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 300   14 NOVEMBER 2014   PAGES 39591 TO 39719

NCRA
Guardians of the Record

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1　[PROCEEDINGS ON 14 NOVEMBER 2014]

2　[08:45]　CHAIRPERSON:　　　The Commission resumes.　In

3　order to create a bit more time for argument we've agreed

4　that today we won't have two tea breaks, we'll have one

5　short five-minute comfort break and thereafter we'll have a

6　10-minute tea break.　I know that's going to put pressure

7　on everybody, but it's a sacrifice we have to make for the

8　public good.　Mr Semenya.

9　　　　MR SEMENYA SC:　　　Chair, Commissioners,

10　thank you.　I thought to start by dealing with the analysis

11　on our terms of what was the nature of the group from the

12　koppie on the 16th.　Chair, you would realise that there are

13　sharp differences that SAPS has with some of the parties

14　with SAPS contending that it was really a distinct large

15　group of people who were on the koppie and a similarly

16　distinct smaller group of armed strikers on the koppie, and

17　the significance of that difference in our submission is we

18　do realise when a measure such as the unfurling of the

19　barbed wire started that that type of Public Order Policing

20　technique achieved what is a predictable response from the

21　normal public order situations, 2/3000 of those dispersed

22　without incident, without anything, and yet remained the

23　other 3/400 who were armed and who we say no normal Public

24　Order Policing techniques were capable of defusing or

25　dispersing them, and we do know as a matter of record that

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1　even as late perhaps as it was that the teargas and stun

2　grenade and water cannons were used on them, the result is

3　what we still had.

4　　　　With that said, Chair, can I invite us to deal

5　with an allied topic, which is what exactly was the nature

6　of the threat that was faced by the police on the 16th, and

7　I invite us to look at page 101 of our written submissions,

8　that is on page 41, paragraph 101 on page 41.　We say

9　there, Chair, that there is an argument that the threat to

10　the police at scene 1 was posed by the front group of

11　strikers who came around the kraal and that some of those

12　strikers who came around the kraal but were at the back of

13　the group did not pose any threat to the police, and we

14　made the submission that this argument is wrong and it is

15　wrong for the following reasons.　The evidence

16　overwhelmingly shows that the members of the group that

17　moved around the kraal were acting in concert and with

18　common purpose.　Even those who may not have had weapons on

19　them, if there were any, because we are still contending

20　that if there were any they were moving with a group of

21　heavily armed people and reconciled themselves with that

22　reality.

23　　　　Chair, you'd remember that the evidence leaders

24　referred us to Mr Ledingoane, referred us I think to Mr

25　Ntsenyane who – Mr Ntsenyeho – yes, Chair, they referred us

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1　to Mr Ntsenyeho in various frames from even the previous

2　days to identify this is the same person with the yellow

3　backpack and show us that individual again even on the 16th,

4　and argued that he did not have any weapons with him.　But

5　if you look at the frame of the 16th he is barely an arm's

6　length away from the man who's shooting at the police.　So

7　you would have to ask the question can he innocently say

8　that there is even practical ways of discriminating him

9　against the one who's shooting at the police?　And the

10　argument we make there is that he clearly is in concert, or

11　has associated himself sufficiently with the conduct of the

12　many.

13　　　　There are verbal threats which are uttered by Mr

14　Noki and others and they are talking the "we," "we are

15　going to show the world how we are going to kill each other

16　today.　It must with respect be with reference to the "we"

17　as a group, canvassing all of them.

18　　　　On the 13th the evidence at the railway line shows

19　a group moving in unison on the command of its leaders and

20　those at scene 1 who were possibly members of the group of

21　13 August 2012 as well.　We make the point that there is

22　evidence that those who went around the kraal followed an

23　instruction from Noki not to run away and that was the

24　evidence that we heard, that he commanded all of those

25　people that he was with shortly before they approached the

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1　kraal, and we make the submission that the suggestion in

2　argument that the threat for instance posed by individuals

3　who fired at the police could have been handled using a

4　sniper suffers from the same flaw.　It's not an individual

5　that was a threat to the police line, it was the armed

6　group as a whole acting in concert with a common purpose

7　under the leadership and direction of Mr Noki.

8　　　　Chair, we may need to emphasise what we stated

9　yesterday in our respectful submission that you are not

10　dealing with a situation of some 3, 4 individuals who are

11　in confrontation with 3, 4 police officers in an ordinary

12　course of events in this country.　You're really talking

13　about a cohort of 700-odd police officers who were in clear

14　display on the 16th and who the group of 3 or 400 decided to

15　defy.　Happily if we understand the submissions by the

16　evidence leaders there is agreement that whatever happened

17　on the 16th of August 2012 was not premeditated executions

18　and we say over and above the elements which the evidence

19　leaders identify in support of that conclusion it would

20　have been quite a feat to persuade the commanders at 14:30

21　to commit a crime of that magnitude at 15:30.

22　　　　CHAIRPERSON:　　　[Microphone off, inaudible]

23　understand Mr Mpofu to contend for that.　Remember in his

24　argument when he and I had a discussion as to what

25　happened, probably happened, the understanding was he

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1 conceded that the TRT people were probably forming a human
2 block, as it's been described, and the intention was that
3 they would disperse and disarm and arrest, but that what
4 then happened was the, when the teargas and water cannon
5 was used at a later stage than perhaps was appropriate,
6 that had the effect – remember this was the argument of the
7 evidence leaders as well that that broke the advancing
8 group into three, one group being on the side of the kraal,
9 the other one being the head group where Noki was, and then
10 the third group were the ones who turned around and ran,
11 that in effect the – this is as I understand the concession
12 – in effect the front group was sort of pushed forward by
13 the teargas and the water cannon and rubber bullets, rubber
14 balls it was, and that created the impression in the minds
15 of the TRT that they were being attacked and that's why
16 they fired because they argued that in the circumstances
17 the principles of putative defence don't apply because the
18 rules don't apply. But I understood the concession to be
19 that the intention wasn't to mow them down, deliberately to
20 mow them down, that it resulted from this particular
21 combination of circumstances. If I've stated incorrectly
22 I'll be corrected.
23   Yes, Advocate Hemraj points out that what was I
24 think conceded was that the TRT were there as a human block
25 to prevent the strikers from going into Nkaneng. There was

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1 fears that certain things might happen if they went into
2 Nkaneng, but the point was, I think it was quite clear from
3 the concession that it wasn't the contention that this was
4 a deliberate massacre, that the idea was to mow them down,
5 but was the results of a particular confluence of
6 circumstances which were described. So I don't know that
7 it's necessary for you to elaborate on the point. It seems
8 to me to be correct to say that nobody at this stage of the
9 inquiry suggests that. If I'm wrong I'll be corrected, but
10 I don't think I'm wrong.
11   MR SEMENYA SC: Yes, that was the only
12 submission we were making, that the evidence leaders also
13 make the point that whatever we can say about what happened
14 on the 16th could not have been a function of a premeditated
15 decision to execute the people as has happened, and I
16 recall you, Chair, you even pointed to the fact that in the
17 middle of international media being present there it could
18 not, that conclusion could not –
19   CHAIRPERSON: There's a further point
20 that's linked to that that I had intended raising earlier,
21 but I didn't. It's probably appropriate to raise it now.
22 Mr Mpofu in his argument begins by a quotation from the
23 best-selling work by the French economist, Professor Thomas
24 Piketty, and he quotes it on the first page of his heads,
25 making the point of course that what happened at Marikana

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1 went all over the world and was viewed with shock and
2 revulsion and so forth, but although Professor Piketty
3 doesn't state it in direct terms there is an impression
4 created certainly I think in the eyes of the casual reader
5 that what happened in South Africa at Marikana was that
6 strikers were killed because they were striking, and
7 Professor Piketty in fact refers to two earlier incidents,
8 one in Chicago, both in the 19th century, one in Chicago and
9 the other in France, where the impression seems to be – I'm
10 not aware of the details of those two incident, but this is
11 a bit like Peterloo I suppose earlier in English history,
12 where effectively people were shot because they were
13 striking. Now, and certainly we have read in the media
14 that certain people internationally have made the
15 accusation against South Africa that how dare South Africa
16 criticise other countries when they themselves shoot
17 strikers because they're striking. Now am I correct in
18 thinking that it's not contended by anybody that the
19 strikers in this case were killed because they were
20 striking?
21   MR SEMENYA SC: It must be common cause
22 at least before this hearing, Chair.
23   CHAIRPERSON: If there is a contrary
24 impression out there either in South Africa or in the rest
25 of the world, that's something which should be –

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1   MR SEMENYA SC: Dispelled.
2   MR MPOFU SC: Chairperson, I'm sorry,
3 just in fairness to Mr Semenya, I don't want him to argue
4 on the basis of these concessions and understandings which
5 I'm going to contest. Firstly if there's an impression
6 that they were shot because they were striking, it's not
7 out there, it's in here and I'm going to deal with it when
8 I argue.
9   CHAIRPERSON: Are you going to contend
10 they were shot because they were striking?
11   MR MPOFU SC: Yes, "Today we are ending
12 the strike." That's what Mbombo said.
13   CHAIRPERSON: I see, alright. If that's
14 your contention then obviously it's one that we have to
15 address. If it's your contention and you're going to
16 advance it then we'll have to think about it. If you're
17 correct we'll uphold the contention and if you're not, we
18 won't.
19   MR SEMENYA SC: Yes, Chair, can I then
20 address another point? The case SAPS is making in relation
21 to what may in part explain the events of the 16th is that
22 the plan was interrupted and we know when we look at what
23 is called the Scott's Plan that indeed the plan was that
24 the barbed wire was going to be unrolled, or rolled out,
25 there was going to be an announcement made to the strikers,

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1 they were going to be given an opportunity to disperse and
2 that did not happen for what we now know through the
3 evidence that the strikers went to the unfurling barbed
4 wire. We need hardly make that point any higher, it's
5 evident even from the video clips that depict the events of
6 that day.
7   Somewhat a little contentious is the role and
8 function of the NMF, extraordinary session of the NMF. Two
9 elements to it; the one it's even if it were to be
10 contended that the decision to disarm the strikers the
11 following day was made by the NMF, we would submit that
12 that would be perfectly lawful that the highest top brass
13 of the South African Police meet and look at the gravity of
14 the situation unfolding in Marikana with 10 lives down and
15 say no, this has to stop. What we may debate later, as we
16 definitely will, would be the question of was that done
17 with the care required of police service in the
18 circumstances.
19   But there is another difficult subject around the
20 NMF and that relates to the fact that the National
21 Commissioner as well as the Provincial Commissioner do not
22 mention that event until, even Roots appears not to be
23 alive to the meeting that was held there and the evidence
24 by both the NATCOM and the PC on that issue is that it was
25 an inadvertent omission, but I think, Chair, we can make in

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1 mitigation of that error, if it is found to be one, the
2 very fact that there doesn't seem to be anything ominous
3 about what was discussed there, so the –
4   CHAIRPERSON: I know you say that, but
5 why won't they tell us what happened? Why do we get these
6 evasive responses to the questionnaire that I sent out?
7 Why does the National Commissioner herself when I ask her
8 about it say that she can't remember? I mean things had
9 gone dramatically wrong the next day. I would have
10 imagined that the discussion that took place is something
11 that she would have remembered, but she gives me the answer
12 when I asked her was the risk discussed, she says "I can't
13 be expected to remember pedantic detail about time." Now
14 these are the factors which lead one to, prima facie4
15 obviously, subject to what you're going say, to infer that
16 something is being concealed from us and it must be
17 something awkward because you don't conceal things that
18 aren't awkward. So if it was as you say it was, nothing
19 wrong with what was said, perfectly in order,
20 understandable, why didn't they tell us all that? Why do
21 they go to these extravagant lengths to conceal what
22 happened from us? Normally when a witness does something,
23 conceals something or says something untrue, very often
24 there's a reason or very often actually it points, just
25 like an arrow pointing in the direction of the truth. Now

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1 in what direction does this concealment point?
2 [09:05] MR SEMENYA SC: Well, Chair, again, a
3 matter of conjecture on my part that it may very well have
4 been thought that an announcement of that fact would show a
5 decision was taken by them as opposed to the Provincial
6 Commissioner. Even something innocuous like that, I'm
7 referring to the content of that conversation with the top
8 brass. We can accept that whatever it is that was
9 discussed was also communicated to the JOC the following
10 day.
11   CHAIRPERSON: I don't want to make things
12 difficult for you by heckling you, but I have got problems
13 that I must put to you. The decision taken was to endorse
14 her proposal, so therefore it was a proposal she made, not
15 a decision she made, a proposal she made which they
16 endorsed, that's the first point. The second point is you
17 remember I asked her, I said to her your experience is not
18 in the operational matters, your experience is in financial
19 administration. She said yes. I said there were
20 experienced operational people around the table among your
21 fellow provincial commissioners and if any of them – if
22 there'd been an argument to say no, no but the risks, we
23 must look at it very carefully, perhaps we mustn't accept
24 your proposal in the form you've presented it, what would
25 your attitude have been, and she said oh no, she would

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1 obviously have accepted that because she accepted her
2 limitations in that field, in that area. And then the
3 further point is what the JOC was told, as far as we know,
4 the JOCCOM was told, was simply that she had decided, that
5 that was recorded in the occurrence book, and in fact
6 Major-General Annandale made it his business to see that
7 that was recorded, stood over Brigadier Pretorius while she
8 wrote it. So I'm not sure, with respect, that – I must put
9 the problems to you because I may be overlooking something,
10 but I'm not sure, with respect, that the conjecture you put
11 is actually going to work.
12   MR SEMENYA SC: Chair, I was attempting
13 obviously to answer the difficult question, but also put in
14 the postulate that whatever may have been discussed there
15 couldn't be something inconsistent with what the PC then
16 tells the rest of the world at 9:30 the following day. It
17 can't be incongruent to that and what the PC tells the rest
18 of the world at 9:30 that morning is something lawful.
19 It's we are going to wait until there is a voluntary
20 disarmament on their part, but if there isn't we're going
21 to have to act.
22   Let me attempt, Chair, again to tackle another
23 point. You'd recall, Chair and Commissioners, that there
24 was a whole illustration made during the evidence which the
25 evidence leaders were suggesting there were two areas on

1 which around the kraal the advancing strikers could have
2 been blocked, path A and path B. The difficulty we have
3 with that proposition is we are not told if they were
4 blocked then what, what was going to happen next. Does
5 that mean the police would then retreat back to the JOC and
6 say to the PC we feared that we are going to be under
7 attack and in the light of that we decided to come back to
8 the JOC and to re-strategise. And if we take that
9 conjecture forward, the armed strikers got into the
10 settlement and killed people and we'd hear the police
11 service that says to the rest of South Africa, oh the only
12 reason we retreated there is because we feared we were
13 going to be attacked. It can't work like that in a
14 constitutional democracy. The only people who have, as we
15 submit, the right under the Constitution to maintain law
16 and order, it's them, and it is not available for them, as
17 it might very well be for you and I, Chair, to retreat and
18 run away and tell everybody else and mayhap even with
19 aplomb that we may get for running away. This is their
20 constitutional mandate, they have a duty to maintain law
21 and order. You just don't block it at A or B and do
22 nothing about it. In fact I think a better proposition, if
23 that were a possible avenue, would have been for Brigadier
24 Calitz to say mission abandoned. Then everybody else gets
25 into their cars and the people move, why block them at all?

1   CHAIRPERSON: Does it follow, I mean I
2 can understand if the only alternative once they'd blocked
3 them was to go back to the JOCCOM, to the JOC, abandon the
4 mission, but would that have been the only thing they could
5 have done? Once they've blocked them so they can't come
6 forward, they then, presumably the police would have stayed
7 there, they could then have used the teargas and the non-
8 lethal methods, you know, the force continuum, the water
9 cannon. Remember at the demonstration, we saw how powerful
10 the water cannon is, it knocks you backwards. They could
11 have used the water cannon, they could have used the
12 teargas, they could have used the stun grenades, they could
13 have used the rubber balls. The indications are that the
14 non-lethal methods actually did have the effect of driving
15 that section of the advancing strikers, not in the front,
16 backwards. So if they'd blocked them so that – they then
17 used the water cannon and so forth, the non-lethal methods
18 in a manner which didn't drive some of the strikers forward
19 and create the impression that they were trying to attack
20 the police, but drive them all back and presumably they
21 would have gone towards the koppie, and then the plan
22 could have been resumed, but I mean these are what Mr
23 Burger calls counterfactuals, aren't they?
24   MR SEMENYA SC: Let's test that, Chair.
25 You block them at path B, that is at the mouth of the

1 kraal, where do you use the non-lethal methods? Because
2 you're behind there. The only path, Nyala 4 has already
3 closed that side of the kraal, you close with Nyala 6 the
4 other mouth of the kraal, they are on the other side, how
5 do you disperse people like that? All they have to do is
6 to stand another distance away from you, then you'll have
7 to open.
8   CHAIRPERSON: But what would they have
9 done – you remember the plan didn't prevent the strikers
10 from going into Nkaneng provided they took the long road as
11 opposed to the short road. If they had gone west into
12 Nkaneng from the other side there wasn't a problem. And in
13 fact if some of the earlier people who left had gone into
14 Nkaneng they weren't prevented from taking their weapons.
15 That was something that I remember General Annandale
16 conceded in his evidence. So if you stopped them going
17 directly into Nkaneng opposite the kraal you're then
18 effectively putting the clock back a bit and they're either
19 going to stay where they are or go back to the koppie -
20 because remember the information was they didn't want to
21 give up possession of the koppie and they would fight to
22 retain it and so forth - or they're going to go the long
23 way and go into Nkaneng. But the plan was, you remember,
24 that once they are in a fenced-off area then it would be
25 possible for the warning to be given, which presumably

1 would be the section 9(2) warning which Brigadier Calitz
2 was going to give, and then the rest of the plan could have
3 been resumed. How successful it would have been, of
4 course, is another matter, but it was always going to be
5 that plan. So the police can't be heard to say well it's
6 unfair to suggest we should have carried with our plan if
7 they were going to, wanted to carry on with it anyway. The
8 lack of wisdom of the plan kicks in at an earlier point,
9 but we don't have to discuss that now.
10   MR SEMENYA SC: But then it means where
11 you have blocked them you would have to unblock that to go
12 to them, to the koppie.
13   CHAIRPERSON: The original plan
14 envisaged, you remember, that there was going to be a block
15 on the other side of kraal and there was some suggestion
16 that there would have been some kind of gap through which
17 the police were going to enter. That was always inherent
18 in the plan.
19   MR SEMENYA SC: No, Chair, you remember
20 when Nyala 6 was originally positioned in that way, the
21 plan was that they were going to move out as the police
22 from the western side of the kraal. It's only when Nyala 4
23 and Nyala 6 were brought in that they were going to now use
24 the eastern side of the kraal and that is where it is
25 suggested a block must happen. Now I'm saying if you have

