

# 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 295

6 NOVEMBER 2014

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1 [PROCEEDINGS ON 6 NOVEMBER 2014]  
 2 [09:03] CHAIRPERSON: The commission resumes.  
 3 Before we continue with the argument with the Human Rights  
 4 Commission, there's something I want to say that I  
 5 should've said yesterday. And that is that we've been very  
 6 impressed with the quality of the heads of argument we've  
 7 received from across the board from the parties and also  
 8 from the evidence leaders and the Human Rights Commission  
 9 who of course are not party in the strict sense. I'm  
 10 saying that without prejudging it and obviously we can't  
 11 accept everything that's in all the heads of argument  
 12 because there are a lot of contradictions between the  
 13 various parties and different contentions that we have to  
 14 give serious consideration to. But I must tell you that I  
 15 was, I and my colleagues were very impressed with the  
 16 amount of intense effort and work that's gone into the  
 17 heads, references to various aspects of the evidence and  
 18 make it much easier for us to handle the 40 000 paged  
 19 record than I fear it would be the case at the beginning.  
 20 And while I'm about it I also want to say how grateful we  
 21 are to the three parties, quasi parties, who led expert  
 22 evidence. That's the police who gave the evidence, Mr De  
 23 Rover, the Human Rights Commission who gave us the  
 24 evidence, Mr White and the Legal Resources Centre who gave  
 25 us the evidence of Mr Hendrickx. There's a substantial

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1 measure of agreement between them, the points of which they  
 2 differ. Obviously matters we have to carefully consider  
 3 but we feel more confident than we otherwise would've been  
 4 by the fact that we have the benefit of expert evidence  
 5 from these witnesses which makes a big difference in a  
 6 commission of this kind. Ms Le Roux, would you like now to  
 7 continue with your argument?  
 8 MS LE ROUX: Yes, thank you, Chairman.  
 9 Thank you for that expression of appreciation. Chair, if I  
 10 could start by just addressing an issue that arose  
 11 yesterday in the evidence leaders' address where my learned  
 12 friend, Mr Chaskalson referencing the alleged attack on  
 13 Papa11 and, Chair, this is dealt with in the evidence  
 14 leader's heads, page 39, paragraph 731.9 where the  
 15 submission is made that there is clear evidence of attacks  
 16 before the shooting on the SAPS, before the shootings on  
 17 the SAPS vehicles to the east of the kraal and that this is  
 18 evidence which has to be accepted even if you discount the  
 19 SAPS version of events relating to incidents 1 and 2. And,  
 20 Chair, the footnote reference there, it's footnote 1146  
 21 refers to the supplementary statements of Warrant Officer  
 22 Mamabolo which is KKK60 and Sergeant Matava which is MMM29.  
 23 Now, Chair, this is a submission that the human rights  
 24 commission strongly disagrees with and would like to draw  
 25 your attention to our submissions, page 99, paragraph A,

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1 where these self same members, Warrant Officer Mamabolo and  
 2 Sergeant Matava, the statements that are relied on by the  
 3 evidence leaders for their submissions are these officers'  
 4 supplementary statements. Their initial statements, we  
 5 submit, constitute dishonest evidence because there they  
 6 claimed that they were – so Constable Mamabolo alleged that  
 7 he had seen members led by Major General Naidoo climbing  
 8 over the rocks at scene two firing at protestors. He  
 9 called cease fire because he could see no threat, that his  
 10 calls were ignored. Constable Matava alleged that he  
 11 witnessed Major General Naidoo firing his pistol at a  
 12 protestor from the rocks. Yet neither of their initial  
 13 statements contained this highly relevant evidence and  
 14 their initial statements originally had absolutely no  
 15 evidence about Scene 2 and falsely claimed that Papa11 had  
 16 parked 150 metres away from Papa3. So given that glaring  
 17 inconsistency between the two statements, we would submit  
 18 that accepting the supplementary statement as clear  
 19 evidence would be an error by the commission. But in any  
 20 event at its highest the content of the supplementary  
 21 statements indicates evidence of an attack on property, the  
 22 tires of the Nyala. It's certainly not an attack on life,  
 23 the members within that Nyala and therefore it's  
 24 significant in terms of being able to justify any conduct  
 25 by the police and their use of force would certainly be

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1 minimal.  
 2 But, Chair, in addition, if you consider video V2  
 3 which is UUUU10.2, that's the video that follows the  
 4 movement of the strikers, leaving the koppie and around the  
 5 kraal. In that footage which follows them continuously  
 6 certainly by the lead group there is no approach made to  
 7 Papa11. There is no attempt to damage the tyres or any  
 8 other evidence of this alleged attack that is evident in  
 9 that footage and it does not appear to be a period of time  
 10 in that video footage where such a thing could have taken  
 11 place. So for all of those reasons we would respectfully  
 12 but strongly disagree with the evidence leader's  
 13 characterisation of that evidence as clear evidence that  
 14 could be accepted of attacks preceding the shootings.  
 15 Chair, having dealt with that, if I now can return to my  
 16 main address and it serves well to start with where the  
 17 Human Rights Commission's participation here, what its  
 18 always been founded on and that is Section 11 of the  
 19 Constitution which is the right to life together with the  
 20 right to human dignity as well as freedom and security of  
 21 the person. This is what is informed the Human Rights  
 22 based approach that we have presented to the commission.  
 23 The right to life of course is recognised and protected  
 24 both in domestic law as well as in all of the global human  
 25 rights instruments that South Africa is a party to and it's

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1 been described as the most fundamental right without which  
 2 all others are meaningless.

3 It has two components, both of which are  
 4 important because they provide some legal context to the  
 5 commission's work and they determine to some extent the  
 6 process by which it fulfils its mandate as set out in the  
 7 terms of reference. The first of these is to prevent the  
 8 arbitrary deprivation of life and, Chair, related to that  
 9 is the principle of prevention, precaution in these  
 10 circumstances that I addressed yesterday and will deal with  
 11 again later. But secondly a duty arises on the state to  
 12 investigate and ensure accountability where there has been  
 13 an arbitrary deprivation of the right to life. And the  
 14 requirements and nature of that investigation are relevant  
 15 to the commission's work. Because, Chair, we submit that  
 16 this positive obligation on the State is an obligation for  
 17 it to initiate an investigation that is formal, that is  
 18 independent, that is expeditious and that is focused on  
 19 looking at the justification if any for the use of force by  
 20 the State.

21 This commission is therefore the chosen  
 22 instrument to satisfy that duty and it's the instrument by  
 23 which an investigation has been conducted to ensure  
 24 accountability to combat impunity and to address the  
 25 indifference of the South African State and the police

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1 service in particular to the taking of life and the  
 2 violation of the right to life that occurred at Marikana.  
 3 So, Chair, all of this proceeds from the presumption that  
 4 the taking of life by the State is unlawful until proven  
 5 otherwise.

6 CHAIRPERSON: Human life by anybody,  
 7 whether by the State or anybody else is unlawful unless  
 8 proven otherwise. That's effectively what cases like  
 9 Mambaso and Felix decide.

10 MS LE ROUX: Correct, Chair. And  
 11 therefore this also means that there is a burden of proof  
 12 imposed on SAPS which we submit it has not discharged  
 13 before you. Chair, if I can then turn to address the two  
 14 related issues of the standard of proof in the commission  
 15 as well as the burden of proof and if I start with the  
 16 standard of proof that would be appropriate here and,  
 17 Chair, in this regard we associate ourselves not only with  
 18 the submissions by my learned friend Mr Budlender  
 19 yesterday, but also the extensively referenced and  
 20 researched submissions made by my learned friends for the  
 21 LRC in their heads of argument commencing at page 73. And,  
 22 Chair, the starting point when approaching standards of  
 23 proof in this commission would be the notion of flexibility  
 24 because it is not a court of law. It is not applying  
 25 slavishly either a criminal or a civil standard and there

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1 is no requirement that the same standard of proof be  
 2 applied to all questions that are before you. Since it  
 3 would be appropriate therefore to apply different standards  
 4 of proof for different issues, there are at least three  
 5 submissions that we make in this regard. The first is that  
 6 when you are fulfilling your terms of reference and  
 7 considering whether there are matters that should be  
 8 referred for prosecution or further investigation that  
 9 determination should be made once the standard of a prima  
 10 facie case is satisfied. This is the same standard used by  
 11 the National Prosecuting Authority when it entertains the  
 12 same question and we see no reason to deviate from that.  
 13 Secondly, Chair, the standard of proof to be applied to a  
 14 particular question, we submit, would need to be determined  
 15 by the amount of evidence available to you for  
 16 consideration. Therefore where the commission is confident  
 17 that it heard most or all of the evidence relating to a  
 18 particular issue, it may be appropriate to apply a higher  
 19 standard such as the balance of probabilities. However,  
 20 where it is clear that you have only heard part of the  
 21 evidence, a lower standard of proof would then be  
 22 appropriate while still discharging your mandate and  
 23 investigative duty. And, Chair, that lower standard of  
 24 proof has been described by the evidence leaders as  
 25 reasonable suspicion. To put it slightly more neutrally if

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1 you reached a reasonable conclusion on a particular issue,  
 2 that would be appropriate. Chair, the example we gave you  
 3 in the heads of argument relate to the allegations made by  
 4 Officers Myburgh and Swartz which we would submit are an  
 5 example of where you have not heard complete evidence in  
 6 relation to which version to choose between but there  
 7 certainly seems to be an issue were there further  
 8 investigation there. And on that reasonable conclusion or  
 9 reasonable suspicion that these allegations would benefit  
 10 from further scrutiny, they should be referred to the  
 11 appropriate authorities and institutions. And, Chair,  
 12 thirdly it would be appropriate to apply a lower standard  
 13 of proof where there has been practical hurdles to  
 14 obtaining this complete evidence on a particular issue.  
 15 Now those practical hurdles may simply be the hearing  
 16 procedures of the commission have not enabled us to hear  
 17 from absolutely everybody who may have had relevant or  
 18 material evidence to provide you in oral testimony.  
 19 However it could also be because a party before you has not  
 20 provided, either through refusal or some other failure to  
 21 provide you with all of the relevant evidence in its  
 22 possession and control. Chair, where parties before you  
 23 have not engaged in a full and open manner, we would submit  
 24 a lower standard of proof could be applied in reaching  
 25 findings adverse to that party. This is another way of

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1 saying that adverse inferences can be drawn against a party  
 2 where it was within its power to provide you with the  
 3 evidence and information necessary to determine a question  
 4 on a higher standard. It has refused or failed to do so  
 5 therefore a lower standard of proof is appropriate. Chair,  
 6 an obvious example there would be the appalling inadequacy  
 7 of many of the police statements that are before you.  
 8 Chair, in our heads we have made these submissions relating  
 9 to the standard of proof applicable here and we also used  
 10 an analogy to the standard of proof that's applicable in  
 11 inquest proceedings. We made that analogy because an  
 12 inquest serves a strikingly similar purpose to this  
 13 commission. It promotes public confidence and satisfaction  
 14 that any unnatural deaths will receive proper attention and  
 15 investigation. And that investigation is to not only  
 16 determine what happened, but also to determine whether  
 17 there are any measures that could prevent a reoccurrence of  
 18 those type of deaths as well as to bring those responsible  
 19 to account. Section 16.2 D of the Inquests Act provides  
 20 that whether a death was brought about by any act or  
 21 omission prima facie involving or amounting to an offense  
 22 on the part of any person is the standard that it applies.  
 23 We referenced the case of the Matthews Goniwe inquest in  
 24 our heads at page 880 where the judge held, the question is  
 25 simply whether there is evidence available which at a

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1 subsequent criminal trial may be held to be credible and  
 2 acceptable and if accepted, can prove that the death was  
 3 brought about by an act or omission involving or amounting  
 4 to the commission of a criminal offense by person or  
 5 persons.  
 6 So, Chair, to round off our submissions relating  
 7 to the standard of proof, it's simply to state that it is  
 8 not for this commission to make a final determination of  
 9 these type of issues and rights for all purposes, for all  
 10 questions in order to satisfy its terms of reference. It  
 11 may be appropriate that it discharges its investigative  
 12 duty and satisfies the quest for accountability here, but  
 13 applies a lower standard of proof to certain questions  
 14 where there are deficiencies in the evidence before you.  
 15 Chair, if I then turn to the related question of the  
 16 burdens of proof, we've all heard repeatedly that the facts  
 17 case before you is one of self or private defence. It has  
 18 two elements that need to be satisfied, the principle of  
 19 necessity where every shooter would have to establish a  
 20 genuine and reasonable belief of an immanent threat to life  
 21 and that a determination was made that lethal force was  
 22 absolutely necessary in the circumstances. And secondly  
 23 that SAPS would need to satisfy the principle of  
 24 proportionality which requires that lethal force used was  
 25 the minimum reasonably necessary in the circumstances to

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1 neutralise the perceived threat. Chair, it means that the  
 2 SAPS bears the burden of proving – Chair, it means that the  
 3 SAPS here bear the burden of providing justification for  
 4 its use of force at Marikana in both respects, necessity  
 5 and proportionality. For all the reasons set out in our  
 6 heads of argument we –  
 7 CHAIRPERSON: I didn't understand that  
 8 from the day the case opened, sorry, the day we started  
 9 sitting in the opening speeches I didn't understand Mr  
 10 Semenya to contend to anything differently. He said this  
 11 is our case, this is – we say the deaths were caused by  
 12 private defence or self defence and we will establish that.  
 13 That is –  
 14 MS LE ROUX: Yes, Chair.  
 15 CHAIRPERSON: - that was his attitude.  
 16 MS LE ROUX: But, Chair, it does mean  
 17 that it's therefore open to the commission, because we  
 18 submit that the SAPS have failed to discharge that accepted  
 19 burden in either respect, it is open to the commission to  
 20 find that that failure to discharge the burden establishes  
 21 a prima facie case that the killings and the use of force  
 22 were unlawful by the SAPS. Either or both because they –  
 23 CHAIRPERSON: Doesn't that follow from  
 24 the principle that some time, the terminology is not  
 25 entirely clear or consistent, but where a party bears an

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1 onus in the true sense that party also bears the risk of  
 2 non persuasion. In other words if it's not clear at the  
 3 end of the day whether the killings were justified, then  
 4 the – I know your argument is that it is clear they were,  
 5 but I'm dealing with the next logical stage in the matter.  
 6 If the commission is not persuaded then the risk of non  
 7 persuasion lies with the police, therefore that leads to a  
 8 finding against them. That seems to be trite law, I would  
 9 imagine. The terminology isn't always clear and some  
 10 people say that there's no onus in a commission. Well  
 11 that's not entirely true because if someone, if there's a  
 12 risk, if there's a situation which is not clear and some  
 13 party must in the circumstances bear the risk of non  
 14 persuasion, consequences flow from that. But, anyway, I'm  
 15 sorry to interrupt you but that seems to be the way the  
 16 proposition should be stated accurately so it can be better  
 17 understood.  
 18 MS LE ROUX: Yes, Chair, and of course  
 19 where the party had not discharged that burden the finding  
 20 would not only be that there is evidence of unlawful  
 21 killing, but that would then provide a basis for the  
 22 commission when it applies its mind to whether there are  
 23 further prosecutions or further investigations which flow,  
 24 we would submit that would satisfy the prima facie standard  
 25 of proof that would then be applicable. Chair, I'm

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1 relieved to hear you state that the SAPS have accepted that  
 2 as their burden because in their heads of argument which –  
 3 CHAIRPERSON: They did at the beginning  
 4 as I understood it –  
 5 MS LE ROUX: Yes, Chair, and –  
 6 CHAIRPERSON: - and I would've thought  
 7 that in the light of the case like Mambaso and Felix they  
 8 were right to adopt that attitude.  
 9 MS LE ROUX: But, Chair, it remains that  
 10 in paragraphs 96 to 99 of the SAPS heads of argument dealt  
 11 with in reply by the Human Rights Commission at page 12  
 12 from paragraph 23 onwards in our replying submissions, the  
 13 SAPS indicates there, submits there that no adverse  
 14 inference can be drawn from the fact that SAPS have not  
 15 called every SAPS member who fired a shot as a witness to  
 16 give oral evidence and that it seems to somehow amount to a  
 17 reliance on the commission's ruling that the SAPS bears no  
 18 responsibility to justify the proportionality of every shot  
 19 fired.  
 20 CHAIRPERSON: I must confess, I don't  
 21 have – I don't understand the problem that you have with  
 22 that submission of the police. The, if the police had said  
 23 we have been challenged now to call every person who fired  
 24 a shot, every shooter, I'm not quite sure, I presume some  
 25 clever person has done the sums but I'm not quite sure how

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1 many shooters there were but there were lots and lots and  
 2 lots of shooters and I don't know whether we would've  
 3 beaten Lord Saville's record, but certainly we would've sat  
 4 here for a very, very long time hearing every shooter  
 5 coming and being cross-examined from every angle by all the  
 6 parties who come here and asked all sorts of interesting  
 7 relevant and uninteresting and irrelevant questions. So I  
 8 don't criticise the police for not calling everyone. If  
 9 they wanted to call everyone I don't know whether my  
 10 medical advisors would've been satisfied with a decision of  
 11 theirs to do that and I wouldn't be the only person in that  
 12 category. And I indicated in the ruling I gave that I  
 13 didn't expect them to call everyone. I gave them the  
 14 assurance and I'm quite satisfied it was entirely justified  
 15 in doing so but no inference would be drawn against them  
 16 because they didn't propose doing what would've been  
 17 totally unreasonable.  
 18 [09:23] And in fact impossible regarding the time limits  
 19 in which we were operating. The statements are before us,  
 20 of course, of most of the people, the fact that  
 21 particularly important people may not have been called is  
 22 obviously in a different category. But the mere fact – how  
 23 many people were there who fired shots, Mr Semenya, 300,  
 24 400, what's the number?  
 25 MR SEMENYA SC: It is 160 odd.

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1 CHAIRPERSON: 160, well how many  
 2 witnesses did we have, about 59 wasn't it?  
 3 MR SEMENYA SC: Indeed, Chair.  
 4 CHAIRPERSON: 59 and how many of the  
 5 shooters came and gave evidence?  
 6 MR MPOFU SC: And zero at scene 1.  
 7 MR SEMENYA SC: I thought you were  
 8 addressing me, Chair.  
 9 CHAIRPERSON: Sorry what did you say, Mr  
 10 Semenya? I didn't hear that. Share the joke with me.  
 11 MR SEMENYA SC: No, no I say I thought  
 12 you're addressing me, now I'm hearing zeros and numbers and  
 13 whatever else coming from there.  
 14 CHAIRPERSON: Well your learned friends  
 15 are trying to help you. Anyway the point of the matter was  
 16 that we couldn't have had all the shooters. We had a lot  
 17 of evidence about shooting, General Naidoo for example was  
 18 a shooter who came and gave evidence for example and there  
 19 were some others. But the fact of the matter is that you  
 20 can't, in my opinion and I'm indicating that clearly now.  
 21 So if you want to try to persuade me I'm wrong you must do  
 22 so, you can't say because the police didn't call every  
 23 shooter you must draw an inference against them because  
 24 you're expecting the police to behave in a way which would  
 25 be totally subversive of the expeditious – you know one of

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1 the things you said was a tribunal of this kind, if  
 2 tribunal is the right word, investigating body of this kind  
 3 should do various things and one of them was proceed with  
 4 expedition. Well we tried to proceed with expedition, some  
 5 people may say that sitting for two years showed that we  
 6 didn't comply with that obligation. If we tried to be too  
 7 expeditious of course, then we might have avoided making  
 8 all sorts of discoveries that we actually made along the  
 9 way. But certainly the results would have been so totally  
 10 removed from expeditious that I hesitate to think of what  
 11 adjective would be appropriate.  
 12 MS LE ROUX: Yes, Chair and I must be  
 13 clear about where we have a disagreement with the SAPS that  
 14 is addressed in our reply. We certainly do not challenge  
 15 the Commission's ruling. We understand, however, from the  
 16 heads of argument from the SAPS that their interpretation  
 17 of the ruling is that the failure to provide oral evidence  
 18 is a basis on which they can be excused from having adverse  
 19 inferences drawn against them. And in response to that we  
 20 say the failure to have oral evidence does not lift your  
 21 burden of justification. You needed to put up written  
 22 statements that satisfied and demonstrated both necessity  
 23 and proportionality and you failed to provide evidence in  
 24 any form that would discharge that burden. That's the  
 25 point –

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1 CHAIRPERSON: I can understand that, but  
 2 that's another argument altogether. In other words  
 3 provided the shooters have given evidence albeit in writing  
 4 rather than orally from the witness chair one must look at  
 5 what they say, whether they say it in writing or say it  
 6 orally. I understand that argument and if one assumes that  
 7 what's in their written statements is what they would have  
 8 said in the witness chair and they would have said nothing  
 9 else then of course one can deal with that evidence on the  
 10 basis that one would have done if that evidence had been  
 11 given orally. There isn't a problem with that surely.

12 MS LE ROUX: Yes, Chair and that is our  
 13 only argument, that is the only point, that it relates to  
 14 whether they've discharged their burden not just because  
 15 they couldn't bring witnesses to this room, but because  
 16 they failed to put up any evidence that the Commission  
 17 could use to find that the use of force had been justified.  
 18 Chair, I'd like to them move on to address some of the  
 19 issues that are addressed in part 4 of our heads of  
 20 argument which commence at page 16. The first three of  
 21 those relate to three consequences that we submit must  
 22 follow from the deficiencies of SAPS evidence before you as  
 23 well as its general approach to the Commission. And Chair,  
 24 first and fundamentally to these consequences is the SAPS  
 25 failure to engage in a spirit of full and frank disclosure

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1 with the Commission. We would submit that the SAPS case  
 2 before this Commission ha been characterised by a culture  
 3 of denial and impunity and a failure to engage in the  
 4 spirit of full and frank disclosure. We've submitted in  
 5 the heads the details of what we submit is deliberate  
 6 misleading of the Commission on a number of key issues as  
 7 well as the concealment of vital evidence. Moreover –

8 CHAIRPERSON: I don't want to stop you, a  
 9 good deal of the material covered in this part of your  
 10 heads has already been dealt with by Mr Chaskalson and –

11 MS LE ROUX: Yes, Chair and I don't  
 12 intend to repeat it.

13 CHAIRPERSON: So you don't have to  
 14 traverse it again, those facts are before us.

15 MS LE ROUX: Yes, Chair.

16 CHAIRPERSON: Whether the inference that  
 17 the evidence that you seek asks us to make, to draw is one  
 18 that can appropriately be drawn is a matter that presumably  
 19 will be dealt with later. But the instances of alleged  
 20 lack of candour and lack of co-operation and concealment  
 21 and so forth those are before us.

22 MS LE ROUX: Yes, Chair.

23 CHAIRPERSON: For what they're worth.

24 MS LE ROUX: And what we will submit is  
 25 that this all ties back to the fundamental submission that

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1 the Human Rights Commission makes before you which is the  
 2 need to hold the SAPS accountable as an organisation.  
 3 Because we heard from Mr De Rover, the SAPS's own expert as  
 4 to the resistance and obstacles that he encountered to  
 5 disclosure, to reflection and to any redress. His picky  
 6 phrase was that lessons learnt were considered as mistakes  
 7 made and we know from the statements made at the time by  
 8 the SAPS leadership that a very clear message was sent that  
 9 no mistakes were made, that was nothing that could have  
 10 been done differently, that there was nothing to account  
 11 for. And we submitted that those were premature,  
 12 irresponsible and wrong because, Chair, it's one thing for  
 13 the leadership of the SAPS to have been concerned for the  
 14 morale of an organisation in the aftermath of a tragic  
 15 event. But it's quite another to publicly exonerate the  
 16 entire organisation unequivocally without first conducting  
 17 even a cursory investigation.

18 Chair, the SAPS also and you have all of the  
 19 evidence and all of the references, but it also committed  
 20 itself to itself in private defence case without any real  
 21 knowledge of what had happened at scene 1 or scene 2, no  
 22 investigation, no debriefing. This set the tone for the  
 23 participation in this commission process which to use the  
 24 phrase of one of the reports that we refer to in our heads  
 25 of argument, "this is the proverbial blue wall of silence"

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1 that the police erect in the aftermath of an event where  
 2 they would need to be held accountable. And there are many  
 3 bricks in that wall. Mr Chaskalson covered several of  
 4 these, but it's the failure to debrief. The meeting at  
 5 Roots which not only produced a discredited exhibit L, but  
 6 seemed to mould the SAPS into one that was designed to be  
 7 consistent and faithful to a self and private defence case  
 8 with no recognition of wrong doing. At Roots none of the  
 9 measures were taken that may have shielded the SAPS against  
 10 these claims of collusion, those are set out in our heads  
 11 at page 74. And ultimately documents that were presented  
 12 to the Commission as contemporaneous were in fact drafted  
 13 at Roots. We then had the fortuitous disclosure of the  
 14 Scott hard drive with its treasure trove of contemporaneous  
 15 documents and the documents that show up this creation of  
 16 evidence later at Roots. Then we have all of the  
 17 discredited –

18 CHAIRPERSON: It wasn't entirely  
 19 fortuitous, it was a result of pressure which was a  
 20 culmination of a long and obviously many, many hours of  
 21 hard work, so fortuitous is the wrong word.

22 MS LE ROUX: And Chair, it culminates  
 23 with the key false claims in the police case which are  
 24 summarised in a table on page 82 of our heads of argument.  
 25 These are set out in more detail commencing from page 76.

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1 But, Chair, if I can briefly go through those five key  
 2 false claims. The first is the claim that the plan had  
 3 been devised and approved on the 14th of August as part of a  
 4 comprehensive planning process with input from various  
 5 commanders and that the decision to implement stage 3 was  
 6 taken on the 16th of August in response to an escalation of  
 7 the threat by the strikers. We know that's false, we know  
 8 that there was no plan, we know it was devised under  
 9 significant time pressure with no input from POP  
 10 commanders, that the decision to implement that was taken  
 11 at the NMF without any reference to the operational  
 12 leadership at Marikana.

13 The second key false claim is that prior to the  
 14 SAPS firing live ammunition at scene 1 the SAPS had  
 15 defended themselves against two previous attacks, that they  
 16 had less lethal methods including water canon, tear gas and  
 17 stun grenade. Chair, we now know there were no previous  
 18 attacks by the strikers on the police lines and the SAPS in  
 19 their heads of argument and replies seem to accept that  
 20 there is no incident 1 and no incident 2. Similarly the  
 21 less than lethal measures were not used against the lead  
 22 group and those that were used against them were used in a  
 23 way that inappropriately and ineffectively drove them  
 24 towards the TRT line. The third false claim is that the  
 25 SAPS fired live ammunition for only eight seconds and then

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1 stopped in response to a call for ceasefire. When fact we  
 2 know that the volley lasted for 12 seconds with  
 3 intermittent shots from R5 rifles and potentially side arms  
 4 continuing for more than a minute. And that the calls for  
 5 ceasefire commenced within 4 seconds and are ignored.  
 6 Fourthly we know that the claim that the JOC members and  
 7 the operational commander were unaware of the shooting,  
 8 they were unaware of the deaths or the serious injuries at  
 9 scene 1 or scene 2 until approximately twenty past four.  
 10 Where now we know that in fact the JOC was aware of the use  
 11 of live ammunition at scene 1, aware of the high  
 12 probability of deaths and injuries and was aware of this  
 13 before scene 2 had commenced. And finally there was the  
 14 false claim that scene 2 occurred as various units  
 15 approached koppie 3 in order to carry out the disperse,  
 16 disarm and arrest plan and responded with live ammunition  
 17 to life threatening attacks by the strikers when in fact  
 18 and as acknowledged by certain of the SAPS witnesses seemed  
 19 to have occurred because of a complete breakdown in  
 20 commanded control and the creation of a situation of  
 21 dangerous cross fire. In addition the SAPS witnesses have  
 22 provided you with evidence of at least one unlawful  
 23 execution style killing of a striker. There is no adequate  
 24 explanation for at least 14 deaths and it appears that most  
 25 likely those 14 deaths were caused by recklessly fired and

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1 stray bullets. So, Chair, in sum and in addition the SAPS  
 2 failed to comply with explicit discovery obligations.  
 3 These are set out in the annexures to our heads of argument  
 4 as well as canvassed at page 85, section 1.5 of our heads.  
 5 Discovery obligations were met with various inadequate  
 6 responses. One would be there are no such documents. We  
 7 would discover belatedly there are in fact such documents.  
 8 We were told that requests were made and nothing responsive  
 9 was produced. Witnesses then came and testified that they  
 10 were never asked. So the deficiencies and the failure to  
 11 comply with discovery obligations similarly has contributed  
 12 to the lack of evidence before you by the SAPS. And  
 13 finally there's the failure to provide adequate statements  
 14 or statements at all. Chair, the inadequacy of the  
 15 statements is canvassed at page 91, section 1.6 of our  
 16 heads and the failure to provide statements for several  
 17 members at all who were at Marikana and may have assisted  
 18 the Commission is addressed at page 100, section 1.7. But  
 19 what I need to say about the provision of statements by the  
 20 SAPS is two further things. The first is that the SAPS  
 21 seem to drip feed this Commission, so statements dribbled  
 22 in over the two years of this inquiry, deadlines were  
 23 missed, new deadlines were set. Those were missed, third  
 24 deadlines were set, those were missed, assurances were  
 25 given that statements were in production, never produced.

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1 But, Chair, secondly it seemed that the drip feed  
 2 was in response to damaging facts emerging in the  
 3 Commission. So it was an exercise in damage control not to  
 4 come forward fully and frankly to disclose everything that  
 5 any SAPS knew that could have been of assistance to you.  
 6 Indeed the way Mr De Rover was treated is a manifestation  
 7 of the same blue wall of silence. Despite being assured  
 8 that he would have unfettered access he was never told the  
 9 full story either. So, Chair, not only has there been a  
 10 deliberate concealment of evidence, but there has been a  
 11 knowing presentation of a false case. And we submit that  
 12 there are seven evidential consequences that follow and  
 13 that inform the findings that are possible by the  
 14 Commission. These are set out in part 2 of heads as well  
 15 as addressed by my learned friends for the Legal Resources  
 16 Centre. Chair, these seven consequences are the following.  
 17 Firstly, the SAPS or any person, any party before the  
 18 Commission should not be permitted to benefit from its own  
 19 failure or refusal to provide adequate evidence to the  
 20 Commission. Secondly, the Commission can have no  
 21 confidence that it has all relevant documentary material in  
 22 the possession of the SAPS. Thirdly, it can have no  
 23 confidence that the SAPS witnesses have disclosed all  
 24 relevant information within their knowledge to the  
 25 Commission during their testimony. Fourthly, as a result

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1 where the only evidence available to the Commission is that  
 2 of a SAPS witness and there are prima facie reasons to  
 3 doubt that evidence it should be treated by the Commission  
 4 with the utmost caution. Where there is SAPS witness  
 5 evidence that is contradicted by contemporaneous material,  
 6 whether it's video, photo or documentary we would submit  
 7 that that material needs to be preferred over anything that  
 8 was testified to. Where there is no evidence provided by  
 9 the SAPS on matters that ought to have been within its  
 10 members' knowledge we submit that adverse inferences can  
 11 and should be drawn as to why that evidence wasn't provided  
 12 and what it may have shown. And finally where it's  
 13 impossible to reach a finding on a balance of probabilities  
 14 because of these deficiencies and failures in the provision  
 15 of evidence by the SAPS we would submit that a lower  
 16 standard of proof is appropriate and it would be acceptable  
 17 for the Commission to reach conclusions based on a  
 18 reasonable suspicion or a reasonable conclusion standard.

19 So, Chair, those are the consequences of the  
 20 SAPS's failure to engage in a full and frank manner with  
 21 the Commission. The second consequence of its approach in  
 22 the Commission relates to the failure to retain  
 23 contemporaneous records for decision making and planning  
 24 and your findings in relation to those. These are  
 25 addressed in part 4, section 2, page 120 of our heads. And

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1 essentially, Chair, I won't go through the evidence again,  
 2 but we know there is an admitted failure by the SAPS to  
 3 maintain adequate record keeping of the decision making and  
 4 the planning of the Marikana operation. As a result of  
 5 that where we do have contemporaneous documentation it  
 6 should be preferred to any evidence by a witness, but even  
 7 then we should treat it with some caution because of the  
 8 fabrication of documentation that we know from the  
 9 disclosure of the Scott hard drive. So similarly when the  
 10 Commission is coming to its findings with respect to  
 11 decision making and planning we would caution the  
 12 Commission that these principles would probably need to be  
 13 applied to that when it tries to reach its findings.

