI: Yes, Chairperson –
 2 CHAIRPERSON: What are they?
 3 MR GUMBI: We are going to oppose the
 4 application.
 5 CHAIRPERSON: Sorry? You're going to
 6 oppose?
 7 MR GUMBI: Yes.
 8 MR VAN AS: We're also instructed to
 9 oppose, Mr Chairperson.
 10 CHAIRPERSON: And Lonmin as well?
 11 MR VAN AS: Correct, Mr Chairperson.
 12 CHAIRPERSON: I see. So we're going to
 13 have quite a number of arguments. I hope we won't have any
 14 repetition. Ms Pillay.
 15 MS PILLAY: Thank you, Chair. Chair, the
 16 evidence leaders take the position that the application is
 17 unfound in law and in fact and ought therefore to be
 18 dismissed. If I could pick up, Chair, on the legal
 19 position, and to pick up on the vires argument that Mr
 20 Semenya initially –
 21 CHAIRPERSON: I think vi-res is a better
 22 pronunciation.
 23 MS PILLAY: Chair, the source of the
 24 Commission's power is set out in section 1 of the
 25 Commissions Act and there are essentially three sources of

<p style="text-align: right;">Page 31065</p> <p>1 power, the first one being the Commissions Act, the second 2 being any other – 3 CHAIRPERSON: One is the Commissions Act, 4 yes? 5 MS PILLAY: The second is any other 6 statute rendered applicable by the Minister through 7 proclamation – 8 CHAIRPERSON: By the Minister or the 9 President? Doesn't the President issue the proclamation? 10 MS PILLAY: Sorry, by the President 11 through proclamation, and the third source is additional 12 powers conferred on the Commission through the regulations. 13 Now section 3 of the Commissions Act is headed, 14 "Commission's powers and" – 15 CHAIRPERSON: Sorry, before we get there, 16 is there not possibly a fourth source and that is Mr 17 Semenya referred to the Constitution, section 84 I think it 18 is. The President has the power, a prerogative power 19 reserved in [mechanical interruption] Constitution by 20 section 84 to appoint commissions. That was the power that 21 has existed for many years. The Commissions Act is an act 22 which spells out certain powers that commissions have if 23 the President in his proclamation setting up the commission 24 makes the Commissions Act applicable, which of course he's 25 done, and then of course the other sources. So it may well</p>	<p style="text-align: right;">Page 31067</p> <p>1 section 3 of the Commissions Act nor the regulations set 2 out a power in respect of this Commission to compel a 3 witness to subject him or herself to psychiatric 4 evaluation. Importantly, Chair, the regulations do not 5 invoke any statutory instrument that would empower this 6 Commission to do so. 7 CHAIRPERSON: In an ordinary trial, 8 whether a criminal trial or a civil trial in a court, is 9 there a power such as the one sought to be applied in this 10 matter? Is there such a power which a court has in respect 11 of witnesses? I understand a court can send an accused off 12 for investigation – or observation is the normal 13 expression, but is there any provision that you know of 14 applicable in a civil trial for example which would empower 15 a court to act as I'm asked to act in the present case? 16 MS PILLAY: Chair, we've been unable to 17 find a provision that applies in the context of a civil 18 trial. We know that in the context of criminal trial that 19 section 194 of the Criminal Procedure Act applies, but even 20 in that instance - and we will address you on that, Chair – 21 there are certain specific requirements that must be met – 22 CHAIRPERSON: Ja. 23 MS PILLAY: - before the Court can invoke 24 its powers. 25 CHAIRPERSON: Even in a criminal case</p>
<p style="text-align: right;">Page 31066</p> <p>1 be that there is some kind of basis for suggesting, as I 2 think Mr Semenya did, that the Constitution is also 3 relevant. But I'm not sure that any specific power is 4 sought to be relied on which derives from some kind of 5 interpretation of the Constitution, but logically I imagine 6 the Constitution is also a fourth source but it may not be 7 relevant for our purposes. 8 MS PILLAY: Chair, we don't dispute that 9 in certain circumstances this Commission may resort 10 directly to the Constitution to derive certain implied 11 powers. What we're setting out is that we're dealing 12 specifically with the power invoked by the applicants in 13 this particular instance. 14 CHAIRPERSON: Thank you, I understand 15 that. 16 MS PILLAY: And that power as we 17 understand it is a statutory power implied in terms of this 18 Commission's power to invoke, to determine its own process 19 and using section 194 as a beacon to understand what that 20 is. 21 Now specifically, Chair, section 3 of the 22 Commissions Act sets out this Commission's powers in 23 respect of its treatment of witnesses and these powers are 24 augmented by regulations 8, 9, 10 and 12 of the 25 regulations. What is significant, Chair, is that neither</p>	<p style="text-align: right;">Page 31068</p> <p>1 under 194 - perhaps this is anticipating a point you're 2 going to make – has a court in a criminal case the power to 3 send a witness away for observation? 4 MS PILLAY: It's not a power to compel a 5 witness to psychiatric evaluation, but it's a power to 6 subject that witness to what can be known as a trial- 7 within-a-trial to determine his or her competency, Chair. 8 I think that's as far as the section goes. 9 CHAIRPERSON: Well, I would imagine that 10 even in a civil case you would do a, in English law it's a 11 called a voir dire, you have inquiries of various kinds as 12 to the admissibility of evidence both in civil cases and in 13 criminal cases, a trial-within-a-trial as we call it, and 14 presumably the questions of competence of a witness could 15 be dealt with by such an inquiry. 16 MS PILLAY: But specifically, Chair, no 17 power to compel the witness to subject himself to 18 psychiatric evaluation. 19 CHAIRPERSON: What happens if Mr X says 20 well, thank you very much but I don't want to be subjected 21 to this appropriate medical scrutiny which they ask for, 22 I'm not going to cooperate? What can I do? Have I got the 23 power to compel him? What do I do? Do I commit him to 24 prison for contempt of the Commission? I don't think I've 25 got the power to do that at all prima facie, and if there's</p>

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1 something that I've overlooked I'd be pleased to have my
 2 attention drawn to it.

3 MS PILLAY: Nothing beyond acting in
 4 contempt of an order of this Commission, or a ruling of
 5 this Commission.

6 CHAIRPERSON: I don't think I've even got
 7 the power to – I haven't got the power that I used to have
 8 when I was a judge to deal with people who commit contempt
 9 of court. As I read the regulations people who do that can
 10 be sentenced and they can be dealt with in the ordinary
 11 criminal courts that the prosecution authority [inaudible]
 12 I don't know if there's anything else that I can do. As I
 13 say, I'm just expressing prima facie views and asking for
 14 information. If there's something I've overlooked I'd be
 15 pleased to have my attention drawn to it.

16 MS PILLAY: Chair, the section of the
 17 regulation which deals with people acting, or wilfully
 18 hinder, resist or obstruct the work of the Commission, is
 19 regulation 17. So that presumably would be the regulation
 20 at issue.

21 CHAIRPERSON: People who behave in that
 22 fashion then commit an offence and can be prosecuted, but I
 23 can't deal with them by myself. The most I can do is be a
 24 complainant perhaps, you know, go to the local Centurion
 25 Police Station complaining that conduct of this kind has

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1 been taking place.

2 MS PILLAY: We accept that, Chair. The
 3 arrested and injured, Chair, have sought to find solace in
 4 this Commission's power to regulate its own process and we
 5 submit the starting point, Chair, is to look at the
 6 regulation itself and to see what it specifically provides
 7 for.

8 Now the applicable regulation is regulation 19
 9 which provides that the Commission may determine its own
 10 procedures. Now we submit that the provision in its own
 11 terms and self-evidently merely provides this Commission
 12 with procedural, limited procedural powers. Now we know,
 13 Chair, that even in the context of the inherent powers of a
 14 court the Constitutional Court has warned that these powers
 15 should be exercised with caution and we would submit the
 16 same would apply to these limited procedural powers.

17 We would submit the power to force or to compel a
 18 witness to subject him or herself to psychiatric evaluation
 19 is a substantive power which would clearly fall beyond the
 20 ambit of what is contemplated in regulation 19. We would
 21 submit therefore, Chair, that on a legal basis that the
 22 application has no merit.

23 But in any event we say that there's no factual
 24 basis for the application because, Chair, even where the
 25 power to force a court to engage with a witness's

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1 competence to testify, even where such a power is express,
 2 like in section 194 which has been relied upon by the
 3 applicants, the test for whether the application ultimately
 4 succeeds is a complex one and there are two clear
 5 requirements. The first is that the witness must suffer
 6 from a mental illness and the second requirement is that as
 7 a direct result of that mental illness the witness must be
 8 deprived of the proper use of his or her reason.

9 Now we submit that having closely followed Mr X's
 10 testimony thus far it is certainly not apparent to us that
 11 he suffers from any form of mental illness or that he is
 12 deprived of the proper use of his reason. His testimony
 13 has thus far been clear and coherent and we have all been
 14 able to follow his account of the events.

15 Now whether or not his account has been a
 16 truthful one thus far is an entirely separate issue.
 17 Ultimately having heard his testimony as a whole the
 18 evidence leaders will make submissions on the cogency of Mr
 19 X's testimony, as we will do in respect of all the other
 20 witnesses who appear before this Commission.

21 But we submit that certainly no one who has been
 22 sitting in this auditorium for the duration of his
 23 testimony thus far can claim to legitimately be unable to
 24 follow his account of what has transpired, and to the
 25 extent that it is argued or implied, Chair, that Mr X's

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1 personal belief systems or specifically his belief in mutu
 2 or traditional medicine, to the extent that it's argued
 3 that that amounts to a mental illness we submit that that's
 4 an astounding proposition and we would ask for that to be
 5 dismissed out of hand.

6 In relation to the written application, Chair, we
 7 point out that the affidavit is tellingly bare of any
 8 substantiated allegations. There are no substantiated
 9 allegations which support an inference that Mr X has a
 10 mental illness and we find it regrettable that the arrested
 11 and injured have not taken the Commission into its
 12 confidence by putting up proper substantiated affidavits
 13 from people who have personal knowledge of, or who claim to
 14 have personal knowledge of Mr X's state of mind. We submit
 15 that the hearsay allegations are unhelpful and they do not
 16 sustain a case even on a prima facie basis that Mr X is
 17 mentally ill.

