

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 298

12 NOVEMBER 2014

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1 [PROCEEDINGS ON 12 NOVEMBER 2014]
 2 [09:04] CHAIRPERSON: The Commission resumes.
 3 Yes, Mr Mpofu.
 4 MR MPOFU SC: Thank you, Chairperson and
 5 the two Commissioners, Commissioner Hemraj, Commissioner
 6 Tokota. I'm going to divide my argument, Chairperson, into
 7 two broad categories. The first category deals with what I
 8 call preliminary issues, or introductory issues, and the
 9 second one deals with the merits, so to speak, and under
 10 the merits the topics that I'm going to cover will be the
 11 issue of the 11th, or what I call the absolution or
 12 exculpation of the NUM. I won't spend a lot of time on
 13 that because it has been discussed and most of the issues
 14 that I was going to cover have been covered.
 15 Then I will deal with the availability of
 16 putative self-defence as postulated by the evidence
 17 leaders, which is the joint heads that were referred to.
 18 Then, Chairperson, I'm going to deal with the
 19 issue of criminal liability involving various stakeholders
 20 and persons. A subheading under that, which I'll deal with
 21 separately, would be corruption, the corruption charges and
 22 perjury, in other words the non-murder charges.
 23 Then I'm going to deal with the issue of muti and
 24 then the alleged collective of vicarious liability of the
 25 strikers and then a broad rubric of selected

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1 recommendations which are in my heads or in other people's
 2 heads or which are not in any of those which we are going
 3 present. So on the merits those are the key issues,
 4 Chairperson.
 5 I thought just by way of lightening the
 6 atmosphere, Chairperson, seeing that you almost, or not
 7 almost, you did miss out on the praises that Mr Ramphela
 8 was planning for you –
 9 CHAIRPERSON: I probably deserve to.
 10 MR MPOFU SC: Yes, and seeing that the
 11 reason was because of your probing questions and since I
 12 expect nothing less than I might as well expend the praises
 13 now so that they cannot be withdrawn later.
 14 CHAIRPERSON: [Microphone off,
 15 inaudible]. I notice we always get applauded when we come
 16 in when we start, we never get applauded as we go out.
 17 Obviously we do something in the course of the day which
 18 causes difficulty.
 19 MR MPOFU SC: Yes, thanks, Chairperson.
 20 So yes, Chair, thank you. No, Chairperson, on a serious
 21 note I think that it's appropriate to acknowledge the role
 22 that you have played and your two Commissioners. This
 23 cannot be a very easy task. It certainly is an unenviable
 24 task to have to deal with a question of this magnitude
 25 being placed on your shoulders, and in the past two years

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1 we have seen all three of you doing your best to ensure
 2 that the parties, balancing all our various and sometimes
 3 conflicting interests, and we hope that you will discharge
 4 your duties with the same determination that we have
 5 observed in the past two years or so.
 6 I think I might also thank my colleagues here and
 7 also, you know, although sometimes we were on different
 8 sides of the divide we managed to keep the spirits going,
 9 but most importantly, Chairperson, I think we must thank
 10 the victims of the Marikana massacre or tragedy who have
 11 stayed with us for such a long time, and the victims are
 12 many, Chairperson. Victims are the people primarily who
 13 lost their loved ones, those who were injured, but there
 14 are many other victims that have lost their lives even
 15 subsequent to the 16th of August. Some their cases were
 16 covered in the media, some were brutally killed on various
 17 parts of the divide.
 18 There's a mother of one of the deceased, Mr
 19 Sokanyile I think, who upon hearing the news of the death
 20 of her son died immediately and with the result that there
 21 were two funerals in that family.
 22 When the families were presenting you might have
 23 heard that one of the widows was pregnant and I was
 24 informed when upon enquiring after hearing that story that
 25 the child died immediately, no doubt associated with the

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1 trauma of what had happened.
 2 You know about two of the people that I
 3 represented who allegedly committed suicide, Mr Mpofana and
 4 Mr Mabotyana. Mr Mabotyana you met because he was one of
 5 the people who had been subpoenaed, and of course there's
 6 Mr Mehlomkomo or Bhayi who was killed most recently,
 7 probably related to the evidence of Mr X.
 8 So the victims are many, Chairperson, and I'm
 9 sure at secondary levels there are many other victims and
 10 they're all looking upon you and your Commissioners to do
 11 the best you can with the material in your hands to
 12 alleviate their suffering.
 13 This matter, Chairperson, is about, at face value
 14 it's about the right to life which is quite obvious because
 15 the right to life is what was taken, but in my estimation
 16 it's mostly about the right to dignity. The right to human
 17 dignity is one of the values that's enshrined in our
 18 Constitution. In the Makwanyana case it was said that the
 19 right to life and the right to human dignity are the most
 20 important rights which rank above all others, and of course
 21 there's the right to physical integrity and respect of
 22 those who were injured.
 23 Why is the right to dignity the most important
 24 issue to be looked at here? It is because my analysis,
 25 Chairperson, is going to be based on looking at what

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1 happened, because that is important, how it happened –
 2 that's also important – but most importantly why it
 3 happened and I venture to say that when we look at the
 4 question why it happened we will come back to this question
 5 of human dignity.

6 The reason the question why is important,
 7 Chairperson, is because as you have said many times, your
 8 task is not merely to expose the facts and the chronology
 9 of what happened but hopefully, and maybe the most
 10 important task is to ensure that this doesn't happen again.
 11 We can't bring back their lives and limbs that were lost,
 12 but we can prevent this from happening again, hopefully,
 13 and we will never prevent it from happening again if we
 14 don't ask why it happened because it would mean whatever
 15 solutions we prescribe we will be solving the wrong
 16 problem. So the question why is of the most paramount
 17 importance.

18 Another issue that I want to raise by way of
 19 introduction is that we are dealing here by and large with
 20 people who are poor, who are uneducated relatively to
 21 different degrees. Sometimes you know the legalese and all
 22 these technicalities might escape them, but they know the
 23 truth when they see it and that is what they seek and all
 24 of us in our different capacities have busied ourselves
 25 with the idea of getting it out.

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1 But we must never underestimate people simply
 2 because they are poor and underestimate their intelligence
 3 and their powers of perception. If I had time I – if I
 4 told you the stories of the interactions we've had with our
 5 clients which have sometimes affected many of the decisions
 6 we have taken, you would have thought that they were law
 7 professors, but that's because they take this matter very
 8 seriously and they really want to get the best out of it,
 9 and there's a tendency, which I will refer to later,
 10 sometimes to underestimate that or to even brush aside some
 11 of the evidence that they give simply because it's not
 12 coming from someone who's wearing a tie or has a big title,
 13 and sometimes we even miss out on important details.

14 Then I'm going to talk about what I call the
 15 tools of analysis that I'm going to use, Chairperson, in
 16 this address. Those tools are set out in my heads of
 17 argument and, Chairperson, of course at the risk of stating
 18 the obvious, it's something that you have said, I'm not
 19 going to regurgitate what is in my heads. I will choose
 20 certain sections which I feel are important and hopefully
 21 engage with the panel on some of the more grey areas.

22 I've used the methodology of what I call game
 23 changers. That's one of the tools that I'm going to use.
 24 That goes hand in hand with what I've said about the why
 25 question because game changers by definition means these

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1 are things which are significant turning points which led
 2 us to the disaster that we're here about, and as you know
 3 I've identified three of such game changers and each one of
 4 them have their own little children.

5 But the key to game changers are what happened on
 6 the odd-numbered days of that week, the 11th, the 13th and
 7 the 15th. On the 11th, as we know, was what we refer as the
 8 NUM attack. On the 13th was the skirmish near the railway
 9 line and on the 15th was the culmination of the political
 10 pressure and our view is that what happened on the 16th was
 11 simply a culmination of all those factors and other related
 12 factors, but these three played a significant role.

13 Then of course I'll be making references to the
 14 terms of reference where, because that after all is what we
 15 are here about, and then the themes, there are 10 themes
 16 that we set out in our opening address. You know one of my
 17 colleagues here asked me very, a flattering question, which
 18 was how did we know all these things in October 2012 which
 19 we stated in our opening address and which have been proven
 20 to be true, and my answer was there's no magic in it. The
 21 mere fact that we are the only party which represents
 22 eyewitnesses, people who were there, because the other
 23 people unfortunately lost their lives so they can't speak
 24 for themselves, and then of course it's only SAPS, the
 25 police and the government agencies that were there. But

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1 the people we represent were there. To them this is, it's
 2 no mystery about what happened at this point and that point
 3 because they were there. They lived through it, every
 4 minute. Long before the Commission started we had a clear
 5 view of what had happened because we had gone through the
 6 bail applications and so on, and we had consulted with the
 7 people.

8 I just want to mention one thing, Chairperson, to
 9 counterpose it with what I'm going to say were attempts by
 10 other parties to pull the wool over the eyes of this
 11 Commission deliberately, which is unforgivable, and it is
 12 this; despite the fact that the people we represent don't
 13 have resources to organise a nine-day conference at Roots
 14 and prepare a version, so to speak, or millions and
 15 millions of rands to ensure that, you know, to delete
 16 entries from this and that book, speaking for myself I was
 17 very satisfied that the version that they gave us before
 18 the Commission started was foolproof and it was, there were
 19 checks and balances that one was able to apply to see that
 20 more or less this is what occurred on that day. I'll give
 21 you a small example, Chairperson. On the question of where
 22 the people were going, that when they left koppie 1 their
 23 hundred percent intention was to go to Nkaneng, I have
 24 never had any doubt and the reason for that is simple.
 25 When we went to consult with the people, I think around the

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1 20 something of August - as you know they were kept in
 2 three different police stations - because we were talking
 3 to people who were not talking to each other, so the
 4 chances of them having a meeting to conspire about this
 5 were eliminated, it was clear to us that there is
 6 consistency. But to make it – let's assume those ones had
 7 managed to conspire in the Canters about this issue, we
 8 then went to visit those people who were in the hospitals,
 9 who had not been with this group who are in the cells, like
 10 Mr Phatsha, I think there's actually a transcript of an
 11 interview that was done with Mr Phatsha and other people in
 12 one hospital when they were being visited by the President
 13 and in that transcript - I'll give you the reference,
 14 Chairperson – those people there sitting in that hospital
 15 were saying exactly the same thing; we were going home to
 16 Nkaneng. We went around the kraal. We were boxed into a
 17 gap and we were shot, and they had not had any contact with
 18 the other people that we were talking to in the police
 19 stations, and so for other people this might have been a
 20 big revelation. We, by the time the Commission started we
 21 knew that the people had never intended to attack the
 22 police and they might have left in different groups or
 23 different modes; others were walking, others were running,
 24 but they were ambushed when they were trying to escape to
 25 the township.

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1 [09:23] And that's just one example of the advantage that
 2 we have as a party of dealing with eyewitnesses as it were
 3 as opposed to trying to piece together objective evidence
 4 which has been the unfortunate burden of some of the
 5 parties. So those are the tools of analysis and then of
 6 course we'll talk about legal parameters that are
 7 applicable, Chairperson. We've made the point in our heads
 8 that one should not be overly or too legalistic about this.
 9 This is not a court of law, but the reason why we have a
 10 judge and two senior advocates and all of us here is
 11 because the method that we're going to use to get to the
 12 outcomes that we seek is inevitably legalistic and
 13 therefore we can't avoid that although we mustn't elevate
 14 it to the be and end all. So those are just the remarks
 15 that I wanted to make by way of introduction. Maybe the
 16 last point in that line is that I'm going to focus in
 17 between what I'm going to say and what I've called the
 18 merits on the three organisations that in my respectful
 19 submission where at the centre of the causal chain as
 20 exemplified by the game changers and that is the National
 21 Union of Mineworkers, Lonmin and SAPS and the various
 22 relationships, bilateral and trilateral relationships among
 23 them which in the past we have called toxic collusion and
 24 the unholy alliance. And as it happens, Chairperson, a
 25 person of your experience knows a case like this which is

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1 of this magnitude you literally find something new every
 2 day and so there are one or two theories which I will
 3 advance which admittedly are not even in our heads or were
 4 canvassed with witnesses but where I think there would be
 5 sufficient, objective factors to support. Again let me
 6 make an example. It is my view, Chairperson, that the role
 7 of the National Union of Mineworkers in this saga is maybe
 8 larger than we all think and by that I don't mean that the
 9 moving around in the quantum that Mr Tip and I always talk
 10 about or that they kill people or anything like that. I
 11 just mean that it is very clear that at the centre of the
 12 political motives and all the forces at play that brought
 13 about this disaster was this desire to save the NUM from
 14 what the Chairperson called yesterday bleeding of
 15 membership or weakening status in the platinum belt and so
 16 on related to what had happened in Impala. And I'll
 17 develop that theory when I talk about the collusion or the
 18 third game changer. That is every time you relook at this
 19 it seems to be looming very large as something where there
 20 was some kind of consensus among the parties that I say
 21 were the cause of these events. Now let's then go to the
 22 first issue and the merit. It is the issue of the
 23 justification of the actions of the NUM on the 11th and I'm
 24 not going to approach it now from the point of view of
 25 criminal liability and so on because I think that has been

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1 canvassed. All I can say about that, Chairperson, is that
 2 firstly the law in Van Wyk is of doubtful applicability.
 3 Well firstly I think the law in Van Wyk's case is not
 4 helpful to the NUM because of what has already been stated
 5 that those people who were shot by members of the NUM
 6 clearly when they were fleeing and not in the course of any
 7 imminent attack .
 8 CHAIRPERSON: Even if they were shot
 9 before they fled, they could have got a warning as I saw
 10 it.
 11 MR MPOFU SC: Absolutely.
 12 CHAIRPERSON: And if they'd got a
 13 warning, a spoken warning as well as a warning shot or two
 14 in the air for all we know they might well have decided it
 15 was unwise to persist in advancing towards the NUM office
 16 and turn back and turn around and gone back to where they
 17 came from. And if a warning had been given before shots
 18 were fired then it would have entitled or may well have
 19 entitled those who fired the shots to rely on defence of
 20 self defence.
 21 MR MPOFU SC: Yes.
 22 CHAIRPERSON: Or even defence of
 23 property, but absent the warning then it may well be, this
 24 is obviously a matter for the DPP to decide initially and
 25 then the courts, but it may well be that they might be

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1 found guilty of either attempted murder or perhaps assault
 2 with the intention of grievously bodily harm.
 3 MR MPOFU SC: Yes, thank you,
 4 Chairperson.
 5 CHAIRPERSON: That seems to be the case.
 6 In other words you don't have to say they were shot at
 7 while they were fleeing, they might even have been shot
 8 while they were advancing. But in the circumstances
 9 obviously this is something I take it Mr Tip will deal with
 10 when he argues, but this is a prima facie view which I'm
 11 putting.
 12 MR MPOFU SC: That's correct,
 13 Chairperson, yes maybe my sequencing was not correct. The
 14 point I was making is that there are various factors. One
 15 of them being the fact that they were shot at the back
 16 while they were fleeing, but the Chairperson is quite
 17 correct. The issue that arises even before that is the
 18 issue of the warning. There's only probabilities alone,
 19 Chairperson, the reaction of the crowds to the shots that
 20 were fired would suggest that if those shots were fired in
 21 the air the reaction would have been the same because
 22 clearly that reaction was simply from the fact that shots
 23 were ringing. Whether they were ringing on peoples' bodies
 24 or in the air the reaction on the probabilities would have
 25 been the same. So the absence of the warning is

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1 significant, thanks, Chairperson. But also the fact that
 2 these were people who – well the law paraphrased now is
 3 that in defence of property the taking of a life or
 4 attempted murder or something like that in terms of
 5 proportionality can only be done in exceptional
 6 circumstances. And again, without canvassing the blow by
 7 blow, just the mere geography of where each of the groups
 8 were would suggest that these were not yet emergency or
 9 exceptional circumstances. The fact that they had been
 10 warned, the fact that they actually took the advice of
 11 taking the quantum away and even if one says okay well they
 12 might not have had the means to take the fires away and so
 13 on. Not even asking, they were told in no uncertain terms,
 14 in so many words by Julius Mutlefelo that this is a rumour
 15 and they didn't even take steps to ascertain whether the
 16 rumour was indeed so or not. And again one doesn't take an
 17 armchair approach to these things, but on the totality of
 18 the circumstances it would seem that the – or at the least
 19 let's say the exceptional circumstances have not been
 20 established. And the latest case of Walters in the
 21 Constitutional Court would suggest that if the Van Wyk case
 22 which is an old case of 40 years ago were to come before
 23 our courts now it might not have the same result. At least
 24 some of the authors suggest that Van Wyk would not pass
 25 constitutional muster. But one doesn't have to go into all

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1 that. Chairperson, the issue at this stage is prima facie,
 2 we know that as a matter of fact the police actually
 3 charged or had a list of suspects although they didn't
 4 action it.
 5 CHAIRPERSON: They opened a docket didn't
 6 they? Attempted murder I think it was and it seems from
 7 the evidence that investigation stopped in respect of they
 8 docket while the Commission was sitting and I take it
 9 nobody, least of all us imagined for a moment that the
 10 Commission would take as long as it did.
 11 MR MPOFU SC: That's correct. So let's
 12 put that question aside. It's very clear that the
 13 Commission in our submission must recommend that the
 14 members of the NUM who and NUM itself must shoulder the
 15 blame for those injuries on Mr Mabuyakhulu and Mr Ngema and
 16 be held accountable and investigated for charges for at
 17 least attempted murder and assault to do grievous bodily
 18 harm as was suggested by my colleagues yesterday. But the
 19 importance of that event is not in that arena, Chairperson,
 20 the importance of that event is that particularly in view
 21 of the evidence that was dealt with, of the timing dealt
 22 with by Mr Gotz yesterday. It seems clear now that two of
 23 the most important decision which led us to the tragedy
 24 were taken as a result of that event. And that is so,
 25 whatever view one takes about the intentions of the

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1 strikers and so on and one has to – this idea that marching
 2 or being dissatisfied with something suggests violent
 3 intentions is something that I don't understand,
 4 Chairperson. Let's assume that the strikers were annoyed
 5 by the fact that management had said they only talk to them
 6 through the NUM, let's assume they were also annoyed by the
 7 fact that the NUM had taken steps to break the strike.
 8 Let's assume that they were annoyed by the people driving
 9 around in the quantum and all the other reasons that have
 10 been suggested, that does not mean that they are marching
 11 in protest of all those things necessarily meant that they
 12 had violent intentions. And the reason for that is we
 13 know, as Mr Mabuyakhulu said this crowd it was exactly the
 14 same as he constantly put it, it was the same as the 10th,
 15 as the previous day. So just as they marched to the LPD to
 16 air their grievances about wages, they were marching to the
 17 NUM to air their grievances about whatever. But as to
 18 their disposition it was exactly – they were in the same
 19 space as they were on the 10th and the importance of those
 20 shootings is that and the reason why we call it a game
 21 changer is that clearly the two very crucial decisions that
 22 were taken that day. One was that they should no longer be
 23 meeting near the stadium because they would be vulnerable
 24 to further attacks and somebody said because also it was
 25 mine property. Two was that they took a decision to arm

<p style="text-align: right;">Page 39255</p> <p>1 themselves. As we now know with the benefit of hindsight 2 that those two decisions played a crucial part, very 3 crucial part to get us where we are now. Even if someone 4 can postulate to say well they could still have been shot 5 near the stadium three days or four days later. Nobody 6 with a straight face can deny the mere fact that they were 7 at that koppie, in that particular terrain, near that 8 particular kraal and all that played a significant role in 9 the dynamics of the outcome that we now know. 10 And that decision can be traced directly to the 11 NUM attack. Again the decision to arm themselves, in the 12 light of the analysis that Mr Gotz gave yesterday it's 13 quite clear that the rush to get dangerous arms which must 14 have followed at hot pursuit and ended among other places 15 at Mr Cassim's shop was also instigated by that attack. 16 And so we have two crucial factors that gets us to the 17 disaster. The terrain and let's call it the motive of the 18 police for raiding the place in the first place which is 19 the fact that people had dangerous weapons. And the police 20 were obviously entitled to be concerned about that. And I 21 daresay, Chairperson, that absent those two, that motive or 22 the reason for the raid which is the weapons and the 23 terrain that we have we would either not be here at all or 24 we would have been here later or earlier or whatever. So 25 those were crucial milestones, hence we refer to them as a</p>	<p style="text-align: right;">Page 39257</p> <p>1 these game changers have their own brother game changers as 2 it were. Maybe the real game changer is what happened on 3 the 10th or what did not happen on the 10th which, was we 4 know, was really a decision that cannot be justified. 5 Forget about whether exhibit XXX8 was binding or was signed 6 by this one or not signed by that one. The point of the 7 matter is does it make sense, does it make sense just out 8 of common sense that if you are a manager and you find that 9 your workers today did not start work, they are sitting 10 outside, that you must go and listen to them irrespective 11 of whether they've complied with the Labour Relations Act 12 and so on. That's just a natural common sense reaction. 13 So what is contained in XXX8 is what a reasonable employer 14 should do anyway. 15 [09:43] Which is to talk to the people and ask them in 16 proper circumstances to have, select a committee, have a 17 counter-committee on the side of management and so on, but 18 Lonmin did not do that despite the fact that there was an 19 expectation from the employees that they would be spoken 20 to, given the Da Costa history, and the only reason that 21 Lonmin did not talk to the workers, Chairperson, is what 22 I've called in the heads of argument the floodgates 23 argument. If you summarise all the reasons that they give 24 it's that, well, if you talk to these people, well, then 25 other groups of people will come and ultimately it's about</p>
<p style="text-align: right;">Page 39256</p> <p>1 game changer. 2 And Chairperson, insofar as that game changer is 3 accompanied by criminality then the Commission, we would 4 suggest should give a stern warning to the people because 5 the first signs remember, if our version is correct, 6 Chairperson, it would mean the first signs of pangas and 7 guns and all that was now. At least that we know of, of 8 course we know somewhere in the still of the night there 9 were marauding crowds and so on. But from what we know and 10 what we have seen on the visuals the first signs of pangas 11 and spears are the spears and pangas that are held by those 12 NUM people. And that it must have played a role in the 13 rush as it were to say well if they managed to chase us 14 away with pangas and guns and spears we'll get our own and 15 the rest, as we say, is history. So it's crucial game 16 changer, but let's not forget that that game changer is 17 directly related to the culpability of Lonmin because if Mr 18 Mabuyakhulu is correct that the main reason was to say – 19 was a helpless plea to NUM to say we've marched to our 20 employer, they've said – they've referred us to you, what 21 do you expect us to do. Let's assume that that's all was 22 going to happen then that march in the first place let 23 alone the shootings and what have you would not have taken 24 place had Lonmin not been intransigent about talking to the 25 workers on the 10th. And so that's why I was saying some of</p>	<p style="text-align: right;">Page 39258</p> <p>1 money because so what's wrong with floodgates? The only 2 thing that's wrong with the floodgates is the fact that, 3 well, those ones will also be asking for more money and 4 then we'll open a precedent and then another group will 5 come and ask for more money. So for these financial 6 considerations we will do something unnatural and refuse to 7 speak to our own employees. 8 CHAIRPERSON: There seemed to be another 9 factor at play and that was their belief that because of 10 the two-year agreement nothing could happen in between, a 11 view which was of course shared by the local branch of NUM. 12 That also I think prima facie again played a role in 13 stiffening the backs as it were of Lonmin and encouraging 14 them to adopt the intransigent attitude they did. 15 MR MPOFU SC: Yes. No, that is so, 16 Chairperson. Well, my only submission in respect of that 17 is that in respect of both of those parties it was grossly 18 unreasonable for them to believe that. NUM is an 19 experienced union, they've been entering into agreements 20 for the past 30 years or so. Lonmin has at its disposal 21 some of the best legal brains that money can buy. So it's 22 unreasonable for them not to know that there's a clause in 23 their own agreements, both of them, that gives them this 24 leeway, and you'll remember, Chairperson – I don't have the 25 reference, I think it was Mr Zokwana or Mr Gcilitshana, but</p>

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1 one of them said that on a previous occasion it had
 2 occurred that, I think because there was some inflation –
 3 unexpected –
 4 CHAIRPERSON: Mr Zokwana gave an incident
 5 that dated back to something like 2005 -
 6 MR MPOFU SC: Sure.
 7 CHAIRPERSON: - where there was a two-
 8 year agreement or a three-year agreement, an agreement over
 9 a period which provided for an inflationary increase.
 10 MR MPOFU SC: Absolutely.
 11 CHAIRPERSON: And the rate of inflation
 12 jumped dramatically during the period, so the inflationary
 13 increase was totally inadequate and despite a clause worded
 14 the same way as the clause we have here NUM went to the
 15 employer, raised the point, negotiated for an increase.
 16 The agreement was amended and the increase was given. So
 17 Mr Zokwana was quite clear –
 18 MR MPOFU SC: Yes.
 19 CHAIRPERSON: - that the view taken by
 20 the local branch at Marikana was incorrect.
 21 MR MPOFU SC: Yes, so Chairperson, it can
 22 be assumed that that ignorance was not genuine. It's
 23 either they did know that they can negotiate waiver, or if
 24 they didn't they should have, they ought to have known,
 25 just from this discussion that we have had, both of them.

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1 CHAIRPERSON: Well, there's another point
 2 I suppose that the point was, again these are all prima
 3 facie points I'm putting to you; we may hear response from
 4 others that they're not sound, but the other point of
 5 course is that regard being had to the importance of the
 6 matter it may well be argued that the local branch should
 7 have at least contacted head office and said are we correct
 8 in thinking that nothing could be done because of this
 9 clause, in which case I take it they would have got the
 10 answer no, you're wrong.
 11 MR MPOFU SC: Yes, Chairperson. Let me
 12 just summarise it by saying, Chairperson, there cannot be
 13 any valid reason really for the stance taken by Lonmin on
 14 the 10th, except as I say this floodgates argument which on
 15 its own has its own deficiencies, and one is not suggesting
 16 of course, Chairperson, that well, at that stage they would
 17 have foreseen that there's going to be a disaster and all
 18 that. I'm not there, because on the 10th clearly nobody was
 19 in that zone. But just judged from the reaction of a
 20 reasonable employer, what they did on the 10th certainly led
 21 to the disaster and it cannot be justified. So what I'm
 22 trying to do, Chairperson, is to say the game changer of
 23 the 11th is directly married to the conduct of Lonmin on the
 24 10th.
 25 COMMISSIONER HEMRAJ: Mr Mpofo, you also

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1 raise the point that Lonmin was less than consistent in
 2 their approach towards whether they do or do not talk to
 3 the strikers.
 4 MR MPOFU SC: Yes, Commissioner Hemraj,
 5 remember we're not just talking only about XXX8 where
 6 there's this debate. There is a principle in Lonmin which
 7 is not, whose applicability is not debated by anybody,
 8 which was called the line of sight strategy that Mr Da
 9 Costa explained. Mr Da Costa in engaging with the workers,
 10 talking to them, whatever word one chooses, was guided by
 11 this line of sight strategy. So when it comes to the terms
 12 of reference which says that did Lonmin conform with their
 13 own policies and so on, you Commissioners must look at XXX8
 14 and decide its applicability, but the Commissioners will be
 15 able to say even if XXX8 is not applicable, the line of
 16 sight strategy that was explained by Mr Da Costa, which was
 17 never disowned by anybody, as you put it, Commissioner
 18 Hemraj, is what had guided the actions of Da Costa and
 19 which leads to the inconsistent actions in this instance of
 20 the 10th of August, yes. So it covers one of the terms of
 21 reference, but it also covers the factual sequence. So the
 22 finding must be made against Lonmin on the adherence to its
 23 own policies and practices and so on, without any doubt on
 24 that basis alone.
 25 Chairperson, if I can just move to the question

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1 of putative self-defence –
 2 CHAIRPERSON: You can move to it, but I
 3 mean it's a bit out of sequence at the moment, isn't it?
 4 It comes up later on.
 5 MR MPOFU SC: Yes. It does. Well, it
 6 comes up later on. Yes, in fact in terms of the –
 7 CHAIRPERSON: Ja, but I mean –
 8 MR MPOFU SC: No, no –
 9 CHAIRPERSON: I won't dictate to you the
 10 order of your argument, but it occurred to me it does come
 11 up later, but if you think it important to get it across
 12 now we will obviously receive the argument on the point.
 13 MR MPOFU SC: No, I suppose, Chairperson,
 14 what's weighing on my shoulders is the fact that that
 15 issue, I'm arguing it on behalf of other people. So, but –
 16 CHAIRPERSON: Is there any reason to
 17 think the other people have to leave early and won't be
 18 able to hear the argument later on?
 19 MR MPOFU SC: No, Chairperson, but they
 20 might be thinking when is he going to get to our issue.
 21 But in terms of sequence, Chairperson, you're quite right.
 22 I think the next game changer in that sequence really is
 23 the 13th.
 24 CHAIRPERSON: May I put a problem to you
 25 about that? It might be contended that the next game

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1 changer – I understand your point about the NUM, the events
 2 at the NUM office was a game changer, there may have been
 3 other game changers before that too, but it might be argued
 4 that the next game changer was a decision by the strikers
 5 not simply to use the weapons that they had for defence,
 6 but for attack, that clearly – you conceded this, I think
 7 correctly and sensibly – that the murders on the morning of
 8 the 12th and the murders on the night of the – the murder on
 9 the night of the 12th and the early morning of the 13th,
 10 those were done by strikers. We don't know who they are,
 11 unless we can accept Mr X's evidence and that's a whole
 12 chapter on its own we don't have to go into. But it might
 13 well be contended that the decision by the strikers, or
 14 some of the strikers to move over from possessing their
 15 weapons, if this was their intention before that, to move
 16 over from possessing the weapons solely to defend
 17 themselves, to move over to what I've described at times in
 18 the Commission as murder and mayhem, to violence directed
 19 at life of individuals in order to intimidate others so
 20 that they would take part in an unprotected strike that
 21 they weren't willing to do, it might be contended that that
 22 in itself was a game changer –
 23 MR MPOFU SC: Yes.
 24 CHAIRPERSON: - because it brought other
 25 important consequences in its –

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1 MR MPOFU SC: Sure.
 2 CHAIRPERSON: I must put that to you
 3 because I'd like to hear your submission.
 4 MR MPOFU SC: No, that's quite correct,
 5 Chairperson. I have three submissions to make in regard to
 6 that. The first one is one cannot deny in honestly
 7 speaking the fact that the gruesome killings of the 12th in
 8 a way changed the game, particularly from the point of view
 9 of the law enforcement agencies and so on, can't deny that.
 10 The issue here, Chairperson, is this - and again
 11 it's one of those issues that as you delve into the matter
 12 come to you - the march at the 12th, at the risk of being
 13 fired by my attorneys, in my honest view the march of the
 14 12th, Chairperson, was the march that SAPS actually want us
 15 to believe was the march of the 11th, or even NUM. Given
 16 what had transpired, given the bona fide belief, which
 17 seems that it was bona fide that two people had been killed
 18 and so on, we know that whole story, I would find it very
 19 difficult to say to you, Chairperson, that the march of the
 20 12th was not a march that was motivated by an intention to
 21 retaliate and all that. So –
 22 CHAIRPERSON: Would revenge be an
 23 appropriate word?
 24 MR MPOFU SC: Chairperson?
 25 CHAIRPERSON: Would revenge be an

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1 appropriate word?
 2 MR MPOFU SC: Yes, Chairperson. So
 3 because it's clear, undeniable that what happened on the
 4 11th had engendered this animosity and that there's no other
 5 way that one can explain the brutality of what happened on
 6 the 12th, and so if someone was to say to me what do you
 7 think would have happened if the strikers had not been
 8 stopped on the 11th I would probably say nothing, I don't
 9 think anything would have happened. They might have been
 10 signing around there and, or whatever, maybe exchanged
 11 words, but on the 12th I wouldn't be able to answer that
 12 question.
 13 CHAIRPERSON: [Microphone off,
 14 inaudible].
 15 MR MPOFU SC: Yes, so I'm just saying,
 16 Chairperson, in agreement with you, I must not be read to
 17 underestimate what happened on the 12th.
 18 CHAIRPERSON: The other question that
 19 flows from that is, I could understand the argument that
 20 whatever may have been the position prior to the events of
 21 the 11th, I think we get a slightly different interpretation
 22 of those facts from Mr Tip, but we're not going there at
 23 the moment. Certainly whether there was hostility before
 24 or not, the hostility either became more serious or arose –
 25 MR MPOFU SC: Yes.