14 Thirdly and finally, Chair, there's a further  
 15 consequence which relates to the inadequacy of statements  
 16 for your conclusions about necessity and proportionality on  
 17 the use of force. Again the approach is to justify each  
 18 and every shot, to justify the start and continuation of  
 19 shooting. Very practically what this means is we need to  
 20 understand the justification for firing bullet 1 in second  
 21 1. We need to understand the justification for firing at  
 22 second 12 or second 60. We need to understand the  
 23 justification for firing bullet number 25 by an individual  
 24 member. All of this both singly and cumulatively would  
 25 need to be put before you in order for the SAPS to have

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1 discharged its burden to justify the use of force. And  
 2 Chair, in this regard I must pause to note our submissions  
 3 relating to a matter that received some attention during  
 4 the course of the Commission proceedings, namely, the  
 5 status of warning statements. Chair, we submit that it's  
 6 entirely irrelevant because the point is that this  
 7 Commission does not have adequate evidence to find that the  
 8 SAPS justified the use of force. The fact that some of  
 9 that evidence before you is in the format of a warning  
 10 statement is not the point. The point is the failure by  
 11 the SAPS to provide all information. Of course there is a  
 12 point to be made about warning statements which is where an  
 13 officer has decided to waive his right to self-  
 14 incrimination. He must do more than just admit to a prima  
 15 facie case of unlawful killing. He must provide sufficient  
 16 and extensive detail that would be able to establish the  
 17 necessity and proportionality of his use of force.

18 CHAIRPERSON: It's not an entirely  
 19 accurate approach, the warning statement was not, the  
 20 warning statements were not made for the purpose of the  
 21 Commission. They were made by the persons who made them in  
 22 circumstances where they were warned by IPID that they were  
 23 suspects, they were told of their rights and they were then  
 24 invited to make statements. They obviously would have  
 25 borne in mind that if they are charged criminally the

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1 statements will go before the court and the court will then  
 2 have to consider the question of whether they're guilty or  
 3 not in the light, inter alia, of what they said or didn't  
 4 say in their statements. And it may well be that failure  
 5 to mention things that are important combined with whether  
 6 they mentioned the things that are not so important would  
 7 be a factor which the criminal court would bear in mind in  
 8 assessing the case against a particular deponent. Or a  
 9 statement maker, I'm not sure whether they were made under  
 10 oath, I think they were put under oath later.

11 [09:43] But it's a different thing where you have a  
 12 witness who's asked to make a statement for this Commission  
 13 and told that the statement you make can't be used against  
 14 you in any subsequent criminal case unless you commit  
 15 perjury in which case you can be charged with perjury.  
 16 That kind of statement is more susceptible I would imagine  
 17 of the kind of inferences being drawn than the case of a  
 18 mere warning statement. I'm not saying that a warning  
 19 statement's irrelevant, I'm not saying you can't take it  
 20 into account, but clearly you've got to be practical and  
 21 you've got to be fair. And you've got to bear in mind the  
 22 circumstances in which the warning statement is made, what  
 23 the maker of the statement thinks will happen to his  
 24 statement compared with a statement made for the purpose of  
 25 this Commission where that section of the regulation



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1 applies that the statement can't be used against him at all  
 2 in any subsequent criminal case. That's a distinction that  
 3 one cannot ignore unless one wants to be unfair and I hope  
 4 that by this time it's clear that that's the last thing we  
 5 want to be in this Commission. [Inaudible] by people in  
 6 circumstances which I suppose we must forgive in this  
 7 regard being had to the poor picture, but unfairness is not  
 8 our business.

9 MS LE ROUX: Chair, let me then bring it  
 10 down to two submissions. Chair, the point on warning  
 11 statements is essentially two submissions. The first is  
 12 where the right to self incrimination has been waived and  
 13 sum account was given. The Commission can scrutinise that  
 14 account for its failure to reveal the detail necessary to  
 15 establish self or private defence. But in addition and  
 16 more importantly the SAPS has had two years to supplement  
 17 those statements with statements for this Commission having  
 18 explained to its members that they will not be admissible  
 19 in subsequent criminal proceedings.

20 CHAIRPERSON: That's a different  
 21 question. I thought I'd indicated it to you already I can  
 22 understand that submission. You put up a statement, it's a  
 23 warning statement made in circumstances where the statement  
 24 maker thinks that all that's going to happen to this  
 25 statement is it's going to put before a criminal trial if

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1 I'm ever charged, that's all. But we are dealing with a  
 2 different situation where a statement has been made which  
 3 is designed only for criminal cases. That person is now  
 4 expected or the police are now expected to give a full  
 5 explanation of what happened and all they can put before us  
 6 is this statement made in other circumstances with other  
 7 considerations in mind. And if there are gaps then those  
 8 are gaps that may well be important with regard being had  
 9 to the particular circumstances. Whether they're important  
 10 in assessing the case against the particular policeman who  
 11 may or may not have been approached and asked whether he  
 12 wishes to supplement his statement or whether simply they  
 13 can be used broadly, as it were, against SAPS as a body is  
 14 of course another question that we'd also have to consider.  
 15 I think I've endeavoured to indicate to you what I  
 16 understand your submission to be and if I've indicated it  
 17 correctly well then fine. If I've indicated a  
 18 misunderstanding then I'm afraid you must be patient with  
 19 me and take me a little bit further down the road you want  
 20 me to go.

21 MS LE ROUX: No, Chair, I think we're  
 22 entirely on the same page in terms of the two submissions,  
 23 but the nature of the warning statements and the failure of  
 24 the SAPS to supplement, but of course they are related  
 25 because to discharge your terms of reference you need to

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1 scrutinise and the relevant ruling of the Commission  
 2 relating to the evidence of the shooters states that each  
 3 and every statement of each and every shooter will be  
 4 scrutinised in this way. So the failure by the SAPS to  
 5 provide you either with a supplemental statement or some  
 6 other way in which they could have cured the deficiencies  
 7 in the warning statements leaves you with only evidence  
 8 from these individual shooters that seems to reveal  
 9 unlawful killing and no defence. That's why it does have a  
 10 consequence in terms of your findings and the potential  
 11 referral for prosecution or further investigation that what  
 12 is before you may be a basis for that referral and its  
 13 consequence the warning statements deficiencies themselves  
 14 to reveal a defence, but in addition the failure to  
 15 supplement.

16 COMMISSIONER HEMRAJ: Do you say that the  
 17 guidelines that have been laid down in many decision about  
 18 the approach, the contents of warning statements that we  
 19 shouldn't be mindful of those cautions and apply another  
 20 standard to them?

21 MS LE ROUX: No, Commissioner Hemraj, our  
 22 submission is merely – at the moment with respect to the  
 23 overwhelming majority of shooters the evidence you have is  
 24 warning statements. The explanation for the deficiencies  
 25 of those warning statements and their failure to reveal a

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1 defence may be a result of there being warning statements.  
 2 But then for your purposes there was a burden on the SAPS  
 3 to supplement that evidence and provide you with the detail  
 4 that would have revealed self or private defence by those  
 5 individual shooters. Otherwise when you, as the  
 6 Commission, evaluate those statements, trying to determine  
 7 whether you need to refer people for further investigation  
 8 or prosecution all you have is a body of statements that  
 9 reveal unlawful killing and no defence. Certainly we  
 10 accept their status as a warning statement, but once it's  
 11 been scrutinised through your eyes, discharging your  
 12 mandate it has these consequences for those individual  
 13 officers and the SAPS as a whole.

14 CHAIRPERSON: There's a further problem  
 15 that you haven't touched on and that is – this was a point  
 16 that was made clearly in the evidence leaders' submission.  
 17 In relation to the killings, well basically there are two  
 18 kinds of cases that can follow, one would be a civil case  
 19 and one would be a criminal case. The criminal case the  
 20 onus is on the state to prove beyond a reasonable doubt, in  
 21 the civil case the onus is on the defendant to establish on  
 22 the balance of probabilities that the killing was justified  
 23 and proportional and so forth. Now we are considering the  
 24 case to the point of view of referring the matter of a  
 25 particular shooter to the prosecution authorities it's with

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1 a view to a prosecution being instituted. So that's also  
 2 got to be factored in, but when one is considering the  
 3 matter as to whether the police itself is liable for a  
 4 killing and even an individual policeman were civilly  
 5 liable ex delicto for a killing, that, of course, is a  
 6 different matter. I understand your argument fully in  
 7 relation to the civil level, the civil liability, the  
 8 police civil liability, even of the particular shooter.  
 9 But your argument seems to me prima facie, forgive my  
 10 saying it, to involve some kind of over simplification when  
 11 one deals with the question of potential criminal liability  
 12 which would be the subject of a referral. But of course  
 13 the standard doesn't have to be very high for that because  
 14 as you say all one needs is a prima facie case. One  
 15 assumes that the DPP would have an extra investigation  
 16 done. IPID would resume their investigation where they  
 17 stopped about two years ago and investigate further and the  
 18 decision would ultimately be taken on all the information  
 19 which is available. But it's not quite as simple, on the  
 20 criminal level I would suggest, as you put it, I think we  
 21 understand each other. Am I correct?  
 22 MS LE ROUX: Chair, my instructions in  
 23 this regard are obviously that the Human Rights Commission  
 24 is very conscious to respect the mandate both of this  
 25 Commission as well as of the NDP and IPID when determining

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1 the potential range of offences and the potential  
 2 individuals which should be referred to those institutions  
 3 for prosecution. So beyond the submissions that I can make  
 4 on the applicable standard of proof with respect to a prima  
 5 facie case unfortunately I'm unable to assist the  
 6 Commission any further with respect to identifying –  
 7 CHAIRPERSON: You made a valiant attempt  
 8 to assist us and we're grateful for your efforts.  
 9 MS LE ROUX: Thank you, Chair. Chair, if  
 10 I can then move onto the topic covered in part 4, section 6  
 11 commencing at page 171 of our heads of argument. This is  
 12 the approach to expert evidence that was placed before the  
 13 Commission by three parties and the transformation of Mr De  
 14 Rover. Chair, I hope it will be accepted as fairly  
 15 uncontroversial that expert evidence is required for the  
 16 Commission to satisfy paragraph 1.2 of the terms of  
 17 reference that policing, public order policing and public  
 18 order policing of violent protest are areas of expertise  
 19 being their lawyers –  
 20 CHAIRPERSON: Did I not say that in my  
 21 introductory remarks this morning?  
 22 MS LE ROUX: Yes, Chair.  
 23 CHAIRPERSON: Are you persuade me that  
 24 what I said is not correct?  
 25 MS LE ROUX: No, Chair, I'm just

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1 repeating it.  
 2 CHAIRPERSON: Do you think I need  
 3 repetition, do you think I've forgotten what I said? These  
 4 concurring judgements that the leading Johannesburg bar he  
 5 used to specialise in before he was elevated to higher  
 6 status –  
 7 MS LE ROUX: Chair, if I start with the  
 8 expert of the Human Rights Commission, Mr Gary White, we  
 9 would submit that he is qualified, credible that his  
 10 evidence was well referenced and he demonstrated that he  
 11 was fully informed with respect the relevant and material  
 12 evidence on which his opinions were formed. These are  
 13 canvassed in detail in the heads and I do not intend to  
 14 repeat those. But, Chair, what is critically important is  
 15 that all three experts that appeared before this Commission  
 16 are in agreement, or broadly speaking agree with the  
 17 overwhelming majority of Mr White's criticisms of the SAPS  
 18 operation. So in light of that consensus there is no  
 19 reason for the Commission to reject any part of his  
 20 analysis and criticisms of the operation.  
 21 CHAIRPERSON: It's not as simple as that  
 22 either. There's no reason to reject anything he says which  
 23 the others – you would say which the others agree with.  
 24 Clearly if they don't agree on a particular topic then one  
 25 doesn't accept what he says without more because he said

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1 it, one has to analyse what he says and what the contrary  
 2 view is and try to come to a conclusion as to what's  
 3 correct.  
 4 MS LE ROUX: Yes, Chair.  
 5 CHAIRPERSON: Expert evidence after all  
 6 is the giving of, stating of opinions and giving of reasons  
 7 therefore which are such as to satisfy the court or the  
 8 Commission that the opinions stated by the expert are  
 9 correct. A mere say so of an expert takes the case no  
 10 further.  
 11 MS LE ROUX: Yes, of course, Chair. But  
 12 this consensus between the three experts therefore  
 13 underpins their recommendations which similarly are  
 14 strikingly, strikingly echo and mirror each other. And  
 15 Chair, there are the two key opinions expressed by Mr White  
 16 that we submit should underpin the Commission's findings  
 17 and these underpin his detailed criticisms with respect to  
 18 the operational failure arising because of poor  
 19 intelligence planning, briefing and command and control.  
 20 And it's the two critical questions that he came back to  
 21 again and again during his evidence. Why was the plan  
 22 implemented then and why was this the plan? So, Chair,  
 23 what this also means is that his recommendations which I'll  
 24 address at the end are practical measures that he has  
 25 proposed to combat not only some of the operational

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1 deficiencies that he observed, but also to promote  
 2 accountability within the SAPS. These practical steps  
 3 would, he hopes, change the SAPS's culture of impunity  
 4 indifference to one of accountability. If we turn then to  
 5 the evidence of Mr De Rover what is striking in the  
 6 submissions by the SAPS is that they studiously and  
 7 conspicuously ignore that the fatal blows to their case  
 8 were administered by their own expert. There's a disavow,  
 9 if they're attempting to disavow his agreements with Mr  
 10 White and Mr Hendrickx that simply doesn't help the SAPS  
 11 before the Commission because Mr De Rover's demolition of  
 12 the SAPS is not a mere inconvenience that they can step  
 13 over and continue as before. Because what you have before  
 14 you is evidence from a qualified policing expert and if we  
 15 just highlight three particular elements that should  
 16 concern the Commission and attract its attention. The  
 17 first was his conclusion that there was what he called  
 18 associative threat perception at scene 1. That's officers  
 19 firing because others are firing, not because they observe  
 20 a threat. Silence from the SAPS on that conclusion. He  
 21 identified nine victims at scene 2 that he says were killed  
 22 by what he called incidental fire. Silence from the SAPS  
 23 on that opinion and finally his time with us was spent in  
 24 large part describing the organisational obstructionism  
 25 that he encountered. Silence from the SAPS on how they

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1 treated their expert and we now note from his  
 2 recommendations provided to you that he appears to no be  
 3 independent from the SAPS and no longer a consultant to  
 4 them.  
 5 So, Chair, once we accept Mr De Rover's  
 6 qualifications and his agreement with Mr White we then turn  
 7 to his independent recommendations which mirror those of Mr  
 8 White. And we would therefore suggest that they are a  
 9 further reason why that raft of recommendations proposed by  
 10 the three experts should be carefully considered and  
 11 adopted by the Commission. Chair, finally if I could deal  
 12 with the question of the approach to the video evidence  
 13 that was produced by CALS in collaboration with SERI for  
 14 the families. This is set out in detail at part 4, section  
 15 7 commencing at page 201 of our heads of argument. And  
 16 Chair, to quote the evidence leaders they describe this as  
 17 one of the most important pieces of real evidence before  
 18 this Commission and Chair, what struck us in the SAPS's  
 19 heads of argument particularly page 69 and onwards is that  
 20 there seems to now be some agreement from the SAPS in  
 21 relation to what the videos show in certain critical  
 22 respects. So for example not only do they rely on the  
 23 videos, but they seem to accept that there is no incident  
 24 1, page 70, paragraph 165 of their heads. No incident 2 as  
 25 it was described in exhibit L, paragraph 166 of their heads

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1 and then paragraph 170 onwards they accept the splitting of  
 2 the group into what we called the main group who turn away  
 3 from the police lines, the kraal edge group that are pushed  
 4 towards the kraal by the POP and then the front group of 12  
 5 who come around into the TRT fire. And this turning of the  
 6 group and splitting of the group seems to now be accepted  
 7 by the SAPS in reliance of the videos. But, Chair, there's  
 8 one final point to make with respect to the weight and we  
 9 would submit significant weight that should be accorded to  
 10 the video evidence and it's this. That the SAPS put up  
 11 what we can only describe as fairly slap dash objections.  
 12 Bold statements with no referencing or detail that we were  
 13 able to deal with in any meaningful way. We've attempted  
 14 to respond point by point in annexure F to our heads of  
 15 argument, but it appears that the thrust of the objection  
 16 of the SAPS to the videos related chiefly to the  
 17 annotations that appeared on the video. But, of course,  
 18 that's a question of weight, it's not a question of  
 19 admissibility or anything like that. The Commission will  
 20 view those videos, it will accord the way it decides to  
 21 record to the description annotations. It is not something  
 22 that calls for the rejection of the video because the  
 23 Commission will verify where the annotation says this is  
 24 PAPA2 it in fact is. So with respect and in light of our  
 25 detailed response to the criticism in annexure F and

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1 nothing from the SAPS in reply to that we would submit that  
 2 the evidence should be accepted and accorded significant  
 3 weight by the Commission.  
 4 Chair, I'd like to turn next to the next topic  
 5 which is addressed in parts 9 and 11 of the heads of  
 6 argument in detail and try to get through this fairly  
 7 quickly. And Chair, this is where we would apply the  
 8 principle of prevention and precaution to what we know from  
 9 the experts and from the factual evidence where the  
 10 failures in intelligence decision making, planning and  
 11 briefing in the SAPS operation. So drawing together the  
 12 principle of prevention and precaution with the factual  
 13 findings extensively detailed in the heads of argument.  
 14 Just to orientate ourselves again the principles of  
 15 prevention and precaution requires those in command of  
 16 policing operations in which higher levels of force are  
 17 anticipated as a possibility to plan and command those  
 18 operations in such a way as to minimise the risk of the  
 19 need to use lethal force. Where a policing operation such  
 20 as this resulted in multiple deaths the question is not  
 21 simply was lethal force used in legitimate self or private  
 22 defence or was it used with any other justification. But  
 23 also to ask was every step taken to avoid a situation in  
 24 which lethal force could be used during the planning and  
 25 command of that operation. Chair, if we start with the

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1 intelligence failures, these are set out in part 9, section  
 2 2 of the heads of argument. Again the critical submission  
 3 by the Human Rights Commission and by Mr White is with  
 4 respect to how the limited intelligence that was obtained  
 5 was not taken account of in the planning of the operation.  
 6 It did not seem to feed through –  
 7 CHAIRPERSON: Another point that the  
 8 evidence leaders made as well is that the intelligence  
 9 people had great problems in gathering information which  
 10 one could readily understand. Nevertheless they obtained  
 11 information which was important and was vital to be borne  
 12 in mind when the plan was drawn up. The evidence leader's  
 13 complaint to the end.  
 14 [10:02] It was not so much that the intelligence  
 15 gathering was defective but it was the evidence gathered  
 16 wants in mind and applied taking into consideration when  
 17 the plan was drafted. That of course is really a different  
 18 question, isn't it? It's not really a complaint that goes  
 19 under the heading of "Evidence Gathering". It really goes  
 20 under the heading of "Use of Information Gathered", isn't  
 21 it?  
 22 MS LE ROUX: Precisely, Chair. And that  
 23 is Mr White's point in this regard. So the questioning of  
 24 the evidence leaders yesterday, we spent fair amount of  
 25 time on trying to identify the individuals that may have

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1 been responsible for the intelligence not feeding through  
 2 to that operation and while the commission obviously may  
 3 want to make factual findings in that regard or make  
 4 findings in that regard we would submit based on Mr White's  
 5 opinion that is the SAPS that failed. It is those  
 6 processes within the organisation that failed.  
 7 So the failures may well be those of individual  
 8 officers who were tasked with taking account of  
 9 intelligence, feeding it back to the relevant people so  
 10 that they could take it into account in the planning and  
 11 command of the operation, but it's the SAPS' failure as an  
 12 organisation that we would submit the focus of the  
 13 criticism should be. Chair, just so that it's helpful when  
 14 the transcript is reviewed of course we're referring to the  
 15 discussion yesterday where Brigadier Engelbrecht and Major-  
 16 General Mpembe's roles were discussed in detail. Their  
 17 individual conduct may be relevant to the commission's  
 18 question but we would submit and Mr White's evidence is  
 19 that it's the failure in the process that is the reason why  
 20 intelligence failures are relevant to the operation and the  
 21 principle of prevention and precaution.  
 22 CHAIRPERSON: I'm not sure that this  
 23 expression –  
 24 MS LE ROUX: Relates most to.  
 25 CHAIRPERSON: Sorry, I'm sorry to

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1 interrupt you. I'm not sure this expression of  
 2 intelligence failure is a fair one in the circumstances  
 3 because it implies that Brigadier Engelbrecht for example  
 4 and those working under him failed to do what they  
 5 should've done and they could've done what they should've  
 6 done if they had done the right thing which is by no means  
 7 self-evident I would've thought. It's a different question  
 8 as to if one were to say that there's no base – I'm not  
 9 saying this is so. I'm just putting a prima facie point  
 10 here – that it may well be that the intelligence gatherers  
 11 did the best they could. It may well be the information  
 12 they got was all the evidence a) that they could get and b)  
 13 that was needed for the purposes of making further  
 14 decisions.  
 15 It may also be that the mistake was to decide to  
 16 have the tactical option in the afternoon of Thursday the  
 17 16th. It shouldn't have happened in the light of the  
 18 information. The information may well have been of such a  
 19 nature as to indicate that it was impossible to conduct the  
 20 tactical operation on the Thursday afternoon without an  
 21 unavoidable amount of bloodshed which would've meant that  
 22 the operation shouldn't have taken place then and that  
 23 other methods should've been adopted, or alternatively it  
 24 should've been carried out later, but I don't think it's  
 25 fair to talk about evidence failures. Other expressions

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1 may well be appropriate.  
 2 MS LE ROUX: Chair, if I could adopt the  
 3 language that Mr White uses in his recommendations, it's  
 4 the failure to have an intelligence-based plan. So Chair,  
 5 the detail of that failure to ground the planning and  
 6 command of the operation in the known intelligence is set  
 7 out in our heads, page 287, paragraph 2.1.6. Mr White  
 8 referred to that on the 11th of August Brigadier Engelbrecht  
 9 receives the reports from the intelligence handler that  
 10 there's going to be attacks that night and forwards the  
 11 information to Major-General Mpembe with the intention of  
 12 deploying visible policing. Nothing happens. On the 14th  
 13 of August –  
 14 CHAIRPERSON: Again that raises the  
 15 matter we discussed yesterday also and that is that it's  
 16 not clear to me what General Mpembe should've done that he  
 17 didn't do. He was on leave. The evidence seems to  
 18 indicate that he passed it onto the acting provincial  
 19 commissioner who would've – with the expectation which I  
 20 imagine would've been justified that the necessary would be  
 21 done with the information. So I'm not sure that General  
 22 Mpembe can necessarily be criticised and I don't think, I'm  
 23 not sure if Brigadier Engelbrecht can be criticised either.  
 24 There may well be other people who may be the subject of  
 25 criticism but that's a different matter.

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1 MS LE ROUX: And Chair, I must just be  
 2 clear, we're not criticising the individuals who did manage  
 3 to obtain intelligence. The criticism is against the  
 4 process that didn't feed that through so that the plan  
 5 could be based on and take account of and be cognisant of  
 6 the intelligence.

7 CHAIRPERSON: Well, again that may be an  
 8 oversimplification. It may well have been fed through. It  
 9 may have been that those responsible or the person  
 10 responsible for drafting the plan could do nothing about  
 11 it. If he was told you have to have a plan that we're  
 12 going to use at half past one, going to put up at half past  
 13 one, never mind what the intelligence said even though the  
 14 intelligence may say we shouldn't go this afternoon but  
 15 you've got to go this afternoon. There's got to be a plan.  
 16 Again the criticism as you framed it may not be justified.  
 17 It may be that the person who drafted the plan was very  
 18 well aware of the intelligence. It may well be that's part  
 19 of the explanation why he sat the whole morning and he  
 20 wasn't able to produce anything in writing, but these are –  
 21 and can't remember in fact what happened so he says on that  
 22 morning because he spent a morning looking at the wall in  
 23 desperation. That may be what happened. So to criticise  
 24 him for not feeding the intelligence into his plan may with  
 25 respect not be a proper approach, not a fair one.

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1 MS LE ROUX: But Chair, again the target  
 2 of the criticism is not individuals and it's not  
 3 exclusively cropped to only look at the 16th. If you look  
 4 at what's set out in paragraph 2.1.6 we have on the 11th of  
 5 August a report that Brigadier Engelbrecht receives,  
 6 forwarded to Major-General Mpembe, no response in visible  
 7 policing as a result. 14th of August we get the names of  
 8 some of the strikers that are visible in the footage from  
 9 the 13th, unclear what was done with any of that  
 10 information. During the entire week of the 9th to the 16th  
 11 we have Brigadier Victor interviewing people and with a  
 12 view to obtaining information to possibly identify  
 13 witnesses and suspects. None of that seems to have come  
 14 through to the crime intelligence officers who were part of  
 15 the planning team. Lieutenant-Colonel Scott confirms that  
 16 his intelligence –

17 CHAIRPERSON: I'm sorry to interrupt you.  
 18 The trouble with that is, maybe it's something we should've  
 19 looked at but it occurs to me as you put the proposition up  
 20 it may be that the people who were identified were among  
 21 the 50 who stayed on the koppie the whole time and didn't –  
 22 you remember most of them used to go, used to come in the  
 23 morning, go home for lunch, come back in the afternoon, go  
 24 home in the evening, but the evidence is that about 50 of  
 25 them stayed there the whole time if you remember. Now, if

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1 the people who were identified as people to be arrested  
 2 were among the 50 then one can understand – as I say we  
 3 didn't investigate this but it's an inference that may be  
 4 drawn as a reasonable possibility.

5 It may be that they said, look, we can't arrest  
 6 these people until we've done dispersal which is going to  
 7 be done, and of course if they'd done the early morning  
 8 operation which was planned on the 14th then it may well be  
 9 that they would've arrested those people but these are  
 10 matters which were overtaken by events and we didn't  
 11 investigate, maybe we should've done, but I would be  
 12 unhappy to found the criticism on consideration of the  
 13 kinds you've put to us in view of the fact that those  
 14 aspects weren't investigated. And it's all very well to  
 15 say you're criticising SAPS, you're not criticising  
 16 individuals but, you know, SAPS operates through  
 17 individuals. SAPS isn't an incorporeal presence of its own  
 18 that sort of wafts over the field and does things. It  
 19 operates through the hands and legs and brains of  
 20 individuals and the criticism inevitably relates to those  
 21 individuals so we must not be unfair to the individuals  
 22 concerned.

23 MS LE ROUX: Of course, Chair, but  
 24 precisely because we hope to prevent a reoccurrence of  
 25 Marikana by improving the systems and the processes that

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1 other individual officers will have to occupy those roles,  
 2 that's why we're looking at it from the systemic point of  
 3 view. But Chair, all I can ask is that I refer you again  
 4 to what is set out in paragraph 2.1.6 which details the  
 5 intelligence that was undertaken during that week. PT5 is  
 6 the full extent of what fed through and that deficiency is  
 7 what the target of the criticism is. Chair, the second  
 8 systematic criticism that Mr White makes of the operation  
 9 utilising the principle of prevention and precaution as the  
 10 foundation related to decision making and this is set out  
 11 in part 9, section 3 of our heads.

12 CHAIRPERSON: Is this going to be a  
 13 fairly long exposition because I was proposing to take the  
 14 first comfort break at about quarter past 10 after we've  
 15 sat for an hour and a quarter which is what we normally do,  
 16 but I delegate to you the power to indicate when we'll take  
 17 the first adjournment.

18 MS LE ROUX: Chair, if I could just round  
 19 out this point, I will try to do it in the three minutes  
 20 that remain but the key on decision making is again why go  
 21 then and why go with this plan. And this relates, the nub  
 22 of this criticism also relates to the submission that we  
 23 make that the risks of multiple deaths by the SAPS were  
 24 both foreseeable and foreseen and you'll recall the 12  
 25 pieces of evidence that were put to Mr De Rover, these are

<p style="text-align: right;">Page 38750</p> <p>1 set out commencing at page 301 of our heads of argument,  2 paragraph 3.3.1. Those 12 pieces of evidence Mr De Rover  3 accepted that the order to disarm the strikers, the  4 decision to proceed, carried such high risks that the order  5 itself may have been unlawful. So the decision making that  6 preceded the move to the tactical phase in light of these  7 12 pieces of evidence we would submit demonstrated that the  8 SAPS foresaw that lethal force was likely to be used and  9 therefore applying the principle of prevention and  10 precaution should have taken even more steps to ensure that  11 there were ways to minimise or eliminate the risk that  12 force is going to be necessary.</p> <p>13 Chair, if we just briefly run through what those  14 12 pieces of evidence were, it was that force had had to be  15 used on the Monday, the 13th of August, secondly Lieutenant-  16 Colonel Scott's anticipation that force was likely to be  17 necessary, thirdly that the intelligence that was available  18 had suggested that the strikers were likely to resist and  19 believed that the police would not shoot them, fourthly  20 that this mind-set of invincibility that was ascribed to  21 the strikers was taken over into the planning in the risk  22 assessment that was made, fifthly that there was  23 information suggesting there were firearms within the  24 possession of the strikers, sixthly none of the JOCCOM  25 members who came to give evidence to the commission</p>	<p style="text-align: right;">Page 38752</p> <p>1 bloodshed and in fact a serious fire fight on the, when the  2 plan was carried out. Whether it was Brigadier Calitz who  3 did it or who requested the 4 000 rounds or Lieutenant-  4 Colonel Merafe on his own, off his own bat, is something  5 that's the subject of dispute. And one of the problems we  6 have is that neither of them were separately represented so  7 that there was in conflicts between them on the issue and  8 it's unfortunate that we don't have someone arguing for  9 Calitz as to why the finding shouldn't be made against him  10 and someone arguing for Merafe that the finding shouldn't  11 be made against him, but it doesn't matter at the level  12 that you're busy with.</p> <p>13 A senior official, officer, either a brigadier or  14 a lieutenant-colonel, obviously thought there's going to be  15 a serious fire fight and asked for 4 000 rounds. And  16 Brigadier Van Zyl clearly thought mortuary vans would be  17 needed, four of them nogoal, and hence he asked. Of course  18 they didn't come and the 4 000 rounds of ammunition was  19 sent back but that doesn't alter the fact that the fact  20 that they were asked for is evidence of foresight of  21 serious trouble and potential bloodshed. What is the most  22 important one I would've thought is the last, the third  23 last one, the antepenultimate one in your list because  24 there you will remember the Goldstone commission booklet or  25 book on the Regulation of Gatherings Act or Bill, in bill</p>
<p style="text-align: right;">Page 38751</p> <p>1 indicated any serious expectation that the so-called  2 militant group would voluntarily disarm and disperse.</p> <p>3 The seventh piece of evidence is that the  4 intelligence noted that the mineworkers were in possession  5 of dangerous weapons that they would decline to surrender  6 and that they were prepared to resist the police and fight  7 if their demands were not met. The eighth piece of  8 evidence is the reports of serious threats made from the  9 15th through the 16th towards the SAPS, ninth that Major-  10 General Mbombo was recorded on the 14th saying that if the  11 strikers didn't surrender then it's blood. And her oral  12 evidence was that this warning, that she was warned in the  13 morning that it was likely that live ammunition would be  14 used. Tenth is that Lieutenant-Colonel Scott testified he  15 was mindful that tactical option would elicit a violence  16 response from strikers and that he didn't want to send SAPS  17 members into a blatant death trap. Eleventh was that  18 Brigadier Van Zyl on the morning of the 16th of August  19 requested four mortuary vans and finally that 4 000 extra  20 rounds of R5 ammunition were ordered.</p> <p>21 CHAIRPERSON: The last two factors that  22 you mentioned indicate there was foresight and I remember  23 putting that in terms to Mr De Rover and that was something  24 that he didn't appear to be aware of until it was put to  25 him to indicate that two senior people anticipated</p>	<p style="text-align: right;">Page 38753</p> <p>1 form, said one thing you've got to do is you've got to  2 consider the things that could happen in descending order  3 as it were of probability and have a plan in place to deal  4 with each of them. And what this one indicates is that  5 Scott foresaw the possibility that the POP people couldn't  6 handle the matter with less lethal force, that they would  7 in fact have to flee for their lives into their Nyalas and  8 the TRT people would have to be in place to deal with that  9 contingency and the only way they could deal with it was by  10 firing, using their R5s. So that factor in itself is very  11 important at the planning level as to what was foreseeable  12 and what was done to cater for that foreseeable  13 contingency, but I'm sorry if –</p> <p>14 MS LE ROUX: And Chair, on that  15 restatement of the principle of prevention and precaution  16 perhaps we should take the adjournment.</p> <p>17 CHAIRPERSON: Yes, it sounds like a  18 proposition that's difficult to resist. We'll take a 15  19 minute adjournment.</p> <p>20 [COMMISSION ADJOURNS COMMISSION RESUMES]  21 [10:37] CHAIRPERSON: The Commission resumes. Ms  22 Le Roux.</p> <p>23 MS LE ROUX: Thank you, Chair. Chair,  24 before we took the break I was just rounding out the 12  25 pieces of evidence on which we rely for saying that it was</p>

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1 foreseeable and foreseen that lethal force was likely to be  
 2 used during the operation yet the decision making went  
 3 ahead regardless. The next component of Mr White's  
 4 criticism of the operation that is relevant to the  
 5 application of the principle of prevention precaution is  
 6 that the plan itself was negligent. This is addressed in  
 7 detail in our heads commencing at page 311 part 9 section  
 8 4. But essentially the criticism is that in order to  
 9 ensure that the strikers would disarm the plan required 60  
 10 TRT members to respond proportionately to any resistance  
 11 that they met, given that they only had R5 assault rifles.  
 12 It was quite clear that any response was going to have to  
 13 use lethal force to ensure compliance with the desire to  
 14 disarm the strikers. The other deficiencies of the plan  
 15 identified by Mr White relating to the roll out of the  
 16 barbed wire and the like, I am not going to canvass in oral  
 17 argument.