18 Finally Chair, we have been asked by one of the
 19 widows who has been attending these proceedings for the
 20 past year and a half to put forward a personal view and a
 21 personal request. She's indicated that she's waited for
 22 over a year and a half to hear any information or evidence
 23 which sets out how her husband was killed. Mr X is the
 24 first witness who has volunteered information on how her
 25 husband's killing has come about. She is deeply distressed

<p style="text-align: right;">Page 31073</p> <p>1 by the current turn of events and has asked us to convey to 2 the Commission her sheer desperation to have Mr X share 3 with the Commission and the rest of the country any 4 information on how her husband was killed. Chair, those 5 are our submissions. 6 [11:53] COMMISSIONER HEMRAJ: Ms Pillay, there is 7 authority, isn't there, that in assessing the competence of 8 the witness, that it's open to the presiding officer to 9 observe the witness and listen to his evidence and that'll 10 suffice in him coming to his decision. 11 MS PILLAY: That is so, Commissioner. 12 COMMISSIONER HEMRAJ: There are two cases 13 that speak to this. The one is S v Dladla and the other is 14 S v Katoo that both speak to these requirements. 15 MS PILLAY: That is correct. 16 CHAIRPERSON: Section 194 - 17 MS PILLAY: Case number, section 194 18 which sets out the process that a criminal trial, criminal 19 court can take, Chair. 20 CHAIRPERSON: - applicable here by 21 analogy. If Mr Mpofu's analogy with section 194 applies 22 then obviously one must look at cases or one is entitled to 23 look at cases on section 194 and how it's applied in a 24 court. 25 MS PILLAY: That is so, Chair.</p>	<p style="text-align: right;">Page 31075</p> <p>1 show an intelligent appreciation of what the question was 2 designed to place before the Commission. 3 There is, latent in this application, an 4 important question concerning timing and process and I 5 would wish, with your leave, Mr Chair, to make one or two 6 brief submissions about paragraph 14.9 of the affidavit 7 that has been placed before you. That affidavit identifies 8 four particular factual questions and it is said about them 9 that what Mr X says or will say about these, demonstrates 10 outrageous absurdities with no logical or factual basis. 11 We take an entirely different view, with respect, and we 12 say that these are the matters of the kind that require 13 proper ventilation through the ordinary course of the 14 presentation of evidence and its being tested through, 15 inter alia, cross-examination. Let me illustrate that 16 submission by reference to paragraph 14.9.1 where it is 17 said that Mr X's account about the issue of human blood and 18 tissue having been removed, plainly it appears from the 19 body of Mr Fundi, that is said to constitute an outrageous 20 absurdity but, Mr Chair, all of us have had sight many 21 times of slide 30 in exhibit L. I'm not going to ask that 22 that be displayed but the Commission will be familiar with 23 it and it shows the body of Mr Fundi with his lips having 24 manifestly been chopped off. And what we say about that, 25 Mr Chair, is that far from being an outrageous absurdity,</p>
<p style="text-align: right;">Page 31074</p> <p>1 CHAIRPERSON: Thank you, Ms Pillay. Mr 2 Tip? 3 MR TIP SC: Thank you, Chair. I advance 4 these submissions on behalf of NUM and also on behalf of 5 Mrs Fundi. We oppose the application, as I indicated 6 before the tea adjournment. An essential ground concerns 7 the powers of the Commission to require referral for 8 observation in any way at all. Copious, well, full 9 submissions have been made in respect of that by Mr Semanya 10 and particularly perhaps Ms Pillay and we respectfully 11 align ourselves with those submissions. 12 It is of course so, Chair, that the Commission 13 enjoys a capacity and the power and the duty, indeed, to 14 see to it that the evidence that is placed before it will 15 assist it and we do not in any way differ from that aspect 16 of Mr Mpofu's submissions where he said that if, for 17 instance, there was a manifestly intoxicated person who 18 presented him or herself to give evidence here, you, Chair, 19 and the Commissioners would be fully entitled to say you're 20 not going to assist us, you leave. If you can return in a 21 sober state, that - like Ms Pillay, it is our respectful 22 submission that the evidence that has been presented thus 23 far by Mr X is not of an order that could bring about a 24 conclusion of that sort. His response to the questions put 25 to him in chief thus far have been clear and reasoned and</p>	<p style="text-align: right;">Page 31076</p> <p>1 there is an account that enjoys objective corroboration. 2 It, of course, can be tested and in the ordinary course it 3 will be tested and ultimately submissions will fall to be 4 made one way or the other about it, but to identify that as 5 a basis upon which the Commission should at this stage 6 decline to hear the accounts given by Mr X in detail about 7 that and cross-examination would, with respect, not be 8 sound. 9 The next point, the killing of black and white 10 sheep, Mr Mpofu seemed to suggest that that's a self- 11 evident absurdity. It is, with respect, not so and if I 12 recall correctly, he said whilst we were still at 13 Rustenburg that there is no such thing as a black sheep. 14 Now, Mr Mpofu is no more a zoologist than I am, Mr Chair, 15 but I am confident that there are indeed black sheep and 16 it's a matter (indistinct). 17 CHAIRPERSON: You're not talking about 18 metaphorical black sheep? 19 MR TIP SC: I'm not talking - 20 CHAIRPERSON: You mean the actual - 21 MR TIP SC: Our society and literature is 22 replete with the metaphorical black sheep, Mr Chair. No, 23 I'm talking physically about the sheep in a black, in a 24 white flock. 25 Thirdly, Mr X has given a brief description at</p>

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1 this stage of certain demonstrations that were apparently
 2 made by the sangoma and/or his sons concerning a tin box.
 3 Whether or not shots were indeed fired at that box, well,
 4 that is something to be tested in evidence, that's put as a
 5 patent outrageous absurdity.
 6 Fourthly and lastly, the attention of the
 7 Commission is drawn to the evidence of Mr X that the
 8 shooting, there was a shooting on 11 August 2012 and that
 9 Lonmin security guards were the ones who fired those shots
 10 and he says, it is common cause that indeed NUM officials
 11 fired shots on that occasion. Now assuming that to be
 12 common cause, we're not here to dispute that, Mr Chair, but
 13 this is no different from any item of evidence where a
 14 witness gives an account of a particular event about which
 15 other parties disagree and they may be in a position to say
 16 there is already evidence that contradicts it – and in due
 17 course that can be done and thereafter the Commission will
 18 form a view of the cogency or otherwise of such criticisms.
 19 It's no different in character, with respect, from those
 20 who had advanced the position that on the 11th of August NUM
 21 shot dead two people who were quite innocently walking past
 22 the office where, having been at a meeting at the Lonmin
 23 offices. There's no suggestion that persons who gave that
 24 sort of evidence fell to be disqualified as witnesses and
 25 told to go away for want of reason.

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1 In short, Chair, we make the submission that Mr X
 2 and his account of the several events about which he
 3 testifies and will testify if the testimony continues, at
 4 this stage present themselves as more than adequately clear
 5 and their reliability or otherwise can be tested and
 6 doubtless will be fully tested in the ordinary course.
 7 Those are our submissions.
 8 CHAIRPERSON: Thank you, Mr Tip. Mr Van
 9 As, are you going to – who is going to argue next? Mr
 10 Gumbi?
 11 MR GUMBI: Yes, Chairperson. Thank you
 12 very much, Chairperson and the Commissioners. On behalf of
 13 Lieutenant Baloyi and the family of the late Warrant
 14 Officer Lepaaku, we are instructed to oppose this
 15 application. It's our main submission, Chairperson and
 16 Commissioners, that this application has no basis in law.
 17 We understand that the application, the principle
 18 underlying this application is based on section 194 of the
 19 Criminal Procedure Act and hence Commissioner Hemraj has
 20 indicated that our Supreme Court of Appeal, they have
 21 articulated this principle contained in section 194 of the
 22 Criminal Procedure Act. For record, our legal submission
 23 is based on the case of State v Katoo 2006(4) SALR page
 24 348. This judgment was delivered by eminent judges of our
 25 Supreme Court of Appeal, it is Judge Jafta –

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1 CHAIRPERSON: Well, they're all eminent,
 2 by definition.
 3 MR GUMBI: Yes, yes.
 4 CHAIRPERSON: It's invidious, you know,
 5 to single some out as eminent and the implication being –
 6 but you say did Judge Jafta give the main judgment?
 7 MR GUMBI: Yes, that's why I refer,
 8 judges.
 9 CHAIRPERSON: Yes, and who concurred with
 10 him? Who concurred with him?
 11 MR GUMBI: The judges who concurred,
 12 Harms JA by then, Cameron JA, Mthiyane JA and Cloete JA by
 13 then. In that case law, Chairperson, the court made it
 14 crystal clear that before one could invoke the provision of
 15 section 194, there are certain requirements that one has to
 16 comply with and my learned colleagues Adv Semenya and Ms
 17 Pillay have dealt with those requirements. And at
 18 paragraph 10 the Supreme Court of Appeal makes it crystal
 19 clear that those two requirements must be, collectively be
 20 satisfied before a witness can be disqualified from
 21 testifying on the basis of incompetence. And on the
 22 procedure, the Supreme Court of Appeal articulated the
 23 procedure one has to follow before invoking the provisions
 24 – (indistinct). The Supreme Court of appeal, when one
 25 looks at paragraph 12 of the judgment, the court held that

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1 the procedure that can be adopted is by either invoking an
 2 inquiry whereby medical evidence on the mental state of the
 3 witness is led, alternatively, or allowing the witness to
 4 testify so that the court can observe him or her and form
 5 its own opinion on the witness's ability to testify.
 6 It is our legal submission before this Commission
 7 that this Commission is not only confined to refer these
 8 witnesses for psychiatric observation. We submit that this
 9 Commission has a jurisdiction, they can allow Mr X to
 10 testify, they can observe Mr X and formulate its own
 11 opinion on his ability to testify.
 12 In conclusion we submit that, based on this legal
 13 principle articulated by the Supreme Court of Appeal, this
 14 Commission must allow Mr X to testify. The family of the
 15 late Warrant Officer Lepaaku is so keen to know what
 16 transpired before Warrant Officer Lepaaku was killed on the
 17 13th of August 2012. Hence we made a commitment in this
 18 Commission that we will leave no stone unturned surrounding
 19 the death of the late Warrant Officer Lepaaku.
 20 [12:13] The same applied to Lieutenant Baloyi who was
 21 severely injured on the 13th of August and Lieutenant Baloyi
 22 also again and his entire family is so keen to know what
 23 transpired before the 13th of August 2012 and what
 24 transpired after they were attacked by the protestors. It
 25 is on that basis, Chairperson and the Commissioners we

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1 submit that this Commission should reject the application
 2 by the applicant. Those are our submissions, Chairperson.
 3 CHAIRPERSON: Thank you, Mr Gumbi. Mr
 4 Van As are you next?
 5 MR VAN AS: Thank you, Mr Chairperson.
 6 Mr Chairperson, I'm also instructed to oppose this
 7 application on behalf of Lonmin, I don't intend repeating
 8 the submissions other than to advance the following two.
 9 Firstly, with respect, it's extremely doubtful that you
 10 have the power to make such an application. In the limited
 11 time at my disposal the only circumstances under which I've
 12 been able to find a body other than a court to have the
 13 power to make such a finding is a military tribunal, the
 14 most famous being the Nuremberg trials with Rudolph Hess
 15 who sent for observation in the midst of a military
 16 tribunal to see whether he was fit. Secondly, even if
 17 we're wrong on that, Mr Chairperson –
 18 CHAIRPERSON: Rudolph Hess was an
 19 accused.
 20 MR VAN AS: He was an accused. Even if
 21 we're wrong on the law, Mr Chairperson, what is, with
 22 respect, particularly disconcerting is the fact that a lot
 23 of the evidence Mr X has given, in fact corroborates
 24 evidence given by other witnesses and the version of the
 25 very parties who are opposing this application. Mr

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1 Chairperson, you will recall, with respect, that much has
 2 been made of the fact that trade unions were not part to
 3 the initial wage demand by the rock drill operators.
 4 That's the very version that Mr X has placed before this
 5 Commission. He not only, from what I can understand,
 6 corroborates the version of AMCU that they were unaware and
 7 did not form part of this wage demand but also corroborates
 8 the version given by Mr De Costa, namely when the rock
 9 drill delegation initially approached him they specifically
 10 told him they don't want trade unions involved in these
 11 negotiations. Now that, with respect, is hardly the
 12 evidence of a person bereft of his senses, incapable of
 13 giving evidence before this Commission. Those are our
 14 submissions, thank you, Mr Chairperson.
 15 CHAIRPERSON: Does anyone else wish to
 16 argue?
 17 SPEAKER: Chairperson, yes. On behalf of
 18 the family of Warrant Officer Monene we would like to say
 19 that we oppose this application. Chairperson, we fully
 20 align ourselves with the submissions made on behalf of that
 21 and the evidence leaders and all the other legal teams that
 22 oppose this application. And we do not wish to repeat the
 23 submissions that are already made before this Commission.
 24 And Chairperson, we wish to put it on record that the
 25 family of Warrant Officer Monene would like to know and