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1 CHAIRPERSON: - hostility from the side
 2 of the strikers towards NUM –
 3 MR MPOFU SC: Yes.
 4 CHAIRPERSON: And that would go quite far
 5 to explain the, not to justify but explain what happened on
 6 the morning of the 12th.
 7 MR MPOFU SC: Absolutely, yes.
 8 CHAIRPERSON: But we're get a further
 9 rising of the temperature on, at K4 on the night of the
 10 12th.
 11 MR MPOFU SC: Correct.
 12 CHAIRPERSON: And it goes even higher
 13 than that I think, or something can be said of the
 14 proposition that this remained at a very high level on the
 15 early morning of the 13th when Mr Langa was murdered.
 16 MR MPOFU SC: Yes.
 17 CHAIRPERSON: Now that's quite an
 18 important aspect of what happened from then on, isn't it?
 19 MR MPOFU SC: Yes, it is, Chairperson,
 20 except for this; the activities of the 12th I think are in a
 21 class of their own because on the 12th, as the Chairperson
 22 correctly points out, whatever, we have various estimates
 23 of the numbers, but nobody can deny the fact that there you
 24 are dealing with the crowd, so to speak. I'm sure it was
 25 not everybody, there was other people who remained at the

<p style="text-align: right;">Page 39267</p> <p>1 koppie, but it was a sizeable crowd, whereas on the night 2 of the 12th I don't even think we have an estimate of how 3 many people were there, but it was clearly a minority, a 4 tiny minority of what we might call "the crowd." 5 On the killing of Mr Langa it's also possible it 6 could even have been one or two people, nobody knows, but 7 one can safely say it was not 3000 people walking around 8 and they found Mr Langa walking. So there is that slight 9 distinction. It doesn't make them better killings or 10 whatever, but it simply places them at a particular level 11 where they can't even by any stretch of the imagination be 12 attributed to "the strikers," as it were, whereas the 12th 13 is different and the 12th, as the Chairperson has said, is 14 clearly emanating from what happened on the 11th. So even 15 if you accept everything that you and I have agreed on, 16 Chairperson, it still makes the 11th a game changer because 17 the march of the 12th was to retaliate or revenge or 18 whatever it is, for the shootings and the killings, alleged 19 killings which had happened on the 11th. So it's a build-up 20 and a further raising of the temperature that I have to 21 concede, but it emanates from these two important things, 22 the refusal by Lonmin to speak on the 10th, the shootings of 23 the 11th and the word "revenge" itself presupposes that 24 something else has happened before. 25 While we are there, Chairperson, I might as well</p>	<p style="text-align: right;">Page 39269</p> <p>1 at the time, that didn't work, at the hands of the 2 strikers. That doesn't mean if those strikers are – 3 CHAIRPERSON: At the hands of some 4 strikers. 5 MR MPOFU SC: Of some strikers, yes, of – 6 thank you, that's even better. 7 CHAIRPERSON: Certainly this conduct 8 can't be, blame for what happened – 9 MR MPOFU SC: Absolutely. 10 CHAIRPERSON: - can't be attributed to 11 all 3000 or 4000 strikers. 12 MR MPOFU SC: Absolutely. That's the 13 crucial point. 14 CHAIRPERSON: That's the point you're – 15 MR MPOFU SC: That's the crucial point. 16 Thank you very much, Chairperson. 17 COMMISSIONER HEMRAJ: Mr Mpofo, when you 18 say the march on the 12th was motivated by revenge, the – 19 CHAIRPERSON: [Microphone off, inaudible] 20 MR MPOFU SC: I must be careful, so that 21 I can keep my job. I'm just saying that – 22 COMMISSIONER HEMRAJ: Might be – 23 MR MPOFU SC: Ja, one cannot – I have no 24 evidence that it was – 25 CHAIRPERSON: That's not to say you can't</p>
<p style="text-align: right;">Page 39268</p> <p>1 do this now. It's very important to understand that where 2 the injured and arrested come from, and as it was said by 3 Mr Nzuzza, it's a bit of an exaggeration the way it was put 4 by the evidence leaders that they have almost kind of 5 pleaded guilty to murder or what not. That's not what was 6 said. What was said is that – and this was said in a very 7 serious note, it's something that we had to consult about 8 and get sufficient consensus, as they say – that this is a 9 Commission of Inquiry where the country needs to hear the 10 truth. If we were in a court of law we would have taken a 11 different stance altogether. We would have said well, if 12 you can't prove it you can't prove it. Who knows, Mr Langa 13 could have been met with some robbers and so on. Who 14 knows, Mr Twala could have had an argument about football 15 with one of the strikers and got killed there, and so on 16 and so on. But we can't in a process like this adopt those 17 kinds of positions and that is why they took the position 18 which is to say evidence or no evidence, the killings that 19 were clearly linked to the strike must have happened at the 20 hands of one or two strikers, 20, 30, it doesn't matter, 21 but the point is that those were – we want to acknowledge 22 so that the Commission doesn't have to grapple with all 23 those issues of fanciful propositions, that for the sake of 24 this process we acknowledge that those killings happened 25 related to the strikers, or as I put it carefully I thought</p>	<p style="text-align: right;">Page 39270</p> <p>1 exclude it. 2 MR MPOFU SC: I can't exclude it, yes. 3 CHAIRPERSON: And it might even be a 4 probability it was a factor, but you didn't put it any 5 higher than that. 6 MR MPOFU SC: On the whole, yes, it's 7 reasonably possible on the test that was adduced here. 8 COMMISSIONER HEMRAJ: And then the 9 incidents at K4 Shaft, what do you say was behind that? 10 Would it be intimidation, trying to enforce the strike? 11 What do you say about that? 12 MR MPOFU SC: Yes – 13 COMMISSIONER HEMRAJ: Is that not the 14 crowd – 15 MR MPOFU SC: Yes. 16 [10:03] Let's take a simple example. You know, I've been 17 a striker before. When you are in a strike, Chairperson 18 and Commissioners, you are bound to have these kinds of 19 dynamics. That's why these things, if they can be 20 prevented, they should be prevented. As Mr Ramaphosa said 21 the history of strikes in the mining industry in this 22 country is well catalogued and it's full of many corpses 23 and killings of non-strikers and all that. In fact I 24 remember specifically, I think it was in the eighties, when 25 there was a campaign by the NUM to save some of its members</p>

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1 who were facing the death sentence, you know. So these
 2 things are not, it's no secret, it's in the Butler book,
 3 it's there and I canvassed it with Mr Ramaphosa and he
 4 candidly admitted that yes, there were – there was a lot of
 5 violence, some of it on non-strikers and so on. So it's –
 6 let's not even go to that history. Let's just look at
 7 Impala. We know that there's that kind of phenomenon was
 8 happening a few months before this disaster. So no, one
 9 doesn't have to be a genius to realise that in this – and
 10 that's why the culpability of Lonmin becomes quite serious
 11 because by letting this keg to be festering, knowing, you
 12 know it's one thing if you are doing that, there's some
 13 strike at Pick n Pay where there is precedent of violence
 14 but you know the milieu, you know that non-strikers are
 15 vulnerable and as it's been said by other parties, you
 16 probably have a duty to even take steps to say I am closing
 17 the shaft and so on. So all I am saying, Commissioner
 18 Hemraj, is that given all that we know, that's why I am
 19 saying I can't come here and say, oh well, we don't know
 20 why these people – why people went to K4. Obviously there
 21 was a minority group of however many people that felt that
 22 it must enforce the strike by unlawful means. There's no
 23 doubt about that. Remember, Mr Nzuzi's involvement, the
 24 history of Mr Nzuzi's involvement in the strike is quite
 25 interesting because he himself, not even knowing that there

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1 was a strike was just going to nightshift and met two or
 2 three people in the dark and so on, and asked him questions
 3 and they threw stones at him and when he got to his shack
 4 he asked the person he stays with, who is an RDO because he
 5 was not an RDO, what's going on? And then that's the first
 6 time that – so there's no doubt even from our own version
 7 that there were those sporadic incidents of intimidation.
 8 We can't deny that.
 9 Now the – and the issue about accepting that
 10 these deaths were part of the strike to put it at its
 11 lowest is really because it's stretching the hands of
 12 reconciliation. Remember when we are all finished here and
 13 done, these people have to live together and one of the
 14 purposes of this Commission is to foster reconciliation
 15 because without reconciliation again to say this will not
 16 happen again would be further and further away, and that is
 17 why we appreciated that Mr Ramphole when he finished his
 18 address, acknowledged that gesture and the families of the
 19 victims acknowledged that gesture because it will go a long
 20 way in alleviating. In fact when we make the
 21 recommendations we will specifically say that the
 22 Commission should without being too prescriptive suggest
 23 that there should be a reconciliation programme of some
 24 sort in those communities, and really this is something
 25 that was done in that spirit that it was turned against

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1 them as you know, it's a confession or they've now admitted
 2 to murder and they are not honest about their expressions
 3 of condolences which is very unfortunate but that's, I have
 4 to put on record that if it was done in that spirit. I
 5 know for sure because I was involved in ensuring that that
 6 is done. So the short answer is Chairperson, through this
 7 discussion one cannot underestimate what happened on the
 8 12th and so on.

9 But what happened on the 13th after Mr Langa's
 10 brutal killing then placed another crucial role in getting
 11 us to – you see, Chairperson, let me put this bluntly like
 12 this, if anybody believes that Lonmin, Mr Ramaphosa and all
 13 these people really were running around and bringing up all
 14 these thousands of bullets and whatnot because of their
 15 concern for Mr Fundi and Mr Mabelane and so on, well,
 16 anyone who believes that will believe anything. That was
 17 not the point. Of course we are all appalled at deaths,
 18 you know. The ten people who died are human beings but if
 19 anyone really believes that that is what is moving was
 20 creating this hullabaloo well, then we have – have to
 21 think again. Firstly, there's this, the story that gets
 22 bandied about is that well, the strikers had killed ten
 23 people before, so what do they expect?

24 CHAIRPERSON: Even a wrong number isn't
 25 it?

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1 MR MPOFU: It's wrong.
 2 CHAIRPERSON: Three of those were
 3 strikers who were killed on the 13th -
 4 MR MPOFU: Absolutely.
 5 CHAIRPERSON: - in the hands of the
 6 police.
 7 MR MPOFU: Yes, thank you Chairperson,
 8 yes. But in the media until today you will find that no –
 9 forgetting exactly what the Chairperson is saying, three of
 10 the people were strikers themselves, were killed but at
 11 least on our version as expressed in Mr Boo's statement
 12 five of those ten deaths must be placed squarely in the
 13 hands of the police and that includes Warrant Officer
 14 Monene and Warrant Officer Lepaaku. We know the story, we
 15 will get to that. So this thing about ten deaths, ten
 16 deaths and so on is just one of these flags that get flown,
 17 but there's no controversy about the other five which is
 18 what we have just discussed.

19 Now I was saying that the – even, let's even
 20 assume that these bigwigs were worried about those five
 21 deaths, with the greatest respect Chairperson, it will die
 22 I think in Soweto alone you have every weekend ten, 15
 23 people who die, who never seen all these people running
 24 around and bringing thousands of – and the STF and what
 25 have you. So it's a lie, it's a lie that they were moved

<p style="text-align: right;">Page 39275</p> <p>1 by that, by that – I am not saying they were so inhuman as 2 to be unmoved but I am saying the hive of activity that we 3 saw there was not driven by that. That's why the 13th is in 4 a league of its own. The 13th Chairperson, happens when all 5 the objective evidence that we see is that there were those 6 strikers were not attached to anybody. Maybe I am 7 overstating the proposition because we know that they were 8 holding dangerous weapons but apart from that, Chairperson, 9 these are people who, a small group of about a hundred or 10 so that on all the visual material we see is as described 11 by Mr Motlagewa of the very respectful very submissive and 12 so, and even if one thinks that those terms maybe are too 13 glowing, at the very minimum they get stopped by Lonmin 14 security. They are told, you must turn back, they turn 15 back. We see them on the video. They turn back. They 16 even say, okay we will turn back but please tell our 17 management to come and address us and Mr Motlagewa says 18 thank you, we will do that, we will tell management to 19 come, but for now, you must go back. And they go back. 20 They are stopped by Major-General Mpmembe. They sit down. 21 There's still a sign of respect. They talk to them. 22 There's disagreement and so on, but what is it that they 23 are saying Chairperson? They are saying, we are not 24 fighting, more than ten times in I think it's 222 that 25 transcript and the videos is Z1. We are not fighting, we</p>	<p style="text-align: right;">Page 39277</p> <p>1 CHAIRPERSON: Which is why he decided to 2 apply the doctrine of situation appropriate. 3 MR MPOFU: Mm. That's correct, 4 Chairperson, yes. Yes, no doubt that he wanted to avert a 5 disaster but I am saying in addition, surely he must have 6 also been - to this proposition of being able to disarm the 7 whole crowd. 8 CHAIRPERSON: I think there's some 9 evidence that he was a bit sceptical about whether it would 10 happen but in any event the fact of the matter was that if 11 he tried to disarm them there, there would have been – 12 MR MPOFU: Absolutely, at that Tatane - 13 CHAIRPERSON: - a substantial amount of 14 bloodshed and I don't say 34 people would have been killed 15 but a significant number might well have been – 16 MR MPOFU: Yes. 17 CHAIRPERSON: - and he very sensibly 18 decided to do what he did. 19 MR MPOFU: Yes. Thank you, Chairperson. 20 So really what we have is a small crowd of submissive 21 respectful people who, if you don't want to believe the 22 body language, then you must believe what they say that we 23 are not fighting, we have no problem with the police and so 24 on and so on. And a very significant thing happened which 25 you see in videos that one which has a bearing on the</p>
<p style="text-align: right;">Page 39276</p> <p>1 are not fighting, we just want management to come and talk 2 to us. We are holding these arms. Remember one of them 3 even did this, we are holding these arms because we are 4 attacked by the NUM. And eventually what is the deal? 5 They say, okay, escort us to the mountain and you will get 6 all the arms. Now you might say, oh well, maybe it was a 7 trap or whatever, they didn't mean it. We don't know. But 8 here was an opportunity for a voluntary disarmament of the 9 strikers offered by them. They say escort us, then you 10 will get all the weapons, not just these hundred, you will 11 get all. What more must they do? And General Mpmembe very 12 sensibly if I was in his shoes, I would have done the same. 13 If I accept, I am coming to collect 100 pangas and it looks 14 like I might get 2 000. Why not? And that is why General 15 Mpmembe acceded to that, and reached an agreement as Mr Booi 16 called it, a non-verbalised agreement. 17 CHAIRPERSON: Well, there was quasi- 18 mutual assent. 19 MR MPOFU: Absolutely. 20 CHAIRPERSON: But what Major-General 21 Mpmembe did say, that's a factor one can't ignore was he 22 realised that if he tried to disarm them there, there would 23 have been as he put it, another Tatane incident or one 24 worse than that. 25 MR MPOFU: Sure.</p>	<p style="text-align: right;">Page 39278</p> <p>1 massacre itself. When they defied Major-General Mpmembe as 2 it were, and he allowed them to go, that is, I've called it 3 in my heads the mirroring, if you mirror that moment with 4 what happened on the 16th it's actually very instructive 5 because here are these people, they are doing exactly what 6 they did on the 16th when they were massacred. They are 7 singing, they are doing this with their arms, they are 8 crouching and these were seen as big scenes as it were on 9 the 16th. And what's more, they go – there's a line of 10 armed policemen in front of them and they go towards that 11 line, exactly what happened on the 16th, but those policemen 12 didn't open fire on them, and they let them through and the 13 strikers, surprise, surprise, did not attack them. They 14 walked. They were escorted by the police exact, a mirror 15 image of what happened on the 16th. And until we know what 16 happened then until the teargas came. So let's for now 17 factor away the teargas and the stun grenades. What 18 happened in that 500 metres or so is exactly what should 19 have happened on the 16th, that if the people wanted to go 20 to a particular destination which is Nkaneng on the 16th, 21 and the koppie on the 13th, and the police were concerned 22 about the safety of other people, then escort them or 23 whatever, particularly in view of the fact that remember, 24 with Major-General Mpmembe, even worse, he doesn't have a 25 plan at all. He is just improvising as he's going along.</p>

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1 On the 16th, we have a plan and the plan says
 2 don't worry, if you don't get weapons today, you will get
 3 them phase 6. But the people were massacred exactly as I
 4 say on the same – so the 13th is significant for two
 5 reasons, there's a game change in the sense that it
 6 obviously led to further revenge, even going back to what
 7 the Chairperson and I had spoken about which I'll get into
 8 now. But it provides as I say, this golden opportunity of
 9 a mirror image of what could have been done if you had
 10 proper leadership on the 16th, and the proper situation
 11 appropriateness had been – I am sorry, Commissioner.
 12 COMMISSIONER TOKOTA: Sorry, what do you
 13 say about this criticism by the evidence leaders against
 14 General Mzembe that he didn't have a plan or things like
 15 that? Do you fault him in any way in his actions?
 16 MR MPOFU: No. Chairperson, I must say
 17 the dynamics among ourselves has a –
 18 CHAIRPERSON: Different contentions put
 19 up by different parties, that's to be expected.
 20 MR MPOFU: No, I –
 21 CHAIRPERSON: You, I won't get into
 22 trouble for saying what I am now going to say, but you have
 23 adopted a, as I see it a very realistic approach to a
 24 number of the matters, made concessions which others
 25 weren't prepared to make or not as readily as you made them

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1 –
 2 MR MPOFU: Thanks, Chair.
 3 CHAIRPERSON: You did so for a number of
 4 reasons, one you've explained, and which does you credit,
 5 the other is you also of course add strength to your other
 6 submissions, that's a factor that –
 7 MR MPOFU: Thanks Chairperson.
 8 CHAIRPERSON: - hasn't escaped us.
 9 MR MPOFU: Yes. No Chairperson, I must
 10 confess I can't fault General Mzembe's approach. I just
 11 can't even if I tried because as I say for me what he did
 12 is exactly the mirror image of what should have been done
 13 because here he sees a situation, he says it to you here,
 14 Chairperson, as Chairperson has just correctly pointed out,
 15 he refers to the Tatane – how can you fault someone who
 16 applies his mind to the possibility of death. He says on
 17 the 15th in my entire training, I am paraphrasing, anywhere
 18 in the world I have never heard someone disarming someone
 19 with an axe, with a gun. That is exactly what the police
 20 did on the 16th. They went to that mountain to disarm
 21 someone with an axe, with a gun. Major-General Mzembe said
 22 that's a recipe for disaster. So I am afraid, the approach
 23 that he took, let's assume – and that doesn't – I am not
 24 absolving from the criticism what I will call the
 25 institutional criticism of you can't go into that kind of

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1 thing without a plan and so on, those where one can talk
 2 about. And if indeed it was him who gave the – which is
 3 unlikely in my estimation, if it was him who gave the
 4 instruction for the teargas then of course he must be
 5 faulted. But that would have been so inconsistent with
 6 what he had just done up to that point but you know, you
 7 never know. But General Mzembe I must say – but also,
 8 Chairperson let's just be real here, you know General
 9 Mzembe was probably in the history CJOC he was the most
 10 short lived CJOC. He was appointed at 12 and fired at 2.
 11 [10:23] You know, so because after that incident it is
 12 very clear that not only did the members of SAPS want to
 13 murder him, but at that point he stopped being the CJOC.
 14 One can say whatever they want, at that very point General
 15 Mzembe was fired. He was just a figurehead, a de facto –
 16 they brought in the real big guns. They brought
 17 Annandale –
 18 CHAIRPERSON: Constructive firing I
 19 suppose –
 20 MR MPOFU SC: Constructive dismissal,
 21 yes, Chairperson. That is why the Annandales of this world
 22 with their gung-ho approach, STF, all these people are
 23 brought – the 13th is very, very important. Why do you
 24 think all of a sudden we have Annandale, we have – who's
 25 doing the plan? It's Scott, an STF man. Who's the hostage

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1 negotiator? It's McIntosh. So the entire picture changes;
 2 it's war now. The Mzembe's of this world with their
 3 situational appropriateness and what have you must move
 4 out, it's war now. Scott says it in his affidavit, or in
 5 his statement. I've quoted that in my replying heads. He
 6 says at that point – sorry, Chairperson, he says – ja, no,
 7 no, it's somebody else. I'm sorry, I have to find this.
 8 It's an interesting – it's also important in another
 9 context. If you'll forgive me, Chairperson. Actually this
 10 quotation I got it from the LRC heads. So I suppose it's a
 11 case of easy come, easy go.
 12 CHAIRPERSON: Are you [microphone off,
 13 inaudible] quotation in paragraph 92 of your reply.
 14 MR MPOFU SC: 92 of my reply, yes,
 15 probably. Yes, Chairperson, that's – I'm indebted to the
 16 Chairperson. Somehow I thought it was at the beginning.
 17 That's where it was supposed to be. Scott says, and I'm
 18 quoting, "After hearing the briefing given by the National
 19 Commissioner and by the commanders involved in the
 20 conflictive incident earlier on that day, which had tragic
 21 results, I formed the view that this group of strikers had
 22 taken their level of willingness to achieve their goals to
 23 levels beyond what the police had previously experienced in
 24 labour and service delivery unrest. They had moved from
 25 destruction of property and harming of non-striking

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1 employees to standing against the authority of the State
 2 vested in the police by attacking and murdering police
 3 officials when they tried to enforce the law. With the
 4 killing of police officials it was my view that the
 5 strikers had crossed a barrier where they could with
 6 greater ease take the decision to confront the police again
 7 should the police be required to resolve the situation
 8 tactically." This is the truth. You see if you read that
 9 carefully you'll see this thing of harming non-strikers is
 10 nothing. Now they've moved from harming non-strikers to
 11 standing against authority of the State, so we are in a
 12 different zone now. Authority of the State, that's war.
 13 You can kill non-strikers, but to kill the police and
 14 challenge the authority of the State is war, and that is
 15 when the war was declared.

16 CHAIRPERSON: Yes, well I understand the
 17 submission, but what might be argued on the other side, and
 18 of course we've got to weigh up arguments on all sides –

19 MR MPOFU SC: Yes.

20 CHAIRPERSON: - not just both sides, is
 21 that in fact the first plan that they drew up, the inputs
 22 from Colonel Merafe, which of course couldn't be
 23 implemented because of what happened on the Wednesday
 24 night, that that plan was a significantly less risky plan
 25 and that plan might have achieved what they wanted to

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1 achieve without bloodshed at all. It was never given a
 2 chance of course, and what Scott also did, in fairness to
 3 Scott, was he said before we even go there we really should
 4 try the road of negotiation, and you say they may have got
 5 the wrong negotiator, but there's nothing wrong – I'm not
 6 sure that's correct, but I know what you – but the
 7 principle was a good principle, wasn't it? The good
 8 principle was let's not go on to the attack, let's rather
 9 solve the problem if we can by negotiation. So that's
 10 another point, to be fair, to put on the side of Scott.

11 The other point which arises is later the
 12 decision to bring the trade union presidents, that also was
 13 an attempt to go the peaceful route. So these are all
 14 factors which operate on the other side. The last point
 15 that I must put to you, and I just put these to you so you
 16 can deal with them if I'm on the wrong track, prima facie
 17 views; I know you criticise bringing in the STF, but the
 18 interesting thing about the STF is they didn't fire a shot.

19 MR MPOFU SC: Correct, and NIU.

20 CHAIRPERSON: And Colonel Gaffley, who
 21 was in charge, in fact was horrified when the K9 people
 22 started firing away into the bushes and he told his own men
 23 to duck and he ordered cease fire. So I understand on
 24 paper it sounds terrible that they brought in the STF and
 25 you think that, you get the idea of cash-in-transit heists

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1 and the activities that go on there taking place at
 2 Marikana. In fact that didn't happen as a result of the
 3 bringing in of the STF. It may well be, and I understand
 4 this is your argument, the main point that you make and I'm
 5 just putting it to you to make sure I understand it
 6 correctly, was bringing in those people from head office
 7 brought in a different ethos, a paramilitary approach to
 8 solving a problem which should have been solved in another
 9 way. I understand that argument, but I think to be fair
 10 the points that I've put to you on the side of Colonel
 11 Scott are also points to be borne in mind, unless if you
 12 disagree, perhaps after we've taken the tea adjournment you
 13 can tell me why.