18 Chair, we then get to the criticisms relating to  
 19 briefing, which commence in our heads at page 324 and these  
 20 are threefold in essence. The first is the inadequacy of  
 21 the briefing provided to members. The second is the  
 22 problematic setting of the briefing where Lieutenant-  
 23 Colonel Scott was having to brief off the computer screen  
 24 image, no written notes or plans that were available to the  
 25 commanders being briefed. And then thirdly, the clear

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1 evidence of misunderstanding and confusion on some  
 2 fundamental elements of the plan that resulted. So then  
 3 finally, when it comes to command and control of the  
 4 operation we submit that that too was negligent. The facts  
 5 of admission is that command and control broke down  
 6 entirely during the operation but they blamed that on  
 7 radios essentially. But the fact is that the operation was  
 8 not under proper and appropriate or effective command and  
 9 control. So given all of these failings in planning and  
 10 command, international and domestic human rights law would  
 11 require the Commission to conclude that all the deaths  
 12 caused by police on 16 August were firstly unlawful,  
 13 secondly in breach of the principle of prevention and  
 14 precaution, and these findings are appropriate regardless  
 15 of whether the firing of shots by individual SAPS members  
 16 may have been justified. And of course, Chair, there is  
 17 insufficient evidence before you of any of that  
 18 justification.

19 Chair, if I turn then to one of the essential  
 20 questions that has occupied the commission, with respect to  
 21 the policing operation on 16 August. It's whether the  
 22 officers who fired their weapons acted in legitimate,  
 23 private and self-defence or putting it another way, were  
 24 they under attack by armed and aggressive strikers at scene  
 25 1? Now our submission is that there was no attack. The

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1 attack in one of its formulations by the SAPS is that they  
 2 intended to attack the police but then, Chair, it is  
 3 striking that the police zone that was to be protected by  
 4 barbed wire was never entered by the strikers. This police  
 5 zone was demarcated with the deployment of police resources  
 6 on its outer perimeter by the barbed wire Nyalas, yet for  
 7 significant amount of time that barbed wire hadn't been  
 8 deployed. It wasn't the barrier that was protecting the  
 9 police zone and the strikers skirt those resources. They  
 10 never entered the police zone. this police zone that held  
 11 the people that they were seeking to attack.

12 Chair, there was some discussion yesterday  
 13 relating to the perception of an attack as the strikers  
 14 rounded the kraal. We have obviously addressed this  
 15 extensively in our heads in parts 10 and 11 but there's the  
 16 counterbalance to the police eye view which we get from the  
 17 Reuters footage and that's the strikers' eye view of that  
 18 front group who come around the kraal. And we would submit  
 19 that frankly most of that group of 12 would see the heels  
 20 of the man in front of him. So the ability for them to be  
 21 launching an attack in some co-ordinated fashion simply is  
 22 not proved by the video footage at least of their movement.

23 Which Chair, brings me to the issue of common  
 24 purpose or single intent and the de-individualisation of  
 25 the group that the SAPS reply on for the justification for

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1 the shooting. And this is addressed in detail in part 4  
 2 section 4 of our heads of argument. And this was because  
 3 the nature of the threat, if any, posed by the strikers and  
 4 their intent is obviously a critical issue for the  
 5 Commission to resolve. As we understand the SAPS case,  
 6 it's that they all or at least a core group of around 3 to  
 7 400 individuals were militant, were violent, were highly  
 8 organised, shared a common intent to kill and attack  
 9 police, and were emboldened further in this enterprise by  
 10 the effects of muti. Facing a group like that the TRT  
 11 could, we do accept, could have reasonably but erroneously  
 12 perceived a threat. But that is not the evidence before  
 13 this Commission. The Human Rights Commission accepts that  
 14 there may be individuals within that core group that were  
 15 violent and that were prepared to use extreme violence to  
 16 achieve their goals. We would also accept there was a  
 17 degree of co-ordination and organisation within it and that  
 18 that level of co-ordination and organisation increased over  
 19 the events of that week in August. But it is not possible  
 20 for the Commission to extrapolate from that evidence that  
 21 there was a single intent shared by all those that were  
 22 shot by the police. Chair, there's simply little to no  
 23 reliable evidence before the Commission of this, for all of  
 24 the reasons set out commencing at page 135 of our heads, we  
 25 submit that the evidence of Mr X is so unreliable that it

1 should be rejected in totality. And Chair, related to this  
 2 are the evidence leaders' submissions relating to single  
 3 intent and Mr Chaskalson very helpfully yesterday clarified  
 4 their submissions with respect to putative self-defence  
 5 which are addressed in our reply, page 4, paragraph 6 to  
 6 12. And Chair, we would accept at scene 1 that the lead  
 7 group of 12 people who come around the kraal that from the  
 8 perspective of the TRT officers, at the immediate moment,  
 9 the immediate sighting of these strikers as they come  
 10 around the kraal, in second 1, they may have perceived a  
 11 threat which may have justified bullet 1. But within four  
 12 seconds there is a dust cloud, within four seconds there  
 13 are calls for cease fire, yet up to a minute later we are  
 14 still having R5s discharged and we have 328 rounds  
 15 discharged in total in this period of time. Add to this,  
 16 Mr De Rover's conclusion that he sees associative threat  
 17 perception, people firing because others are, and the  
 18 deficiency of all of the shooter evidence before you from  
 19 scene 1, we would submit that there has simply not been  
 20 sufficient justification for the extent of the use of live  
 21 ammunition and lethal force at scene 1.

22 The SAPS then seem to try to bolster their  
 23 justification by saying that there was evidence of threats  
 24 from the strikers. Chair, we deal with this from page 142  
 25 of our heads where we submit the following two critical

1 submissions. The first is that the number and the ferocity  
 2 of these threats have been greatly exaggerated by the SAPS.  
 3 You will recall in the heads we traced through the  
 4 exaggeration that is introduced into what the Lonmin  
 5 translator recalled from his original statement to how it  
 6 appears in exhibit L and in the police case. And Chair,  
 7 what we also note in Mr White's evidence where he said it's  
 8 quite common to have threats against the police. But the  
 9 submission is that the number of threats and the ferocity  
 10 of the threats was exaggerated by the police. So why would  
 11 they do that? Why would the evidence that seems to be  
 12 undisputed that there were threats made against the police,  
 13 why would you need to exaggerate these? And what the SAPS  
 14 does is it says there were threats, there was an attack or  
 15 a perception of an attack by the police in the TRT line, so  
 16 therefore the strikers have followed through on their  
 17 threats. But Chair, that's simply illogical and doesn't  
 18 flow because the same logic could be applied to the police.  
 19 There's evidence that the police intended to use lethal  
 20 force. They used lethal force. Therefore they had a  
 21 premeditated intention to kill the strikers. These simply  
 22 do not lead to those conclusions. In addition to that just  
 23 completely fatal flaw and logic, we then have a part of  
 24 the SAPS case that is deeply objectionable and it's  
 25 addressed at part 4 section 4.5 of our heads of argument.

1 And this relates to the use of muti, because muti seems to  
 2 be the answer for the strikers' conduct for the police.  
 3 And Chair, simply the use of muti does not establish a  
 4 shared common intention by the strikers to attack police.  
 5 But we make further submissions with respect to the use of  
 6 muti. The first of these is that the evidence before this  
 7 Commission on muti that can be accepted because Mr X's  
 8 evidence ought to be rejected in its entirety. The  
 9 evidence before this Commission is that muti was used. We  
 10 have the photographic evidence of it. We have oral  
 11 evidence of it. We know from the post mortem reports that  
 12 a number of those killed had fresh scarification marks  
 13 indicating muti use. But Chair, we also have evidence that  
 14 should be accepted by the Commission, the muti was for  
 15 defensive not offensive means.

16 CHAIRPERSON: Why was Mr Fundi's body  
 17 mutilated?

18 MS LE ROUX: Chair, we have no idea.

19 CHAIRPERSON: I could understand herbs  
 20 being used and water being used and muti of that kind as  
 21 apparently some professional footballers use it week in and  
 22 week out even if they've lost last week, they still use it  
 23 again this week. I can understand that. That's  
 24 effectively the level of muti that you are conceding was  
 25 present. But muti involving – well, one mustn't take two

1 steps in one, why was Mr Fundi's body mutilated? For what  
 2 purpose? That's a fact that we can't ignore. His brother  
 3 who prepared the body for burial made an affidavit about  
 4 it, and there's also some post mortem evidence about the  
 5 body as well, not as clear as the brother's but  
 6 nevertheless. Why was the body mutilated, for what  
 7 purpose? Why were those portions of the body removed?  
 8 Why, what for?

9 MS LE ROUX: Chair, I have –

10 CHAIRPERSON: If it was, if the next step  
 11 would be, the argument presumably will be for the police,  
 12 was for the person making muti, what sort of muti? Quite  
 13 powerful muti surely. Not the kind of muti that  
 14 footballers use on a Saturday morning before they go to the  
 15 football ground.

16 MR MPOFU SC: Chairperson, I am sorry, I  
 17 don't want to interrupt, but there's no evidence that any  
 18 body parts were removed. That must be, I think  
 19 Commissioner Hemraj tried to explain that.

20 CHAIRPERSON: I put to you what the  
 21 brother who made an affidavit, who prepared the body for  
 22 burial, he said parts of the body were removed around the  
 23 mouth, and so on. That is the evidence. Anyway, Mr Mpoфу,  
 24 you will get a chance to speak later. I don't want to  
 25 encourage counsel to interrupt other counsel even if they



<p style="text-align: right;">Page 38762</p> <p>1 are intending to assist the counsel presently arguing.  2 That way leads to a lack of, what is the word? Command and  3 control.  4 MR MPOFU SC: Yes.  5 CHAIRPERSON: And I don't want to be  6 criticised on that ground.  7 MR MPOFU SC: Thank you, Chairperson.  8 CHAIRPERSON: I suggest you carry on, Ms  9 Le Roux.  10 MS LE ROUX: Thank you, Chair. And  11 Chair, we have two answers to the question why was there  12 this mutilation of the body, if that is what the evidence  13 that's accepted by the Commission shows. The first answer  14 is we simply don't know. There is no evidence before this  15 Commission that explains the purpose of that if it in fact  16 happened. So this Commission does not know why. Secondly,  17 even if we accept that it was to strengthen the muti that  18 was used by the strikers, somehow make it even stronger and  19 more powerful. That does not establish a common intention  20 to kill policemen.  21 CHAIRPERSON: That's a separate question,  22 yes. I haven't got a problem with that.  23 MS LE ROUX: But Chair, that is where the  24 police use muti, the police use muti to explain somehow  25 magically a common intention is formed by the group of</p>	<p style="text-align: right;">Page 38764</p> <p>1 what the evidence before the Commission, and I must pause  2 to just say that muti in the Commission must be treated not  3 as something exotic or magical, or a feature of the occult  4 or anything like that, it is a perfectly ordinary regular  5 practice by South Africans, and the evidence before the  6 Commission is what we should be concerned about, and what  7 it shows us. Not some prejudice that we may have –  8 CHAIRPERSON: Colonel Vermaak also gave  9 evidence based on his experience as a public order  10 policeman dealing with unrest elsewhere in the North West  11 Province, and he gave evidence about muti and the use of  12 muti in circumstances of public unrest, so it's not correct  13 to say that there's no evidence at all. You may say that  14 there are questions as to regarding the weight of that  15 evidence. You may also be met with the point that that  16 evidence wasn't challenged in cross-examination but it's  17 certainly not correct to say that there was no evidence at  18 all.  19 MS LE ROUX: No, no, Chair, my submission  20 is that there is no evidence that muti creates a common  21 purpose, a single intent. The use of muti is not disputed,  22 and in fact, as far as I read the evidence, muti was used  23 in order to embolden the strikers. It was used in a ritual  24 where they joined together and felt solidarity defensively  25 against the NUM initially, and then against the SAPS. That</p>
<p style="text-align: right;">Page 38763</p> <p>1 strikers. The evidence before this Commission does not  2 establish that.  3 CHAIRPERSON: Aren't they entitled, I am  4 just putting this to you as something to deal with, I am  5 not sure what the answer is, I hope I will be assured by  6 somebody writing a report. The argument on the other side  7 I imagine would be that if you can use the removal of some  8 parts of the body as an indication of, there's no other  9 reason to suggest itself, to create a powerful muti, and  10 then one can look at the bodies of those who had  11 scarification marks, the argument would be that this wasn't  12 – the footballers don't as I understand don't normally have  13 scarification marks every Saturday before they go to the  14 football ground. So the argument would be that at least  15 those people took it for – took that particular muti for a  16 particular reason and that would, it may not take them all  17 the way down to a conclusion that there was a common  18 purpose but it would indicate some kind of common mind at  19 the stage of the scarification. That's the matter I take  20 it, if Mr Semenya, if he thinks there's any substance in  21 the point will elaborate on and when he does it, we will  22 obviously ask him questions directly from the other side to  23 test the accuracy of any submissions he may make in that  24 regard.  25 MS LE ROUX: But Chair, at its highest,</p>	<p style="text-align: right;">Page 38765</p> <p>1 is the evidence before the Commission. That does not take  2 the police to where they want to go with muti, which is  3 that it establishes single intention to attack the police,  4 justifying the use of force in scene 1.  5 CHAIRPERSON: While you are making the  6 point perhaps I should put it to you as well, in relation  7 to the suggestion which is put up by the strikers that they  8 carried their weapons to defend themselves against NUM, was  9 a response to the shots that were fired on the Saturday  10 morning. That evidence has a serious question mark over it  11 because firstly we have evidence of intimidation and so  12 forth starting on the Friday night. Secondly we have  13 evidence that they went to the NUM office with arms, direct  14 evidence was given by one of the NUM witnesses who wasn't  15 cross-examined on the point, the evidence is the attack on  16 the NUM offices about 11 o'clock, they started buying  17 weapons at 9 o'clock, so one certainly cannot without more  18 accept the suggestion that they were bearing weapons simply  19 to defend themselves against an attack on NUM. There is  20 evidence that points the other way. It's all obviously got  21 to be evaluated. A final decision can't be made until the  22 very end. It's something that is on the table and has to  23 be examined.  24 MS LE ROUX: Chair, I am not sure how to  25 respond to that because obviously we have addressed what we</p>

<p style="text-align: right;">Page 38766</p> <p>1 know in the evidence in terms of weapons carrying and the 2 like and as I have already said we accept that the strikers 3 were armed and in their ranks may have had violent 4 individuals. But again, as the use of muti doesn't 5 establish common intent nor does carrying weapons. 6 CHAIRPERSON: I wasn't – 7 MS LE ROUX: That's the point I am 8 dealing with. 9 CHAIRPERSON: I wasn't dealing with that, 10 I was responding to a submission you made or a comment you 11 made that the evidence of muti that we have may well be 12 explicable on the basis that they wanted to be emboldened 13 so as to deal with an attack by NUM. I suggested to you 14 that that might be contended to be an oversimplification in 15 light of the facts I put to you. 16 MS LE ROUX: Chair, if I can return then 17 to the evidence before you about muti, the critical piece 18 of evidence is that of Prof Lamla and the SAPS put in a 19 supplementary statement by him on the last day of hearings 20 that we were here. Chair, this is addressed at page 154 21 paragraph 4.5.11 of our heads of argument because what is 22 striking about the SAPS' own evidence, the SAPS' expert 23 evidence on muti, is no higher than that, the Intelezi 24 would have galvanised the strikers into action to allow 25 them to die for a noble cause and confront the inevitable</p>	<p style="text-align: right;">Page 38768</p> <p>1 shot at and hit by rubber bullets before running towards 2 the TRT line. If they had already been hit by these rubber 3 bullets, why would they still continue to believe that live 4 ammunition would not harm them. And finally, the strikers 5 who retreated to the third koppie, are alleged by SAPS to 6 be part of a core group that initially attacked scene one. 7 If they had seen their fellow strikers shot and killed by 8 the police bullets, why would they continue to believe that 9 they were invulnerable to sharp pointed ammunition at scene 10 two. So Chair, the evidence before the commission relating 11 to the effect of the muti, simply does not establish the 12 police case of a common intention to attack the police that 13 would justify killing them at scene one or scene two. 14 Chair this notion of, it has a lot of 15 alliteration in it, but essentially the notion that you 16 would have murderous minors on muti attacking you, is just 17 not the evidence before the commission. Chair, in a 18 similar vein, and this is dealt with at part 4, section 4.6 19 of the Heads of Argument, the conduct of the strikers, the 20 crouching and planning of the weapons that we've heard so 21 much evidence about, similarly does not establish a common 22 intention to kill police. It doesn't even establish an 23 individual's intention to attack the police. But, Chair, 24 what all of this ultimately boils down to is that the SAPS 25 case about the common intention, the shared intention of</p>
<p style="text-align: right;">Page 38767</p> <p>1 with fortitude. 2 [10:57] It doesn't say they think they're invisible. It 3 doesn't say that they think they're invincible. It just 4 says that they are galvanised and that they will bravely 5 confront the inevitable with fortitude. So Chair, 6 obviously we don't accept the strikers would have had some 7 intention to die, but the SAPs own muti expert has 8 disassociated himself from the SAPS case. He does not say 9 the use of muti either created a common intent to go and 10 attack police or that the belief was that they were 11 invisible or so invincible and sought out an attack against 12 the police. But in addition to the expert evidence put up 13 by the police, which doesn't help the case that they make 14 relating to muti, we have the objective evidence, which 15 shows us strikers wearing large blankets to protect 16 themselves from rubber balls. If they believed the rubber 17 bullets could hit them, why would they have thought that 18 they were invisible or invulnerable to sharp pointed 19 ammunition? The strikers were blocked by Nyala4 when they 20 were trying to walk down the road and then rubber bullets 21 were fired at them more than a minute and fifty second 22 before the TRT fire started. So if they were blocked by 23 the Nyala and shot at with rubber bullets and those had an 24 effect on them, why would they continue to believe that 25 they were invisible to real bullets? The strikers were</p>	<p style="text-align: right;">Page 38769</p> <p>1 the strikers, comes down to a de-individuation theory which 2 is not only wholly discredited and without support in 3 modern crowd psychology theory or literature, but is 4 contradicted by the evidence of the movement of strikers. 5 We deal with this in part 4, section 4.7 of our Heads of 6 Argument. So Chair, we see the splitting of groups of 7 strikers. So if that group of three hundred when they set 8 off shared a common purpose, they were shedding membership 9 all the way around the kraal. We know from the video 10 footage that strikers turn away. We know from the 11 positions of the bodies around the kraal that strikers were 12 not continuing in their movement towards the TRT line. So 13 even if de-individuation could provide the answer that muti 14 and clanging of weapons can't provide, it simply cannot be 15 accepted by the commission. So Chair, to sum up then what 16 we know happened in the lead up to scene 1, we now have a 17 disavowal of scenes 1 and two by the SAPS. We have an 18 acceptance by them that the group split and Chair, I must 19 be clear that I don't misrepresent that acceptance by the 20 SAPS legal team. They accepted the group split and some 21 people turn and run away. It's not clear that the SAPS 22 accepts the further splitting around the kraal into the 23 little groups. 24 CHAIRPERSON: Sorry, basically the two 25 groups, the lead group I think it is and the kraal group?</p>

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1 MS LE ROUX: Correct, Chair. The kraal  
 2 edge group and the lead group, yes Chair.  
 3 CHAIRPERSON: Well let's find out. Mr  
 4 Semenya, are you able to answer this. Do you accept that  
 5 there was that splitting? If you do, then that will  
 6 shorten things.  
 7 ADV SEMENYA SC: I accept the video  
 8 footage is what it is, Chair. Whether that is a split or  
 9 not a split, it's a different matter.  
 10 CHAIRPERSON: I see, all right I see  
 11 thank you. You heard what Mr Semenya said so you have to  
 12 go the long road and not the short road.  
 13 MS LE ROUX: Chair, Mr Chaskelson has  
 14 dealt with what the video footage shows so I am not going  
 15 to duplicate that effort. But Chair that objective  
 16 evidence showing movement of strikers then brings us to is  
 17 the questions of proportionality of the shots fired at team  
 18 1 and the approach the commission should take to those.  
 19 This is set out in part 10, section 7 and part 4, section 3  
 20 of the Heads of Argument. Chair, a number of submissions  
 21 arise. The first is that the evidence before this  
 22 commission from the SAPS is woefully inadequate to justify  
 23 shooting either being necessary or proportional. There is  
 24 no evidence before you to justify the continuation of  
 25 shooting, we would say, certainly beyond the four seconds

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1 when the dust cloud arises and, in addition, beyond the  
 2 first calls of cease fire that are made within four  
 3 seconds.  
 4 CHAIRPERSON: Remind me of that. The  
 5 dust cloud seems to arise after about four seconds and the  
 6 cease fire call seems to be also at about four seconds.  
 7 Are we able to see, it's been some time since I looked at  
 8 the video, are we able to see with a fair degree of  
 9 certainty that the calls to cease fire more or less  
 10 coincided with the beginning of the dust cloud? You say  
 11 you can take the two together and say that those were two  
 12 reasons self-standing reasons, but there is a synergistic  
 13 effect of the one on the other, which would strengthen the  
 14 case for saying that there should have been a cessation of  
 15 firing when those two things coincided.  
 16 MS LE ROUX: Chair, the dust cloud and  
 17 the calls for cease fire coincided four seconds. The dust  
 18 cloud is what you see on the Reuters footage, the calls for  
 19 cease fire is on the El Jazeera footage, which has a  
 20 different field of view, but on the timing correlation  
 21 exercise, they coincided at four seconds. But of course,  
 22 Chair, recall that the submissions made by the Human Rights  
 23 Commission with respect to cease fire which is that this a  
 24 contradiction in the SAPS case because cease fire should be  
 25 irrelevant if you're shooting in self or private defence.

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1 You stop shooting when you have neutralised the threat that  
 2 you are responding to. So the dust cloud obscures that  
 3 threat and you should have stopped firing. The fact that  
 4 it coincides with the cease fire call as well is a separate  
 5 point which contradicts the self or private defence case  
 6 advanced by the police.  
 7 CHAIRPERSON: I'm not sure that it  
 8 contradicts it exactly. Let's assume that each individual  
 9 shooter is entitled and obliged to make up his own mind as  
 10 to whether it's necessary to shoot in self-defence. But if  
 11 an officer then thinks that whatever the situation was when  
 12 the shooting started, the danger is now over, there is  
 13 nothing to stop him from saying to the shooters, Stop.  
 14 It's clear to me that whichever threat there may have been  
 15 to which you reacted to is over. So I'm not sure that it  
 16 is a contradiction but I would have thought that it's a  
 17 point in your favour that this order was given after four  
 18 seconds and the shooting went on either for another four  
 19 seconds or another eight seconds or, even, there were  
 20 isolated shots after that for a minute. I would have  
 21 thought that's a point in your favour, but I don't want to  
 22 unduly shorten your argument, but it's not necessary to  
 23 make points that would be clear to some people.  
 24 MS LE ROUX: Yes Chair and of course the  
 25 judgement of an officer calling for cease fire would be a

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1 relevant consideration when you consider the continuation  
 2 of fire over those calls. Chair, the conclusion by Mr De  
 3 Rover that he sees associative threat perception is also  
 4 relevant to your consideration of the proportionality of  
 5 shots fired at scene 1 because others are shooting can  
 6 never be proportional to anything because you haven't  
 7 perceived a threat. You are not acting then in self or  
 8 private defence. But, Chair, the critical questions that  
 9 relate to the TRT line is that why do we have sixty TRT  
 10 officers with R5 rifles with their absolutely devastating  
 11 ammunition there. Mr White's conclusion was that it was  
 12 entirely foreseeable that having sixty guys lined up with  
 13 R5 rifles, lining them up because of a poor plan would  
 14 result in disproportionate force. We know from the  
 15 evidence that there were members of the SAPS who fired on  
 16 automatic mode, which is grossly negligent and was  
 17 acknowledged as such by Mr De Rover. We have the dust  
 18 curtain which emerges after which we would submit no shots  
 19 could be justified because there was no identifiable threat  
 20 being neutralised. And finally, Chair, we have the expert  
 21 evidence of Scott, which found that R5's continued to be  
 22 fired until more than a minute after the initial volley  
 23 started. And Chair, this brings to mind two phrases that  
 24 are in the Heads of Argument. The first is from the NDP  
 25 where it states that the SAPS need to get away from an

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1 approach from More Police, Bigger Guns. Mr De Rover said  
 2 that his advice to the SAPS were to Arm Down and Smarten  
 3 Up. And what we see in the disproportionate use of force  
 4 at scene one is precisely the need for recommendations from  
 5 this Commission in that regard.

6 CHAIRPERSON: A further point that arises  
 7 at this point is Mr Hendrickx 'view. Mr Hendrickx' view is  
 8 that the national planning commission is right. To say the  
 9 police has been re-militarised and that what happened on  
 10 the 16th of August is indicative of that fact that if you  
 11 are going to plan to deal with problems encountered by the  
 12 POP and the remedy you advise for the POP people coming  
 13 under attack is to build a firing line of sixty TRT people  
 14 then Mr Hendrickx says that that is evidence of a military  
 15 approach which anathema to modern concepts of policing and  
 16 should have had no place in South Africa. It should never  
 17 have had ever, but certainly, after '94 when there was a  
 18 distinct policy decision to move away from that, it's  
 19 something that should never have come back. Anyway that's  
 20 Mr Hendriks' point which is relevant I would have thought  
 21 to this argument. Whether it is correct or not, we'll hear  
 22 when Mr Semenya addresses that.

23 MS LE ROUX: Yes Chair, it certainly  
 24 would be relevant and have further support for the  
 25 submissions. Chair, I don't intend to canvass what is

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1 covered in part 5 of our Heads of Argument. The same  
 2 submissions would arise with respect to the use of force at  
 3 scene two and its excessiveness. Chair, if I can then turn  
 4 to my final topic which is the recommendations made.  
 5 Annexure A to our Heads of Argument are the recommendations  
 6 from the Commissioners of the Human Rights Commission. I  
 7 don't intend to spend too long in addressing these with  
 8 you, but essentially it's a human rights based approach to  
 9 ensure the progressive strengthening of human rights, so we  
 10 see socio-economic concerns being taken into account, the  
 11 need for psycho-social support, the need for compensation  
 12 to the victims and the like. In addition, that findings be  
 13 made that the right to life, the right to dignity, the  
 14 right to freedom and security of the person were violated  
 15 by the SAPS. That in addition, the complimentary  
 16 international human rights instruments were contravened.  
 17 And then, Chair, there are several recommendations proposed  
 18 that deal with progressive measures to promote this human  
 19 rights framework, as well as policy reforms within the  
 20 SAPS, institutional strengthening and human rights capacity  
 21 building within that organisation.

22 Chair, if I can then turn to Annexure B of our  
 23 Heads of Argument which are the proposed recommendations by  
 24 Gary White. If I can address in some detail the first, and  
 25 we would submit, one of the most important of these and

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1 that is that he proposes the appointment of what he calls  
 2 "an Implementation Oversight Body". This would be to  
 3 address a key concern that Mr White notes at page 2,  
 4 paragraph 7 of his recommendations. That a key issue of  
 5 concern will be to ensure that the recommendations made by  
 6 the commission to the President and endorsed by the  
 7 President, are in fact implemented by the SAPS and  
 8 implemented properly and satisfactorily. In light of this,  
 9 he proposes an Implementation Oversight Body which of  
 10 course the exact composition and mandate would be for the  
 11 commission to determine. But he suggests that it may have  
 12 the following characteristics; the Implementation Oversight  
 13 Body should be time limited and based on a realistic  
 14 expectation of the time period required for the SAPS to  
 15 implement the endorsed recommendations; it should be led by  
 16 what he has called an "Oversight Commissioner", someone of  
 17 significant standing, experience and independence to ensure  
 18 the compliance of the SAPS and other related actors with  
 19 the effective and efficient implementation of the endorsed  
 20 recommendations. It should have both technical policing as  
 21 well as relevant legal expertise available to it and there  
 22 should also be representation on it from civil society  
 23 organisations focused on human rights, safety and security,  
 24 policing, the use of force and the rule of law. This  
 25 Implementation Oversight Body should report regularly to

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1 the Presidency and the Minister of Police and publish these  
 2 reports to notify the public relating to its progress in  
 3 the implementation of any of the recommendations from this  
 4 commission by and within the SAPS.

5 Chair, Mr White explains in his recommendations  
 6 that he has some experience of that body because when the  
 7 Patton Report came out that looked at the reform of the  
 8 Northern Ireland Policing Servicing, which Mr White was a  
 9 part of, it had a hundred and seventy five recommendations  
 10 to reform policing and of those recommendation one hundred  
 11 and seventy two to one hundred and seventy five required  
 12 the setting up of what was known as an Oversight Commission  
 13 that monitored and ensured compliance with implementing the  
 14 recommendations made by the commission. So, Chair, Mr  
 15 White concludes that an implementation oversight body is  
 16 likely to be determinative of the successful implementation  
 17 by the SAPS of any police related endorsed recommendations.  
 18 It would not only ensure oversight of the implementation  
 19 process, but provide additional required expertise to the  
 20 SAPS during the course of the implementation process. It  
 21 would ensure the expeditious implementation of the  
 22 commission's recommendations would ensure effective  
 23 interventions to improve the policing capabilities of the  
 24 SAPS and would ensure that immediate steps to address the  
 25 operational failures identified at Marikana were taken.