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1 find out what happened when he was killed on the 13th of
 2 August and they have been sitting through this commission
 3 since the beginning, up to today. And Chairperson, it is
 4 very important and it has been demonstrated by the evidence
 5 that is already before this Commission as adduced by this
 6 witness that there is light at the end of the tunnel, that
 7 the truth might actually be found out before this
 8 Commission. And we therefore submit that, Chairperson,
 9 this application ought to be dismissed on the basis of the
 10 arguments that are already adduced. Thank you very much,
 11 Chairperson.
 12 CHAIRPERSON: Ms -
 13 MS LE ROUX: Yes Chair, thank you.
 14 Chair, my instructions are that the Human Rights Commission
 15 abides the outcome of this application. I do wish to just
 16 briefly say it on the record why that is our position. It
 17 is not because the Human Rights Commission is unconcerned
 18 about the fairness of these proceedings and our
 19 participation to date has indicated that. It's simply
 20 because my client is a unique party in this Commission in
 21 that they were not there on the day and are therefore
 22 unable to assist the Commission factually as to the content
 23 of Mr X's evidence. Of course, we do intend to assist the
 24 Commission in due course, making submissions as to how that
 25 evidence squares with other objective evidence to support

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1 the submissions. But we are, of course, confident that the
 2 Commission will determine the application in a way that
 3 ensures procedural fairness to all parties. Thank you,
 4 Chair.
 5 CHAIRPERSON: Thank you, Ms Le Roux. Any
 6 other party wish to say anything before I call upon Mr
 7 Mpofo to reply? No. Mr Mpofo.
 8 MR MPOFU: Thank you very much,
 9 Chairperson. Chairperson, I must take responsibility, it
 10 must be me who did not explain what application I'm
 11 bringing here for it to be misunderstood by so many people.
 12 Chairperson, firstly just to start with what Ms Le Roux has
 13 just said about the powers. I cannot believe, Chairperson,
 14 that anybody would doubt that your inherent power, or
 15 rather your power to determine your procedures must
 16 incorporate the power that whatever happens here must be
 17 fair and that is what we've understood you to be doing for
 18 the past two years, Chairperson. Otherwise, every time you
 19 make a ruling or you say we must stop or we must have a
 20 postponement or can't ask this question, we would be saying
 21 well show us in the regulations where it says you can do
 22 that. We can't work like that. But the irony of ironies
 23 is for a party like SAPS which said to you that the powers
 24 imbued by section 19 to determine your own procedures, that
 25 is why we're hearing Mr X's evidence on video link with all

1 these qualifications. This is exactly because in that
 2 power to determine your procedure they were able to
 3 fashion, successfully, powers which are expressly provided
 4 in the regulations but which clearly flow there from. I
 5 can't imagine, we would have a million pages of regulations
 6 if they were going to envisage every situation. If the
 7 person is intoxicated this is what the Commissioner must
 8 do. If they take off their clothes and stand on their
 9 heads this is what the Commissioner must do. The point is
 10 simply that this Commission is bound by the ordinary rules
 11 of fairness to all which is why we were interposing the
 12 rights of other people who might be affected by Mr X's
 13 evidence because that's really the issue.

14 Secondly, Chairperson, you're quite right, that
 15 is why I said by the way, when we started, that the powers,
 16 when you asked me the question about powers, start with the
 17 Constitution of the country. And that is simply because,
 18 Chairperson, let's assume for the purposes of this argument
 19 that the Commission is an organ of State, or you know, some
 20 kind of body. Then section 81 of the Constitution says
 21 that the Bill of Rights applies to all law and binds the
 22 legislature, the executive, the judiciary and all organs of
 23 state. And all the rights that are enumerated earlier,
 24 which I'm not going to repeat, emanate from that Bill of
 25 Rights. And those are the rights that attach to what I've

1 termed in the affidavit we've referred to as the other
 2 affected parties whether they are the injured and arrested
 3 or the families or AMCU or all the parties. And therefore
 4 what we're talking about, Mr Ntsebeza, the test on this, is
 5 about credibility, not in the sense of cross-examination.
 6 If you like it's about credibility in the absolute sense of
 7 the word. Because it is self evident that whether it's a
 8 court or a tribunal or whatever it is it would be absurd
 9 for it to receive evidence which is worthless. So the
 10 underlying principle behind section 194 or any of its
 11 equivalent must surely be that if evidence is going to be
 12 worthless because the person from whom it comes is – has
 13 their faculties affected by whatever it is. Whether it is
 14 drugs or intoxication or mental illness. Then it's no
 15 longer a matter of credibility in the sense of whether is
 16 to be believed or whether they think it is this or that.
 17 It's a question of whether the person is competent as a
 18 witness even just to open their mouth. And Chairperson, as
 19 I said, the irony, it's no use to come and say well we want
 20 to hear this because it's important or because we leave no
 21 stone unturned and all that. That's exactly the point. Do
 22 you want to lift an artificial stone that is not a real
 23 stone? The point is that if the evidence patently
 24 worthless and it's got nothing to do with – in fact for
 25 that very reason it is the more reason, because of its

1 importance, that the court, rather the Commission must be
 2 circumspect so that if – and the other point that is being
 3 missed is that all we're asking for is an investigation.
 4 If my learned colleagues are competent to evaluate Mr X's
 5 state of mind well good luck to them. I'm not. I'm saying
 6 that someone else who is qualified to do so should perform
 7 that task and that person might well come to the view which
 8 the other medical experts in the room seem to share, which
 9 is that he's fine. But I'm not one of them, neither are
 10 you, Chairperson. Therefore the only duty that lies on us
 11 as the applicant is simply to convince you, Chairperson,
 12 that there is an appearance - and if the report comes as I
 13 say –

14 CHAIRPERSON: Appearance of lack of –
 15 MR MPOFU: Yes, the correct expression,
 16 the one that I isolated, the one of that he's deprived of
 17 the proper use of reason. That's really the gist of – if
 18 we borrow again from section 194. We can't prove it that's
 19 why the section says no person appearing or proved to be
 20 afflicted. And if there's anybody in this room who was not
 21 startled when Mr X said that the people in this room
 22 through the video link at his remote location somewhere
 23 have bewitched him through that video link and caused him
 24 to ask for permission to go and see his Gogo. If everyone
 25 thought that was fine but then I don't want to say – I

1 suggest that there's no one in this room actually who
 2 thought that was just a – and I think that's exactly the
 3 reason that SAPS immediately after he made those outrageous
 4 remarks asked for the Commission to be stood down. And I
 5 think that's also the reason why the Chairperson when that
 6 second application by SAPS was made did not even solicit
 7 our views because what could we do. We can't blame the
 8 Chairperson for that because the situation was absurd. And
 9 therefore, Chairperson, another misconception of what we're
 10 saying is that it affects or rather it has anything to do
 11 with his right of belief in witchcraft.

12 [12:33] Chairperson, let me allay any fears about that;
 13 that is not the point we are making. The point we are
 14 making is if insofar as those beliefs may affect
 15 prejudicially the rights of the people that we represent,
 16 so he's free to believe whatever he wants. So if someone
 17 says, if they say I believe that I'm Elvis Presley, that's
 18 fine, you can believe whatever you want, but the minute you
 19 say well, I believe I'm Elvis Presley and therefore I'm
 20 married to Priscilla Presley, she's my wife, that affects
 21 somebody else's rights, then that's where the law should
 22 draw the line.

23 So that's the point. The point is that you are
 24 counter posing the rights of people to have their integrity
 25 not impugned and not to be insulted here and called witches

1 and wizards, whatever Mr X was implying about our clients,
2 and cannibals, and in the case of Mr Mathunjwa as phantom
3 appearers on the mountain when they're far away from it.

4 That's the issue. It is whether – that's a
5 simple question, is whether this Commission is going to
6 allow that kind of thing to continue and all sorts of
7 things like that to be said about people, some of whom are
8 not able to answer for themselves, by a person of doubtful
9 competence. That's all, or whether the Commission will do
10 what we are asking it to do, which is not to banish Mr X
11 from giving evidence forever and amen, but simply to
12 satisfy ourselves one way or the other that despite these
13 indicia, which as I say I'm not going to repeat, he is
14 nevertheless competent to give evidence at all.

15 So if anyone is looking for the powers of the
16 Commission they first derive from the fact that the
17 Commission is bound to protect other people's human rights
18 like any other organ of State and then they go right down
19 to the regulation which says you may determine your own
20 procedure, Chairperson, as I was saying.

21 As far as the, there's also the, with respect,
22 latching onto this issue of the evidence in the affidavit.
23 Again, Chairperson, an important measure of fairness, or
24 component of fairness is consistency. We legal
25 practitioners surely must be entitled to make certain

1 statements to say this is my reason, this is what I've
2 consulted with my clients about. After all, when the
3 application for Mr X's video link or in camera evidence was
4 presented here we only had the affidavit of Mr Pretorius,
5 and Mr X is not even his client. His client is SAPS. But
6 we were not fastidious about that because we knew that Mr
7 Pretorius must have had interactions with Mr X, and if Mr
8 Pretorius says that X is concerned about his safety we'll
9 accept that. So now all of a sudden we are being drawn
10 down to technicalities about, you know, textbook
11 definitions of presentations of evidence by the same people
12 who aren't.

13 So Chairperson, as far as the powers are
14 concerned, for all that really needs to happen,
15 Chairperson, is to say another point that is missed,
16 because there's no point in taking pot shots at one or two
17 or three paragraphs, because we have said more than once
18 even in that affidavit, short as it is, that what we are
19 talking about is the cumulative effect of the indicia that
20 we point out. We have said that specifically we are not
21 only relying on what happened on Friday but on the
22 cumulative effect of the evidence, including what we are
23 told are signs of some previous possible brain injury,
24 which may easily be ascertained by SAPS with Mr X if it's
25 [inaudible], with respect.

1 So who really, we've given all these things, the
2 absurdities that have been pointed to, what happened on
3 Friday, possible previous brain injury, are we going to be
4 so wilfully blind, to borrow Mr Bizos's expression, that we
5 say despite all those indicia we are not going to even ask
6 for an investigation? Not a determination, an
7 investigation. Then, Chairperson, really it would mean
8 that we just want to have the evidence for the sake of
9 having the evidence, because surely all the people who have
10 been quoted by Ms Pillay and my other colleagues as have
11 been so anxious to find the truth, are not anxious to hear
12 fantasy and hallucinations of a delusional man.

13 What they actually want is credible evidence in
14 the sense that I've described, which might shed some light
15 as to how their loved ones suffered what they suffered, and
16 one can understand subjectively from their point of view,
17 one of my colleagues – I don't know which one - who said
18 that person was – I think it was Ms Pillay – would like to
19 hear any evidence that deals with it. Well, that's fine,
20 but you, Chairperson, you're not in that subjective
21 [inaudible] and I'm sure you have no intention of
22 subjecting us to any evidence even if that evidence is
23 clearly not what the [inaudible]. I too if I was directly
24 affected as a family member, I would say well, I've been
25 sitting here, I'll hear anything, as long as my person is

1 mentioned, but that can't be the test.