14 MR MPOFU SC: Thank you, Chairperson.

15 CHAIRPERSON: 15 minutes?

16 MR MPOFU SC: Ja.

17 [COMMISSION ADJOURNS COMMISSION RESUMES]

18 [10:48] CHAIRPERSON: - that was the more
 19 militaristic –

20 MR MPOFU SC: Absolutely.

21 CHAIRPERSON: - what you call the STF
 22 approach, but it's really the militarised police, the
 23 remilitarisation.

24 MR MPOFU SC: Yes.

25 CHAIRPERSON: Police force attitude from

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1 head office, which was not the attitude which you say
 2 General Mpembe adopted. That is the main thrust you –

3 MR MPOFU SC: [Inaudible] ja, he didn't –

4 CHAIRPERSON: I think I indicated to
 5 you –

6 MR MPOFU SC: Yes.

7 CHAIRPERSON: - that I didn't have a
 8 problem with that, prima facie.

9 MR MPOFU SC: Yes, but I –

10 CHAIRPERSON: The operational responses
 11 as you know, and so forth.

12 MR MPOFU SC: That's correct,
 13 Chairperson, yes, but I acknowledge the points that you
 14 make. I was simply saying this, it's a turning point in
 15 that sense alone of, as I say the constructive dismissal of
 16 Mpembe, more than constructive dismissal, he was threatened
 17 with murder and the taking over of the apartheid –

18 CHAIRPERSON: If you are thinking in
 19 terms of constructive dismissal and so forth, then again
 20 this is a point obviously that's got to be dealt with by
 21 your learned friends, but it does appear – this is based on
 22 something De Rover said actually – it does appear that if
 23 he'd been left in charge and based upon what he said on the
 24 Wednesday night to Mr Zokwana, things would have turned out
 25 differently – might well have. Let's put it that way –

<p style="text-align: right;">Page 39287</p> <p>1 MR MPOFU SC: Absolutely.</p> <p>2 CHAIRPERSON: - might well have turned</p> <p>3 out differently, and Mr De Rover made an interesting little</p> <p>4 remark somewhere about the – I forget exactly how it was</p> <p>5 put but something along the lines of Mpembe wasn't listened</p> <p>6 to or didn't have much influence, or words to that effect.</p> <p>7 I'm sure one of these clever people here will find it for</p> <p>8 us, but that effectively reinforces the point you're</p> <p>9 making.</p> <p>10 MR MPOFU SC: Yes, Chairperson. Yes,</p> <p>11 that's completely true, Chairperson. It shows that not –</p> <p>12 actually, Chairperson, it goes further than that. If you</p> <p>13 look at what happened on the 16th you have literally two</p> <p>14 streams of things happening. You have what you might call</p> <p>15 the Mpembe effort which culminates in, I mean 15th and 16th,</p> <p>16 evening of the 15th to the 16th, which culminates in the</p> <p>17 visit by the leaders to the koppie, the recorded</p> <p>18 conversation where he clearly says all these things about</p> <p>19 the X and all that. So you have that going on.</p> <p>20 Meanwhile –</p> <p>21 CHAIRPERSON: I'm sorry to interrupt you.</p> <p>22 It even goes further than that. You say it goes further.</p> <p>23 I'm saying even further than you say.</p> <p>24 MR MPOFU SC: Even further.</p> <p>25 CHAIRPERSON: What he says is if you</p>	<p style="text-align: right;">Page 39289</p> <p>1 figuratively is Annandale, then nobody else can be</p> <p>2 convinced.</p> <p>3 CHAIRPERSON: But again you know I'm not</p> <p>4 sure that it's quite as bad as that for Annandale.</p> <p>5 Annandale was also put in a tricky situation. You remember</p> <p>6 Annandale actually stood over Brigadier Pretorius at 3:20PM</p> <p>7 and said please record the following in the occurrence</p> <p>8 book, but the point you're making I think is that if you</p> <p>9 put yourself in Mpembe's shoes at 6:30 on the Thursday he'd</p> <p>10 expressed views the night before as to what he thought</p> <p>11 should happen, and then effectively it was D-day and that</p> <p>12 was not what he had envisaged.</p> <p>13 MR MPOFU SC: Very crucial, Chairperson,</p> <p>14 and that –</p> <p>15 CHAIRPERSON: Taken out of his own – he</p> <p>16 couldn't then say no, no, no, no, it can't be D-day –</p> <p>17 MR MPOFU SC: Ja.</p> <p>18 CHAIRPERSON: - for these reasons –</p> <p>19 MR MPOFU SC: Ja.</p> <p>20 CHAIRPERSON: - because from on high the</p> <p>21 instruction had come.</p> <p>22 MR MPOFU SC: Absolutely. That is</p> <p>23 crucial, Chairperson, and that informs – you see, this</p> <p>24 issue of the collusion is not just a cosmetic thing. That</p> <p>25 informs the attitude, the inexplicable attitude of Lonmin.</p>
<p style="text-align: right;">Page 39288</p> <p>1 leave it to me what we're going to do is we're going to –</p> <p>2 he doesn't say it in express terms, but it amounts to that</p> <p>3 – we're going to go on looking at the photographs and</p> <p>4 identifying the people with weapons. You, the people from</p> <p>5 NUM, are secretly going to tell us without attribution</p> <p>6 who's got weapons and where they are, and we're going to go</p> <p>7 and get them at the hostels. That effectively is what he</p> <p>8 says to Zokwana, as I understand him. That's my approach</p> <p>9 for dealing with the matter. The other way, going to the</p> <p>10 koppie, that's a recipe for disaster, and while he's saying</p> <p>11 that, in parallel with that other things are being said at</p> <p>12 Midrand –</p> <p>13 MR MPOFU SC: Absolutely. That's exactly</p> <p>14 the point, Chairperson. Almost, if it was a movie it would</p> <p>15 be on the one scene in Rustenburg you have General Mpembe</p> <p>16 planning all these nice things and interventions and so on.</p> <p>17 Meanwhile in Midrand the National Management Forum is</p> <p>18 tightening and accelerating the plan for war. That's</p> <p>19 exactly what happened. So you can't, whether you look at</p> <p>20 General Mpembe from the point of view of the 13th or from</p> <p>21 this point of view of the 15th, 16th, overnight kind of</p> <p>22 divide, you – well, if you are in doubt about his</p> <p>23 nationalisation then the mere fact that when the tragedy</p> <p>24 actually occurs he's somewhere in the air alone and, you</p> <p>25 know, and the person who's calling the shots literally and</p>	<p style="text-align: right;">Page 39290</p> <p>1 Here they were in the evening, high fives were being</p> <p>2 exchanged with Mathunjwa in that Mpembe effort, and</p> <p>3 Mathunjwa comes in the morning, nobody wants to talk to</p> <p>4 him. Why? Because by then they know, they have been told</p> <p>5 obviously that it's D-day and in fact they were just about</p> <p>6 to host the D-day press conference, so to speak, then and</p> <p>7 there. That is the only reason why Mathunjwa suddenly</p> <p>8 finds different people in the morning. What happened to</p> <p>9 these people who were all hugging, saying it looks like</p> <p>10 tomorrow there's hope, and all these good things, and all</p> <p>11 of a sudden nobody wants to talk to me and nobody's going</p> <p>12 to talk to those criminal anymore?</p> <p>13 COMMISSIONER TOKOTA: Mpembe says I'm not</p> <p>14 in charge, go to –</p> <p>15 MR MPOFU SC: Absolutely, and he says it</p> <p>16 in so many words. He says –</p> <p>17 CHAIRPERSON: I must say that –</p> <p>18 MR MPOFU SC: In fact he washed his hands</p> <p>19 exactly –</p> <p>20 CHAIRPERSON: A long time ago Advocate</p> <p>21 Tokota said to me that piece of evidence rings very true.</p> <p>22 MR MPOFU SC: It certainly does. There's</p> <p>23 no doubt that what Mr Mathunjwa says there is correct</p> <p>24 because it fits in with this whole narrative. In fact</p> <p>25 Mpembe, if Mpembe, my only criticism of Mpembe is that he</p>

<p style="text-align: right;">Page 39291</p> <p>1 is adhering to this nonsense of, what you call it, closing 2 the ranks, because quite frankly the evidence is against – 3 he tried, you know, say no, they didn't tried to murder me, 4 it wasn't that serious, and I was still the CJOC. That is 5 the main criticism of him, of trying not to unsettle the 6 cart –</p> <p>7 CHAIRPERSON: There's another criticism 8 that one can understand exactly what happened. You 9 remember after, when you people were away trying to get 10 legal aid we went on with some evidence, particularly with 11 Colonel Scott, and then when you came back General Mpembe 12 came back and by this time we had the Scott computer, we 13 knew what the plans were and how things worked and so on, 14 and Scott himself had said that the original plan was still 15 on the table in the JOC on the Thursday morning, and then 16 he, you know all that evidence.</p> <p>17 MR MPOFU SC: Correct.</p> <p>18 CHAIRPERSON: And then when poor Mpembe 19 came the point was put to him and he then said no, no, no, 20 no, no, we'd already had this new plan on the Tuesday 21 afternoon, which of course was the original Roots story.</p> <p>22 MR MPOFU SC: Yes.</p> <p>23 CHAIRPERSON: And he was as it were 24 obliged to stick to it.</p> <p>25 MR MPOFU SC: Absolutely.</p>	<p style="text-align: right;">Page 39293</p> <p>1 then gets doomed from the start once that attitude is 2 adopted. The Bishop Seoka –</p> <p>3 CHAIRPERSON: That is not entirely 4 correct. When Mr Mathunjwa went – now admittedly the case 5 is that he didn't have much to offer the strikers, but he 6 did make quite an eloquent speech to them and advised them 7 that the way to go is the way which in fact they went 8 subsequently some years later, namely through the CCMA and 9 a protected strike and so on. He put up quite a convincing 10 argument, I must say I thought, and if he'd succeeded, now 11 the question is even though they had the plan, even though 12 the NMF had decided if they don't lay down their arms, it's 13 phase 3, tactical option, but he nearly pulled it off.</p> <p>14 MR MPOFU SC: Absolutely.</p> <p>15 CHAIRPERSON: Or rather, I don't know how 16 nearly he pulled it off, but he certainly tried very hard.</p> <p>17 MR MPOFU SC: No, he tried hard, under 18 those difficult circumstances, Chairperson. Remember now 19 he – remember according to his version at least there is 20 some undertaking that they will be engaged, the strikers, 21 in some way or another, whether it's through a delegation 22 or whatever. Now he has to go there and offer practically 23 nothing. In fact that's what I said when, I think I was 24 cross-examining Mr Mathunjwa, anybody who knows how 25 strikers behave will appreciate the deft work of Mr</p>
<p style="text-align: right;">Page 39292</p> <p>1 CHAIRPERSON: The poor man hadn't been 2 told, of course very properly I suppose no-one told him 3 since he was under cross-examination, but he didn't know 4 what had happened while Colonel Scott was cross-examined.</p> <p>5 MR MPOFU SC: Yes.</p> <p>6 CHAIRPERSON: And I must say I felt very 7 sorry for him.</p> <p>8 MR MPOFU SC: I do too, Chairperson.</p> <p>9 CHAIRPERSON: And I can understand 10 exactly the pressures to which he was subjected. Anyway, 11 but that's really just an aside.</p> <p>12 MR MPOFU SC: Yes, that's true, 13 Chairperson.</p> <p>14 CHAIRPERSON: We must carry on with 15 the matter.</p> <p>16 MR MPOFU SC: Yes. So if we accept that 17 not only that there is this inexplicable change of 18 attitude, and as Commissioner Tokota correctly points out, 19 I mean obviously Mr Mathunjwa didn't know the other 20 dynamics but that statement was very telling when he says 21 look, we agreed yesterday and all, Mbombo is now in charge 22 effectively, it's no longer my business. There can't be 23 any other explanation that the decisive NMF meeting had 24 changed the dynamics and the fate of what was likely to 25 happen, and that's crucial because the Mathunjwa effort</p>	<p style="text-align: right;">Page 39294</p> <p>1 Mathunjwa's diplomatic speeches of Amandla, Amandla, this, 2 you, and so on, and then in its slipping you must use the 3 legal structures, you must, CCMA and this, but you have to 4 be at the pace of the crowd as it were, and that's what he 5 was forced to do with literally nothing to offer. It would 6 have been better if he had come and did that speech and 7 said well, what is more is that at 3 o'clock at LPD your 8 leaders can go there or whatever, but he couldn't because 9 now he was being shunted from pillar to post, so he 10 literally had nothing to offer, and the bravery to go there 11 twice under those circumstances when you have nothing to 12 offer is something that should be –</p> <p>13 CHAIRPERSON: You know it's even more 14 commendable than that really because he'd asked for this ad 15 hoc – well, on the assumption that argument is correct, he 16 asked for some kind of bargaining forum, ad hoc or 17 otherwise, and he'd been told you can't take part, and 18 there was nothing in it for him at that point. Whether he 19 was trying to get something is a matter that we have to 20 look at, but when on the most adverse reading there was 21 nothing in it for him he still went back.</p> <p>22 MR MPOFU SC: Yes, he did, Chairperson, 23 but even this thing about he tried to get to the table, so 24 what? If he was the president of my union and he didn't 25 try to get a place on the table I would fire him. That's</p>

<p style="text-align: right;">Page 39295</p> <p>1 his job.</p> <p>2 CHAIRPERSON: No, I'm not going there.</p> <p>3 MR MPOFU SC: Yes.</p> <p>4 CHAIRPERSON: What I'm saying is when, he</p> <p>5 was quite clear on any version there was nothing in it for</p> <p>6 him, he still went back and he tried -</p> <p>7 MR MPOFU SC: That's correct,</p> <p>8 Chairperson.</p> <p>9 CHAIRPERSON: - very hard.</p> <p>10 MR MPOFU SC: Yes, that's correct, he</p> <p>11 did, and as the Chairperson, I can't put it better than the</p> <p>12 Chairperson that to his eternal credit he went on his</p> <p>13 bended knees to, under those circumstances without anything</p> <p>14 to gain, as it were.</p> <p>15 So the effect, just to go back to the issue of</p> <p>16 the 13th, so the 13th is important for that purpose because</p> <p>17 it brings the, what I'll call shorthand, it brings the</p> <p>18 militarisation element, but the 13th is also important</p> <p>19 because it introduces this issue of revenge, very, very</p> <p>20 important. Let's forget about who was to blame about those</p> <p>21 five deaths. Let's put that aside, but the truth is that -</p> <p>22 and it was acknowledged by even Mr Ramaphosa - is that we</p> <p>23 all know that, and it also comes from the extract that I</p> <p>24 read from Scott, we all know that the minute there are</p> <p>25 police killings, literally the game changes, and as Scott</p>	<p style="text-align: right;">Page 39297</p> <p>1 you remember. Paragraph 7 of Vermaak's statement, exhibit</p> <p>2 - I think JJJ19, on that whole debate about engage, engage,</p> <p>3 engage, he says in that paragraph that "When I realised</p> <p>4 that these people have not heard the order from Calitz I</p> <p>5 repeated it because I thought of what had happened on the</p> <p>6 13th." So the order to engage was repeated literally with</p> <p>7 the spectre of the 13th looming large as to what had</p> <p>8 happened on the 13th. So the 13th is, but without it I</p> <p>9 would go as far as to say what happened on the 16th would</p> <p>10 not have happened, would not have been led by those people</p> <p>11 who led it and would not have happened the way that it did.</p> <p>12 So it's those two broad elements.</p> <p>13 Something very quick that I must - which is</p> <p>14 unrelated to what I'm saying about the 13th, and it's about</p> <p>15 the pulling of the wool over the eyes of the Commission</p> <p>16 issue. It is the lie that was sold about -</p> <p>17 CHAIRPERSON: The pulling of the wool or</p> <p>18 attempted pulling?</p> <p>19 MR MPOFU SC: Attempted pulling of the</p> <p>20 wool. Well, the truth, Chairperson, of course is that</p> <p>21 we'll never know how much more deception there is. I think</p> <p>22 the evidence leaders must also take their share of the</p> <p>23 praise in unearthing and making sure that the wool was not</p> <p>24 pulled as much as it was intended, but we don't know what</p> <p>25 else, what else has been concealed and how much has - but</p>
<p style="text-align: right;">Page 39296</p> <p>1 candidly puts it there, now we have a situation where there</p> <p>2 are police killings and all the evidence shows that that is</p> <p>3 what drove the, what I called in one of the cross-</p> <p>4 examinations, the frenzy of activity. In fact if you look</p> <p>5 at the statement of Naidoo, of Annandale, they even forget</p> <p>6 to mention the three strikers who died. According to them</p> <p>7 there was a thing on the 13th and two policemen died and</p> <p>8 that's it. In their supplementary statements they somehow</p> <p>9 remember that there were also strikers.</p> <p>10 So that's a very important contributor to what</p> <p>11 happened on the 16th. Actually I think more than two of the</p> <p>12 witnesses acknowledged that in the briefings, in the course</p> <p>13 of the briefings Kidd, Captain Kidd when he was briefing</p> <p>14 his TRT people on the 16th he said remember, these are</p> <p>15 dangerous people, they killed two policemen and other eight</p> <p>16 innocent people, another version of the misinformation.</p> <p>17 But be that as it may, nobody can deny that the killing of</p> <p>18 the policemen, for whatever reason, was a huge game changer</p> <p>19 which influenced not only the change of guard at the top,</p> <p>20 but the mood at the bottom significantly, and it literally</p> <p>21 defined how the 16th was approached.</p> <p>22 Captain Loest, who even says that we reminded</p> <p>23 them just before, remember that, you know, we were scared</p> <p>24 of what might happen. Vermaak I think says it as well, in</p> <p>25 fact Vermaak says it at a crucial point, Chairperson, if</p>	<p style="text-align: right;">Page 39298</p> <p>1 let's put it this way; it is an attempt, Chairperson,</p> <p>2 because it was unsuccessful insofar as we now know that</p> <p>3 stories like they were veering to the settlement and that</p> <p>4 is why the teargas was fired have practically been</p> <p>5 abandoned because, you know, of what came out.</p> <p>6 The smoking gun in this whole Commission came out</p> <p>7 of the work of the evidence leaders in getting that, the</p> <p>8 hard drive, because the smoking gun in this is JJJ192.</p> <p>9 Without, before JJJ192 came, remember you were made to</p> <p>10 believe that, as you correctly pointed out, the decision</p> <p>11 was taken on the 16th, General Phiyega did not, actually</p> <p>12 underplayed very much what happened on the 15th. All the</p> <p>13 phone calls, the political considerations and all that,</p> <p>14 that is the smoking gun that actually unravelled some of</p> <p>15 the things that we had suspected, I must confess, when we</p> <p>16 made our opening statement, and so one cannot underestimate</p> <p>17 that. But the truth of the matter is that it was</p> <p>18 foreseeable, very foreseeable - well, General Mpembe I</p> <p>19 think conceded correctly his references to Tatane could</p> <p>20 have meant only, he did that on the 15th as well, on the</p> <p>21 13th and the 15th he referred to the Tatane incident and</p> <p>22 that's clear what that means.</p> <p>23 But General Mbombo says in JJJ192 very clearly,</p> <p>24 because of what happened on the 13th emotions are high on</p> <p>25 both sides, and if these people are deployed, 20 people</p>

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1 might die. Well, she was only wrong by 14, but –

2 CHAIRPERSON: [Microphone off, inaudible]

3 to be fair to her there was talk about whether they should

4 have done anything on the Tuesday and to be fair to her she

5 said no, no, no, we can't go on Tuesday, the day after

6 Monday, because emotions are still running high, and she

7 says she specifically ordered that nothing should be done

8 on the Tuesday because of the fear that the high emotions

9 from the Monday were still there.

10 MR MPOFU SC: Yes.

11 CHAIRPERSON: Of course she might be

12 criticised for not realising that emotions were still

13 running high after that, but that's a factor that must also

14 be argued –

15 MR MPOFU SC: Yes, thank you,

16 Chairperson –

17 CHAIRPERSON: But to be fair to her, she

18 did prohibit any action on the Tuesday and that was

19 obviously a right decision.

20 MR MPOFU SC: Yes, well Chairperson, I

21 have two submissions to make about that. That's correct.

22 [11:08] But quite frankly anyone who thinks that the

23 police are angry about the killing of their colleagues on a

24 Tuesday, but by Thursday they'll get over it is in

25 dreamland. Surely she could never have thought that the

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1 emotions have suddenly dissipated in a matter of 48 hours.

2 The real explanation, Chairperson and in fact that's an

3 aggravating factor for her is that she definitely foresaw

4 deaths and because she succumbed to the political pressures

5 despite the fact that she had foreseen deaths, that's

6 really the only conclusion one can find. Because left to

7 her own devices sense would have prevailed, she might have

8 said look let's either make sure that these people are

9 properly counselled or we remove them completely and bring

10 a new lot or whatever. But she didn't have time to do

11 those things because the political pressure was banging on

12 them that it must done immediately. So on the question of

13 foreseeability the dye is cast, she foresaw death, in fact

14 we might say she even foresaw higher deaths than Mpembe,

15 Mpembe – we're talking about Tatane, that's Sunday picnic

16 for one person. Mbombo says 20 people might die if we go

17 ahead and yet they still go ahead within a space of – the

18 difference between Tuesday and Wednesday is in the context

19 negligible. So but this issue is also crucial for another

20 reason and hopefully it will off time. When we talk about

21 the issue of Mr Ramaphosa later again he candidly admitted

22 that you know one knows that once there's been police

23 killings the temperature rises and so on. But that goes

24 also to question of his own foreseeability or foresight

25 because knowing what he knows about the mining industry and

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1 the dynamics there. Knowing that police officers have been

2 killed on the Wednesday, I'm sorry on the Monday the 13th,

3 yes, to actually go and pour petrol over the fire as it

4 were and ask for concomitant action and more pointed ways

5 and all that armed with that knowledge it's one thing if

6 you had done it on Monday, maybe one would have said oh

7 well you'd only referred to Impala maybe and say well he

8 knew what had happened in the past. But now here is

9 something fresh, fresh, fresh of police killings and you

10 say just bring the army. Surely nobody alive could say

11 someone who does that does not foresee even the slightest

12 possibility of deaths ensuing. But we'll get to that. So

13 let me the 13th, Chairperson. We then go to – well the 14th

14 we know what happened on the 14th is mainly the JJJ192

15 conversation which was very important as well as the

16 unfortunate death of Mr Twala. Mr Twala's death one

17 doesn't know when he died, but I think the proximity, the

18 reason why we made - the concession we made was the

19 proximity of his body to the koppie. But apart from that,

20 Chairperson there was really no violence after the 13th for

21 a period of – if you factor in Mr Twala's death of 48

22 hours, if you factor it out even longer. So here you are

23 you have a dichotomy of a situation or a paradox of a

24 situation where throughout the week from since the Saturday

25 you have probably the most peaceful period and obviously

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1 these are relative things, there was no peaceful period

2 there. But relatively speaking you have the quietest

3 period and it is in that period that you get the tragedy

4 taking place and the only explanation is provided in what I

5 call the smoking gun of the whole Marikana Commission which

6 is JJJ192. That conversation, Chairperson, with the

7 greatest, is nothing else but a, you know a conspiracy to

8 murder. Let me call it that because on the 14th General

9 Mbombo and it's what you call a consummation of the toxic

10 collusion. Here you have Mr Mokwena and General Mbombo,

11 apart from saying look don't do this, let's align our

12 plans. Don't do the pamphlets today, do them tomorrow.

13 Sinclair says ja we must deploy the horses and so on. They

14 obviously see themselves as one team at that stage which I

15 think Brigadier Calitz considered it was at that stage a

16 joint operation. But that might be defensible, you might

17 say look if I'm a complainant and some people have to come

18 to attack me and I'm going to show them the evidence or

19 whatever. So there's a level at which that can be

20 justified, but to sit there and say what we've just

21 discussed now there's a clear possibility of deaths. Two,

22 you Lonmin must act in such a way as to disassociate

23 yourselves from the notion that you are favouring AMCU.

24 Three, let us make sure that we kill this thing before Mr

25 Malema can come and diffuse it. What is that, Chairperson,

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1 what is that? How can a police official say that I don't
 2 want violent conflict to be resolved, I don't want it or if
 3 I have choose between political considerations and the
 4 resolution of this violence I'm going to choose the
 5 political considerations. What is that, what kind of a
 6 country is that? And it goes – you know if you read the –
 7 it's chilling reading really because she said because, the
 8 word because that is in that extract is something that I
 9 just can't get over, Chairperson. This is what she says, I
 10 mean this is a disgrace. Provincial Commissioner, "Now our
 11 discussion with the National Commissioner was surrounding
 12 this thing that says that is thing now happening again
 13 that Malema come to diffuse this thing. So that it becomes
 14 as if Malema has taken charge of the mines. So that it has
 15 got a serious political connotation, that we need to take
 16 into account. Hence I just told these guys that we need to
 17 act as such to kill this thing. If today we don't find co-
 18 operation these people will need to move in as such that we
 19 kill it because we need to protect a situation that any
 20 Jack and Jill from the political arena" blah, blah, blah.
 21 Because, I mean what is it, Chairperson, what are we
 22 looking for? If we don't see that word because, we must
 23 kill this thing immediately because of the political
 24 considerations. I don't understand it. We can't sit here
 25 for two years and looking for a reason why this massacre

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1 occurred when it is here in front of us. This is a smoking
 2 gun. We can pretend and look for this and come with big
 3 legal explanations and concepts and books and what have you
 4 in Latin terms. Here is the reason why the massacre
 5 happened because we protect a situation where any political
 6 Jack and Jill can come, we must kill this thing
 7 immediately.
 8 CHAIRPERSON: You quoted in your heads,
 9 section 199, sub-section 7 of the Police Services Act,
 10 paragraph 35.14, page 22 of your main heads.
 11 MR MPOFU SC: Page 22, yes. Oh yes.
 12 CHAIRPERSON: This is the Police Services
 13 Act where it says – I beg your pardon -
 14 MR MPOFU SC: I can't find my own heads –
 15 paragraph?
 16 CHAIRPERSON: This is the Constitution,
 17 it's 35.14, paragraph 35.14 of your heads, page 22. In the
 18 Constitution it said "Neither the security services nor any
 19 of their members may in the performance functions further
 20 in a partisan manner any interest of a political party."
 21 There's another section, I think, in the Act also which
 22 made the point that the police are not to take political
 23 considerations into account and not to act in a way where
 24 it could benefit one political party or disadvantage
 25 another.

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1 MR MPOFU SC: That's correct,
 2 Chairperson. Yes so it's Section 199.7 of the
 3 Constitution, it's the Act itself and then of course the
 4 big one, Chairperson, is the Section 195 of the
 5 Constitution which prescribes so to speak the impartiality
 6 of the public service as it were. 195.6, yes. We would
 7 say that 195.1 provides that the public administration must
 8 be governed, it's at 5.10 of my heads, by democratic values
 9 and principles enshrined in the Constitution including the
 10 high standards of professional ethics, impartiality and so
 11 on. So this is a fundamental breach of the Constitution,
 12 of the Act, of anything that anywhere in the world that
 13 policing is supposed to stand for. And this is the cause,
 14 this is it, there's nothing else. We can look, we can
 15 pretend, we can blindfold our eyes, but this is why the
 16 thing had to killed and this kind of sentiment – as she has
 17 correctly said, well discussed between her and the National
 18 Commissioner is clearly the dominant sentiment which was
 19 taken to the National Management Forum. Remember these two
 20 players who were hatching this evil plot are the main
 21 players in the NMF. One is the National Commissioner, she
 22 obviously chairs the meeting because she's the National
 23 Commissioner, the other one is the Provincial Commissioner
 24 of where the thing is happening. So the other people in
 25 the NMF really were just - I think someone was suggesting

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1 that they should be charged. I don't know why they would
 2 be charged because all they did was to endorse the
 3 decision.
 4 CHAIRPERSON: It's not as simple as that
 5 either because the discussion took up to an hour, a number
 6 of them took part and you remember that the Provincial
 7 Commissioner Mbombo said in response to a question I asked
 8 her, he conceded that her expertise was financial and there
 9 were people around the table with a lot of operational
 10 experience. And if any of them had raised notes of caution
 11 and said look here it's not a good idea for the moment
 12 because, she would have withdrawn her proposal. So it's
 13 not quite as simple as you –
 14 MR MPOFU SC: No, no true, Chairperson,
 15 look maybe I'm contesting too strongly. The point I'm
 16 making and of course we know, I think the evidence leaders
 17 point this out that it was not just endorsement, they also
 18 agreed to provide resources and so on. So they might not
 19 be completely holy, holy.
 20 CHAIRPERSON: I'd really like to find
 21 what really happened at that meeting. Apart from the fact
 22 that if there's a tape, even that's a questionable matter,
 23 but if there's a tape we can't get our hands on it. It was
 24 lost apparently, but apart from that I caused a
 25 questionnaire to be sent to every member of the Management

<p style="text-align: right;">Page 39307</p> <p>1 Forum who were there at that extraordinary session and the 2 two who have since left the service declined to answer. 3 The others have given answers, I don't know what the 4 English is, but 'n nikssegende aarde, non-committal and 5 when I asked whether anybody raised the risks the National 6 Commissioner said well she couldn't remember pedantic 7 detail like that. 8 MR MPOFU SC: That's correct. 9 CHAIRPERSON: I must say this is a prima 10 facie view obviously, every view I express must be prima 11 facie, I must keep an open mind, but I would have thought 12 that when things went as catastrophically wrong as they did 13 on the Thursday someone would have remembered oh dear this 14 was discussed or wasn't discussed last and why wasn't it. 15 It's very sad it wasn't or if it was it wasn't listened to. 16 And that, I would have thought, had been etched in the 17 minds of at least some of the people who were there. But 18 some of them deliberately I think I can say without being 19 accused of being unfair, deliberately evaded the questions 20 that I asked them. One of them said that it was all about 21 the North Western Province, I am from the KwaZulu Natal, it 22 doesn't concern my province and that was all she said. I 23 must say – 24 MR MPOFU SC: That was General - 25 CHAIRPERSON: I don't that's a</p>	<p style="text-align: right;">Page 39309</p> <p>1 CHAIRPERSON: Something unsatisfactory 2 being hidden. 3 MR MPOFU SC: Yes and even, Chairperson – 4 CHAIRPERSON: Advocate Hemraj is 5 suggesting that there's another inference, of course and 6 that is an attempt on the part of those concerned to try to 7 evade responsibility, ultimate responsibility for being 8 parties to a decision, an endorsement remember of a 9 proposal which is one they want to run away from as far as 10 they can now. That also is not a satisfactory inference. 11 MR MPOFU SC: No it's not, Chairperson, 12 but maybe I would encourage the Commission to take it even 13 one step further which is this. Firstly let me say this, 14 it's just a technical approach of saying well I'm no longer 15 working there therefore I'm not going to respond to the 16 Commission. I meant that alone just shows the kind of 17 attitude. Then the others who gave obfuscatory material 18 were doing so because they still worked there, they had to. 19 But the point here is that as we are getting closer to the 20 heart and the meat of the issues, whatever happened there 21 we know that as far as the two people are concerned was 22 informed by the political considerations. And the 23 Chairperson is quite right, the only question might whether 24 those others were just innocent or were they also brought 25 in into the issue of political pressure. And in assessing</p>
<p style="text-align: right;">Page 39308</p> <p>1 satisfactory response to a serious question sent by this 2 Commission, but that's a matter which obviously will be 3 dealt with. 4 MR MPOFU SC: Chairperson, yes I will 5 invite you just to be brief on that one, I would invite the 6 Commission to say you are entitled just as if those evasive 7 answers were given here, you are quite entitled in these 8 circumstances to draw whatever inference should be drawn 9 from the evasive answers and the non co-operation. Just 10 think about it, Chairperson. 11 CHAIRPERSON: One inference, I'm saying 12 these things out loudly and others are going to argue and 13 can respond to what I say and help us to do the right 14 thing, but the point that occurs to me is that an inference 15 can be drawn that something unsatisfactory happened at that 16 meeting which they don't want to tell us. What exactly it 17 was I'm not sure. It may simply be, of course, that they 18 said we've got to do this because if we don't do it 19 tomorrow Malema will be there on Friday which would have 20 been an unsatisfactory thing to say. And then maybe that's 21 all they're hiding, but I must at the moment, unless I'm 22 persuaded otherwise that prima facie it looks to me as if 23 something is being hidden. 24 MR MPOFU SC: Yes, thank you, 25 Chairperson.</p>	<p style="text-align: right;">Page 39310</p> <p>1 that and in drawing that inference, Chairperson, one has to 2 look into the glaring, unsatisfactory manner in which 3 General Phiyega clearly wanted to shield the Minister from 4 any involvement after the fact. Remember that whole thing 5 about the missing page, I don't even want to go there. And 6 the only common denominator in all those discussions which 7 took two or three days of the Commission of trying to 8 unravel this draft and that draft and so on, the only 9 common denominator was the fact that she wanted to remove 10 any reference to the Minister or at least any reference 11 that suggested the Minister was more than at arms length in 12 this issue. So if you read the fuzziness around National 13 Management Forum and what she said under oath and tried to 14 unsay and then the inference must be irresistible that this 15 thing that you and I, Chairperson, don't know what it is 16 that everyone is trying to hide must be the political 17 pressure or the role that it played in the decisions. 18 CHAIRPERSON: I'm not sure that's right. 19 [11:28] Obviously that's why I am putting these things to 20 you. It may well be that the Malema point may have been 21 what they are hiding and that is certainly something that 22 is there. 23 MR MPEMBE: It is possible. 24 CHAIRPERSON: Do you remember I asked her 25 that? She said she never mentioned it at the meeting but I</p>

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1 am not sure if one can accept that answer.