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1 blocked both of them and they went back and you intended to
2 continue the operation you'd have to unblock that so that
3 you go out of it.
4   CHAIRPERSON: It doesn't it depend on the
5 nature of the block. If it was a wire block from Nyala 6
6 then there was some suggestion you could create a space.
7 If it was a human block of TRT people in a line then you
8 haven't got a problem at all, have you?
9   MR SEMENYA SC: Well perhaps this
10 illustrates my point, Chair, with the exchange that we have
11 had; this is a decision that to be made by Calitz together
12 with all the commanders there in fractions of seconds and
13 look at which of those options would have been feasible and
14 which one would have been practical to implement and what
15 efficacies would be with one or opposed to the other.
16   CHAIRPERSON: I'm sorry, I don't quite
17 understand. The situation we're postulating at the moment
18 is there was a human block created, the problem was the
19 non-lethal force created the situation where some of the
20 strikers in the front were pushed forward with consequences
21 that we know. But if that hadn't happened, the human block
22 had been called and they couldn't advance, then wouldn't
23 there have been effectively a standstill? I mean Calitz
24 and company could have then had a meeting, decided what to
25 do, they might well have decided to call off the operation

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1 until the next morning, that's another possibility which
2 arises. But there were various things they could have
3 thought about, but they were experienced, Calitz was an
4 experienced POP man, some of the others were as well,
5 Merafe and others, though Merafe wasn't there, he was
6 elsewhere. But some of the others were also experienced.
7 One would hope that it would not have been beyond their
8 ability to come up with something that would have worked
9 and would have been relatively risk free.
10   MR SEMENYA SC: There are two things,
11 Chair. Chair, perhaps two things. There was indeed a TRT
12 basic line human block there, it didn't work, it produced
13 the result that it did. But –
14   CHAIRPERSON: Why didn't it work? If the
15 non-lethal force had been used slightly earlier before the
16 strikers had got to that point and presumably the ones at
17 the front would have done what the ones slightly further
18 back would have done, turned around and gone back. The
19 problem was this concatenation of circumstances brought
20 about by the fact that the non-lethal force was only used
21 after some of the strikers had passed the point at which
22 the non-lethal force was going to be used. Isn't that so?
23   MR SEMENYA SC: That's a different point.
24 I was answering, or attempting to answer the first one,
25 whether a human block could have blocked them out and I'm

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1 saying that on the evidence it looks like even the TRT line
2 wouldn't do it. I don't see how a POP line similarly lined
3 on the mouth of the kraal could have stopped them
4 advancing.
5   Around a different subject, the question of the
6 Scott's plan, of course Chair, if we are correct that there
7 was an attack on the police line of the nature we describe,
8 even on Colonel Vermaak's description of the events that
9 they were impi-like, that POP techniques could have
10 contained that threat, then there clearly is nothing wrong
11 with what is the Scott's plan because it sought to cater
12 for that which goes beyond standing order 262. And we take
13 solace when we read the submissions of the evidence
14 leaders. They too think somehow 262 should be able to be
15 amended to accommodate something more. It's implicit in
16 their recommendations if you read them.
17   MR BUDLENDER SC: Chair, we say there's a
18 lack clarity as to whether that applies and it should be
19 amended to make it clear that it applies in these
20 circumstances. We don't say that it doesn't apply, we
21 leave that open.
22   MR SEMENYA SC: Yes, but that grey area
23 says let's clarify it to make sure that it is patently
24 clear it caters for things beyond –
25   CHAIRPERSON: There was an opacity, I

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1 think is the right word, in 262 which should removed. 262
2 should spell out clearly what is to happen in this kind of
3 situation and we will make recommendations in that regard
4 and hopefully we'll get assistance, well we have already
5 got some assistance from you in your heads, maybe if you've
6 got other ideas which would help to make it clearer they
7 would be gratefully received.
8   MR SEMENYA SC: Well, Chair, within SS we
9 made a submission the legislative instruction that is
10 9(2)(d), the statute there contemplates the use of weapons
11 and firearms if events cannot be contained otherwise.
12   CHAIRPERSON: It authorises the use of
13 firepower in particular circumstances, it doesn't say how.
14 That's a detail which one would expect the standing order
15 to provide.
16   MR SEMENYA SC: Indeed, Chair. Another
17 subject was the question that there was relative calm after
18 the killing of Mr Twala and any offensive action by the
19 police would only serve to escalate as opposed to de-
20 escalate the conflict. Again if we are correct, Chair,
21 that the decision taken by the PC on the 15th that offensive
22 action would have to be taken was clearly intended to
23 contain what was perceived to be the real threat, and the
24 real threat in the wake of the 9th to 16th was indeed that
25 you have heavily armed people who are responsible at the

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1 time the decision was made for the death in part of 10
2 people. There was enormous damage to property, police
3 officers had been killed, security personnel has been
4 killed, how much more can you expect an escalation? Would
5 an escalation be another 10 more deaths by that time, 20
6 more that were to be contained? Of course the threat in
7 our submission is precisely the very fact that there are
8 this many, they are this determined, they are this armed
9 and they pose a threat to law and order. That's what had
10 to be contained, we would submit.
11   Another argument is offered that of course there
12 could have been a way of putting a filtering line. Now our
13 submission in relation to that, Chair, is that if we do
14 justice to the evidence and we recognise the terrain, and
15 we accept the evidence that virtually the people who came
16 to the koppie came from all directions really, and you have
17 limited resources as the police do, where do you put this
18 filtering line? Is it on the western side, is it on the
19 eastern side, is it on the southern side, is it on the
20 northern side? And clearly if they can see there is a
21 filtering line there they will go the other direction and
22 that filtering line, its efficacy is compromised or
23 undermined or cancelled for that matter. That would be our
24 submission in relation to that.
25   Again, Chair, let us look at another matter; says

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1 General Mpembe and says General Mbombo in their
2 communication with Lonmin officials, there will be
3 bloodshed, and the arguments, if we understand them, is
4 that that must mean that both of them did foresee the
5 bloodshed of strikers. But again, Chair, the evidence by
6 both of them is we have used those words to try and impress
7 on Lonmin people to appreciate the urgency of the dialogue.
8 What could be wrong with that? What could be wrong with
9 that as an explanation to say please let's avoid any
10 bloodshed, please go and speak to the people in the koppie.
11 Please, dialogue is the best way of resolving that.
12 [09:25]   Now we dislocate those expressions in those
13 communications and heighten them to the level of suggesting
14 that there was a foreseeability of some bloodshed occurring
15 the following day. If this discussion of bloodshed and
16 reference to bloodshed was said among the police persons
17 themselves to the exclusion of others, it would bear
18 contextually a different meaning altogether.
19   CHAIRPERSON: I think, if I may say so,
20 that you're not taking into account for the purposes of
21 your argument the evidence that General Mpembe gave when he
22 came back and he gave, I asked him questions about what
23 he'd said on the Wednesday night and I understood his
24 evidence to be that he wasn't telling an untruth to
25 Zokwana, what he was saying – I'm concerned with what he

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1 said to Zokwana. He said to Zokwana there's no way you can
2 disarm someone on the koppie if he's got an axe and you've
3 got a rifle, there will be bloodshed. He then proposed
4 another approach which one can call the Mpembe plan, which
5 was to get information and we know that a process was
6 already underway of a team of detectives who'd come from
7 Gauteng and they were going through all the footage and
8 seeking to identify the people, with the aid of Lonmin, who
9 had weapons and find out their names and where they were
10 and so forth, and he asked Mr Zokwana to get the NUM people
11 anonymously to provide information also as to who had
12 weapons in the hostels, who had weapons in the informal
13 settlement, so that the weapons could be got there because
14 these were daytime strikers, or daytime arms bearers. They
15 used to go home, come in the morning and go home in the
16 evening, some of them even went home for lunch. So that
17 was the Mpembe plan. The Mpembe plan was, if it had been
18 implemented, been given a chance, of course it couldn't be
19 because the order came you've got to act on Thursday. If
20 the Mpembe plan had been followed, substantially less
21 risky, it would have dealt with the matter, or may well
22 have done, in a much less disastrous fashion. I don't know
23 that General Mpembe has got the credit that he deserves
24 for, (a), the sensible approach he adopted on the 13th, and
25 what was clearly his approach on the Wednesday evening. So

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1 it's not just appropriate to have regard to what he said to
2 Lonmin, we've also got to have regard to his clear thinking
3 on the matter as expressed to Mr Zokwana.
4   MR SEMENYA SC: Chair, even there it is
5 an attempt to say it's important we go to the koppie and
6 talk to the people. So –
7   CHAIRPERSON: I'm not in any way
8 challenging what you say there. You've made the submission
9 very strongly that Lonmin bears some of the blame for what
10 happened because they were obdurate and they, we were asked
11 what is the source of their obligation to talk to the
12 strikers. Well the answer given was a request from the
13 police. They were doing their best to deal with a very
14 difficult – I think everybody commented on the matter,
15 accept it was a very difficult situation. Mr White was
16 quite candid about that, very difficult situation the
17 police had. They needed all the help they could get from
18 Lonmin. They asked Lonmin and Lonmin for reasons which
19 attempts have been made to explain, didn't cooperate. If
20 that's the point you're making, that prima facie is a sound
21 submission.
22   MR SEMENYA SC: That's right, also an
23 attempt on my part to say we place those bloodshed
24 utterances in the context in which they obtained. The
25 other aspect we have to address because of the submissions

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1 made by Mr Ntsebeza relates to the scarifications. Chair,

2 if one looks at the post mortem reports, this is what

3 stands out; those that were done by Pathologists Morad and

4 Ngude do not distinguish between scarification marks that

5 are old and new, but they do make reference to them and the

6 others are described as fresh scarifications. Now of those

7 who were at scene 1 it is only Mr Ledingoane and Mr

8 Gwelani, two only who did not have scarifications.

9   CHAIRPERSON: And we know they weren't

10 anywhere near the front line, so they weren't part of the

11 front group who you say were the makarapa.

12   MR SEMENYA SC: I will still invite you,

13 Chair, to say that please accept –

14   CHAIRPERSON: [Inaudible] in the wrong

15 direction. That point is not put as a point against you,

16 it's a point in your favour.

17   MR SEMENYA SC: No, no, no, I accept

18 that.

19   CHAIRPERSON: They weren't part of the

20 front group. They weren't part of the group who you say

21 were the makarapas. They were people who were

22 unfortunately shot at from a distance when they weren't

23 part of any advancing group. So it doesn't help, you

24 wouldn't expect them to have scarification marks because

25 they were in a different position. Your point is all the

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1 front group people who were killed had scarification marks.

2 That's your submission.

3   MR SEMENYA SC: That's the submission

4 we're making, Chair. Even where there is argument directed

5 at saying there was channelling at the kraal, nobody can

6 advance an argument with cogency that suggests that

7 channelling was per plan or per design or per instruction

8 of anybody. What I think we see, or what spawns that type

9 of argument is once you freeze the images at a particular

10 point you are then able to see them positioned in a way

11 that – to use the language that has been said around that –

12 which has the effect of channelling them. But nobody is

13 advancing an argument that says there was a design or a

14 decision or anything that the people should be channelled,

15 and that must be so, Chair, because to channel them it

16 means you would have appreciated that the only way in which

17 they could have an escape or an exit would be through one

18 direction.

19   We have just been having the exchange, Chair,

20 that said a whole number of people dispersed westwards.

21 Even after the shooting a whole number of people did

22 disperse westwards. So it cannot be channelling, and if I

23 understand what the Public Order Policing techniques do,

24 channelling as a method is – and the exhibits are there to

25 show us – it's an effective tool in urban settings because

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1 then you are able to use solid structures to channel people

2 in a particular direction, not in an open field where they

3 can go anywhere they choose.

4   The evidence leaders have obtained now the

5 opinion of Dr Naidoo in relation to the death of Mr Mati

6 and Chair, yes, we know that Dr Naidoo did not perform the

7 post mortem, he came to the conclusion different to the

8 pathologist that performed that post mortem. He came to

9 that conclusion based on looking at the post mortem report

10 and the photographs and the Chair correctly directs that a

11 proper resolution of that conflict of expert opinion, if

12 the second one is also one, is that there must be this

13 conference and response by the pathologist who did the post

14 mortem report to say whether or not he still stands by it

15 and if he needs to advance further reasons why his

16 conclusion is a correct one, can then give it to the

17 evidence leaders. But we cannot at this moment move from a

18 premise that says Mr Mati was killed by a bullet wound.

19 That conclusion cannot stand, and absent an agreement by

20 the experts, unfortunately the Commission would have to say

21 there's no agreement on that point. It can't do better

22 than the evidence that is available before it.

23   So the argument goes in respect of another

24 element that Captain Loest did not fire on the 16th and so

25 did the others not, and if you understood the argument it

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1 is intended to convey this conclusion that there could

2 therefore not have been a threat to life, but Chair, you

3 would recall even in examination of Captain Loest I

4 pertinently put it to him that if nobody in that line had

5 fired at the advancing group, what would he have done, and

6 he said he would have fired too. So it is understandable

7 why he felt sufficiently covered by those who were

8 discharging their firearms at the time.

9   CHAIRPERSON: Wasn't there also some

10 suggestion that in this kind of operation the commanders

11 shouldn't fire?

12   MR SEMENYA SC: Indeed, Chair, but

13 obviously this is in instances where the commander orders

14 the firing. Well, the facts are a little different, but

15 yes, that is the case, Chair.

16   It is significant, Chair, to draw your

17 Commission's attention to this piece of evidence that when

18 one looks at the people who were lying on the ground at

19 scene 1, you do also see Mr Magidiwana at that point where

20 he is, he still has his arms with him. So it cannot be

21 that even however belated the non-lethal measures that were

22 taken could not get him just to drop those arms and move on

23 and say well, this is it. He is still having them at that

24 point.

25   We need to address what may again seem a – which

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1 may conduce to a misinterpretation in our submission of
2 Colonel Vermaak's evidence in relation to the events of the
3 13th. He says from the chopper he could see no reason why
4 the teargas was discharged because as his observation went
5 it could not have been that the people were going to the
6 settlement.
7   But Chair, a careful scrutiny of the record will
8 show that the settlement which Colonel Vermaak was
9 referring to is the one the other side of the river and
10 that is not what General Mpembe was attempting to do,
11 because he wanted – that is now General Mpembe wanted to
12 have the Nyalas comes into the road that separated the veld
13 from the settlement, the entire settlement, and that
14 vindicates another point, Chair, because there is a debate
15 as to whether or not at that time the strikers were going
16 to the koppie or they were going to the settlement.
17   Now we say look at the body of Warrant Officer
18 Lepaaku. That body is almost adjacent to the road
19 separating the veld and house number C05, which is on the
20 other side of that road. So to say that they were not
21 close to the settlement, to the informal settlement, cannot
22 be correct if you reference that with the point where
23 Warrant Officer Lepaaku was killed and the other striker as
24 well.
25   Very late in the day we were given a report by

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1 the Bapo Ba Mogale of some three academics who wrote on the
2 question of muti, Chair. We would like that to be admitted
3 as an exhibit as well. We have attempted to give everyone
4 the CVs that were not initially attached to the report –
5   CHAIRPERSON: That is the report by Dr
6 Mufamadi and two others?
7   MR SEMENYA SC: That is correct, Chair.
8   CHAIRPERSON: And we were given
9 yesterday, I think, or was it the day before, CVs of Dr
10 Mufamadi and her colleagues.
11   MR SEMENYA SC: Indeed, Chair, and we'd
12 say whatever –
13   CHAIRPERSON: Mr Mpofu I understand
14 didn't object to the document, he just said he wasn't going
15 to read it and he said it wasn't of any value, so there's
16 obviously no difficulty about admitting it and we will have
17 to read it because we have to read everything. We're not
18 in the fortunate position as Mr Mpofu who reads
19 selectively. But anyway, it's in and I'm sure Ms Pillay,
20 who's nodding her head, she will – we won't waste time with
21 it now, she will give it an exhibit number and that will be
22 communicated to everybody.
23   MS LE ROUX: Chair, the Human Rights
24 Commission has objections to that document. I'm not sure
25 if you'd like me to put them on the record or include them

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1 in our note since they go to the question of weight.
2   CHAIRPERSON: I think you'd better
3 include them in your note because –
4   MR BUDLENDER SC: Chair, we'll also have
5 something to say about that in our notes.
6   CHAIRPERSON: Yes, yes, I understand.
7 There are two points; one is admissibility, admission I
8 suppose, and the other is weight. I can understand there
9 may well be arguments about weight, but I don't know that a
10 commission of this kind we should be too strict on the
11 admissibility side.
12   MR MPOFU SC: Chair, while we are at
13 this, we also object to the document.
14   CHAIRPERSON: Alright, you've got that on
15 record.
16   MR MPOFU SC: Obviously we can only
17 object on the admission, not the weight, since we've
18 resolved not to read it.
19   CHAIRPERSON: I see. When you exercise
20 your hard-won rights to reply you can deal with the matter.
21   MR SEMENYA SC: Well yes, Chair, I don't
22 know whether that is going to be ZZZZ-something.
23   CHAIRPERSON: Ms Pillay will let you know
24 when we take the first comfort break.
25   MR SEMENYA SC: Thank you, Chair. Can I

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1 try and tackle another aspect, Chair, or at least to finish
2 this exhibit and say of course it is going to be a question
3 of what weight is to be placed on it, but as we pointed out
4 earlier, it is quite a fresh explanation coming from what
5 from my reading of the CVs, well qualified individuals who
6 can speak on that. They may not be able to persuade you
7 that X is a believable witness, and that's not where we
8 seek their support.
9   Where we seek their support is to say to us that
10 we can accept that there are people in this country who
11 practice traditional, who have belief in traditional
12 medicines. They use it for a whole number of things, and
13 in the main it is for non-violent purposes, but there are
14 instances when it is used precisely to fortify oneself in
15 relation to whatever is perceived to be a threat to them
16 and to get themselves strong.
17   Now you would recall even at this hearing at the
18 very least there is an attempt to explain the use of the
19 muti on a plinth that says it was used for defensive
20 purposes, and we are not told exactly what defensive
21 curtain it offers one who has underwent that muti in the
22 face of an attack, but it could clearly not have been
23 intended to be an attack, a defence against a police
24 attack.
25 [09:45]   And Mr Mpofu then invites us to say if they truly

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1 believed that, that the muti would render them invisible,
2 then it is not rational when we see that they realised that
3 the police see them and therefore it can never offer itself
4 as a rational explanation. Well, there is an answer to
5 that, Chair, and it is this; often there is no congruence
6 between faith and reason. This country has a fair
7 population of Christians who believe that Jesus Christ
8 walked on water, that he was born of a Virgin Mary, that he
9 took six pieces of fish to feed a whole body of people,
10 multitudes of people, that he turned water into wine and a
11 whole host of other things. Are they rational? I don't
12 want to go down that road, but I am merely trying to
13 illustrate that it is a belief system. It is shared by
14 many. We respect it. And equally where the Constitution
15 says there must be – the right to believe is protected
16 under the Constitution, it must include the belief of those
17 who think muti does what they say it can do. We may not
18 like it and –
19   COMMISSIONER TOKOTA: Let me perhaps
20 interrupt you to say that actually speaking for myself as a
21 Black person in South Africa, I agree with Mr Mpofu that
22 the Blacks do, some of the Blacks do believe in muti use
23 for various reasons. So speaking for myself you can bring
24 in the professor from UK or from wherever, he is not going
25 to change that. And the fact of the matter, you can