2 Finally, Chairperson, I just want to again allude
3 to the clear misreading of Katoo's case. In Katoo's case,
4 Chairperson, which, the other reference is 2005 (1) SACR
5 522 (SCA), all that was said, Chairperson is that a trial
6 court has a duty – underline that word, it's even more than
7 a power, it's a duty – a trial court has a duty properly to
8 investigate – underline investigate again, not to determine
9 – whether the witness is incompetent, and the learned judge
10 said at paragraph 12, "This may be done by way of an
11 inquiry" – underline again inquiry – "whereby medical
12 evidence on the mental state of the witness is led or by
13 allowing the witness to testify so that the Court can
14 observe him or her and form its own opinion on the
15 witness's ability to testify." In other words Mr Gumbi is
16 right that the procedure that we are praying for now is not
17 the only procedure, but that's, so what. It's one of them,
18 as it is said there. So the application is competent in
19 that sense because it is consonant with the duty upon you
20 to investigate and satisfy yourself as to the competence of
21 the witness mutatis mutandis.

22 But I think where he makes the mistake is the
23 second leg where it says "or to allow the witness," that
24 sentence must be read from exactly where it starts, which
25 says, "This may be done by way of an inquiry," in other

1 words in the course of that same inquiry you could for
 2 argument sake I suppose say okay well, I will call Mr X and
 3 say do you have a metal plate, did you have brain surgery,
 4 blah-blah-blah, and so on, ja, and what did your "Gogo" say
 5 when you went to the – and all those, that one should make
 6 that inquiry. But that would still be itself an inquiry to
 7 determine the competence of the witness rather than simply
 8 ignoring.

9 Ms Pillay says it could be determined by a trial-
 10 within-trial. The law is exactly the opposite of that and
 11 Zeffert deals with a case where they say, that's on page
 12 812, in the case of R v Creinhold, C-R-E-I-N-H-O-L-D, the
 13 magistrate decided that a witness who had been testifying
 14 for half an hour was drunk and incompetent to give
 15 evidence. He therefore adjourned the case until the next
 16 day, imprisoned the witness and ordered his evidence to be
 17 taken de novo, a procedure which was confirmed on appeal.
 18 And it says with reference to, by analogy the situation
 19 where a witness becomes incompetent for another reason as
 20 in Leepile, in other words it's not confined to
 21 interpretation, and then the important part which responds
 22 to Ms Pillay's submissions that "It is not necessary to
 23 hold a trial-within-a-trial to determine whether a person
 24 is a competent witness." That's the correct –

25 COMMISSIONER HEMRAJ: Mr Mpofu, I'm sorry

1 to interrupt you –

2 MR MPOFU: I'm sorry, Chair.

3 COMMISSIONER HEMRAJ: Sorry, there is a
 4 case of State versus Zenzile, 1992 (1) that says it's not
 5 always necessary to hold a trial-within-a-trial, not that
 6 it's not necessary at all.

7 MR MPOFU: Commissioner, I'll have to -
 8 between what you say and what Zeffert says I think I'll
 9 take what you say, save to say, maybe to refer further to
 10 that the footnote 63 of the propositions that I've just
 11 repeated, referred, comes exactly from that S versus
 12 Zenzile 1992 (1) SACR 444 (C), so it's the same case. But
 13 for the purposes of this argument I'm prepared to accept
 14 that formulation of Commissioner Hemraj, which is that it
 15 is not always necessary. I don't even want us to go there.
 16 I'd like us to confine ourselves to the procedure that is
 17 confirmed by the SCA in Katoo, which is the two, the
 18 alternatives that I've already mentioned.

19 The point is simply this, whatever it is, whether
 20 it's the referral to medical evidence, whether it's the
 21 questioning by the Court or whether it's a trial-within-a-
 22 trial, whatever, that is an inquiry separated from the
 23 process of the merits of the evidence itself. That's
 24 really the only point I'm making. So whatever you call it,
 25 you label it, it's an inquiry as to the competency of the

1 person.
 2 That is why, Chairperson, in the – I think it's
 3 in the affidavit we used the word "preferably." Yes, in
 4 paragraph 5 where we say the nature of the application, it
 5 says, "The nature of and the purpose of this application is
 6 simply to seek a ruling that Mr X's competence and
 7 capability to give evidence as a witness in the Commission
 8 be investigated preferably by means of a medical inquiry
 9 into his mental and/or psychological" – that's so we
 10 understand that's not the only thing that could be done,
 11 otherwise we could have used that word. So that's the
 12 correct reading of Katoo's case, Chairperson.

13 CHAIRPERSON: [Microphone off, inaudible]

14 MR MPOFU: Well ja, other things, Chair,
 15 I won't address – well, I can assure you, Chairperson, that
 16 being a rural boy that I was I definitely know that there
 17 are black sheep, hence the expression the black sheep of
 18 the family.

19 [12:52] The point I was simply making is that that is
 20 such a rare find that even in the rural area where I was
 21 herding many sheep, it was not something that you can
 22 sommer leave the koppie and go and grab a black sheep in
 23 Nkaneng, at night nogal. So, and it was at that level that
 24 – and by the way, the evidence of SAPS itself is that when
 25 the police went to look for the remains of the – I suppose

1 they couldn't now see whether it was the black or the white
 2 sheep but that nothing was found, but again Chairperson,
 3 the point is exactly what I'm saying, that all these things
 4 must be viewed cumulatively. They may all be explicable, I
 5 don't know but they should ring a bell and given the
 6 jeopardy of the right of other people on the other side of
 7 the scale, that bell needs not to be ignored as you are
 8 being asked to do, that you must ignore the clear doubt, at
 9 least. Otherwise we need to know then, Chairperson, I mean
 10 honestly I don't want to get into absurd levels. What
 11 happened? Did Mr X go to see his inyanga? What did the
 12 inyanga say? Who among the people here were bewitching
 13 him? How did they do it through the screen and does he
 14 still want to continue? How far is his Gogo? Where – how
 15 long is it going to take for him to (indistinct) – that my
 16 clients are not working on him, we don't want to go there.
 17 Let a very experienced and medically trained person deal
 18 with those issues with the witness, to all our
 19 satisfaction. Thank you, Chairperson.

20 CHAIRPERSON: Thank you, Mr Mpofu. Mr
 21 Ntsebeza, do you wish to say anything further?

22 MR NTSEBEZA SC: Nothing further to add,
 23 Mr Chair.

24 CHAIRPERSON: Mr Mosikili, do you wish to
 25 say anything further?

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1 MR MOSIKILI: Nothing further, Chair.
 2 CHAIRPERSON: Thank you. It's now five
 3 to one. I'd like to think about the matter. I hope to be
 4 able to give my ruling at quarter to two. We will now
 5 adjourn until quarter to two.
 6 [COMMISSION ADJOURNS COMMISSION RESUMES]
 7 [13:49] CHAIRPERSON: The Commission resumes.
 8 This is an application brought by the injured and arrested
 9 persons, supported by certain of the families of, the
 10 families of certain of the deceased and also AMCU for an
 11 order described in the heading to the Notice of Application
 12 as an order for the referral of Mr X for mental observation
 13 and/or the determination of his competency as a witness.
 14 The Notice of Motion reads as follows, "Please
 15 take notice that an application is hereby made for the
 16 following ruling: 1. That sufficient grounds exist for the
 17 parties' belief that Mr X may not be a competent witness.
 18 2. That accordingly all reasonable steps ought properly to
 19 be taken to investigate and/or ascertain Mr X's competency
 20 as a witness. 3. That Mr X be subjected to the
 21 appropriate medical scrutiny in order to achieve the above
 22 and to report to the Commission. 4. That until the report
 23 is obtained, Mr X be barred from giving any further
 24 evidence in the Commission. 5. Such further and/or
 25 alternative relief as may be deemed appropriate and fair in

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1 the circumstances."
 2 It is clear that in order for the application to
 3 succeed, the allegation made in paragraph 1 of the notice
 4 must be shown to be correct, namely, that sufficient
 5 grounds exist for the parties' belief that Mr X may not be
 6 a competent witness.
 7 It is clear from the cases to which I have been
 8 referred that every person is presumed to be competent to
 9 give evidence in a criminal trial and in other litigation
 10 and also before a Commission unless there is a clear basis
 11 for holding otherwise. As it was put in the decision of
 12 the Supreme Court of Appeal to which a number of the
 13 counsel who argued the matter referred, namely, S v Katoo
 14 2005(1) SACR 522 SCA at paragraph 14, there is a
 15 presumption to the effect that every person is a competent
 16 witness.
 17 Counsel referred, Mr Mpfu who argued the matter
 18 on behalf of the injured and arrested persons, referred to
 19 section 194 of the Criminal Procedure Act 51 of 1977 which
 20 reads as follows, "No person appearing or proved to be
 21 afflicted with mental illness or to be labouring under any
 22 imbecility of mind due to intoxication or drugs or the like
 23 and who is thereby deprived of the proper use of his
 24 reason, shall be competent to give evidence while so
 25 afflicted or disabled."

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1 Mr Mpfu conceded that the section is not
 2 directly applicable in these proceedings because we are not
 3 sitting in a criminal trial but in a Commission, but he
 4 contended that the provisions of the section should be
 5 applied by way of analogy as they are a useful codification
 6 of what would be the common law on the matter.
 7 In Katoo's case it was pointed out in paragraph
 8 11 of the judgment of Jafta AJA, with whom the other
 9 members of the court concurred, that the two requirements
 10 set out in the section must be collectively satisfied
 11 before a witness can be disqualified from testifying on the
 12 basis of incompetence. The second requirement is that the
 13 – well, the first requirement is that it must appear to the
 14 trial court or be proved that the witness suffers from a
 15 mental illness or that he or she labours under imbecility
 16 of mind due to intoxication with drugs or the like. The
 17 second requirement is, it must be established that as a
 18 direct result of such mental illness or imbecility, the
 19 witness is deprived of the proper use of his or her reason.
 20 It was held in paragraph 13 that the trial court has a duty
 21 properly to investigate – this was of course an appeal from
 22 a criminal trial – held in paragraph 13 that the trial
 23 court has a duty properly to investigate the cause of the
 24 imbecility of the – this was a case involving a witness
 25 whose evidence was not received by the court and he was

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1 allegedly an imbecile. The court said in para 13 that the
 2 trial court had a duty properly to investigate the cause of
 3 her imbecility before concluding that she was incompetent.
 4 It said, "Section 193 enjoins a trial court to enquire into
 5 this issue and decide whether a witness is in fact
 6 incompetent." And the judgment continues, "This may be
 7 done by way of an inquiry whereby medical evidence on the
 8 mental state of the witness is led or by allowing the
 9 witness to testify so that the court can observe him or her
 10 and form its own opinion on the witness's ability to
 11 testify." Reference was made to a number of cases in which
 12 the courts in this country had permitted persons suffering
 13 from mental disorders, as well as imbeciles, to testify
 14 subject to their being competent to do so.
 15 Now, in the present case I have had the
 16 opportunity to observe the witness giving evidence and to
 17 form my own opinion as to his ability to testify. I am
 18 satisfied that it cannot be said that there are even prima
 19 facie indications that he is deprived of the proper use of
 20 his reason. In the circumstances I am satisfied that the
 21 allegations set out in the first paragraph of the
 22 application for the referral of Mr X for mental observation
 23 and/or the determination of his competency as a witness has
 24 not been made out. I am not satisfied that sufficient
 25 grounds exist for the parties' belief that Mr X may not be