2 MR MPOFU: Yes, no but that would be the

3 same thing. Remember the Malema issue is not hanging in

4 the air, Chairperson, it's related to the fact that

5 Ramaphosa was chairing the disciplinary thing and

6 nationalisation and all those things.

7 CHAIRPERSON: I am aware of that but what

8 we also would appear to know, again prima facie, is that

9 the thinking of the Provincial Commissioner and you say

10 also the National Commissioner, I must look at it again

11 very carefully to see if that's right, but certainly the

12 thinking of the Provincial Commissioner was we've got to

13 act soon because Mr Malema's going to come, we don't want

14 that. And I asked myself the question from the very first

15 day of this Commission, why Thursday? And when I read that

16 transcript I thought I had the answer. I may have, may

17 not.

18 MR MPOFU: Chairperson, you did have the

19 answer. And that is – it's towards the end.

20 CHAIRPERSON: Sorry, Mr Mpofu.

21 MR MPOFU: Yes, thank you Chairperson.

22 No, I was – I just wanted – just give me a second,

23 Chairperson. Yes, Chairperson, I just wanted – just not to

24 leave this point hanging about whether it was just the

25 Provincial Commissioner or National Commissioner.

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1 CHAIRPERSON: - I was going to relook at

2 the transcripts again just to satisfy myself.

3 MR MPOFU: Yes, just to –

4 CHAIRPERSON: Is there something that you

5 want to draw my attention to?

6 MR MPOFU: Yes, it's a very short

7 extract, after that long discussion, she says Chairperson,

8 "and that ourselves as the police we managed, you know, and

9 managed the situation after Malema came." And then she

10 says, "Now our discussion with the National Commissioner,"

11 this is the Provincial Commissioner saying, "was around

12 this thing that says, is this thing now happening that

13 again Malema should come," blah, blah. So she was –

14 CHAIRPERSON: Prima facie it sounds if

15 you are right.

16 MR MPOFU: Yes.

17 CHAIRPERSON: This desire to get in

18 before Mr Malema could get in was a desire on the part of

19 both the National and the –

20 MR MPOFU: And the Provincial

21 Commissioner, thanks Chairperson. And then the other

22 sordid details which come out of that – of JJJ192 but again

23 the other significant one which was canvassed I think by my

24 learned friend Mr Budlender, was the issue of the other

25 political consideration namely, which goes back to the

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1 point I made earlier in the morning, namely the protection

2 of NUM and this impression and then the ANC and all that,

3 which Minister Shabangu very unsuccessfully tried to dodge

4 by saying these evil forces, were not AMCU but Lonmin. I

5 mean that's laughable.

6 CHAIRPERSON: That's a different point.

7 That was the speech she made at the NUM AGM.

8 MR MPOFU: Yes. I am just – yes that is

9 correct, Chairperson. No, I am simply saying that there

10 was –

11 CHAIRPERSON: Not an AGM, it was a course

12 of some sort.

13 MR MPOFU: Yes.

14 CHAIRPERSON: It was a meeting anyway.

15 MR MPOFU: Somewhere, yes. The point I

16 am – the only connection with that is that – all I am

17 saying Chairperson is that there was a clear view in that

18 political camp if you like, which included the NUM, the

19 ANC, Mr Ramaphosa, Zokwana, Mantashe, all the people

20 mentioned in those emails about this mission to ensure that

21 the NUM does not get overtaken which is understandable at a

22 political level because they are allies in COSATU and so

23 on. But the point is that all those things should not be

24 playing their minds in the – or rather, any role in the

25 minds of the police officials at all, they should be

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1 foreign things that have to do with other people.

2 I am sure we will come back to JJJ192. So that's

3 the 14th. The 15th, we have already discussed. The

4 important thing about the 15th is the Gwala meeting and what

5 we have already discussed, the Mpembe meeting in the

6 evening, the visits to the koppie, and I've already

7 mentioned the sudden change of weather that was confronted

8 – that Mr Mathunjwa was confronted with in the morning.

9 But again, and the D day note, we have the D day note, the

10 D day press conference, although that word was not used

11 there, but I am calling that –

12 CHAIRPERSON: Whoever gave it, was a

13 summary of what –

14 MR MPOFU: Absolutely.

15 CHAIRPERSON: - he used that phrase.

16 MR MPOFU: Yes, and the D day

17 announcements so to speak. Now the relevance of this,

18 Chairperson, is that once again let's forget the moral or

19 criticisms about whether it was political or not political

20 or what have you, the reality is that because the decision

21 had been taken and it's D day, it then has a direct effect

22 on how, on what happens between the morning and half past

23 three because now it has to happen, it has to be today and

24 so on, you know, the briefing, I mean that's one of the

25 briefings if you look at exhibit L, actually took like ten

<p style="text-align: right;">Page 39315</p> <p>1 minutes. I think it was the STF that was briefed at 15:20. 2 One of the biggest operations and most dangerous and so on, 3 and people who have never been there who have come from all 4 sorts of places are briefed for ten minutes. I mean that 5 alone, shows that even with the best will in the world the 6 operation was stillborn and it was bound to fail and to end 7 in a disaster. Even, forget about who, whether he had the 8 best, even if he had the best policemen with the best 9 equipment, all these things, how could something like this 10 be planned in such a rush and be implemented in the fashion 11 that it was. That's why we had glaring things, 12 Chairperson, such as the fact that Scott thinks that the 13 deployment of the wire is going to be simultaneous but 14 Calitz thinks that it's going to be in successive. Those 15 are the simple signs of an operation that is just being 16 rushed through for – just to meet the D day thing. 17 CHAIRPERSON: Another matter that you 18 haven't touched on yet, I hope I am not stealing your 19 thunder, if I do, if I am I apologise. We were told and 20 obviously the legal representatives of the police were 21 told, they told us, that the plan that was implemented was 22 one that had been drawn up on the Tuesday with the input 23 from Merafi and a plan was of course drawn up with the 24 input from Merafi but it wasn't this plan. And it was 25 available there to be used when it had to be, and once the</p>	<p style="text-align: right;">Page 39317</p> <p>1 MR MPOFU: Yes. 2 CHAIRPERSON: And counsel for the police 3 without any problem gave them to us. 4 MR MPOFU: That's correct. 5 CHAIRPERSON: And obviously they acted 6 correctly. Once shouldn't have to praise people for acting 7 correctly, but it's a practice to do so nevertheless. 8 MR MPOFU: Yes. 9 CHAIRPERSON: Once we had those notes, 10 then of course a lot became clearer that had been murky 11 before. There's the other problem - 12 MR CHASKALSON SC: Chair, those notes 13 were given to us not on request, I mean there'd been a 14 request by the Human Rights Commission several months 15 previously but those notes were given to us when Adv 16 Semanya first became aware of their existence and at a time 17 when there had been no request. 18 CHAIRPERSON: I am glad you pointed that 19 out because that then strengthens the point that I made 20 that he acted properly, we expect nothing other from him 21 but nevertheless it's appropriate to say publicly that he 22 acted very, very properly. 23 MR MPOFU: Yes, Chairperson, before – 24 CHAIRPERSON: There's one other point – 25 MR MPOFU: Yes?</p>
<p style="text-align: right;">Page 39316</p> <p>1 – Scott was cross-examined and his computer became 2 available it was clear that why there was a contradiction 3 in the police case from the beginning. The contradiction 4 in the police case from the beginning which was obvious, 5 was that with one breath they were saying we made the 6 decision at half past one, and in another breath they said 7 it was announced at 09:30. Now it was obviously taken 8 therefore before 09:30, the question is when, and the 9 minutes of the 06:30 meeting didn't seem to tell us the 10 decision had been taken yet – 11 MR MPOFU: TT4. 12 CHAIRPERSON: If they were genuine, the 13 minutes, then something happened between that meeting and 14 09:30. That was a mystery but the fact is the police case 15 began with a contradiction and of course the contradiction 16 was later explained but the problem was always there. 17 MR MPOFU: Yes, that's correct, 18 Chairperson, because remember even before the mystery was 19 solved there was a kind of via media type of explanation 20 that actually General Mbombo made the decision before the 21 01:30 meeting. But again they didn't explain the question 22 of why the press conference – 23 CHAIRPERSON: Of course what also 24 happened to be fair, was when we asked for the handwritten 25 notes they were forthcoming.</p>	<p style="text-align: right;">Page 39318</p> <p>1 CHAIRPERSON: - the, Exhibit L, tended to 2 conceal what had happened at 09:30. How anyone could have 3 thought regard being had to the press publicity about that, 4 what was said at 09:30 that we would be misled by the 5 statement about what was said at the 09:30 press 6 conference, exhibit L, gaan my verstand te bowe, but we 7 won't go there either. 8 MR MPOFU: It's worse than wool, 9 Chairperson but before, maybe we take the break, 10 Chairperson, I just want to say that – 11 CHAIRPERSON: - to go until quarter to, I 12 see. 13 MR MPOFU: Quarter to, okay then we can. 14 CHAIRPERSON: If we reach the stage where 15 you prefer me to take the adjournment now I will. 16 MR MPOFU: I will, between now and then I 17 will indicate, thank you Chairperson. But I wanted to just 18 say this very quickly, while we are discussing this, 19 apropos my learned colleagues representing SAPS, you know 20 there have been suggestions or innuendos and so on, and I 21 just want to echo what you are saying, Chairperson, that 22 they've acted with more than appropriateness situational or 23 otherwise in the circumstances. You know, I've known Mr 24 Semanya for most of my professional life, and to have a 25 client like this, who lies to you, calls a meeting for nine</p>

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1 days for the sole purpose of concocting a version, and then
 2 gives it to you, what are you supposed to do? You know, so
 3 I think under the circumstances and I don't expect him to
 4 acknowledge the, those remarks while he is still on the
 5 brief, but Chairperson, they were placed at various points
 6 here into the most difficult situations that any
 7 professional should be placed on. And under those
 8 circumstances they have really done they have really done
 9 us proud.

10 CHAIRPERSON: Simply, they have acted in
 11 accordance with the highest traditions of our profession
 12 and we hope those high traditions will always be
 13 maintained. Can we take the adjournment now?

14 MR MPOFU: Yes, thank you.

15 CHAIRPERSON: 15 minutes.

16 [COMMISSION ADJOURNS COMMISSION RESUMES]

17 [12:00] CHAIRPERSON: The Commission resumes.
 18 Before you proceed with your argument, Mr Mpofo, I
 19 understand from Mr Bham that the Lonmin have obtained the
 20 AVL records relating to the vehicles that went to the NUM
 21 office on the Saturday morning which will give us objective
 22 evidence as to what time that incident took place. So Mr
 23 Bham, can you please give us the information you received?

24 MR BHAM SC: Thank you, Mr Commissioner.
 25 This has been made available, vehicle with registration

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1 number HSC571NW, Toyota Hilux, that was the Lonmin vehicle
 2 which went to the NUM offices on the morning of 11 August
 3 2014, and the –

4 CHAIRPERSON: 2012.

5 MR BHAM SC: 2012, sorry, and the
 6 tracking record shows that it arrived at the NUM offices at
 7 8:35AM on that day.

8 CHAIRPERSON: Thank you very much. I
 9 think that puts that matter beyond doubt.

10 MR MPOFU SC: Absolutely, Chairperson,
 11 that's five minutes – it's in line with Mr Gotz's
 12 submissions yesterday. Thank you very much.

13 CHAIRPERSON: Mr Gotz's submissions are
 14 vindicated.

15 MR MPOFU SC: Yes, that's correct.

16 CHAIRPERSON: [Microphone off, inaudible]

17 MR MPOFU SC: Yes. Thank you,
 18 Chairperson, and no doubt the necessary adjustments will be
 19 done in the evidence leaders' heads.

20 CHAIRPERSON: [Microphone off, inaudible]
 21 responses to all changes in stories that arrive that come
 22 up from time to time.

23 MR MPOFU SC: That's correct, yes,
 24 Chairperson.

25 MR CHASKALSON SC: On that note, Chair,

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1 can I just qualify Mr Bham's submissions –

2 CHAIRPERSON: You're not allowed to talk
 3 while you're laughing, Mr Chaskalson.

4 MR CHASKALSON SC: In fact it reached the
 5 NUM office a little bit earlier, 8:23. By 8:35 it was in
 6 the position where Mr Motlogeloa speaks of having driven
 7 off to the north to turn around so that he had a view of
 8 what was to become the incident.

9 CHAIRPERSON: We'll hand that in as an
 10 exhibit.

11 MR MPOFU SC: Thank you.

12 CHAIRPERSON: Ms Pillay who is keeping
 13 this running record of extra exhibits will incorporate it
 14 was well, I trust. Is that right, Ms Pillay?

15 MS PILLAY SC: That's correct, Chair.

16 CHAIRPERSON: Good.

17 MR MPOFU SC: Thank you –

18 COMMISSIONER HEMRAJ: Do we know how soon
 19 after that warning the actual march took place?

20 MR CHASKALSON SC: What we do know is it
 21 must have happened between, probably between – the incident
 22 probably took place between 8:35 and 8:42 because by 8:42
 23 the vehicle has moved off again and is in a position on the
 24 other side of where the incident would have taken place.

25 MR GOTZ: Chair, that would accord with

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1 our assessment as we've set it out in our speaking notes
 2 that we handed up yesterday. That's precisely the time
 3 that we estimated on the basis of various pieces of
 4 evidence.

5 COMMISSIONER HEMRAJ: Thank you. Thank
 6 you, gentlemen.

7 MR MPOFU SC: Thank you, Chairperson –

8 CHAIRPERSON: Nice to be vindicated and
 9 to learn that your inferences were correct.

10 MR MPOFU SC: Yes, thank you very much,
 11 Chairperson. I spent half of my life trying to find Mr
 12 Cassims. It looks like it was not necessary. Chairperson,
 13 yes, we were discussing the 16th and I was saying that –
 14 maybe before we do that let me – no, let me do it
 15 afterwards. Again I'm not going to traverse the blow-by-
 16 blow of what happened in the morning of the 16th, the
 17 efforts of the – all the comments that I've made about the
 18 "failure," or the attitude adopted by Lonmin in respect of
 19 the Mathunjwa effort would apply also to the effort by the
 20 Bishop. There's no doubt that Bishop Seoka's efforts were
 21 also kind of ignored on the basis of the prior knowledge
 22 that, you know, D-day was happening and so on. After all
 23 the people that the Bishop was talking to were, had been at
 24 the press conference in the morning, assuming, which is
 25 unlikely, that they had not been told the night before or

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1 some other time.

2 So as I've said before very literally with Bishop

3 Seoka, here was a God-sent opportunity to do something, or

4 to grab an unexpected opportunity. Let's say Mr Mathunjwa

5 wanted a seat on the table and he was suspected to be part

6 of the forces behind the strike and all that, but here's

7 Bishop Seoka who has no interest whatsoever in the matter

8 except to do the good work of the church, which is to try

9 and avert situations like this, and yet he was also treated

10 with nothing short of disdain and he was forced to leave.

11 The idea of the image that haunted Bishop Seoka of somebody

12 calling him and saying, "Bishop, Bishop, where are you? We

13 are being killed," exactly shows the mood of the strikers

14 that they too had seen this effort as a God-sent

15 opportunity which might yield something and they must have

16 seen the Bishop's arrival as an opportunity to get what

17 they had been asking for, for days, which is just to be

18 spoken to. And Chairperson, I can't emphasise, I spoke

19 about human dignity; this is not just about talking,

20 Chairperson, it is the fact that these people said they

21 want to be spoken to because this is their employer and the

22 indignity of being treated with such disdain, and despite

23 what Mr Burger said, I'll refer you to extracts where Mr

24 Magidiwana says that the employer should have come and put

25 something on the table and they should have said we don't

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1 have this amount, we have this amount, and so on. So

2 really all they wanted – and that's what they said to

3 General Mpmembe, that's what they said to anybody who cared

4 to listen, that's what they said to Mathunjwa, that's what

5 they said to the Bishop. To the Bishop they asked this

6 strange combination of things; we want water and the

7 employer, and the desperation that must have been in the,

8 when they realised that Mathunjwa's efforts had not yielded

9 anything, the desperation of phoning to say "Bishop, where

10 are you?" and the Bishop in his testimony says he could

11 hear the gunshots as they were ringing, shows us very

12 clearly that yet another opportunity was left to go by,

13 because this is D-day.

14 Remember, Chairperson, you know if one has to

15 look for another smoking gun, maybe smaller than the bigger

16 one, what did General Mbombo say in the morning, "Today we

17 are going to end the strike." She didn't say today we are

18 going to end the violence, today we are going to make sure

19 nobody, another non-striker is going to get killed. "Today

20 we are going to end the strike." Now, and we still wonder

21 what was going on there. It is very, very clear that the

22 mood was that come what may, Bishop or no Bishop, today we

23 are ending the strike and we are moving in with all the

24 equipment and bullets and mortuary vans and what have you

25 at our disposal.

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1 Anyway, water under the bridge. The

2 opportunities have been lost now. What actually happens at

3 the mountain? For me one of the biggest omissions in this

4 whole saga is the failure of Brigadier Calitz to give, as

5 he is prescribed to do by all the SAPS regulations, to give

6 some kind of warning before the barbed wire is drawn out.

7 That is so crucial, Chairperson, because if you go through

8 the evidence of Magidiwana he says we did not know what

9 these people were doing; were they going to arrest us?

10 Were they going to kill us, as Mathunjwa had said? Were

11 they just going to beat us up? What? And the obligation

12 which is in 262, for you it actually asks to give two

13 warnings. The first one, we went through this, and the

14 second one I think Brigadier Calitz said after 20 minutes,

15 and so on. That –

16 CHAIRPERSON: That wasn't a warning in

17 respect of the wire. That was –

18 MR MPOFU SC: Oh, yes.

19 CHAIRPERSON: - supposed to be a warning

20 in respect of the dispersal.

21 MR MPOFU SC: Yes.

22 CHAIRPERSON: And in fact as I read the

23 act that's required under section 9(2) of the Regulation of

24 Gatherings Act –

25 MR MPOFU SC: Yes.

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1 CHAIRPERSON: - before the dispersal

2 action can take place.

3 MR MPOFU SC: Absolutely.

4 CHAIRPERSON: He was going to do that,

5 but this is something different. This is the wire.

6 MR MPOFU SC: Yes.

7 CHAIRPERSON: Of course Brigadier Calitz

8 does say that he was asked by Mr Noki about the wire and he

9 said he told him, and there's of course the debate whether

10 if that is correct, whether that would have been known to

11 the others.

12 MR MPOFU SC: Yes, Chairperson, yes, that

13 evidence unfortunately cannot help SAPS. I mean you can't

14 say I have an obligation to give a warning to the crowd and

15 I happened to give it to somebody and I was hoping that

16 he'll just spread it around.

17 CHAIRPERSON: Yes, to be fair, the other

18 argument of the police is it was a defensive measure and

19 262 doesn't require notice of that, and of course that

20 raises the question if it's a defensive measure in the eyes

21 of the police it might not necessarily be seen as a

22 defensive measure in the eyes of the strikers, but anyway,

23 these are matters we have to –

24 MR MPOFU SC: Yes, Chairperson, I stand

25 corrected, but my own recollection is that even 262 says

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1 that before you even take the defensive measures you must
2 give a warning in many languages and so on, but I'll find
3 the reference.

4 CHAIRPERSON: I must confess, I don't
5 think that's right, but anyway, but we'll deal with it –

6 MR MPOFU SC: We'll find it, yes. Thank
7 you, yes. No, we'll find the reference, but – and
8 Brigadier Calitz conceded this, but the point about this is
9 not just technical compliance. The point about this is
10 that surely the people upon whom you are administering your
11 policing methods, such as this, must be told. I've said –

12 CHAIRPERSON: Mr White dealt with that
13 very fully in his –

14 MR MPOFU SC: Yes, very much,
15 Chairperson. I think I put it to Brigadier Calitz that
16 even the apartheid police in my experience would pretend to
17 give you a warning. I remember very, many times where they
18 say you have five minutes, and then they move in or throw
19 teargas after two minutes. That's fine, but at least there
20 was a pretence that, you know, you must disperse or else.
21 You can't just "sommer" arrive there and do this and do
22 what was done here with a volatile crowd like this, and
23 draw up wire and you know, others are queuing up, others
24 are putting their protective material, others are cocking
25 their guns. Nobody knows what is going on. A simple thing

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1 the regulations in languages, what have you. This one, one
2 would understand if there was no niceties of translation
3 and so on would not have been there, but at the very least
4 somebody should have said if you go any further, or
5 whatever, you know, something is going to happen to you.
6 None of that is done.

7 But what takes the cake is the third opportunity.
8 After all that, okay, the 16 or 18 people have been killed
9 now at scene 1. There is seven minutes between the time
10 they move in at scene 2 and the people are huddled in the
11 inside that bushy area and nobody, Chairperson, thinks of
12 just taking a loudhailer and saying you people there in
13 that bushy area, come out otherwise we're going to shoot
14 you, or whatever. Nobody. They go in there and they kill
15 them. Nobody has said if you come out on this side or
16 whatever, now that we've seen that the water that we have
17 thrown – and the water was actually just a joke because how
18 do you throw in that water when you've surrounded the place
19 with armed policemen? What must they do? But the simplest
20 obligation is to say to them - you have these helicopters
21 hovering about, is to say get out, or if you come out with
22 your hands up you'll go to the left, if you want to fight
23 go to the right, whatever, you know, but you can't just go
24 in there with guns blazing literally, to do what? To shoot
25 them for what? For not doing what? Because you have not

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1 of just telling the people you must leave – we saw there
2 were loudhailers which had just been used by the strikers a
3 few minutes before, or by Mr Mathunjwa. Somebody should
4 have grabbed a loudhailer there and say you must go, or
5 whatever, or put your arms down and only those who have put
6 their arms down will be allowed to go, whatever, whatever,
7 but must say something. You can't just mount an operation
8 of this nature.

9 The second one – there are three areas where this
10 is crucial, Chairperson. It is at the point of drawing the
11 wire and then, and there's no explanation whatsoever there
12 because there's no sign of anything that – if indeed the
13 wire is being drawn successively over a period nine minutes
14 or whatever, why don't you use that opportunity? And the
15 means are there.

16 Then let's assume there was some explanation for
17 that, then you go to the gap next to the kraal. Again
18 nothing is said next to the kraal about the, giving a
19 warning. The means and the opportunity, definitely there
20 because if you are able to open your mouth and say "Media,
21 go away," surely you must be able to open your mouth and
22 say drop your spears, or whatever. Again that, so you've
23 got the method, you've got the loudhailer to chase away the
24 media, but you don't say anything. Of course this time – I
25 mean the first warning would have been done according to

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1 even communicated anything.

2 If you read through all the prescripts,
3 Chairperson, of SAPS, you will see the pivotal role – and I
4 put this to both General Annandale and Brigadier Calitz –
5 the pivotal role of communication. It's –

6 CHAIRPERSON: Sorry, it goes further than
7 that. He was now busy with the dispersal operation under
8 section 9 of the Regulation of Gatherings Act, and section
9 9(2) as I recall it – if I'm wrong I hope I'll be
10 corrected, I'm sure I'll be corrected – section 9(2) says
11 before you do that you've got to give a warning in
12 languages and what have you, so he was obliged under the
13 act - and one assumes he would have known what the act said
14 - before he was starting with the dispersal operation to
15 give a warning. So whatever happened at scene 1, this is
16 now scene 2, according to the evidence the plan is back on
17 track. They're now busy doing what they set out to do.
18 That's what General Mpembe said and Colonel Scott said as
19 well at some point. So, and the act made it clear, he
20 should have given a warning and that wasn't explained as
21 far as I can recall.