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1 Chair, the next section of Mr White's proposed  
 2 recommendations deal with practical measures that he  
 3 proposes should be implemented within the SAPS to address  
 4 the absence of a culture of accountability within the SAPS.  
 5 He repeats that he finds the lack of accountability within  
 6 the SAPS to be a causal driver of the outcome of the  
 7 operation as well as something of key concern to him going  
 8 forward. But he notes that it's simply inappropriate to  
 9 make one or two simple recommendations to address this,  
 10 because it really is about organisational cultural change  
 11 starting with leadership, but implementing processes and  
 12 systems within the SAPS that will ensure accountability.  
 13 And he explains the premise from which he moves in trying  
 14 to identify what could help with instilling an  
 15 accountability based culture and it is to say that whether  
 16 there are internal processes that record members' actions  
 17 contemporaneously and leave them open to scrutiny  
 18 thereafter, it's likely to create a culture of  
 19 accountability from one of impunity or indifference. He  
 20 then sets out several practical recommendations that he  
 21 suggests could be made. These include the introduction of  
 22 what he calls decision making logs that would record the  
 23 planning and operational decisions by those in command of  
 24 major public order policing operations. They would  
 25 disclose not only the decision actually made, but also the

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1 rationale for that decision and why alternatives that were  
 2 considered, were rejected. He proposes that police  
 3 officers and police vehicles carry immediately obvious  
 4 identification numbers because often the public order  
 5 uniforms make police officers appear anonymous and we have  
 6 seen in the commission the difficulty of identifying police  
 7 officers when they're in their full uniform. So both  
 8 vehicles and uniforms should carry prominent identification  
 9 numbers so that when something goes wrong, it's possible to  
 10 identify who was there. He proposes that the SAPS  
 11 introduces a system to monitor the use of force by members  
 12 and this would be all use of force. Whether it's firearms  
 13 or whether it's less lethal measures such as rubber rounds,  
 14 water cannons and tear gas. He proposes it could even  
 15 extend to the use of equipment such as batons and handcuffs  
 16 in the ordinary course of their patrol duties. He proposes  
 17 that this be contained in a database that is monitored and  
 18 then he speaks of what is called tracking and trending. So  
 19 you track and trend officers that seem to be resorting to  
 20 the use of force on a regular basis, highlighting as to  
 21 local command for remedial action. He proposes  
 22 disciplinary codes be introduced that include a duty of  
 23 supervisors so as to create vicarious liability for the  
 24 actions of those under the command of supervisory officer  
 25 ranks.

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1 [11:17] He proposes that the use of any firearms of  
 2 ammunition should be able to be forensically matched. He  
 3 proposes a robust system of accounting for firearms and  
 4 ammunition issued to individual officers. He proposes that  
 5 radio transmission be recorded because the evidence of the  
 6 commission has given rise to several disputes and several  
 7 deficiencies in your ability to make findings because radio  
 8 transmissions were inaudible or simply not recorded. He  
 9 then proposes what he calls a post incident management  
 10 regime which on the one hand would deal with resolving the  
 11 apparent disputes and contradictions between the roles of  
 12 the SAPS detectives and crime scene experts as well as the  
 13 IPID following an operation while ensuring that any  
 14 officers' rights are protected in that process, but  
 15 ensuring that we get the earliest possible securing of the  
 16 best evidence from an incident.  
 17 He proposes that SAPS members be properly trained  
 18 in their obligations when providing evidence because given  
 19 the deficiency of the statements we've seen here Mr White  
 20 says that having proper training in how to provide evidence  
 21 would address what we've seen here with respect to the many  
 22 instances where members who didn't fire during an operation  
 23 but were present where and when other members did use  
 24 lethal force provide statements that do no more than simply  
 25 recording their presence and he notes that there would

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1 therefore be evidence that could come from these members  
 2 that were present and observed what happened that we  
 3 haven't seen.  
 4 He proposes that the tactic of armed police  
 5 officers forming a baseline during POP operations be  
 6 urgently reconsidered by the SAPS because the justification  
 7 for such tactic is simply difficult to understand and the  
 8 likely outcome would've been easily anticipated and he  
 9 simply says it's not clear to him what this achieves given  
 10 its incredibly high level of risk. Finally he notes that  
 11 all of these recommendations require strong and consistent  
 12 leadership with set transparency and accountability as the  
 13 key objectives for the SAPS. Mr Chair, that is the package  
 14 of what he's called accountability related recommendations  
 15 that Mr White proposes.  
 16 He then sets out various recommendations that  
 17 relate very specifically to planning, chiefly a planning  
 18 model and the means by which he suggests that a review be  
 19 undertaken so that a planning model can be developed for  
 20 public order operations that would cover all of the  
 21 relevance factors and ensure things that didn't happen in  
 22 Marikana such as a challenge process, such as ensuring the  
 23 input of skilled expert commanders is all captured and  
 24 provided. This obviously would require training and  
 25 investment in the individual police officers.

<p style="text-align: right;">Page 38782</p> <p>1 And essentially that planning model would then 2 ensure that the personnel of the SAPS that are involved in 3 planning these operations are selected for the appropriate 4 and required operational roles that they have, they 5 undertake regular and up to date training for these roles 6 and they are then subject to some form of evaluation of 7 their performance in the planning role. Mr White then sets 8 out intelligence related recommendations and briefing 9 related recommendations as well as those relating to 10 command and control training, equipment and resources. But 11 Chair, in essence Mr White has proposed and the other two 12 policing experts we would submit have proposed very similar 13 interventions that are necessary and we would encourage and 14 urge the commission to adopt the detailed and very specific 15 interventions that Mr White proposes in the 16 recommendations. Chair, those are our submissions. 17 CHAIRPERSON: Yes, thank you. Before you 18 conclude my colleague, Commissioner Tokota, wants to ask 19 you a question or two. 20 COMMISSIONER TOKOTA: Now, bearing in 21 mind your mandate in terms of the constitution I just want 22 to check, I didn't have opportunity to go through all pages 23 here, is there anything right which was done by the police 24 during this whole operation? Is there anything correct 25 which was done because if I understand your argument right</p>	<p style="text-align: right;">Page 38784</p> <p>1 steps taken by the SAPS once they arrived on the scene at 2 Marikana, but once the decision was taken by the national 3 management forum things went badly wrong. 4 COMMISSIONER TOKOTA: Now, speaking for 5 myself now, I can understand the LRC. They're represent 6 Ledingwane, resident, they're representing their clients 7 and other people. Is there any reason why your criticism 8 is directed exclusively to the police? 9 MS LE ROUX: Yes, Commissioner Tokota, 10 and it's addressed in our heads of argument at part 1 11 section 2 commencing at page 15 of our heads of argument. 12 The South African Human Rights Commission participated here 13 firstly because it received a complaint about the police, 14 so its constitutional mandate is to respond through 15 investigation to complaints received about human rights 16 violations. Until the police killed people they hadn't 17 violated – 18 COMMISSIONER TOKOTA: Sorry, sorry to 19 interrupt you, here we are not dealing with the complaint 20 of the police. We are investigating the circumstances 21 about all the role players there I would take it that since 22 you are not representing any one of them you would assist 23 us also in the part played by other parties in this whole 24 process. Is there any reasons why you were not offering 25 your services insofar as to assist us for example NUM?</p>
<p style="text-align: right;">Page 38783</p> <p>1 from the planning everything went wrong? Was there 2 anything that was right done by the police? 3 CHAIRPERSON: Please, people who want to 4 have, that want to talk must go outside the chamber. We 5 can't have people chatting amongst themselves or commenting 6 on questions and answers being given. You have the right 7 to be here to listen but not to talk and make a noise. 8 What's the answer to that one, Mr Le Roux? 9 MS LE ROUX: Chair, the answer is – 10 CHAIRPERSON: I imagine going and getting 11 Colonel McIntosh to negotiate. 12 MS LE ROUX: Yes, Chair. 13 CHAIRPERSON: It would be a very really 14 good thing really. 15 MS LE ROUX: And Chair, let's record Mr 16 White's, the source of the criticism of the SAPS operation, 17 Mr White's evidence. Mr White gave all credit to the 18 approach taken by the police on the 14th, on the 15th. He 19 commended the efforts by Major-General Mpembe to negotiate 20 with the strikers on the 13th. He commended the efforts of 21 Officer McIntosh to try to negotiate with the police, but 22 once the decision is made at the national management forum 23 to go tactical that is when everything goes wrong. So 24 Commissioner Tokota, the Human Rights Commission and 25 Mr White in particular has certainly commended several</p>	<p style="text-align: right;">Page 38785</p> <p>1 MS LE ROUX: Commissioner Tokota, two 2 responses, firstly the reason the Human Rights Commission 3 is participating in this process is so as not to duplicate 4 the investigation that it would otherwise have to make into 5 a complaint that it received about the national 6 commissioner and the police at Marikana. Its mandate is 7 circumscribed by the complaint it receives. Secondly when 8 the Human Rights Commission approached the chair of this 9 commission to notify it, to request and advise that it 10 sought to participate in this process it was very clearly 11 set out that the parameters of that participation would be 12 threefold. Firstly it would focus on the police because 13 that was the nature of the complaint that received it, that 14 triggered its participation at all. 15 Secondly it would look to assist with procedural 16 questions and we've played that role potentially to the 17 annoyance of the commission at some point, concerned about 18 the procedures and the process and fairness of the 19 commission's proceedings. And thirdly we sought not to 20 duplicate the evidence that the parties before you would be 21 able to provide. So the other teams that are here 22 representing eye witnesses can provide you with evidence. 23 That is why the Human Rights Commission instead invested 24 its resources in providing you with expert evidence, that 25 of Mr White, Ms Scott and Mr Dagan in particular because</p>

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1 providing you with that type of expert evidence would not  
 2 have duplicated the efforts of the parties that were  
 3 otherwise before you.  
 4 CHAIRPERSON: Colleague Tokota.  
 5 COMMISSIONER TOKOTA: Yes.  
 6 CHAIRPERSON: He has no further  
 7 questions.  
 8 MS LE ROUX: Chair, I do have two  
 9 submissions that I need to make though.  
 10 CHAIRPERSON: Well, make your  
 11 submissions. Before you make your submissions let me say  
 12 that you referred again as you have from time to time to a  
 13 suggestion that the commission has been acting – oh, you're  
 14 not listening so I won't carry on here. You referred in  
 15 the course of your answer to comments that were made from  
 16 time to time by the Human Rights Commission suggesting that  
 17 we were acting unfairly to certain people procedurally. I  
 18 just want to say that, and I have said it already this  
 19 morning, we have tried very, very hard to be fair to  
 20 everybody. We've received a lot of criticism. Whenever we  
 21 gave a ruling or I gave a ruling against one party. That  
 22 party said I was being unfair. When I then gave a ruling  
 23 against the opposite party the next time I was accused of  
 24 being unfair again. Well, either I was consistently unfair  
 25 or these allegations cancel each other out. I'd like to

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1 think the latter. You said you had two submissions you  
 2 wish to make.  
 3 MS LE ROUX: Yes, thank you, Chair. The  
 4 first is to state that I've explained the reasons why we  
 5 focussed on the police and, Chair, of course that's not a  
 6 complete submission without saying focussed on the police  
 7 in phase one. The South African Human Rights Commission  
 8 fully intended and to the extent that it was able to given  
 9 the opportunity that it had to participate in phase two  
 10 which relate to the surrounding socio-economic rights  
 11 questions that arise that are the underlying causes of the  
 12 commission, so certainly with respect to phase two the  
 13 Human Rights Commission would've looked at all parties and  
 14 I think our submissions that we did make on phase two dealt  
 15 with the conduct of all the role players and stakeholders  
 16 that could be held responsible for the dire socio-economic  
 17 circumstances of the communities of Marikana.  
 18 So focussing only on one party only relates – is  
 19 a criticism that could only be made with respect to phase  
 20 one but for the reasons I've given we respond by saying it  
 21 is not a legitimate criticism. But Chair, you highlighted  
 22 the question of fairness. If the commission felt that it  
 23 would've benefitted from the Human Rights Commission  
 24 somehow assisting it in phase one by looking at the conduct  
 25 of other parties it would've been helpful to know that in

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1 the two years that we've been here because we would've then  
 2 been able to make a decision as to how we do that and if we  
 3 could extend our mandate given its limitations and the fact  
 4 that that is what constrains us constitutionally and  
 5 legislatively.  
 6 CHAIRPERSON: Right, okay, the points you  
 7 made have been noted. Thank you for your submissions and I  
 8 already indicated earlier what our attitude is in regard to  
 9 the inputs we've received not only from the Human Rights  
 10 Commission but from – which we're going to receive from the  
 11 other parties as well and what I say still stands. Mr  
 12 Bizos, you're next.  
 13 MR BIZOS SC: Yes, thank you, Mr  
 14 Chairman. Yes, thank you. Mr Chairman, we have filed 300  
 15 pages of argument as to what happened, what should not have  
 16 happened and what recommendations the commission should  
 17 make. We cannot do justice to the work that we have done  
 18 on those heads of argument in the time allowed but  
 19 nevertheless we accept it and I will try and deal with  
 20 certain matters for an hour and my colleagues will follow.  
 21 CHAIRPERSON: Yes, Mr Bizos, I don't  
 22 understand your comment about doing justice to – I made it  
 23 clear from the beginning I hope that the parties were  
 24 expected to produce arguments which would be in writing.  
 25 The time for oral hearing is to be devoted not to doing

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1 "justice" in quotation marks to the whole argument but to  
 2 highlighting points that are particularly important and  
 3 answering questions and points that are raised by the  
 4 commission, so I'm sure the time that you've been given  
 5 will be enough to enable you to do those things.  
 6 MR BIZOS SC: We'll try our best, Mr  
 7 Chairman. There is however a matter that I want to raise  
 8 right away which I consider of very grave importance to the  
 9 reputation of the commission, to the administration of  
 10 justice in South Africa and what contribution we can make  
 11 in order to enhance the reputation. I am concerned  
 12 particularly personally, Mr Chairman, with paragraph 95 of  
 13 the SAPS heads of argument. Let me read out the paragraph.  
 14 "The position of SAPS in these proceedings and especially  
 15 in relation to persons who died as a result of police  
 16 action is that their deaths where evidence is available  
 17 occurred in circumstances of self and/or private defence  
 18 alternatively putative and self/private defence." What  
 19 this amounts to is a submission made by SAPS that they  
 20 should be exonerated, completely exonerated for anything  
 21 that happened within the terms of reference of the  
 22 commission and more particularly that they are not  
 23 responsible in any way to the people who died and members  
 24 of their family.  
 25 You'll forgive me, Mr Chairman, because we

1 actually practiced for many years together that the  
 2 reputation of the administration of justice during the  
 3 Apartheid regime was at a very low level as a result of  
 4 findings of commissions that no one was to blame. May I  
 5 remind the commission that it started with Sharpeville in  
 6 1960 and finished with the massacres in the Vaal Triangle  
 7 in the early nineties and before the dawn of democracy in  
 8 '94. I would submit with the greatest respect that a  
 9 finding by the commission that the police are not  
 10 responsible for any of the deaths will undermine the  
 11 administration of justice in our country and the rule of  
 12 law and I would urge for the reasons that I'm about to give  
 13 – I'll forget about the heads of argument – I will, I want  
 14 to tell you why. The police play a very important role in  
 15 government and more particularly in a democratic state. I  
 16 want to quote what Chief Justice Chaskalson of the  
 17 Constitutional Court said in the Mohammed case versus  
 18 President of the Republic of South Africa. "In a  
 19 government of laws existence of the government will be  
 20 imperilled if it fails to observe the law scrupulously.  
 21 Government is the potent omnipresent teacher. For good or  
 22 for ill it teaches the whole people by its example.  
 23 [11:37] If a government becomes a law breaker it breeds  
 24 contempt for the law, it invites every man to become a law  
 25 unto himself, it invites anarchy. I would submit, with

1 respect, that this is what the police are asking you to  
 2 find. Yes there are laws, there are the standing orders,  
 3 the constitution, there's the common law. Experts can say  
 4 that we mustn't use R5s, we mustn't be trigger happy, we  
 5 mustn't do this, we mustn't do that, but the legal  
 6 representatives of the police want you to exonerate the  
 7 police. Let me rely on the 14 items in the catalogue read  
 8 to you by our learned friend, Mr Chaskalson, 14 of them.  
 9 If – you know I know him, he's very careful, he's like his  
 10 father. I accept that there is substance in the  
 11 submissions that he made in those 14. In more than half of  
 12 them the people who behaved in that manner defeated the  
 13 ends of justice deliberately. That is a very serious  
 14 offence.  
 15 CHAIRPERSON: Attempted to do so.  
 16 MR BIZOS SC: I beg your pardon Mr –  
 17 CHAIRPERSON: If what he says is correct  
 18 they attempted to do so. Whether they succeeded is a  
 19 matter to which we do not –  
 20 MR BIZOS SC: No, but an attempt would  
 21 defeat the ends of justice is defeating the ends of  
 22 justice, Mr Chairman. Many a defence is I didn't intend  
 23 it, but if you did it –  
 24 CHAIRPERSON: No, Mr Bizos, let's  
 25 understand each other. Attempting to defeat the ends of

1 justice is a criminal offence, there's no question about  
 2 that. Whether the ends of justice were in fact defeated by  
 3 the attempts to which Mr Chaskalson referred and whether  
 4 that amounted to attempts to defeat the ends of justice is  
 5 a matter in which we must keep an open mind to the end.  
 6 But if he's right that the conduct he referred to amounted  
 7 to attempt to defeat the ends of justice when the ends of  
 8 justice were ultimately defeated is a matter to which we do  
 9 not yet know the answer. That's the only point I'm putting  
 10 to you now.  
 11 MR BIZOS SC: Mr Chair, let us pose the  
 12 question, General Annandale chose Lieutenant-Colonel Scott  
 13 to do a plan to control or to manage the gathering of the  
 14 people at the koppie. He, Lieutenant Scott said that he'd  
 15 never read the standing orders relating to crowds. He was  
 16 ordered to do the plan by a general. Is the general going  
 17 to go Scott free for that stupid decision of his? What was  
 18 Lieutenant-Colonel Scott, a man who had been decorated for  
 19 killing 11 people instead of arresting them and he was  
 20 promoted from Lieutenant-Colonel to Colonel whilst these  
 21 proceedings were going on. What image does that give to  
 22 the administration of justice by an organ that is there to  
 23 assist justice, to obey law and order? Are you being asked  
 24 no-one to blame, we heard that from Sharpeville to the Vaal  
 25 Triangle where it finished. By the way, as I've said

1 before, Mr Semanya and I were involved in the last one.  
 2 Now I would submit, with the greatest respect, that it  
 3 would be completely unacceptable to the people of South  
 4 Africa that have been following what has been said if the  
 5 police are said they are not to blame for anything. I saw  
 6 in their heads of argument, Mr Chairman, the first  
 7 paragraph and I got some pleasure out of it because they  
 8 quoted Mr Cyril Ramaphosa that many of us are responsible  
 9 and I thought you know this is a good admission by the  
 10 police, we're getting somewhere. Until I read their heads  
 11 of argument, not only in that paragraph, but two other  
 12 paragraphs they ask to be absolved. Now let us examine  
 13 that, Mr Chairman.  
 14 We act for a young man who was killed some  
 15 distance away from the gap that they say people were afraid  
 16 that they would be killed. No weapon was found near him,  
 17 he was fatally shot, there was no razor mark in order to  
 18 show that he had been influenced by the person that  
 19 provided the muti. His grandfather made a statement that  
 20 he was a worker, he was earning a total of about R6000 a  
 21 month, but he didn't think that it was enough because there  
 22 was a family of six that he had to support and that he was  
 23 the only breadwinner for the whole family from the  
 24 grandfather to one of his young children. There is an  
 25 affidavit to that effect and that he was shot dead. The



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1 experts that we engaged in order to examine the bodies  
 2 suggest that he could not have moved very far from the spot  
 3 on which he was – the bullet finished in his body and this  
 4 is on the other side of the koppie.  
 5 CHAIRPERSON: The kraal I think you mean.  
 6 MR BIZOS SC: I beg your pardon.  
 7 CHAIRPERSON: The other side of the  
 8 kraal.  
 9 MR BIZOS SC: The kraal, I'm sorry yes I  
 10 beg your pardon, yes. On the other side of the kraal. Now  
 11 what evidence is there that the police should be exonerated  
 12 for his death? He wasn't in the group that they say, who  
 13 was attacked. What they say in answer to it is a line or a  
 14 line and a half that he made common cause with the people  
 15 that were threatening them. I'll read it, it's coupled  
 16 with other four or five people that he was killed and what  
 17 they say about that in paragraph 178, their answer to it  
 18 that they want to be absolved, 178. "The bodies of members  
 19 Ndongophele, Gwelani, Ledingwane," that's our client's  
 20 grandchild "and B Mtshazi were found at the back of the  
 21 kraal." So there's no dispute as to where he was. "They  
 22 were clearly amongst a group of strikers who were attacking  
 23 the police or those the police could reasonably have  
 24 believed were meaning to attack them. There could not have  
 25 been any innocent individual amongst the attacking group.

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1 They all made common cause with Noki's leadership and  
 2 utterances that were to kill the police." You know that  
 3 may look good in the final paragraph of a plea disclaiming  
 4 responsibility. It may be okay for that, but is that an  
 5 answer on which my learned friends want to rely that their  
 6 clients must be exonerated for the death of this person?  
 7 It only had to be uttered to be rejected, with respect and  
 8 this is not the only one. There are others, it's no good,  
 9 Mr Chairman, with the greatest respect, being told that  
 10 there was muti, yes it's most unacceptable that that sort  
 11 of thing should happen. It's also unacceptable that there  
 12 should be people who take hundreds of rands from people to  
 13 sell invalid propositions to them and it is perhaps  
 14 unfortunate that there are some people who believe them.  
 15 But what has happened here, Mr Chairman, is that the police  
 16 instead of doing what they had to do and that is produce  
 17 evidence either viva voce or in terms of statements. I  
 18 will refer you to the list of cases given by our learned  
 19 friends on self defence and private defence. They were of  
 20 a very instructive – I have read all of them, they have a  
 21 common factor. The self defence was justified because the  
 22 person that pulled the trigger went into the witness box  
 23 and was believed that his life was in danger. I would  
 24 submit, with respect, Mr Chairman, that the fact that there  
 25 are no such statements and that no evidence was given is

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1 not the fault of the Commission. I submit, with respect,  
 2 that the nine days that the people gathered in  
 3 Potchefstroom in order to put together exhibit L should not  
 4 have produced exhibit L for the reasons set out by my  
 5 learned friend, Mr Chaskalson. But have evidence,  
 6 statements - the Commission who was announced, it will be  
 7 for the purposes of the Commission, instead of putting a  
 8 incomplete and in some instances false document before the  
 9 Commission on which we took months to examine and to dig  
 10 out, thanks to the industry of the evidence leaders, where  
 11 the truth lies and where they lied about things. And then  
 12 perhaps if there were sufficient statements of the  
 13 individuals that pulled the trigger it may well have been  
 14 well there is a plethora of evidence of self defence,  
 15 exonerate them. There are none, there were what are called  
 16 warning statements. Warning statements are taken, you are  
 17 not obliged to say anything, but if you do it may be used  
 18 in evidence against you. Why? Why such statements and not  
 19 what was expected by the Commission? In the words of the  
 20 President "Here is the evidence of why we shot." We could  
 21 have examined them, we need not have spent months trying to  
 22 reconstruct exhibit L and perhaps it would have been  
 23 unnecessary to spend a week or two on the evidence of Mr X.  
 24 We submit that you are not here, Mr Chairman and members of  
 25 the Commission, to exculpate nor to convict the police.

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1 You are here to advise the President and the people of  
 2 South Africa and the world at large that the police had  
 3 done wrong. That the national prosecuting authority should  
 4 not do what it was doing between 1960 and 1992 by saying  
 5 that we have seen no wrong done and there is no one to  
 6 blame. I think that we have reached a stage, Mr Chairman,  
 7 when the no one to blame is no longer a proper finding by a  
 8 commission that has heard the evidence that we have heard.  
 9 Mr Chairman –  
 10 CHAIRPERSON: Mr Bizos, I was proposing  
 11 to take the second adjournment, the tea adjournment around  
 12 about now. So when it's convenient for you let me know and  
 13 we'll take it.  
 14 MR BIZOS SC: Mr Chairman, I'll leave it  
 15 to you. I want to place before the Commission the facts  
 16 regarding the killings and injuries –  
 17 CHAIRPERSON: Would you like to deal with  
 18 that after we've taken the adjournment?  
 19 MR BIZOS SC: Yes –  
 20 CHAIRPERSON: We'll take the adjournment  
 21 of 15 minutes, 15 minutes.  
 22 [COMMISSION ADJOURNS COMMISSION RESUMES]  
 23 [12:14] CHAIRPERSON: Yes, Mr Bizos.  
 24 MR BIZOS SC: Mr Chairman, members of the  
 25 Commission, the killing of 34 people on the 16th and the

<p style="text-align: right;">Page 38798</p> <p>1 wounding of 78 cannot be separated. Let us assume for a 2 moment that there was some fear in some and they shot, 3 assume. Where is the man that stopped, that shouted out 4 "Cease fire"? Why wasn't he called? 5 CHAIRPERSON: One of the people who 6 called out "Cease fire" was Captain Loest, who did give 7 evidence. 8 MR BIZOS SC: I'm sorry if I missed it. 9 I - 10 CHAIRPERSON: Captain Loest gave evidence 11 and he was one of the people who called out "Cease fire" at 12 scene 1 as far as I remember. 13 MR BIZOS SC: Yes, well I withdraw the 14 submission. 15 CHAIRPERSON: And Advocate Tokota reminds 16 me that Colonel – I think he's a Lieutenant-Colonel – 17 Claassen also called out "Cease fire" and he also gave 18 evidence. At scene 2 of course we didn't have oral 19 evidence from Colonel Gaffley, but Colonel Gaffley's 20 statement was put before us. 21 MR BIZOS SC: Yes. 22 CHAIRPERSON: And he when his people, the 23 STF, who never fired a shot at scene 2, when they came 24 under fire effectively, because they were in between, they 25 came under fire from the K9 people, he told them to cease</p>	<p style="text-align: right;">Page 38800</p> <p>1 downwards your submission is correct. 2 MR BIZOS SC: Ja, she's responsible in 3 terms of the act certainly for the civil compensation. 4 CHAIRPERSON: He has responsibility, he 5 might – 6 MR BIZOS SC: She has responsibility, but 7 not a criminal – 8 CHAIRPERSON: No, no, he has 9 responsibility, I understand that. But you said he was 10 party to devising the plan, but there's no evidence that – 11 MR BIZOS SC: They want you to find that 12 nothing was wrong. They want you to find nothing was wrong 13 by the police. 14 CHAIRPERSON: I know that, and the draft 15 of your argument is we shouldn't uphold the argument, we 16 should decide against them. It's a bit like, remember 17 President Coolidge went to church, he was asked what the 18 sermon was about, he said it was about sin the preacher was 19 against it. Well, that's basically what you're telling us. 20 MR BIZOS SC: If it was not malice of 21 forethought, Mr Chairman, that they were going to shoot at 22 people in order to break the strike, and there is 23 sufficient evidence in that breaking the strike was not the 24 police's business, and there is evidence that the people in 25 Lonmin actually put some pressure and they assisted. The</p>
<p style="text-align: right;">Page 38799</p> <p>1 fire as well. So there is some material about that. 2 MR BIZOS SC: Yes, so some material, but 3 let's try, they want to be exonerated for seriously 4 wounding 78 people. Why were they shot? By whom were they 5 shot and why? And what will they say about the forensic 6 expert as to whether they were really attacking or running 7 away from the nature of the wounds and parts of the body 8 that were seriously injured? Where is the self-defence 9 there? They want to be exonerated. They haven't given you 10 any reasons why they seriously wounded 78 people. They 11 haven't given any reasons why they didn't tell the truth 12 and hid the fact that they met on the evening of the 15th, 13 high-ranking officials. Why? They forgot about it. 14 With the greatest respect, the leaders that had a 15 hand in the plan cannot be exonerated. They have to 16 answer. The people who, from the then Minister of Police 17 to the senior officers that devised the plan and made the 18 decision that the 16th was going to be D-day – 19 CHAIRPERSON: There's no evidence that 20 the Minister was involved in that. 21 MR BIZOS SC: I beg your pardon, Sir? 22 CHAIRPERSON: There's no evidence that 23 the Minister was involved in that, that he devised the 24 plan, he decided it had to be the 16th. There's no evidence 25 to that effect. But from the National Commissioner</p>	<p style="text-align: right;">Page 38801</p> <p>1 role played by Lonmin will be dealt with by my colleague. 2 But be that as it may; we don't say that the 3 police are the only people who are answerable for what 4 happened. What happened from particularly the 13th was to 5 be deplored. It cannot be justified. It is – 6 CHAIRPERSON: Sorry, Mr Bizos, I think 7 you had a slip of the tongue; you said from the 13th. There 8 were murders on the 11th. 9 MR BIZOS SC: Well, let me deal with 10 that – 11 CHAIRPERSON: There were people who were 12 shot on the 11th – 13 MR BIZOS SC: The pre-16 violence and the 14 pre-16 – 15 CHAIRPERSON: Ja, ja, no, you said from 16 the 13th. All I'm saying to you is I suspect that you 17 intended to begin on the 10th – 18 MR BIZOS SC: Yes. 19 CHAIRPERSON: - for the period when 20 unacceptable behaviour took place. 21 MR BIZOS SC: From the 10th, and more 22 particularly the 13th, that is, the finding should be made 23 and the Director of Public Prosecutions must be called upon 24 to find who are the people responsible and do it, but what 25 is of great concern, Mr Chairman, to us, is that because</p>

<p style="text-align: right;">Page 38802</p> <p>1 two policemen were killed - which is to be regretted – it's  2 to be taken into consideration whether the police should be  3 exonerated for killing the people on the 16th.  4 May I remind you of the words of Chief Justice  5 Chaskalson in the death sentence case that even the worst  6 of us are entitled to the right of life, even the worst of  7 us, so that the mere fact that certain strikers may have  8 done some wrong to the 10th is something that a lot of time  9 was taken. It is to be condemned, but it is not an excuse  10 for the killings of the 16th, Mr Chairman. They were not  11 forthright – you know people that have got nothing to fear  12 and who are innocent don't have to hide facts and don't  13 have to lie, and to say that 4 000 rounds of ammunition and  14 four mortuary vans were ordered was really, find some  15 excuse for it. It is evidence that they were preparing in  16 order to show who was boss. They were going to break the  17 strike. That is an inference that may be drawn. It may  18 well be that in a criminal trial a particular accused may  19 be able to prove, no, this was not it, but the prima facie  20 evidence is there that there was this – how else does one  21 explain that ordinary policemen threatened to kill a  22 general for a decision that he takes and nobody takes it  23 seriously? How disciplined is this police force?  24 Of the people shot with high-velocity gunshot  25 were 29. 20 were shot with more than one bullet wound.</p>	<p style="text-align: right;">Page 38804</p> <p>1 disregard that and say there is some sort of explanation,  2 these police are not responsible, or are you going to say  3 that there is prima facie evidence that the police are  4 responsible for the deaths and the injuries?  5 We call upon the Prosecutor General to put  6 together a particularly strong and intelligent team to  7 further investigate. It may well be that some of them may  8 have to be given amnesty provided they give satisfactory  9 evidence probably against their superiors, because, Mr  10 Chairman, we have a very sad state of affairs. 34 people  11 that were killed and 78 are seriously injured, and the  12 Commissioner of Police says "Congratulations, you did 110%  13 job," within a day or two. What encouragement is that to  14 the constable to say yes, I did shoot, but possibly we were  15 told that the only way that we can really bring this strike  16 to the end is if we shot some of them in order to show that  17 we are in authority. I'm not going to say that it will be  18 successful, but it is a matter which requires investigation  19 and not an exoneration that the police counsel are looking  20 for.  21 Mr Chairman, I will stop there. My colleagues  22 will take over in relation to Lonmin and also the  23 applicable law to the –  24 CHAIRPERSON: Yes, thank you, Mr Bizos.  25 Which of your colleagues is going to take offer, will take</p>
<p style="text-align: right;">Page 38803</p> <p>1 Only 1 in 10 of the injured miners and only 1 in 5 of the  2 deceased miners were shot from the front. If you are an  3 attacker you're going to be shot in front. The facts do  4 not support the version of the police.  5 Regarding the injured miners of the 61 clinical  6 records examined in this report, 18 cases displayed severe  7 injuries and 24 victims required major surgical procedures.  8 37 of the 61 injured miners have been left with some  9 disability, and regarding the deceased miners, the 34 fatal  10 injuries were all as a result of bullet wounds to their  11 upper body, in other words 100% of the people who died on  12 the 16th of August were shot in their upper parts of the  13 body.  14 What has happened, Mr Chairman, what has happened  15 to the directives of our judges that if you must shoot, do  16 not shoot to kill, try and disable by shooting in the leg  17 or avoiding the killing? At scene 1, 53 SAPS members  18 comprising 47 members of the TRT and 6 of POP members,  19 fired 284 rounds of sharp-point ammunition and 522 rubber  20 bullets – the references are given in our heads of  21 argument. And here is, Mr Chairman, the expectation that  22 if force is to be used it should be proportionate. What  23 caused the miracle of so many dead and so many seriously  24 injured with not a single scratch of any policeman of the  25 16th? What is the inference to be drawn? Are you going to</p>	<p style="text-align: right;">Page 38805</p> <p>1 the baton immediately from you? Is that Mr Brickhill or Mr  2 Ngcukaitobi?  3 MR BIZOS SC: [Microphone off, inaudible]  4 CHAIRPERSON: Mr Brickhill first,  5 alright. Thank you, Mr Bizos.  6 MR BRICKHILL: Thank you, Chair. Chair,  7 by our count we have an hour remaining of our allocation.  8 We propose to allocate that time as follows; I shall make  9 brief submissions for approximately 20 minutes on the issue  10 of the standard of proof, and my learned friend Mr  11 Ngcukaitobi will make submissions on the responsibility of  12 Lonmin both under phase 1 and phase 2 for the remainder of  13 our time allocation.  14 Chair, the issue of the standard of proof and the  15 related question of onus have already received attention in  16 oral argument, and attention in particular in the written  17 argument of the Human Rights Commission. There is  18 substantial emerging consensus on the general principles  19 that should inform the approach of the Commission to onus  20 and standard of proof, but we have certain submissions of  21 clarification and some difference in the application of the  22 general principles to the ultimate findings and  23 recommendations of the Commission. Our focus is the  24 practical bite of these issues, standard of proof, to the  25 findings, conclusions and recommendations that the</p>