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1 believe in what you believe in, like Christians and so on,
2 and maybe Mr Mpofu is right in saying it's not even
3 necessary to read these things because that's what it is
4 inherent within certain Black populations.
5   MR SEMENYA SC: And to the extent that it
6 may be common cause amongst some of us it then begins in my
7 respectful submission to explain what may otherwise be
8 inexplicable, and I am making this submission purely to
9 remove the temptation that we should look at a rational
10 basis for the use of muti. Chair, at the beginning of our
11 written submissions we refer you Chair, to the sage words
12 in our submission of the Deputy President in relation to
13 this whole conspectus of issues, and we quote the evidence
14 where he says, "The tragedy that has occurred at
15 Marikana" –
16   CHAIRPERSON: Sorry, page?
17   MR SEMENYA SC: Page 1.
18   CHAIRPERSON: Page 1 of your reply?
19   MR SEMENYA SC: Of my written
20 submissions, Chair.
21   CHAIRPERSON: The main heads, thank you.
22   MR SEMENYA SC: There the Deputy
23 President says to us, "The tragedy that has occurred at
24 Marikana has to be approached as a collective failure by
25 many role-players, many stakeholders," and I don't think he

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1 says that many who had some role to play can say that they
2 do not bear any form of responsibility. "I think the
3 responsibility has to be collective and as a nation we
4 should dip our heads and accept that we did fail the people
5 of Marikana, particularly the families and the workers and
6 those who died, we did fail them," end of quote at that
7 point. The significance of all of this Chair, is there is
8 in our respectful submission merit to that. The tragedy
9 that is Marikana was produced by a confluence of factors,
10 as we said, and if it is to be avoided we as a nation would
11 have to act differently and bring all our shoulders to the
12 wheel to get a different result, and we say in those
13 written submissions from paragraph 3, Chair, that the place
14 to start is to accept a common understanding of what
15 constitutes acceptable public order discourse for South
16 Africans. It must also be plain to understand what impedes
17 the achievement of peaceful protest. It must be accepted
18 by all that what we want is a South Africa that is able to
19 offer those who want to exercise the constitutional right
20 of assembly to do so, and to do so within the constraints
21 that are placed on the exercise of that right by the
22 Constitution and the law.
23   We also make the submission that there must also
24 be a common understanding of what militates against the
25 attainment of peaceful protest and assemblies. We must

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1 agree that a South Africa we do not want is one where
2 public dissent, be of a social, economic, political or
3 labour nature is expressed by groups of persons bearing
4 weapons and bent on conflict and mayhem. We must agree
5 that we do not deserve a South Africa that looks with
6 complicit acquiescence at public display of criminal
7 conduct where industrial disputes which can be resolved
8 through negotiation and dialogue are left to fester until
9 police intervention is inevitable, where capital can for
10 commercial reasons ignore its legal obligations designed to
11 ameliorate the working, social and living conditions of its
12 employees and hope to subdue disaffection of its workforce
13 through police intervention. It must be a country where
14 those who hold political oversight do take accountability,
15 I think it should read, for some of the protests which are
16 spawned by political grievances, where civil society does
17 not express outrage when law and order is disregarded and
18 where the police are forced to go above the public order
19 tools of law enforcement with resulting deaths and injuries
20 to persons, where trade unions can with ease abdicate
21 leadership and responsibility flowing from the wrongful
22 conduct of their members.
23   We also make the submission in paragraph 5 that
24 capital place an important role in the economy of the
25 country, and that with that accepted, the right of capital

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1　to participate in the economy must also answer to its duty
2　to resolve industrial grievances through negotiation
3　principally and that the role of capital in such a
4　democratic discourse is one which appreciates its
5　responsibilities imposed by law, in this case being mining.
6　The responsibility of capital is also to conduct its
7　business within the prescripts of the Constitution and the
8　relevant legislation.
9　　　　　More importantly and directly we say about
10　Lonmin, it was obliged to comply with its legal obligations
11　set out in the Mining Charter and its social labour plan,
12　which obligations were intended to ameliorate the living
13　conditions and working condition of its own employees,
14　which are also intended to restore the dignity of workers
15　eroded by past practices of overcrowded single-sex hostels,
16　and it could do this as capital appreciating its leverage
17　in negotiations must always prefer dialogue as a tool for
18　resolving industrial conflict.
19　　　　　That Chair, we submit is the South Africa that we
20　submit we should all be striving for and it is achievable
21　only in our respectful submission if, as we say, all
22　shoulders come to the wheel, but most importantly, before
23　we make our final submissions it's important that we
24　explain the –
25　　　　　CHAIRPERSON:　　　　I'm sorry to interrupt you,

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1　Mr Semenya, would this be a convenient stage for us to take
2　the first – it's really a comfort break, we would only be
3　five minutes, I hope.
4　　　　　MR SEMENYA SC:　　　　Indeed, Chair.
5　　　　　CHAIRPERSON:　　　　Will it be convenient for
6　you? I don't want to interrupt your, the flow of your
7　argument but –
8　　　　　MR SEMENYA SC:　　　　Indeed Chair.
9　　　　　CHAIRPERSON:　　　　Please everyone try to be
10　back here in five minutes.
11　　　　　[COMMISSION ADJOURNS　　　　COMMISSION RESUMES]
12　[10:04] CHAIRPERSON:　　　　The Commission resumes. Mr
13　Semenya.
14　　　　　MR SEMENYA SC:　　　　Chair, I'm almost at the
15　tail-end of our submissions, barring the questions that I
16　may have to field from the Commissioners, and –
17　　　　　CHAIRPERSON:　　　　Most of the questions that
18　you have to field you've already had, you've dealt them I
19　think as best you could in the circumstances.
20　　　　　MR SEMENYA SC:　　　　Thank you, Chair. There
21　are those, a few of these that I must deal with. Chair,
22　you'd recall there is also a suggestion, if not something
23　higher, that Brigadier Calitz ought to have given a warning
24　at koppie 3 and it seemed as though it is a warning as
25　contemplated by Standing Order 262.

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1　　　　　CHAIRPERSON:　　　　Well, there's also the
2　suggestion he should have given a warning as required by
3　section 9(2) of the Regulation of Gatherings Act. If he
4　was going to embark upon a dispersal as envisaged in the
5　section then it would seem that he – this is something that
6　perhaps you can argue on. If you're not ready to argue on
7　today you can give us a note on it, but it is an issue
8　that's been raised and we certainly would appreciate
9　assistance on it. In other words it's not just the
10　standing order, it also is whether if he was engaged in a
11　dispersal operation, a lot of people gathered on the
12　koppie, he wanted to disperse them, those with dangerous
13　weapons they could then be seized because the, by the
14　police under I take it the Criminal Procedure Act and they
15　could be arrested actually for possession of dangerous
16　weapons, but the first thing he wanted to do was a
17　dispersal and if it's correct that before you can exercise
18　powers to disperse a gathering you have to give a warning,
19　then he would have had to give a warning. Anyway, that's
20　the issue. I don't know what the answer will be. I would
21　appreciate submissions on it. If you're able to give us
22　them now, fine. If you give them to us later in writing,
23　we will gratefully accept that.
24　　　　　MR SEMENYA SC:　　　　Yes, Chair, perhaps a few
25　submissions in that regard would suffice. Part of what

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1　triggers that enquiry is somewhat the fact that we are
2　trying to distinguish scene 1 and scene 2 as if they are
3　different operations. They are not different operations.
4　We have for convenience here made them separate topics to
5　be handled separately because it is easier to do that, but
6　Brigadier Calitz was not involved in two, and his
7　colleagues were not involved in two scenes. They were
8　involved in one operation which was the dispersal,
9　disarmament and arrest of all those armed strikers, and I
10　should add to that, Chair, that whereas regulation 9(2)
11　requires –
12　　　　　CHAIRPERSON:　　　　Section.
13　　　　　MR SEMENYA SC:　　　　- section rather, of the
14　Regulation of Gatherings Act requires the warning, in this
15　instance the police did even more. They begged the people
16　to disarm. They begged them to disperse. This is now on
17　the other wild side of the spectrum, and even the begging
18　and the pleading, and we see even Mr Mathunjwa go down on
19　his knees –
20　　　　　CHAIRPERSON:　　　　He wasn't exactly acting as
21　a police agent when he did that.
22　　　　　MR SEMENYA SC:　　　　No, no, no, no, no, he
23　wasn't, Chair, and I'm not advancing that as an argument.
24　I'm merely saying that if the law requires the police to
25　act that way is clearly intended to say make them aware

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1   this is what is what is required of you, and the police
2   went beyond that point to say we beg of you, in many
3   repeated ways, and did that with a loudhailer and said to
4   them please disarm and disperse. That didn't work.
5   In relation to koppie 3, Chair, it was pointed
6   out to me that the operation did not even stop at koppie 3.
7   There were further violent acts of damage to property that
8   went on beyond koppie 3 and where the police had to attend
9   to it. So I don't know if the postulate is put that the
10   incident should have been stopped at scene 1, whether the
11   police if told that we are under attack at K4, somebody
12   would say no, don't attend to it, we have stopped the
13   operation. That would not be a practical way of dealing
14   with things.
15   There is also criticism about the use of
16   specialised units in Public Order Policing. The first
17   response that we must offer as a submission in that regard
18   is to say that if you are talking about Public Order
19   Policing incidents proper – and by proper I mean those that
20   obtain within the constraints of the law – clearly that
21   recommendation to that effect is sound, but we need to be
22   practical about this. We need to accept that we are not
23   there as a country in our appreciation of the important of
24   law obedience, that a Marikana would happen. You would
25   have, as my learned friend Mr Burger would say, marauding

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1   individuals, heavily armed, who are bent on mayhem. What
2   do we do there? And as we make a submission section 9(2)
3   does tell us what we do if the criteria is met for the use
4   of firearms and weapons.
5   I'm also informed by my learned colleagues that I
6   should draw the attention of the Commission to exhibit
7   GGG4, page 11 of that exhibit. Page 12, I'm told, Chair.
8   CHAIRPERSON: It's a long time ago when
9   we'd received that exhibit. Can you perhaps just remind us
10   what it is? I know we'll read it, but if there's a nice
11   clear passage that you can give us at the moment it will
12   help. It is GGG4, para 12.
13   MR SEMENYA SC: Not para 12, page 12,
14   from line 14. If we can go, at the top of the right-hand
15   corner of the page it says 681, 681.
16   CHAIRPERSON: That's page 12.
17   MR SEMENYA SC: There in the middle you
18   would see, Chair, that General Mpembe says, and he's
19   speaking to Mr Mathunjwa, "No, thanks, president, are you
20   saying tomorrow they will hand in their weapons, they will
21   disperse?" Says Mr Mathunjwa, "Yes, I mean if you are
22   [inaudible]. I said it clearly that we have been portrayed
23   as AMCU as the union that is instigating violence all over
24   the world, so denounce any end to violence if you are
25   committing such, please denounce. We do not want to hear

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1   any incident because all incident that are happening around
2   the area is reflected [inaudible]. It is AMCU who
3   instigates such a thing, so please, as from now on, as from
4   now we do not want to hear anything about that [inaudible]
5   address you. Denounce violence, it means weapons, no
6   weapons, and then get your mandate, give us what we agree
7   and people disperse." So we point to that very direction
8   question by General Mpembe, "Are you saying they are going
9   to disarm tomorrow?" he says yes, but –
10   CHAIRPERSON: [Microphone off, inaudible]
11   goes on and he does seem to be saying effectively what he's
12   going to say the next day, the speech he's going to make,
13   as far as I read it, a sort of trailer almost of what he's
14   going to say the next day. This is one of the passages
15   that was referred to earlier in support of the contention
16   that Mr Mathunjwa gave a definite promise that they would
17   lay down their arms, but there are other passages which go
18   the other way and General Annandale certainly said that he
19   didn't regard what Mr Mathunjwa said as amounting to a
20   definite guarantee or undertaking that they definitely
21   would lay down their arms, but this passage I think is
22   support for the proposition that Mr Mathunjwa was very
23   confident that they would, and he conveyed that confident
24   to the police. We know now with 20/20 hindsight that he
25   was overconfident, but certainly to be fair to the police,

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1   they were told by a very confident Mr Mathunjwa that all
2   would be well the next day. I think that's a fair summary.
3   MR SEMENYA SC: "We'll all be happy
4   tomorrow," words to that effect. I'm not suggest that he
5   gave an unequivocal undertaking that he will deliver that
6   type of promise, clearly, but there was certainly amongst
7   the police an expectation that that might very well be a
8   possibility of the people disarming voluntarily.
9   CHAIRPERSON: There's a further point in
10   your favour on that point and that is according to the
11   evidence it does look as if the police still laboured under
12   what I think one can now describe as a misapprehension that
13   all the strikers were really AMCU people and even the NUM
14   people really more ex-NUM people than actual NUM people at
15   that stage, and one sees interchangeably in the documents
16   reference to the strikers and AMCU. So if the police had
17   been led to believe, I suppose by Lonmin, that the strikers
18   were all really AMCU, or that AMCU was substantially behind
19   the strike, that would have encouraged the police to
20   believe that if the president of AMCU thinks that the
21   strike is going to stop, or not the strike but the weapons
22   are going to be handed down, they will accept the
23   instruction or the request from the president of the union.
24   It's difficult to be overly critical of the police for
25   given the mindset they were in, it would be difficult to be

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1　overly critical of the police for assuming that Mathunjwa
2　was right and that they'd all be happy the next day.
3　　　　MR SEMENYA SC:　　　The one other aspect we
4　have to address is was Marikana an unprecedented event.
5　You'd recall there has been a lot of controversy around
6　that and we have been told the May event of 2012 bears
7　similar resemblance to Marikana and that claim cannot
8　stand. Well, firstly the Lonmin security tells you, Chair,
9　Commissioners, that they've never seen anything like that
10　in Marikana – In Lonmin, not in Marikana, in Lonmin, and
11　they have handled many unprotected strikes, and the
12　security tells you normally as a matter of course if you
13　stood up and said disperse, that is what would happen. It
14　didn't happen on the 12th. So there is that evidence which
15　we submit must bear weight to what the police are
16　describing.
17　　　　There's also the evidence which has not been
18　controverted, that use of teargas, which is the doctrine in
19　Public Order Policing, has never triggered an attack on the
20　police on its use, where strikers say because you are
21　throwing teargas at us, that is the reason for us to attack
22　the police. That's a separator as well, Chair.
23　　　　There is yet another separator. History has it,
24　and the evidence has not been controverted, that the
25　unfurling of a barbed wire as a defensive measure has never

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1　provoked the response that was observed on that day, and
2　for that reason it could not have been foreseen that its
3　use would have the consequences that it had. Most of the
4　time public disturbance events occur as a matter of
5　spontaneity when they begin to get out of order. They
6　often start in a particular fashion and then emotions go
7　awry and after that things may very well go wayward, but it
8　is with some element of fluidity and spontaneity to them.
9　What is different with Marikana is this is planned, it is
10　militarised, it is by individuals who even prior to the
11　16th, some of whom would have been associated with very
12　violent deaths of policemen and of co-workers and of
13　security personnel of Lonmin. That's a separator. We have
14　never had that type of thing in the past, says the police,
15　and there is no reason to disbelieve them.
16　　　　That must trampoline me, Chair, to what must be
17　my concluding submissions, unless – I'm pointed to also
18　deal with the question whether as SAPS we had taken an
19　adversarial posture against Colonel Vermaak.
20　　　　CHAIRPERSON:　　　I would also like you to
21　deal with, if you can, with the submission that Mr Mpofu
22　made that, it related to the use of the word "Engage,
23　engage." He said, I'm not sure I'm doing full justice to
24　his submission, but as far as I'm concerned it doesn't
25　matter. He referred to Brigadier Calitz as saying when he

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1　said "Engage, engage," he was actually intending to speak
2　to the POP people. This was then repeated by Colonel
3　Vermaak because he'd remembered what happened the 13th and
4　he was afraid that they hadn't, weren't responding, and
5　what Mr Mpofu said, as I understand him, was that that, by
6　that time the POP people were already in the Nyalas and
7　that was understood by the TRT people as being a command to
8　them and that was also part of the explanation for what
9　happened. He then I think went on to submit that in fact
10　the TRT people fired not so much in self-defence, or what
11　they thought was self-defence, but because they were
12　obeying this command to "Engage, engage," which they
13　thought was addressed to them. Now I'd be grateful – again
14　if you're not able to deal with it at the moment I'd be
15　grateful to receive a note on that from you.
16　　　　MR SEMENYA SC:　　　Chair, Captain Loest
17　testified on the point that they understood that "Engage,
18　engage" to be an instruction to POP. They never responded
19　to it as TRT members. So there is direct evidence that
20　contradicts that argument.
21　　　　Also an appreciation of how this operation was to
22　happen was clearly that the POP people were going to be
23　responsible for the conduct of POP and so too those of NIU
24　would be taking instructions from NIU and STF from people
25　of STF. It was not contemplated that because you are the

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1　operational commander, Brigadier Calitz would be giving
2　instructions to STF people to do A or B or C in relation to
3　the event. It is clearly that they were going to act under
4　the command of Gaffley, who was in charge of them as STF.
5　So it has to be understood in a proper context about how
6　multi units operate in a particular environment.
7　　　　Are we adversarial against Colonel Vermaak?
8　Clearly not, Chair. There is Captain Baloyi who says
9　things that are negative for SAPS. There's nothing wrong
10　with that. Everybody has been allowed to come and say what
11　they have to say and even Colonel Vermaak has not been able
12　to say he was, (1), precluded from making certain
13　disclosures, never went that far.
14　[10:24]　And never went as far as to suggest that on the
15　contrary he was advised to state an untruth. It never went
16　so far as that and we submit that it is not unexpected that
17　in an organisation that large you would find people who
18　hold disparate positions in relation to a particular
19　matter. And Chair, when we don't address the question of
20　incident 1 and 2 it's not because we abandon the fact that
21　those incidents didn't happen, we are saying nothing turns
22　on that. There is clear evidence that can explain events
23　precipitating, or the events immediately before the
24　shooting happened at the kraal which bear no controversy
25　around it. Unless if the insinuation is you are lying to

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1 the Commission when you say they happened, in which event

2 then we'd have to address a different matter. And I don't

3 place so much weight to it because as we made the

4 submission, Chair, I don't think the President is

5 interested in questions of credibility.

6   The President in your report is interested in

7 understanding those issues that can help the government

8 shape its policy and its conduct so that South Africa can

9 avert Marikana 2. That's what the President is interested

10 in. If we are in a civil or criminal trial and credibility

11 issues were primarily in relation to the adjudication of a

12 particular matter then I think my emphasis on whether or

13 not this witness is credible and the other not would have

14 been slightly different, and slightly differently nuanced

15 for that matter. If I was an onus-bearing party and had to

16 rely on a particular witness to carry my case it would have

17 been different. I think this process is a slightly

18 different one.