22 MR MPOFU SC: Absolutely, there was no
23 explanation at all.

24 COMMISSIONER HEMRAJ: What was the
25 answers –

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1 MR MPOFU SC: Mr Chaskalson tried his
 2 best to get that answer.
 3 COMMISSIONER HEMRAJ: What was the
 4 answers when you posed those questions, Mr Mpofo?
 5 MR MPOFU SC: Well, it was first posed by
 6 Mr Chaskalson. I'm not sure of the order, but when I
 7 raised it Brigadier Calitz said, well firstly he said they
 8 didn't think of it, or something like that, or they didn't
 9 have the means and I think, I'm not sure, I did put to him
 10 that they could have even used the speakers of the people
 11 in the helicopters, or something, some, but something. But
 12 he certainly acknowledged that it was a period, there was a
 13 lull of about seven minutes during which this could have
 14 been done if someone had –
 15 CHAIRPERSON: I seem to remember Mr Bizos
 16 was the first one to raise the matter and then it was taken
 17 up by you.
 18 MR MPOFU SC: Yes, that's correct. Thank
 19 you, Chairperson. So at all those three stages, whether
 20 you're looking at before the drawing out of the wire or
 21 before the shooting at the gap, or most glaringly before
 22 scene 2 takes place, there's a momentous failure of
 23 complying with the most basic of the prescripts, which is
 24 simply to communicate, because these are human beings that
 25 you are dealing with here, you can say to them if you do

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1 this or don't do this or don't go to this side because this
 2 side – whatever. I have no doubt if someone had said to
 3 them well, those who want to leave must not leave in the
 4 direction of Nkaneng for arguments sake.
 5 [12:20] They must go to the other side towards Marikana
 6 and those who remained we'll assume that you'll want to
 7 fight or something of that nature. You know some kind of
 8 communication so that some of the people like Mr Gwelani
 9 who was there to bring food and so on I'm sure would have
 10 taken that invitation. But it's quite clear that if one
 11 looks at criminal liability, you don't have to go beyond
 12 that. As an omission, but for that omission or rather to
 13 borrow Mr Burger's counter factual analysis, it must be
 14 clear that had that been done at least some of the people,
 15 if not all, would have made a choice at least. So by the
 16 time the people are shot at and so on it's already a
 17 botched operation. But again let's go to – and again I
 18 want to go back to that issue of the fact that the version
 19 of the strikers was so consistent. Mr Magidiwana, I had
 20 not even consulted him on this, was asked, during cross-
 21 examination, to draw the path that they followed. And that
 22 path is clearly consistent with the path that we found
 23 recently from, I think it's UUUU10, which shows very
 24 clearly that they were avoiding the police. Because
 25 remember the police version was that there incident 1 next

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1 to the pole and so on and so on which is like a direct – if
 2 you look at that slide with the arrows. The first one and
 3 it makes sense if you had to follow that theory of SAPS.
 4 The first doesn't go above, it's a direct attack to the
 5 pole, but Mr Magidiwana came with this round about thing
 6 which wouldn't make sense to any person, why would they,
 7 when they are going to Nkaneng go around this way and then
 8 into the front of the kraal. It was clear that they were
 9 avoiding contact with the police all along. Before we even
 10 get anywhere near the kraal they are walking in such a way
 11 as to ensure that there is no contact. But what is more
 12 which is made clear in that animated exhibit UUUU10 is that
 13 you can actually see, if I had the time I would play it,
 14 you will see policemen, there are two in camouflage and
 15 then there are others. As the mass of people is walking
 16 you see them getting out of their vehicles, if anyone
 17 wanted to attack they would have attacked them. But the
 18 importance of that is not the fact that they didn't attack
 19 them, the importance of that fact is the fact that the
 20 police, those police officers knew that these people are
 21 not going to attack them, subjectively. They would never
 22 have been milling around in such proximity. Before the
 23 barriers came if they did not know in their heads
 24 subjectively that these people are not making this walk in
 25 order to attack us and that becomes important later for of

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1 putative self defence. So you have a group of people who,
 2 as the evidence leaders have pointed out, have really been
 3 beaten to submission. Mr Mathunjwa has just told them that
 4 you are going to be killed, they are singing a lament
 5 [vernacular] and they are walking, understanding that
 6 whatever stand off they were trying to create it's over.
 7 And they ensure that they avoid the police, they go past
 8 unarmed policemen, don't attack them, they are following
 9 other people who are using the path to Nkaneng, nothing has
 10 happened to those people. And all of a sudden what
 11 happens, Nyala 4 accelerates, accelerates to close that
 12 path and they have no other option, so the kraal becomes –
 13 it's part of the barbed wire in real effect. It's just
 14 another barrier. So what do they do? They have to
 15 negotiate this other barrier of the kraal to go to the path
 16 to Nkaneng which they had been going to. It's very, very
 17 simple. According to Captain Loest, he said even one or
 18 two, when they were blocked by Nyala 4, one or two made it
 19 through. So let's assume there's this theory that if they
 20 had gone through, if Nyala 4 didn't close them off they
 21 would have attacked. He says no, one or two went through
 22 and I asked him did they attack anybody, no. Again
 23 putative self defence. How would anybody, anybody
 24 reasonable or unreasonable think that these people who have
 25 been walking in this fashion, who have not attacked anybody

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1 and that is why, Chairperson, this thing of pulling the
 2 wool is crucial. It is because the police must have known,
 3 Chairperson, must have known that according to the correct
 4 path that was followed by these people there were no signs
 5 of attack. Why else would they invent incident 1 and
 6 incident 2 and this, that and the other? It's because they
 7 just knew that on the objective facts there was no attack.
 8 So you have to create it and fool the whole world and this
 9 Commission with bright yellow arrows which signify nothing.
 10 Everybody knew that these people are trying to access that
 11 road. And this brings me to the other issue, Chairperson.
 12 I said one – you read this thing 1000 times until issues
 13 come up. I and I've never put this to anybody so I'll only
 14 have to rely on the snippets of evidence that are there, I
 15 would invite the Commissioners to look for signs of this,
 16 that the TRT were under instructions not to allow those
 17 people to go to Nkaneng, the so-called militant group.
 18 I'll explain why and that instruction must have been, if
 19 you read Captain Loest's evidence, that by any means
 20 necessary they must not be allowed to go through. That is
 21 shown if you look at UUUU10 again and even exhibit EEE16
 22 you'll see that before the actual shooting the basic line
 23 is not where we always find it which is just across the
 24 road. There's a point at which it straddles the road and
 25 almost comes to the fence of the – the southern fence –

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1 CHAIRPERSON: [Inaudible].
 2 MR MPOFU SC: Yes, the southern fence
 3 that's covering the shack. And that's literally blocking
 4 the road, I mean there's no other way of explaining it.
 5 It's there in both of those exhibits and they are standing
 6 there. And then, of course, Captain Loest says their
 7 instruction was that they must stand firm and not move
 8 back. That is consistent with the theory that I'm
 9 projecting now which is that their instruction was that you
 10 can let all these other people go, but these militant ones
 11 must not, by any means necessary must not be allowed to go
 12 home. Or if someone hadn't told these people that there's
 13 a phase 6 that might happen and so on and so on and they
 14 were under the impression that it had to be done now. And
 15 one of the reasons I'm saying that is that you'll remember,
 16 I think it was General Naidoo, there was just this
 17 disjoint, because I kept on saying to him why did you have
 18 to refer to section 49 of the Criminal Procedure Act and I
 19 think I gave up that line of cross-examination because it
 20 was clear that we're just not talking on the same page.
 21 But the mere fact that somebody said to these members of
 22 the police you must remember section 49 again accords with
 23 this theory that really what these people were told to do
 24 is that you must arrest these people and don't let them go.
 25 And if it looks like they're going to evade the arrest

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1 which is implied in section 49.2, you must kill them. Not
 2 in so many words, but that evidence of saying oh yes please
 3 don't forget section 49.2 shows that the primary purpose
 4 was that these ones must not be allowed to go through. And
 5 that really would explain this whole notion of TRT must
 6 come, so what it means, to cut a long story short,
 7 Chairperson, is that to go back to the discussion that you
 8 had, I think, with the evidence leaders, or one of my
 9 learned colleagues is that Brigadier Calitz had three
 10 options to block that gap. Either by using barbed wire or
 11 by using the block method which has been discussed here or
 12 by lining up the firing squad. And of those three he chose
 13 the third one. There's no other explanation because as
 14 Magidiwana kept on saying why did they not allow us to get
 15 to the road. If they'd allowed us to get to the road then
 16 they would have seen, he didn't say, I've quoted it in my
 17 replying heads, he says if when we got to the road, we had
 18 crossed the road then I would I say then they must shoot
 19 us because then what we'd be doing, we would be attacking
 20 them. But if we turned left as we intended to do then they
 21 obviously must do something else, but they shot us before
 22 we reached the road, before they can tell whether we are
 23 going to cross and attack them or turn left and go home.
 24 And the reason why that happened, Chairperson, is simply
 25 again another breach of the rules. The rules had said very

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1 clearly that the TRT line must be at least 100 metres
 2 behind the POP line and again, we don't have to be
 3 technical, let's say because of the dynamics of the scene
 4 they felt that they must reduce that distance, but you
 5 can't reduce it to 12 metres, to a situation where by your
 6 own voluntary act you are now placing yourself into a
 7 situation where you know you must defend yourself so to
 8 speak. It just puts paid to this theory of self defence.
 9 All they needed to do is to even move back and make that
 10 distance 20 metres, whatever is the allowable distance.
 11 Remember I put it to both Captain Loest and Thupe the
 12 attack such as you conceived was an attack of pangas and
 13 spears and they conceded that. So it was that attack
 14 because these are hand instruments, a distance of 20 or 30
 15 metres would have allowed them, as I say, to make this –
 16 rather to both of them, the strikers to make the election
 17 of turning left or attacking and also the police to see
 18 what is going on. There's no evidence whatsoever which
 19 suggest that they didn't have room to do that. In fact the
 20 evidence points to the exact opposite because they ran to
 21 that position of basic line as it is shown in the objective
 22 evidence. So if they could run forward to close the gap
 23 surely they could move a little bit back to open it up so
 24 that they can see what's going to happen. So the
 25 explanation once again can only be that their instruction

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1 was to close that gap and block it as it were so that the
 2 so-called militant group must either be arrested or shot if
 3 they don't comply or something of that nature.
 4 COMMISSIONER HEMRAJ: Mr Mpofu, when was
 5 that theory do you say that that instruction was given to
 6 the TRT because the original plan was for them to be
 7 dispersed from the north west?
 8 MR MPOFU SC: No, yes that's why I'm
 9 giving it in a broad term such as by any means necessary
 10 because it could have been in the north west or east, but
 11 what seems to have happened, Commissioner and I admit that
 12 this is speculation drawn from these including the
 13 reference to section 49 and so on. What seems to have
 14 happened is Brigadier – remember there is common cause that
 15 Brigadier Calitz gave the – or at least gave Captain Loest
 16 the instruction that they must move towards the gap.
 17 Captain Loest agrees – it is common cause that he gave the
 18 instruction to go there. It's common cause that somebody,
 19 Loest or someone else gave the further instruction for
 20 basic line, basic line, what we hear on the videos.
 21 Stretch it out, stretch it out, so this was no coincidence.
 22 In fact it's common cause that everything that happened
 23 there happened on command except the shooting.
 24 Miraculously the shooting is the only thing that is denied.
 25 The basic line, the running forward there, stretch it out,

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1 media go away, cease fire, so suddenly jump the shooting
 2 and then cease fire, again we were back to the command mode
 3 as it were. So within the realm of that speculation I'm
 4 saying that instruction must have been given at the latest,
 5 Commissioner Hemraj, at the time – you remember there's a
 6 photo and also on that video there's a time when the TRT is
 7 basically standing where it should have been, about 100
 8 metres away. And they are standing on a line between the
 9 Nyalas and my suspicion is that they were being briefed at
 10 that stage. And it must be soon thereafter because after
 11 Nyala 4 closes then they run towards the gap and that can't
 12 be spontaneous, someone have said run towards the gap. And
 13 within that series of instructions the blocking and Loest –
 14 at least what Loest gives us is that was an instruction
 15 that we must stand firm. Don't retreat and even that, tell
 16 me what is that to say – because once they are there and
 17 you give them the instruction to stand firm then it means
 18 you are blocking that space as opposed to protecting it
 19 which is what they were supposed to do. So the answer is I
 20 don't know, but on the probabilities that instruction would
 21 at the very least have come when the instruction to run
 22 towards – to man the gap so to speak was given.
 23 CHAIRPERSON: Are you suggesting that
 24 what was envisaged on the police side was that there would
 25 be what one can call a human block across the mouth of the

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1 channel? That would prevent them from proceeding to
 2 Nkaneng or towards the police towards the police, whichever
 3 –
 4 MR MPOFU SC: Anywhere, yes.
 5 CHAIRPERSON: Then, of course, we've got
 6 the fact that – well it was too late as far as the front
 7 people were concerned, teargas was fired and I think
 8 teargas was fired and water canon were used and stun
 9 grenades, I think, were fired as well. And the argument is
 10 that the front group then divided into three, the back
 11 turned around and went back eventually I suppose towards to
 12 scene 2. The front section were the ones who were in the
 13 immediate fire and then there were the ones against the
 14 kraal. Now one of the things that's been puzzling me is
 15 why was the water canon used, teargas and stun grenades. I
 16 understand it was done too late and I understand the
 17 consequences of that because it had the effects of driving
 18 the front group forward towards the human block. Now is it
 19 possible, you know you put this as a new point, I'm must
 20 responding, is it the police intention was to have a block,
 21 to drive the people back, but because the actual teargas
 22 was fired and stun grenades and the water canon too late
 23 there was this unfortunate consequence that the front lot
 24 were sent forward, in many cases to their deaths. And the
 25 rear portion went backwards. If that's a possibility, even

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1 a probability, that would indicate that the police didn't
 2 intend to mow them down. And that would, I suppose, be
 3 confirmed by the fact that it was all done before TV
 4 camera, video cameras of the world media. And you know one
 5 does find it rather improbable that the police would have
 6 intended to do, to mow them down in front of the TV camera
 7 as well. Sending a shock of horror which is not entirely
 8 anticipated.
 9 [12:40] So is it possible that what I'd put to you – I
 10 know I put a long question, I apologise, but it's difficult
 11 to put it more briefly – that what they intended was a
 12 human block, drive them back, but unfortunately the act of
 13 dispersal which was done by the water and the stun grenade
 14 and teargas, that took place too late, with this
 15 unfortunate splitting with the consequences. How do you
 16 respond to that?
 17 MR MPOFU SC: Chairperson, I think you've
 18 hit the nail on the block. The issue here is this; you
 19 see, the good thing about this falsification of evidence is
 20 that it gives us a very good counterfactual, so to speak.
 21 The mere fact that the police pretend that those measures
 22 were taken earlier shows, agrees exactly with what you are
 23 saying, Chairperson, namely that they know that properly
 24 those measures, the teargas, the water and so on, should
 25 have been done at the stage when they were going towards

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1 the first gap. Mr –

2 CHAIRPERSON: [Microphone off, inaudible]

3 MR MPOFU SC: Yes, the western gap, ja.

4 The lie that it was done there vindicates exactly what the

5 Chairperson is saying because what seems to have happened

6 is very clear; it's almost like reacting after the fact,

7 you think oh well, before we shoot we must have teargas and

8 water, so boom, boom, boom, quickly, you know, eight

9 seconds before the shooting. But the effect of that is

10 discussed very in detail in the families' heads, which come

11 to the conclusion that the teargas and the stun grenade and

12 so on happened behind this group and that explains what the

13 Chairperson has actually said correctly. For those people

14 to whom it happened in front of them, they turn back. For

15 those to whom it happened behind them, they moved forward,

16 simple, because the – remember, it was not just the effect

17 of the teargas and the stun grenade, there were also those

18 POP people who were shooting between the gaps of those two

19 Nyalas.

20 CHAIRPERSON: The rubber balls.

21 MR MPOFU SC: The rubber balls, yes, and

22 Magidiwana, answering to a question from the Chair, said

23 exactly that, that after the – you can see Magidiwana in

24 exhibit L206 looking at the POP members and according to

25 his evidence he was screaming. Obviously that didn't come

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1 out in exhibit L. He's screaming, being shot at by those

2 people and I think the Chair then asked him after that,

3 both to escape what was happening and the gap, as it were,

4 you accelerated forward, and he said yes, accelerated

5 forward, and he says as you turned then we were shot at.

6 So, and again I measured that distance in Mpofo paces – I

7 forgot when we went for the in loco inspection. No, 23 was

8 the gap, the actual gap. I'm talking about the line which

9 would be perpendicular to the gap between where Magidiwana

10 was when, in L206, which is measured by that tree. You

11 remember when we were at the inspection I pointed to this

12 tree and said this is the tree against which Magidiwana was

13 in L206. The distance between that and where they were

14 ultimately killed is in Mpofo paces about 10, 10 paces or

15 so, give or take, and that is the crucial distance because

16 if they were being propelled, because these defensive

17 measures were being applied from behind, as well as being

18 shot at by the POP, which had the effect of turning the one

19 group back and propelling the others forward, then what the

20 Chairperson is saying is correct.

21 CHAIRPERSON: If that is so then that

22 means that the intention of the people who were using these

23 defensive measures, as you call them, was presumably not to

24 drive them forward but to drive them back, but because it

25 was done too late it had the effect which you described.

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1 MR MPOFU SC: Effect, it –

2 CHAIRPERSON: So that –

3 MR MPOFU SC: Yes, that might be so –

4 CHAIRPERSON: - to the intend of the

5 people.

6 MR MPOFU SC: That might be so,

7 Chairperson, but remember they were not killed by those

8 people. They were killed by the TRT line. If the TRT line

9 was, as I've tried to postulate, had the instruction that

10 whatever the cause is, these people must not – these

11 particular people, because remember Magidiwana also said

12 they were targeted – these particular people must not move

13 through. Block that road, hou vas, whatever was said,

14 don't move, don't retreat, remember section 49, and all

15 those things, then there was no other result which could

16 eventuate apart from intentionally, but thinking you're

17 acting under section 49(2), killing them to, at the best

18 for the police to effect their arrest.

19 CHAIRPERSON: It looks though as if they

20 – again one will have to look at the videos again very

21 carefully. It looks as if initially there were warning

22 shots fired, sand, dust going up and so forth. Of course

23 we know that thereafter – or let me say, I think I'm

24 correct in saying thereafter the shooting continued, they

25 were no longer warning shots.

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1 MR MPOFU SC: Ja. No, Chairperson, I'm

2 afraid the warning shots really we must just discount.

3 CHAIRPERSON: No, but if there were

4 warning shots the – I'm trying to get into the minds of –

5 MR MPOFU SC: Yes, the sequence.

6 CHAIRPERSON: - of the TRT people, fire

7 warning shots and they see the people still coming on.

8 They then think they've got to fire, the consequences

9 follow from that. Of course the reason why – I'm just

10 putting it to you to see how you react - the reason why the

11 people don't respond to the warning shots of course is

12 they're being attacked from behind because of the teargas

13 and so forth. This is part of their being driven – the

14 front lot being driven forward instead of back –

15 MR MPOFU SC: Yes.

16 CHAIRPERSON: - by the defensive

17 measures. Is it –

18 MR MPOFU SC: Yes, Chairperson –

19 CHAIRPERSON: Is it possible – I ask the

20 question no more accurately than that – is it possible that

21 that's what happened?

22 MR MPOFU SC: It's possible, Chairperson,

23 but what I'm saying is this - look at it again now from the

24 minds of the strikers, of a reasonable citizen; if all

25 those forces are propelling you in that way, how on earth

<p style="text-align: right;">Page 39347</p> <p>1 are you going to think that in a democratic South Africa</p> <p>2 these people standing in front of you with R5s are going to</p> <p>3 mow you down? You –</p> <p>4 CHAIRPERSON: I understand that. The</p> <p>5 question I'm putting to you doesn't relate to that at all.</p> <p>6 MR MPOFU SC: Yes.</p> <p>7 CHAIRPERSON: No, I understand the point.</p> <p>8 I understand the strikers are moving forward.</p> <p>9 MR MPOFU SC: Yes.</p> <p>10 CHAIRPERSON: They can't move back</p> <p>11 because of what's happening behind.</p> <p>12 MR MPOFU SC: Yes, but what is –</p> <p>13 CHAIRPERSON: So there's the front group</p> <p>14 that, most of whom are killed.</p> <p>15 MR MPOFU SC: Advances, yes.</p> <p>16 CHAIRPERSON: There's the kraal edge</p> <p>17 group, a number of whom are killed as well.</p> <p>18 MR MPOFU SC: Yes.</p> <p>19 CHAIRPERSON: And then there are the –</p> <p>20 MR MPOFU SC: Yes.</p> <p>21 CHAIRPERSON: But one has got to put</p> <p>22 oneself into the, try to put oneself into the shoes of the</p> <p>23 advancing strikers and why they continued to advance.</p> <p>24 MR MPOFU SC: Sure.</p> <p>25 CHAIRPERSON: You've also got to put</p>	<p style="text-align: right;">Page 39349</p> <p>1 an actual attack by the advancing strikers.</p> <p>2 MR MPOFU SC: That's correct.</p> <p>3 CHAIRPERSON: If we can't be satisfied</p> <p>4 that's so, alternatively if we can be satisfied it's not</p> <p>5 so –</p> <p>6 MR MPOFU SC: Yes.</p> <p>7 CHAIRPERSON: - based on the video</p> <p>8 material and –</p> <p>9 MR MPOFU SC: Yes.</p> <p>10 CHAIRPERSON: - then self-defence goes</p> <p>11 out of the window.</p> <p>12 MR MPOFU SC: Yes.</p> <p>13 CHAIRPERSON: But, of course self-defence</p> <p>14 is a matter of legality.</p> <p>15 MR MPOFU SC: Yes.</p> <p>16 CHAIRPERSON: We then move on to putative</p> <p>17 defence –</p> <p>18 MR MPOFU SC: Correct.</p> <p>19 CHAIRPERSON: - which is a culpability –</p> <p>20 MR MPOFU SC: Which is, yes.</p> <p>21 CHAIRPERSON: And there, there are rules</p> <p>22 and cases –</p> <p>23 MR MPOFU SC: Yes.</p> <p>24 CHAIRPERSON: - which have been analysed.</p> <p>25 I haven't had a chance to read them, but I assume regard</p>
<p style="text-align: right;">Page 39348</p> <p>1 yourself in the mind of the TRT people and what they, if</p> <p>2 they were forming a human block, why they didn't say right,</p> <p>3 we're the human block, they can't come through us, why they</p> <p>4 fired.</p> <p>5 MR MPOFU SC: Yes.</p> <p>6 CHAIRPERSON: If you find that they fired</p> <p>7 warning shots first but they appeared to have no effect,</p> <p>8 then of course some of them did things that are singularly</p> <p>9 inappropriate, they put their rifles on automatic –</p> <p>10 MR MPOFU SC: Yes.</p> <p>11 CHAIRPERSON: - they fire into the dust</p> <p>12 cloud, all those facts which have been covered in the</p> <p>13 evidence, but if that's the basic explanation of what I</p> <p>14 stated –</p> <p>15 MR MPOFU SC: Yes.</p> <p>16 CHAIRPERSON: - or reasonably possible</p> <p>17 explanation, then I take it that fits what we see on the</p> <p>18 videos. Is that right?</p> <p>19 MR MPOFU SC: Yes, it does, Chairperson.</p> <p>20 Let me deal with that because that brings us closer to this</p> <p>21 question of putative self-defence. I'm assuming at my own</p> <p>22 risk that nobody can sustain - the case for self-defence</p> <p>23 proper is really, there's no way that the –</p> <p>24 CHAIRPERSON: [Microphone off, inaudible]</p> <p>25 clarity. Self-defence proper, as you call it, depends upon</p>	<p style="text-align: right;">Page 39350</p> <p>1 being had to my knowledge of the people who I think were</p> <p>2 involved in it, I'm sure it's a very conscientious and</p> <p>3 thorough job.</p> <p>4 MR MPOFU SC: It is, Chairperson, and</p> <p>5 I'll try to summarise it because the heads are there. But</p> <p>6 let me start by saying this –</p> <p>7 CHAIRPERSON: May I ask you an awkward</p> <p>8 question? We only got this, this morning.</p> <p>9 MR MPOFU SC: Yes.</p> <p>10 CHAIRPERSON: These heads. Have your</p> <p>11 learned friends for the SAPS had them earlier or will they</p> <p>12 – of course they're only arguing tomorrow anyway.</p> <p>13 MR MPOFU SC: Yes.</p> <p>14 CHAIRPERSON: So they'll gave an</p> <p>15 opportunity to look at them overnight, but have they</p> <p>16 actually had longer than that?</p> <p>17 MR MPOFU SC: No, they haven't,</p> <p>18 Chairperson, and I must confess, they've had them later</p> <p>19 than I promised them because I had, as I indicated on the</p> <p>20 record, I had a discussion with Mr Semenya and I think I'd</p> <p>21 promised that they would get them on Monday. They only got</p> <p>22 them with everybody else.</p> <p>23 CHAIRPERSON: Well, may I say this; that</p> <p>24 we – I hesitate to say this, but it's true, we've only got</p> <p>25 to give the President the report by the 31st of March. I</p>

<p style="text-align: right;">Page 39351</p> <p>1 hope we will have it drafted by sometime towards the end of 2 February because there will be a big process of checking 3 and proofreading and all that kind of thing. But if the 4 police find they can't respond in the time they have by say 5 tomorrow, then obviously they will have the right to file 6 the written answer sometime next week or shortly 7 thereafter – 8 MR MPOFU SC: Yes, Chairperson, we would 9 agree with that. 10 CHAIRPERSON: - because this isn't a case 11 for strict timelines. 12 MR MPOFU SC: Yes. 13 CHAIRPERSON: Time limits – 14 MR MPOFU SC: And this is an important 15 point – 16 CHAIRPERSON: - which you forfeit if you 17 can't comply. We've been perhaps a bit too relaxed about 18 that up to now, but anyway, our purpose is to get the 19 truth. 20 MR MPOFU SC: Yes, thank you, 21 Chairperson. 22 CHAIRPERSON: And if we've got to wait a 23 week for extra heads from the police to get the truth, 24 we'll do it. 25 MR MPOFU SC: That's it –</p>	<p style="text-align: right;">Page 39353</p> <p>1 shooter. I explored that with him. He agreed that, you 2 know, and surely it must be so even if one looks at the 3 objective evidence that firstly that striker at that stage 4 was obscured from the TRT, and secondly unless if there was 5 nothing else happening, no stun grenades, no fire balls and 6 so on, then one would have said well, even if they were 7 obscured they would have heard, just heard the shot. But 8 that shot was happening in the middle of all sorts of – 9 this is the highest point of the pandemonium of, it's 10 exactly in that zone of the water and the teargas and the 11 stun grenades and the shotguns, so if they didn't see that, 12 put aside the fact that that striker clearly is 13 retaliating, rightly or wrongly, to being shot on the foot 14 by one of those POP people – 15 CHAIRPERSON: POP. 16 MR MPOFU SC: Yes, put that aside. But 17 that shot certainly did not play any role in the minds at 18 least, which is what we are exploring now, of the TRT line 19 for the reasons that I've – 20 CHAIRPERSON: I'm sorry, Mr Mpofu, would 21 it be fair to put the proposition this way, that if – 22 remember we're now trying to get into the heads of the TRT 23 people, assessing their culpability. If they had seen him 24 fire or alternatively heard him fire, then that would have 25 been a factor which would have influenced them and what</p>
<p style="text-align: right;">Page 39352</p> <p>1 CHAIRPERSON: But anyway, the point is 2 you say the legal principles in relation to putative 3 defence have been distilled – 4 MR MPOFU SC: Yes. 5 CHAIRPERSON: - by you and your learned 6 friends in this note? 7 MR MPOFU SC: Yes, that's correct, 8 Chairperson, and this is a crucial point of the Commission, 9 so clearly we agree that SAPS, if they're inclined to have 10 answering heads, must be given that opportunity. 11 COMMISSIONER HEMRAJ: Mr Mpofu, before 12 you get to the issue of self-defence can you help me with 13 an issue? The one striker that fires live ammunition is 14 part of the group that's being propelled forward. He does 15 that and the exchange with the POPS personnel on the side – 16 MR MPOFU SC: Correct, yes. 17 COMMISSIONER HEMRAJ: Do you say that 18 presents no threat whatsoever to the TRT? 19 MR MPOFU SC: Yes, and I'll explain why. 20 The, I made a point of asking this question to Captain 21 Loest. Remember Captain Loest is the only shooter who 22 didn't shoot – 23 CHAIRPERSON: He was the only shooter who 24 was a non-shooter. 25 MR MPOFU SC: Yes, the only non-shooting</p>	<p style="text-align: right;">Page 39354</p> <p>1 they were doing because there were people approaching, one 2 shot being fired and who knows how many other shots. 3 MR MPOFU SC: Ja. 4 CHAIRPERSON: Your answer to that is I 5 take it yes, that would be so, but they couldn't have seen 6 it – 7 MR MPOFU SC: On the evidence. 8 CHAIRPERSON: - because of the 9 pandemonium point. 10 MR MPOFU SC: Yes. 11 CHAIRPERSON: And therefore it's 12 irrelevant. 13 MR MPOFU SC: Yes. 14 CHAIRPERSON: That's your – 15 MR MPOFU SC: That's what I'm saying, 16 yes, Chairperson, and Loest confirmed that much, because I 17 was worried about that point. And in any event, again 18 without being facetious, that point, the relevance of that 19 point would be related to the fact that they themselves had 20 closed that gap to, on the basis that whatever attack might 21 come would be from these handheld instruments, let's 22 assume, up to that stage. But the most important thing is 23 that even Magidiwana's evidence, which was unchallenged, 24 was that he didn't even see, he himself who was part of the 25 group, simply because he was in the front group, as the</p>

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1 Chairperson has explained, you see, because this happened
 2 behind him. So he himself could not see it. He says he
 3 saw it on television, meaning on the monitors here when we
 4 were in Rustenburg, or when we were consulting with him.
 5 So if Magidiwana couldn't see it that presents two things;
 6 firstly that the TRT could not have seen it, or the
 7 Magidiwana group would have blocked the, whatever was
 8 happening at the back anyway. So that has to be factored
 9 out. It's all very well for all of us to have slow motion
 10 and look at the thing on monitors now, but at that point
 11 the evidence would be slanted to the idea that this didn't
 12 play any role with the TRT.

13 But let's go to the putative self-defence issue –

14 CHAIRPERSON: Mr Mpofo, it's now 4
 15 minutes to 1. I don't think you'll be able to do the
 16 putative defence in four minutes. If there's a discrete
 17 little portion you can deal with in four minutes, fine,
 18 otherwise if you prefer to deal with it after lunch we'll
 19 take the adjournment. I'm not quite sure how you're doing
 20 in relation to time.

21 MR MPOFU SC: That's my concern.

22 CHAIRPERSON: If I have to start again at
 23 half past 1, will that – because we've got to allow for Mr
 24 Tip who's going to follow you.

25 MR MPOFU SC: Yes. Yes, Chairperson, no,

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1 I'd rather if the Chairperson allows me, I'll do my best to
 2 do the putative self-defence in the 15 minutes that remains
 3 because I want to deal with something else after lunch. I
 4 want to deal with the Ramaphosa, the criminal –

5 CHAIRPERSON: Where do you get 15
 6 minutes? Four minutes, or three minutes really.

7 MR MPOFU SC: Four? Oh well, the other
 8 thing is I had made a deal with Mr Tip about the time, but
 9 after what I said this morning about NUM I'm not sure if
 10 the deal –

11 MR TIP SC: No, I'm a man of honour,
 12 Chair, and nothing that my learned friend says disturbs our
 13 arrangements –

14 MR MPOFU SC: Thank you, Chairperson -

15 MR TIP SC: [Inaudible] detail.

16 MR MPOFU SC: Thank you, Chairperson.

17 Well then, Chairperson, I'll take your offer, but can I
 18 just put the principle and then I'll discuss it when we get
 19 there. Firstly, Chairperson, the approach taken by the
 20 evidence leaders on putative self-defence is just wrong in
 21 law and in the approach that they take. They say that they
 22 base their claim for putative self-defence on what they say
 23 was a reasonable reaction of the TRT basic line, now let's
 24 call it that. Putative self-defence, and the mistake that
 25 they make is that putative self-defence has nothing to do

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1 with unlawfulness, despite the name "putative self-
 2 defence" –

3 CHAIRPERSON: [Microphone off, inaudible]

4 MR MPOFU SC: It's about intention, yes,
 5 culpability, in that sense, and therefore if you're going
 6 to meet a charge of murder with putative self-defence then
 7 the question is dolus because there must be the congruency
 8 of the principle. Now once you have dolus it means you are
 9 dealing with the subjective intention of those people, and
 10 all the formulation say if they genuinely or honestly
 11 believe and so on, and so on, and you can't, with the
 12 greatest respect, infer the intention of the shooters when
 13 the shooters are not here. That's the first point.

14 Put aside the fact that you can't draw an adverse
 15 inference because there was an arrangement and so on, that
 16 I'll accept, but the truth of the matter is that they're
 17 not here, and there is a case which I had, I was going to
 18 use for another – it's S versus Kola, 1966 (4) –

19 CHAIRPERSON: Kola?

20 MR MPOFU SC: Kola's case, yes. S versus
 21 Kola, 1966 (4) SA 322.

22 CHAIRPERSON: What court?

23 MR MPOFU SC: AD, and one of those of
 24 quoting what is in the case, but at 327 of that case the
 25 following is said –

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1 CHAIRPERSON: Did you say 332?