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1 Commission is enjoined to make.  
 2 Chair, in relation to onus – and I shall make a  
 3 very brief submission; that issue appears to be largely  
 4 uncontroversial - we would submit that there is an onus in  
 5 the sense articulated by the Chair of the risk of non-  
 6 persuasion that rests on entities, in particular the SAPS,  
 7 that are required to justify killings and injuries.  
 8 Chair, we do note that in paragraph 98 of their  
 9 heads of argument the SAPS make the submission that there  
 10 is no onus-bearing party in the strict legal sense, but  
 11 they accept that it is for the SAPS to lead evidence to  
 12 explain the circumstances under which police acted, from  
 13 which the Commission may then form conclusions and which  
 14 may point to justifications, in their language.  
 15 Chair, we say that there is an onus in the form  
 16 of a risk of non-persuasion and that that onus will inform  
 17 the findings that the Commission makes. We'll come in due  
 18 course to the distinction between the different standards  
 19 of proof as they apply to recommendations of civil  
 20 responsibility, criminal responsibility, and other  
 21 potential recommendations.  
 22 Our main focus then is the standard of proof. We  
 23 accept as the standard point the contention advanced by Mr  
 24 Budlender that at the highest level the notion of  
 25 responsibility to be applied by this Commission, with

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1 respect, is a broader notion of accountability than simply  
 2 civil or criminal responsibility and that there may be  
 3 findings of responsibility that fall short of civil or  
 4 criminal responsibility that should nevertheless be made  
 5 and that may inform specific recommendations, for example  
 6 recommendations going to operational systemic instructional  
 7 issues, such as the need for additional training. But for  
 8 the purpose of accountability, Chair, which in our  
 9 respectful submission is the central purpose, or a central  
 10 purpose of this Commission, civil and criminal liability  
 11 are key.  
 12 [12:33] We align ourselves, Chair, with the submissions  
 13 advanced by the Human Rights Commission and Mr Budlender on  
 14 behalf of the evidence leaders that two key standards that  
 15 this Commission should apply are the standard of  
 16 probabilities and of reasonable suspicion.  
 17 Chair, in our heads of argument, we set out in  
 18 our written heads of argument from page 73 to page 92, we  
 19 set out an analysis of the approach of previous commissions  
 20 of inquiry both in this country and in six other  
 21 jurisdictions, which we say support this general approach.  
 22 The general approach that emerges, Chair, is that the  
 23 standard to be applied is not the ordinary civil standard,  
 24 nor the criminal standard of beyond reasonable doubt, but  
 25 that greater flexibility is applied and that a prima facie

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1 case, or a sufficient case is an appropriate basis on which  
 2 to make findings.  
 3 Chair, I shall simply highlight, we deal with a  
 4 number of South African commissions. I simply highlight  
 5 the Goldstone Commission which submitted multiple reports  
 6 during the course of its proceedings and in those reports –  
 7 and we provide the references in our heads of argument –  
 8 the standard used by the commission was that of sufficient  
 9 or adequately substantiated evidence or of a prima facie  
 10 case.  
 11 There are also references in the commission's  
 12 reports to findings where the commission held that it had  
 13 no doubt that certain facts were the case. Chair, this did  
 14 not constitute in our submission the application of the  
 15 criminal standard, but was merely a reflection of the  
 16 conviction with which the commission was able to make  
 17 particular findings.  
 18 Chair, across the range of commissions in South  
 19 Africa that we've covered, which include the Khayelitsha  
 20 Commission, the Dolan Commission, the Myburgh Commission  
 21 and the Goldstone Commission, a standard of prima facie  
 22 proof was consistently considered appropriate and sometimes  
 23 articulated as sufficient evidence, a sufficiency standard.  
 24 Chair, we submit that this approach is also consistent with  
 25 the approach taken in the six jurisdictions that we've

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1 traced – the United Kingdom, Australia, Canada, New  
 2 Zealand, India and even Pakistan.  
 3 Chair, but what emerges from the reports of these  
 4 commissions, which we shall make available to this  
 5 Commission in electronic form, is that a flexible approach  
 6 is taken and that previous commissions have considered it  
 7 appropriate to record when making findings the degree of  
 8 confidence with which certain findings are made.  
 9 So Chair, in the United Kingdom in the Azelle  
 10 Rodney Inquiry which was concerned with the police shooting  
 11 and killing Azelle Rodney, the commission held as follows.  
 12 "Given the essential nature of an inquiry I see my task as  
 13 inquisitorial and unfettered by any fixed burden or  
 14 standard of proof. That said, when making a finding that  
 15 does not reflect common ground I will record the degree of  
 16 confidence behind the finding." And Chair, in its final  
 17 report the Azelle Rodney Inquiry indeed did so and certain  
 18 findings are reflected as probabilities and others as mere  
 19 possibilities, but that finding is made and recorded and it  
 20 also informs recommendations that follow.  
 21 Similarly, Chair, in the Patrick Finucane Review  
 22 in the United Kingdom, which was set up to investigate a  
 23 murder, we see similar flexibility. The commission stated,  
 24 "I have not adopted a uniform standard of proof. I have  
 25 adopted a flexible approach and have indicated, where

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1 appropriate, the degree to which I am persuaded by credible  
 2 evidence.”  
 3 And finally, Chair, we would point to the Stephen  
 4 Lawrence Inquiry, this particularly notorious inquiry  
 5 around the killing of a black teenager by a gang of five  
 6 white youths and the inadequate police investigation that  
 7 followed in the United Kingdom, and there, Chair, in the  
 8 Stephen Lawrence Inquiry the commission emphasised that,  
 9 and I quote, “We are entitled to reach conclusions upon a  
 10 balance of probability, and we are entitled also to voice  
 11 suspicions should they be found validly to exist. The  
 12 standard of proof is not so rigid that we cannot make  
 13 findings.”  
 14 Chair, the question that then flows from this  
 15 approach, if it is to be accepted, is how it is to be  
 16 applied when the commission comes finally to draw  
 17 conclusions, and we submit to make recommendations  
 18 regarding civil liability and criminal liability. This was  
 19 the question that the Chair posed to Ms Le Roux earlier in  
 20 argument and it’s whether the standard is applied  
 21 differently, whether it plays out different in relation to  
 22 civil liability and criminal liability.  
 23 Chair and Commissioners, you will have seen from  
 24 our heads of argument that we seek a recommendation in  
 25 relation to civil liability, that in the first place both

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1 the SAPS and certain key members and Lonmin be found  
 2 civilly liability, or it be found that there is a  
 3 sufficient basis that they are civilly liable, and the  
 4 recommendation that we seek is for an expedited mechanism  
 5 specially established to pay compensation to all the  
 6 victims.  
 7 In relation to the standard of proof we would  
 8 submit that if ultimately this Commission is persuaded on  
 9 the probabilities, as we say it should be, that those  
 10 entities are civilly responsible, that it would be  
 11 appropriate to make this strong recommendation that the  
 12 special mechanism for expedited compensation be established  
 13 so that victims, all the victims are not forced to  
 14 institute further civil proceedings and wait longer to  
 15 secure compensation.  
 16 In relation to criminal responsibility, Chair, we  
 17 say that the standard of proof plays out differently. We  
 18 seek ultimately the recommendation of investigations  
 19 towards possible prosecution of a range of individuals,  
 20 categories of members of the SAPS, from the National  
 21 Management Forum down to the individual shooters. We  
 22 similarly make submissions in respect of the criminal  
 23 liability of Lonmin, potential criminal liability of Lonmin  
 24 on certain of its key agents, and my learned friend Mr  
 25 Ngcukaitobi will address that in due course.

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1 CHAIRPERSON: Sorry, before you go on  
 2 with that, can I just take you back to a point you made a  
 3 moment ago dealing with civil liability. I take it the  
 4 recommendations to which you refer are those set out in  
 5 paragraphs 8.2 and 8.3, pages 227 and 228. Am I correct?  
 6 MR BRICKHILL: Indeed so, Chair. We  
 7 picked up that the paragraph numbering of our heads of  
 8 argument in electronic form had gone awry. A corrected  
 9 version was –  
 10 CHAIRPERSON: Ja.  
 11 MR BRICKHILL: - was circulated, but  
 12 those are the recommendations, Chair.  
 13 CHAIRPERSON: Now the point I want to put  
 14 to you is you suggested the State acknowledge civil  
 15 liability for loss suffered by the dependents of those  
 16 killed by members of the SAPS and those who were injured,  
 17 we must compensation them for the loss in accordance with  
 18 ordinary principles of civil liability, and you suggest a  
 19 separate board or mechanism be established to determine the  
 20 amount of the loss for which the State is liable. So your  
 21 recommendation is that compensation be paid to, in the case  
 22 of the people who died to the dependents of those who were  
 23 killed by the police, and in the case of those who were  
 24 injured, directly to the injured parties.  
 25 Now I can understand there would be some concern

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1 in certain quarters, and this is a point which has been  
 2 addressed by the evidence leaders, the fact that there are  
 3 other victims in respect of whom you make no  
 4 recommendation. In our systems of law human rights have a  
 5 horizontal application as well as vertical application, and  
 6 those who died at the hands of the strikers also suffered  
 7 from a breach of their human rights, which for some reason  
 8 the Human Rights Commission didn’t see fit to defend,  
 9 although they did, apart from dealing with the police in  
 10 response to a complaint, they also deal with Lonmin. But  
 11 let’s leave the Human Rights Commission out of it.  
 12 The evidence leaders suggest that it would be  
 13 regarded as totally inappropriate for people who might well  
 14 have participated – there’s no necessarily proof – might  
 15 well have participated in some of these acts of brutality  
 16 to receive compensation because they were injured.  
 17 Obviously they must receive compensation for injuries which  
 18 they received which were the subject of unlawful conduct by  
 19 the police, but it would be totally inappropriate to leave  
 20 uncompensated those who were injured at the hands of the  
 21 strikers, or the dependents of those injured at the hands  
 22 of the strikers. It’s no good that they sue the strikers  
 23 because it’s not likely they’ll recover anything even if  
 24 they get judgment. I’m surprised that you don’t make any  
 25 recommendations in respect of them.

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1 MR BRICKHILL: Chair, in relation to the  
 2 issue of the standard of proof we certainly submit that the  
 3 same standard should apply to all, but in terms of the  
 4 special mechanism for civil compensation that we propose  
 5 our primary purpose is to serve our clients' interests and  
 6 so our primary submission is that he and the category of  
 7 persons with whom he was associated should be  
 8 compensation –  
 9 CHAIRPERSON: Yes, but I did understand  
 10 when Mr Bizos presented himself initially at the first  
 11 hearing of the Commission that the stance of the LRC was a  
 12 very commendable one, that you were acting for the  
 13 Ledingoane family, but you were also acting on a sort of  
 14 pro bono basis and pro bono publico basis, and Mr Bizos  
 15 said, I remember it was a phrase that resonated with me,  
 16 that our primary client is the Constitution, the  
 17 Constitution which as I've said gives human rights on a  
 18 horizontal basis to all people concerned, not only  
 19 vertically. So that why I put the question to you.  
 20 MR BRICKHILL: Chair, we would accept  
 21 that the special compensation mechanism should extend to  
 22 all the persons who were killed during the period from the  
 23 10th to the 16th of August and all the injured person,  
 24 including the SAPS members, Lonmin employees.  
 25 CHAIRPERSON: But I mean someone like Mrs

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1 Fundi for example has got human rights as much as anybody  
 2 else, and she's entitled to see to it that this Commission  
 3 does what it can to see to it that her rights are enforced  
 4 also.  
 5 MR BRICKHILL: Indeed so, Chair.  
 6 CHAIRPERSON: Not only Mrs Fundi, but the  
 7 other people in the same category.  
 8 MR BRICKHILL: Chair, my learned friend  
 9 Mr Ngcukaitobi will develop our argument in support of  
 10 Lonmin's responsibility. We contend that Lonmin shares  
 11 responsibility and it ought too to compensate the victims.  
 12 It becomes a complication potentially in terms of  
 13 contributions towards the other categories of persons that  
 14 the Chair draws to our attention in terms of who should  
 15 bear that responsibility, who should pay the compensation,  
 16 but we certainly accept the proposition that if a central  
 17 mechanism is to be established, a special mechanism, that  
 18 it should apply to all the persons who were killed and  
 19 injured and not merely the strikers.  
 20 Chair, if I may then conclude on the issue of  
 21 standard of proof. Chair, reliance is placed on a ruling  
 22 that no inferences may be drawn from the failure of  
 23 individual shooters to give evidence. The corollary of  
 24 that –  
 25 CHAIRPERSON: Oral evidence. To give

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1 oral evidence.  
 2 MR BRICKHILL: To give oral evidence,  
 3 indeed, Chair. The corollary of that position, Chair, we  
 4 submit is that one cannot draw inferences in favour of the  
 5 shooters, cannot reach findings that in effect may  
 6 inadvertently absolve shooters and result in an end to  
 7 investigations. We submit, Chair, that fairness requires  
 8 that there be a compelling justification for killing before  
 9 a finding is made to decline to recommend further  
 10 investigations towards a possible prosecution.  
 11 Chair, such a finding, although it clearly does  
 12 have consequences for the SAPS members and others against  
 13 whom it is made, is not a final determination. It is not a  
 14 conviction or even a binding finding of civil liability.  
 15 We submit, Chair, that fairness towards the killed and  
 16 injured strikers, including our client, also needs to be  
 17 weighed in that balance when determining whether to make a  
 18 finding and whether to recommend investigation towards  
 19 possible prosecution.  
 20 We say that even if there is evidence – and we  
 21 don't accept that there is – that approaches the  
 22 justificatory threshold that comes close to justifying a  
 23 killing, that there is still a reasonable suspicion that  
 24 the killing may be unjustified, the Commission should  
 25 record its findings in the flexible manner that we contend

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1 for, including recording the degree of conviction with  
 2 which particular factual findings are made, and then  
 3 ultimately make a recommendation of further investigation.  
 4 We submit then, Chair, that it is not for the  
 5 Commission to make findings with respect that inadvertently  
 6 may absolve persons who may be criminally liable. Although  
 7 not binding, Chair –  
 8 CHAIRPERSON: Yes, I'm sorry, I take it  
 9 you're going to deal now with the point I'm going to put to  
 10 you. We're not here to make findings against people.  
 11 We're not here to convict people. We're not here to hold  
 12 them liable civilly. We're just a commission. We're here  
 13 to give advice to the President in respect of questions he  
 14 asked us for advice on. We're not here to absolve people  
 15 either. I mean we may well find – you suggest we  
 16 shouldn't, but assuming we did find that a particular  
 17 person was not liable, absolve him or her, that wouldn't  
 18 bind anybody. Someone who was aggrieved by the conduct of  
 19 the person concerned would be entitled to bring proceedings  
 20 and the fact that we had made the finding that you suggest  
 21 in any event we shouldn't make, would not take the matter  
 22 any further. It would be theoretically irrelevant,  
 23 wouldn't it?  
 24 MR BRICKHILL: Chair, it was for that  
 25 reason that we framed the submission as inadvertently

<p style="text-align: right;">Page 38818</p> <p>1 absolve in practice. Although not binding, Chair, the  2 Commission findings will inform the steps that are taken by  3 the role players to secure accountability. The  4 Constitutional Court said so, Chair, in paragraph 15 of its  5 judgment. In effect, Chair, the nation waits and all the  6 relevant role players wait, they stall. The IPID  7 investigation we know has stalled, effectively awaiting the  8 outcome of this Commission. We know for example, Chair,  9 that disciplinary action has not been taken against SAPS  10 members despite the emergence of prima facie breaches, for  11 example Warrant Officer Breedt and the crime scene.  12 So Chair, the submission is that although the  13 Commission would not in law be absolving, that may in  14 practice be the effect if such a finding is made and if no  15 recommendation is made that the relevant authorities pursue  16 an investigation which may lead to a prosecution, and that  17 prosecution may or may not be successful. Chair, the  18 relevant threshold in relation to whether there's a  19 prosecutable case has recently received attention by the  20 Constitutional Court, it's a judgment not referred to in  21 our heads of argument, delivered only a week ago on the 30th  22 of October in National Commissioner of the SAPS versus  23 Southern African Human Rights Litigation Centre.  24 CHAIRPERSON: National Commissioner of  25 the SAPS versus?</p>	<p style="text-align: right;">Page 38820</p> <p>1 Chair, the bite of this authority, its relevance  2 for present purposes is that the question for this  3 Commission is whether there's a reasonable possibility that  4 if investigations are recommended they may yield a winnable  5 case in prosecution - may not, will, and this Commission  6 must be alive to the possibility, with respect, that such  7 an investigation may yield fresh evidence despite all that  8 has passed before this Commission and all the evidence that  9 has been unearthed in two years.  10 So Chair, to conclude, the fact that there may be  11 at this stage plausible difficulties, arguable difficulties  12 with prosecution of certain categories of SAPS members, and  13 arguable defences, that alone is not a sufficient reason to  14 decline to recommend investigation towards possible  15 prosecution. And Chair, we do say that this would apply to  16 all the persons who were killed, including SAPS, Lonmin  17 employees, and the strikers.  18 Chair, we submit that that threshold for present  19 purposes has been crossed in respect of the categories of  20 persons in respect of whom we seek a recommendation for  21 further investigation, including Chair, importantly, the  22 NMF, the commanders and the shooters, including the TRT  23 shooters at scene 1, Chair.  24 [12:53] We accept the difficulties identified by Mr  25 Chaskalson and Mr Budlender in relation to possible</p>
<p style="text-align: right;">Page 38819</p> <p>1 MR BRICKHILL: Southern African Human  2 Rights Litigation Centre, and the SAFLII citation is [2014]  3 ZACC page 30, a decision of the Constitutional Court on the  4 30th of October. Page 30.  5 CHAIRPERSON: Is it page or case?  6 MR BRICKHILL: Case 30, indeed, Chair.  7 It's case 30 of 2014. [2014] 30. Chair, the case was the  8 Zimbabwe torture docket case. It concerned the question  9 whether the SAPS and ultimate the NPA had the power and the  10 duty to investigate allegations of crimes against humanity  11 committed in Zimbabwe and ultimately to prosecute should  12 the perpetrators enter South Africa and for present  13 purposes, Chair, what's relevant is the Constitutional  14 Court's finding at paragraph 78 that the SAPS have a  15 constitutional duty to investigate possible crime and the  16 threshold for that duty, in other words where the SAPS may  17 decline to investigate was articulated as follows by Acting  18 Justice Majiedt before a unanimous court, the threshold was  19 put as follows, "There is a reasonable possibility that the  20 SAPS will gather evidence that may satisfy the elements of  21 torture allegedly committed," and the court went on in  22 paragraph 79 to emphasise that "Any inadequacies in the  23 docket at that stage, and any follow-up or supplementation  24 or corrections must form part of an investigation that will  25 happen subsequently."</p>	<p style="text-align: right;">Page 38821</p> <p>1 prosecutions. There is a legal question around legal  2 causation in respect of the NMF and there are factual  3 questions, potential factual difficulties around the TRT  4 shooters, but Chair, those are not a barrier to  5 recommendation for investigation that may lead in due  6 course to a successful prosecution. Chair, those are my  7 submissions.  8 CHAIRPERSON: Thank you, Mr Brickhill.  9 Now it's Mr Ngcukaitobi.  10 MR NGCUKAITOBI: Thank you, Mr Chairman.  11 Yesterday Mr Budlender explained the four purposes behind  12 the inquiry. The –  13 CHAIRPERSON: Sorry, Mr Ngcukaitobi, I  14 should have told you we're adjourning at 1, but we could  15 either take the adjournment now and start five minutes  16 earlier than we otherwise would have, or you can spend the  17 five minutes setting the scene as it were, putting up the  18 main markers for your argument. It's for you to decide.  19 MR NGCUKAITOBI: I'll take the latter  20 option, Mr Chairman.  21 CHAIRPERSON: Alright.  22 MR NGCUKAITOBI: The second purpose that  23 was highlighted by Mr Budlender is accountability and he  24 explained - quite convincingly in my respectful submission  25 – that such an act may not meet the civil or criminal</p>

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1 threshold for liability. But this is a commission  
 2 concerned with the broader question of establishing who is  
 3 accountable, and he also explained that in trying to answer  
 4 this question we've got to apply, there's two standards – I  
 5 nearly said it's double standards. The first standard is  
 6 reasonable probability and the second standard, in the  
 7 event we are unable to conclude on the balance of  
 8 probabilities, is the reasonable suspicion test.

9 The question I want to address in my oral address  
 10 is accountability of Lonmin in relation to both phase 1 and  
 11 in relation to phase 2, and if I may highlight upfront in  
 12 relation to phase 2, we know that from the heads of  
 13 argument Lonmin says that no findings – I repeat, no  
 14 findings should be made at all in relation to phase 2. It  
 15 says that the reason for that is because we have not heard  
 16 sufficient evidence and that it is not responsible for the  
 17 lack of sufficient evidence.

18 The second reason that it advances is that it has  
 19 not had an opportunity to cross-examine the witnesses that  
 20 were brought, the witnesses that produced the reports,  
 21 particularly Dr Kally, but we know, Mr Chairman, that for  
 22 five years between 2006 and 2011 Lonmin promised to build  
 23 5500 houses. It failed to build those houses. It was  
 24 never held accountable by the department. It is now  
 25 seeking to further defer the responsibility, or the

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1 accountability for its failure to meet its phase 2  
 2 commitments. It now says that it embraces a proposal made  
 3 by the Human Rights Commission that its accountability must  
 4 again be deferred to some sort of a task team.

5 We say that this Commission should hold Lonmin  
 6 accountable for phase 2 on the evidence that is currently  
 7 before it. And if I may highlight, there are seven sources  
 8 of evidence in relation to phase 2 which this Commission  
 9 can on the standard proposed by Mr Budlender make findings  
 10 against Lonmin. The first is Lonmin's own bundle, which  
 11 exceeds 2000 pages. We cannot simply disregard it and  
 12 treat it as if it doesn't exist. The second is a bundle  
 13 which goes into several hundred pages, produced by the  
 14 evidence leaders, that goes into phase 2. The third is the  
 15 LRC's own bundle on phase 2, that is about 200 pages. The  
 16 fourth is the evidence of Mr Ramaphosa. No reference has  
 17 been made to it in its heads of argument by Lonmin.

18 The fifth is the evidence of Mr Seedat, who was  
 19 called specifically to address phase 2 questions. We were  
 20 told, Mr Chairman, that we couldn't ask phase 2 questions  
 21 to Mr Mokwena and we should reserve them to Mr Seedat.

22 The sixth is a report prepared by our colleagues  
 23 at the Human Rights Commission - Mr Tokota, I understand  
 24 that the Human Rights Commission is meant to be  
 25 independent; I mean colleagues in the sense of the

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1 advocates representing the Human Rights Commission – which  
 2 deals with the problems of the SLP system in South Africa,  
 3 and then the seventh source of evidence is the report by Dr  
 4 Kally Forrest.

5 So I want to submit upfront, Mr Chairman, that we  
 6 have enough evidence to make findings even on the lesser  
 7 standard that was proposed by Mr Budlender. The time I  
 8 think is now exactly 1 o'clock, Mr Chairman.

9 CHAIRPERSON: We will resume at 2  
 10 o'clock. Sorry, Mr Budlender, is that right? 2 o'clock or  
 11 quarter to 2? Sorry, I sit corrected; we'll resume at  
 12 quarter to 2.

13 [COMMISSION ADJOURNS COMMISSION RESUMES]  
 14 [13:48] CHAIRPERSON: The Commission resumes.  
 15 Yes, Mr Ngcukaitobi.

16 MR NGCUKAITOBI: Thank you, Mr Chairman.  
 17 Now of course another reason given by Lonmin relates to the  
 18 claim that phase 2 at any rate is outside the terms of  
 19 reference of the Commission. It is a bit perplexing why  
 20 they persist with this argument because this was the very  
 21 subject of the conversation about whether to separate or  
 22 whether to even continue with phase 2 and the ruling to  
 23 that effect was given. But at any rate, it is clear that  
 24 it is within the terms of reference, even if the terms of  
 25 reference are reconsidered, if it should be necessary.

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1 But also Lonmin blows hot and cold on the subject  
 2 because in their original heads of argument they say that  
 3 this matter is completely outside the terms of reference,  
 4 but later in their replying heads of argument they now  
 5 embrace the suggestion by the Human Rights Commission which  
 6 is predicated on the acceptance that the topic of phase 2  
 7 is within the terms of reference. They obviously embrace  
 8 it because ultimately what that recommendation leads to is  
 9 that the whole of phase 2 must go to this task team. In  
 10 other words it must be postponed again.

11 Now in relation to phase 1 there are two issues  
 12 that I intend covering. The first of course is the whole  
 13 question about the terms of reference, but I also want to  
 14 go beyond the terms of reference and to examine whether or  
 15 not on the facts there is a basis to regard Lonmin as being  
 16 criminally liable for having participated or causing the  
 17 deaths of the 34 strikers on the 16th of August, and indeed  
 18 the other people who died in the days prior to the 16th of  
 19 August.

20 Could I then start with phase 2. We start off by  
 21 examining the ambit and the extent of phase 2. We have  
 22 decided to confine our input in the oral submissions only  
 23 to the housing obligation. We have not chosen the housing  
 24 obligations randomly or arbitrarily. We have chosen it  
 25 because we know on the evidence that this was a topic that



<p style="text-align: right;">Page 38826</p> <p>1 was already a boiling point by 2008. There was already  2 widespread worker dissatisfaction about what the workers  3 called at that stage the tendency by Lonmin to break its  4 promises. I put the proposition in cross-examination to Mr  5 Seedat. He indeed accepted that by 2008 Lonmin knew that  6 the lack of adequate housing was a particularly troublesome  7 area in its employment relations.</p> <p>8 But we also pick it for another reason, which is  9 that if one is to be concerned about the underlying causes  10 of the social unrest, one of the factors to be taken into  11 account is the migrant labour system. That's what Dr Kally  12 Forrest tells u. The failure by Lonmin to provide adequate  13 housing simply entrenches the migrant labour system because  14 it means that the people coming from the Eastern Cape, from  15 Swaziland, from Mozambique, to come and work at the  16 platinum mines of Lonmin are compelled at the end of each  17 year to return to the labour sending areas in circumstances  18 where we know on the facts of this case that Lonmin was  19 actually doing very little to improve even the labour  20 sending areas, notwithstanding its commitments under the  21 social and labour plan. So what was the –</p> <p>22 CHAIRPERSON: I'm not sure that's  23 correct. I'm not sure that one can deduce from the  24 material before us that they were doing nothing to –</p> <p>25 MR NGCUKAITOBI: No, I say very little,</p>	<p style="text-align: right;">Page 38828</p> <p>1 commitments made in the social and labour plans was to  2 develop the labour sending areas by including, amongst  3 other things, projects, housing and other activities that  4 are mentioned, and in the later SLPs we see that Lonmin  5 repudiated even the commitments made in relation to the  6 labour sending areas.</p> <p>7 COMMISSIONER TOKOTA: The second question  8 is, do we have evidence from the employees themselves as to  9 the causal link of the strike to the failure by Lonmin to  10 comply with this obligation?</p> <p>11 MR NGCUKAITOBI: That is not my  12 contention, Commissioner Tokota.</p> <p>13 COMMISSIONER TOKOTA: No, no, I'm just  14 asking.</p> <p>15 MR NGCUKAITOBI: Yes. The answer is no,  16 Mr Tokota, Commissioner Tokota. There will be argument,  17 I'm sure, that will be made by Mr Mpfu because one of his  18 witnesses in fact did give evidence to the effect that this  19 is one of the areas that were of contention amongst the  20 workers. The only evidence we rely upon is the evidence of  21 the Minister in relation to the speeches that she gave when  22 she was Minister of Minerals &amp; Energy, and of course the  23 evidence of the Deputy President in relation to the  24 causation element.</p> <p>25 And the terms of reference in any event are free</p>
<p style="text-align: right;">Page 38827</p> <p>1 Mr Chairman.</p> <p>2 CHAIRPERSON: - the labour sending area.  3 Those obligations were spelt out in the annual reports.  4 They indicated what they had done in Transkei for example  5 to comply with certain of their obligations. I'm not sure  6 that it would be appropriate for us to find that they'd  7 done nothing, or very little about –</p> <p>8 MR NGCUKAITOBI: They were doing very  9 little, Mr Chairman. I can pursue this argument because we  10 have examined what they were doing in the labour sending  11 areas and some of the projects were simply discontinued in  12 the middle without any explanation being given by Lonmin,  13 and in this particular instance the commitments about  14 housing in the labour sending areas which was simply never  15 carried through.</p> <p>16 CHAIRPERSON: I think my colleague Mr  17 Tokota wants to ask you a question.</p> <p>18 MR NGCUKAITOBI: Sorry, I didn't notice.</p> <p>19 COMMISSIONER TOKOTA: I just want to  20 check with you whether is it your argument that Lonmin also  21 had an obligation to build houses from the sending areas,  22 or –</p> <p>23 MR NGCUKAITOBI: My argument,  24 Commissioner Tokota, is that Lonmin had an obligation to  25 comply with its social and labour plan. One of the</p>	<p style="text-align: right;">Page 38829</p> <p>1 of the causal element when it comes to the examination  2 because you are required to examine the labour policies  3 generally in the context of the Constitution and the  4 commitments made in the SLP. So I will make the submission  5 further, Commissioner Tokota, that when you examine your  6 roll you should not necessarily confine yourself to the  7 causal connection. We get back to the difficulty that Mr  8 Budlender warned us about, which is we should be keeping  9 our eyes on the ball of accountability. Once you make a  10 commitment to your workers in terms of legislation which is  11 binding, then you must comply with it.</p> <p>12 What was the nature of the obligation, and was it  13 in fact an obligation which was binding? We know from the  14 evidence given by Mr Seedat that there was some kind of an  15 equivocation by Lonmin in relation to whether or not they  16 were compelled to comply with the terms of the SLP, but the  17 provisions of section 25(2)(f) of the MPRDA are quite  18 clear, that a holder of a mining right must comply with the  19 requirements of a social and labour plan.</p> <p>20 Furthermore, the provisions of regulation 44 of  21 the regulations passed in accordance with that act make it  22 clear that if a party wishes to amend the terms of a mining  23 right, particularly the social and labour plan, they must  24 ask for permission from the government. So it could not be  25 clearer that this obligation stems from the act and it</p>