19   My final remarks, Chair. Chair, it's very

20 important for us as a country to understand the role of the

21 police, and errant police officers do not belong in the

22 South African Police Service and there is no attempt on the

23 part of at least us as a legal team on instructions that we

24 have received to defend that. But it is very important for

25 us also as a nation to understand that they are the only,

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1 only instrument under the Constitution who have a

2 responsibility for the maintenance of law and order, and

3 they do it under very difficult circumstances. It is

4 bloodcurdling, Chair, when Mr De Rover says to us in five

5 years we lose 880 members of the police service in the line

6 of duty. It's a serious number for a country to sustain

7 and –

8   CHAIRPERSON: In quick summary, I think

9 it's over 120 a year. It's more than two a week.

10   MR SEMENYA SC: Something like that,

11 Chair, and it is people who our safety rests on. It is

12 people who the law authorises them to carry firearms and

13 other weapons within the constraints of the law so that you

14 and I, Chair, can have our law and order in place, and when

15 we do judge their conduct we should do that in deep

16 appreciation of the special place they occupy. I'm not

17 defending individuals, I'm defending the institution of the

18 police service and I'm saying whatever else we lose, what

19 we should not lose is the importance and centrality in the

20 organisation of our constitutional order. Those are our

21 submissions, Chair.

22   CHAIRPERSON: Thank you, Mr Semenya. Mr

23 Mpofu you've got half an hour.

24   MR MPOFU SC: Chairperson, can I request

25 that we take a short break so that we can – I can discuss

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1 the –

2   CHAIRPERSON: Ja, alright.

3   MR CHASKALSON SC: Sorry, Chair, we

4 really don't have time for breaks at this stage. I would

5 oppose a request for a break at this stage.

6   CHAIRPERSON: We'll take a tea break a

7 bit later on, but we're going to stop at 1 o'clock, it's

8 half past 10.

9   MR MPOFU SC: Well, that's – the break,

10 Chairperson, was actually meant to – anyway we can do it at

11 the tea break to discuss with the evidence leaders –

12   CHAIRPERSON: We told you yesterday that

13 you would have half an hour, after the discussions we had.

14   MR MPOFU SC: Yes.

15   CHAIRPERSON: I take it you've prepared

16 half an hour's worth –

17   MR MPOFU SC: No, I haven't, Chairperson,

18 other things have just arisen now. That's why I wanted the

19 break so that we can discuss the question of time

20 allocations because there's more time now.

21   CHAIRPERSON: My fellow commissioners

22 urge me that I should give Mr Mpofu his five minutes and so

23 I do that.

24   MR MPOFU SC: Thank you.

25   [COMMISSION ADJOURNS   COMMISSION RESUMES]

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1 [10:37] CHAIRPERSON: The Commission resumes. I

2 understand the matter that you wanted to deal with in the

3 adjournment has been successfully dealt with, MR MPOFU SC.

4   MR MPOFU SC: It has, Chairperson, thank

5 you very much.

6   CHAIRPERSON: I take it Mr Wesley is

7 going to keep the – be the timekeeper.

8   MR MPOFU SC: Mr Wesley, yes. I am

9 assuming – well Chairperson, as matters stand now I have 40

10 minutes, so what I would propose is that because it's 20 to

11 11, we can go until 11, and then I will do it in two

12 instalments.

13   CHAIRPERSON: What happens at 11?

14   MR MPOFU SC: No, I was saying if,

15 depending on when you want to take the –

16   CHAIRPERSON: Oh, tea?

17   MR MPOFU SC: - the tea break, yes. I

18 was proposing if you do it at 11, then I can break it into

19 two instalments.

20   CHAIRPERSON: Well, if you prefer that –

21   MR MPOFU SC: I would.

22   CHAIRPERSON: - I personally would prefer

23 to go on and then take the adjournment when you are

24 finished, but obviously if it will help you to help us

25 more, then I will do it the way you suggest.

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1   MR MPOFU SC: Thank you, Chairperson. I

2 think let's leave it to me for now. Thanks.

3   CHAIRPERSON: Alright.

4   MR MPOFU SC: I might go for your option,

5 depending on – Chairperson, thank you very much. I am

6 obviously racing against the clock here. So what I am

7 going to do, Chairperson, firstly is to deal with the issue

8 of concessions, real and otherwise, that have been spoken

9 about. The first one is that Mr Semenya somewhat has made

10 my job easier because of what I will go as far as to call

11 concessions that he has made. I am sure he will contest

12 that, but in the absence of time, if I have to develop any

13 of the points I am going to make, Chairperson, then I will

14 leave it for the notes. So I am going to be very cryptic.

15 The first one is that Mr Semenya told us yesterday that the

16 conduct of the strikers was – he said treasonous, I am sure

17 he wants to treasonable, but it was treason, it amounted to

18 treason. Now Mr Semenya represents the South African

19 Police Services, so I am sure whatever view he espouses

20 here must be the view of his clients, and you will remember

21 that I read out the extract from Colonel Scott that the

22 Chairperson helped me to find where the similar sentiment

23 had been expressed that once they killed a police, then it

24 was no longer about these small matters of killing non-

25 strikers or enforcing a strike, it was now a challenge, to

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1 use Mr Semenya's words and Colonel Scott, it was now a

2 challenge against the authority of the State, and Mr

3 Semenya has said exactly the same thing.

4   Now that, Chairperson, is a crucial, crucial

5 concession to make because it goes exactly to what we have

6 been trying to explain for two years, that these people

7 were regarded as the enemy. We know what happens, what we

8 should do, what should we do as a country with treasonable

9 people who threaten the authority of our State? We must

10 declare war against them. That is what our army is there

11 for, and that is why from the point – that's why we call

12 the 13th a game changer, we have been calling it since the

13 beginning until now, because it was the point at which the

14 whole business changed into war and that is exemplified by

15 many things which I don't have to go into now, what I call

16 the frenzy of activity that followed that point. So from

17 that crucial turning point onwards we were no longer in the

18 territory of just small matters, we were in the land of

19 treason and war.

20   Then the second concession which is important

21 relates to what happened at scene 1 where Mr Semenya in his

22 address this morning, not yesterday - the other, the

23 treason was yesterday - refers us to the fact that the TRT

24 formed a human block, and that's in relation to something

25 else which I am going to discuss just now. Well, it goes

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1 to a submission which I made on Wednesday, Chairperson,

2 that if the TRT indeed made a human block then we have this

3 very simple situation; whereas in that gap the TRT had the

4 time, the means and the wherewithal, and the regulations to

5 boot, to prevent the further movement of the strikers by

6 using barbed wire or by using a physical block of some sort

7 with Nyalas or whatever, they chose to have what Mr Semenya

8 has called a human block. But it was not just a human

9 block of you know, comrades holding each other like this.

10 It was a human block of more than 50 people armed with

11 automatic or semi-automatic rifles. That's the difference,

12 and therefore that is also a very important statement to

13 note, which takes us Chairperson to the concessions that I

14 was said to have made. I disowned one of them when we were

15 talking now and you correctly said I will deal with it when

16 I am replying.

17   Let's start with the question of premeditated

18 murder. Let me - firstly I was not making any concessions

19 on that question, Chairperson. I was simply saying that

20 one of the theories, and I think I tried to explain this,

21 it was a theory that I said against myself I had not put to

22 anybody but it's one that I had just gained from reading

23 and rereading the documents, and the spark was the

24 reference by General Naidoo I think to section 49, that one

25 of the theories that one could look at was that – well

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1 section 49, reference to section 49 but also Captain

2 Loest's evidence that they were told to stand fast and not

3 retreat and so on and so on. And I said one of the – and

4 the fact that they straddled the road at some stage - I

5 said one of those theories will be that at best for them

6 they were told that they must not allow the so-called

7 militant group to pass through and they must arrest them by

8 any means necessary, at all costs. That would still be

9 unlawful because remember, well firstly it would be

10 illogical because there was always going to be phase 6 if

11 they were so desperate to get those armaments. But you

12 can't instruct people of that kind of – who are bearing

13 those kinds of arms, to say to them don't retreat, and that

14 is where the trick is, Chairperson. Mr Semenya tells us

15 that why must we expect them to run away because their duty

16 is to protect the State or whatever. Well, Chairperson, we

17 must expect them to retreat because that duty to protect

18 the State doesn't just lie on them, it also lies on the

19 POP, and what did the POP do? They retreated, in front of

20 our eyes here on the screen. They retreated into the

21 Nyalas and that was it. So if the TRT had done the same,

22 you know, instead of – I didn't understand the submission,

23 whether they will be protecting their egos or what, but

24 they had exactly the same duty to retreat as the POP, which

25 did in an exemplary way, which by the way was in front of

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1 them. So the POP would have been closer to the strikers
2 than the basic line. So their failure to retreat cannot be
3 explained by this notion that what we expect of them as a
4 police force and so on and so on, because whatever we
5 expect of them as a police force, applies equally to POP.
6   But the real point is this, Chairperson; even if
7 you take that postulation - we have no excluded the issue
8 of premeditated murder at all, but we have said at the
9 lowest, let's say that at scene 1 at the very lowest there
10 was dolus eventualis - and I don't have to go, Chairperson
11 would understand what I mean by that in the sense that they
12 should have foreseen and so on and so on.
13   CHAIRPERSON: Not they should have
14 foreseen, if they should have foreseen but didn't then it's
15 culpable homicide, if it is a crime. For dolus eventualis
16 you have to say they did foresee and they were reckless, as
17 they proceeded with their conduct were reckless as to the
18 consequences.
19   MR MPOFU SC: Thanks, Chairperson, yes.
20 But Chairperson, I just want to point something to you.
21 You will remember, if you look at our opening statement,
22 whatever the exhibit number is, you will see that the 10
23 points that we made there, Chairperson, we differentiated
24 between scene 1 and scene 2. I am paraphrasing because I
25 don't have it in front of me, but we said at scene 1 there

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1 was murder, unjustifiable homicide, I think that those were
2 the words that we used. We said that there was murder
3 there. And then we said at scene 2 there was premeditated
4 extrajudicial executions, and that's where there is a
5 subtle difference. The reason we made that difference,
6 Chair, was because we had - in our consultations it was
7 clear that whatever had happened at scene 1, at scene 2 the
8 killing zone and all what we know about it, the fact that
9 no warning was given, the fact that the people were
10 surrounded and trapped there, I think the way I put it to
11 Brigadier Calitz - again I am paraphrasing - I said to him
12 apropos that question of why they were not warned, I said,
13 look, you had these people surrounded – I said, you had
14 these people surrounded. Yes. I said underneath them
15 there was the earth, the ground. Yes. On top of them
16 there were helicopters flying. Yes. So there was nowhere
17 to go, and yet you didn't even say to them - and we have
18 had that discussion on Wednesday and so on and so on. Just
19 from that point it was clear that the executions, as we
20 call them, at scene 2 were definitely premeditated.
21   But now here's the thing, Chairperson. Here's
22 the thing; you see you are permitted as Commissioners in my
23 respectful submission to say if indeed there is prima facie
24 evidence that what happened at scene 2, as we claimed in
25 our opening statement was premeditated and coldblooded

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1 executions, and you would be fortified in that belief by
2 the evidence of Myburgh, whatever problems at the lower
3 scale of reasonable suspicion that he did not – he could
4 not have made up this, what he said he heard someone
5 saying, "These people deserve to die," there can't be a
6 better description of an execution than that. But if you
7 put all those things - and even at a prima facie level
8 accept that what happened at scene 2 were coldblooded
9 executions then, Chairperson, you are quite entitled to
10 extend that to say, well, as Mr Semenya has said it was
11 actually one transaction, one operation. The fact that
12 here for argument's sake we divided it up is just neither
13 here nor there. Then you are quite entitled to say, well,
14 if it was execution at scene 2, it must have been execution
15 at scene 1 as well because the – if it was indeed one
16 transaction and one thing, you would remember this kind of
17 logic I used - I am just digressing a little bit - when we
18 were talking about the planting of weapons, I can't
19 remember which witness I was cross-examining but I said to
20 that witness, look, if you are coming to this Commission
21 and giving us the excuse that the reason you were removing
22 these weapons was because the medics were asking you to do
23 so, then since we know that you removed weapons at scene 1,
24 where there were no medics, then surely that could not have
25 been the reason. And there was a long debate about it, but

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1 it's that kind of thing because if you are going to lie
2 about something regarding the one scene, but somehow it
3 doesn't fit on the other, then at worst it must be assumed
4 that the non-applicability doesn't apply even where it to
5 the naked eye might be seeming to apply.
6   So that's our submission on the question of
7 premeditated murder. We are not excluding it exactly
8 because we, in fact at scene 2 we are alleging it, but at
9 scene 2 we are alleging executions, at scene 1 we are not
10 excluding them but at scene 1 we are prepared to accept for
11 the sake of argument that dolus eventualis might have been
12 – but that's not a concession that we make that there was
13 no intention to kill them.
14   More so, Chairperson, the other concession that
15 we certainly do not make, which I am glad the Chairperson
16 alluded to it because it gives an opportunity to deal with
17 it, is that the people were not killed because they were
18 striking. We certainly do not make that concession. Why?
19 Because I said it on Wednesday, what were the first words -
20 as the Chairperson said, the words that were said to the
21 world by General Mbombo? "Today we are going to end the
22 strike. Today we are going to end the strike." That, and
23 Mr Semenya actually said this, he said, whatever, when you
24 were asking him about what was discussed at the NMF,
25 whatever they discussed can't be inconsistent with what

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1   General Mbombo told the world the following day. What did
2   General Mbombo tell the world the following day? "Today we
3   are going to end the strike." So whatever they discussed
4   at the NMF must have had something to do, on Mr Semenya's
5   formulation must have had something to do about ending the
6   strike. And we know – and that takes us to the next point,
7   Chairperson, you – sorry, Chairperson –
8   CHAIRPERSON: Do I understand you
9   correctly to say, it may well be - I don't think you put it
10 any higher than that - that what has been concealed in
11 relation to what happened at the NMF was there was a
12 decision to break the strike, which would have been an
13 improper decision?
14   MR MPOFU SC: That's correct,
15 Chairperson. In fact –
16   CHAIRPERSON: That's revealed as it were
17 -
18   MR MPOFU SC: Yes.
19   CHAIRPERSON: - by the remark that the
20 Provincial Commissioner made in her eNCA interview.
21   MR MPOFU SC: Yes, Captain Adriao and
22 all, and the D-day and so on.
23   CHAIRPERSON: No, never mind the D-day.
24   MR MPOFU SC: Okay well –
25   CHAIRPERSON: The breaking the strike -

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1   MR MPOFU SC: Yes, was only General
2   Mbombo.
3   CHAIRPERSON: The Provincial Commissioner
4   said, I think it was after the press conference, she had an
5   interview on eNCA, we saw that video clip when she said it
6   there. She did say of course that it was a slip of the
7   tongue, but she also conceded that she did nothing to
8   correct it in the period thereafter.
9   MR MPOFU SC: That's correct. Yes,
10 Chairperson, actually you took the words out of my mouth.
11 I was just about to say, we, at least you and I,
12 Chairperson, in our debate on Wednesday, and I think you
13 repeated it this morning, said very obviously something,
14 something is being concealed about the discussions of the
15 NMF. One can't put it higher than that. Otherwise really,
16 why would you be fed with evasive written answers and all
17 that goes with it, the so-called pedantic detail theory of
18 the National Commissioner. But now we are getting closer
19 to what that something was. That something surely, but
20 surely, we speculated the other day, we said it was
21 something political. I said, maybe it's the pressure of
22 the Minister, you said maybe it's the Malema issue, it
23 doesn't matter, it could be both, it could be one of them,
24 but that something must have been (a), political.
25 [10:57]   (B) unlawful, and (c), something that was at all

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1   costs supposed to be concealed from this Commission, and it
2   must have had something to do with breaking the strike and
3   we know how far that chain can go.
4   So it seems clear now that for political reasons
5   – oh, and you must also read that whole statement that I've
6   just made together with the blatant untruthful evidence of
7   the National Commissioner around whether the Minister was
8   told that stage 3 was going to be gone into and so on and
9   so on. That retreat, which is clear from the minutes,
10 which Annandale has agreed was what happened, is what was
11 said, is that the Minister was told about stage 3, which
12 means he knew what stages there were and he must have known
13 that the stage 3 is the tactical stage and that's why the
14 retreat was done here and in Rustenburg.
15   It would mean that there is another intention to
16 hoodwink the Commission into minimising the role that was
17 played by the senior political people and that alone, as
18 the Chairperson says, in the Zeffert's Law of Evidence –
19 the Chairperson will be familiar with this – it's said that
20 if you are lying it doesn't necessarily mean you are
21 guilty, but if you are lying – as the Chairperson put it
22 better than me – it points the arrow –
23   CHAIRPERSON: It can point.
24   MR MPOFU SC: - it can point the arrow at
25 something else that you are concealing, and that can be

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1   debunked with these, or decoded with the submissions that
2   I've made.
3   That brings again the link between the political
4   pressure and what actually happened on the 16th even closer
5   because the strike, properly so called, was not the
6   business of the police.
7   CHAIRPERSON: What goes against that, I
8   must confess this is a matter that caused me a lot of
9   puzzlement. What's against that is you have the very
10 proper approach of General Mpembe on the 13th saying we just
11 want the weapons, lay down the weapons, we're not going to
12 arrest you, you can carry on, and I think Lieutenant-
13 Colonel McIntosh said something similar to the strikers
14 when he negotiated with them, and even the plan – now
15 unless one accepts it's a trap, which I don't think is
16 suggested, what the police intended to do was to disarm
17 these people, disperse them by the non-lethal methods and
18 so on. That was apparently going to happen, unless we
19 suggest that's the total – we accept that's just a total
20 pretence, but I don't think that can be suggested. So if
21 they dispersed them and disarmed them, then it wouldn't
22 have followed that the strike would have been broken. It
23 might be that the strike would have been more difficult to
24 enforce by the militant strikers because they wouldn't be
25 able to use violence and intimidation to the same extent,

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1 but if that had been done the strike wouldn't have been
2 broken. So I've been puzzling for a long time about how
3 those items of the evidence which tend to point one way can
4 be reconciled with the statement that the Provincial
5 Commissioner made. It's one of the mysteries. Maybe we'll
6 find the answer –
7   MR MPOFU SC: Yes.
8   CHAIRPERSON: But it is a mystery, I'm
9 afraid.
10   MR MPOFU SC: Yes, the –
11   CHAIRPERSON: Certainly everyone I think
12 would agree, and Mr Semenya would be the first to concede
13 I'm sure, that it wouldn't have been a proper approach for
14 the police to throw its State provided force into the scale
15 on behalf of Lonmin to break a strike.
16   MR MPOFU SC: Yes.
17   CHAIRPERSON: That's a matter between the
18 employer and employee and the police have got no business
19 with that. Their job is to maintain law and order.
20   MR MPOFU SC: That's correct. Thank you,
21 Chairperson, and then while – I'll move on to something
22 else. I hope that that mystery will be resolved when the
23 Commissioners deliberate in less pressurised conditions
24 than I'm operating under now.
25   Then again, Chairperson, just to touch on this