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1 a competent witness and it follows that the application
 2 must be dismissed.
 3 Mr Mathibedi – sorry, Mr Mpofu, you've turned
 4 your light on?
 5 MR MPOFU: Yes. Chairperson, I'm sorry
 6 to do this. Can I just ask for a five minute adjournment?
 7 I need to take instructions on what we need to do next.
 8 CHAIRPERSON: I'm not sure that five
 9 minutes will be enough, I think I'd better give you 10.
 10 [COMMISSION ADJOURNS COMMISSION RESUMES]
 11 [14:11] CHAIRPERSON: The Commission resumes. Mr
 12 Mpofu, you wanted to take instructions on something.
 13 MR MPOFU: Yes, thank you, Chairperson.
 14 Yes, Chairperson, we –
 15 CHAIRPERSON: - the witness off again.
 16 Could they – when and if it's necessary to turn the machine
 17 on so that the witness can see us and we can see him and we
 18 can hear him and he can hear us, I'll say so. In the
 19 meanwhile the machine must be turned off, please. Yes, I
 20 take it that both audio and visual have been turned off.
 21 Mr Mpofu.
 22 MR MPOFU: Thank you, Chairperson.
 23 Chairperson, in the meantime, or rather for now the –
 24 because that was the real issue, our instructions, we had
 25 already received instructions that this is a matter that

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1 may well be taken to a court of law in the event that the
 2 ruling was the way that it is, because the clients feel
 3 very strongly about their own rights as it were, apart from
 4 those of - which they feel have not been adequately
 5 addressed.
 6 The only reason why we wanted a quick
 7 consultation, that's why I said a few minutes, was simply
 8 to find out from them what to do now, as of now, and
 9 happily after those short discussions they have accepted
 10 that in the meantime the witness can continue on the basis
 11 that we don't know how long it's going to – one of the
 12 difficulties, Chairperson, is that this, as you know these
 13 are poor people, even for them to try and get money to go
 14 to court is going to be another monumental struggle. So we
 15 wouldn't even be able to indicate to you for example
 16 whether it's tomorrow or next week, so it wouldn't make
 17 sense for the Commission in the meantime to be disabled to
 18 that extent, and that they've accepted our advice as far as
 19 that is concerned. So if and when there are further
 20 developments we'll advise the Commission, Chairperson.
 21 CHAIRPERSON: I think they've been given
 22 very sensible advice and I'm glad that they have accepted
 23 it. Mr Mathibedi.
 24 MR MATHIBEDI SC: Thanks, Chair, I beg
 25 leave to call Mr X.

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1 CHAIRPERSON: Yes, very well. The
 2 machine can now be turned on again, both the audio and the
 3 visual aspects of it, so that we can see and hear the
 4 witness and he can see and hear us. I did say earlier that
 5 the machines on the other side could be turned on again
 6 when I indicated that that could happen and I have so
 7 indicated, so they can be turned on so that we will be in a
 8 position to hear and see the witness and he will be in a
 9 position to hear and see us.
 10 MR MPOFU: Chairperson, I'm sorry, while
 11 this is going on, just for my own ability to advise my
 12 clients; am I correct in assuming that the point about the
 13 powers of the Commission is not –
 14 CHAIRPERSON: I've made no decision on
 15 that point. It wasn't necessary.
 16 MR MPOFU: Sorry –
 17 CHAIRPERSON: We left the point open as
 18 to the powers of the Commission –
 19 MR MPOFU: You've left the point –
 20 CHAIRPERSON: I didn't decide that. I
 21 dismissed the application on the basis that in my view it
 22 had no merit. So that rendered it unnecessary for me to
 23 decide whether I, if it had merit I still would not have
 24 been able to grant the application because I had no power
 25 to do so. That point is left open.

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1 MR MPOFU: Oh, I see. So you decided the
 2 merits without the preliminary point, yes. Okay.
 3 CHAIRPERSON: Please remind the witness
 4 that he is still under oath. He's coughed, so I take it if
 5 he speaks we've got to hear him as well. Mr Mathibedi –
 6 you have reminded him he's under oath?
 7 MR NTSEBEZA SC: There's been no
 8 response, Mr Chair. He was asked twice "Can you hear me?"
 9 He has not responded.
 10 MR X: s.u.o.
 11 MR NTJINGILA: He confirms, Mr Chair.
 12 EXAMINATION BY MR MATHIBEDI SC (CONTD.):
 13 Thanks. Sir, we are still dealing with the incidents of
 14 the 11th in the evening during the performance of the
 15 rituals. Sir, who was responsible for making the mixture
 16 that was used as part of the rituals?
 17 MR X: It was an inyanga.
 18 MR MATHIBEDI SC: What kind of persons
 19 were the volunteers, the people who had to do the rituals,
 20 what kind of person were they expected to be?
 21 MR X: It was people who had donated
 22 money at that moment.
 23 MR MATHIBEDI SC: Now how much was the
 24 total amount required that was to be paid to the inyanga?
 25 MR X: The total amount was 1 000, but

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1 you could pay a deposit of 500.

2 MR MATHIBEDI SC: Besides that the

3 volunteers were expected to pay an amount of R1 000, what

4 kind of person were they supposed to be in terms of if one

5 talks of their character?

6 MR X: It's the strong person who could

7 keep the secrets from the mountain, then keep them there in

8 the mountain.

9 MR MATHIBEDI SC: The people who took

10 part in the rituals, did they have a specific name?

11 MR X: They had a name called makarapas.

12 MR MATHIBEDI SC: Did the makarapas have

13 any role to play in the unprotected strike?

14 MR X: The makarapas were those people

15 who were to kill people.

16 MR MATHIBEDI SC: You testified that at

17 the time that some of the strikers went to the river to go

18 and wash, some of the strikers remained at the koppie. You

19 remember that?

20 MR X: Yes, we were in groups. We didn't

21 go at the same time to the river.

22 MR MATHIBEDI SC: Is there any reason why

23 some of the strikers remained behind at the koppie?

24 MR X: Yes, they were watching the place

25 where the sangoma was staying.

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1 MR MATHIBEDI SC: Between the date of the

2 11th and the 16th did you change your clothing?

3 MR X: No, we didn't change clothing. We

4 were supposed to be wearing the same clothes, wearing a

5 blanket, so that you must be always smelling of muti.

6 MR MATHIBEDI SC: Is there any person who

7 advised or instructed the people who underwent rituals not

8 to change their clothing?

9 MR X: We were told by inyanga.

10 MR MATHIBEDI SC: Between the 11th and the

11 16th, where did you sleep?

12 MR X: The makarapas were sleeping on the

13 mountain.

14 MR MATHIBEDI SC: Why was it necessary

15 for the makarapas to sleep at the mountain?

16 MR X: We were not supposed to meet with

17 women, to disobey the instruction of inyanga.

18 MR MATHIBEDI SC: The makarapas were

19 expected to sleep at the mountain until when?

20 MR MPOFU: Chairperson –

21 MR X: They were instructed to sleep in

22 the mountain until we get what we need, that 12 500.

23 CHAIRPERSON: Mr Mpofo?

24 MR MPOFU: Ja, Chairperson, I just want

25 to point out, there's a subtle point which would otherwise

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1 not be important except for the fact that we have had some

2 contradictions around the use of this term that is being

3 used now. What the witness said is that the, remember last

4 week he said makarapa was the muti. Now he's saying it's

5 people. What he said is that the people of makarapa were

6 asked to wait at the mountain. Now it must be made clear

7 whether when he says the people of makarapa he means the

8 people who used the muti or whether he's using it in the

9 sense that Mr Mathibedi is using that term. As I say it

10 would otherwise, if it wasn't for that –

11 CHAIRPERSON: Yes, I understand the

12 distinction you're drawing, which I think from what we

13 heard last week I think is correct, but anyway, let's hear

14 what the interpreter says. Do you understand the point Mr

15 Mpofo is making?

16 MR NTJINGILA: Yes, I understand,

17 Chairperson.

18 CHAIRPERSON: Yes, Mr Mathibedi? The

19 point of Mr Mpofo's intervention as I understood it was to

20 explain to the interpreter the subtle nuance that's

21 necessary for this evidence to be properly understood. The

22 interpreter says he now understands it, so we can carry on.

23 MR MATHIBEDI SC: Thanks, Chairperson.

24 You have indicated that there was a committee of 15. Do

25 you remember that?

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1 MR X: Yes, I do remember.

2 MR MATHIBEDI SC: What was the role of

3 the committee of 15?

4 MR X: Everything that was done in the

5 mountain you couldn't do it without passing them first.

6 MR MATHIBEDI SC: In the committee of 15

7 was there an overall leader?

8 MR X: Yes, there was Mambush and Xolani.

9 MR MATHIBEDI SC: When was Mambush

10 appointed as one of the leaders?

11 MR X: He was chosen because he was brave

12 and strong.

13 MR MATHIBEDI SC: When was he chosen,

14 that is Mambush?

15 MR X: He was chosen on the 11th. After

16 the rituals have been performed on us we were told to

17 select a person who's strong, who can go forward when we

18 are going to people.

19 MR MATHIBEDI SC: Who told the strikers

20 to select a person who was going to be the leader?

21 MR X: It was an inyanga.

22 MR MATHIBEDI SC: After Mambush was

23 chosen as the leader, what happened?

24 MR X: He was strengthened more than us

25 so that he must be the one who's going to be the leader

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1 when we are going forward.
 2 MR MATHIBEDI SC: Sir, what happened to
 3 the remains of the two sheep?
 4 MR X: The hole was dug and the remains
 5 were put in there and Mambush took a bath there as he was
 6 one who was strengthened to lead us and as we were going to
 7 the people.
 8 MR MATHIBEDI SC: Who was responsible for
 9 digging the hole and when was it dug?
 10 MR X: It was dug on the 11th by those
 11 people who we left in the mountain, because when we came
 12 back from bath we find the hole already there.
 13 MR MATHIBEDI SC: After the rituals were
 14 performed on Mambush, what happened? Sir, will you give
 15 the interpreter an opportunity to translate what you are
 16 saying?
 17 MR X: Okay, Ntate, Nkosi. We were told
 18 not to kill any animal and when we were talking, when we
 19 were pointing something we must use the fist. When you are
 20 carrying your sticks you must not let them touch the
 21 ground, pointing up. They must be horizontal with the
 22 ground and you must not have a hat on top of your head.
 23 [14:31] I was told not to be intimate with any women, we
 24 must not wash for seven days, if you wash you must that
 25 green soap. The green Sunlight soap.

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1 MR MATHIBEDI SC: Sorry, Sir, after the
 2 rituals were performed on Mambush what happened to the
 3 hole?
 4 MR X: We closed that hole but then I
 5 come back to show the police to find the hole it opened
 6 again.
 7 MR MATHIBEDI SC: Sir, I'm going to refer
 8 you to exhibit AAAA16. Chair, I'm asking that the photos
 9 or pictures of Mr X should not be distributed as depicted
 10 in the credit.
 11 CHAIRPERSON: Yes we're going to see
 12 photographs of Mr at the scene of an inspection that he had
 13 with the police. Those pictures must not be broadcast or
 14 photographed at all by the cameras or transmitted to the
 15 overflow room. They must not be shown at all.
 16 MR MATHIBEDI SC: Chair, I'm going to
 17 refer to photo 13 which is set out as "Toon die beweerde
 18 getuie van 'n vermoedelik punt uitgewys." Do you have the
 19 photo with you, for you, Sir?
 20 CHAIRPERSON: According to the key
 21 photograph 13 shows the alleged witness pointing out an
 22 apparent point.
 23 MR X: Yes I've got it.
 24 MR MATHIBEDI SC: What does that photo –
 25 CHAIRPERSON: Sorry, sorry I think my

Page 31111

1 translation was wrong. It's the – photograph 13 shows the
 2 alleged witness, that's this witness pointing out an
 3 alleged point. I suppose it's the best translation,
 4 vermoedelik punt.
 5 MR MATHIBEDI SC: Thanks, Chair. What
 6 does that photo depict?
 7 MR X: That photo shows the place I was
 8 talking about, one that they closed the hole but when we
 9 came back we found out it's open and those what you see
 10 there were left there.
 11 MR MATHIBEDI SC: What happened in that
 12 hole?
 13 MR X: When I came back to that hole with
 14 the police I found out the hole it opened and the soil that
 15 was supposed to have closed it, not there and there were
 16 those dry branches there.
 17 MR MATHIBEDI SC: Now on the day of the
 18 inspection why did you point out this hole?
 19 MR X: It's because it's the place where
 20 Mambush was, the rituals were performed on him to make him
 21 strong and that's the remains of those sheep were left
 22 there.
 23 MR MATHIBEDI SC: Now photo 14, amongst
 24 others, depicts a dog, do you confirm that?
 25 MR X: Yes.

