

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 5 29 OCTOBER 2012 PAGES 359 TO 489

HELD AT

CIVIC CENTRE, RUSTENBURG, NORTH WEST PROVINCE



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1 [PROCEEDINGS ON 29 OCTOBER 2012]
 2 [09:06] CHAIRPERSON: The Commission resumes.
 3 Before we commence with the main proceedings this morning,
 4 there are three aspects that I think should be dealt with
 5 at outset. The first relates to the question of the
 6 transportation and accommodation of the deceased's families
 7 who wish to be present at the hearings of the Commission.
 8 The second issue relates to certain requests that were made
 9 in relation to legal aid and the third relates to the
 10 arrests of certain persons who were in attendance on
 11 Tuesday, by the police, which have led to complaints that
 12 the work of the Commission is being prejudiced and that
 13 certain action should be taken in consequence thereof.
 14 Mr Madlanga, are you able to deal with those
 15 three aspects, that's beginning with the transportation and
 16 accommodation of the families first?
 17 MR MADLANGA SC: Thank you Chairman,
 18 Commissioners. On the question of the funding of the
 19 attendance of the families, I was called by Mr JB Skosana
 20 of the Department of Justice at quarter past eight this
 21 morning. He advises that they are pushing for an amendment
 22 of the regulations to provide something that goes along the
 23 following line or lines – I'm paraphrasing of course. It
 24 will provide that the Department will fund those families
 25 that are willing to attend the Commission hearings. I

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1 asked him what the practical value of that would be
 2 because, in my view, I don't think any of the families were
 3 forced to attend, only those who wanted to would have
 4 attended in the first place. He said that there is no
 5 statutory basis as of now for the Department to fund the
 6 attendance of the families and that the amendment would
 7 serve the purpose of a statutory provision for the funding.
 8 And he said that they are pushing for this to be finalised
 9 today. I then asked him how soon would they be in a
 10 position to then fund the attendance of the families. He
 11 said that would happen soon after the amendment.
 12 Then on the question of legal aid, I was
 13 contacted by Mlambo, JP who chairs Legal Aid South Africa
 14 and he raised certain questions with us, the evidence
 15 leading team. We responded to those. Those questions
 16 related to the funding of Mr Mpofo's clients. We responded
 17 to the questions that he was raising and he contacted me in
 18 the evening yesterday and said that they are going to have
 19 a teleconference as the board of Legal Aid South Africa and
 20 that they will revert to me either this afternoon or early
 21 evening today.
 22 Insofar as the families of the deceased Lonmin
 23 security guards are concerned, he said that they want to
 24 treat those similarly as they have done with the families
 25 of the deceased people, the families that are being

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1 represented by Mr Ntsebeza. They want to treat those in
 2 the same manner but he said that there are certain
 3 formalities that have to be met.
 4 I have already spoken to Mr Rampile who is
 5 representing the families of the deceased Lonmin security
 6 guards and I've already given him the name of the contact
 7 person that he must sort out those formalities with, so
 8 that one seems on course, Chairperson.
 9 CHAIRPERSON: Thank you, Mr Madlanga.
 10 MR MADLANGA SC: Then on the last issue,
 11 the arrests, what one gleans from the correspondence
 12 received from SAPS is that, amongst others, SAPS is saying
 13 we are entitled to exercise our rights, if not obligations
 14 or responsibilities, to arrest whoever we have a reasonable
 15 suspicion of having committed an offence. No-one can
 16 quarrel with that, I accept that without any reservations,
 17 they do have that right.
 18 The second point they make is that to divulge
 19 information relating to the arrests may be disadvantageous
 20 to the process of investigations which are at a sensitive
 21 stage at this moment. I would want to take issue with that
 22 and the submission I would make in that regard is that,
 23 one, I do not believe that SAPS or at least my colleagues
 24 on the other side representing SAPS, are not going to trust
 25 the Commission if the Commission were to take the stance

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1 that we, as the Commission, are going to treat the
 2 information that you divulge to us as the Commission
 3 confidentially. If they were to say that they would
 4 distrust the Commission, I would be quite surprised. I
 5 doubt that they will say so and I would urge that that
 6 information be availed to the Commission and the reason why
 7 that should be done is because a point has been made that
 8 Mr Dali's clients - or indeed even the legal
 9 representatives themselves, Mr Dali Mpofo included – are of
 10 the view or perception or belief that the arrests are in
 11 fact taking place in order to thwart the endeavours of Mr
 12 Dali Mpofo's clients in the presentation of their case
 13 before this Commission.
 14 This Commission can only be in a position to test
 15 that contention, that belief, that perception, if it is
 16 given an opportunity to have sight of the contents of the
 17 docket to see whether indeed, at least on the basis of what
 18 is contained in there, there was a basis for a reasonable
 19 suspicion and therefore a basis for the arrests.
 20 Those would be our submissions on the three
 21 matters, Chairperson.
 22 CHAIRPERSON: Yes, thank you very much.
 23 MR MADLANGA SC: Thank you.
 24 CHAIRPERSON: Mr Madlanga, you indicated
 25 that you wanted to say something else.