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1 comparative analysis between scene 1 and scene 2, scene 2
2 in a strange way also provides us with the answer to the
3 putative self-defence issue because there's no – nobody, it
4 would be laughable if anybody would suggest putative self-
5 defence in relation to scene 2 and the killing zone and so
6 on and so on, and therefore if it was not putative defence
7 there, if they shot people knowing that they are not being
8 attacked, then we can certainly infer that at scene 1 it
9 was also not putative self-defence. I won't put it higher
10 than that. Again it's the one transaction theory which I
11 advanced earlier.
12   Chairperson, I have an obligation to do this
13 because yesterday - you know I don't know how many times we
14 must say this; there has never been any suggestion that the
15 injured and arrested or any of the parties who represent
16 the other victims have said that the deaths that occurred
17 on the 16th are more important, or whatever was being
18 suggested by Mr Semenya yesterday, than the 10 deaths that
19 preceded them, or the seven non-striker deaths, because we
20 know that three were strikers. That has never been our
21 case. It will never be our case. If any –
22   CHAIRPERSON: It could scarcely be. (a),
23 you never said it and if you had said it I would have been
24 down on you like a tonne of bricks.
25   MR MPOFU SC: Again, Chairperson, you

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1 take the words out of my mouth. It's written here, I've
2 said if any of us had suggested any such thing I'm sure we
3 wouldn't have finished the sentence because the Chairperson
4 would have –
5   CHAIRPERSON: Mr Semenya suggested it
6 actually, but anyway, if there's a perception around –
7   MR MPOFU SC: It must die.
8   CHAIRPERSON: - that you were more
9 interested, well maybe your clients of course would affect
10 – but that somehow those deaths were on a higher scale than
11 the others –
12   MR MPOFU SC: Ja.
13   CHAIRPERSON: - if that's a perception
14 anybody has it's a wrong perception –
15   MR MPOFU SC: No, it's very wrong, ja.
16   CHAIRPERSON: I'm not sure Mr Semenya
17 said it, but it doesn't matter, if there's a perception,
18 it's no longer there.
19   MR MPOFU SC: It's no longer there, yes.
20   CHAIRPERSON: It's an ex-perception.
21   MR MPOFU SC: What is happening in this
22 Commission, Chairperson, and I'm glad my learned friend Mr
23 Tip at least has joined us on the side of people who are
24 saying if anybody, whether it's a member of NUM, whether
25 it's a striker, whether it's AMCU or whatever, is

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1 implicated in the gruesome deaths that preceded the 16th,
2 those people must be found, tried, arrested and locked up
3 in jail for the rest of their lives. There should be no
4 doubt about this. So that – you know the only people in
5 this room, Chairperson, who do not take that position are
6 the people who are guilty of murdering those people, that
7 is SAPS and Lonmin, because Lonmin says charge all the
8 people who made all these gruesome dastardly, what, what,
9 except us, Lonmin, we are innocent. SAPS says the same;
10 charge everyone, you know it's bad, gruesome, look at this
11 picture, they're all guilty except us, SAPS. We are not
12 saying that. We are saying charge even ourselves if we are
13 – and that, Chairperson, if you take from the biblical
14 example of the wisdom of Solomon you will know who is the
15 guilty party among those people. One does not need
16 Solomonic wisdom, as Holmes JA once said, to work out that
17 one. The people who are playing holy-holy are the guilty
18 ones.
19   Now the next issue, Chairperson, is - also I just
20 want to say this, I have to say this; it does not matter,
21 Chairperson, it does not matter how morally reprehensible
22 the actions of the strikers were, we all agree it's
23 gruesome, look at, we just have to look at the pictures,
24 but in this country, Chairperson, we have decided that the
25 death sentence has been abolished and what this police did,

1 because they felt that their fellow policemen had been
2 killed, they sentenced these people to death and executed
3 them. The executions in this country are not allowed even
4 if they were judicially sanctioned, let alone extrajudicial
5 executions that were committed on the 16th. So one doesn't
6 have to doubt the moral reprehensibility of what was done,
7 but it cannot deserve the firing squad that the world saw
8 being meted against our people on the 16th.
9   Now the other thing, I just want to touch then,
10 Chairperson, on the, what I've called the three game
11 changers. Maybe we could take that break now, just so that
12 I can isolate – because it's just three points, three broad
13 points, but I can split them up into –
14   CHAIRPERSON: How long are you still, do
15 you –
16   MR MPOFU SC: About five, let's say five,
17 15 minutes, Chairperson.
18   CHAIRPERSON: Well, let's check with Mr
19 Wesley, how much time has he still got, Mr Wesley?
20   MR WESLEY: 11.
21   CHAIRPERSON: How much?
22   MR WESLEY: 11, Chair.
23   CHAIRPERSON: 11. Alright, we'll take a
24 10-minute adjournment –
25   MR BUDLENDER SC: Chair, I want to say

1 that Mr Mpofu's unique contribution to this, not his only
2 contribution but unique contribution to the work of this
3 Commission is the ability to make 13 minutes become 18 and
4 17 become 42, and I think we should all thank him for that.
5   MR MPOFU SC: I'll accept that,
6 Chairperson, as a compliment.
7   CHAIRPERSON: We're busy with 11.
8 Alright, let's take a 10-minute adjournment now and then
9 he's got 11 minutes and then Mr Chaskalson and you, Mr
10 Budlender, have the rest of the sitting until we adjourn
11 at –
12   MR MPOFU SC: Thank you very much,
13 Chairperson.
14   [COMMISSION ADJOURNS   COMMISSION RESUMES]
15 [11:22] CHAIRPERSON: The Commission resumes.
16 Before Mr Mpofu continues with his address I've been asked
17 to address two requests to the members of the public who
18 are present in the auditorium. The first relates to the
19 headsets that you all have today, I'm asked to ask you
20 please to leave them here in the chamber and they will then
21 be collected and returned to the contractor. The other
22 request relates to the headset that someone was using
23 yesterday and didn't hand in, so there's one headset short,
24 I'm quite sure it was taken through inadvertence, but I'm
25 asked that the person concerned must please bring it back

1 because otherwise the Department is going to have to pay
2 for it. So those are two points. One, leave your headsets
3 in the chamber today and two, the person who took the
4 headset away yesterday please bring it back and hand it in
5 so we don't have to pay for it. Then I'm asked to make an
6 announcement that the Human Rights Commission as one of its
7 contributions to the work of Commission has arranged for a
8 photograph of all the counsel, legal representatives plus
9 the Commissioners to be taken at the end. And apparently
10 we're all going to have to be here at the front and some
11 kind photographer is going to take the photograph or
12 photographs. So just after we adjourn, I hope it won't
13 take too long, but just after we adjourn the photographs
14 are being taken and its, as I've said, it's one of the many
15 contributions the Human Rights Commission has made to our
16 proceedings.
17   Then finally before we carry on with Mr Mpofu I'm
18 told that Mr Bizos, whom I think can be described as the
19 doyen of human rights lawyers in South Africa, as we well
20 remember has made a contribution to our proceedings as
21 well, unfortunately he's not here today, but I ask Ms
22 Weldon please to convey a message of congratulations – I
23 think I can take it upon myself to speak on behalf of us
24 all, to convey to him our very sincere congratulations on
25 the attainment of the 87th anniversary of his nativity.

1 It's his 87th birthday today, we're very happy for him, we
2 wish him all the best. We hope he has a great day, a
3 wonderful year and many happy returns with good health all
4 the say. So please would you convey that message to him Ms
5 Weldon? I think we can possibly give him a round of
6 applause. Mr Mpofu.
7   MR MPOFU SC: Thank you, Chairperson, I'm
8 glad that Mr Bizos's birthday coincides with day 300 of
9 this Commission, Chairperson. Chairperson, I just want to,
10 with the very limited time I have, I'm just going to touch
11 on very quickly, one is Commissioner Hemraj had asked me
12 about a reference of what Brigadier Calitz's responses were
13 when I asked him about the no warnings, particularly at
14 scene 3. Scene 2 rather, it's on page 20534, that's one of
15 the answers, line 14 to 25, day 173 where he said there was
16 time, or no chance, geen kans at scene 1 which is nonsense.
17 And then the other quick point which I wanted to make,
18 Chairperson, is that just to agree with Mr Semenya, my
19 learned colleague, on his analysis of if there's going to
20 be an inquiry into the fitness of office of the National
21 Commissioner, which we also advocate in our submissions,
22 one should not just look at section 8 as suggested by the
23 evidence leaders, but also section 9 of the Police Act.
24 Actually the inquiry is probably placed at section 9, but
25 there's no harm at looking at both, reading section 8 with

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1   section 9. And then I just want to make this point to

2   round off the point I was making earlier about the death

3   sentence, that I'm told and I won't say this under oath

4   because I have not Googled it myself, but I'm told that

5   incidentally after the death sentence was abolished in

6   England it was reserved for another 40 years for treason.

7   So is that correct, yes. South Africa has abolished

8   completely.

9   CHAIRPERSON: Completely?

10   MR MPOFU SC: Yes except when it's war,

11   in times of war. When the Constitution is suspended.

12   CHAIRPERSON: There is an exception, that

13   is the exception.

14   MR MPOFU SC: Yes.

15   CHAIRPERSON: But that exception wouldn't

16   apply in anyway.

17   MR MPOFU SC: Yes, but that just shows

18   you then it means then the South African Police Services

19   were using the English system. Now the next issue,

20   Chairperson, is that I just want to deal very quickly with

21   matters that deal with the game changes. The first one is

22   an issue that you canvassed with my learned colleague, Mr

23   Tip, about the crucial matter of whether or not the

24   strikers were armed when on their way to the NUM offices on

25   the 11th. It's a very important issue, Chairperson, we

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1   can't brush it off. I would have thought that the analysis

2   made by Mr Gotz of the Cassim rush so to speak would have

3   put that matter to rest. But insofar as he didn't

4   Chairperson must also take into account the fact that

5   there's actually evidence, oral evidence of Mabuyakhulu who

6   was a very good witness that they were not armed which was

7   not challenged. In fact when it was challenged it provided

8   one of the most interesting moments in this Commission

9   because Mr Semenya played the video we say you can't be

10   serious, look at that video and it turned out to be the

11   video of the NUM people.

12   CHAIRPERSON: Unfortunately we haven't

13   got a video for reasons that –

14   MR MPOFU SC: Yes it was the NUM people

15   walking and then that was clarified.

16   CHAIRPERSON: We've only got the after

17   the incident video, we haven't got a prior one and that was

18   canvassed and I think that may have explained it.

19   MR MPOFU SC: No all I'm saying,

20   Chairperson, that insofar as Mr Mabuyakhulu was challenged

21   it turned out that he was being challenged with the wrong

22   video, the NUM people were assaulting him. He even said I

23   can even see my stick there, one of them has taken my

24   stick. And then, of course, the evidence of the strikers

25   who kept on saying, near the railway line and everywhere

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1   that the reason why they went to arm themselves. And Mr

2   Gegeleza by comparison to Mr Mabuyakhulu, Chairperson, as a

3   witness was – it would be like comparing a Mercedes Benz to

4   a Volkswagen. He was a very unsatisfactory witness, one of

5   his highlights was that the armed people of NUM only

6   carried one stick and on spear, or something like that on

7   which I cross-examined him. So the Commission must make a

8   finding that Mr Mabuyakhulu evidence that they were in the

9   same way as they were on the 10th, in other words not armed,

10   except for their sticks, that that should be the basis and

11   that whatever follows then with the game changer then I've

12   already argued. The next one is game changer two,

13   Chairperson, which is what happened on the 13th, very, very

14   important. Two points, one is the point that was debated

15   between my learned colleague, Mr Semenya and Commissioner

16   Tokota. And that question is the lingering question of if

17   as I put, I think it was Brigadier Calitz where I said what

18   was the attack, what was the attack and he said well it was

19   the crouching and the singing and so on. If that is true

20   then Commissioner Tokota put it to Mr Semenya which I don't

21   think was answered properly why under the exact same

22   conditions did firstly they not attack the five or seven

23   policemen who were standing in front of them. At least one

24   of them you can see on the video. I think I put the

25   distance in the end to about two metres or so between them

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1   and the strikers, but more importantly going to putative

2   self defence, if those policemen did not believe that

3   because those people were crouching and singing and so on

4   that it constituted an attack how could the ones of the 16th

5   believe the same thing? So that does away both with the

6   putative self defence, but also what I call the mirroring

7   of the two scenes. But more importantly, Chairperson,

8   about game changer two is the following fact. And it goes

9   back to this issue of the execution and the death sentence

10   meted out against the strikers because remember our case is

11   that the motives that were at play here, paramount among

12   the police, was the revenge motive which we have spoken

13   about. And with Lonmin it was making money and saving the

14   NUM, but as far as the revenge motive is concerned,

15   Chairperson, ask yourself the following rhetorical

16   question.

17   CHAIRPERSON: You've got five minutes

18   left.

19   MR MPOFU SC: Yes, I have a stopwatch,

20   Chairperson and Mr Wesley. Ask yourself the following

21   question rhetorically, Chairperson, if the members of SAPS

22   were prepared to kill, to murder a general of the police,

23   one of their own because of what happened on the 13th. If

24   they were prepared to kill a general how much more about

25   the people that they thought were the ones who had murdered

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1 their colleagues? I'll leave it that. If they were
2 prepared to kill a general, no less than a general, their
3 leader, the chief of the JOC, they were prepared to murder
4 him you can imagine what their feelings were against the
5 strikers. Then, Chairperson, let's go to the last game
6 changer which is the political motive. I just want you to
7 add one more - you and I, Chairperson, I was giving you the
8 factors which would point to what I'm hoping would be a
9 finding that the discussion of the NMF at least included
10 the political considerations. One of the things I want you
11 to add, Chairperson, is the evidence of Mr De Rover. Mr De
12 Rover said that an operation of this kind, in his expert
13 opinion, could never have been carried out without the
14 political sanction from above. Now all of us have said
15 that, I've said that and so on. The importance about the
16 fact that it comes from De Rover is that Mr De Rover is the
17 police expert, he's the SAPS expert. It was not Mr White
18 or Mr Hendrickx or Mr Mpofu or whatever. He is brought
19 here by SAPS and he says there is no way that a operation
20 of this type could happen without a political say so from
21 above. So there's no ground upon which the Commission
22 would not be entitled –
23 　　　CHAIRPERSON:　　　　　I'm sorry - approval from
24 the executive and the judiciary.
25 　　　MR MPOFU SC:　　　　　Oh.

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1 　　　CHAIRPERSON:　　　　　So that indicated to me
2 that the political set up to which he's accustomed in the
3 Netherlands isn't the same as ours.
4 　　　MR MPOFU SC:　　　　　Yes anyway that's akin to a
5 declaration of war which we say this was. But,
6 Chairperson, I want to end with this, when I asked the
7 people I represent what should be final message to the
8 Commission what came out were the following, what I would
9 call warnings that they were giving. But I'll change them
10 into pleas because I don't think I'm in a position to make
11 warnings. But they said please, Chairperson, whatever you
12 do, do not insult the intelligence of South Africans and
13 the people of the world. Please follow the requirements of
14 your job, you and evidence leaders are supposed to be the
15 only non-partisan people here, to be impartial and to do
16 your respective functions without fear, without favour and
17 without prejudice. Secondly, please do not ignore the
18 obvious as to what was being concealed at the NMF meeting.
19 We've already covered that. And then please do not condemn
20 the victims and insult them with theories such as the muti
21 theory and apropos what Mr Semenya was saying about these
22 beliefs. I can refer him to the oxymoron of a holy war.
23 Even people who believe in other religions sometimes use
24 those religions either for defensive, for creating
25 defensive curtains. Even prayer is used for a defensive

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1 curtain. And they say, Chairperson, please do not expect
2 that any of the players here did not foresee the
3 possibility of death. As Mr Jamieson, I think, conceded,
4 it was put up by Mr Gotz and as is implied in the
5 concessions made by Mr Ramaphosa, everyone foresaw the
6 possibility of death. And then the last one was please
7 don't try to – I know I have half a minute, ja, don't try
8 to whitewash powerful politicians at all costs or do – what
9 I saw this morning, Chairperson, to round off that
10 submission, most of us who watched television yesterday
11 would have seen some of the scenes that will probably have
12 a negative effect into the future of our democracy, of
13 police storming into – POP storming into parliament. But
14 that is not what I want to talk to you about, I want to end
15 my address by quoting what one of the members of parliament
16 said there, Mr Naren Singh of the IFP. He said to those
17 people "Do not, in the name of protecting one man, you are
18 protecting one man" he said "but opening a wound in our
19 nation that would bleed forever." And that is a plea that
20 we would put to this Commission or a warning or a plea that
21 our job is to make sure that this does not happen again.
22 And that as humanity as South Africans, although the Deputy
23 President said that we are collectively guilty we reject
24 that. But we say that we are collectively victims all of
25 us as South Africans are victims, all of humanity are

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1 victims and you must remember that, Chairperson. As from
2 today all of humanity will be under the slogan that says we
3 are all Marikana. So we accept collective victimhood, but
4 we reject the collective responsibility. The
5 responsibility must go where it rests, to those people who
6 were instigated and made sure that our people are mowed
7 down and executed in cold blood. Thank you very much,
8 Chairperson.
9 　　　CHAIRPERSON:　　　　　Thank you, Mr Mpofu. Mr
10 Chaskalson.
11 　　　MR CHASKALSON SC:　　　　　Thank you, Chair. Mr
12 Budlender and I are going to split the reply. I'm going to
13 try to address very briefly seven issues. The first is
14 what should be done about the fact that no visible policing
15 was put in place in response to Brigadier Engelbrecht's
16 intelligence reports of 11 August. The second is Lonmin's
17 –
18 　　　CHAIRPERSON:　　　　　What was the first one?
19 　　　MR CHASKALSON SC:　　　　　What should be done
20 about the fact that no visible policing was put in place in
21 response to Brigadier Engelbrecht's intelligence reports?
22 　　　CHAIRPERSON:　　　　　I see, thank you.
23 　　　MR CHASKALSON SC:　　　　　The second is Lonmin's
24 complaints about the phase 2 against it. The third is
25 AMCU's submissions about dangerous weapons and the criminal

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1 law. The fourth is SAPS's contention that the JOC didn't
2 know that the operation was continuing from scene 1 to
3 scene 2. The fifth is what one can infer from the post-
4 mortems in relation to the presence of muti marks on the
5 victims of the 16th and what inferences may or may not be
6 drawn from that. The sixth is to clarify our punitive
7 recommendations and the seventh is to respond to the issue
8 in relation to the terms of reference and our submission
9 that there should be an inquiry under the SAPS Act into
10 misconduct or the fitness of the office of the National
11 Commissioner. Now if there's time after Mr Budlender's
12 submissions we'd like to show a presentation that we've
13 prepared which identifies with photographs the exact place
14 where 41 of the 44 victims died between 12 and 16 August.
15 It's 41 out of 44 because in respect of three of the
16 victims who died in hospital, Warrant Officer Lepaaku, Mr
17 Sagalala and Mr Ntsoele. We can't find conclusive
18 photographic evidence or video which shows the exact point
19 that they were killed.
20   CHAIRPERSON: Where they sustained the
21 fatal injuries.
22 [11:42] MR CHASKALSON SC: Indeed, where they
23 sustain the fatal injuries. We thought that this
24 presentation would be an appropriate presentation to use on
25 the last day of the Commission to remind ourselves what