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1 should be complied with.  
 2 Now there should be of course a distinction  
 3 between two questions. The one is whether there has been  
 4 non-compliance and the second is whether there has been a  
 5 justification for such non-compliance. I think Mr  
 6 Chaskalson made the argument in the course of the cross-  
 7 examination of Mr Seedat.  
 8 In relation to the question of non-compliance we  
 9 submit there are obviously two standards that should be  
 10 applied. The first is full compliance and the second is  
 11 the doctrine of substantial compliance. We submit that  
 12 Lonmin has breached both the full compliance notion and the  
 13 substantial compliance doctrine in relation to one  
 14 commitment, which is the commitment to build houses. We  
 15 know on the facts that Lonmin built three out of the 5500  
 16 houses. Of course by no stretch of any imagination can it  
 17 be contended that three out of 5500 is substantial  
 18 compliance. So we ask the Commission to make a finding  
 19 that Lonmin acted in violation of section 25(2)(f) of the  
 20 MPRDA because it failed to comply with the terms of its SLP  
 21 in relation to the building of the 5500 houses.  
 22 Now there are obviously several excuses or  
 23 justifications that have been given by Lonmin –  
 24 CHAIRPERSON: Before we get there, the  
 25 defence put up by Lonmin is they didn't have to build the

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1 houses, they only had to facilitate the building –  
 2 MR NGCUKAITOBI: Yes, I'll –  
 3 CHAIRPERSON: - and their case is that  
 4 they did what they had to do to facilitate. Unfortunately  
 5 their facilitation wasn't successful, but they say that  
 6 what they did constituted compliance with their  
 7 obligations.  
 8 MR NGCUKAITOBI: Yes, I'll deal with  
 9 that –  
 10 CHAIRPERSON: You have to deal with that.  
 11 You can't just assume –  
 12 MR NGCUKAITOBI: Yes, I'll deal with  
 13 that –  
 14 CHAIRPERSON: - without grappling with  
 15 that argument.  
 16 MR NGCUKAITOBI: Yes, it's the fourth  
 17 part of the excuses given by Lonmin because what they have  
 18 also tried to do, as you correctly point out, Mr Chair, is  
 19 to recast their obligation and wiggle out of it by calling  
 20 it something else, but I will show you on the documents  
 21 that they understood it to be the construction of the  
 22 houses.  
 23 Now the first one is obviously the financial  
 24 constraints. There are several answers to the financial  
 25 constraints. Some were explored at length by Mr Chaskalson

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1 with Mr Seedat, particularly in relation to the issue of  
 2 the payment, of payments that were made to the BEE  
 3 shareholders of Lonmin.  
 4 But there is also another answer to it, which is  
 5 that the financial constraints complained of are the  
 6 financial constraints post October 2008. The commitments  
 7 themselves date back to 2006. In fact, according to the  
 8 SLP of 2006 the commitment between 2006 and 2007 was to  
 9 build 700 houses. So the financial excuse there simply  
 10 does not make sense.  
 11 In the SLP of 2006/2008 the commitment was to  
 12 build 1300 houses, and we know that those houses were also  
 13 not built. So in relation at least to about 2000 of these  
 14 houses we know that the financial excuse simply does not  
 15 cut it for Lonmin.  
 16 But furthermore we know that in 2007 Lonmin  
 17 obtained a financial facility from the Rand Merchant Bank  
 18 in the amount of R380 million. When I cross-examined Mr  
 19 Seedat about what actually happened to this money, why did  
 20 Lonmin not take it up because it would have been an ideal  
 21 thing to take up this offer, he said that he had asked  
 22 people at Lonmin, nobody could answer. I asked him whether  
 23 as we speak today there is not a single person at Lonmin  
 24 who can shed any light on this. He said indeed that was  
 25 the position. So you are constrained, Mr Chairman, I want

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1 to submit, to find that there was no reason given in this  
 2 Commission by Lonmin why the facility provided by RMB of  
 3 R380 million, we accept upfront that it would not have  
 4 fulfilled completely their obligation, but we submit that  
 5 it would have gone a substantial distance towards meeting  
 6 their obligation. So for Lonmin to come to the Commission  
 7 and claim that, (a), it didn't comply; and (b), it doesn't  
 8 know why it didn't comply, simply does not make sense in  
 9 relation to this aspect.  
 10 In addition to the points that were covered in  
 11 the evidence of Mr Seedat by Mr Chaskalson in relation to  
 12 the payment of dividends to BEE shareholders we also know  
 13 that post 2008 these dividends continued being paid. Mr  
 14 Ramaphosa's company Shanduka, although it was not paid  
 15 dividends, was paid an amount of R250 000 per month,  
 16 ostensibly for empowerment or transformation advice,  
 17 including among other things the issue about compliance  
 18 with the SLPs. We also know that Lonmin in the same period  
 19 bought an asset, the mining asset Akanani. We also know  
 20 that they paid Dr Sivi Gounden an amount of R35 million.  
 21 So clearly, Mr Chairman, they had the resources. The only  
 22 issue is that they decided not to channel these resources  
 23 to the building of the houses. They decided to channel  
 24 these resources to other activities because in our  
 25 submission they simply did not regard the building of these

<p style="text-align: right;">Page 38834</p> <p>1 houses to be a matter of priority.</p> <p>2 So we seek a finding in relation to this item</p> <p>3 that the financial excuse given by Lonmin should be</p> <p>4 rejected and that it should be found that Lonmin had</p> <p>5 sufficient financial resources to build or facilitate the</p> <p>6 building of these houses.</p> <p>7 Maybe at this point, Mr Chairman, it's</p> <p>8 appropriate to refer to the point you were trying to press</p> <p>9 me on, which is well, Lonmin says it didn't have to build</p> <p>10 the houses, it simply had to facilitate the houses. That</p> <p>11 was precisely the spirit under which the letter from RMB</p> <p>12 was written. It was a letter to assist Lonmin to</p> <p>13 facilitate the building of these houses, but</p> <p>14 notwithstanding that it was not taken up and you've simply</p> <p>15 not been given any explanation why it was not taken up.</p> <p>16 The second excuse given by Lonmin is that there</p> <p>17 was a lack of demand for these houses on the part of the</p> <p>18 workers. So from blaming the lack of financial resources</p> <p>19 we are now blaming the workers. We are saying that the</p> <p>20 workers actually do not want these houses.</p> <p>21 Now there is substantial evidence which shows</p> <p>22 that actually there was a massive demand for these houses,</p> <p>23 and in this regard it's important to draw a distinction</p> <p>24 between a demand for ownership and a demand for housing</p> <p>25 because the obligation made in the 2006 SLP was an</p>	<p style="text-align: right;">Page 38836</p> <p>1 provide. I've already referred to the 2006 SLP, and</p> <p>2 particularly the obligation to provide access to these</p> <p>3 houses.</p> <p>4 But furthermore there are several other parts to</p> <p>5 the evidence that show that it was a concrete as opposed to</p> <p>6 a weak unenforceable obligation. The first part that we</p> <p>7 deal with is the, we deal with this at paragraph 53.1 of</p> <p>8 our heads of argument for phase 2, and that's where we</p> <p>9 quote the SLP which deals with the provision of access to</p> <p>10 housing, and in the later SLP of 2007 we know that what</p> <p>11 they tell us there is that they are committed to providing</p> <p>12 all employees with a opportunity to access their houses.</p> <p>13 Now later on what happens is a sustainability</p> <p>14 report is produced in 2008 and in that sustainability</p> <p>15 report – and that is at SSSS2 at page 1378 – Lonmin for the</p> <p>16 first time says that its commitment is to construct 5500</p> <p>17 houses within the greater Lonmin community by 2011. Of</p> <p>18 course we know by 2008 that they were already substantially</p> <p>19 behind in relation to their commitment.</p> <p>20 In the next sustainability report of 2009 again</p> <p>21 the language of construction of the 5500 houses is used and</p> <p>22 that is at SSSS2 at page 1390 that we've referred to in</p> <p>23 paragraph 53.4.2 of our heads of argument. That again is</p> <p>24 repeated in the 2010 sustainability report which Lonmin</p> <p>25 says its obligation again is to construct 5500 houses</p>
<p style="text-align: right;">Page 38835</p> <p>1 obligation to provide access to the housing. That access</p> <p>2 could be provided either by rental stock, alternatively by</p> <p>3 the actual construction aimed towards the ownership,</p> <p>4 alternatively by even a third method, which is rent-to-buy.</p> <p>5 All of those methods were produced to the attention of</p> <p>6 Lonmin in the 2008 report that they commissioned, and it</p> <p>7 was prepared by the experts. That report tells us that 85%</p> <p>8 of Lonmin workers actually wanted to own their houses and</p> <p>9 only 15% wanted to rent their houses. Lonmin says later</p> <p>10 that in 2010 in a policy and procedure document that</p> <p>11 actually it was the reverse; 15% ownership and 85% rental,</p> <p>12 but when I asked in cross-examination what happened to that</p> <p>13 15% that intended to own the housing and why were their</p> <p>14 houses not built, there was no proper explanation by Mr</p> <p>15 Seedat.</p> <p>16 So we ask in this regard that there should be a</p> <p>17 finding that there was indeed a demand, a consistent demand</p> <p>18 for access to housing. Whether that was in the form of</p> <p>19 rental or whether that was in the form of ownership really</p> <p>20 doesn't matter for the purposes of the argument that we</p> <p>21 make before this Commission.</p> <p>22 Now Lonmin also tells us, and this is the point,</p> <p>23 Mr Chairman, that you were raising with me, that actually</p> <p>24 you must contextualise our obligation. It was an</p> <p>25 obligation to facilitate as opposed to an obligation to</p>	<p style="text-align: right;">Page 38837</p> <p>1 within the greater Lonmin community. So it is clear, Mr</p> <p>2 Chairman, that Lonmin understood the nature of the</p> <p>3 obligation not as a weak unenforceable facilitation</p> <p>4 obligation, but as a concrete construction obligation.</p> <p>5 In fact, Mr Chairman, you will remember in the</p> <p>6 cross-examination – and we've referred to this at paragraph</p> <p>7 53 – that you put to Mr Seedat whether or not he thinks it</p> <p>8 would be sensible for the government to simply allow them</p> <p>9 their mining right which they were applying for on the</p> <p>10 basis of a non-commitment, or whether the government</p> <p>11 actually wanted commitments, and he accepted that actually</p> <p>12 the government would not have been content with a non-</p> <p>13 commitment on facilitation, and in fact the government</p> <p>14 would have wanted a concrete undertaking.</p> <p>15 CHAIRPERSON: Before you move on, just go</p> <p>16 back to a point that you made a few minutes ago, SSSS2,</p> <p>17 there Lonmin does say that its commitment was amongst</p> <p>18 others to construct 5500 houses within the greater Lonmin</p> <p>19 community, GLC.</p> <p>20 [14:08] And then it goes on to say this – and this has</p> <p>21 been puzzling me for some time – “Our principle risk is</p> <p>22 possible withdrawal of our mining licences” –</p> <p>23 MR NGCUKAITOBI: Yes.</p> <p>24 CHAIRPERSON: - “resulting from failure</p> <p>25 to deliver commitments.”</p>

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1 MR NGCUKAITOBI: Yes.

2 CHAIRPERSON: Now you'll remember that Mr

3 Jamieson's evidence – I think it was Mr Jamieson - was that

4 because Lonmin PLC is listed on the London Stock Exchange

5 there's an ongoing obligation to advise shareholders of

6 matters that are relevant with regard to the share price

7 and how the company is doing, and so on, and this is one of

8 his tasks, was to do that, and I'm not sure, I don't think

9 the evidence covers it, but I'd be very interested, very

10 surprised to know whether – surprised to know if Lonmin

11 actually informed its shareholders that it will run this

12 risk of possible withdrawal of its mining licences by

13 failing to comply with its obligations under the SLP. That

14 would have caused a fall in the share price, which was

15 substantially greater than anything that happened after the

16 16th of August 2012. But I don't know whether there's any

17 evidence on that, or whether that's just a thought that I

18 should have raised at the time and didn't.

19 MR NGCUKAITOBI: No doubt Lonmin will

20 attend to that, Mr Chairman. We are not aware of any

21 evidence in relation to that issue, but it is also

22 important for another point, which is one of the arguments

23 I'm trying to persuade the Commission about, which is that

24 Lonmin knew that this was a legal obligation that had to be

25 complied with and the evidence given by Mr Seedat, which

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1 somewhat creates the impression that Lonmin somewhat

2 believed that this was not an enforceable obligation,

3 should simply be rejected. It knew that if it didn't

4 comply there was a risk that its mining permit would be

5 withdrawn by the department.

6 I started off by indicating that one of the

7 problems of course is that the responsibility of the

8 government has been excised from the terms of reference and

9 Lonmin was never held accountable by the government, but

10 they should not be allowed at least in this Commission not

11 to account for their failures to comply with their SLPs.

12 Now Mr Chairman, those are the four excuses given

13 by Lonmin. We say you should reject each and every one of

14 those excuses and you should find that they did not comply

15 with the provisions of the act, and because they did not

16 comply with the provisions of the act, clearly they have

17 caused a loss to the employees because those employees lost

18 an opportunity to access adequate decent accommodation.

19 Now I want to make a further point in relation to

20 this failure by Lonmin. It is true that Lonmin, qua Lonmin

21 failed to comply with its SLP obligations, but the failure

22 also extended beyond management into the board of directors

23 itself because we know on the evidence that the

24 responsibility to comply, to monitor rather the compliance

25 with SLPs was assigned to the transformation committee,

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1 which was a subcommittee of the board of directors, and we

2 know that the chairman of the transformation committee was

3 Mr Ramaphosa, and when he was asked questions about

4 precisely what role was played and why in fact the

5 transformation committee did not do its job he seems to

6 accept that the transformation committee fell short of its

7 obligations, and he seems to suggest that some of the

8 issues should be raised with management.

9 Now I have made submissions about whether or not

10 the failure by the board specifically to ensure that the

11 company complies with the law should not be considered as a

12 breach of the Companies Act, and if it is considered to be

13 a breach of the Companies Act, particularly under sections,

14 I think it's 76 and 77, whether or not the Commission

15 should not make a referral to the Companies Commission, the

16 Companies and Intellectual Property Commission to

17 investigate whether or not any of the directors who sat in

18 the transformation committee should not be held liable for

19 the breaches by Lonmin, of which they were aware and did

20 nothing to correct in relation to the housing obligations.

21 I simply make that proposal as one of the recommendations

22 that we make.

23 I want to move on, Mr Chairman, to phase 1 topics

24 and Lonmin. Now I ended phase 2 by asking whether or not

25 there should be a referral to the Company Commission in

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1 relation to the members of the transformation committee. I

2 want to start phase 1 by again referring to what role

3 should be associated with the Deputy President. So first

4 we want to embrace the submissions made by Mr Budlender,

5 which is that there is on the evidence at least a

6 sufficient degree of probability that the members of the

7 police took into account political considerations when they

8 decided on the action on the 16th.

9 Mr Budlender also identifies the source of those

10 political considerations, and particularly Mr Ramaphosa as

11 being one of the sources of those political considerations.

12 So the question then that must be asked is not whether

13 criminally or civilly Mr Ramaphosa should have foreseen the

14 possibility of bloodshed, but it is whether he should be

15 held accountable if we were to apply the standard that was

16 suggested by Mr Budlender, whether he should be held

17 accountable for the use of political pressure on the SAPS.

18 Now we say on the evidence that has been given,

19 which we accept, it is clear that the ultimate source of

20 the political pressure was Mr Ramaphosa. It is clear from

21 the evidence that was given by Mr Jamieson that the very

22 reason that Mr Ramaphosa was contacted in relation to this

23 matter was because of his political connections. It is

24 clear that Mr Ramaphosa had two conversations on the 12th of

25 August on his own evidence with the Minister of Police. In

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1 the first conversation he sought to bring to the attention  
 2 of the Minister of Police the unfolding situation at  
 3 Lonmin. In the second conversation he sought to bring to  
 4 his attention the urgency of the situation. The other  
 5 events thereafter unfold and we know that ultimately they  
 6 culminate in Commissioner Mbombo having the conversation on  
 7 the 14th with Mr Mokwena, saying "Well, we know that Mr  
 8 Ramaphosa is involved in the matter," and that's one of the  
 9 considerations that they take into account.

10 So if you accept the –  
 11 COMMISSIONER TOKOTA: Sorry, Mr  
 12 Ngcukaitobi, wasn't Mr Ramaphosa used as a means of  
 13 facilitating the response by the police by Lonmin?  
 14 MR NGCUKAITOBI: He was.  
 15 COMMISSIONER TOKOTA: Because he had that  
 16 political influence at least to have the police to come to  
 17 the situation.  
 18 MR NGCUKAITOBI: Sorry, Commissioner –  
 19 COMMISSIONER TOKOTA: Was that use merely  
 20 because he's a political person, or –  
 21 MR NGCUKAITOBI: Commissioner Tokota, he  
 22 was used for various reasons. The only point I make is  
 23 that one of those reasons, which was admitted by Mr  
 24 Jamieson, was his political connections. He was used for  
 25 his stature. He was used for his historical being. He was

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1 used for his influence. The problem I make is, (1), is if  
 2 you accept the proposal that has been made by Mr Budlender  
 3 that one of the factors taken into account are political  
 4 considerations, you've got to answer the flipside, whether  
 5 the source of those political considerations should not be  
 6 held accountable for those political considerations –  
 7 COMMISSIONER TOKOTA: But I understood  
 8 that argument to be relating to the police, not to Lonmin.  
 9 MR NGCUKAITOBI: He has answered that.  
 10 COMMISSIONER TOKOTA: It was a decision  
 11 of the police.  
 12 MR NGCUKAITOBI: Yes.  
 13 COMMISSIONER TOKOTA: Which actually  
 14 connected him to that. I understood him to be like that,  
 15 but I may have misunderstood him.  
 16 MR NGCUKAITOBI: No, you are right,  
 17 Commissioner Tokota. I make a separate argument, but I use  
 18 his argument as a foundation for mine.  
 19 CHAIRPERSON: Before you talk about  
 20 accountability, is it relevant to ask what was it that Mr  
 21 Ramaphosa was trying to do? According to the evidence  
 22 there was a dismal failure of visible policing on the 12th,  
 23 the Sunday. Information had been received from  
 24 intelligence people, Brigadier Engelbrecht, of what it was  
 25 thought the informant said was going to happen, and it did

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1 happen. The undertaking was given by General Mpembe that  
 2 Visible Policing would be beefed up or strengthened. That  
 3 didn't happen. Captain Govender, who was in charge of  
 4 Visible Policing wasn't even contacted, and this was  
 5 reported to Mr Ramaphosa that there had been this failure  
 6 of Visible Policing and he then contacted the Minister to  
 7 say that is what was reported to him, suggested the  
 8 Minister look into it. The Minister than said he would do  
 9 that and he did so. Was there anything improper or  
 10 inappropriate in regard to what Mr Ramaphosa did on the  
 11 Sunday?  
 12 MR NGCUKAITOBI: On the 12th, rather.  
 13 CHAIRPERSON: Sorry?  
 14 MR NGCUKAITOBI: On the 12th.  
 15 CHAIRPERSON: The Sunday, yes, the 12th.  
 16 MR NGCUKAITOBI: Yes, yes. Well, Mr  
 17 Chairman, we say that at that point when Mr Ramaphosa was  
 18 contacted - and I explored this a bit in the cross-  
 19 examination – two options were available to him. The one  
 20 is to use his being and his position as a force of good and  
 21 facilitate negotiations. The other is to increase police  
 22 presence and to militarise the situation.  
 23 CHAIRPERSON: No, that's a separate  
 24 question which you can deal with in a – I won't stop you -  
 25 you can deal with in a moment. But assuming you have two

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1 farmers, each of whom owns a cattle ranch in the Kalahari,  
 2 and assume there's a dangerous gang of cattle thieves -  
 3 cattle rustlers as they would say in another country - who  
 4 are armed, who are shooting people, who are terrorising the  
 5 inhabitants of these two cattle ranches, stealing cattle  
 6 and doing all sorts of other things, and assuming one of  
 7 those farmers is a politically connected person and assume  
 8 the other isn't, now I know it may be easier for the  
 9 politically connected person to get through to high-ups,  
 10 but even the politically non-connected person might if he's  
 11 persistent enough be able to get through to some senior  
 12 official to say look here, there's a serious problem on my  
 13 ranch and on the ranch of my neighbour and the police are  
 14 doing nothing about it, can't you do something. It  
 15 wouldn't be wrong for the politically non-connected person  
 16 to do that, would it?  
 17 MR NGCUKAITOBI: Mr Chairman, I'm  
 18 reluctant to accept the proposition.  
 19 CHAIRPERSON: Well the answer is either  
 20 yes or no.  
 21 MR NGCUKAITOBI: Yes. I'm reluctant to  
 22 accept the proposition. Let me explain –  
 23 CHAIRPERSON: No, may I suggest good  
 24 advocacy.  
 25 MR NGCUKAITOBI: Yes.

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1 CHAIRPERSON: To answer the question  
 2 first and give the explanation later. My experience has  
 3 been over the years that if counsel don't answer questions  
 4 and try to explain them before answering it doesn't work.  
 5 MR NGCUKAITOBI: Yes.  
 6 CHAIRPERSON: It's better to answer the  
 7 question and then give the explanation.  
 8 MR NGCUKAITOBI: Yes.  
 9 CHAIRPERSON: The question was the  
 10 politically non-connected farmer, is he doing anything  
 11 wrong by going as high up in the police force as he can and  
 12 saying look here, there's a serious problem, my neighbour  
 13 and I, farms are being terrorised by this gang of cattle  
 14 rustlers who are murdering our staff, killing our animals,  
 15 destroying our property, the police are doing nothing,  
 16 please see to it if something can be done? Anything wrong  
 17 with that?  
 18 MR NGCUKAITOBI: Mr Commissioner, the  
 19 problem is that – so let me answer the question –  
 20 CHAIRPERSON: Yes or no?  
 21 MR NGCUKAITOBI: Let me answer the  
 22 question first.  
 23 CHAIRPERSON: Alright.  
 24 MR NGCUKAITOBI: So there is, I mean it  
 25 depends what you mean when you say "anything wrong with

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1 it," because if the standard that is being applied is a  
 2 moral standard then clearly there's nothing wrong with it.  
 3 CHAIRPERSON: Okay.  
 4 MR NGCUKAITOBI: But there is a problem  
 5 if we create the impression that people with political  
 6 connections can use those connections to get things that  
 7 other people cannot have.  
 8 CHAIRPERSON: No, but if Mr Ramaphosa –  
 9 well, leave Mr Ramaphosa out of it now – the politically  
 10 connected farmer in the example I put to you, if he does no  
 11 more than his non-politically connected neighbour has done,  
 12 is he doing anything immoral, anything inappropriate? All  
 13 he's trying to do is to get the police to do their work.  
 14 MR NGCUKAITOBI: Yes, Mr Chairman, on  
 15 these facts this was not a call to the police to do their  
 16 work, this was a call to the Minister. This is where the  
 17 source of the political pressure is.  
 18 CHAIRPERSON: No, but the Minister is the  
 19 member of the cabinet according to the Constitution  
 20 responsible for the police.  
 21 MR NGCUKAITOBI: Yes.  
 22 CHAIRPERSON: He has oversight  
 23 responsibilities. Mr Chaskalson and Mr Budlender, Mr  
 24 Budlender I think, Mr Budlender dealt with it in his  
 25 argument. He has the right to contact the National

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1 Commissioner and say look here, there seems to be a problem  
 2 over there, I suggest you look into it and sort it out if  
 3 you can. That's all, as I understand it, that Mr Ramaphosa  
 4 did. But as I say, let's leave Mr Ramaphosa out of it. My  
 5 two farmers in the Kalahari, if the non-politically  
 6 connected farmer did nothing wrong, why did the politically  
 7 connected one do anything wrong, or did he?  
 8 MR NGCUKAITOBI: Yes, I mean I have a  
 9 difficulty in accepting the proposition that because I have  
 10 political connections I can go straight to the Minister,  
 11 whereas an ordinary person on the street is required to go  
 12 to the police station.  
 13 CHAIRPERSON: I don't know that he's  
 14 required to go to the police station. If I was the farmer,  
 15 the non-politically connected ranch owner, and there was  
 16 murder and mayhem going on, on my farm, and the local  
 17 police station weren't helping me, I would go as high as I  
 18 could and if I was persistent enough I would get through.  
 19 MR NGCUKAITOBI: Yes, if you look –  
 20 CHAIRPERSON: Now the problem I've got is  
 21 you see, can you have the use of – [inaudible] used another  
 22 context earlier – can you have a double standard? Can you  
 23 say the non-politically connected farmer can go as high as  
 24 he can get in the police just to ask the police to do their  
 25 work; the politically connected one, because he's

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1 politically connected, has got to act as some kind of  
 2 agricultural eunuch and not do anything at all because he's  
 3 politically connected? I mean can that be right?  
 4 MR NGCUKAITOBI: I see the proposition,  
 5 Mr Chairman. I make the argument that it would be wrong  
 6 for this Commission to adopt an attitude that acknowledges  
 7 that people with political connections are entitled to use  
 8 those political connections for, in this instance as we  
 9 know, the protection of a private interest, which is not  
 10 applicable to me –  
 11 CHAIRPERSON: I'm sorry, but it's a  
 12 different proposition I'm putting. I don't want to  
 13 interrupt you. I'll give you an opportunity to complete  
 14 your point, but the difficulty as I see it is you're  
 15 putting it the other way around. What I'm merely asking  
 16 you is, is the politically connected person to be prevented  
 17 from doing things that non-politically connected people can  
 18 do simply because of his political connection? That seems  
 19 to be an interesting, but I would venture to think  
 20 difficult to defend proposition.  
 21 MR NGCUKAITOBI: Mr Chairman, the only  
 22 proposition I make is people with access to political power  
 23 ought to use that political power responsibly. The idea  
 24 that people with access to political power can simply call  
 25 upon those political connections as and when they wish, I

<p style="text-align: right;">Page 38850</p> <p>1 am reluctant to submit that this Commission can adopt or 2 endorse that kind of society. The problem is that all of 3 us, with or without political connections, should simply 4 follow the channels. There is a major problem related to 5 abuse of political office with what we see happening in 6 this instance. We know that the only reason that was given 7 by Mr Jamieson when he was being cross-examined by Mr Mpfu 8 about why did you choose Mr Ramaphosa, was that because he 9 had political contacts. You can multiply this outside the 10 situation that this Commission is faced with and think 11 about the consequences of allowing people with political 12 connections to use them for their personal interest.</p> <p>13 COMMISSIONER TOKOTA: But in the light of 14 the history of Lonmin not getting police, visible policing, 15 what was wrong in Mr Jamieson using that in order to secure 16 the presence of the police? What is it that was wrong?</p> <p>17 MR NGCUKAITOBI: It's unclear whether or 18 not there was a complete non-cooperation from the police. 19 I think there had been a gradual increase in the police 20 presence on the site, and of course it escalated as soon as 21 Mr Ramaphosa came onto the scene. Commissioners –</p> <p>22 CHAIRPERSON: [Microphone off, inaudible] 23 9 o'clock that evening as well.</p> <p>24 MR NGCUKAITOBI: Yes.</p> <p>25 CHAIRPERSON: But you see, what seems to</p>	<p style="text-align: right;">Page 38852</p> <p>1 parties will say that he should be criminally charged. We 2 simply say that he should be held accountable. We 3 understand that that was suggested by Mr Budlender. Now –</p> <p>4 CHAIRPERSON: I'm sorry, I might give you 5 another minute for this. What exactly does that mean in 6 practical terms? Does it mean that the Commission should 7 make a moral judgment against him, say you haven't 8 committed a crime, you haven't committed a civil wrong, but 9 you've behaved badly and we think that we must tell the 10 world that you've behaved badly? Is that what holding him 11 accountable means, or does it mean something else? Ek vra 12 maar net. I don't know what the answer is.</p> <p>13 MR NGCUKAITOBI: Mr Bizos, who is my 14 leader in this case, has just advised me that he acted 15 unwisely.</p> <p>16 [14:28] The factual findings can be made in relation to 17 the political pressure and it can be recorded that it was 18 improper for him to exert political pressure, no more than 19 that.</p> <p>20 CHAIRPERSON: But then by improper you're 21 asking for a moral judgment. What you're saying – I'm not 22 saying this is wrong, I'm just trying to find out what 23 "hold him accountable" means. Does it mean that the 24 Commission must make – it may well be that the answer is 25 yes, but I'm asking you, does it mean the Commission must</p>
<p style="text-align: right;">Page 38851</p> <p>1 be inherent in your argument is that when Mr Jamieson 2 phoned Mr Ramaphosa and said look here, the police are 3 doing nothing, terrible things are happening at Marikana, 4 we told the police about it, the police are sitting with 5 folder arms, nothing is happening, please do something; Mr 6 Ramaphosa said look here, if I was a private citizen I'd be 7 only too pleased to help you, but unfortunately I'm a 8 member of the NEC and I happen to know the cell number of 9 the Minister of Police, it would be wrong and improper for 10 me to use that number. Is that a serious proposition 11 you're putting up?</p> <p>12 MR NGCUKAITOBI: Yes, because this is the 13 only way we can be consistent with principle. If it is 14 wrong for the police to take into account political 15 considerations, the source of those political 16 considerations must be accountable.</p> <p>17 Now Mr Chairman, I want to make the – I think 18 I've got about 10 minutes. I want to deal then with –</p> <p>19 CHAIRPERSON: It's not what you have, but 20 I'll give it to you.</p> <p>21 MR NGCUKAITOBI: I want to deal then with 22 the responsibility of Lonmin in relation to phase 1 as 23 distinct from Mr Ramaphosa's responsibility, and Mr 24 Chairman, just to make clear, we don't suggest that Mr 25 Ramaphosa should be criminally charged. I'm sure other</p>	<p style="text-align: right;">Page 38853</p> <p>1 give expression to a moral judgment, say you didn't do 2 anything criminal, you didn't do anything which is civilly 3 actionable, but you acted immorally? Is that what you –</p> <p>4 MR NGCUKAITOBI: Acted improperly.</p> <p>5 CHAIRPERSON: Sorry, improperly.</p> <p>6 MR NGCUKAITOBI: Yes, yes.</p> <p>7 CHAIRPERSON: Isn't that the same thing? 8 Can you act improper without acting immorally, or vice 9 versa?</p> <p>10 MR NGCUKAITOBI: Well, Mr Chairman, the 11 proposition I make is simply that if the task of the 12 Commission is to advise the President in relation to which 13 policy, in relation to the policies he may adopt, there is 14 nothing standing on your way from expressing the view that 15 it was improper for you, given your political standing, to 16 use your political power to bear on the police. Nothing is 17 wrong with that. That's not an expression of a moral 18 judgment. It's simply advice being given to the President.</p> <p>19 CHAIRPERSON: So to use Mr Bizos's 20 expression, we would say to the President Mr Ramaphosa 21 acted unwisely in doing what he did and we suggest that you 22 issue some kind of – I don't know if it's a handbook for 23 members of the NEC –</p> <p>24 MR NGCUKAITOBI: Well, there's something 25 called the ethics, which is not quite –</p>

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1 CHAIRPERSON: Yes, yes, yes, of course.  
 2 MR NGCUKAITOBI: - criminal, not quite  
 3 civil, but it's ethical.  
 4 CHAIRPERSON: Alright, well you're  
 5 putting it more strongly now than just unwisely. The  
 6 President should issue some kind of handbook for members of  
 7 the NEC –  
 8 MR NGCUKAITOBI: Yes.  
 9 CHAIRPERSON: - to say in future if your  
 10 farm is being attacked by a gang of cattle rustlers who are  
 11 shooting your staff and killing your cattle and destroying  
 12 your property, you may not phone the Minister of Police to  
 13 ask the police to do their work because that will be seen  
 14 as unethical conduct. Is that what you're saying we should  
 15 recommend?  
 16 MR NGCUKAITOBI: Yes, Mr Chairman. I've  
 17 made the motivations for this because one really does not  
 18 know where this ends and one does not know how many other  
 19 politically connected people can simply call upon their  
 20 politically connected friends. So I suggest that from an  
 21 ethical point of view it was wholly inappropriate to make  
 22 that contact and there is nothing stopping the Commission  
 23 from making that finding and giving the advice to the  
 24 President that it was inappropriate.  
 25 Now I think I now have eight minutes. Can I move