2 MR MPOFU SC: I said 322, three double
 3 two, sorry, Chairperson. At 327 against the letter H the
 4 following extract from another case, R versus Deetlefs, is
 5 endorsed, "Intention is an operation of the will directing
 6 an overt act. Motive is the feeling which prompts the
 7 operation of the will, the ulterior object of the person
 8 willing. A person kills another," or rather, "If a person
 9 kills another intention directs the act which causes death
 10 and motive is the object which the person had in view, the
 11 satisfaction of some desire or revenge.

12 [13:00] The important issue, Chairperson, here is that
 13 what is said is that the intention of a person can only be
 14 measured by what that person – it is self evident by what
 15 that person says. You can't just take it from the air. So
 16 as far as dolus is contained, neither the evidence leaders
 17 nor yourselves, Chairperson, nor SAPS can say what the
 18 subjective intention of the –

19 CHAIRPERSON: But of course you can in
 20 the absence of direct evidence, there's a reason why
 21 there's direct evidence isn't forthcoming and there's no
 22 adverse inference to be drawn from the lack of direct
 23 evidence, you can on a circumstantial evidence basis in
 24 some cases, not in all, but in some cases get the answer.

25 MR MPOFU: Probably, generally, okay, let

<p style="text-align: right;">Page 39359</p> <p>1 me then preface what I've said with generally speaking but 2 remember that's not what the evidence leaders are doing. 3 What they are saying, they are saying those people 4 reasonably thought that they were being attacked. In other 5 words, once you bring the element of reasonableness then 6 you are in another terrain of culpa. So, and that is not 7 wrong in principle because the leading case in S v 8 D'Oliviera makes it very clear, S v D'Oliviera it's 1993 9 (2) SACR 59A, another AD, at page 63 and 64, and I just 10 read out the extract, and I will analyse it when we get 11 back. It says, "A person who acts in private defence acts 12 lawfully provided his conduct satisfies the requirements 13 laid down for such a defence and does not exceed its 14 limits," we've dealt with that. "The test for private 15 defence is objective. Would a reasonable man in the 16 position of the accused have acted in the same way?" It 17 refers to S v Ntuli. "In putative private defence, it is 18 not lawfulness that is in issue but culpability. If an 19 accused honestly believes his life or property to be in 20 danger but objectively viewed they are not, the defensive 21 steps he takes cannot constitute private defence. If in 22 those circumstances he kills someone his conduct is 23 unlawful. His erroneous belief that his life or property 24 was in danger may well, depending on the precise 25 circumstances," which must underline, "exclude dolus in</p>	<p style="text-align: right;">Page 39361</p> <p>1 alternative defence of self defence, so the court enquires 2 on self defence and says, no, it's not there, but in any 3 event let's now look at culpa, or rather dolus, and after 4 dolus it looks at intent. 5 CHAIRPERSON: We will adjourn now, we 6 will resume at quarter to, I think. The point simply is if 7 he gets through on self defence basis, then his conduct was 8 not unlawful, and that's the total answer to the charge. 9 MR MPOFU: That's correct. 10 CHAIRPERSON: If he doesn't succeed on 11 excluding unlawfulness, then you look at his culpability. 12 If there was dolus you find him guilty of – 13 MR MPOFU: Murder. 14 CHAIRPERSON: If however you feel there's 15 only culpa, culpable homicide, and if you find no 16 culpability at all then he is still acquitted. 17 MR MPOFU: That's correct. 18 CHAIRPERSON: Alright, thank you for 19 explaining the law as clearly as you have. We will 20 continue with the expedition, but I take it some of your 21 learned friends who are smiling broadly helped the 22 expedition at quarter to two. 23 MR MPOFU: Thank you Chairperson. 24 [COMMISSION ADJOURNS COMMISSION RESUMES] 25 [13:54] CHAIRPERSON: The Commission resumes.</p>
<p style="text-align: right;">Page 39360</p> <p>1 which case liability of the person's death will also be 2 excluded." I am sorry, it goes further, which is 3 important, but – 4 CHAIRPERSON: Even if you exclude dolus, 5 that's not the end of it. 6 MR MPOFU: Absolutely, it's not quoted 7 here but what – 8 COMMISSIONER HEMRAJ: The accused did not 9 testify in that matter. 10 MR MPOFU: Correct in D'Oliviera, 11 correct. The accused did not testify which was making the 12 point that I am making. 13 CHAIRPERSON: But it was a case where 14 there was no basis for excusing his failure to testify. 15 MR MPOFU: Yes that's correct, 16 Chairperson. But the full quote goes further, it says, 17 what the Chairperson has just said "that however the 18 inquiry does not stop there." You then have to enquire 19 into culpable homicide which is where the issue of 20 reasonableness comes. Yes, it says, after the word 21 "excluded. At worse for him he can then be convicted of 22 culpable homicide for the. So it's a three stage thing. 23 Firstly, and that ties up with another point that putative 24 self defence again generally speaking is not a primary 25 defence so to speak. It's a fall back. It's an</p>	<p style="text-align: right;">Page 39362</p> <p>1 Thank you very much. I have been handed the judgment in 2 Koller. 3 MR MPOFU: Yes, Chairperson – 4 CHAIRPERSON: Hang on, is this the right 5 case? 6 MR MPOFU: Yes. Oh, for the proposition 7 that I was making. No, Chairperson, if I may explain two 8 things. One is that, it looks like I needed the lunch more 9 than everyone else. The extracts that I read it's just 10 above, rather below the one. I've highlighted on your 11 copies the extracts that I should have read, which I will 12 read out just for the record. 13 CHAIRPERSON: You have quoted us the 14 passage 327. 15 MR MPOFU: Against H. Yes, I wanted to 16 quote against F which is the one I've highlighted on your 17 copy. And it says – 18 CHAIRPERSON: Yes. 19 MR MPOFU: It says, "Where a question of 20 the state of mind of an accused person is in issue it is 21 not easy for a court to come to a conclusion favourable to 22 the accused as to his state of mind unless he has himself 23 given evidence on that subject." 24 CHAIRPERSON: Yes, so that's – 25 MR MPOFU: That's more like –</p>

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1 CHAIRPERSON: Or self-evident -

2 MR MPOFU: Correct.

3 CHAIRPERSON: Yes, thank you. Thank you

4 for the copy.

5 MR MPOFU: Thank your Chairperson. And

6 Chairperson, because of exigencies of time, what I am going

7 to do is I am just going to round off five propositions

8 very quickly around this issue of putative self defence and

9 for the rest I will rely on the heads. Well, four, the

10 first one was just to clarify this, the quotation. The

11 second one, Chairperson, very briefly deals with the

12 question that you raised about warning shots and all I want

13 to say about that is that from the – my cross-examination

14 of Captain Loest, it became clear 1) that although he

15 called it warning shots, it's not warning shots as we all

16 know the term, because I put it to him that when you do a

17 warning shot properly defined, you obviously must create an

18 opportunity to see what happens and he considered that that

19 opportunity was never created. So it can't be a warning

20 shot as we know the term to suggest because on his evidence

21 there was no break, and I think the Chairperson put the

22 question to him more clearer, much clearer by saying would,

23 if someone wanted to drop the arm, the weapons or run away

24 or whatever, or say, look I give up, would they have had

25 that option, and it was clear from the cross-examination

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1 that that would not have happened. So you know, just to

2 use the words "warning shots" doesn't make it a warning

3 shot. A warning shot must be accompanied with an

4 opportunity to do something.

5 CHAIRPERSON: To heed the warning.

6 MR MPOFU: Absolutely yes, otherwise it's

7 not a warning, it is just a shot or it's what Minister

8 Shabangu would call a kill shot. The second, the third

9 point Chairperson, is – and that point by the way is

10 aggravated by something else which the Chairperson

11 discussed with one of my colleagues about I think it was Ms

12 Le Roux but in any event after the first four seconds any

13 shots that were fired thereafter could not have been –

14 could not even fall remotely under putative.

15 CHAIRPERSON: The order to cease fire was

16 given, perhaps you have got to allow for a bit of reaction

17 time to that.

18 MR MPOFU: Yes.

19 CHAIRPERSON: Certainly for significant

20 time in our context shots to be fired after cease fire had

21 been given right down the line.

22 MR MPOFU: Yes. And remember,

23 Chairperson, that the captain said, I put this proposition

24 to him, you yourself never felt, you yourself subjectively

25 now never felt that your life was threatened? And he said,

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1 no. And then I coupled that question with the - saying to

2 him, in terms of the basic line would it be fair to say, I

3 am paraphrasing, to say that you were standing at the most

4 vulnerable point? In other words, closest to the strikers

5 than the other people down the line. And he made that

6 concession which would mean that if he never felt

7 subjectively that his life was under threat, and he was at

8 the closest point than as you go further down the line, so

9 to speak, then you can't say those people would have – but

10 it goes back to the answer obviously would be that you know

11 subjectivity is subjectivity, and it might differ but I am

12 just saying on the face of it, if he was at the most

13 vulnerable point and he never felt that his life was

14 threatened then the Commission is entitled to assume that

15 none of the other people could have had even putatively

16 thought that.

17 CHAIRPERSON: I've got a little bit of

18 difficulty with that because he was one of those who

19 shouted "cease fire" after four seconds.

20 MR MPOFU: Sure.

21 CHAIRPERSON: Which implies that he

22 thought before four seconds expired that there was a need.

23 So I am not quite sure –

24 MR MPOFU: No.

25 CHAIRPERSON: - what the value for that

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1 answer is but clearly it's an answer that assists you some

2 –

3 MR MPOFU: Yes, thank you very much

4 Chairperson. And again, I won't put my head on the block

5 but my memory is that when I put that question to him, it

6 was on the basis that at any stage you never felt that your

7 - but the record will speak for itself. The third point,

8 Chairperson, is the order to engage, engage, engage. That

9 again, fortunately it's not your job, Chairperson, to

10 resolve that with certainty in relation to what we are

11 discussing but I will only go as far as to say that there

12 is sufficient clarity or lack thereof around that issue

13 that it cannot be said that that command to engage was not

14 given, 1). 2) It cannot be said that it was not given as a

15 trigger to the TRT shooting because remember we have two

16 independent sources of this. Vermaak says, and the Chair

17 and I had a debate about this, Vermaak says I heard Calitz

18 saying "engage," I thought he was talking – I thought those

19 people were POP because I was in the air, I couldn't see

20 properly. It turned out that they were TRT, so when I

21 repeated the engage sign, maybe either in response to

22 Calitz or myself they shot. But that's a bit of a long

23 shot. The second one is Botes. Botes was very clear that

24 when he heard the "engage, engage, engage" and again in

25 response to a question that I put which was clarified by

<p style="text-align: right;">Page 39367</p> <p>1 the Chairperson, it was a matter of seconds before he heard 2 the volley. So again, just on those bases alone there is 3 sufficient evidence to suggest that far from putative self 4 defence or any defence, putative or otherwise that the 5 shooters were shooting in response to the engage command. 6 And I am say a conspectus of all these factors crowned by 7 the fact that the people whose subjective minds were busy 8 inspecting now did not come and say anything in relation to 9 what was said in Koller's case, must do away with any 10 notion of putative self defence. But before I do the next 11 two factors, let me quickly say this. The analysis of the 12 evidence leaders is wrong for another reason, and that 13 reason is simply this, it is not for the Commission to find 14 out whether or not there is a valid defence that might have 15 operated in the minds of the shooters, I mean that, we 16 can't expect the Commission to do that. The point here is 17 that in relation the self-defence of any description the 18 onus as we defined it in relation to the Commission is on 19 SAPS, because prima facie people were killed. They died, 20 they were shot everyone saw it on television. Prima facie 21 it's murder, it's an unlawful killing an intentional 22 killing and so on. And so I think the Chairperson called 23 it the duty of non-persuasion. Yes, the risk of non- 24 persuasion. 25 CHAIRPERSON: Remember this inquiry</p>	<p style="text-align: right;">Page 39369</p> <p>1 MR MPOFU: Thank you, Chairperson. Yes, 2 so I just wanted to get that out of the way. The next of 3 the points is Ntamo's case. It's quite I think in our – in 4 one of our heads, it does apply or the – but the citation 5 just in case is 2001 (1) SA 830 TKH Transkei High Court. 6 And that was the case that was referred to by my learned 7 friend, Mr Chaskalson, a judgement of Madlanga AJP I think 8 at the time. And that case is authority for the following 9 for the following proposition and I am not going to canvass 10 the facts or what happened there. Simply that when you are 11 looking at the state of mind of police officers, you can't 12 apply the objective standard of the reasonable man so to 13 speak or person but must apply the reasonable police 14 officer and I would go as far to say in this case the 15 reasonable TRT police officer, knowing that you have legal 16 force in your hands must obviously impose certain extra 17 duties. And apropos that, Chairperson, let me say this, if 18 you are a TRT person and you think that the strikers with 19 pangas or whatever, might attack you, you have your side 20 arm with you but in anticipation you bring a machine gun, 21 automatic rifle, and you cock it, before the attack 22 materialises then I am afraid from another point of view of 23 proportionality again whether it's putative or self-defence 24 proper you are out of the – of either those, or either one 25 of those two.</p>
<p style="text-align: right;">Page 39368</p> <p>1 proceeds on two levels, there's the civil level which 2 involves various SAPS as an organisation or the Minister I 3 suppose really technically and a civil claim brought 4 against the Minister for deaths sustained at the hands of 5 members of the police service acting in the course and 6 scope of their duties. There the onus clearly, a civil 7 case, Mabaso versus Felix the onus on the police to 8 justify, if they can't, they fail. The, I think it was Ms 9 Le Roux who pointed it out in her heads, of course it's 10 different where the, you are dealing with criminal 11 liability and there we are dealing with individuals and 12 there of course the onus would be on the State and negative 13 the defence and one the factors one would bear in mind 14 before recommending a prosecution perhaps or – we are not 15 going to recommend prosecution, we recommend that the cases 16 where we do make recommendations in this regard that the 17 matter be investigated and the Provincial DPP – 18 MR MPOFU: I am going to try and persuade 19 you otherwise, Chairperson. 20 CHAIRPERSON: But consider you know, give 21 careful consideration to whether. But as far as the 22 criminal level is concerned, of course there the onus isn't 23 – wouldn't be on the accused, and one has to bear that in 24 mind as well. But certainly on the civil side Mabasa v 25 Phoenix I would imagine occupies all the ground you need.</p>	<p style="text-align: right;">Page 39370</p> <p>1 CHAIRPERSON: Isn't, I haven't studied 2 the cases, it's one of the things I shall do when I go home 3 over the weekend, isn't the proposition essentially upheld 4 by Madlanga AJP as he then was, that in deciding what – 5 whether a defence of self-defence is made out or excluded, 6 you don't just look at the events that happened during the 7 so-called attack. If you did things beforehand which 8 indicated you planned incorrectly for the situation, and 9 it's in line to some extent with the rights here in the 10 McCann case. Now the police seem to contend that McCann is 11 internationally human rights, European human rights - is 12 not part, the ratio is not part of the domestic aw of South 13 Africa. And that's one of the matters we have to grapple 14 with as well, and you remember, I put the example of the 15 homicidal criminal who is loose in the building, say a 16 police headquarters and he's running down the passage and 17 you can get him to go, and there's a T-junction, you can 18 get him to left or right. If he goes right, left, you lock 19 him up in a room, he can't do anything. You then go right, 20 you will be in an office with people who have got guns. 21 It's foreseeable that there will be a shoot out. It's 22 foreseeable that people who will be under attack and will 23 be defending themselves. They will be as the people who 24 were in McCann's case, they will be free of liability but 25 that's not the end of the matter because the person who</p>

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1 decided to allow the person, the homicidal criminal to go
 2 right when he was able to arrange for him to go left would
 3 have liability. That's the example that I invented.
 4 MR MPOFU: Yes.
 5 CHAIRPERSON: Thought of. If that's the
 6 law, there is no clear authority on it, if that's the law
 7 and it seems to be sensible, then the McCann principle
 8 would be part of our domestic law.
 9 MR MPOFU: Absolutely.
 10 CHAIRPERSON: And it would be strange if
 11 it wasn't.
 12 MR MPOFU: Yes.
 13 CHAIRPERSON: So –
 14 MR MPOFU: That's correct, Chairperson.
 15 CHAIRPERSON: I am not surprisingly, you
 16 support that proposition?
 17 MR MPOFU: I do.
 18 CHAIRPERSON: Maybe Mr Semenya will be
 19 able to show the logical fallacy to it.
 20 MR MPOFU: Thank you, Chairperson. And
 21 just for the sake of completion this is what Madlanga said
 22 briefly, having canvassed the facts. "The point of the
 23 matter is that if the police had not acted wrongfully in
 24 the first place for all we know, there might not have been
 25 any life-threatening shooting at all. One cannot simply

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1 ignore this fact and so to speak start on a clean slate.
 2 The preceding unreasonable conduct of the police cannot
 3 provide an acceptable excuse for the subsequent use of
 4 lethal force. I again emphasise that the police bore the
 5 onus to prove" – okay, well, that doesn't apply here.
 6 "That they failed to do. I am well aware of the caution
 7 against adopting the armchair approach," and so on, and
 8 then importantly after that, he says, "If I am wrong on the
 9 proposition put forth above, I must consider the question
 10 of proportionality," which is the point that I've just
 11 made. Thank you.
 12 CHAIRPERSON: The first section would
 13 appear to deal directly with the example I put up.
 14 MR MPOFU: Absolutely.
 15 CHAIRPERSON: Of the man who is running
 16 down a passage to a T junction. He's sent right instead of
 17 left.
 18 MR MPOFU: Yes.
 19 CHAIRPERSON: And people in the room
 20 correctly justifiably defend themselves.
 21 MR MPOFU: Yes.
 22 CHAIRPERSON: But that's not the end of
 23 the inquiry.
 24 MR MPOFU: Yes. That's correct, thank
 25 you Chairperson.

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1 CHAIRPERSON: That's the McCann
 2 principle.
 3 MR MPOFU: That's the McCann principle.
 4 In other words, on the McCann principle my argument now is
 5 that the police will fail on both legs, because McCann says
 6 the mere fact that there might be a defence of private
 7 defence for the individuals does not mean that the state or
 8 the institution of SAPS in this case is –
 9 CHAIRPERSON: To apply that principle to
 10 the facts of this case are possible application of that
 11 principle to the facts if this case, might involve the
 12 following approach. I just point – I am not saying it's
 13 correct, I am just putting it up for people to consider,
 14 that if they, the police had stuck to the first plan, where
 15 Scott had done, had compiled with the benefit of Merafi,
 16 there was a lot of public order policing inputs and carried
 17 it out on the Friday, waited until the Friday morning and
 18 done it, they might have disarmed the people, dispersed
 19 them, arrested the criminals without any bloodshed at all.
 20 Because however it was decided not to adhere to that plan,
 21 for reasons we know and to go into another plan which
 22 arguably was a foolhardy risky plan, which may have been
 23 the only one that Scott could have thought of in the time
 24 available, that's another matter. Even if the people who
 25 were caught up in the situation created by the second plan,

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1 were able to – their shooting could be justified, even that
 2 was so.
 3 MR MPOFU: Fine.
 4 CHAIRPERSON: Then it doesn't get the
 5 police off the hook, on the McCann principle it would
 6 apply?
 7 MR MPOFU: Yes. That's exactly a summary
 8 of the McCann principle, Chairperson. The last point is
 9 maybe a technical point but one that we have raised in the
 10 heads and that is that if you read the terms of reference,
 11 the applicable part says that the Commission must find
 12 whether the conduct of SAPS, I am paraphrasing, was
 13 reasonable and justifiable. In other words, it doesn't say
 14 "and/or." So in theory if that is correct, the – even if
 15 one were to find that it was justifiable under what we've
 16 called self-defence proper, it still has to be reasonable
 17 and vice versa. Even if one were to find that the mens rea
 18 element was missing under putative self-defence it still
 19 has to be justifiable as the terms of reference read now,
 20 we can't have it both ways as it were.
 21 [14:14] So even on the most benevolent approach which can
 22 be taken it would be that SAPS then has not shown that
 23 their conduct was justifiable and reasonable. At best they
 24 could show one of those two. Certainly not justifiable
 25 because self-defence proper is, on our submission at least

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1 is out, but maybe, depending on what the Commission finds
 2 on putative self-defence, maybe reasonable in the sense
 3 postulated by the evidence leaders.
 4 That in a nutshell, Chairperson, is – the big
 5 point really is that all this pales into insignificance if
 6 one looks at the objective evidence. The objective
 7 evidence shows us that any policeman who was there with his
 8 eyes seeing these people avoiding and, you know, running
 9 away and trying to, and coming towards, and with the –
 10 that's what the world saw, Chairperson. The world wants to
 11 know what happened at that crucial point. The world saw
 12 people who were, the world didn't know about these things
 13 about that there's teargas behind them and so on, but what
 14 they did see were people who were huddled up with blankets
 15 and they're covering themselves from the, whatever, the
 16 teargas and the –
 17 CHAIRPERSON: [Microphone off, inaudible]
 18 MR MPOFU SC: Yes, yes, and that is what
 19 a policeman there saw. So there's no ways that
 20 subjectively or reasonably or otherwise, that that
 21 policeman, having seen these people for the past nine
 22 minutes walking about there and being able more than all of
 23 us sitting here to read their demeanour, to see what we now
 24 see on the television screen, how could they ever have
 25 thought that they were under attack? They couldn't under

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1 those circumstances. So just to round off that point.
 2 So the last vestige of any justification, using
 3 that word broadly, of the shooting of the people, which was
 4 the putative self-defence, must fall away and the
 5 consequence that follow is that both SAPS and the shooters
 6 must be found to be criminally liable for their actions.
 7 CHAIRPERSON: SAPS being criminally
 8 liable?
 9 MR MPOFU SC: Well ja –
 10 CHAIRPERSON: Will we prosecute the South
 11 African Police Services?
 12 MR MPOFU SC: No well, section 332
 13 doesn't apply to them, it applies only to Lonmin, yes, but
 14 as Burchell says, that would bring a situation where the
 15 State would be the prosecutor and the accused, so we can't
 16 have that.
 17 CHAIRPERSON: It sounds like a divorce
 18 case, the State versus the State.
 19 MR MPOFU SC: Yes, State versus the
 20 State, ja. Now moving to the question, I'm not going to
 21 deal with scene 2, any of those, Chairperson. That's been
 22 canvassed. Let's now go to the question of criminal
 23 liability, starting broadly but also dealing with the
 24 question of the criminal liability of Mr Ramaphosa. Again
 25 to avoid the State problem we'll just say the People versus

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1 Ramaphosa & Others. The crucial thing why we say Mr
 2 Ramaphosa should be accused number 1 in a murder case is
 3 this, Chairperson – let me put the proposition broadly
 4 first. In fact I'll use the LRC, the LRC has two lists of
 5 accused persons. The one is of the police accused, let's
 6 call it that. It starts with Minister Mthethwa, and the
 7 other one is of the Lonmin accused, it starts with Mr
 8 Mokwena, and my learned colleague Ms Barnes amended the one
 9 list by adding Mr Ramaphosa on the one and my argument is
 10 going to be that he should be added on both lists, that
 11 whichever way you look at it he is the first accused on
 12 both lists, and I'll explain why. If you look at it from
 13 the point of view of the commission of a crime, then he
 14 must certainly be on the SAPS list of accused as the first
 15 accused. If you look at it from an alternative point of
 16 view of the omission to do something and so on, then he
 17 must be accused number 1 on the Lonmin list, and those are
 18 two separate legal bases – obviously you can't charge him
 19 twice for the same thing, so it would be an alternative
 20 charge as it were.
 21 But putting that aside, the very idea,
 22 Chairperson, that you can – and that's why I go as far as
 23 to say in my heads if you're not going to charge Mr
 24 Ramaphosa don't charge anybody, really, because you cannot
 25 have a situation where the source of the political

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1 pressure, the person who ignited the whole, what I've
 2 called the chain of causality which resulted in the
 3 massacre, where the Provincial Commissioner says we must do
 4 this in this way, in this fuddled way, or befuddled way,
 5 because we are responding to the political pressure. And I
 6 don't want to belabour that point because my understanding
 7 of what the evidence leaders are saying is that there's no
 8 quarrel between us, and I am sure not anybody, that Mr
 9 Ramaphosa was the factual cause of the massacre to that
 10 extent.
 11 Where we seem to part ways with the evidence
 12 leaders, because they say, there's a contradictory part of
 13 what they say; at first they say it's inexplicable why the
 14 decision of the NMF was taken, but in another section of
 15 the heads they say it can only be explained through the
 16 political pressure.
 17 CHAIRPERSON: Probably different authors
 18 at work.
 19 MR MPOFU SC: Yes, that's what I
 20 suspected. But be that as it may, and I plead guilty to
 21 that as well because it was the timelines were quite tight,
 22 but the point is this, Chairperson, let's talk about this
 23 legal causation. Firstly, even if they were right on legal
 24 causation, which they are not, it would not resolve the
 25 question of whether or not there's a prima facie case

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1 because let's postulate a case where, Chairperson, given
 2 the test that we've all now agreed on, because yours is not
 3 to find anyone guilty or all those things. If I say to
 4 you, Chairperson, I've presented now a case here which
 5 shows that Mr Chaskalson unlawfully and intentionally did
 6 and caused the death, but for now I can only show you that
 7 he was the factual cause because I saw him there and I saw
 8 the dead body, but I can't tell you whether he was also the
 9 legal cause and so on, surely that alone satisfies the
 10 prima facie case because the legal niceties of legal
 11 causation are not for you to determine, Chairperson. Those
 12 niceties are for the criminal court to determine.

13 But that's just to show that it's inescapable
 14 that these criminal charges have to be recommended, but
 15 let's take them at face value on the legal causation.

16 Legal causation, Chairperson, is one of these refugees of
 17 lawyers. Legal causation, in fact one of the authors,
 18 Bobeck, even goes as far as to say it does not exist. I
 19 don't go that far.

20 CHAIRPERSON: I must say that I've always
 21 been unhappy about the expression. In civil law I prefer
 22 the expression "remoteness of damages."

23 MR MPOFU SC: Absolutely, yes.

24 CHAIRPERSON: But there's high authority,
 25 including the Appellate Division, who uses, in no lesser

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1 person than Chief Justice Corbett who uses the expression,
 2 so I'm happy to defer to a jurist of that eminence.

3 MR MPOFU SC: Me too, Chairperson.

4 CHAIRPERSON: But legal causation is
 5 almost a contradicting term.

6 MR MPOFU SC: It is.

7 CHAIRPERSON: And one of the items I
 8 wrote I quoted a German judge that said as long as one
 9 realises that it's nothing to do with causation at all,
 10 it's remoteness of damage really. It's the, that something
 11 that happened was so remote that the factual causal chain
 12 is cut.

13 MR MPOFU SC: Yes, absolutely.

14 CHAIRPERSON: But let's not get
 15 involved –

16 MR MPOFU SC: Into that, yes.

17 CHAIRPERSON: - in fights about
 18 terminology.

19 MR MPOFU SC: No, we know what they
 20 mean –

21 CHAIRPERSON: It's the concept we have to
 22 apply.

23 MR MPOFU SC: Yes, thank you,
 24 Chairperson, we know what they mean. Actually the way to
 25 put it, Chairperson, is whatever you call it, any lawyer

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1 must accept that there must be limitation of liability.
 2 That's really the topic. That's what it should be called,
 3 limitation of liability. You can't simply say all the
 4 other factual cause, therefore – ja, just from common
 5 sense, because then it would mean any factual causation of
 6 anything is – so the point that the authors make, but the
 7 most important distinction is that is legal causation, as
 8 the Chairperson correctly puts, like Professor Zeffert
 9 says, it's like the holy Roman empire, which is neither
 10 holy nor Roman nor an empire. So it's neither legal nor
 11 causation. It's actually a question of negligence and
 12 limitation of liability. We're using whatever legal
 13 instrument, and that is why its evaluation is based on
 14 policy considerations, which is what I've just described,
 15 that you can't say all factual consequences of something
 16 are either civilly or criminally, or creates a
 17 responsibility.

18 So the real issue is intention, it's
 19 foreseeability because remoteness, the only way you can
 20 test remoteness is about whether something was foreseeable
 21 or not, and remoteness, whether you – I've quoted Snyman
 22 who says that legal causation straddles both intention and
 23 causation, explaining what I've just said. Remoteness must
 24 feature only like this, that the consequences of your
 25 actions were so remote that from a public policy point of

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1 view you should not suffer the obvious consequences of
 2 those consequences, if you know what I mean, and that's all
 3 there is to it.

4 And what does the law then do to look at that?
 5 The basic statement is that foreseeable consequences cannot
 6 be remote. It's just, it's another contradiction. So in
 7 the eyes of the law what you can foresee is, must be in the
 8 mix, and that's why we come with notions such as dolus
 9 eventualis and so on, because dolus eventualis for all its
 10 justifications creates a situation where it's 50/50 as to
 11 whether the intention was there, but from the eyes of the
 12 law it's a fiction, so to speak, that is created so that in
 13 the eyes of the law, whether I am the man or the woman who
 14 sets alight my shop because I want insurance money, if I
 15 can foresee that there's somebody there then I'm as much of
 16 a murderer as the other person who, a serial killer who
 17 goes out with full intention to go and kill, and all the
 18 other questions will be questions of sentence and so on and
 19 so on.