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1 we've been doing for the last two years. There may be time
2 to do so. If there isn't we will circulate it to the
3 parties and make it available to you and your Commissioners
4 so that it may be of assistance to you in preparing your
5 report.
6   CHAIRPERSON: Perhaps it could be put on
7 the website as well of the Commission.
8   MR CHASKALSON SC: Well, Chair, it's not
9 the sort of material that should go on the website –
10   CHAIRPERSON: I see.
11   MR CHASKALSON SC: - because the pictures
12 are particularly gruesome and –
13   CHAIRPERSON: I see. I understand.
14   MR CHASKALSON SC: To start then with the
15 issue of the intelligence reports from Brigadier
16 Engelbrecht, it was raised in our primary argument by Ms
17 Pillay, and she made the point that Brigadier Engelbrecht
18 reported to Major-General Mpembe on 11 and 12 August about
19 imminent attacks on NUM and on the workers at K4 and the
20 need for visible policing, two separate reports.
21   Now Major-General Mpembe says he was on leave and
22 handed the matter over to Major-General Naidoo. Major-
23 General Naidoo claims not to remember receiving any SMSs or
24 telephone calls from Major-General Mpembe in this regard
25 either on the 11th or the 12th. If I can give you the

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1 references, it's day 198, 24278, line 14 to 24279, line 6,
2 in respect of the 11th, and 24274, line 20, to 24275, line
3 25, in respect of the 12th, and we know that SAPS did not
4 implement a visible policing strategy on the weekend of 11
5 and 12 August and that there were tragic consequences for
6 Mr Fundi, Mr Mabelane, and Mr Mabebe. I leave Mr Langa out
7 of that group because I'm not sure that SAPS's Visible
8 Policing strategy would have had the effect of saving him.
9 It may well have saved Mr Fundi, Mr Mabelane and Mr Mabebe.
10   So somewhere from Brigadier Engelbrecht through
11 Major-General Mpembe to Major-General Naidoo and then on to
12 the operational members the communication chain broke down
13 and SAPS failed to take action that may very well have
14 contained the situation at Marikana before it spun out of
15 control. Now in our submission this is a very –
16   CHAIRPERSON: I'm sorry, Mr Chaskalson,
17 even if one puts out of the reckoning for the moment the
18 intelligence that was communicated to General Mpembe, there
19 was of course a plan in place which provided for the
20 establishment of the JOC, which wasn't implemented. Major
21 Govender who dealt with Visible Policing as well, Major
22 Govender was to be the official in charge of that; he
23 wasn't even informed of the plan according to him.
24   MR CHASKALSON SC: Indeed, there are two
25 separate breakdowns. The one is the specific intelligence

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1 in relation to an attack on the NUM office and K4 -
2   CHAIRPERSON: There were two points –
3   MR CHASKALSON SC: And the separate, the
4 second is the failure to implement the plan. We've
5 addressed the failure to implement the plan at length, but
6 in relation to the failure to act on the intelligence, the
7 failure of SAPS as an institution to act on the
8 intelligence of Brigadier Engelbrecht, in our submission
9 it's a very serious matter and it seems from the evidence
10 that it was either Major-General Mpembe or Major-General
11 Naidoo who was at fault in this regard. That's what the
12 evidence suggests. We can't say who, but we would ask the
13 Commission to recommend that the issue be investigated
14 further by SAPS itself because this is a matter for
15 disciplinary proceedings, for further investigation and
16 disciplinary proceedings. Somebody failed to do a very
17 important job and a job which may have saved people's
18 lives. It's for SAPS to find out who that person was and
19 to take the necessary action.
20   If I can then move to the Lonmin case on phase 2,
21 now Lonmin asks you not to make any findings against them
22 in relation to the failure to discharge their social labour
23 plan housing obligations. They claim the issue falls
24 outside your terms of reference. They claim it would be
25 substantively unfair to them to make any findings against

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1   them because the housing problem is a problem that

2   government should be dealing with. They claim that even if

3   they had built the 5500 houses it wouldn't have made a

4   difference because it would have made no material change to

5   the housing backlog faced by the employees, and they claim

6   it would be procedurally unfair to them because they say

7   they had limited time to address the phase 2 issue and they

8   were only able to put up one witness.

9   The only thing that they don't claim is that they

10   actually fulfilled their SLP housing obligations. It's not

11   an oversight on their part. They don't make that claim

12   because it's manifestly unsustainable. They must always

13   have known it was an unsustainable claim because when they

14   finally got their opportunity to put up their one witness

15   to speak to the merits of their defence they chose Mr

16   Seedat, who on his own admission has no personal knowledge

17   whatsoever relevant to the SLP obligations. So instead of

18   a witness we got a spin doctor, and that is in fact what

19   happened.

20   Now in argument they continue ducking and diving

21   to avoid the merits. Now we'd urge this Commission not to

22   let them get away with it, and we'll take their evasive

23   complaints one by one. The terms of reference complaint is

24   a red herring. The Chair's ruling makes that clear. There

25   couldn't ever have been any reasonable doubt that the

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1   failure to address the housing issue "created an

2   environment conducive to the creation of tension, labour

3   unrest, disunity among its employees by the [inaudible]

4   conduct." It's not a test for legal causation in relation

5   to deaths. It's a test about the creation of an

6   environment conducive to the creation of tension.

7   But even if there was some doubt, that was

8   actually removed by the one piece of evidence that Mr

9   Seedat actually was qualified to give on the basis of

10   personal knowledge, namely that the Lonmin board itself

11   recognise that the tragic events at Marikana were linked to

12   the critical shortage of decent housing for its employees.

13   That was Mr Seedat's evidence and the reference is in our

14   heads, it's day 292, page 38355, lines 4 to 21. So that's

15   the terms of reference complaint.

16   The "it's not fair not to look at government"

17   complaint is a non-starter. In an ideal world your

18   Commission would have been able to investigate the failures

19   of government and to make recommendations in this regard

20   and we don't for a minute suggest that there haven't been

21   manifest failures on the part of government. But the

22   amendment of the terms of reference changed that and it

23   leaves your –

24   CHAIRPERSON: I must say in fairness to

25   the President when he, we'll quote this in the report but

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1   when he wrote to me to tell me that he was changing the

2   terms of reference, taking out 1.5, he did indicate it

3   might be necessary at the end of our work to reconsider

4   that and to have some kind of investigation in some form

5   into the issues raised by the deleted 1.5. So it's not

6   something that has necessarily disappeared from the radar

7   screen forever.

8   MR CHASKALSON SC: Indeed, but where the

9   situation now is, Chairperson, is that your Commission has

10   a legal duty to perform the function that has been assigned

11   to it in accordance with the reduced terms of reference and

12   it would be an unlawful abdication of that function to

13   decide you won't investigate Lonmin, which you're asked to

14   investigate, because you can no longer investigate

15   government. It would in fact be unlawful.

16   Then we come to the "it wouldn't have made a

17   difference" argument. We find that in Mr Burger's address

18   on day 296, page 28993, lines 3 to 17, and I'd like to

19   quote it. "Can I then conclude on this issue by the

20   counterfactual? Assume for the moment there's going to be

21   a finding, assume for the moment that we're going to be

22   criticised in a vacuum, what's the counterfactual here?

23   Because then the Commission will have to address the

24   reality; what if 5500 houses had been built, what effect

25   would that have had on the tragedy? Remember we employ

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1   28000 employees and we've got 10000 contract workers.

2   Let's forget about the contract workers" - sensible

3   concession - "and think away that the government should

4   provide housing to them," not just the government, their

5   employers, "but of the 28000 we've employed we've now built

6   houses for five and a half thousand. What about the other

7   20 and a half thousand?" That argument, the arithmetic is

8   wrong, it would have been 22 and a half thousand. "Is that

9   going to take away their complaints? Is that going to

10   create trust between the employer and the employee? I

11   wouldn't have thought so."

12   Let's step back from this argument and just look

13   at it, because it's quite a breathtaking argument for

14   Lonmin to make. It amounts to an argument that Lonmin has

15   been so neglectful of the housing needs of its workforce

16   that the 5500 houses in their SLP would have been no more

17   than a drop in the ocean of squalor in which they expect

18   their workers to live. That's what the argument is.

19   Well, Lonmin may have been bad, but it wasn't

20   that bad. The figures that Mr Burger quoted to you are

21   actually incorrect for two reasons; first is they conflate

22   the total workforce with the number of migrant workers in

23   categories 4 to 9, which is the real inquiry, migrant

24   workers, and second they ignore the houses that were

25   already available for Lonmin's category 4 to 9 migrant

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1 workers either through hostel conversion process or through
2 housing developments undertaken by Lonmin prior to 2000.
3 Now we've prepared a table which we have
4 circulated by email and given in hardcopy to Lonmin and
5 made available to you and your Commissioners, Chair. It's
6 table 1 which shows the correct figures on the basis of
7 Lonmin's own documents with the sources, and there we see
8 that the total number of category 4 to 9 employees was
9 23044, not 28000 quoted by Mr Burger, that the total number
10 of these workers who were in decent housing by 2012 was
11 5883, which is 25%, 1 in 4. The total numbers not in
12 decent housing by 2012 was 17161, 74.47%, three-quarters.
13 We then look at what would have happened if
14 Lonmin had delivered. It would have created another 1130
15 on outstanding hostel conversions and another 5497 houses,
16 that's the 5500 minus the three that they managed to build.
17 That would have changed the situation, so instead of 25% of
18 the workers in decent housing and 74% not in decent
19 housing, you would have had 54% in decent housing and 45%
20 not in decent housing.
21 Now in our submission it would have been a very
22 material difference. It's not just that more than half the
23 migrant workers would have been in decent housing, it's
24 also that the remaining 45% would have seen that their
25 employer was in the process of addressing their living

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1 conditions. Instead three-quarters of the migrant
2 workforce was living in squalor and Lonmin had done nothing
3 about it for more than a decade. In fact they'd compounded
4 the problem by pushing 7 out of every 8 hostel residents
5 into the informal settlements. So it very much would have
6 made a difference, is our submission.
7 CHAIRPERSON: There was a suggestion that
8 they had a choice, they didn't have to take the living-out
9 allowance, they could have used, taken advantage of
10 accommodation provided by Lonmin, but when I asked Mr
11 Seedat how that would work in practice he wasn't able to
12 explain how such choice could have been exercised -
13 MR CHASKALSON SC: Indeed, Chair, well –
14 CHAIRPERSON: - what alternative there
15 was apart from the living-out allowance.
16 MR CHASKALSON SC: Well Chair, it wasn't
17 possible because there wasn't any available housing. That
18 leaves the procedural fairness complaint. It can be easily
19 addressed. First of all it's grossly overstated. Lonmin
20 has had Dr Forrest's preliminary report since 15 August.
21 That's more than a month before Mr Seedat testified, more
22 than two months before they filed their reply to that
23 preliminary report. So they can't complain that they
24 didn't have a proper opportunity to assemble a rebuttal of
25 the complaint against them. If they had an answer they had

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1 the time to put it forward.
2 But if you're still concerned about procedural
3 fairness, we'd point out that with the exception of
4 paragraph 26 of our heads of argument, which refers to a
5 DMR report, every submission in our heads of argument is
6 based exclusively on legal instruments or Lonmin's own
7 documents. So it's either a proclamation or the Mineral &
8 Petroleum Resources Development Act, or it's a document
9 from Lonmin.
10 CHAIRPERSON: The DMR document they had
11 already, hadn't they?
12 MR CHASKALSON SC: No, they got through
13 us but they didn't have independently. But we'd invite you
14 to ignore paragraph 26. If they didn't have enough time to
15 consider this document in the two months since they
16 received Dr Forrest's report we don't need to depend on it.
17 If you read our heads on the basis that we found our
18 submissions exclusively on legal instruments and Lonmin's
19 own documents and the testimony of Mr Seedat, you'll see
20 that Lonmin has no complaint about unfairness and what
21 you'll see from the heads, and it's in the heads, I'm not
22 going to take you to them in any detail, but paragraphs 14
23 to 22 show that there was a clear obligation on Lonmin to
24 build 5500 houses between 2007 and 2011 and Lonmin was at
25 all times aware of this obligation.

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1 Paragraphs 23 to 27 show that they managed to
2 build only three of the 5500 houses they committed to
3 building and that failure was the product of a unilateral
4 repudiation of their original obligation. Paragraph 29
5 shows that their complaints about delays in proclamation
6 are spurious.
7 Paragraph 30 shows that their complaints about
8 affordability are irrelevant because the SLP obligation was
9 a binding legal obligation under the act. So affordability
10 didn't enter into it. At best it gave them an opportunity
11 to approach the department for a variation.
12 But paragraph 31 shows that in any event the
13 budget for the entire programme could have been funded by a
14 reduction of less than 20% in the $607 million, and I
15 emphasise dollars, not rands, that Western Platinum paid in
16 dividends to Lonmin and Incwala over this period, or a
17 reduction in the R1.3 billion payments that Western
18 Platinum made to Lonmin and its Bermuda subsidiary over the
19 same period, ostensibly for marketing services that the
20 figures show cost considerably less than half that amount.
21 So the money was there, it was just sent elsewhere.
22 So we would urge this Commission to find that
23 Lonmin was in clear default of its housing obligations
24 under the SLP and to ask that this finding be brought to
25 the attention of the DMR. It's for the DMR to decide what,

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1 if anything, to make of it, but it does need to be stated

2 and it does need to be brought to the attention of the DMR.

3   That brings me to the issue of dangerous weapons

4 at a gathering. AMCU submitted that the mere carrying of

5 dangerous weapons at a gathering was not a criminal offence

6 prior to the post-Marikana amendment of the Regulation of

7 Gatherings Act. That's incorrect. Section 2(2) of the

8 Dangerous Weapons Act empowered the Minister to prohibit

9 the carrying of dangerous weapons at gatherings by means of

10 a notice which would specify the category of gatherings and

11 the category of objects which were to be treated as

12 dangerous weapons –

13   CHAIRPERSON: Was that section in

14 operation in August 2012?

15   MR CHASKALSON SC: The section was in

16 operation and the notice that was made under it is

17 Government Notice 1633 of 1 October 1996. 1633 of 1

18 October 1996, which prohibited persons from being in

19 possession at any time at any gathering at or in any public

20 place of any object belonging to a class or type that was

21 specified in schedule, paragraph 2 of the schedule, and

22 that paragraph includes spears, assegais, knobkieries,

23 pangas, knives with blades longer than – the list is long

24 and so any person carrying one of the objects at a public

25 gathering in Marikana was guilty of an offence and we don't

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1 retreat from our submissions in this regard in paragraph

2 13.36 of our heads.

3   We do however need to add to those submissions in

4 two respects, and they're two important respects. The

5 first is it's not only the strikers who participated in

6 armed assemblies during the week of 9 to 16 August 2012.

7 Exhibit ZZZZ6.27, which is the videos taken by Lonmin

8 Security on the afternoon of the 11th of August, show a

9 group of NUM supporters marching triumphantly around the

10 Wonderkop Hostel complex with dangerous weapons in the

11 afternoon of 11 August. Now that's a long time after there

12 may have been any need to defend themselves from any attack

13 that may or may not have taken place in the morning.

14   CHAIRPERSON: Are the hostels a public

15 place?

16   MR CHASKALSON SC: The hostels I would

17 submit would be a public place for these purposes, and we

18 would submit that if the laws in relation to armed assembly

19 are to be enforced against the strikers they must be

20 enforced against the NUM supporters too.

21   The second is a more complicated submission and

22 that is that despite our belief that this country must

23 stamp out armed assemblies, and that is a submission that

24 we regard as very important, armed assemblies have

25 bedevilled political life in this country since, well, a

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1 long, long time back. They were responsible for literally

2 thousands of deaths in KwaZulu-Natal in the 80s and 90s.

3 They've been responsible for deaths in labour unrest right

4 through the period of the 80s and 90s, and they continue to

5 be responsible for deaths. We do not retreat from a very

6 firm submission that they must be stamped out.

7   We do flag a concern that there is a risk that

8 the fragile peace that prevails in Marikana could be

9 disturbed by mass arrests for possession of weapons in

10 gatherings in August 2012, particularly if they're

11 perceived to be arrests effected on a partisan basis, or

12 for an ulterior purpose. How to assess that risk and what

13 weight to give it are matters for the discretion of the

14 NPA. We would merely ask the Commission to identify that

15 risk in its report and to emphasise that whatever decisions

16 are taken in relation to the prosecutions, to prosecutions

17 for contravention of the laws relating to armed assembly,

18 those decisions must be taken on an even-handed basis. If

19 they're not taken on even-handed basis it would really,

20 well, make matters much worse in Marikana rather than

21 better.

22 [12:02] Then there's the suggestion –

23   CHAIRPERSON: Of course, another thing

24 that can be done, and I don't know whether you are going to

25 deal with it and that is, what I recalled earlier when you

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1 weren't in the chamber, the Mpembe plan that apart from

2 arresting people for what happened, as far as in relation

3 to dangerous weapons and assembly, if existing dangerous

4 weapons in the possession of people in Marikana can be

5 seized by the police, then presumably some of the dangers

6 would also fall away.

7   MR CHASKALSON SC: And maybe that a

8 possible recommendation in this regard is some – a

9 suggestion of some sort of amnesty for surrender – in

10 return for surrender of weapons, that is something that

11 might be a way of addressing both issues. But the one

12 principle that we would want to come out of this Commission

13 is that going forward, armed assemblies have to be treated

14 ruthlessly. The suggestion that the JOC was unaware that

15 the operation was proceeding, in his argument yesterday Mr

16 Semenya suggested that there isn't evidence that the JOC

17 was aware that the operation was proceeding to scene 2

18 after scene 1. Now that, with respect, is not correct.