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1 on then to the liability of Lonmin as a company. Now I  
 2 suggest that where we start with Lonmin, we start by  
 3 recognising that Lonmin was under a legal duty to protect  
 4 its employees. That legal duty comes from two sources.  
 5 The first is the common law and the authority we have for  
 6 the common law is a judgment of the Supreme Court of Appeal  
 7 cited at page 173 of our heads of argument, Media24 Ltd and  
 8 Another versus Grobler. Mr Chairman, you will remember  
 9 this case very well because in the law reports it says the  
 10 judgment was written by Farlam JA.  
 11 CHAIRPERSON: I seem to remember that Mr  
 12 Burger appeared in the matter as well, so you've got two  
 13 people in the room who know about that case.  
 14 MR NGCUKAITOBI: Yes, it says that "It is  
 15 well settled that an employer owes a common law duty to its  
 16 employees to take reasonable care for their safety. This  
 17 duty cannot in my view be confined to an obligation to take  
 18 reasonable steps to protect them from physical harm caused  
 19 by what may be called physical hazards. It must also in  
 20 appropriate circumstances include a duty to protect them  
 21 from psychological harm caused." So the duty that you, Mr  
 22 Chairman, expressed was a duty to take reasonable care of  
 23 the safety of your employees. I suggest that that duty is  
 24 not broken simply because an employee is in an illegal  
 25 strike. In fact in some instances it may simply be

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1 enhanced.  
 2 Then the second source of the duty is legislation  
 3 itself, and that is the Occupational Health & Safety Act 85  
 4 of 1993, particularly section 8, and in both the common law  
 5 and in legislation the duty is to take reasonable steps to  
 6 protect your employees. So I want to suggest that the  
 7 question for the Commission is really to ask whether or not  
 8 Lonmin not out of benevolence but because of a legal duty  
 9 took reasonable steps to protect their employees from harm.  
 10 This is so particularly bearing in mind, as you pointed  
 11 out, Mr Chairman, earlier that the Constitution is also of  
 12 horizontal application, so that workers are people too.  
 13 They have dignity. They have the right of life and they  
 14 should be protected from physical danger. So did Lonmin  
 15 discharge its obligations to take reasonable steps to  
 16 protect its employees?  
 17 Now of course we know that there are broadly  
 18 speaking two categories of employees. There are those  
 19 employees who were not on strike, and then there are those  
 20 employees who were on strike, but my submission is broader;  
 21 it says that Lonmin was obligated by law to take reasonable  
 22 steps to protect both categories of employees.  
 23 Now what did Lonmin do wrong which would have  
 24 been in breach of this obligation? So the first relates to  
 25 the question whether or not this strike, as it was called,

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1 could have been resolved in different ways, in other ways  
 2 by negotiations, and that ties up to the first question,  
 3 1.1.1 that relates to Lonmin, whether or not Lonmin  
 4 exercised its best endeavours to resolve any dispute which  
 5 may have arisen between Lonmin and its labour force and  
 6 generally among its labour force. So your terms of  
 7 reference require you to answer the question whether or not  
 8 you can say on the evidence Lonmin used its best  
 9 endeavours, not just any endeavours, not just reasonable  
 10 endeavours, but best endeavours. In other words, did they  
 11 do everything they could possibly do within their capacity  
 12 to resolve the tension that had arisen at that stage.  
 13 So I want to suggest that they didn't. They  
 14 repudiated this obligation. To begin with, once Mr Da  
 15 Costa had spoken to the workers – and I know that there is  
 16 a dispute about whether this was negotiation or whether  
 17 this was discussion, it doesn't matter exactly. Once he  
 18 had spoken to the workers and once it was clear even after  
 19 the investigation by Mr Mokwena that actually Lonmin was  
 20 underpaying its workers when compared to Impala and Anglo,  
 21 there was a duty to keep the channels of communication  
 22 open. In fact one of the positive aspects of the evidence  
 23 by Mr Ramaphosa was to recognise after he got the email  
 24 from Ms Ncube right on the 9th of August that the only way  
 25 out of this impasse is negotiation. Of course the problem



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1 is that he didn't carry through that recognition.  
 2 So the main point I make about this topic, Mr  
 3 Chairman, is that if your terms of reference require you to  
 4 ask if Lonmin used its best endeavours, then you must ask  
 5 why on earth did they not speak to the workers. Why did Mr  
 6 Mokwena find it necessary to discontinue the negotiations  
 7 on the 10th of August, in our submission at the most  
 8 inopportune moment when he decides to close the  
 9 negotiations? This is not the same as saying they should  
 10 have given in to the R12 500 demand. It is simply to say  
 11 that they should have kept the doors of the negotiations  
 12 open, and this is so particularly if one has regard to the  
 13 narrative presented by Mr Da Costa, who says these workers  
 14 came to me three times; I told them what the position was  
 15 and they dispersed peacefully. And even on the third  
 16 occasion when they came to him and he told them the  
 17 response by management, there was a grumbling outside but  
 18 he says that the security got involved and they told them  
 19 to leave and they left. And why then did Lonmin simply  
 20 decide we are closing down the space for negotiations when  
 21 we know that even after the 16th of August the dispute was  
 22 only resolved by negotiations.  
 23 So I make the proposition here in relation to –  
 24 CHAIRPERSON: Actually it goes a bit  
 25 further than that. Under their protocol dealing with

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1 unprotected strikes –  
 2 MR NGCUKAITOBI: Yes.  
 3 CHAIRPERSON: - particularly dealing with  
 4 people who are not coming through the union –  
 5 MR NGCUKAITOBI: Yes.  
 6 CHAIRPERSON: - there was a protocol  
 7 which dealt with the way this kind of problem is to be  
 8 handled.  
 9 MR NGCUKAITOBI: Yes, that's the –  
 10 CHAIRPERSON: They say that wasn't  
 11 approved by the executive, but nevertheless it was the  
 12 protocol in force at least as far as security sections are  
 13 concerned.  
 14 MR NGCUKAITOBI: Yes, XXX8, we say that  
 15 the Commission should simply reject the idea that this was  
 16 – even if you accept the idea that this was not approved,  
 17 the fact of the matter is that we know that the security  
 18 people said it was applicable, and if it was applicable it  
 19 should have been complied with. The fact that Mr Mokwena  
 20 comes later to repudiate the protocol is neither here nor  
 21 there.  
 22 Now then further, so we say that in relation to  
 23 the first question you have to ask, did they use their best  
 24 endeavours, the answer to that is no. Then the next item  
 25 is the question about the cause of the deaths –

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1 CHAIRPERSON: No, in answer to that, it's  
 2 not as simple as that. You've got to ask yourself what  
 3 reason do they put up for not doing what you say they  
 4 should have done, and is the reason that they put up a good  
 5 reason or a bad reason.  
 6 MR NGCUKAITOBI: Yes.  
 7 CHAIRPERSON: You can't just say they  
 8 didn't use their best endeavours, they didn't negotiate,  
 9 they closed the door. The answer is not self-evident. In  
 10 order to answer that question one way or t'other one's got  
 11 to look at the reasons they gave for closing the door and  
 12 not negotiating further. Those reasons may be good  
 13 reasons, in which case you can't say they didn't use their  
 14 best endeavours; alternatively they're bad reasons, then of  
 15 course the question is answered the way you want it  
 16 answered.  
 17 MR NGCUKAITOBI: We say that the reasons  
 18 were bad reasons. They gave as far as we can remember  
 19 three reasons. They first said that there was a collective  
 20 agreement in place, but the evidence deals extensively with  
 21 clause 12.4 where it's clear that the collective agreement  
 22 could in fact be amended.  
 23 Then in this particular instance what's important  
 24 as well is the evidence of Da Costa who says that when he  
 25 raised the issue of the allowance with the NUM

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1 representatives on the ground there was no objection, and  
 2 when he raised it with AMCU there was also no objection,  
 3 and yet you don't get an explanation why then was it not  
 4 simply presented at the central bargaining forum where it  
 5 could be debated and if all the parties agree they would  
 6 simply amend the agreement.  
 7 Then of course the other reason is that the  
 8 workers would not budge from their demand. But we all  
 9 know, anyone who has had anything to do with labour  
 10 relations, that the workers always say they won't budge in  
 11 their demand. Lonmin is a big company; it's been in  
 12 existence for a long period of time. It knows that this is  
 13 no more than a negotiating or a bargaining tactic. The  
 14 fact that a worker insists on a particular demand does not  
 15 mean you must close down the negotiations. In fact it is  
 16 the very reason why you must keep the negotiations open.  
 17 So I suggest that the reasons that they have put up for  
 18 closing the negotiations are simply not up to scratch.  
 19 Now then I want to deal with the question whether  
 20 or not – which is also posed by your terms of reference –  
 21 whether by act or omission Lonmin directly or indirectly  
 22 caused loss of life or damage to person or property. There  
 23 are complicated questions that arise here. We know that at  
 24 a broad level Lonmin, this was ultimately a human resources  
 25 labour issue. It should have been resolved at the

<p style="text-align: right;">Page 38862</p> <p>1 boardrooms of Lonmin, not in the mountains of Marikana. It  2 spiralled out of control, but it was simply as a  3 consequence of the incompetence of the HR department of  4 Lonmin because this should have been contained prior to it  5 escalating to engage the services of the police.  6 Why do we say so? We say so because on the  7 evidence, particularly of Mr Blou when he was cross-  8 examined by Mr Tip, and as the submissions that were made  9 earlier by Ms Pillay, Lonmin knew that there had been a  10 similar problem at Impala. It could not have been  11 surprised that the same problem arose in its own premises,  12 and this did not simply escalate into a violent act on the  13 16th of August. It had been building over a period of time  14 and Lonmin should have put in place sufficient, not just  15 security measures, but also human resources measures to  16 contain the problem.  17 But also we know that Lonmin was told directly  18 about the possibility of bloodshed. In the meeting that  19 was held on the 14th of August 2012 between Commissioner  20 Mbombo and Mr Mokwena, when Commissioner Mbombo said "If  21 you are asking us to go to the koppie and to disarm those  22 people, then it is blood." At this point, given the  23 relationship that already existed between Lonmin and the  24 police, Lonmin should have taken additional steps to  25 prevent any loss of blood because it is now made clear to</p>	<p style="text-align: right;">Page 38864</p> <p>1 investigated for the crime of murder.  2 COMMISSIONER HEMRAJ: Do you say that  3 Lonmin was part of the decision to disarm and disperse?  4 MR NGCUKAITOBI: Yes.  5 COMMISSIONER HEMRAJ: And the decision to  6 go to tactical phase?  7 MR NGCUKAITOBI: Yes, indeed,  8 Commissioner Hemraj, I make that submission. In fact we've  9 made extensive submissions on that very point. It's not  10 the same point that Mr Mpofo makes about the toxic  11 collusion, but it's simply to show how – what's the correct  12 word? – embedded Lonmin was in the security establishment.  13 In fact they were giving directions, giving instructions,  14 providing their choppers, in fact sitting with the  15 Commissioner whilst flying over the koppie, ostensibly to  16 give them orientation, on the very day of the execution of  17 the operation, the 16th. So I say that it is impossible to  18 find SAPS criminally liable and exclude Lonmin on the facts  19 that we know.  20 Now there's someone talking about collusion.  21 That's not me. Alright, so Mr Chairman, I've been told  22 that my time is up, but I know that my colleague wants to  23 me make a concluding remark. Yes, I think the proposition  24 that I have to make is that we submit that there should be  25 both criminal and civil liability for SAPS and Lonmin and</p>
<p style="text-align: right;">Page 38863</p> <p>1 them that if we implement this so-called dispersal and  2 disarmament at the koppie at the present moment, then blood  3 would follow.  4 On the 15th of August the same message was passed  5 to Lonmin by the police. General Mpembe in that  6 conversation says at least on three occasions that "If I  7 have to go and disarm those people with the knobkieries  8 with my guns, then there will be bloodshed." He repeats it  9 three times. So if Lonmin did not think the situation was  10 serious, it is told, in fact its senior executives are told  11 on two occasions that what you are asking us to do will  12 ultimately result in bloodshed.  13 So Mr Commissioner, if you accept my proposition  14 that there is a positive common law duty to protect your  15 employees, and you are told that the actions that the  16 police are about to undertake are going to result in  17 bloodshed and you shrug your hands at that information,  18 should you not be found criminally liable? Because this is  19 extreme recklessness on the part of Lonmin.  20 So I suggest that given that this was  21 foreseeable, given that Lonmin was told about the  22 possibility of bloodshed, given that Lonmin had a positive  23 duty in statute and in common law to protect its workers,  24 the Commission should really consider whether or not there  25 should be no recommendation made that Lonmin should be</p>	<p style="text-align: right;">Page 38865</p> <p>1 Lonmin should be required to contribute to the fund that we  2 have proposed. In our heads of argument in relation to  3 Lonmin we've confined ourselves to payment for loss of  4 support, but we want to amend that to make a broader  5 suggestion in line with what the Human Rights Commission  6 has suggested. Those are the submissions, Mr Chairman.  7 CHAIRPERSON: Thank you. Now it's time  8 for the representatives of the Monene family to argue. Ms  9 Mosebe, are you here? Yes, you are here.  10 MS MOSEBE: Yes, thank you very much –  11 CHAIRPERSON: You're happy to argue from  12 there?  13 MS MOSEBE: Yes, yes, I am, thank you  14 very much, Chairperson.  15 CHAIRPERSON: So I think we'll go till 3  16 o'clock and then we'll adjourn. That will be in the middle  17 of your argument and then you can carry on after that,  18 unless you want to adjourn now. I'm in your hands.  19 MS MOSEBE: No, Chairperson, I'll prefer  20 to start now.  21 CHAIRPERSON: Now, alright.  22 MS MOSEBE: Thank you very much.  23 CHAIRPERSON: Please proceed.  24 MS MOSEBE: Thank you very much,  25 Chairperson and Commissioners. Chairperson, first I will</p>

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1 briefly address the Commission on the purpose why the  
 2 family of Warrant Officer Monene found it very important to  
 3 participate in these proceedings. (1), Chairperson, the  
 4 primary objective was to assist this Commission to find the  
 5 truth surrounding his death and in finding that truth,  
 6 Chairperson, we sought to assist the Commission to find the  
 7 whys and the hows and the whos in relation to his death,  
 8 and Chairperson, in our heads of argument – that is on page  
 9 2 of our heads of argument we make two recommendations,  
 10 suggestions of recommendations that this Commission ought  
 11 to make. The first one is that the murder case of Warrant  
 12 Officer Monene be referred for further investigation by an  
 13 appropriate law enforcement agency, and then number 2 will  
 14 be that the alleged perpetrators –  
 15 CHAIRPERSON: Sorry, what page is that?  
 16 MS MOSEBE: That is on page 3, I'm sorry.  
 17 CHAIRPERSON: 3, yes. I couldn't find it  
 18 on page 2.  
 19 MS MOSEBE: Yes, page 3. That is  
 20 paragraph 1 and 2 on page 3. That is on top of that page,  
 21 and then the second recommendation, Chairperson, will be  
 22 that the alleged perpetrators of the murder of Warrant  
 23 Officer Monene be referred to the National Prosecuting  
 24 Authority for prosecution. Chairperson, those two  
 25 recommendations are made in line with section 5 of the

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1 terms of reference of this Commission. Now –  
 2 [14:48] CHAIRPERSON: I'm sorry, I take it the  
 3 recommendation in para 1 really refers to IPID. I take it  
 4 – no, it wouldn't be IPID, it's not by police, it would be  
 5 by the SAPS, would it? The appropriate law enforcement  
 6 agency.  
 7 MS MOSEBE: Yes, indeed.  
 8 CHAIRPERSON: He was killed by –  
 9 MS MOSEBE: By the strikers.  
 10 CHAIRPERSON: - by the strikers.  
 11 MS MOSEBE: Yes, that is not in dispute.  
 12 CHAIRPERSON: So that would be the SAPS,  
 13 and thereafter the – wouldn't it be better to do it the  
 14 other way around? In other words to send it to the, it  
 15 really would be the Provincial Director of Public  
 16 Prosecutions with the recommendation that the matter be  
 17 investigated further, and thereafter, once it's been  
 18 investigated the Provincial DPP should consider whether or  
 19 not to prosecute the alleged perpetrators?  
 20 MS MOSEBE: That is correct, Chairperson.  
 21 The decision to prosecute or not we submit should be  
 22 entirely upon the NDPP, depending on what these further  
 23 investigations reveal. But then, Chairperson, we would  
 24 like to make further submissions. We will confine  
 25 ourselves to two parties or to two stakeholders who

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1 participated on the events of the 13th of August, one that  
 2 will be the SAPS or its members, and then some of the  
 3 strikers.  
 4 Chairperson, in order to do that we would first  
 5 like to refer this Commission to the post mortem of Warrant  
 6 Officer Monene - we don't need to go to it - and I would  
 7 like to mention that, Chairperson, it was very disturbing  
 8 for this family that I represent to discover the findings  
 9 that were made by the doctors who examined his body that he  
 10 had two gunshot wounds and further he was hacked on major  
 11 parts of his head. The injuries were very gruesome and  
 12 it's still very difficult for this family to have to sit  
 13 through evidence that suggests you talk about that, or to  
 14 look at the pictures as they are contained in some of the  
 15 pictures that are before the Commission.  
 16 Now Chairperson, in order to examine –  
 17 CHAIRPERSON: I'm sorry, before you go on  
 18 to deal with that I'd like to ask you something about your  
 19 further recommendations, or proposals. Those we find on  
 20 pages 54 and 55 of your heads. Now the first one is you  
 21 ask for a finding that the strikers unlawfully attacked and  
 22 killed Warrant Officer Monene and that fits in really with  
 23 the recommendation that we've discussed –  
 24 MS MOSEBE: That is correct, Chairperson.  
 25 CHAIRPERSON: Then 22.1.2 says that "A

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1 break in command structures of the SAPS caused the attack  
 2 on Warrant Officer Monene."  
 3 MS MOSEBE: That is –  
 4 CHAIRPERSON: Now I understand the  
 5 argument and you elaborated on it. But there's a further  
 6 point that I think may require consideration and that is –  
 7 I don't know what exactly break in command structures would  
 8 involve, but let's assume for the sake of argument that  
 9 investigations would reveal that Warrant Officer Kuhn acted  
 10 on his own; he disagreed with what General Mpembe had  
 11 ordered, he thought it was inappropriate, he thought  
 12 something should be done to bring the matter to a head and  
 13 disarm the strikers and he fired teargas, and that was you  
 14 remember described as the spark that caused the trouble,  
 15 and then following him Lieutenant Baloyi, who had taken  
 16 some stun grenades from someone else before setting out,  
 17 obviously minded to do something if necessary, he then  
 18 fired off stun grenades. Now assuming that's all that can  
 19 be shown, but assuming that it's also found – and it would  
 20 have to be, I take it, unless it's found that Major-General  
 21 Mpembe authorised it - that this was unlawful because it  
 22 was a breach of the standing order and force can only be  
 23 used on the command of the overall commander or the  
 24 operational commander; Major-General Mpembe was wearing  
 25 both hats at the time, but even if it was an action by,

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1 without a command by Warrant Officer Kuhn and Lieutenant  
 2 Baloyi that caused the trouble, would the SAPS not be  
 3 vicariously liable for what they did? In which case the  
 4 SAPS would be civilly liable because of what Kuhn and –  
 5 this is on the assumption that these findings are made, you  
 6 understand. I'm not saying now what the finding should be,  
 7 but if that assumption is correct then the SAPS will be  
 8 civilly liable, vicariously liable in fact, for the actions  
 9 of Kuhn and Baloyi if they were the precipitating factors  
 10 that brought about the death of your client's husband, and  
 11 they would be obliged to pay compensation. Now you're not  
 12 asking for that, but am I correct in assuming that now that  
 13 it's been put to you pertinently you might consider asking  
 14 for it?  
 15 MS MOSEBE: Chairperson, yes, and we  
 16 dealt with it in our heads of argument, that is on page 25,  
 17 although not specifically that SAPS ought to be found  
 18 vicariously liable, but then on page 25, paragraph 8 we  
 19 dealt with the contravention of the standing order,  
 20 paragraph 11.5 of the standing order, and we illustrated  
 21 that indeed there is evidence before this Commission that  
 22 this standing order, this teargas and stun grenades were  
 23 fired maybe probably without instruction, and if that is  
 24 the case these people acted within the course and scope of  
 25 employment and therefore SAPS ought to take responsibility

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1 for these actions. So Chairperson, yes, it is correct  
 2 that –  
 3 CHAIRPERSON: What you will be doing  
 4 then, I take it, is you would be asking for, in the  
 5 alternative possibly to 22.1.2, something under 22.1.3 to  
 6 the effect that the SAPS are vicariously liable for the  
 7 actions of those persons who fired teargas and stun  
 8 grenades which put in train the series of events which led  
 9 to the death of Warrant Officer Monene?  
 10 MS MOSEBE: That is correct, Chairperson.  
 11 Chairperson, that sort of like puts the next point out of  
 12 the way, but just to rephrase and recap it is that there is  
 13 evidence before this Commission, whether there was an  
 14 instruction or there wasn't, teargas was fired, a stun  
 15 grenade was fired by Lieutenant Baloyi. Whether it was in  
 16 self-defence or not is something that this Commission has  
 17 to look at and consider and make a decision upon it, and  
 18 there is further evidence that another teargas, or stun  
 19 grenade that is unaccounted for was still fired before this  
 20 attack could happen on Warrant Officer Monene. So  
 21 Chairperson, it is clear, it is very apparent that there is  
 22 a contravention of standing order 11.5 and therefore we  
 23 will then submit that SAPS should take responsibility, it  
 24 is vicariously liable, and again SAPS should consider  
 25 taking appropriate disciplinary steps against Warrant

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1 Officer Kuhn because we know for certain that he fired this  
 2 teargas and he says that he didn't have those instructions,  
 3 or he thought he had instructions, whilst he didn't have.  
 4 CHAIRPERSON: In other words whether or  
 5 not there was an instruction, on your argument I take it  
 6 SAPS are liable. If there was an instruction to fire  
 7 teargas and stun grenade, that caused the problem because  
 8 it wasn't necessary to do that at the time, everyone was  
 9 proceeding just to the koppie under police escort, without  
 10 trouble. So if the instruction was given it was a wrong  
 11 instruction, you would say, and therefore the police are  
 12 liable. If the instruction wasn't given and the people who  
 13 fired the teargas and the stun grenades didn't have  
 14 authority to do it, then the SAPS are liable in any event  
 15 on that basis?  
 16 MS MOSEBE: That is correct, Chairperson,  
 17 and what makes it very important is this, is that Major-  
 18 General Mpembe conceded before this Commission, at one  
 19 stage in our heads of argument we highlight where he stated  
 20 specifically before this Commission that it was indeed what  
 21 the Chairperson termed the "vonk," or the spark that caused  
 22 the whole catastrophe and that is how Warrant Officer  
 23 Monene lost his life, therefore, Chairperson, it is not in  
 24 dispute that if that is so admitted, therefore SAPS is  
 25 definitely liable.

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1 CHAIRPERSON: Is there anything else that  
 2 you wish to say or need to say at this stage?  
 3 MS MOSEBE: On this point, no.  
 4 CHAIRPERSON: Shall we take the  
 5 adjournment now?  
 6 MS MOSEBE: Yes.  
 7 CHAIRPERSON: 15 minutes.  
 8 [COMMISSION ADJOURNS COMMISSION RESUMES]  
 9 [15:11] CHAIRPERSON: The Commission resumes.  
 10 Yes, Ms Mosebe?  
 11 MS MOSEBE: Thank you, Chairperson and  
 12 the Commissioners. Now after those submissions,  
 13 Chairperson, the question that comes is that even if  
 14 teargas, stun grenades had been fired at this peaceful  
 15 seeming crowd, did it warrant that this police officer  
 16 should be killed? Now Chairperson, my submission will be  
 17 no, there was no justification –  
 18 CHAIRPERSON: Yes, the evidence leaders  
 19 have already submitted - and I think Ms Le Roux did not  
 20 demur – that the conduct of the strikers in responding to  
 21 the teargas and the stun grenade was inappropriate and out  
 22 of line, and that the strikers had made no attempt to  
 23 justify what happened and so the suggestion is that we  
 24 should suggest that, you know, the same kind of  
 25 recommendation as has been discussed previously, that the

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1 Provincial DPP should have the matter further investigated  
 2 and should then consider whether to prosecute the alleged  
 3 perpetrators, or those in respect of whom he has a case  
 4 which he thinks is a winnable case in the docket. So  
 5 that's my paraphrase. Probably not entirely the way Mr  
 6 Budlender phrased it, but that's their proposal and I  
 7 didn't understand Ms Le Roux and the Human Rights  
 8 Commission to disagree. So if that's all you want us to do  
 9 then you don't have any opposition to that being done.  
 10 Anyway, I don't want to stop you, but that's the way I see  
 11 it.

12 MS MOSEBE: Chairperson, we'll definitely  
 13 align ourselves with those submissions. However,  
 14 Chairperson, I would like to address the Commission on one  
 15 point, to say that there has been a suggestion – I can't  
 16 remember from which heads of argument – Chairperson, that  
 17 there is no direct evidence as to who of the strikers did  
 18 what in terms of this criminal conduct, the murder of  
 19 people, the robberies of the police, and so on.  
 20 Chairperson, we would like to submit that that is not true.  
 21 Chairperson, if one recalls the evidence of Captain Thupe,  
 22 I cross-examined him on a statement on QQQ, it's exhibit  
 23 QQQ9, he states that as the police were being attacked he  
 24 observed one man taking an R5 rifle. Now it is common  
 25 cause before the Commission that Warrant Officer Monene was

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1 robbed of his 9mm firearm and an R5 rifle. Now he observed  
 2 a man taking that R5 rifle, throwing it into the hands of  
 3 another man, or passing it on to another man, and at one of  
 4 the inspection in loco that were organised by this  
 5 Commission at Marikana he saw the man and that was at the  
 6 inspection in loco of the 13th, of the scene of the 13th of  
 7 August. Therefore, Chairperson, it gives a clear  
 8 indication that not much has been lost and again it gives  
 9 hope that once this investigation is conducted people like  
 10 Captain Thupe has committed before this Commission that he  
 11 can actually point out the man on the videos to the  
 12 evidence leaders. Now that exercise can be made to the  
 13 SAPS or to any other law enforcement agency that is  
 14 investigating these murders, and we believe that from there  
 15 it will then be easier to carry on the investigation and  
 16 find out who the perpetrators of this violence are.

17 COMMISSIONER HEMRAJ: It hasn't actually  
 18 pertinently been asked of the police officers present if  
 19 they could identify some of the persons.

20 MS MOSEBE: Yes.  
 21 COMMISSIONER HEMRAJ: It's never fully  
 22 been explored.  
 23 MS MOSEBE: Well, Commissioner Hemraj, we  
 24 attempted to ask most of the people who testified before  
 25 this Commission, you know I would often ask them will you

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1 be able, if you say you observed this, or Major-General  
 2 Mpembe I asked the same things, he said he was 15 metres  
 3 away, 15 paces away when he observed Warrant Officer Monene  
 4 being killed, and part of the cross-examination was whether  
 5 will you be able to assist the police to identify these  
 6 people who perpetrated this crime and then he said no he  
 7 could not observe because of this and this and that, and  
 8 then Mr Blou on behalf of Lonmin he said "I saw what  
 9 happened. I was about a hundred metres away," and the same  
 10 question was asked, "Will you be able to assist," and so  
 11 on. Unfortunately the answer was no, but then,  
 12 Chairperson, given that there is Captain Thupe it gives  
 13 credence to the fact that if a proper investigation is to  
 14 be undertaken by an institution like SAPS, or any other law  
 15 enforcement agency that the Commission deems fit, there can  
 16 be something that can be found and a criminal case can then  
 17 be conducted.

18 CHAIRPERSON: Yes, well that would  
 19 presumably be covered by a recommendation to the Provincial  
 20 DPP that he have the matter further investigated and the  
 21 investigation would obviously involve interviewing people  
 22 like Captain Thupe and studying the videos and so forth.

23 MS MOSEBE: That is correct, Chairperson.  
 24 CHAIRPERSON: Alright, thank you. Is  
 25 there anything else that you want to add?

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1 MS MOSEBE: Chairperson, I would like to  
 2 quickly comment on the fact that – I know it sounds a bit  
 3 repetitive, but then Chairperson, I would just like to  
 4 comment on the evidence of some of the people, the strikers  
 5 who were present at the scene of the 13th. Chairperson, Mr  
 6 Nzuzza for an example, he seemed to, when he came to testify  
 7 he seemed to recant the evidence that he had already given  
 8 in his statement. When he was asked whether, you know, how  
 9 did this fight occur, he had stated in his statement that  
 10 there was a fight between the police officers and the  
 11 strikers and that is how the police officers lost their  
 12 lives. When he was asked to elaborate on it he said "No, I  
 13 did not see anything. I did not see a fight. Actually  
 14 people were trying to run away. They had been grabbed by  
 15 the police officers," and so on. There was a lot that he  
 16 recanted in his cross-examination. He didn't stick to the  
 17 version that he had already given, and Chairperson, we  
 18 would like to submit that there was dishonesty that was  
 19 involved in there and he flatly refused to take  
 20 responsibility for anything that the strikers could have  
 21 done, including these two murders, and he stated that he  
 22 did not see anything wrong that had been done. Advocate  
 23 Budlender tried to get him to apologise and so on, but  
 24 then, Chairperson, what came out clear is this; is that  
 25 there was no remorse that was shown before this Commission

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1 by the leadership of the strikers, or part of the strikers,  
2 and Chairperson, we submit that in a democracy that cannot  
3 be so. People must learn to take responsibility.

4 Then, Chairperson, we would then submit without  
5 any further waste of time that we seek to persuade this  
6 Commission, given the argument that is contained in our  
7 heads of argument, to make the recommendations that we have  
8 outlined on paragraph 22, page 55 of our heads of argument,  
9 and Chairperson, unless if there's anything else that the  
10 Chairperson and Commissioners would like me to address on,  
11 that would be our argument.

12 CHAIRPERSON: That's your argument, thank  
13 you. We've got your -

14 MS MOSEBE: Thank you, Chairperson.

15 CHAIRPERSON: We've got your written  
16 heads. We'll study them. We already looked at them.  
17 We'll study them again and bear in mind what you've said to  
18 us orally today, which will be transcribed in any event.

19 MS MOSEBE: Thank you, Chairperson.

20 CHAIRPERSON: Thank you. Mr Gumbi.

21 MR GUMBI: Thank you very much,  
22 Chairperson and the Commissioners. Chairperson and the  
23 Commissioners, as you all know that in this Commission we  
24 are representing two parties. We are representing the  
25 family of the late Warrant Officer Lepaaku who was killed

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1 because of the post traumatic stress disorder he's  
2 suffering from since the incident of 13 August 2012.  
3 That's the issue that I wanted to put on record. That's  
4 why in this Commission we didn't have his testimony, he  
5 didn't come and testify before this Commission, and the  
6 only evidence we had before this Commission is his  
7 statement that was circulated at the beginning of this  
8 Commission. That's the issue that I wanted to put on  
9 record.

10 In dealing with my heads of argument,  
11 Chairperson, first of all I won't deal with the  
12 introduction from page 4. We all know why this Commission  
13 of Inquiry was appointed, and we know all the parties that  
14 are before this Commission, that is the Commission is  
15 entitled to scrutinise the conduct of Lonmin, SAPS, AMCU,  
16 NUM, the role played by the Department of Mineral  
17 Resources, individuals, group of people who were there.

18 In dealing with my heads of argument, Chairperson  
19 and the Commissioners, on page 5 of my heads of my  
20 arguments I've just articulated some sub-heading, some of  
21 the issues I will deal with. I will deal with the brief  
22 factual matrix of the incident of the 13th near the railway  
23 line, and I will deal with the testimony of the witnesses  
24 who were there on the 13th of August 2012 who testified  
25 before this Commission, and some of them who didn't testify

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1 on the 13th of August 2012. We also represent Lieutenant  
2 Baloyi who was severely injured on the 13th of August 2012  
3 near the railway line, and when we joined this Commission,  
4 Chairperson, we've made commitment that we'll try as much  
5 as we can to assist this Commission to leave no stone  
6 unturned surrounding the death of the late Warrant Officer  
7 Lepaaku and the injury of Lieutenant Baloyi.