20 But the foreseeability – another serious mistake
 21 that is made by the evidence leaders in their effort to
 22 exculpate Mr Ramaphosa is mixing up again mens rea with
 23 motive. The law is very clear on this, I've quoted it in
 24 my heads; the motives of a person have absolutely nothing
 25 to do from a legal point of view with the consequences. I

<p style="text-align: right;">Page 39383</p> <p>1 again give this example; if I set my house alight because I 2 want to claim for insurance, that's my motive, but if I 3 foresee that there's a human being, some hobo who happened 4 to be there and I don't check whether he's there today or 5 not, then the intention – you see, in normal English when 6 we talk in the street that statement would be like 7 ridiculous, what do you mean intention has nothing to do 8 with motive. But the law separates those two very clearly 9 and that is also dealt with in the case of Kola and 10 whatever other case I've quoted in my heads. So even 11 accepting, which I don't at all, even accepting that Mr 12 Ramaphosa was motivated by this civic duty because he was 13 worried about Mr Fundi and all the others, even accepting 14 that, that may well have been his motive but his intention 15 legally speaking is only tested according to the following 16 principle; was it foreseeable that deaths would occur? Was 17 it foreseeable that deaths would occur and did he, was he 18 reckless as to whether that occurs and did he not do 19 whatever needs to be done, the whole dolus eventualis 20 formulation, if you take it at its minimum. So there's 21 only one question, foreseeability, whether you approach it 22 from dolus eventualis point, whether you approach it as so- 23 called legal causation, it doesn't matter; the issue is was 24 it, were the consequences foreseeable. 25 Now, Chairperson, with the greatest respect, here</p>	<p style="text-align: right;">Page 39385</p> <p>1 President at the time anyway, so – 2 MR MPOFU SC: Well, he is now. 3 CHAIRPERSON: I know, but that's 4 irrelevant. 5 MR MPOFU SC: No, he was – exactly. No, 6 no, I'm saying we must forget now because in, so that he 7 can face the – 8 CHAIRPERSON: I mean our officials can be 9 charged with offences while they're in office – 10 MR MPOFU SC: Thank you. 11 CHAIRPERSON: There's a judge president 12 somewhere in the country whose been charged with some – 13 MR MPOFU SC: I know, in the Eastern 14 Cape. That's correct, Chairperson. No, no, all I'm 15 saying - 16 CHAIRPERSON: The law has no respect to a 17 person. 18 MR MPOFU SC: Thank you, Chairperson. 19 Yes, with all due respect, but again here, here's the 20 person, this is not just any person, Chairperson. This is 21 somebody – Mr Ntsebeza yesterday spoke about all the 22 massacres that have happened before. Well, let me tell you 23 this, speaking for myself, this is my second massacre. I 24 was in the Bisho massacre as one of the marchers there and 25 the soldiers shot people and killed them and who was</p>
<p style="text-align: right;">Page 39384</p> <p>1 is a man who I say to him under cross-examination – and as 2 I've said earlier in the morning, you were aware that there 3 was this volatile situation, yes; you were aware that 4 people had been killed, yes; you were aware that they 5 included police officers; you were aware of, let's call it 6 the standoff, yes. Now if there's a standoff, Chairperson, 7 with a group of 3000 miners who to your knowledge at least, 8 mistaken or otherwise, have killed 10 people, as what was 9 being bandied about, and are refusing to leave a koppie and 10 your solution to that is that they must bring another 11 thousand policemen and the army and all that, how on earth 12 can it be said that you do not foresee if you are a South 13 African – well, whatever, even if you are not a South 14 African – that there's a possibility of people dying there? 15 Surely, let alone if you are a person who knows the mining 16 industry more than all of us, who knows the temperament of 17 miners, of what once they've decided on something and all 18 those things, and you know what happened at Impala, you 19 know all these things, how – I don't understand how it can 20 ever be argued that you do not foresee the eventuation of 21 death. You cannot. Here's a man, Chairperson, and here we 22 must not forget about the fact that this is a Deputy 23 President and so on, in the eyes of the law he must be 24 treated like everybody else. 25 CHAIRPERSON: He wasn't the Deputy</p>	<p style="text-align: right;">Page 39386</p> <p>1 leading that march? It was Mr Ramaphosa. He knows, 2 Chairperson, he knows that if you bring the army into a 3 situation like that, or these specialised units or many 4 policemen and so on, death – I won't say is almost certain, 5 but it's definitely foreseeable. 6 So here is somebody who armed with all this 7 knowledge goes along, and I accept that the army was not 8 brought and so on, but goes along with a sentiment that 9 says this thing can only be resolved by bringing the police 10 or the army, and we are told that he thought – I don't know 11 what, the army is just going to come and hug these miners 12 there and, or, I don't know, give them a lift to go home. 13 The army is a machine that kills people, and as the 14 Chairperson corrected me when we were in Rustenburg, that's 15 not its only function. 16 [14:34] But you know, we all know that once you say look, 17 this situation, here are these people sitting here in the 18 Farlam Commission, they are refusing to come out of the 19 council chamber, let's bring in the army, you can't, you 20 can't then say you're not foreseeing the loss of life. 21 What you are doing is to say whatever – and that's where 22 motive maybe becomes important – whatever the risk of loss 23 of life to those people sitting in that auditorium, there 24 is some other important consideration which supersedes that 25 loss of life, and in the case of Mr Ramaphosa that</p>

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1 consideration was his financial interest at worst. At best
 2 it was what I referred to in the morning, the desire to
 3 shield the NUM from its fortunes of dwindling membership.
 4 It doesn't matter which one it is, or both. The point of
 5 the matter is that no-one – and this is not again,
 6 Chairperson, this is the chairperson of, ironically the
 7 previous day on the 15th of August, on the day that he's
 8 sending these emails that they must send the army and the
 9 police, he was flying to Cape Town for the adoption of the
 10 National Development Plan, on that day, literally the –
 11 when he saw Minister Shabangu he was there for the National
 12 Development Plan. What does the National Development Plan
 13 say? It says this militarised police that we have here is
 14 brutal, is – I can't remember the expression used, of
 15 trying to use, solve every problem by use of force and so
 16 on and so on, and hence it should be demilitarised. So
 17 he's the last person to say he doesn't know that he was
 18 sending a brutal police force into what, at least let's
 19 give him this, a brutal group of people. So he was
 20 orchestrating this clash of brutality because he – again
 21 let's give him the due that he was rightfully shocked by
 22 what had happened and so on and so on, but that alone is
 23 aggravation because it shows that you are now saying these
 24 brutal people must go and confront these other brutal
 25 people.

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1 So with the greatest respect, any suggestion of
 2 not foreseeing death there is just fanciful, and I'm not
 3 saying he, he might not have foreseen it in the same terms
 4 as the people on the ground, the 20 deaths or Tatane or all
 5 the other people who clearly foresaw deaths, but in his own
 6 space he certainly foresaw death. And remember,
 7 Chairperson, there's law on the question of – the evidence
 8 leaders say that well, he certainly didn't foresee that 34
 9 people are going to die. It doesn't matter; whether he
 10 foresaw five or eight or 34, that's irrelevant. And then
 11 there's the other point which gets bandied about; oh well,
 12 then why did he arrange a meeting with the NUM people on
 13 the 17th? It does not matter. He does not have to foresee
 14 that the people are going to be killed on the 16th at 4
 15 o'clock near the kraal. That's not what foreseeability is.
 16 There is ample law which shows that you do not
 17 have to foresee the causal sequence of your actions. You
 18 have – and I've cited the cases in my heads, the mere fact
 19 that even authorities which come from S versus De Bruin
 20 which it's probably referred to in my heads, yes, say this,
 21 Chairperson, and I just want to make this point before I
 22 read this because it's just a quick point.
 23 Those 34 and the 17th go out of the way because
 24 what the law says is that if you see the foreseeability of
 25 death, even if it's remote or slight, that is sufficient to

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1 bring you into the realm of dolus eventualis, and this is
 2 what was said by Holmes JA in De Bruin, "Secondly, dolus
 3 eventualis" - or he was explaining the difference, "the
 4 accused foresees the possibility, however remote, of his
 5 act resulting in death to another, yet he persists in it
 6 reckless whether death ensues or not, on analysis the
 7 multiple characteristics of dolus," and then he talks about
 8 subjectivity and so on, but the key issue that I'm
 9 communicating now is that this case, and many other
 10 subsequent cases – ja, that's at 510, what I've just read
 11 is at 510 of the judgment, Chairperson. The citation, I'm
 12 sure it's in my heads, but just in case, it's 1968 (4) SA
 13 498 (AD) and it has been approved subsequently in S v Shaik
 14 & Others, which is also an AD case, that is 1983 (4) SA 57
 15 (A) at page 62.
 16 CHAIRPERSON: Page?
 17 MR MPOFU SC: 62, six-two, Chairperson.
 18 There's another case, S v Van Aardt, I'll find the
 19 citation.
 20 CHAIRPERSON: [Microphone off, inaudible]
 21 authorities for the same proposition.
 22 MR MPOFU SC: Yes.
 23 CHAIRPERSON: And you've got at least two
 24 Appellate Division authorities –
 25 MR MPOFU SC: Yes, that should be

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1 sufficient, yes. Thank you, Chairperson. And the
 2 principle there is quite simple and it is that – I don't
 3 want to restate the principle, but let's come back to the
 4 facts here. What that means therefore, Chairperson, is
 5 that – and the reason why there's this huge concealment -
 6 going back to the, all the things that have been concealed
 7 from us here – can be that it was obvious even to the
 8 Minister, the police and the National Commissioner that had
 9 you, Commissioners, known that the decision to rush the
 10 operation on the 16th was as a result of this political
 11 pressure, then you would have naturally wanted to probe as
 12 to how far it went and so what had to be done was to
 13 deceive you into thinking that the decision was taken on
 14 the 16th.
 15 The reality, and that is why, as I said earlier
 16 General Phiyega has to remove all references to the
 17 Minister and so on, because it's just a scheme to deceive
 18 the Commission into believing that this was an operational
 19 decision and not a political one, and that is why even the
 20 Minister in his own affidavit, Minister Mthethwa, makes
 21 what would otherwise look like an innocuous "mistake" when
 22 he says when I received the call from Mr Ramaphosa I phoned
 23 the National Commissioner. When I cross-examined him it's
 24 clear that nothing of the sort happened. He phoned the
 25 Provincial Commissioner. Why is he deceiving the

<p style="text-align: right;">Page 39391</p> <p>1 Commission again on that? Because he knows that if the 2 truth is told it will be clear that he jumped the National 3 Commissioner for whatever reason – maybe she was not 4 answering, I don't know, there might be a valid reason, but 5 that he jumped the National Commissioner and delved into 6 the operational area, that's how much the pressure was, and 7 spoke to General Mbombo. The conversation that General 8 Mbombo in JJJ192 is relating is the conversation that was 9 direct, that happened between her and Mr Ramaphosa, but she 10 also refers to a separate discussion which happened between 11 the Minister and the National Commissioner. That's the one 12 that says who are the shareholders and so on and so on. 13 The National Commissioner says, "Oh, I get it." Ja, so 14 that means there are two separate discussions, one between 15 Ramaphosa and Mbombo, which is reinforced by another 16 discussion between Mthethwa and Phiyega, all of which 17 culminates in the same thing, which is that there is 18 pressure from a politically high person and hence we must 19 kill this thing, and so on and so on and so on. 20 So you can't, with the greatest respect, if 21 you're going to charge Minister Mthethwa, who really his 22 crime is that he was the conduit for the political 23 pressure, or if you're going to charge National 24 Commissioner Phiyega, I dare say that of all these people 25 if anyone could get away with it, it would be the National</p>	<p style="text-align: right;">Page 39393</p> <p>1 MR MPOFU SC: Sorry, Chairperson? 2 CHAIRPERSON: Are you still dealing with 3 Mr Ramaphosa? 4 MR MPOFU SC: Oh yes, the answer is yes. 5 CHAIRPERSON: You said yes. I didn't 6 turn my machine on, that's why I repeated it. 7 MR MPOFU SC: Oh yes, thank you, 8 Chairperson. Yes, and I'm not going to be long. I just 9 want to deal with the flipside, the omission, list of 10 omission accused, so to speak. Again what have we got 11 here, Chairperson? We have a person who has made – I can't 12 even count them – concessions, rightfully so, to myself, to 13 my learned colleagues, that – and to you, Chairperson, and 14 to the Sunday Times and to everybody, where he says, I take 15 personal responsibility for what happened. The 16 Chairperson, in fact when I questioned him on that article 17 the Chairperson took it further and said, used the word 18 "personal," "We hear this thing about collective 19 responsibility and what have you, but do you take your 20 share of the personal responsibility?" He said yes. If 21 the reference is not in – 22 CHAIRPERSON: I remember the – 23 MR MPOFU SC: You remember that, 24 Chairperson, yes. 25 CHAIRPERSON: I remember the passage.</p>
<p style="text-align: right;">Page 39392</p> <p>1 Commissioner because the National Commissioner, I think his 2 problems arise from the National Management Forum, but in 3 this connection she clearly did not – I mean she, the 4 innocence with which she must have asked that question, she 5 says the Minister says he's being pressurised by the 6 shareholders, who are these shareholders, it just shows 7 that she didn't even know who was the shareholder, and 8 Mbombo says it's Cyril, and Mokwena – very interesting 9 discussion – Mokwena, before, all she had to say was 10 "There's a politically high," and he says "It's Cyril." He 11 knows, because everybody knows who is the exerter of the 12 political pressure. 13 So with the greatest respect, Chairperson, it can 14 never be said by any stretch of the imagination that a 15 person who clearly foresees the deaths of other human 16 beings and acts in that way and those deaths actually to 17 eventuate in whatever way on whatever date did not foresee 18 that happening. So that's the side of, as I say topping 19 the police list as accused number 1. 20 If we go to the omission – 21 CHAIRPERSON: [Microphone off, inaudible] 22 MR MPOFU SC: Yes, Chairperson. Yes, on 23 the alternative charge. 24 CHAIRPERSON: Still with Mr Ramaphosa – I 25 hadn't turned my machine on – the answer is yes?</p>	<p style="text-align: right;">Page 39394</p> <p>1 MR MPOFU SC: Yes, you'll find – 2 CHAIRPERSON: He talked about collective 3 responsibility and I said, including himself, and I said – 4 MR MPOFU SC: Yes. 5 CHAIRPERSON: - well, what personal 6 responsibility do you take and he then answered – 7 MR MPOFU SC: Yes, thank you, 8 Chairperson. But that's just one reference. Every time 9 this question was put to him, "Do you accept 10 responsibility?" "Yes." And I even went further and said, 11 "Do you accept that had you not omitted to do what a person 12 in your position should have done, all the 44 people, not 13 just the 34, all the 44 people might still be alive today?" 14 He says yes. So on what possible basis can somebody who 15 has come here under cross-examination and gave a confession 16 on that score, so to speak, or at best an admission and we 17 are told that there's not even a prima facie - prima facie, 18 Chairperson, not beyond reasonable doubt, not on balance of 19 probabilities, but on a prima facie basis, that that 20 omission is not criminally actionable? Then why must we 21 charge anyone else, why must we even charge Lonmin for 22 omitting to speak to the strikers? Because it is that very 23 same, self same omission that Mr Ramaphosa, who's a skilled 24 negotiator, who's a former trade unionist, who knows the 25 importance of intervention by negotiation, he's just, as I</p>

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1 pointed out in my heads, he's intervening by negotiation
 2 right now as speak in Lesotho. He did not say there no,
 3 shoot each other first and then we'll negotiate afterwards.
 4 He knew that but you have to go there and to get those
 5 people around the table to avoid the deaths. You can't say
 6 kill each other and then stabilise the situation when half
 7 of the people of Lesotho have killed each other, then that
 8 will stabilise the situation and then – it doesn't work
 9 that way.

10 To his knowledge, and once again Scott – and this
 11 is a rare moment where I must say this good thing about the
 12 police plan, such as it was, that Mr Ramaphosa's
 13 intervention actually had the effect of subverting the
 14 plan. According to what Scott says in the passage that
 15 I've quoted in my replying heads their position, and I
 16 think the police have pushed that case successfully, was
 17 Lonmin, go and talk to the people and we'll deal with the
 18 security situation and so on, and they were fobbed off for
 19 various reasons that they know. But that was their outlook
 20 on the sequence of events; the Lonmin people must talk to
 21 the workers and they will deal with the rest. It is only
 22 through the intervention of Mr Ramaphosa that that sequence
 23 – and Jamieson and all the others – that that sequence is
 24 suddenly subverted, no, now you must "stabilise" with
 25 pointed action, concomitant action, and then he says in

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1 some pages, and then maybe after that there would have been
 2 an opportunity to negotiate. That cannot be. That cannot
 3 be the mindset of a person who just on the basis of that
 4 omission does not foresee the obvious consequences of that
 5 approach, the disastrous - in any situation, you know war,
 6 as I've said in the heads, does not create peace.

7 Peace is created by the negotiating table. The
 8 fact that sometimes peace eventuates after people have had
 9 war is unfortunate. The correct situation is to avoid the
 10 war and you can't say let's have the war and then the peace
 11 will follow, which is exactly what was being done, because
 12 now it was the gung-ho thing, it is not a labour dispute.
 13 Why? Why this big emphasis, it's not a labour dispute? It
 14 is so that do not even think about saying they must go to
 15 the table; bring in the army, bring in the police. It's
 16 concomitant action all the way.

17 The only reason why that message was being sent
 18 so forcefully was – in fact we don't even have to infer;
 19 Jamieson says, the opening line he says "The Minister this
 20 morning, Minister Shabangu, was on the radio saying this
 21 thing must, we must resolve it around the table, and that,
 22 although it's not too damaging, it's not helpful." How can
 23 it even be remotely damaging to say people must talk and
 24 resolve a situation? Because that's exactly what should be
 25 done instead of twisting the logic and pressurising

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1 everybody around who has decision-making powers to change
 2 their characterisation and call it criminal so that they
 3 can bring the big guns (literally) in.

4 So whether you look at it from the point of view
 5 of what he did or from the point of view of what he did not
 6 do, then it's very clear that, as I say he's accused number
 7 1 on both the State list, so to speak, and also the Lonmin
 8 list. If by some miracle I'm wrong on that, then surely on
 9 the – he should be charged, as we know that culpable
 10 homicide is a competent verdict, but let's assume it
 11 doesn't even come through that route, then how can it be
 12 said that there's no prima facie case that a reasonable
 13 person, a reasonable skilled negotiator, a reasonable
 14 former unionist, a reasonable former general secretary of
 15 NUM, in his position would not have foreseen that deaths
 16 were almost certainly going to eventuate? Everybody did,
 17 Chairperson. Let's be blunt about it. The reason why
 18 there was Reuters and CNN and all these other people there
 19 is because everyone knew that there's a standoff there and
 20 one of the ways in which it's going to be resolved is
 21 something quite violent. Nobody would have said okay, well
 22 we know that there are going to be 34 people around the
 23 kraal and all that, but the reason they were there, it was
 24 not just because there's some other old strike in South
 25 Africa, it's because everyone knew that there is a major

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1 standoff where there's likely to be bloodshed, as everyone
 2 said, bloodshed as Mpembe said, bloodshed as Mbombo said,
 3 and bloodshed as anyone else surely must have foreseen, let
 4 alone one who is you know, one of the authors of the
 5 constitution, Chairperson.

6 [14:54] Really this Constitution says very clearly that
 7 the police must not be involved in making political
 8 considerations and one of the people who wrote that
 9 Constitution causes that to happen, causes the Minister to
 10 cross the line, causes the National Commissioner to cross
 11 the line, causes everyone to cross the lines that are set
 12 by our Constitution. And we are told – oh I don't know,
 13 but it was inexplicable or words to that effect. It's not
 14 inexplicable, it's directly linked, it is directly to the
 15 NMF decision as we explained in the morning. It is
 16 directly linked to the D day announcement, it is directly
 17 linked to the botched operation that followed it. And it
 18 is directly linked to the deaths of those 34 people and it
 19 is the omission side, that's the Commissioner, what he did
 20 on the 15th, but the omission which starts much earlier is
 21 directly linked to all the 44 deaths. Because remember,
 22 Chairperson this is not some innocent as he tried to make
 23 us believe, a non-executive director, this is a person who
 24 was in the board meeting of the 25th of July, JJJ10 where
 25 the decision was taken that the strikers must not be

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1 engaged. So he's part of a decision that says the strikers
 2 must not be engaged, why, because it's going to cost us a
 3 lot of money because other people will come and also want
 4 to negotiate. This is said by an organisation that knows
 5 as we know from their slides that the NUM has lost ground.
 6 Technically yes they are still the recognised union and so
 7 on, but they know that these are not the people that have
 8 the confidence of the workers. And yet they adopt in a
 9 meeting a few weeks before the massacre a resolution that
 10 says they must not be spoken to. That decision clearly was
 11 what informed the Jamiesons and the Mokwenas of this world
 12 on the 10th of August from saying we're not talking to these
 13 people. And as I said this morning from that point on we
 14 were on a road to nowhere. The list is endless,
 15 Chairperson and that list endless as it is some of it is in
 16 my replying heads. But the point of the matter is that on
 17 all these nobody's asking you to convict the person and if
 18 the Chairperson is inclined not – my own submission would
 19 be that the Chairperson is quite empowered to recommend a
 20 prosecution. But, if for some reasons, Chairperson is
 21 inclined only to recommend an investigation and so on –
 22 CHAIRPERSON: If we recommend an
 23 investigation we don't know what the investigation will
 24 produce. I can then say whatever the investigation
 25 produces you must still prosecute them.

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1 MR MPOFU SC: It produces, yes. No, no I
 2 think that's sensible, Chairperson, but the only subject to
 3 this – for that approach the test is even lower because if
 4 I was banging my hand on the table to say well,
 5 Chairperson, I want you to recommend no investigation, go
 6 straight to the MPA's office and so on then I would have to
 7 satisfy you that there is a prima facie case on the basis
 8 that a reasonable prospect of a successful prosecution and
 9 so on. But if as the Chairperson has postulated all you
 10 are saying is that there is sufficient in front of us or as
 11 the Human Rights Commissioners called it, a reasonable
 12 suspicion of a crime being committed here. And DPP then
 13 surely that has been imminently, but imminently satisfied
 14 in this case. And we must resist the temptation,
 15 Chairperson, of creating the impression that there are, and
 16 I'm not saying there's any suggestion of that on your part,
 17 Chairperson, but in the public eye that there are separate,
 18 different rules for different folks. Because I am saying
 19 now anybody, if it was Mr Magidiwana or Mr Phatsha and we
 20 say we now know for sure that Mr Magidiwana or Mr Phatsha
 21 is the person who the day before Mr Twala was killed was
 22 sitting in some room and saying this Twala chap you know I
 23 saw him doing this and that. I think you know we must do
 24 this, that and the other. Whether he was there when the
 25 trigger was pulled that would have been enough at least for

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1 the Commission to say he must be investigated for a
 2 criminal offence. And it's not for the Commission as to
 3 whether he's an accomplice or part of a common purpose and
 4 all these nice things. Those are considerations that will
 5 be taken by the DPP. But let's postulate, let's say ground
 6 is found for accomplice liability or even common purpose
 7 then what was said, I think, by Mr Gotz yesterday about the
 8 clear foreseeability on the part of Mr Jamieson where
 9 there's no question, he says look we foresaw that things
 10 might happen. But maybe we thought the police might – that
 11 part of the law would say that you don't need causation
 12 legal or otherwise because common purpose doctrine is meant
 13 exactly for these situations where you don't have to
 14 attribute the causality for each of the participants. So I
 15 don't want to go down that line, I'm simply saying,
 16 Chairperson, we don't want a theoretical discussion as to
 17 whether he's corporate perpetrator or a perpetrator or an
 18 accomplice or whatever. The point of the matter is that
 19 there is sufficient evidenced in front of this Commission
 20 for him to be charged with a crime of murder and
 21 alternatively culpable homicide. Just as it would happen
 22 with anyone else who's not a Deputy President.
 23 CHAIRPERSON: It's 3 o'clock now.
 24 MR MPOFU SC: Yes, Chairperson, well my –
 25 CHAIRPERSON: We've got your written

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1 heads, both your main heads and your replying heads.
 2 MR MPOFU SC: No, Chairperson the
 3 arrangement is –
 4 CHAIRPERSON: You were arguing the aspect
 5 in respect of Mr Ramaphosa on the basis that a lot of what
 6 you said would apply mutatis mutandis to the others.
 7 MR MPOFU SC: Yes, yes, no there's no
 8 doubt, Chairperson, let me just explain something about the
 9 time. The arrangement is that I have – because there's no
 10 other time on the table, I'm going to eat into my reply
 11 time on the space or the hope that it will be recovered
 12 either through Mr Tip's or Mr Semenya's brevity or
 13 respective brevities. But if that doesn't materialise then
 14 I'll eat into my own time. But I will try not to eat all
 15 of it up.
 16 CHAIRPERSON: May I suggest then that
 17 before you eat some of your reply time up we drink some
 18 tea. We'll adjourn for 15 minutes.
 19 MR MPOFU SC: Thank you, Chairperson.
 20 [COMMISSION ADJOURNS COMMISSION RESUMES]
 21 [15:21] CHAIRPERSON: The Commission resumes.
 22 Yes, Mr Mpofu.
 23 MR MPOFU SC: Yes, Chairperson, I'm going
 24 to quickly round off the points. As I was saying, if the
 25 recommendations of the evidence leaders are followed on

<p style="text-align: right;">Page 39403</p> <p>1 both putative self-defence and the issue of Mr Ramaphosa, 2 what is really being said is that we are back to what Mr 3 Bizos called "nobody is to blame." So you must let the 4 shooters, the people who shot the people go off, and also 5 let the ringleader, the kingpin of the murderous scheme to 6 also get off. 7 Well, this is all I have to say that pressure, 8 which Mr Ramaphosa has admitted to having exerted and which 9 was put into context by Mr Jamieson, in scientific terms – 10 and if I'm wrong on this Mr Chaskalson will share the blame 11 because both of us fancied ourselves as students of 12 physics, but pressure is nothing else but force over area, 13 and here the area was very clear; it was the higher 14 echelons of the police, it was the decision-making apex, so 15 to speak, of the whole structure which went down to the 16 shooters and all that, and applying that pressure at the 17 top was almost as good as applying the force because in 18 real life that it cascaded down, down to the shooters, and 19 therefore for the reasons that we have articulated both in 20 relation to the shooters and the applier of the pressure it 21 cannot be said that that pressure was not the factual legal 22 cause, or whatever cause of the eventuation of the deaths, 23 and that's – 24 MR CHASKALSON SC: Chair, sorry to 25 interrupt Mr Mpofo's argument, but I should make clear that</p>	<p style="text-align: right;">Page 39405</p> <p>1 made that concession, and that's at page 34701. 2 He conceded that he was at the meeting of 25 July 3 when there was discussions which probably led to the 4 adoption of the no-talks stance. He conceded that the – he 5 was aware of the issues of police brutality in South 6 Africa, that's 34736. We've already covered that. He also 7 conceded that he acted as a messenger for Lonmin senior 8 executive in influencing the changing of the 9 characterisation from labour unrest to criminal nature, and 10 he conceded that in reality the root cause of the dispute 11 was a labour dispute, and I think probably one of the last 12 questions I put to him where he conceded that placing of 13 political pressure that results in the killing of people 14 would be unlawful. 15 So as I've said, we have a person who himself 16 really basically says look, I take personal responsibility, 17 I concede that had I done this, and yet somehow the 18 evidence leaders find something to say no, no, no, no, 19 despite whatever he's saying and whatever his concessions 20 on the basis of legal causation or whatever, there's no 21 evidence, something like that, there's no facts which have 22 been put to suggest that he could foresee, no facts. All 23 these things that we were saying in the cross-examination 24 about the army and what-what just don't exist. Well, that 25 can't be, Chairperson. The job of the evidence leaders is</p>
<p style="text-align: right;">Page 39404</p> <p>1 my contribution to the argument was limited to the 2 scientific formula. 3 MR MPOFU SC: Yes. Yes, yes, no that is 4 true, and now that there's an accomplice then I'm – 5 CHAIRPERSON: [Microphone off, inaudible] 6 accomplice without mens rea. 7 MR MPOFU SC: That's correct, 8 Chairperson, just on one element, ja. But, Chairperson, 9 I'll just read out just some of the concessions that I rely 10 on, some of which are cited in the heads. Let's start with 11 the omission case, so to speak. He conceded, Mr Ramaphosa, 12 that Lonmin should have engaged with the strikers, that had 13 they done so it was possible that the violence would not 14 have occurred, and that's at page 34693 of the record. He 15 conceded that he knew that all the employees wanted was to 16 be spoken to. That's at page 34697. 17 He conceded under cross-examination by Mr 18 Budlender that had the approach adopted by Mr Da Costa been 19 followed further deaths could have been avoided, and linked 20 to that he conceded, in my cross-examination I put it, I 21 even put it like this, Chairperson, to say, "Let's assume 22 the Fundi and Mabelane deaths were the trigger" - the 23 discussion you and I had this morning – "of the horror, 24 even at that stage do you concede that the further eight 25 deaths would have been avoided had you intervened?" and he</p>	<p style="text-align: right;">Page 39406</p> <p>1 to analyse the evidence, that's why they're called evidence 2 leaders, and the evidence is there. They might say they 3 disagree with the factors that we put, but they mustn't say 4 they're not there. They are there. We raised those issues 5 in cross-examination and the valuation of those points 6 might differ from person to person, but it cannot be said 7 they're not there. They are there. They were put to the 8 witness. In fact Mr Unterhalter interjected exactly when 9 after putting all these things I was saying to Mr 10 Ramaphosa, because of all those things I'm going to argue 11 at the end that it was foreseeable, that deaths were 12 foreseeable. So it was put in so many words that that was 13 the purpose of the – and it can't help to say well, when it 14 was said to him it's foreseeable he said no, it's not. It 15 doesn't work that way. If a witness simply says, you know, 16 I was not there, that has never been a reason for – what 17 happens is that the inference of foresight, or the 18 foresight is taken from the conspectus of the issues, which 19 I've already enumerated. 20 So in all the circumstances, Chairperson, the 21 recommendation for those criminal charges is inevitable. 22 It would take more hard work to find that he should not be 23 charged criminally under the current circumstances and if 24 it was found that way it will cause the biggest, it will 25 discredit the legal, the whole legal process really because</p>

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1 it will simply mean that, I don't know what needs to be
 2 done for somebody to, not to be convicted but to be made to
 3 pay. That's what society expects, Chairperson. The
 4 criminal law is meant for that, that there's certain
 5 conduct that society has decided must be punished, to put
 6 it bluntly and briefly, and what is called the legal
 7 convictions of the community, the expectations, is that the
 8 community says okay, for these and these and these things
 9 you must be civilly liable, it's a private matter between
 10 those who wronged each other, but for this and that, and
 11 that includes murder and the violation of the most
 12 important rights, as is the right to life and other related
 13 rights, there must be criminal consequences, and this is
 14 the classical case of that.