19 The transcripts of the radio transmissions make clear that

20 anyone in the JOC listening to the radio after the scene 1

21 shootings, would have been aware that the operation was

22 proceeding and that SAPS were still trying to remove

23 strikers from the koppie. We've prepared a time line of

24 the relevant transmissions in annexure 2. The crucial

25 points and that's extracted from the transcript of - the

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1 consolidated transcript of the radio transmissions. The
2 crucial points in the time line are, the first 15:53:50
3 which is marked in red at the top, which is when the scene
4 1 shootings take place. Then there's the item in yellow at
5 16:04:04, the times on the left at the ETV times, the times
6 on the right are the times of the video or the times of the
7 cell phone. When Brigadier Pretorius sends her text to
8 IPID calling them to the scene and saying "having operation
9 at Wonderkop, bad, bodies, please prepare your members as
10 going to be bad." That is the earliest – well, the
11 earliest point at which the JOC can be said to have known
12 about the shootings is of course at the shooting, at the
13 time of the shootings themselves because of the evidence of
14 Mr Botes and Captain Kidd that it was audible on the radio.
15 The second point is 16:04:04 by which stage Brigadier
16 Pretorius knew that it was going to be bad. That is in
17 fact before she received the telephone calls from Captain
18 Loest. The next marker in this time line which is in red,
19 if we scroll down, is the 27 seconds between 16:08:15 and
20 16:09:17 which is when Mr Mkhonjwa becomes the first victim
21 to be shot at scene 2. So that's the point at which the
22 first victim is shot at scene 2, and then at the end of
23 this time line, 16:19:47 Mr Mpumza marked in red is the
24 last victim to be shot at scene 2, to be killed at scene 2.
25 Now, we've marked the transmissions in between and we'd

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1 invite, I don't want to spend much time on it now, we'd
2 invite you and your Commissioners Chairperson, to look at
3 them, but by the time that Brigadier Pretorius sent a text
4 to IPID there were at least ten radio communications that
5 would have made clear that the operation was continuing.
6 Several of them would have suggested that the water cannon
7 was still needed so that – and you can infer from that that
8 the crowd hadn't dispersed. Two of them would have alerted
9 the JOC to the fact that the water cannon was needed in the
10 vicinity of a koppie. Before Mr Mkonjwa was shot and after
11 Brigadier Pretorius's text, there were at least another 12
12 communications which showed that the operation was
13 continuing. Several of these would have made clear that
14 SAPS were engaging the strikers in a koppie. Shortly after
15 Mr Mkonjwa was shot, the JOC would have heard a report that
16 there were two bodies, one of which was him, behind the
17 second koppie, and I emphasise the second koppie, and after
18 that report and before Mr Mpumza was killed there would
19 have been at least another nine reports that would have
20 indicated to the JOC that the operation was continuing and
21 several of these reports would have alerted the JOC to the
22 fact that more shooting was taking place. So we submit
23 that the JOC was aware that the operation was continuing,
24 that it was continuing in circumstances where what had
25 happened at scene 1 created very real risks for what was

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1 going to happen at scene 2. The post-mortem evidence and
2 muti marks. Mr Ntsebeza cited some statistics from the
3 SAPS table in exhibit KKK10 in relation to the presence of
4 fresh muti marks on the victims at scene 1. Unfortunately
5 that SAPS table is not entirely accurate, so we prepared
6 our own table with reference to the post-mortem reports in
7 exhibit A with the correct statistics or the correct
8 details and fully referenced. I want to emphasise that the
9 evidence leaders are of the view that the evidence of fresh
10 muti marks on accused persons cannot be used to infer an
11 intention to attack the SAPS because muti is at best
12 neutral in this regard. Some people taking muti may have
13 been wanting protection in the industrial dispute as Mr
14 Mpumza suggests – sorry, Mr Nzuza suggests. Others may
15 have been wanting protection from SAPS not because they
16 intended to attack SAPS but because they had already seen
17 on the 13th, that SAPS had killed some of their colleagues.
18 Others may have been intending to attack SAPS and may have
19 wanted protection for that but at best, it's neutral. So I
20 want to emphasise our submission that fresh muti marks
21 don't themselves provide evidence of an intention to attack
22 SAPS. Having said that, the Commission must reach whatever
23 conclusion it's going to reach on the basis of the correct
24 facts in relation to fresh muti marks and they are the ones
25 that are set out in the table. What I would indicate

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1 quickly in relation to the table is we've distinguished
2 between scene 1 and scene 2. We've identified the position
3 at scene 1 and in scene 2, where the relevant victim was
4 killed. We've got a column that says "marks fresh or
5 recent," and you will see that in seven of those entries
6 there is a question mark because the report doesn't
7 specify.
8   What I would like to point out in that regard is
9 that it's not a coincidence that all seven come from two
10 doctors who consistently don't distinguish between fresh or
11 old scarification marks, so the fact that there's no
12 mention of fresh scarification marks don't – is not an
13 indication that there weren't fresh scarification marks,
14 it's a reflection of the fact that the two doctors don't
15 distinguish and we've given the references. Over the page
16 there are two more entries in respect of the two victims
17 who we cannot place, Mr Segalala and Mr Motswele. Those
18 are the correct facts. I do want to emphasise again that
19 our primary submission is whatever the facts show are
20 neutral in relation to an intention to attack.
21   CHAIRPERSON: I wanted to ask you about
22 that. What is the significance, if any, of muti marks,
23 recent muti marks, scarification marks? I take it would be
24 a basis for suggesting that the at worst for the strikers,
25 the strikers concerned were minded to attack the police and

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1 wanted to be invulnerable and so forth. It would tend to
2 support the submission that there was an attack or more
3 accurately there wasn't an original intention to attack or
4 possibly to attack. If of course – than then brings us to
5 the next question, was there actually an attack? Now there
6 was threats and there is however an argument that whatever
7 threats there had been when, at the crucial moment there
8 wasn't an attack and the argument would be that that was
9 because if there was going to be an attack the intending
10 attack is repented and decided not to attack, where they
11 have realised this matter was more serious than that. So
12 if there in fact, at the end of the day one were to hold,
13 and obviously when the matter is, you've got to give
14 careful consideration to, that there wasn't in fact an
15 attack, it might be based upon an argument that there, if
16 it is a correct argument, that there wasn't an incident 1
17 and there wasn't an incident 2, and an analysis of the
18 final video that was produced. If one concludes that there
19 wasn't an attack, whatever the intention may have been
20 earlier, then how relevant is the muti evidence?
21   MR CHASKALSON SC: Well, it ceases to
22 have relevance. If the conclusion on the basis of the
23 evidence as a whole is there wasn't an intention to attack,
24 then the muti evidence takes the matter nowhere.
25   CHAIRPERSON: And if there was an attack,

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1 even if there's a question as to whether there was an
2 attack or not, the muti evidence would obviously be
3 relevant and have to be considered.
4   MR CHASKALSON SC: Yes, save for our
5 submission is that muti could reflect one of three
6 possibilities or possibly other possibilities that we
7 haven't thought of.
8   CHAIRPERSON: I am putting it at its
9 highest.
10   MR CHASKALSON SC: Chair, then to come to
11 the punitive recommendations. The first is to emphasis the
12 additional criminal investigations we mentioned in our oral
13 arguments but are not in our heads, because we don't want
14 our heads to be treated as the laundry list of the only
15 investigations, and there are two that spring to mind. The
16 first is the investigation of SAPS shooters who have not
17 provided statements which provide a satisfactory
18 explanation for their shooting at scenes 1 or 2, or in
19 respect of whom there's objective evidence that the
20 shooting was unjustified. The second is the investigation
21 of NUM supporters who can be seen with dangerous weapons in
22 that group that I've just discussed on the afternoon of the
23 11th.
24   Now through the main body of our heads of
25 argument, we have also identified a range of instances of

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1 misconduct on the part of SAPS members. We haven't
2 consolidated them in our concluding section on punitive
3 recommendations. We'd merely emphasise now that we don't
4 want them to be lost in the wash. Wherever we mention in
5 the main body of the heads that a SAPS member should be
6 investigated for misconduct, we stand by that submission
7 and we just also make the obvious point that where we
8 recommended a criminal investigation into a SAPS member for
9 misconduct we'd also recommend that SAPS be instructed to
10 investigate –
11   CHAIRPERSON: It would helpful if you
12 could provide an omnibus note collecting all these
13 references for us.
14   MR CHASKALSON SC: We will –
15   CHAIRPERSON: To save us the task of –
16   MR CHASKALSON SC: We will do so, Chair.
17 And that –
18   CHAIRPERSON: Such revised submissions as
19 you are making now in this hearing.
20   MR CHASKALSON SC: We will do that,
21 Chair. And that leaves the issue of the – an inquiry in
22 relation to the National Commissioner and whether this
23 falls within your terms of reference. There are four
24 issues, one of which is a non-issue. What's the correct
25 provision of the SAPS Act is the first. Is it within your

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1 terms of reference. Is it fair to the National
2 Commissioner and are there grounds for an inquiry? The
3 non-issue is section 8 or section 9. We concede that we've
4 got the wrong section, it's section 9. Section 9 is an
5 allegation into misconduct.
6   The terms of reference question, we would submit
7 answers itself in terms of clause 5 in particular which
8 says, "The Commission shall where appropriate refer any
9 matter for prosecution, further investigation or the
10 convening of a separate inquiry to the appropriate law
11 enforcement agency, government department or regulator
12 regarding the conduct of certain persons. And we would
13 submit that that would embrace an inquiry under section 9
14 of the SAPS Act. Then there is the question, is it fair to
15 the National Commissioner? And I don't fully understand
16 the argument. She's known that her conduct was going to be
17 scrutinised with a view to potential criminal liability or
18 further inquiry in terms of clause 5 of the terms of
19 reference. Several parties have been making submissions
20 that she should be investigated for murder. We don't know
21 whether the Commission will or won't accept those
22 submissions, or culpable homicide. But it's not clear to
23 us how she can complain if the Commission concludes that
24 her misconduct fell short if that which would justify a
25 murder investigation but still amounts to misconduct of the

1   sort that might justify her dismissal and so requires an

2   inquiry in terms of section 9. The issues in relation to

3   the National Management Forum, what happened at the

4   National Management Forum, and what SAPS' response to that

5   was, had been very fully ventilated in this Commission.

6   There could never have been any doubt on the part of the

7   National Commissioner that this was something the

8   Commission was taking very seriously. Now some people are

9   saying that must be referred for prosecution or for

10   investigation with a view to prosecution. We are saying,

11   at the very least it must be referred with a recommendation

12   that an inquiry be set up in section 9.

13   CHAIRPERSON: What do you say about the

14   changes between the report that was sent to the President

15   and the media extract which she made on the morning of the

16   17th?

17   MR CHASKALSON SC: That is – that too we

18   have concerns about and we make the submission in our heads

19   of argument that those changes seem to have emanated from

20   her office. She was certainly aware of the changes.

21   CHAIRPERSON: She was asked about them

22   and she didn't pretend, she didn't – to be fair to her she

23   didn't hide behind anybody else. She said, "I accept

24   responsibility" and so forth. And of course, if she'd read

25   the report that was sent to the President and that was the

1   nature of the information she had, then when she applied

2   her mind in the light of that information, to the statement

3   that she was going to make it's arguable, it's not for us -

4   MR CHASKALSON SC: Well –

5   CHAIRPERSON: - you might have seen the

6   difference.

7   MR CHASKALSON SC: We would submit that

8   she should have seen the difference because there is a very

9   big difference. The one speaks about two separate

10   incidents, one of which is quite difficult to explain or

11   both of which are quite difficult to explain, but the one

12   much more difficult than the other. And the other just

13   speaks about one incident.

14   CHAIRPERSON: There is another point. In

15   the context of natural justice, if we were to suggest, I am

16   not saying that we will, but if we were to suggest that an

17   inquiry be held, she would have the opportunity to make

18   representations to the relevant authority, the President in

19   this case, as to why the inquiry shouldn't be held. So I

20   would have thought that there wouldn't be a problem in

21   relation to natural justice. She doesn't have to be heard

22   by us before we make the suggestion. The complaint, the

23   difficulty would be related as far as she is concerned

24   possibly, to the holding of the inquiry. But she would be

25   able to address before the inquiry is authorised if it is

1   authorised.

2   MR CHASKALSON SC: Indeed, Chair, it's

3   quite an astonishing natural justice argument because it's

4   a suggestion that there should be a hearing. Before there

5   is a hearing about whether there is going to be a hearing,

6   because of course the ultimate hearing, if there is going

7   to be a hearing is going to be the inquiry itself. So

8   there is –

9   CHAIRPERSON: She would have the

10   opportunity to say there shouldn't be a hearing because

11   there isn't a basis for it.

12   MR CHASKALSON SC: Yes. But that's a

13   hearing before the President, not – before the Minister,

14   not before this Commission. Then the last question is are

15   there grounds? And we would stand by what we say in

16   paragraph 1302 amplified by the exchanges that we've just

17   had in relation to the press statement. But when I went

18   back to 1302 I realised to my shock that we hadn't

19   emphasised the actual facts of what her role was at this

20   extraordinary session of the NMF. We focused more on a

21   cover up than on what had or hadn't been done. Because

22   whatever her role was, she was party to a decision that in

23   our submission was a reckless decision that left 34 people

24   dead the next   day. And because of her evasive attitude

25   at the Commission we don't know whether she drove that

1   reckless decision, or whether she was a passive party at

2   the extraordinary sessions. We don't know that. But her

3   role in the attempted cover up of the decision coupled with

4   suggestions of improper political considerations on her

5   part, that are reflected in the transcript of the

6   Provincial Commissioner's meeting with Lonmin on the 14th,

7   suggest that she may well have been a primary player in

8   relation to that decision, either way, there are grounds

9   for a misconduct inquiry. Our submission is that SAPS

10   should not be led by someone who on the best version for

11   her was party to a reckless decision that left 34 people

12   dead, and then participated in an attempt to cover up her

13   involvement in that decision. So we stand very firmly

14   behind the submission that there should be an inquiry in

15   terms of section 9.

16   [12:22]   Chair, I've reached the limit of what I think I

17   can do without interrupting or taking away from Mr

18   Budlender's time, if there is time at the end and we can

19   get to the presentation that we've prepared, we'll ask

20   leave to do so.

21   CHAIRPERSON: I think it might be

22   convenient for us a short, a very short comfort break at

23   this stage before we have Mr Budlender in argument.

24   [COMMISSION ADJOURNS   COMMISSION RESUMES]

25   [12:27] CHAIRPERSON: The Commission resumes.

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1 Yes, Mr Budlender.
2   MR BUDLENDER SC: Thank you, Chair.
3 There are five matters which I wish to address. The first
4 is Lonmin's defence that it was not under a duty, under a
5 legal duty to negotiate with the strikers. The second is
6 Lonmin's decision not to close down its mining operations
7 during the strike. The third is Mr Mathunjwa's account of
8 his meeting with Mr Kwadi on the 16th of August. The fourth
9 is a brief remark on the question of a memorial, and then I
10 have some very brief closing remarks I wish to make.
11   So firstly as to Lonmin's defence of no legal
12 duty to negotiate, a large part of Lonmin's submission was
13 that it was not required by law to negotiate with the
14 strikers. It says that the Constitution and the Labour
15 Relations Act and its own internal protocol did not oblige
16 it to do so. Now in fact they are wrong in respect of the
17 Constitution because the Bill of Rights operates
18 horizontally where appropriate and there could be no doubt
19 that the right to life binds and obliges an employer to do
20 whatever it reasonably can to avoid the loss of life by its
21 employees. It was a breach of its constitutional
22 obligations.
23   But in any event the argument misses the point
24 because the Commission's terms of reference require it to
25 inquire into and make findings and report on, and make

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1 recommendations concerning amongst others, the following
2 matters in relation to Lonmin, "1.1.1, whether it exercised
3 its best endeavours to resolve any disputes which may have
4 arisen (industrial or otherwise) between Lonmin and its
5 labour force on the one hand, and generally among its
6 labour force on the other." It's not a question of whether
7 they had a legal duty to do so, whether they used their
8 best endeavours to resolve the dispute.
9   Secondly you're required to report on and make
10 recommendations on, "1.1.2, whether Lonmin responded
11 appropriately to the threat and outbreak of violence which
12 occurred at its premises." Appropriately; it's not just a
13 matter of legality, it's whether it did the right thing.
14   Thirdly, "1.1.4, whether it employed sufficient
15 safeguards and measures to ensure the safety of its
16 employees, property and the prevention of the outbreak of
17 violence between any parties." Not a question of a
18 legality, question of correct, whether it acted correctly.
19   "1.1.6, whether by act or omission it directly or
20 indirectly caused loss of life or damage to persons or
21 property." And Chair and Commissioners, that goes to the
22 point which we made at the outset of our submissions. The
23 question is not just whether Lonmin, or for that matter
24 other parties, are legally liable for what happened, it's
25 also whether they exercised their best endeavours – to use

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1 the words of the terms of reference – and whether they
2 acted appropriately to exercise, to use the terms of
3 reference. That's what you are mandated by the President
4 to consider and it's no answer to say well, I didn't have
5 to act appropriately because I wasn't legally obliged to
6 act appropriately, or I wasn't obliged, I didn't have to
7 use my best endeavours because I wasn't legally obliged to
8 use my best endeavours. The answer is then you didn't use
9 your best endeavours.
10   Mr Burger asked repeatedly where does the duty
11 arise from. Well, we say that the duty arises, whether or
12 not it's a legal duty, it arises from the duty of a
13 responsible employer to act responsible and to act
14 appropriately where there is a risk of the loss of human
15 life. It is a duty not to say well, 44 deaths gave us good
16 reason to negotiate outside our structures and to be
17 flexible, but 10 deaths weren't enough. 10 deaths do not
18 give us reason to be flexible, only 44 deaths give us
19 reason to be flexible. That's not what a responsible
20 employer does and it's not an appropriate response.
21   CHAIRPERSON: Is it relevant that they
22 were requested by the police, the police came, they invited
23 the police in to help them, the police came to them and
24 urged them to negotiate? Is that relevant on this part of
25 the –

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1   MR BUDLENDER SC: Well, that's very
2 material of course, very material. If they are told please
3 negotiate and they say we won't, all the more reason. Then
4 Lonmin's other explanation for not –
5   CHAIRPERSON: I'm sorry, one more point
6 before you move on. We've had a bit of an argument here as
7 to what exactly "negotiate" means but I'm not sure that
8 it's necessary for us to go that far. Did they have to
9 negotiate or just talk?
10   MR BUDLENDER SC: What they had to do was
11 to talk to the people about what their complaint was and
12 what their demands were and to try to resolve the issue.
13 Now whether you do that by a process of full-on negotiation
14 or you do it by other means is a matter which one has to
15 decide if you like in the terms of situational
16 appropriateness. But the one thing you can't say is we
17 won't talk to you, we refuse to talk to you because of a
18 principle which is, which Mr Da Costa admitted led to a
19 completely cynical outcome, was a refusal to talk at all
20 because they said we'll only talk to you through the people
21 whom we know you're at war with. That was utterly cynical.
22 Mr Da Costa acknowledged that, and that's not what a
23 responsible employer does.
24   Lonmin's other answer, the one answer is we
25 didn't have a legal duty. The other answer is that they

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1 couldn't negotiate because the miners were inflexible about
2 the 12 500 and therefore there was no point in talking to
3 them. Now that is firstly not founded in fact, and
4 secondly it's frankly absurd.
5   CHAIRPERSON: Isn't that mainly ex post
6 facto? There was no basis –
7   MR BUDLENDER SC: That's –
8   CHAIRPERSON: Sorry, if you're going to
9 make that point I won't say anymore.
10   MR BUDLENDER SC: That's precisely the
11 point I was going to make as to why it's not founded in
12 fact. It's not founded in fact because at the time of the
13 events Lonmin had no information at all that the strikers
14 would not budge on a demand for an immediate payment of
15 R12 500. There was no such evidence of that kind before
16 it. Subsequently, we have witnesses who came here
17 subsequently and said that and there's a lot of debate
18 about that, but at the time when they refused to negotiate
19 or refused to talk they had no information which suggested
20 that talking would be absolutely useless unless they're
21 paid R12 500 the next month, and so it's factually
22 unfounded. It's an ex post facto rationalisation.
23   Secondly, it's absurd because everyone knows,
24 even I know that people often make very large demands as a
25 starting point and very often they say we're intransigent