8 But before I could even proceed further,  
9 Chairperson and the Commissioners, the is one issue that I  
10 wanted to put on record with regard to my client I  
11 represent in this Commission, that is Lieutenant Baloyi,  
12 and you'll remember, Chairperson and the Commissioners,  
13 that at the beginning of this Commission Lieutenant Baloyi,  
14 who was severely injured on the 13th of August 2012, was  
15 envisaged to testify before this Commission. He was posed  
16 as one of the witnesses on the incident of the 13th of  
17 August 2012, and I would like to put this on record that  
18 Lieutenant Baloyi couldn't testify before this Commission.  
19 We received a report that he was suffering from post  
20 traumatic stress disorder when we made an arrangement with  
21 the evidence leaders for his testimony to be adduced before  
22 this Commission. Even up to date we haven't received any  
23 revised medical report, save to say that the latest report  
24 we received through my instructing attorney is that  
25 Lieutenant Baloyi has been recommended for early retirement

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1 before this Commission.

2 Specifically I will deal with the evidence, brief  
3 testimony of General Mzembe. He was cross-examined by  
4 various parties, but I've tried as much as I can,  
5 Commissioners and the Chairperson, to brief, to summarise  
6 his evidence. I will deal with the question of submission  
7 on the evaluation of his evidence, that is General Mzembe,  
8 and I will also deal with evidence of other witnesses who  
9 were there on the 13th of August 2012 – the evidence of  
10 Lieutenant-Colonel Merafe, Vermaak, Captain Thupe,  
11 Lieutenant-General Mbombo, the National Commissioner, the  
12 evidence of Mr X, Mr Xolani Nzuza, the evidence of Baloyi,  
13 evidence of Gary White, and the evidence of the widow of  
14 the late Warrant Officer Lepaaku, that is Ms Petunia  
15 Lepaaku, and I will also deal with the conclusion and  
16 recommendation, and I will deal with the recommendation on  
17 the conduct of the SAPS near the railway line. I will also  
18 deal with the conduct, the recommendation on the conduct of  
19 strikers near the railway line. I will also deal with the  
20 recommendation on the conduct of AMCU and NUM, its members  
21 and its officials. That's all –

22 CHAIRPERSON: When you say "deal with" I  
23 take it you mean highlight, because you've only got three-  
24 quarters of an hour. We've got your written argument.

25 MR GUMBI: Yes.

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1 CHAIRPERSON: A very full and diligent,  
 2 comprehensive argument that you prepared for us. So  
 3 anyway, you'll highlight the main points and if there are  
 4 problems that we have with your submissions –  
 5 MR GUMBI: Yes.  
 6 CHAIRPERSON: - we'll put them to you.  
 7 MR GUMBI: Yes, I will try to highlight  
 8 because the evidence is already on record. I will move on,  
 9 Chairperson, I am not going to deal with the brief factual  
 10 matrix of the incident of the 13th of August near the  
 11 railway line as articulated on page 7 of my heads of  
 12 argument. I will go straight to the brief testimony of  
 13 Major-General Mpembe, and in that regard, Chairperson, I  
 14 will deal with some of the issues that emanated during our  
 15 cross-examination of General Mpembe.  
 16 The evidence presented before this Commission is  
 17 that on the 13th of August 2012 General Mpembe together with  
 18 various units, they went near the railway line to intercept  
 19 strikers. He negotiated with strikers and he pleaded with  
 20 them to hand over their dangerous weapons to the police.  
 21 They refused. They told General Mpembe that they will hand  
 22 over their dangerous weapons at the koppie. They proceeded  
 23 with their march. Immediately after that stun grenade,  
 24 teargas was fired and the Warrant Officer Lepaaku and  
 25 Monene and Baloyi were attacked and other strikers were

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1 also killed by the police, and Warrant Officer Lepaaku was  
 2 killed and Warrant Officer Monene was also killed, and  
 3 Lieutenant Baloyi survived that brutal attack.  
 4 When we cross-examined Major-General Mpembe – and  
 5 I would like to put this to the attention of the Commission  
 6 – we put some various statements indicating that on the 13th  
 7 of August 2012 indeed there was an instruction that was  
 8 issued to fire teargas and stun grenade, although he deny  
 9 having issued those instructions. When you look on page 11  
 10 of my heads of argument we indicated some of the statement  
 11 we used when we were confronting Major-General Mpembe and  
 12 we also indicated some inconsistencies and contradiction  
 13 between the debriefing report that was produced after Roots  
 14 meeting, together with exhibit L that was presented before  
 15 this Commission, and our submission to the Commission with  
 16 regard to the evaluation of Major-General Mpembe's  
 17 testimony, I'm not going to deal with that in detail. It  
 18 is a well-known principle of our law of evidence that when  
 19 the court evaluates all the evidence presented before it  
 20 they don't apply what we normally called a piecemeal  
 21 reasoning process, but what the court will normally do,  
 22 will assess the evidence as the whole and we are submitting  
 23 to this Commission that when they evaluate the evidence,  
 24 this crucial evidence of Major-General Mpembe, who was in  
 25 charge of the operation of the 13th of August 2012, they

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1 must apply that principle that was highlighted by our  
 2 Supreme Court of Appeal. I've made the references to those  
 3 case law I'm referring to, State v M, 2006 Supreme Court of  
 4 Appeal decision, they are there in my heads of argument.  
 5 I also deal with some of factors that this  
 6 Commission must take into consideration – the presence of  
 7 corroboration, all stuff like that, and we'll submit,  
 8 Chairperson, that taking into consideration the evidence of  
 9 General Mpembe who was in charge of the operation of the  
 10 13th, all the evidence that was presented before this  
 11 Commission, we submit that there are no contradiction,  
 12 there are no inconsistency. The evidence we use when we  
 13 were confronting General Mpembe during his cross-  
 14 examination indicates clearly that on the 13th of August  
 15 2012 near the railway line there was an instruction issued  
 16 to fire teargas and stun grenade.  
 17 Furthermore, Major-General Mpembe testified  
 18 before this Commission, Chairperson and the Commissioners,  
 19 and he indicated crystal clear that after the killing of  
 20 Warrant Officer Lepaaku and Warrant Officer Monene there  
 21 was no debriefing report that was presented, and also again  
 22 he never oriented members who were mobilised from other  
 23 provinces. Lieutenant Baloyi was mobilised from Pretoria.  
 24 He was never oriented.  
 25 He further testified, if you go to page 15 of my

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1 heads of my argument, we also confronted Major-General  
 2 Mpembe around this critical aspect of criminal intelligence  
 3 information, because he testified before this Commission  
 4 that the crime intelligence information was at his  
 5 disposal. Before he confronted strikers near the railway  
 6 line he had the crime intelligence information about the  
 7 strikers, and that information he never share with his  
 8 subordinate commanders and other police units that they  
 9 were involved, and we submit before this Commission that  
 10 sharing of crime intelligence information is very, very  
 11 important.  
 12 [15:31] Even the Standing Order 262 read with other  
 13 policy document made it crystal clear that the POP  
 14 operations should be based on proactive conflict  
 15 resolution, pre-planning, execution, report and  
 16 recordkeeping.  
 17 We submit, Chairperson, around this critical  
 18 aspect of failure to share crime intelligence information  
 19 with other various police units who were involved in that  
 20 operation near the railway line, that if that crime  
 21 intelligence information that was gathered before he  
 22 intercepted strikers near the railway line was shared among  
 23 the police officers, we submit that Warrant Officer Lepaaku  
 24 would be still alive even today.  
 25 We further submit, Chairperson, that General

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1 Mpembe, he further testified before this Commission that  
 2 after that incident he instructed Merafe to compile the  
 3 operational plan, and we submit that even after he  
 4 instructed Merafe to compile the operational plan, in that  
 5 operational plan we don't see any threat assessment on  
 6 possible police attack and killing being factored in that  
 7 plan, and we submit, Chairperson, that is one of the  
 8 factors that this Commission must also take into  
 9 consideration.

10 The line of command between General Mpembe and  
 11 various police units, the evidence leaders they have dealt  
 12 with that critical aspect, and we also interrogated General  
 13 Mpembe during our cross-examination and we even put some of  
 14 the proposition on the behalf of Lieutenant Baloyi how that  
 15 operation ought to be conducted.

16 The other evidence that was also presented before  
 17 this Commission from other commanders, Merafe, how the  
 18 commanders disagree how the operation should be handled,  
 19 whether it was proper for them to disarm the strikers near  
 20 the railway line or not. On that note, Chairperson, we  
 21 submit that lack of command, or lack of communication  
 22 between Major-General Mpembe and various units near the  
 23 railway line indicates crystal clear that there was no  
 24 clear line of communication between General Mpembe and his  
 25 commanders and it's one of the factors we submit that this

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1 Commission must also take into consideration. And even  
 2 after the police attack Major-General Mpembe also again, he  
 3 was interrogated on this aspect of producing debriefing  
 4 reports, and it's clear, Chairperson, that even up to date  
 5 we don't have debriefing reports of the incident of the 13th  
 6 of August 2012, and we submit, Chairperson, that the  
 7 failure of the SAPS to produce debriefing reports  
 8 immediately after the killing of Warrant Officer Lepaaku is  
 9 inconsistent with its POP policy.

10 SAPS POP policy on crowd management for platoon  
 11 commanders, briefing and debriefing report, and Standing  
 12 Order 262 made it crystal clear that any POP operation,  
 13 there should be a debriefing report that must be presented,  
 14 and we submit that those debriefing reports, Chairperson  
 15 and the Commissioners, if it was presented before this  
 16 Commission those debriefing reports will have assisted this  
 17 Commission to understand clearly what happened before the  
 18 killing of the late Warrant Officer Lepaaku and Monene and  
 19 the injury of Lieutenant Baloyi.

20 It's also our submission, Chairperson and the  
 21 Commissioners, that the importance of debriefing report is  
 22 one of the issues that was identified by the IPID when they  
 23 made its presentation before the portfolio committee on  
 24 police. We indicated that when you look on page 19 of our  
 25 heads of our argument that the SAPS is lacking to produce

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1 post event protest strike reports and they've made a  
 2 recommendation before the portfolio committee on police  
 3 that the commanders must be responsible for preparing  
 4 detailed post crowd control report which must be made  
 5 available to the IPID for investigation purpose.

6 We further submit, Chairperson, that section 29  
 7 of the IPID Act of 2011, it made it crystal clear that the  
 8 SAPS has an obligation to report incidents within the  
 9 period of 24 hours if any of their members fired without a  
 10 command, and we know that on the 13th of August members  
 11 fired without a command. If the Commission find that the  
 12 members fired without a command, we know that Warrant  
 13 Officer Lepaaku and Monene were killed and Lieutenant  
 14 Baloyi was injured.

15 We submit, Chairperson, that those debriefing  
 16 reports also again would have assisted even the IPID to  
 17 understand why Warrant Officer Lepaaku was killed in such a  
 18 brutal manner –

19 CHAIRPERSON: Mr Gumbi, I wonder if you  
 20 can help me. In footnote 43 on page 19 of your heads you  
 21 refer to the IPID presentation before parliament entitled  
 22 "Briefing on crowd control." Is that an exhibit, and if  
 23 so, what's the exhibit number?

24 MR GUMBI: It is an exhibit, I still  
 25 remember, Chairperson. I've made a mistake, I didn't make

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1 the reference to that exhibit as an exhibit.

2 CHAIRPERSON: Alright, well I'm sure that  
 3 Ms Pillay SC will be able to give it to us in due course.

4 MR GUMBI: Yes, it was before the  
 5 Commission, yes, and we submit, Chairperson, that if those  
 6 debriefing reports they were there it will have assisted  
 7 this Commission, even the IPID, to understand what happened  
 8 before Warrant Officer Lepaaku was killed.

9 Furthermore, Chairperson, we submit that Major-  
 10 General Mpembe testified that Warrant Officer Kuhn, who  
 11 fired without command, should be disciplined for having  
 12 acted outside Standing Order 262 and he promised this  
 13 Commission that after his testimony he would ensure that  
 14 disciplinary steps are taken against Warrant Officer Kuhn,  
 15 and we even indicated when we were cross-examining the  
 16 National Commissioner that in terms of section 34(1) of the  
 17 Police Service Act if the member is injured or killed in  
 18 the line of duty, yes, she has powers to initiate inquiry  
 19 and we submit, Chairperson, that even up to date there is  
 20 no inquiry or any internal disciplinary hearing that was  
 21 ever initiated by the SAPS, and we submit that that's a  
 22 critical aspect and this Commission also again must make  
 23 recommendation calling upon the National Commissioner to  
 24 initiate inquiry surrounding the death of the late Warrant  
 25 Officer Lepaaku and Monene and the injury of Lieutenant



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1 Baloyi.  
 2 We submit that there is ample of evidence that  
 3 was ventilated before this Commission that indicates  
 4 clearly that on the 13th of August someone issued  
 5 instruction, although Major-General Mpembe denied that.  
 6 Then furthermore –  
 7 CHAIRPERSON: I'm sorry, am I correct in  
 8 saying that as far as your client, the family of Warrant  
 9 Officer Lepaaku is concerned, the case is essentially the  
 10 same as the case which was presented by your colleague,  
 11 your learned friend Ms Mosebe for the Monene family? In  
 12 other words it doesn't matter for Lepaaku's purposes  
 13 whether - the claim of the Lepaaku family, whether there  
 14 was an instruction or not. If there was an instruction  
 15 then you would say that's the basis of your case. It  
 16 shouldn't have been given, was the spark that set the  
 17 conflagration alight. On the other hand if there wasn't an  
 18 instruction then Kuhn shouldn't have, and Baloyi shouldn't  
 19 have acted as they did and, but the SAPS would be  
 20 vicariously liable for what they did. I think that's  
 21 correct, isn't it? But as far as your case in respect of  
 22 your client Lieutenant Baloyi is concerned, there it's  
 23 important for you to show that Lieutenant Baloyi wasn't one  
 24 of the people who was responsible for the spark, it was in  
 25 fact General Mpembe or some other unknown senior officer.

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1 Am I correct?  
 2 MR GUMBI: Yes, Chairperson.  
 3 CHAIRPERSON: Okay.  
 4 MR GUMBI: Another critical issue,  
 5 Chairperson, with regard to my client Lieutenant Baloyi, I  
 6 wanted to put it crystal clear here that Lieutenant Baloyi  
 7 is not responsible for the spark. When you read his  
 8 statement he made it crystal clear that immediately after  
 9 he alighted from the Nyala two teargas was fired and he  
 10 fired teargas in self-defence while he was running away  
 11 from the protesters and the strikers were chasing him.  
 12 CHAIRPERSON: A stun grenade?  
 13 MR GUMBI: Yes.  
 14 CHAIRPERSON: You said teargas.  
 15 MR GUMBI: Yes, teargas, yes. Stun  
 16 grenade, he threw a stun grenade to the incoming strikers  
 17 and he ran away to the Nyala upon arrival at the –  
 18 CHAIRPERSON: So his case is that his  
 19 stun grenade wasn't part of the spark?  
 20 MR GUMBI: Yes.  
 21 CHAIRPERSON: There is evidence of two  
 22 stun grenades and there's evidence of teargas.  
 23 MR GUMBI: Yes.  
 24 CHAIRPERSON: You say he's not  
 25 responsible for the teargas and his stun grenade you say

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1 must have been the second stun grenade and the trouble was  
 2 caused by the teargas and the first stun grenade. Is that  
 3 your argument?  
 4 MR GUMBI: According to his statement  
 5 teargas were fired –  
 6 CHAIRPERSON: Yes, that's your argument?  
 7 MR GUMBI: - and then thereafter he fired  
 8 stun grenade while running away from the strikers.  
 9 CHAIRPERSON: Ja, anyway –  
 10 MR GUMBI: And that evidence was never  
 11 ever challenged before this Commission. So I submit,  
 12 Chairperson, that you must accept his version as it –  
 13 CHAIRPERSON: No, I'm not sure that's  
 14 right. I mean if he'd given oral evidence he could have  
 15 been cross-examined.  
 16 MR GUMBI: Yes.  
 17 CHAIRPERSON: But how do you cross-  
 18 examine an affidavit?  
 19 MR GUMBI: Yes, I do apologise,  
 20 Chairperson –  
 21 CHAIRPERSON: Have you ever cross-  
 22 examined an affidavit before? I've never tried it.  
 23 MR GUMBI: Yes, Chairperson, my  
 24 submission is that from the evidence that has been  
 25 presented before this Commission we don't have any evidence

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1 contrary to what he's saying on paragraph 9 so far,  
 2 objectively.  
 3 Then I wanted also to deal with the evidence of  
 4 Merafe. When we cross-examined –  
 5 CHAIRPERSON: Page 22?  
 6 MR GUMBI: Yes, page 22 of my heads of  
 7 argument. When we cross-examined Lieutenant-Colonel  
 8 Merafe, and I wanted to highlight some crucial aspect that  
 9 emanated out of his cross-examination. First of all he  
 10 testified that the Crime Intelligence information was never  
 11 shared with him as an experienced POP commander. He  
 12 conceded on that point, and he further conceded that – or  
 13 he agreed with the version of Lieutenant Baloyi that we put  
 14 to him that Major-General Mpembe ought to share Crime  
 15 Intelligence information with other police units, and he  
 16 further conceded that even though the gathering was a  
 17 spontaneous gathering, but Major-General Mpembe ought to  
 18 have convened what we normally called an emergency parade  
 19 and share whatever Crime Intelligence information at his  
 20 disposal. He further conceded that the operation of the  
 21 13th of August 2012 didn't factor Crime Intelligence  
 22 information and the plan that was compiled after that, the  
 23 operational plan of the 13th also again did not factor this  
 24 Crime Intelligence at SAPS disposal, and the source of  
 25 dangerous weapons, and we'll also make submission to that,

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1 and he testified that he was not aware that there was a  
 2 certain hardware that was selling dangerous weapons to  
 3 strikers before the 13th of August 2012.  
 4 He further denied that he briefed members that  
 5 were mobilised from other provinces. Even on a decision of  
 6 Major-General Mpembe to escort strikers on their way to the  
 7 koppie, he conceded that Major-General Mpembe did not share  
 8 that, or he did not inform his members that he had taken a  
 9 decision to escort strikers on their way to the koppie.  
 10 He further conceded that some of the police  
 11 officers who were escorting armed strikers, they were  
 12 empty-handed and they did not have helmet and gas mask. He  
 13 further conceded that even if the decision to block and  
 14 disperse strikers, that decision must also factor the  
 15 safety of members before being implemented by Major-General  
 16 Mpembe.  
 17 We submit, Chairperson and the Commissioners,  
 18 that the evidence, this Commission must accept the evidence  
 19 of Lieutenant-Colonel Merafe because his evidence  
 20 demonstrates clearly how Standing Order 262 and other POP  
 21 policies were thwarted on that day. Furthermore his  
 22 evidence we submit that it demonstrated that the threat  
 23 assessment of the group was never conducted before the  
 24 strikers were intercepted near the railway line, and it's  
 25 further demonstrated that members they were not properly

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1 briefed before they were deployed near the railway line.  
 2 Furthermore the evidence of Lieutenant-Colonel  
 3 Merafe demonstrates clearly that on the 13th of August 2012  
 4 there was no clear line of command and control between  
 5 Major-General Mpembe and other various police units, and we  
 6 submit, Chairperson, in conclusion, on the evidence of  
 7 Lieutenant-Colonel Merafe that this Commission must take  
 8 into consideration that he's an experienced POP commander  
 9 in the Platinum Belt and therefore this Commission must  
 10 accept his evidence without any doubt.  
 11 Furthermore the evidence Lieutenant-Colonel  
 12 Vermaak, we know for a fact that Lieutenant-Colonel Vermaak  
 13 was hovering above the protesters and he was in the chopper  
 14 when the Warrant Officer Lepaaku was attacked and killed by  
 15 the protesters, and in his cross-examination some of the  
 16 version of Lieutenant Baloyi was put to him. On this  
 17 critical aspect of Crime Intelligence information he agreed  
 18 with Lieutenant Baloyi that that information about the  
 19 protesters that they had performed rituals on the previous  
 20 day, they had killed two security officers, they mutilated  
 21 them, all stuff like that, they were supposed to be shared  
 22 among the police officers, and that information was never  
 23 shared before intercepting the strikers near the railway  
 24 line.  
 25 The operational plan of the 13th did not factor

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1 Crime Intelligence information. No briefing of members  
 2 before intercepting strikers near the railway line. The  
 3 police were outnumbered by the strikers who were armed near  
 4 the railway line. He didn't regard Major-General Mpembe as  
 5 an experienced POP commander or a negotiator in that regard  
 6 and when strikers ignored the police line near the big rock  
 7 near the railway line he agreed that Major-General Mpembe  
 8 was supposed to implement protective measures to protect  
 9 the police.  
 10 He further testified that if he was in charge of  
 11 that operation he would not have allowed his members to  
 12 follow armed strikers at such a distance, and the members  
 13 who were following –  
 14 COMMISSIONER TOKOTA: I'm sorry, Mr  
 15 Gumbi.  
 16 MR GUMBI: Yes.  
 17 COMMISSIONER TOKOTA: You say General  
 18 Mpembe was supposed to have supplied the protective  
 19 measures to the members in his company -  
 20 MR GUMBI: He was supposed to ensure that  
 21 there are some protective measures before making a decision  
 22 to escort - safety measures, protective and safety  
 23 measures, before escorting the strikers on their way to the  
 24 koppie.  
 25 COMMISSIONER TOKOTA: In other words the

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1 escorting, you didn't regard that as being dangerous,  
 2 merely to escort people going to the koppie?  
 3 MR GUMBI: It was, I submit –  
 4 COMMISSIONER TOKOTA: Why would they need  
 5 protective measures? They're not doing anything, just  
 6 escorting them to the koppie. Why would he have to ensure  
 7 that they have protective measures?  
 8 MR GUMBI: Commissioner, I submit that  
 9 taking into consideration the nature of this group, this  
 10 group they were armed to teeth and the police they were  
 11 outnumbered there, and this group had killed two security  
 12 officers on the previous day. It was a dangerous –  
 13 COMMISSIONER TOKOTA: That's exactly why  
 14 he decided not to disarm them.  
 15 MR GUMBI: Yes.  
 16 COMMISSIONER TOKOTA: That's exactly why.  
 17 MR GUMBI: Our submission –  
 18 COMMISSIONER TOKOTA: Can I just say  
 19 this, please. Your case is simply this; (1), the killing  
 20 of Warrant Officer Lepaaku was caused by the spark of the  
 21 police – was a result of the teargas by Warrant Officer  
 22 Kuhn, regardless of whether he had acted under command or  
 23 what, the police are liable, that's your case as far as  
 24 Lepaaku is concerned. As far as Baloyi is concerned your  
 25 case is when Baloyi threw the stun grenade he was doing so

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1 in self-defence. He did not cause any spark for the  
 2 strikers to attack the police, so it's the police who  
 3 actually initiated the whole thing, not him. He was acting  
 4 in self-defence. That's the end of your case, not so?

5 MR GUMBI: In fact, Commissioner –

6 CHAIRPERSON: The successful end of your  
 7 case isn't that. What's been put to you by my colleague is  
 8 that the points that you traversed are very interesting,  
 9 but they may not be necessary for you to get your clients  
 10 home because for the reasons he gave you, which you've  
 11 already mentioned yourself. As far as Lieutenant Baloyi is  
 12 concerned, if he was already defending himself against an  
 13 attack by the strikers, the spark had already come into  
 14 existence, caused the conflagration. The conflagration had  
 15 started. He was simply defending himself against that, and  
 16 whichever way you go, whether Mpembe gave an instruction or  
 17 someone else gave an instruction, or whether Kuhn acted on  
 18 his own and whoever threw the first stun grenade acted on  
 19 his own or acted in accordance with an instruction is  
 20 neither here nor there.

21 [15:51] For the same reason that Ms, your colleague Adv  
 22 Mosebe is entitled to say not relevant for her whether  
 23 there was an instruction or there wasn't, any way you look  
 24 at it, the police were vicariously liable. What's being  
 25 put to you is doesn't the same apply to your case?

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1 MR GUMBI: It does apply to my case,  
 2 Chairperson, but our submission here is that taking into  
 3 consideration when we do the threat assessment of the  
 4 group, as I've already indicated that taking into  
 5 consideration what they've done on the previous day,  
 6 killing two security officers, the mere fact that they were  
 7 armed, the mere fact that even after General Mpembe  
 8 instructed them to hand over their dangerous weapons they  
 9 refused to do that, one of the police officers, when you  
 10 look the video of the 13th of August 2012, even tried to  
 11 stand with his shotgun in front of the group and they  
 12 disobeyed, or they just ignored that police officer. All  
 13 those factors they ought to be taken into consideration by  
 14 Major-General Mpembe before he even made a decision to  
 15 escort the strikers. So in other words what we are  
 16 submitting, that the safety of the police officers when he  
 17 made the decision to escort the strikers, he ought to have  
 18 prioritised their safety, and in this regard when you look  
 19 at the evidence, the facts presented before this  
 20 Commission, despite the fact that these people they've  
 21 killed two security officers, they've ignored his  
 22 instruction, they just proceeded with their march, he also  
 23 instructed the police officers to follow them. Then he  
 24 does –

25 CHAIRPERSON: I'm sorry, Mr Gumbi, but

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1 what should he have done? Should he have carried out what  
 2 Lieutenant-Colonel Merafe wanted to do? Should he have  
 3 tried to disarm the strikers there by the railway line?  
 4 Would there not have been more deaths than there actually  
 5 were, on the probabilities, regard being had to the factors  
 6 that you've mentioned about the way the strikers had  
 7 behaved previously?

8 MR GUMBI: Our submission, Chairperson,  
 9 on this critical aspect is that Major-General Mpembe ought  
 10 to have at least instructed his members to remain inside  
 11 their Nyalas while they're escorting the strikers. He  
 12 ought to have instructed his members to maintain a  
 13 reasonable distance between the strikers and the police  
 14 while escorting them. Those are the issues that was even  
 15 indicated by Brigadier Mkhwanazi, a POP trainer, when he  
 16 testified before this Commission that when you are doing a  
 17 POP operation it is very important to factor the safety of  
 18 members. It is upon that basis that we are making those  
 19 submissions before this Commission, based on the facts of  
 20 the 13th near the railway line, that the safety of the  
 21 members was never ever factored by Major-General Mpembe  
 22 when he made a decision to escort.

23 CHAIRPERSON: Wasn't Lieutenant Baloyi in  
 24 an Nyala?

25 MR GUMBI: He was inside the Nyala.

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1 CHAIRPERSON: Why didn't he stay in the  
 2 Nyala?

3 MR GUMBI: Unfortunately we don't know  
 4 why he didn't stay inside the Nyala.

5 CHAIRPERSON: If he stayed in the Nyala  
 6 you wouldn't be here today, would you? Or you might be  
 7 here for Lepaaku family, you wouldn't be here for  
 8 Lieutenant Baloyi, would you?

9 MR GUMBI: Yes, Chairperson, I agree, but  
 10 there were so –

11 CHAIRPERSON: So you say that Major-  
 12 General Mpembe should have said to his men, including  
 13 Baloyi, look here, you stay in the Nyalas, don't get out of  
 14 it? Is that what he should have said?

15 MR GUMBI: Those are the issues that  
 16 ought to be taken into consideration by Major-General  
 17 Mpembe before he even made a decision to escort, to ensure  
 18 that his members' safety when he made a decision to escort.  
 19 It is our submission on that one.

20 Furthermore, Chairperson, in dealing with the  
 21 evidence of –

22 CHAIRPERSON: I'm sorry, Mr Gumbi, as far  
 23 as I can see you've got three or five minutes left. I take  
 24 it you'd like to round off your argument and bring it to a  
 25 successful conclusion in the time available.

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1 MR GUMBI: I'm not clear, Chairperson. I  
 2 only have three minutes left for today or as far as my  
 3 entire argument is concerned? Because I think I was  
 4 allocated -  
 5 CHAIRPERSON: On Monday morning Lonmin is  
 6 starting at 9 o'clock.  
 7 MR GUMBI: Yes, because according to my  
 8 calculation I have 45 minutes are still outstanding. I was  
 9 given 75 minutes.  
 10 CHAIRPERSON: No, no, no, 0.75 hours is  
 11 45 minutes. So how you can have 45 minutes left if you've  
 12 got 45 minutes altogether I don't understand. I mean you  
 13 haven't been arguing for half an hour, you've been arguing  
 14 for less than that. This is what we will do; we'll give  
 15 you 10 minutes – we were going to sit half an hour lunch  
 16 anyway to give someone else who hadn't applied in time to  
 17 be allocated time. We will give you 10 minutes on Monday  
 18 morning 9 o'clock and we'll then have to take half an hour  
 19 lunch and make sure we don't short-change the other people.  
 20 But please, in future if the problem every arises for you  
 21 again, remember 0.75 hours is 45 minutes.  
 22 MR GUMBI: Yes. Thank you, Chairperson,  
 23 I'm indebted to the Chairperson and the Commissioners. I  
 24 will do that. It's almost 4 o'clock.  
 25 CHAIRPERSON: Alright, 10 minutes on

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1 CHAIRPERSON: We'll now adjourn until 9  
 2 o'clock on Monday morning.  
 3 [COMMISSION ADJOURNED]  
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1 Monday. We'll adjourn now until 9 o'clock on Monday  
 2 morning when we'll have the advantage of hearing the  
 3 conclusion of Mr Gumbi's argument.  
 4 MR MPOFU SC: Chairperson, half a minute.  
 5 I just wanted to place on the record, Chairperson, that  
 6 there's some arrange, loose arrangement that we had made  
 7 which I think in fairness the Commissioners should be made  
 8 aware of. Ourselves, the families and AMCU had decided for  
 9 the sake of convenience to do joint heads on the question  
 10 of putative self-defence. For some practical reasons,  
 11 which I don't want to go into now, those heads were  
 12 delayed. We had a discussion with our learned colleagues,  
 13 the evidence leaders, who yesterday had suggested that in  
 14 any event it would be better if we submitted those heads  
 15 after Mr Chaskalson had addressed that portion because we  
 16 might well be answering, not understanding what their  
 17 position is. I also had a discussion with my learned  
 18 colleague Mr Semanya; I've been assured now by the person  
 19 who's collating those various heads that they will be ready  
 20 tomorrow. So on that basis we will serve them obviously to  
 21 everybody else and also to the Commission, just on that  
 22 specific issue.  
 23 CHAIRPERSON: You're asking permission to  
 24 file those heads late and permission granted.  
 25 MR MPOFU SC: Thank you, Chairperson.

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<p><b>ability</b> 38756:20 38780:7</p> <p><b>able</b> 38704:24 38728:16 38740:13 38746:20 38770:4 38771:7,8 38780:2 38785:21 38787:8 38788:2 38802:19 38808:16 38845:11 38876:1,5,10 38889:3</p> <p><b>absence</b> 38778:4</p> <p><b>absolutely</b> 38704:14 38709:17 38711:22 38773:10</p> <p><b>absolve</b> 38816:6 38817:6,14,17 38818:1</p> <p><b>absolved</b> 38793:12 38794:18</p> <p><b>absolving</b> 38818:13</p> <p><b>abuse</b> 38850:5</p> <p><b>accept</b> 38702:11 38722:19 38733:10 38736:25 38739:5,23 38740:1 38757:11,16 38758:6 38762:17 38765:18 38766:2 38767:6 38770:4,7 38788:19 38791:10 38806:11,23 38814:20 38815:16 38816:21 38820:24 38833:3 38840:6 38841:19 38842:10 38843:2 38845:18,22 38859:16 38863:13 38892:12 38894:18 38895:10</p> <p><b>acceptable</b> 38711:2 38726:16</p> <p><b>acceptance</b> 38769:18 38769:19 38825:6</p> <p><b>accepted</b> 38703:18 38705:14 38711:2 38712:18 38714:1 38735:14 38740:6 38741:2 38750:3 38760:7,14 38762:13 38769:15,20 38810:15 38826:5 38837:11</p> 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