15 Very quickly, if I can move to the issue of –
 16 COMMISSIONER TOKOTA: Sorry, before you
 17 move –
 18 MR MPOFU SC: Sorry.
 19 COMMISSIONER TOKOTA: Can you just debate
 20 this criminal liability of Mr Ramaphosa?
 21 MR MPOFU SC: Yes.
 22 COMMISSIONER TOKOTA: Do I understand you
 23 correctly to be saying that because Mr Jamieson phoned him
 24 to say look, these are the incidents, we've been trying to
 25 get the police, can't get them, and because he phoned the

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1 Minister for the police to intervene he must have foreseen,
 2 or he foresaw that once the police come in to intervene
 3 death would ensue, or is it wider than that?
 4 MR MPOFU SC: No, it's much, much wider
 5 than that. To go back to the Chairperson's example of the
 6 farmers, if all he had done is what you are postulating
 7 now, all he had done is said listen, there is this trouble,
 8 can you just make this phone call and just, we can't find
 9 the local station commander, and so on, of course that's
 10 not criminal liability. The criminal liability arises from
 11 applying pressure, this is his words, it's not mine, he, Mr
 12 Ramaphosa says "Let us put pressure on them and let them
 13 act in a pointed way," and so on and so on, and it also
 14 arises from the words that are used in the communication
 15 because by communicating you're not just committing a
 16 crime, it's the content of the words that you are using and
 17 those words are saying emphatically, with underlying or
 18 capital letters, let us ensure that the characterisation is
 19 changed and we label these people purely as criminals.
 20 Remember that whole debate about the hybrid and so on and
 21 so on.
 22 COMMISSIONER TOKOTA: Yes.
 23 MR MPOFU SC: And the only, only way this
 24 situation can be resolved is by bringing the police and the
 25 army. Now those, apart from the fact that that is wrong to

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1 take that approach, as I've said in terms of the
 2 sequencing, the foreseeable consequences of that approach,
 3 given the volatile situation, which is why, Commissioner, I
 4 was talking about adding petrol to the fire – remember
 5 there's already a fire, so if you add petrol to nothing,
 6 nothing will happen, but if you add the petrol to a fire
 7 that's already there of this nature, then we know what's
 8 going to happen. So it's the factual complex of these
 9 particular circumstances. As I say, let's agree with him
 10 to say these people were brutal, barbaric and what have you
 11 and so on, that alone is what the fire is. So if the fire
 12 is like that you don't then aggravate it by bringing
 13 another gung-ho brutalised militarised bunch and mix it
 14 with this other group of people. That is where the
 15 criminal liability arises, and therefore, that's why the
 16 reference I was making to Mr Jamieson is just instructive.
 17 I'm saying postulate that they were charged together in a
 18 common purpose, for argument sake, let's say it was Mr
 19 Ramaphosa and Mr Jamieson, then the fact that he has
 20 virtually conceded foreseeability, and that's the point you
 21 were debating with my learned colleague, means that as far
 22 as causation is concerned it's enough that one of the
 23 parties to that common purpose would have foreseen
 24 something. That's what the whole doctrine of common
 25 purpose is, to cure that so that you don't have to find it

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1 in respect of each participant.
 2 So yes, that's the best answer I can give. So it
 3 arises from foreseeing the possibility of death, and I'm
 4 prepared to say you're not foreseeing 34 deaths, you're not
 5 foreseeing, you know, big Nyalas up and down and
 6 helicopters, but if you are saying when – and the
 7 Chairperson asked this question in a very pointed way, if
 8 you'll excuse the pun, in a pointed way, ja, because he
 9 said, the Chairperson said well, explain this; if Mr
 10 Jamieson is saying there's already 800 police there, so
 11 it's not a situation which we all know which was
 12 unacceptable of earlier in the week, what is this more
 13 pointed way that – it can't be anything else except what we
 14 saw, which was a massive show of force, bringing
 15 paramilitary units and all that what we know. So I'm
 16 saying that has got to be foreseeable, or rather death,
 17 any, some death must be foreseeable at the lowest.
 18 COMMISSIONER TOKOTA: Okay, the other
 19 aspect I don't understand is the liability based on
 20 omission. Is that criminal liability you're talking, or
 21 civil liability?
 22 MR MPOFU SC: No, it's criminal –
 23 COMMISSIONER TOKOTA: What is it?
 24 MR MPOFU SC: - criminal liability, and
 25 again thank you for raising that because what I wanted to

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1 say actually is I'm not going to address on civil liability
 2 and so on because a fortiori, if I succeed to convince you
 3 on the criminal liability the civil liability of all the
 4 parties mentioned follows. But what I'm – no, it's
 5 criminal liability, Commissioner Tokota, because the law on
 6 omissions is simply this; the only difference between
 7 criminal liability of a commission of an offence and the
 8 omission offence is just in the nature of the actus reus,
 9 the nature of the human conduct part. The law, in the eyes
 10 of the law it does not matter whether that conduct is done
 11 by doing something or failing to do something, subject to
 12 the following. If it is the latter, if it is an omission
 13 it must only be where there's a legal duty to act.
 14 Now the duty here - Mr Ramaphosa, we canvassed
 15 this with him extensively - on the omission part arises not
 16 only, it's not the same duty that a General Mbombo would
 17 have, because that's clear, she has a duty as a police
 18 officer to protect the community, blah, blah, blah. Here
 19 we are talking about firstly his fiduciary duties, his
 20 duties as a person in his position so to speak to whom –
 21 remember, these workers are entitled to expect that a non-
 22 executive director of Lonmin must have their best interests
 23 at heart. They can't be expected to think that that person
 24 is going to be biased towards the NUM and want to do things
 25 and phone this one, phone Mantashe and phone Baleni,

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1 Zokwana and so on. They can't. They must expect that as,
 2 or to use the expression qua employees, all these directors
 3 are here to protect our interests. So there's a legal duty
 4 to act from that point of view alone, but again from the
 5 person that he is, he is a member of the National Executive
 6 Committee of the ruling party - I canvassed the connection
 7 between the ruling party and the government with him, which
 8 he conceded - a senior person, and as I've said a person
 9 who is known as a negotiator, a former unionist, all those
 10 put together must but must create a legal duty not to
 11 commit the kind of omission. In other words what I'm
 12 saying, Commissioner Tokota, is that let's say for argument
 13 sake there was another non-executive director, Mr Jones,
 14 who was also a supporter that they mustn't talk to the
 15 people, he might say look, under the – I don't know, this
 16 was my first strike, I don't even know what this thing is
 17 about, I've never read the Constitution in my life, I don't
 18 know what the army does between, I don't know the
 19 difference between the army and the police, so sorry, maybe
 20 I made a mistake, we would believe him. But not Mr
 21 Ramaphosa. We can't. His special position as a non-
 22 executive director, as a shareholder and as a leader –
 23 remember I said to him when you were phoning Mr Mthethwa,
 24 Mr Mthethwa would not have known whether you're calling him
 25 as an NEC member or as a director, and he said yes, and

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1 when I asked Minister Shabangu the same question, when you
 2 were interacting with Mr Ramaphosa was it clear whether it
 3 was as an NEC member, she said no, she could not tell.
 4 Ja, and that's the nature of what I call the
 5 incestuous relationships, because remember there is – to
 6 put it nicely, there's a, not a gang, but there's a group
 7 of people in this whole mix who are on the side of Minister
 8 Shabangu, Minister Mthethwa, Minister – or rather Deputy
 9 President, and so on and so on, whose mission in life is to
 10 ensure that AMCU is not given the upper hand for the
 11 reasons that we canvassed in the evidence, and that is what
 12 I was trying to explain in the, the conflict of interest
 13 arises from that, that with all these fiduciary duties you
 14 are at the same time associated with the parties who are
 15 "against" the same workers to whom you owe that duty for
 16 political reasons, because you don't want AMCU to advance
 17 and so on and so on. That's a clear conflict because the
 18 workers are entitled to expect that you will look after
 19 them as everyone –
 20 [15:41] So thank you, so on the omission that's where the
 21 legal duty arises, which takes us very quickly to the
 22 question of the corruption charges that –
 23 CHAIRPERSON: [Microphone off, inaudible]
 24 corruption charges can I ask you a question about the
 25 suggested prosecution of Mr Ramaphosa for –

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1 MR MPOFU SC: Yes, thanks, Chairperson.
 2 CHAIRPERSON: What you said was it arises
 3 from the foreseeability of death. That was the test that
 4 you propounded, but is it also not necessary to have regard
 5 to the question as to whether he foresaw that the death
 6 would result from illegal action? Now we know the police
 7 have got power to seize objects from people, so therefore
 8 they have the power to disarm. They have the power to
 9 disperse people if they comply with the requirements of
 10 section 9(2) of the Regulation of Gatherings Act, and they
 11 have a power to arrest if they have the necessary
 12 reasonable suspicion under the Criminal Procedure Act. So
 13 it may well have been foreseeable that death might result
 14 as a result of police action, but it doesn't follow
 15 automatically that those deaths would result from illegal
 16 action. So is it not also a part of the test that it was
 17 foreseeable that the process he was setting in motion would
 18 bring about deaths by illegal action by the police?
 19 MR MPOFU SC: Yes, I've got two answers
 20 to that, Chairperson. The first one is no, it's not part
 21 of the requirement, and let's go back to the example that I
 22 made. If I set my shop or my house alight and I can
 23 reasonably foresee that there's a hobo who is trespassing
 24 on it, then I'm guilty of murder. The fact that the hobo
 25 is there illegally cannot absolve me of my criminal

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1 liability. Intention in the legal sense doesn't work like
 2 that. I know what the Chairperson is saying –
 3 CHAIRPERSON: Your example with respect
 4 isn't a good one because the death doesn't result from –
 5 your example, from illegal action. It's, the hobo happens
 6 to be there illegally –
 7 MR MPOFU SC: Fair enough -
 8 CHAIRPERSON: - but that's a different
 9 matter.
 10 MR MPOFU SC: Yes, okay –
 11 CHAIRPERSON: You see, can I just put an
 12 example to you then?
 13 MR MPOFU SC: Yes.
 14 CHAIRPERSON: Unless you want to give me
 15 your second answer first.
 16 MR MPOFU SC: No.
 17 CHAIRPERSON: Assuming there's a robber
 18 in my apartment –
 19 MR MPOFU SC: Yes.
 20 CHAIRPERSON: - and he's a dangerous
 21 robber and I phone the police and I say, would you please
 22 come and deal with the situation, I want you to come
 23 because I've got a robber on my premises and the police
 24 come, now I will surely foresee that if there's a shootout
 25 between the armed robber and the police either the police

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1 or the robber may die, but must I foresee in those
 2 circumstances that the police may act illegally? Now if
 3 that's correct then whenever there's a robber in my
 4 apartment, armed robber in my apartment, I dare not phone
 5 the police and ask them to come if your test is the correct
 6 test because then I'll find myself in the dock on a murder
 7 charge.
 8 MR MPOFU SC: No, no –
 9 CHAIRPERSON: Can that be right?
 10 MR MPOFU SC: No, no, certainly not,
 11 Chairperson. You see, Chairperson, a constitutional
 12 democracy is something that we have to appreciate. Those
 13 kinds of arguments were advanced in the case of State
 14 versus Mankwanyane on the death sentence case and if you
 15 look at all the judgments, particularly the judgment of
 16 Chaskalson, it says that –
 17 CHAIRPERSON: I take it you mean
 18 Chaskalson P.
 19 MR MPOFU SC: P, yes, that's correct,
 20 Chairperson. Not my fellow conspirator in physics. The
 21 whole emphasis of that judgment, Chairperson, is that the
 22 reason why we do not have the death sentence, because
 23 that's all that happened to these people, they were
 24 executed extra judicially, so it was applying the death
 25 sentence to them without even going to court. Let's assume

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1 you've even gone to court and you've heard all your rights,
 2 the new Constitution says that you should not be killed.
 3 Why? Because, to come to your example, as the
 4 Constitutional Court said even the worst among us, the
 5 worst, think of serial rapists, serial killers or serial
 6 whatever, even the worst among us have the right to life.
 7 So the fact that there might have been illegal gathering,
 8 what have you, with the greatest respect can never have any
 9 bearing on the question as to whether someone who foresees
 10 the death of another human being must proceed on the basis
 11 that well, they asked for it because they were involved in
 12 an illegal activity. That I'm afraid is not –
 13 CHAIRPERSON: That's not the basis of my
 14 question.
 15 MR MPOFU SC: Well –
 16 CHAIRPERSON: The basis of my question is
 17 whether it's foreseeable that the death would be brought
 18 about by illegal conduct.
 19 MR MPOFU SC: No, Chairperson, with
 20 respect, yes I hear that. Well, then that goes to another,
 21 to the second issue that I had raised, that one only has to
 22 foresee the death of a human being. You don't have to
 23 foresee the sequence, the causal sequence and all the –
 24 CHAIRPERSON: The example I gave you of
 25 the robber in my house, armed robber in my house, I can't

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1 call the police?
 2 MR MPOFU SC: No –
 3 CHAIRPERSON: Because I could, if the
 4 policeman comes and there's a shootout between the two of
 5 them and either the policeman or the robber gets killed I
 6 will be on the basis of the principle that you argued –
 7 MR MPOFU SC: Yes, okay let –
 8 CHAIRPERSON: - I'd be sitting in the
 9 dock in the criminal court.
 10 MR MPOFU SC: Let me explain to you,
 11 Chairperson –
 12 CHAIRPERSON: That doesn't sound right, I
 13 mean –
 14 MR MPOFU SC: No, it's very simple. If,
 15 the question is again you have to postulate the reality, if
 16 you know, or you're the owner of the house, I'm the robber,
 17 and you know that the local police are so sick and tired of
 18 robbers that every time they see a robber they kill them,
 19 you know this, or you have just done a study that shows
 20 that these police are so averse to robbery that you'll be
 21 killed, and knowing that, as you do, Chairperson, when you
 22 see me in your yard, you call the police, then how can you
 23 say you did not foresee that there would be a death? You
 24 can't. There might be another basis upon which you might
 25 escape criminal liability, but it most certainly cannot be

<p style="text-align: right;">Page 39419</p> <p>1 that you did not foresee the death of a human being. It 2 can't. It's not –</p> <p>3 COMMISSIONER TOKOTA: No, in his example 4 he does foresee.</p> <p>5 MR MPOFU SC: Yes.</p> <p>6 COMMISSIONER TOKOTA: He does foresee 7 death.</p> <p>8 MR MPOFU SC: Yes, he does foresee, but 9 the difference with the Chairperson's example is that one 10 can, it's almost like the weighing of two evils. You can 11 say well, he does foresee, so either he doesn't call the 12 police or he allows his house to be robbed, as it were, 13 he's in a Hobson's Choice situation. Mr Ramaphosa was not, 14 it's not as if, if he didn't call the army and the police 15 the world was going to come to an end. If he didn't call 16 the army and the police the negotiations were going to take 17 – so that example is not a good one, with respect, because 18 here there would have been an element, one might be 19 sympathetic, in fact as they say difficult cases make good 20 law. The –</p> <p>21 CHAIRPERSON: I think the expression is 22 hard cases make –</p> <p>23 MR MPOFU SC: Make good law, yes. Hard 24 cases, yes.</p> <p>25 CHAIRPERSON: Bad law.</p>	<p style="text-align: right;">Page 39421</p> <p>1 if you foresaw the death of a human being, let alone in a 2 constitutional democracy where the right to life is the 3 most paramount, then the worst that can happen is that you 4 must be charged. We're not asking for the death sentence 5 here or the gallows or anything like that. We're saying 6 charge. The fact that he might be acquitted in the 7 criminal trial is, as it is said in the heads, is no skin 8 off the nose of the Commission. He might be. He might be 9 convicted, just like the assailants of Mr Langa might be 10 charged and they might be acquitted. We can't then say oh, 11 Judge Farlam was wrong, look now these people have been 12 acquitted, because that's not the point.</p> <p>13 CHAIRPERSON: No, I think I understand 14 your submission.</p> <p>15 MR MPOFU SC: Thank you, Chairperson.</p> <p>16 CHAIRPERSON: You've got by my watch 17 about eight minutes left, so I'd like you to use them 18 profitably.</p> <p>19 MR MPOFU SC: I will, and by coincidence 20 those eight minutes I'll use it for muti, so maybe they 21 might expand. Chairperson, before we do that, I just 22 wanted to say the submissions on corruption and so on are 23 in the heads, so I won't – suffice to say that it's related 24 to the discussion I was having with Commissioner Tokota 25 about the conflicts and so on. The –</p>
<p style="text-align: right;">Page 39420</p> <p>1 MR MPOFU SC: Yes, bad law. The issue, 2 Chairperson, is that what the Chairperson is postulating is 3 a moral difficulty. That case would be like S v Hartmann, 4 it will be one of those cases where you would find the 5 Chairperson guilty and probably say that till the rising of 6 the court, that's what happened in S v Hartmann because S v 7 Hartmann it was said that here's a person who killed 8 somebody else because of sympathy and euthanasia and all 9 that. On the strict test of the law they're guilty of 10 murder. You can't escape that just because, you know, it 11 was a sympathy vote and all that. But what you then do is 12 having charged the person, having convicted the person, you 13 then say till the rising of the court. That happened in S 14 v Engelbrecht as well where Judge Satchwell said an abused 15 spouse has a right to retaliate, even if the threat is no 16 longer imminent in the classical sense of the word, because 17 of the historical abuse, and Judge Satchwell had no choice, 18 I'm sure she would have wanted to acquit the accused 19 because if you read the tenor of the judgement, but she 20 said but applying the law as a judge I have to find you 21 guilty of murder and then sentenced her to five minutes, or 22 whatever it is.</p> <p>23 So the law is the law. It cannot have all these 24 byways. The issue is that if you foresee the death of a 25 human being, more so even before constitutional democracy</p>	<p style="text-align: right;">Page 39422</p> <p>1 CHAIRPERSON: You did cross-examine Mr 2 Ramaphosa on –</p> <p>3 MR MPOFU SC: On that, yes I did, 4 Chairperson, yes, and I can – unfortunately you can't use 5 the kind of argument that I was one of the authors of the 6 Corruption Act, so I know exactly what it was meant to 7 prevent and it was this kind of thing, but I suppose that 8 won't stand in any court of law. But be that as it may.</p> <p>9 Chairperson, the issue of muti, again with the 10 greatest respect, the muti thing really should not even 11 take the eight minutes because again let's come to the 12 evidence. The evidence is very clear, nobody is denying 13 that muti was used because that was done in broad daylight.</p> <p>14 The only people who deny –</p> <p>15 CHAIRPERSON: [Microphone off, inaudible]</p> <p>16 MR MPOFU SC: Oh, well let me address the 17 memory that I've just had. There are people like Mr 18 Magidiwana, Mr Phatsha, who say that they did not see the 19 muti being used. That does not mean that they are saying 20 it was not used by anybody else. You see what, and there 21 are yet other people like Mr Nzuzza who say they saw muti 22 being used. So, and in fact if all we needed to do quite 23 frankly would have been to call Lieutenant-Colonel McIntosh 24 as a witness and he would have –</p> <p>25 CHAIRPERSON: He was called as a witness.</p>

<p style="text-align: right;">Page 39423</p> <p>1 MR MPOFU SC: No, I'm saying just on 2 the – 3 CHAIRPERSON: [Microphone off, inaudible] 4 MR MPOFU SC: - on this point, ja. We 5 would have just said to him go to what happened on the 14th, 6 he will say my van was standing there and right in front of 7 me within 20 metres there were men who were using a watery 8 substance, and so on. It was not a secret. It was done in 9 broad daylight in front of the koppie, you know, and it was 10 done at the best count on the papers by something like 50 11 people and then I think the other – no, 50 is probably the 12 lowest and then there was another suggestion of 200. Let's 13 take either one of those, it doesn't matter. The point of 14 the matter is that the evidence of all the strikers, 15 including Mr Phatsha, that the majority of the people there 16 were not believers in muti, were people who believed in 17 Christian beliefs, like Mr Phatsha, and so on, on any 18 version of anybody it is a tiny minority and the most 19 important thing is that they are entitled to it. We cannot 20 judge people by our own upper class standards and say that 21 the mere fact that they believe that that muti must be used 22 or is going to protect them is different from other people 23 who believe that prayer is going to protect them. It's the 24 same thing and so the question of whether muti was used is 25 quite frankly irrelevant to the inquiry that is being</p>	<p style="text-align: right;">Page 39425</p> <p>1 was used. The question is simply whether because, because 2 SAPS is looking for a reason why the people were killed and 3 because there's no apparent reason and all the objective 4 evidence shows that the people were killed unlawfully, they 5 have to find some supernatural explanation because how else 6 would you explain? If these people were using muti that 7 made them believe that they are invisible, why did they 8 stop when General Mpembe stopped them? Why didn't they 9 just walk along thinking he can't see them? I mean why did 10 they walk on that path avoiding the police towards Nkaneng 11 if they thought they were invisible? Why did they do this 12 and put up and try and duck those bullets? And as 13 Magidiwana said, if you are not scared of bullets, why 14 would you run away from water? Because SAPS's version is 15 that they were thrown with the water and rubber bullets and 16 you can see Magidiwana in L206 screaming at the person 17 who's shooting at him from the rubber balls, as we 18 discussed earlier. If he thought ah well, firstly he can't 19 see me, secondly the bullet won't penetrate me, he would 20 have "sommer" strolled through to the slaughter. That's – 21 really, please, Chairperson, I don't care however many 22 documents SAPS can submit on this, I'm not going to read 23 them because they do not, they will not answer the 24 question - 25 CHAIRPERSON: You're not a commissioner</p>
<p style="text-align: right;">Page 39424</p> <p>1 postulated here. As to – 2 CHAIRPERSON: Sorry, while you're talking 3 about muti, may I say we've been given a document this 4 morning headed "Analysis of Mr X's statement from an 5 indigenous and psychological perspective," compiled by Ms 6 Jane Mufamadi. Now I don't know who gave us this document. 7 Is it SAPS? 8 MR MPOFU SC: Yes, it must be. 9 CHAIRPERSON: SAPS document, alright. 10 MR MPOFU SC: I think under the doctrine 11 of elimination it must be SAPS. 12 CHAIRPERSON: No, I didn't know that. I 13 didn't know whether the doctrine would apply on the police 14 side. 15 MR MPOFU SC: Chairperson, with the 16 greatest – 17 CHAIRPERSON: [Inaudible]- 18 MR MPOFU SC: Yes, with the greatest 19 respect, you see there is – I don't want to sound arrogant, 20 Chairperson, but I don't care what that document says. I 21 don't read these documents. I've not even read that other 22 report of Professor Lamlo or whatever, because so what? 23 Any old professor can come and give us the analysis of Mr 24 X's statement. The question here is not what Mr X 25 believed, or as I've just explained, whether or not muti</p>	<p style="text-align: right;">Page 39426</p> <p>1 so you don't have to read them. 2 MR MPOFU SC: Unfortunately yes, I have 3 that luxury, Chairperson. You don't have that luxury. 4 Because the, ja, those documents are never, that I can put 5 my mind on, those documents are never going to say that 6 there is a case that the strikers, let alone those who were 7 there, believed that they were invisible or invincible or 8 whatever it is. 9 CHAIRPERSON: You said you were going to 10 spend eight minutes on muti. I think you've spent your 11 eight minutes. Are you happy that the muti is not 12 invincible and it's not invulnerable? 13 MR MPOFU SC: I'm not happy, Chairperson. 14 Obviously the muti is not working because you were supposed 15 to give me more time. But Chairperson, to round off, most 16 of the submissions are, the only important recommendation 17 that I want to highlight is the issue, I think it was 18 raised by the evidence leaders, of assisting in building 19 some kind of monument at the site, I'd like to endorse that 20 recommendation. You know in the two commemoration services 21 that have taken place that issue was raised quite sharply. 22 CHAIRPERSON: The Bishop raised it also 23 in his evidence, remember. 24 MR MPOFU SC: Yes. 25 CHAIRPERSON: Long ago, two years ago.</p>

<p style="text-align: right;">Page 39427</p> <p>1 MR MPOFU SC: Yes.</p> <p>2 CHAIRPERSON: He suggested that a</p> <p>3 memorial should be erected at the site.</p> <p>4 MR MPOFU SC: Yes.</p> <p>5 CHAIRPERSON: It would be a site which</p> <p>6 forever would remind people of what happened, encourage</p> <p>7 people to ensure that it wouldn't happen again.</p> <p>8 MR MPOFU SC: That's correct. And the</p> <p>9 last one, half a minute –</p> <p>10 CHAIRPERSON: So that the deceased can be</p> <p>11 remembered.</p> <p>12 MR MPOFU SC: That's correct,</p> <p>13 Chairperson, and again one has to acknowledge the spirit of</p> <p>14 reconciliation which the Chairperson commented upon, which</p> <p>15 was displayed in the most recent commemoration where all</p> <p>16 the victims were invited, and I understand some of the</p> <p>17 other victims, not of the 34, actually attended. I didn't</p> <p>18 see them, but they told me later.</p> <p>19 The last point is the recommendation on the</p> <p>20 International Criminal Court. I know that the Chairperson</p> <p>21 is not inclined to recommend prosecutions, but I just want</p> <p>22 to say this; it is done only in this context, in the</p> <p>23 context that in terms of the Rome Statute, and again it</p> <p>24 goes to the point of saying we mustn't underestimate the</p> <p>25 intelligence of people who are uneducated because they</p>	<p style="text-align: right;">Page 39429</p> <p>1 MR MPOFU SC: Yes, that's correct,</p> <p>2 Chairperson, but whatever theoretical possibilities were,</p> <p>3 because of a recall or whatever, but the point of the</p> <p>4 matter is that all things being equal you would have the</p> <p>5 person that we are recommending to be accused number 1</p> <p>6 being the one who has to decide who has got to be accused</p> <p>7 number 1. I mean it's very clear, Chairperson, that that</p> <p>8 is why the clients were quite keen to say what are the</p> <p>9 safeguards given the dynamics of power of the people</p> <p>10 involved, high officials, ministers and so on. It's only</p> <p>11 in relation to those kinds of people. Obviously I don't</p> <p>12 know where the cut-off line would be, but it would be</p> <p>13 obviously at that level, and so it's only postulated in</p> <p>14 those circumstances. Chairperson, thank you very much, I</p> <p>15 appreciate the extra two minutes.</p> <p>16 CHAIRPERSON: Thank you, Mr Mpofu.</p> <p>17 Tomorrow morning we will begin with the argument of Mr Tip.</p> <p>18 MR MPOFU SC: Yes, I also want to thank</p> <p>19 my learned friend Mr Tip, thank you.</p> <p>20 CHAIRPERSON: Thank you for the</p> <p>21 suggestion, Mr Tip, and we'll hear from you at 9 tomorrow.</p> <p>22 The Commission will adjourn.</p> <p>23 [COMMISSION ADJOURNED]</p> <p>24 .</p> <p>25 .</p>
<p style="text-align: right;">Page 39428</p> <p>1 raised this with me and at first I also thought it was</p> <p>2 farfetched, but they kept on saying what if there is</p> <p>3 reluctance because of Mr Ramaphosa's position or whoever</p> <p>4 else of the high people, the State versus the State kind of</p> <p>5 argument, and we then had to do research and so that</p> <p>6 recommendation is raised in the alternative.</p> <p>7 [16:01] In other words even in terms of the Rome Statute</p> <p>8 the domestic court, there would have to be a refusal to</p> <p>9 prosecute in the domestic courts before it is referred</p> <p>10 there, and I want to leave you with this thought,</p> <p>11 Chairperson; if God forbid something were to happen to</p> <p>12 President Zuma, then your report will go to Mr Ramaphosa,</p> <p>13 all things being equal. So the chances of that prosecution</p> <p>14 ever –</p> <p>15 CHAIRPERSON: That's only in the short</p> <p>16 period after the death that you talked about that you –</p> <p>17 MR MPOFU SC: Yes.</p> <p>18 CHAIRPERSON: - hope won't happen.</p> <p>19 MR MPOFU SC: No well, it could be</p> <p>20 something else, a recall –</p> <p>21 CHAIRPERSON: - [inaudible] but the</p> <p>22 Deputy President doesn't automatically become the</p> <p>23 President. He acts as President I think in the place of an</p> <p>24 absent President for whatever reason until a new election I</p> <p>25 think takes place in the national assembly.</p>	

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