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1 MR MATHIBEDI SC: What was this dog used
 2 for?
 3 MR X: The dog was searching, following
 4 the sand and it went straight to that place and sat there.
 5 MR MATHIBEDI SC: Will you please have a
 6 look at photo number 18? Photo 18, 19 and 20? Let's first
 7 start with photo number 18. According to the key it's
 8 "Toon Lieutenant-Colonel Van der Merwe van die Nasionale
 9 Taak span wat die toneel ondersoek deur die beweerde getuie
 10 uitgewys is." Chairperson –
 11 CHAIRPERSON: What must I translate for
 12 you.
 13 MR MATHIBEDI SC: That would be photos 18
 14 to 24, key 18 to 20.
 15 CHAIRPERSON: 18 to 20, it shows
 16 Lieutenant-Colonel Van der Merwe of the National Task team
 17 which investigated the scene as pointed out by the witness.
 18 That's 18 to 20, 21 you want to go to – 21 it shows the
 19 ground penetrating radar apparatus that was used by
 20 Lieutenant-Colonel Van der Merwe of the National Task team
 21 during his inspection at the scene.
 22 MR MATHIBEDI SC: Thanks, Chairperson.
 23 CHAIRPERSON: And 22, no you don't need
 24 22 translated. With regard to photo 18 can you explain to
 25 the Commission what was happening?

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1 MR X: That place is the place where
 2 Mambush was, where the rituals were performed on him to
 3 strengthen him and the remains of the sheep, bones and the
 4 meat were thrown there and the hole was closed. But when
 5 we returned that time we find that place is open.
 6 MR MATHIBEDI SC: Sir, I'm going to refer
 7 you to photo 38 and 39. Chair, photo 38 "Toon as vet plant
 8 materiaal soos op die tweede punt wat deur the beweerde
 9 getuie uitgewys is aangetref is."
 10 CHAIRPERSON: Photograph 38 shows a piece
 11 of plant material which was encountered at the second point
 12 pointed out by the witness.
 13 MR MATHIBEDI SC: Sir, will you describe
 14 what this plant material is, shown in photo 38?
 15 MR X: This is a piece of - that we were
 16 using on that day.
 17 MR MATHIBEDI SC: He said on the
 18 mountain?
 19 MR X: Yes on the mountain.
 20 MR MATHIBEDI SC: Which day are you
 21 referring to, Sir?
 22 MR X: It's the [inaudible] that we were
 23 using on the 11th on the first day.
 24 MR MATHIBEDI SC: Sir, I'm going to refer
 25 you to photo 42. According to the key it reads as follows.

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1 "Toon die wol tolletjies soos aan takkies van bos aangetref
 2 by the tweede punt wat deur die beweerde getuie uitgewys
 3 is. Soos verseel in forensiese sakkies."
 4 CHAIRPERSON: Photo 42 shows the strands
 5 of wool which were encountered on the branches of the
 6 bushes at the second point which was pointed out by the
 7 witness. They are sealed in forensic bags.
 8 MR MATHIBEDI SC: Sir, are you in a
 9 position to describe what is depicted in photo number 42?
 10 MR X: Yes those are the strings that
 11 were there in that place where the rituals were performed,
 12 where there was also a sheet which was drawn a lion's head
 13 on it.
 14 MR MATHIBEDI SC: Were you present when
 15 these were removed? Multi coloured ropes were removed and
 16 sealed as shown in photo number 2.
 17 MR X: Yes I was.
 18 MR MATHIBEDI SC: Now as a result of the
 19 investigation that was made during the inspection in loco
 20 was anything found that related to the two sheep?
 21 MR X: Nothing was found.
 22 MR MATHIBEDI SC: After the rituals were
 23 performed on the 11th in the evening were the strikers
 24 convinced of the effectiveness thereof?
 25 MR X: Yes, because Nyanga had smeared

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1 the muti on the box and the box was shot at and the bullet
 2 couldn't penetrate, it just stick to the box without
 3 injuring the box. Some other workers didn't believe, they
 4 believe after the security were killed. They've tried to
 5 shoot us and they couldn't shoot us, that's when they come
 6 in their numbers and perform the rituals also.
 7 MR MATHIBEDI SC: Sir, can we go over to
 8 the day of the 12th of August?
 9 CHAIRPERSON: To Sunday.
 10 MR X: On the 12th we came down from the
 11 mountain, going down between 9:00 and 10:00 to NUM offices
 12 to kill NUM.
 13 MR MATHIBEDI SC: So before leaving the
 14 mountain were there any discussions?
 15 MR X: It was said those people of
 16 Makarapa will return to the mountain, they will stay, they
 17 will sleep in the mountain until the employer give us what
 18 we want.
 19 MR MATHIBEDI SC: Sorry, Sir, I'm
 20 referring to the 12th in the morning before the strikers
 21 left the koppie to NUM's office, was there any discussion
 22 as to what was going to happen?
 23 MR X: We were told to follow the
 24 Nyanga's instruction, that we cannot be intimate with a
 25 woman, for seven days you cannot wash, you cannot change

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1 clothes, you must remain with the same clothes. You must
 2 keep on smelling the muti. When you are speaking you must
 3 point with your finger.
 4 MR MATHIBEDI SC: Sir, I am going to
 5 repeat the question, the question relates to the 12th in the
 6 morning before the strikers went to NUM's office, was there
 7 a discussion as to what was going to happen before moving
 8 off the mountain?
 9 MR X: What I remember is being told that
 10 when you are going forward you are going forward, you don't
 11 look behind or at the side, you only look forward.
 12 COMMISSIONER HEMRAJ: Was there any
 13 discussion that morning about why it is that you were going
 14 to NUM's office in the first place?
 15 MR X: It was said it's because the NUM
 16 is the one that we're fighting with the previous day to end
 17 up going to the mountain. Now we are going down to kill
 18 it.
 19 MR MATHIBEDI SC: Were the strikers
 20 armed?
 21 MR X: Yes there were three that were
 22 armed, that was Mambush, Obai and Anele. They were armed
 23 with firearms. Most of us were armed with pangas and
 24 spears. Mpele was carrying petrol.
 25 MR MATHIBEDI SC: Will you describe the

<p style="text-align: right;">Page 31117</p> <p>1 kind of firearms that were in the possession of some of the 2 strikers?</p> <p>3 MR X: Yes they were carried by some of 4 us, that was Mambush, Mpele and Anele.</p> <p>5 CHAIRPERSON: The question is what kind 6 of firearms did they have? Can you describe the firearms 7 to us?</p> <p>8 MR X: They were carrying the pistols.</p> <p>9 MR MATHIBEDI SC: Are you in a position 10 to help us with the colours of the firearms?</p> <p>11 MR X: The one that I've seen was red 12 here on top.</p> <p>13 MR MATHIBEDI SC: Who was in possession 14 of the red firearm?</p> <p>15 [14:50] MR X: It was Bhele.</p> <p>16 CHAIRPERSON: The last few minutes 17 there's been a development that I don't like and that is, 18 members of the – people here in the auditorium are making 19 comments, talking to themselves, talking to each other 20 while the evidence is being given. People are here to hear 21 the evidence, not to comment or make noises or discuss. So 22 please refrain from talking or making noises. If what I'm 23 now saying is not complied with, I shall have to take 24 serious steps but I don't want to do that because I think 25 it's important that everyone should have an opportunity to</p>	<p style="text-align: right;">Page 31119</p> <p>1 we went back to the mountain. By that time Bhele has 2 already burnt the car, pour petrol, burnt the car and throw 3 the container away. Those pieces of meat were given to the 4 inyanga who burnt it until it was ashes and then it was 5 burnt, the meat was burnt to ashes and it was mixed with 6 some muti to be used for, to lick at it, to strengthen the 7 men so that when they are going forward they don't become 8 afraid and turn back.</p> <p>9 MR MATHIBEDI SC: Chairperson, I think 10 there is a lot of information that the interpreter is 11 missing or losing along the way. Can we please just take 12 an adjournment.</p> <p>13 CHAIRPERSON: [Microphone off, inaudible]</p> <p>14 MR MATHIBEDI SC: That's correct.</p> <p>15 CHAIRPERSON: We'll take the tea 16 adjournment in three minutes. Can we go on for three more 17 minutes?</p> <p>18 MR CHASKALSON SC: Chairperson, can we 19 take the tea adjournment now? I think the widows of some 20 of the people who were killed are struggling with this 21 testimony and it may be an appropriate time to break.</p> <p>22 CHAIRPERSON: We'll take the tea 23 adjournment now for 15 minutes.</p> <p>24 [COMMISSION ADJOURNS COMMISSION RESUMES]</p> <p>25 [15:15] CHAIRPERSON: The Commission resumes. Mr</p>
<p style="text-align: right;">Page 31118</p> <p>1 hear and see the witness.</p> <p>2 MR MATHIBEDI SC: Sir, will you proceed 3 and tell us what happened during the march?</p> <p>4 MR X: When we came to the hostel, to the 5 top gate, the first gate, the security tried to talk to us 6 but we ignored them. They tried shooting but their guns 7 didn't work. Two security guards ran towards the car that 8 was next to the bus stop, a private car. Bhai and Anele 9 fired some shots. Bhele poured petrol in the car and 10 burned the car where there were securities. Bhai removed 11 one of the securities and put him down, Rasta stabbed him 12 with a spear and I also participated when the security was 13 already down.</p> <p>14 MR MATHIBEDI SC: Sir, what was your –</p> <p>15 CHAIRPERSON: He was saying something 16 before you interrupted.</p> <p>17 MR MATHIBEDI SC: Thanks, Chair.</p> <p>18 CHAIRPERSON: Yes, carry on, carry on, Mr 19 X.</p> <p>20 MR X: Bhele cut the chin and the tongue 21 off the security and put it in the plastic. Anele scooped 22 the blood with the bush knife and poured it in the plastic. 23 Anele took the firearm and the cell phone. Mambush took a 24 radio and a cell phone. Bhai took the firearm. We went 25 and passed by the NUM offices to find them not there, then</p>	<p style="text-align: right;">Page 31120</p> <p>1 Mathibedi.</p> <p>2 EXAMINATION BY MR MATHIBEDI SC (CONTD.): 3 Thank you, Chair. Chair, if we could go to bundle B, item 4 30, it's a new exhibit.</p> <p>5 CHAIRPERSON: Right, this is now exhibit 6 AAAA20. Which photograph are you going to refer to?</p> <p>7 MR MATHIBEDI SC: I'm going to refer to 1 8 and number 5.</p> <p>9 CHAIRPERSON: Alright, according to the 10 key photograph 1 indicates what is described as "the 11 firearm with magazine as found" and photo 5 indicates the 12 suspect. Yes, we've now got photo 1, which is the firearm, 13 black and white photograph, so we can't see colour, and 14 then according to the note at the foot of the key it says 15 "The firearm was photographed by me [that's by Warrant 16 Officer Viljoen] on the 25th of October 2012 at 8:52 at the 17 Phokeng Police Station at the request of Captain Carder of 18 the Rustenburg Criminal Investigation Service." And then 19 do we look at photograph 5 as well, Mr Mathibedi?</p> <p>20 MR MATHIBEDI SC: That's correct, Chair.</p> <p>21 CHAIRPERSON: Well we haven't got it on 22 the screen. Now there's a picture of the suspect who was 23 allegedly arrested on the charge, that's presumably a 24 charge of possessing the firearm.</p> <p>25 MR MATHIBEDI SC: That's correct, Chair.</p>