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1 and we won't budge, but they do budge once talking and
2 negotiations take place. That was Mr Ramaphosa's evidence.
3 I know that as having been an employer in a small non-
4 governmental organisation. Everybody knows that. People
5 make demands and when you talk they moderate their demands.
6 One can reasonably expect that the management of the
7 world's third largest platinum miner knew that, and if they
8 didn't know that they had no job managing that company. I
9 don't believe that's the case. They knew it. They knew
10 full well when you talk things shift.
11   Then I want to address two matters where it
12 appears that Lonmin is in any event legally liable. The
13 first matter is Lonmin's decision not to close down its
14 mining operations. Now in his evidence on day 289 Mr –
15   CHAIRPERSON: Sorry, I just want to get,
16 for the purpose of clarity, close down mining, you mean put
17 it on care and maintenance?
18   MR BUDLENDER SC: Yes. Yes, I'll come to
19 that, thank you, Chair. In his evidence on day 289 Mr
20 Seedat addressed the issue of closing the mine to avoid
21 further loss of life. He said "You can't simply switch off
22 and close down because there are certain essential
23 services, maintenance services which have to be continued
24 for safety and other reasons," and that apparently involves
25 something less than 10% of the workforce at most. The

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1 evidence is at page 37794 to 37796.
2   The problem with Mr Seedat's evidence is that,
3 (a), it's purely theoretical, and (b), it doesn't answer
4 the question. It's theoretical because he wasn't on the
5 scene at the time when the decision was made to continue
6 mining operations full-on. He arrived later. He doesn't
7 say, and he can't say why the decision was in fact made.
8   But you do have evidence about why it was made
9 and that was given by Mr Mokwena and I'd like that on the
10 screen because it's a critical passage in the evidence.
11 It's day 292 and it's page 38211 and I'm starting at line
12 17. So Mr Ramphele is questioning Mr Mokwena and he says
13 at line 17, "So it was known, will you agree with me that
14 it was known to Lonmin that there was danger for those
15 employees who were to report for work?" Mr Mokwena, "That
16 is correct." Mr Ramphele, "It is also correct that in your
17 recruitment you recruit a large number of people coming
18 from very distant places and they have to find
19 accommodation in neighbouring villages. Is that correct?"
20 "That is correct." Mr Ramphele, "And that if these people
21 were going to be going to work," and if you'd just look at
22 this paragraph, "if they were going to be going to work
23 they would face the same violent action by those who do
24 not, did not want them to go to work." Mr Mokwena, "That
25 is true." Mr Ramphele, "And that it was a known danger, it

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1 was a known danger that Mr Langa on his way to work would
2 in all probability if he were to meet the strikers, would
3 be faced with the same fate of these people that were
4 injured on the 10th?" Mr Mokwena, "That is correct."
5   CHAIRPERSON: The 10th of course was the
6 wrong date.
7   MR BUDLENDER SC: Yes. Mr Ramphele, "And
8 therefore you would agree with me that not informing Mr
9 Langa that he should not come to work because of the
10 circumstances was something that one can call
11 irresponsible?" Mr Mokwena, "That could be the case,
12 Chair," and then he goes on to explain why the decision was
13 taken. This is the evidence of the decision which was
14 actually taken, not Mr Seedat's subsequent spin on the
15 decision that was taken. "If I may say, one of the options
16 that actually we considered was to close the mine and we
17 deliberated extensively and looked at what that could mean
18 for employees who then we would have to pay because they'd
19 absolutely nothing to do with the strike." So it was a
20 matter that was discussed extensively, let's close the
21 mine. "The question then was if we close the mine the
22 workers who are not on strike have to be paid because
23 they're not on strike, and we realised then that it was
24 going to be very difficult to determine who was actually on
25 strike and who was not on strike if we were to pay people

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1 after closing the mine. Further we also looked at the

2 issue that if we close the mine, continue paying people who

3 are not striking, the likelihood would have been why would

4 anyone therefore go back to work if they're paid because

5 there is an unprotected strike. So it was a complex issue,

6 Mr Chair. I want to admit, however, that it was a

7 consideration on our part actually to close the mine as a

8 tool to avoid further damage." So they closed, what

9 actually happened is not what Mr Seedat says might have

10 happened, what actually happened is they considered closing

11 it, they debated it intensively and they said no, we are

12 not going to do that because we don't want to have to pay

13 wages to strikers and we don't want to have to pay non-

14 strikers for not coming to work. That's the reason.

15 That's the decision, and so Mr Seedat's explanation of the

16 essential services didn't even arise. They didn't even

17 consider whether they should keep the essential services

18 going. That was not even up for debate. They said we

19 won't close.

20   CHAIRPERSON: Presumably if they kept the

21 essential services going there would be a much smaller

22 workforce, much easier to protect them on their way to work

23 and way back.

24   MR BUDLENDER SC: Yes, Mr Chaskalson

25 points out, and under those circumstances if they said we

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1 are keeping the essential services going just to keep

2 things afloat there would have been no incentive for anyone

3 to attack the workers because there was no production

4 taking place, no smoke from the stacks. It would have just

5 been a safety operation. So a deliberate, a cold and

6 deliberate decision was made by Lonmin to instruct people

7 to come to work, knowing that they might be killed, and the

8 reason that decision was made was because that would be in

9 Lonmin's financial interest.

10   We say with all due consideration, that was a

11 cynical and in fact appalling decision. The managers, in

12 the comfort of their offices, deliberated intensively and

13 decided for financial reasons to instruct their employees

14 to come to work, knowing that this would put their lives at

15 risk, and the results were predictable, as Mr Mokwena

16 acknowledged. The decision was not only cynical and

17 appalling, it was also unlawful, if you read the judgment

18 of the SCA in Media24 versus Grobler. The deaths of Mr

19 Mabebe and Mr Langa were the direct result, the direct

20 result of the decision of Lonmin not to close down the mine

21 or put it on a maintenance basis. They were the direct

22 predictable, foreseeable and unlawful consequence of a

23 decision by Lonmin, and the law is quite clear, if you

24 can't provide a safe workplace you may not tell your

25 employees to come to work. It's as simple as that.

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1   Lonmin also failed to comply with its legal

2 obligation to provide adequate protection for its security

3 staff. Their security staff said please buy us some hard

4 vehicles. Lonmin said no, we're only going to provide

5 soft-skin vehicles. But whatever the merits of that

6 decision, it didn't prevent Lonmin from saying to its

7 service provider, Protea Coin, please provide hard-skin

8 vehicles when in fact there was a hard-skin vehicle

9 initially. Could we have a look at exhibit ZZZZ6.23.068?

10 This is on the – there's the vehicle, on the 9th of August

11 2012. It's a very large, very intimidating hard-skin

12 vehicle owned by Protea Coin on the 9th of August. Now

13 apparently that vehicle was burnt out, but there's no

14 explanation for why Lonmin didn't say to Protea Coin that's

15 what we want at the very time when it was most needed. It

16 was there when it was not most needed and it was not there

17 when it was most needed.

18   That brings me to the third matter, which is Mr

19 Mathunjwa's account of his meeting with Mr Kwadi on the 16th

20 of August. I need to reply to the submissions on behalf of

21 AMCU in that regard. In our heads of argument we submitted

22 that initially Mr Mathunjwa gave a false account of what

23 had happened during his meeting with Mr Kwadi on the 16th of

24 August and in response Ms Barnes on behalf of AMCU argued

25 firstly that Mr Mathunjwa couldn't have been expected to

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1 give a detailed account of such an informal meeting in his

2 statement, and secondly that in any event he was consistent

3 in his testimony that AMCU wanted to negotiate in an ad hoc

4 central forum on behalf of the strikers.

5   But we submit that's not the evidence. Firstly

6 in his statement exhibit KK Mr Mathunjwa describes the

7 meeting with Mr Kwadi in some detail in three paragraphs.

8 He doesn't refer to the demand that Lonmin recognised AMCU

9 as a bargaining agent before he goes to the mountain to try

10 to persuade the workers to return to work, and that was

11 very material because if Mr Mathunjwa had demanded this

12 because he needed something to take to the strikers and he

13 didn't get it, then his need for it and his inability to

14 obtain it were very material to the events which followed

15 and one would expect them to be in the statement and say

16 actually I knew I was going to have trouble persuading the

17 strikers. I tried to get something to take to them but

18 Lonmin was hard-headed and wouldn't give it to me.

19   Then secondly during his evidence-in-chief Mr

20 Mathunjwa gave a detailed account of his discussion with Mr

21 Kwadi and again didn't mention this in any way. And then

22 thirdly he was cross-examined on this by Mr Burger. It's

23 day 24, page 2551 from line 11, I'll just read it. Mr

24 Burger puts to him, "What you wanted to get from management

25 is an undertaking that if the workers go back to work and

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1 there's going to be a discussion on wages, you want to be
2 part of the discussion?" Mr Mathunjwa says, "That's your
3 opinion." Mr Burger says, "No, I'm putting it to you as a
4 fact," and Mr Mathunjwa answers, "That is not correct." Mr
5 Burger says, "And you said to management on the morning of
6 the 16th, don't be technical with me, meaning don't refer me
7 to bargaining structures. If these people get off the
8 koppie I want a seat at the table," and Mr Mathunjwa said,
9 "Where is that, Sir? Can you give it to me?" and then it
10 was, after Mr Mathunjwa had been shown the transcript OO13
11 he conceded that he had sought this undertaking from
12 Lonmin. So his evidence initially was not correct.
13   I do, however, want to record something publicly
14 in this regard. I want to record publicly that this in no
15 way detracts from the moral courage which Mr Mathunjwa
16 showed in attempting to persuade the strikers to leave the
17 koppie on the 16th of August when he would obtain no benefit
18 from it, AMCU would obtain no benefit from it, and he
19 risked being attacked as a sell-out by going to the
20 strikers and saying it's time to leave the koppie and lay
21 down your weapons. He showed considerable courage in doing
22 so and he ought to be congratulated for that, and I want to
23 say that it does not lie in the mouths of those who did not
24 lift a finger to prevent the catastrophe to criticise Mr
25 Mathunjwa for his conduct. It's not for them to say that.

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1 They should be ashamed of themselves.
2   If anyone of us, if you ask who used their best
3 endeavours, it was Mr Mathunjwa, no-one else, literally no-
4 one else that I can find. You can say really stretched and
5 tried and hard and pushed, only Mr Mathunjwa. So we
6 criticise his evidence, but his conduct is with respect to
7 be respected.
8   CHAIRPERSON: I don't think he was the
9 only one who used his best endeavours. I'm not sure with
10 respect that's correct. I think there's a lot to be said
11 for what the stance – never mind some of the things he was
12 perhaps persuaded to say, but the stance he took, General
13 Mpembe, was also commendable.
14   MR BUDLENDER SC: Sorry –
15   CHAIRPERSON: I thought you said the only
16 one who used his best endeavours –
17   MR BUDLENDER SC: To whom are you
18 referring, Chair?
19   CHAIRPERSON: General Mpembe. General
20 Mpembe may have said things that he shouldn't have said in
21 evidence, but –
22   MR BUDLENDER SC: We certainly –
23   CHAIRPERSON: - he made the right
24 decision on the 13th. I know the evidence leaders take a
25 different view, but Mr Mpofu takes the view that prima

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1 facie I have and on the night of the 15th he also expressed
2 the view which is one which does him credit.
3   MR BUDLENDER SC: General Mpembe
4 certainly did some things which were right. When Mr Tokota
5 asked earlier in the hearing did the police do anything
6 right, he certainly did some things which were right, but
7 there are things which we've submitted he did wrong and we,
8 one of the things he did wrong was he didn't call off the
9 operation as the overall commander after scene 1.
10 [12:46] He could have done it. I'm not going to re-
11 traverse that. I don't want to re-traverse General Mpembe,
12 though I think some people on our team would like me to,
13 but he did, he certainly did some things right with the
14 meetings that he had with NUM were sensible and wise. His
15 decision not to confront the strikers initially on the 13th
16 was sensible and wise. Unfortunately he blotted his
17 copybook rather badly we say in other respects, but I'm not
18 going to go there.
19   Then Chair and Commissioners, may I say something
20 very brief about the question –
21   CHAIRPERSON: Just before you leave it,
22 Mr Mpofu has submitted that he was from a factual point of
23 view superseded as overall commander and I suppose you
24 don't have to go there, but if that submission has some
25 substance then that detracts from the submission you made,

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1 criticising him.
2   MR BUDLENDER SC: Yes, if that's what
3 he'd said. If he'd come and said I couldn't stop it
4 because it was taken away from me, control was taken away
5 from me, then one could have dealt with that. But there
6 was a closing of ranks and he said no, no, no, no-one – he
7 said "I took the decision."
8   CHAIRPERSON: [Microphone off, inaudible]
9 some things which caused concern, but he also said to
10 Mathunjwa you talk to General Mbombo, I'm not in charge
11 anymore.
12   MR BUDLENDER SC: Which he denies. He
13 can't have it both ways. He can't say give me credit for
14 saying that to Mr Mathunjwa but I didn't say it. He
15 can't –
16   CHAIRPERSON: If we find he did say it to
17 Mathunjwa, you don't suggest that that aspect of Mr
18 Mathunjwa's evidence is questionable and shouldn't be
19 accepted?
20   MR BUDLENDER SC: No, it's entirely
21 consistent with the known facts. Then can I come to the
22 question of the memorial. We made the proposal in our
23 written submissions that there should be some form of
24 memorial. We left it open as to what that should be. It
25 doesn't have to be a statue. There are many ways of

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1 memorialising an event, but we made the submission that
2 there should be some memorialising of what happened and
3 that it must be, that the memorial must be a memorial for
4 all. It must be a part of the process of restoration and
5 reconciliation, not a new source of division. If it is
6 going to be a physical memorial, location is very
7 important, and Mrs Fundi has made the point to us that if
8 the location is not acceptable to everyone the memorial
9 will not serve its purpose, and so both the process of
10 identifying the memorial and the memorial itself have to be
11 inclusive, part of a process of reconciliation, otherwise
12 we will in fact reopen old wounds and reopen very deep
13 wounds.
14   Finally in closing, Chair, may I say this; Lonmin
15 produced the, made available to the Commission the very
16 interesting report of the Stonechild Inquiry in Canada and
17 one of the conclusions of that commission provides the
18 appropriate response, we submit, to what SAPS did
19 immediately after this catastrophe, namely close ranks.
20 Immediately after the catastrophe the Minister, the
21 National Commissioner and Brigadier Calitz all announced
22 that the police had acted correctly and told the police
23 that they had acted correctly, and the passage in the
24 Stonechild Report which we think is helpful is at page 207,
25 and this is what the report says, "Certainly the Saskatoon

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1 Police Service must treat its members with respect and
2 dignity and observe the procedural and substantive
3 protections of the law. If, however, the Saskatoon Police
4 Service becomes an advocate for its members it assumes a
5 role that is antithetical to its responsibility to the
6 public. In assuming such a partisan rule the Saskatoon
7 Police Service contributes to a public perception that the
8 police cannot police themselves and that complaints against
9 the police are futile." That we submit is a very telling
10 observation which is very much applicable to the response
11 what we have had in this Commission.
12   Policing, Chairperson and members of the
13 Commission, is a difficult and sometimes very dangerous
14 task and Mr Semenya is quite right in that regard. We all
15 need the South African Police Service and we desperately
16 need a police service on which we can rely and which we can
17 trust. The South African Police Services' dogged denial
18 that it did anything wrong, its invention of evidence, its
19 concealment of evidence and its attempts now that those
20 efforts have failed to argue that the Commission may not
21 make any meaningful findings and recommendations are not in
22 the interests of the South African Police Service and they
23 are not in the interest of our country. It's time,
24 Chairperson, for some accountability. It's time for a
25 change and it's time for a change from the top. Those are

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1 our submissions, members of the Commission.
2   Finally, may I take the liberty of speaking on
3 behalf of all of us, without a power of attorney, to – I'm
4 the shop steward, I'm told. I would like to take the
5 liberty of thanking you, Commissioners, on behalf of all of
6 us. We're all indebted to you for your patience, for your
7 hard work and for your commitment to finding the truth and
8 we wish you the best as you now undertake the task of
9 producing your very important report. Thank you.
10   CHAIRPERSON: Before I say something,
11 didn't you want to show us something about the position of
12 the deaths? How long is that going to take? Have we got
13 time for that?
14   MR CHASKALSON SC: If we go quickly
15 through it, it will take maybe 12 minutes.
16   CHAIRPERSON: I don't think we've got
17 that, I'm afraid. But you'd said you'd give us copies
18 later.
19   MR CHASKALSON SC: Can we give it an
20 exhibit number so that –
21   CHAIRPERSON: Ms Pillay is in charge of
22 that. She'll give it –
23   MR CHASKALSON SC: ZZZZ49.
24   CHAIRPERSON: Alright, thank you. Thank
25 you very much. Before we adjourn for the last time, there

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1 are some things I want to say. I want to begin by thanking
2 the municipalities of Rustenburg and Tshwane which made
3 venues available to the Commission free of charge and thus
4 made a significant contribution to the Commission's work.
5   I also want to express our gratitude to the
6 officials of the Department of Justice and Constitutional
7 Development and the Secretariat of the Commission for all
8 they've done to facilitate the working of the Commission.
9   We're also grateful to the evidence leaders and
10 their researchers for all the dedicated work they did to
11 enable the Commission to carry out its functions.
12   We also want to express our gratitude to the
13 legal practitioners who represented the various parties who
14 participated in the proceedings of the Commission, thank
15 them for their inputs, for their submissions, which I'm
16 sure will contribute very significantly to a report which
17 we hope will be of assistance not only to the people
18 directly involved in the events at Marikana, but looking
19 ahead, to the country as a whole.
20   It's also important to acknowledge the coverage
21 given to the Commission's work by the media who've enabled
22 the public both in this country and beyond our borders to
23 follow what has been happening at the Commission.
24   We have on occasion found it necessary to engage
25 with the witnesses in what might be considered a robust

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1   manner. This has been done in an effort to enable us to
2   understand and evaluate the evidence and to decide what
3   weight we can attach to their evidence.
4   We, the Commissioners, will as diligently as we
5   can consider all the evidence and all the arguments that
6   we've heard before making our conclusions, before reaching
7   our conclusions.
8   As I've said, I want to thank all the people I've
9   mentioned and to say that it's ultimately been a much more
10   harmonious commission than I thought it would be in the
11   beginning. I was very pleased to see the – issues I won't
12   go into, but by and large the Commission has proceeded and
13   all the people have taken part in a very harmonious way and
14   I think that also will be seen in the end to contribute to
15   a satisfactory result as far as our work is concerned. And
16   on that note the Commission adjourns for the last time.
17   [COMMISSION ADJOURNED]
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