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1 Sir, do you have photo 1 with you, a coloured one?
 2 MR X: [Microphone off, inaudible] the
 3 photo.
 4 MR MATHIBEDI SC: You testified that
 5 Bhele had a red firearm. Do you still remember?
 6 MR X: Yes, Sir.
 7 MR MATHIBEDI SC: Now having had a look
 8 at photo number 1, are you in a position to comment,
 9 comment about the colours of the firearm?
 10 MR X: Yes, this colour looks like that
 11 colour of that firearm.
 12 MR MATHIBEDI SC: Chairperson, the part
 13 of the barrel of the –
 14 CHAIRPERSON: Yes, no, no, I see. For
 15 some reason the photograph on the screen is black and
 16 white, but the one that we've got in our bundles has got
 17 some coloration on it as it were on the barrel of the
 18 firearm, as well as on the trigger and the section just
 19 above the trigger.
 20 MR MATHIBEDI SC: Thanks, Chair. Will
 21 you please go to photo number 5?
 22 MR MPOFU: Chairperson, if we are
 23 expected to cross-examine this witness we'd like to follow
 24 what is being discussed. I think the rest of us are being
 25 kept away from the evidence –

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1 CHAIRPERSON: Sorry, have you not got a
 2 copy of the bundle?
 3 MR MPOFU: I do.
 4 CHAIRPERSON: Yes, well if you look at
 5 the picture in the bundle –
 6 MR MPOFU: I have.
 7 CHAIRPERSON: Alright, well –
 8 MR MPOFU: It's exactly like that one.
 9 CHAIRPERSON: Have you got a black and
 10 white one in your bundle?
 11 MR MPOFU: Yes.
 12 CHAIRPERSON: No well my bundle has got
 13 one that's got some colouring on it.
 14 MR MPOFU: That's why I'm saying you are
 15 privileged, Chair –
 16 CHAIRPERSON: I wasn't aware of that.
 17 Well then Mr Mathibedi is making a copy of it available to
 18 you, so when you cross-examine the witness you'll be able
 19 to do so effectively.
 20 MR MATHIBEDI SC: Sir, will you have a
 21 look at photo number 5? Do you know the person depicted in
 22 that photo?
 23 MR X: That is Bhele. We call him Bhele.
 24 His name according to the ID is Xola Bhele.
 25 MR MATHIBEDI SC: You testified about a

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1 person, you said Bhele had a red firearm. Is this the
 2 person that you're referring to?
 3 MR X: Yes, this is the person.
 4 MR MATHIBEDI SC: Chair – sorry, Sir.
 5 CHAIRPERSON: [Microphone off, inaudible]
 6 a colour photograph of him as well, Mr Mpofo?
 7 MR MPOFU: No, Chairperson, I – well, yes
 8 I do, of the red firearm, because this one doesn't show any
 9 red firearm.
 10 CHAIRPERSON: I don't think we should
 11 discuss it in the hearing of the witness, but possibly if
 12 you discuss it with Mr Mathibedi he may show you some
 13 colouring on the firearm which would be relevant, and we
 14 won't –
 15 MR MPOFU: Yes well Chair –
 16 CHAIRPERSON: We won't discuss it in the
 17 hearing of the witness at this stage.
 18 MR MPOFU: Well, Chairperson, the
 19 question was put at the hearing of the witness. He's being
 20 questioned about a red firearm. That's what Mr Mathibedi
 21 said. There's no red firearm here, so it must be done at
 22 the hearing of the witness because he also goes along with
 23 Mr Mathibedi.
 24 MR MATHIBEDI SC: Chairperson, I've made
 25 available to –

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1 CHAIRPERSON: According to the notes of
 2 my colleague Adv Hemraj the witness said there was red on
 3 the firearm and if you look at the photograph you will see
 4 in the spots that were discussed, he said, according to Adv
 5 Hemraj's notes he said red on the top as well. Now on the
 6 photograph you will see that there is colouring on part of
 7 the firearm, the places to which I referred, namely the
 8 trigger, above the trigger, and slightly on the barrel, and
 9 in fact if you see photograph number 2, which we haven't
 10 been shown, you will see – Mr Mathibedi, why haven't you
 11 shown photograph number 2? It's the other side of the
 12 firearm. Now of course black and white doesn't help
 13 anybody, but if you show Mr Mpofo a colour copy of
 14 photograph number 2 he may be assisted when he cross-
 15 examines to concentrate on –
 16 MR MATHIBEDI SC: Chair, I've made
 17 available to Mr Mpofo the one that I had in my possession
 18 which shows the colour.
 19 CHAIRPERSON: Alright, well then did you
 20 show him photograph 2 as well as photograph 1?
 21 MR MATHIBEDI SC: He's got the whole
 22 bundle, Chair.
 23 CHAIRPERSON: I see. Okay, fine. I
 24 understand Mr Pretorius is now going to put the colours on
 25 the screen, or a coloured copy of the photograph on the

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1 screen. But do we have to wait for that now? Should we
2 not carry on in the meanwhile?
3 MR MATHIBEDI SC: Thanks.
4 CHAIRPERSON: How long is it going to
5 take? Mr Mpofo, you've got your light on.
6 MR MPOFU: I'm sorry, Chairperson. I
7 thought you were going to refer back to me about the red
8 firearm. I make the –
9 CHAIRPERSON: No, no, you made the point
10 that when you come to cross-examine you have to be in a
11 position to understand the evidence to follow it and so on,
12 and black and white photographs didn't help you at all and
13 so anyway, you've now been given a copy of a coloured
14 version of the photograph. Whether that is –
15 MR MPOFU: Amounts to a red firearm –
16 CHAIRPERSON: - is a matter you'll deal
17 with –
18 MR MPOFU: Yes, that's correct, Chair.
19 CHAIRPERSON: - when you cross-examine.
20 MR MPOFU: Thank you.
21 CHAIRPERSON: So we've looked after you
22 for the time being. Yes, carry on, Mr Mathibedi.
23 MR MATHIBEDI SC: Thanks. Sir, you
24 testified that the security personnel fired at the
25 strikers. How many security personnel were there?

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1 MR X: I did not count the security
2 guards but there were quite a number.
3 MR MATHIBEDI SC: The firing that was
4 made by the security personnel, was it heavy?
5 MR X: They were firing rubber bullets.
6 MR MATHIBEDI SC: Are you in a position
7 to state was that the heavy fire that was directed at the
8 strikers by the security personnel or not?
9 MR X: They were aiming up in the air,
10 trying to scare us, but we did not retreat.
11 MR MATHIBEDI SC: How did the strikers
12 approach the security officers?
13 MR X: Approached them kneeling down in a
14 way we were instructed by the inyanga.
15 MR MATHIBEDI SC: I think the witness
16 said in a crouching position. Is that not –
17 MR QGIRANA: That's what I –
18 CHAIRPERSON: Carry on - sorry, before we
19 carry on, according to my notes we haven't actually
20 received exhibit AAAA20, unless my notes are wrong, but
21 perhaps Ms Pillay can help us.
22 MS PILLAY: Chair, we have marked AAAA20.
23 It's the key to the photos by AP Viljoen.
24 CHAIRPERSON: Okay, it is before us.
25 Good, thank you.

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1 MR MATHIBEDI SC: Sir, at the time that
2 the strikers attacked the security personnel, what were
3 they doing?
4 MR X: We were singing.
5 MR MATHIBEDI SC: I'm referring to the
6 security personnel. What were they doing at that stage
7 that the strikers attacked them?
8 MR X: They fired rubber bullets and ran
9 away.
10 MR MATHIBEDI SC: Firing rubber bullets
11 in which direction?
12 MR X: They were firing up in the air
13 because now no one of us was injured or shot at.
14 MR MATHIBEDI SC: You testified that Baai
15 and Anele fired. Do you remember that?
16 MR X: Yes.
17 MR MATHIBEDI SC: The firing was aimed at
18 who?
19 MR X: They were aiming at Fundi and
20 another man, there was two of them in a private car.
21 MR MATHIBEDI SC: Do you know if Mr Fundi
22 and the person that you've referred to in the private car,
23 if they were struck by the bullets or not?
24 MR X: Yes, Fundi was struck on the
25 forehead, on the left side of the forehead.

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1 MR MATHIBEDI SC: Now what was your
2 involvement in the attack on Mr Fundi?
3 MR X: I hit a blow with a panga on his
4 face whilst he was lying on the ground.
5 CHAIRPERSON: Where on his face?
6 MR X: On the face on the cheek, on the
7 side of the face.
8 CHAIRPERSON: Sorry, when you refer to
9 blow on the forehead, you said the left of the forehead but
10 you indicated on your right forehead. Which is correct?
11 Was he struck on the left forehead or the right forehead?
12 MR X: Mr Fundi was bleeding from the
13 forehead.
14 CHAIRPERSON: You showed with your two
15 fingers on the right side of the forehead, above the right
16 eye.
17 MR X: Yes, he was hit on the forehead.
18 I cannot remember exactly which side, what, where on the
19 forehead.
20 CHAIRPERSON: Because you indicated now
21 also left, above the left eye, so it's not clear. Anyway,
22 you say you can't remember where precisely it was, but you
23 say there was bleeding on the forehead. Did I understand
24 you correctly?
25 MR X: Yes, I cannot remember exactly

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1 where, but it was on the forehead.
 2 MR MATHIBEDI SC: Sir, where on the body
 3 did you hit Mr Fundi?
 4 MR X: On the face near or on the cheek,
 5 whilst he was lying on the ground, because when you're
 6 fighting you're not a spectator, you don't stand and watch.
 7 I was not a spectator. I was also fighting.
 8 MR MATHIBEDI SC: Chairperson, I'm going
 9 to refer to the graphic images of the security personnel
 10 who were killed.
 11 CHAIRPERSON: Before I give the warning
 12 that's required, Adv Hemraj wants to ask a question.
 13 COMMISSIONER HEMRAJ: Yes, you said
 14 earlier on that when the security tried shooting their guns
 15 didn't work. I'm not sure what you mean by that. Can you
 16 perhaps explain?
 17 MR X: The guns did not work because the
 18 inyanga said we will not be shot at as a result of the
 19 rituals we'd undergone.
 20 COMMISSIONER HEMRAJ: So there were no
 21 shots fired by those security persons?
 22 MR X: They fired but the bullets did not
 23 do any harm. It would come and just get stuck onto you
 24 like a bullet got stuck on the box when fired on the box.
 25 COMMISSIONER HEMRAJ: Thank you very

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1 much.
 2 CHAIRPERSON: I understand we're now
 3 going to see some very graphic pictures of the two Lonmin
 4 security guards who were killed on the morning of the 12th
 5 of August and those who were near and dear to them will
 6 find these pictures very distressing and will occasion them
 7 a great deal of emotional pain, so I ask that they be not
 8 shown until 30 seconds have expired from the time I stop
 9 speaking to enable anyone who wishes not to be present when
 10 these photographs are shown, to leave the chamber. The 30
 11 seconds starts now. The seconds are up.
 12 [15:35] MR MATHIBEDI SC: Thanks, Chair. I'm
 13 going to refer to exhibit L slide 28. Do you have it with
 14 you, sir?
 15 MR X: Yes, Chair.
 16 MR MATHIBEDI SC: What is depicted in
 17 this slide? Are you familiar with it?
 18 MR X: This is a private vehicle that was
 19 set alight by Bhele by means of petrol.
 20 MR MATHIBEDI SC: When was that?
 21 MR X: On the 12th of August 2012.
 22 MR MATHIBEDI SC: Can we proceed to slide
 23 number 29? Will you describe what is set out in that
 24 slide?
 25 MR X: This is the gentleman who was

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1 taken out of the car, had his chin chopped off and that was
 2 used by the inyanga and the car in the background is the
 3 car that was set alight. The government will never allow
 4 this, it will die if you see this happening in South
 5 Africa, somebody's flesh being taken off like that.
 6 MR MATHIBEDI SC: When did this happen,
 7 sir?
 8 MR NTSEBEZA SC: Mr Chair, I don't know
 9 whether it was translated but I think it was –
 10 MR X: On the 12th August 2012.
 11 CHAIRPERSON: Mr Ntsebeza wishes to say
 12 something. Yes, Mr Ntsebeza?
 13 MR NTSEBEZA SC: I think, I don't know
 14 whether it was translated in its literal sense or rather in
 15 its metaphorical but I think it was but I want to be sure
 16 that the witness had said government would die if this, or
 17 something like that.
 18 CHAIRPERSON: What exactly, just can you
 19 repeat for us what he said about the government?
 20 MR QGIRANA: The witness said the
 21 government would never allow something like this and yes,
 22 the government would die to see something like this
 23 happening in South Africa, it was so.
 24 MR NTSEBEZA SC: Thank you, Mr Chairman,
 25 that's what I wanted to be on the record.

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1 MR MATHIBEDI SC: Sir, would you have a
 2 look at slide number 30 and describe what is depicted in
 3 that slide?
 4 MR X: This is the gentleman whose chin
 5 and tongue were cut off by Bhele.
 6 MR MATHIBEDI SC: When did this incident
 7 occur?
 8 MR X: On the 12th August 2012.
 9 MR MATHIBEDI SC: Will you have a look at
 10 slide number 31? Are you familiar with what is set out in
 11 the slide?
 12 MR X: Yes, I remember this.
 13 MR MATHIBEDI SC: Will you please proceed
 14 and tell us what it is and when did this occur?
 15 MR X: This a gentleman who was burnt in
 16 the car on the 12th of August by Bhele who burnt the car.
 17 MR MATHIBEDI SC: Will you have a look at
 18 slide 32? Are you familiar with what is set out in that
 19 slide?
 20 MR X: Yes, I know this. This is the
 21 same thing.
 22 MR MATHIBEDI SC: The same thing
 23 referring to what, sir?
 24 MR X: This is still the private vehicle
 25 that was set alight on 2012.

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1 MR MATHIBEDI SC: Sir, are you in a
2 position to describe the firearms that were in the
3 possession of the two security officials that were killed?
4 MR X: It was two pump guns, pump action.
5 Those guns were taken to the mountain.
6 CHAIRPERSON: Do we need to see the
7 slides anymore? Do we need to see the slides anymore?
8 You're now talking about firearms, we don't have to see –
9 MR MATHIBEDI SC: Thanks, we can take it
10 off. Sorry, Chair.
11 CHAIRPERSON: - slides dealing with the
12 burning –
13 MR MATHIBEDI SC: What happened to the
14 firearms that were taken to the koppie?
15 MR X: Mambush and Xolani gave a report
16 back that they were kept at the mountain.
17 MR MATHIBEDI SC: What was the report all
18 about?
19 MR X: The report was that we went to NUM
20 offices, there was no-one there, the security personnel
21 tried to shoot at us and we have taken the firearms from
22 them and here are the firearms and that the muti was
23 working.
24 MR MATHIBEDI SC: What ultimately
25 happened to the two firearms?

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1 MR X: It was kept near, next to the
2 inyanga on the mountain.
3 MR MATHIBEDI SC: Sir, what – do you know
4 if the killing of the two security personnel in the
5 employment of Lonmin had any effect on the unprotected
6 strike?
7 MR X: It had an effect because who did
8 not believe in the muti came and underwent the rituals.
9 MR MATHIBEDI SC: Now when were the
10 rituals done of those who never believed?
11 MR X: They came in their numbers to
12 undergo the rituals, realising that the guns of the
13 security and the police were not working. They were
14 standing in a queue after taking off their clothes.
15 MR MATHIBEDI SC: When was that, sir?
16 MR X: That happened from the 12th until
17 the 14th the rituals were being done.
18 MR MATHIBEDI SC: Sir, I'm going to refer
19 you to exhibit L, slide number 34. Do you have it before
20 you?
21 MR X: Yes, I do.
22 MR MATHIBEDI SC: Are you in a position
23 to describe what is depicted in the slide?
24 MR X: Yes, these are the queues for the
25 rituals where muti was being consumed?

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1 MR MATHIBEDI SC: When was that, sir?
2 MR X: The rituals were taking place from
3 the 12th until the 14th. The workers came back believing
4 that the muti is working because the firearms were not
5 working.
6 COMMISSIONER HEMRAJ: Can I enquire where
7 you were while these rituals were being conducted on the
8 12th to the 14th?
9 MR X: I was present.
10 MR MATHIBEDI SC: Did the strikers that
11 performed the rituals on the 11th at any stage thereafter
12 perform further rituals?
13 MR QGIRANA: Performed on the?
14 MR MATHIBEDI SC: Did they perform
15 further rituals, the ones that performed rituals on the
16 11th?
17 MR X: They underwent the rituals once.
18 What happened thereafter, they would be sprinkled with the
19 Intelazi muti to revive the muti on them.
20 MR MATHIBEDI SC: Sir, on the 12th during
21 the night there is an incident that occurred at K4 shaft.
22 Where you present?
23 MR X: Yes, I was present.
24 MR MATHIBEDI SC: Will you proceed and
25 tell us how it came about that you should be involved in

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1 that incident?
2 MR X: We marched from the koppie to K4
3 where we set alight seven cars.
4 MR MATHIBEDI SC: Now before marching to
5 K4 shaft, was there any meeting where a discussion took
6 place?
7 MR X: Yes, the meeting that took place
8 was that the people who had consumed the muti, who
9 underwent the rituals, should go out and those who still
10 had to undergo the rituals remained on the koppie.
11 MR MATHIBEDI SC: What was discussed at
12 the meeting?
13 MR X: It was said they should go and
14 kill the people who were going to work, they should come
15 and join the strike.
16 MR MATHIBEDI SC: What time did the
17 meeting take place?
18 MR X: The meeting was held at about four
19 because we went to K4 late on the 12th.
20 MR MATHIBEDI SC: Are you in a position
21 to estimate the time of when the strikers went to K4 shaft?
22 MR X: It was late.
23 MR MATHIBEDI SC: Was it dark at that
24 stage?
25 MR X: Yes, it was a little bit dark.

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1 MR MATHIBEDI SC: And will you proceed
 2 and tell us what happened upon arrival? How many strikers
 3 went to K4 shaft?
 4 MR X: A lot, Mr Chair, I estimate about
 5 500.
 6 MR MATHIBEDI SC: Were the strikers
 7 armed?
 8 MR X: Yes, they were armed. There were
 9 firearms, pangas, spears.
 10 MR MATHIBEDI SC: Were you personally
 11 armed?
 12 MR X: Yes, I had a panga and a spear.
 13 MR MATHIBEDI SC: Upon arrival at K4
 14 shaft, what happened?
 15 MR X: We arrived there, people who saw
 16 us arriving ran away. Bhai cut the wire – Bhai cut off the
 17 fence, wire fence, with the pliers, pair of pliers. The
 18 other people used the gate and Mambush instructed the
 19 security to give way. The security personnel gave way. He
 20 took the radio and the phones off the security. I was
 21 carrying a five litre container containing petrol. Bob and
 22 myself were carrying five litre petrol containers. We set
 23 alight the seven cars as well as bikes at K4. We killed
 24 one person. That's a person I remember who was wearing a
 25 white T-shirt. That person was at the car park or parking

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1 lot.
 2 MR MATHIBEDI SC: How did you gain access
 3 onto the property?
 4 MR X: Again entrance through the opening
 5 that was cut with a pair of pliers.
 6 MR MATHIBEDI SC: What happened to other
 7 people who reported for duty?
 8 MR X: Some ran, some ran, others went to
 9 the places they were coming from, ran to those places where
 10 they were coming.
 11 MR MATHIBEDI SC: Did you personally
 12 assault anyone or any person who reported for duty?
 13 MR X: Yes, I rushed*19:50 or struck at
 14 this person we found alone because I was not a spectator
 15 watching this fight.
 16 MR MATHIBEDI SC: The person that you
 17 assaulted, where did you find him on the property?
 18 [15:54] MR X: He was already lying down on the
 19 ground. I hit him on the stomach area, the right-hand
 20 side.
 21 MR MATHIBEDI SC: With what did you hit
 22 or assault the victim?
 23 MR X: I stabbed at him.
 24 MR MATHIBEDI SC: Chairperson, I'm going
 25 to refer to a graphic photo of Mr Mabebe. Can the

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1 necessary warning be given?
 2 CHAIRPERSON: What is the gentleman's
 3 name again?
 4 MR MATHIBEDI SC: Mr Mabebe, Chair.
 5 CHAIRPERSON: Mr Mabebe. We're now going
 6 to see a slide of Mr Mabebe's dead body. I can imagine
 7 that will cause a great deal of distress to his family and
 8 his loved ones. I ask that it not be shown until 30
 9 seconds have expired from the time I stop speaking to
 10 enable those who feel that they will be distressed by this
 11 photograph, give them an opportunity to leave the chamber.
 12 30 seconds starts now.
 13 MR MATHIBEDI SC: Chair, I note it's
 14 almost 4 minutes before 4, in view of the fact that –
 15 CHAIRPERSON: I take it that the witness
 16 won't be able to describe –
 17 MR MATHIBEDI SC: Yes.
 18 CHAIRPERSON: - the assault on Mr Mabebe
 19 in the time available. So we will recommence tomorrow
 20 morning at 9 o'clock.
 21 MR MATHIBEDI SC: Thanks, Chair.
 22 MR MPOFU: Chair –
 23 CHAIRPERSON: The Commission will now
 24 adjourn.
 25 MR MPOFU: Chairperson, in view of the

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1 discussions that we previously had about the experts and so
 2 on, I'd like some clarity because it's going to affect my
 3 movements, particularly because I'm, as you know I have to
 4 do everything –
 5 CHAIRPERSON: I can answer your question.
 6 I understand from the representatives of the Human Rights
 7 Commission, whose witness Mr White will be the first expert
 8 to give evidence, that they've received a large number of
 9 documents today from the SAPS which the witness has to work
 10 through. So he will not be able to give evidence tomorrow;
 11 he will give evidence on Wednesday. So this witness it is
 12 anticipated will give evidence tomorrow, but on Wednesday,
 13 even if he hasn't finished in chief, Mr White will be
 14 interposed on Wednesday.
 15 MR MPOFU: Interposed, thank you,
 16 Chairperson.
 17 CHAIRPERSON: I understand that the only
 18 application to cross-examine had come from the SAPS and
 19 which is appropriate because most other parties would ask
 20 questions which would constitute sort of what one can
 21 describe as friendly fire, whereas the main attack on the
 22 witness would come from the SAPS. So we'll adjourn now
 23 until 9 o'clock tomorrow morning.
 24 [COMMISSION ADJOURNED]
 25 .

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