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1 MR MADLANGA SC: Yes, yes, Chairperson.
 2 It's something unrelated to the issues that the Commission
 3 has raised. Last, on the last occasion the Commission sat
 4 it was brought to my attention by one of my learned
 5 juniors, Mr Matthews Mojapelo behind me, that the gentleman
 6 standing there with a camera is recording or is doing a
 7 video recording of the proceedings on behalf of the South
 8 African Police Service. We spoke to him as soon as the
 9 matter had been brought to my attention and asked him to
 10 move away from where he is. We are not making a point that
 11 he should not do what he is doing, but the point is we turn
 12 to the back, we talk to our juniors at the back and some of
 13 what we're saying as counsel is confidential and he just
 14 refused to move. He said let me do my duty and you do
 15 yours. And despite us saying, do your job but do not do it
 16 here, he just would not budge and he even made a point
 17 which I think is quite ridiculous, that his microphone does
 18 not capture what we say here but that it only captures what
 19 comes through the speakers. And, and more importantly than
 20 what I've said thus far, my learned junior Mr Mojapelo said
 21 the day before, that is the day before I actually spoke to
 22 him, the gentleman doing the video recording, the day
 23 before he said to him, "I focused my camera on your screen
 24 and I videoed what you have or you had on your computer
 25 screen, I hope you don't mind." That, he said so according

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1 to Adv Mojapelo in so many words. He is refusing to move
 2 and we totally object to him standing where he is. If he
 3 must record, and he said he is doing it for the National
 4 Commissioner of Police, if he must do what he's doing, he
 5 must do it elsewhere, Chairperson. Thank you.
 6 CHAIRPERSON: Yes, I take it he hasn't
 7 got media accreditation. Those who have got media
 8 accreditation have got certain privileges and access to
 9 places, facilities here, which ordinary members of the
 10 public have not got. So he's here, I take it, in his
 11 capacity as a member of the public. I'm not sure that
 12 members of the public have got the right to do the things
 13 that you say he's doing but perhaps then we must Mr Semenya
 14 to comment on what you've said on this issue before we deal
 15 with the other three issues.
 16 MR SEMENYA SC: Chairperson, it was
 17 earlier brought to my attention and I raised it with client
 18 that that ought not to happen. There shouldn't be any
 19 reason why he cannot be positioned differently and still
 20 have that capturing – I think we do have some accreditation
 21 but there's no basis for him to do it in the manner that is
 22 being complained about.
 23 CHAIRPERSON: Can I ask, where was he
 24 positioned?
 25 MR MADLANGA SC: He has always been there

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1 where he is and that is why he was able to even video Adv
 2 Mojapelo's, what was showing on his laptop.
 3 CHAIRPERSON: He is the gentleman in the
 4 blue coat? Is that –
 5 MR MADLANGA SC: Yes, Chairperson.
 6 CHAIRPERSON: Well, Mr Semenya, he is
 7 where he was before, in the position which is the subject
 8 of objection. Inasmuch as he is part of the staff of your
 9 client, would you tell him to do what you agreed is
 10 appropriate and remove himself from where it is agreed it
 11 is inappropriate that he should be.
 12 MR SEMENYA SC: I see he is obliging.
 13 CHAIRPERSON: Thank you. Without
 14 anything being said by you, Mr Semenya, he has done what
 15 you wanted to tell him to do. I think that the
 16 representatives of the police should remember that the
 17 Police Service is in the frame as much as certain other
 18 organisations and parties are and it behoves them to behave
 19 appropriately. I hope it will never be necessary for this
 20 kind of problem to be dealt with again.
 21 We now move, I think, to the first issue that was
 22 the subject of report from Mr Madlanga, namely the
 23 transportation and accommodation of the families and that I
 24 know is a matter with which Mr Sibizo - was involved. Is
 25 there anything you wish to say in the light of what Mr

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1 Madlanga has told us?
 2 MR NTSEBEZA SC: Yes thank you, thank you
 3 Chairman, thank you Commissioner. Mr Chairman, the first
 4 thing that we would like to record is the mixed message.
 5 First of all, I accept what Adv Madlanga has put before you
 6 on record. I accept it on the basis that he's telling us
 7 what he was told by Mr Skosana. What I am unable to
 8 reconcile is what he has told you on record here as
 9 emanating from Mr Skosana, with what Mr Skosana has been
 10 reported throughout the weekend in the mass media to have
 11 been saying. It prompted a reaction from those who
 12 instruct me, the Socio-Economic Rights Institute, and that
 13 reaction was one of amazement and disgust because he is
 14 reported to have said the following, 1. that the
 15 Department of Justice and Constitutional Development is
 16 going to discontinue financial support aimed at enabling
 17 the families of the deceased to attend the hearings at the
 18 Marikana Commission of Inquiry. That has been carried in
 19 the mass media throughout the weekend and it was attributed
 20 to him.
 21 What also hurt our clients was the fact that he
 22 is reported to have also stated that most or all of the
 23 families that they presumably contacted in this regard had
 24 stated that the money that would be used to transport them
 25 and accommodate here, accommodate them here, would rather

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1 be used or be paid to them because there will be a great
2 deal of costs to transport them here. And he implied that
3 none of the families, including our client, actually wished
4 to attend the Commission, which is why one can make, can
5 understand what Adv Madlanga has stated, namely that they
6 want now to effect this statutory amendment of the
7 regulations.

8 So our submission is that we are not able to
9 accept the veracity of what Mr Skosana has said because it
10 is at odds with what he has stated publicly and therefore -
11 I don't know whether Mr Chairman you wanted to – oh okay.
12 [09:26] So we take the view therefore that, on our
13 instructions – and we are in constant contact, my attorney
14 throughout the weekend has been working with the families –
15 we told you and your commissioners, with respect, that the
16 families want to attend, that the families have never
17 expressed a desire not to attend and that in any event, in
18 our submission, it would be their right to attend an
19 inquiry that seeks to establish how their relatives were
20 killed. It doesn't have to be articulated in
21 constitutional rights terms, it doesn't have to be
22 articulated in legal bases, it is just a natural thing that
23 one would expect should be happening. But if it is so that
24 we must articulate it on a legal basis, then we will notice
25 of dispute that is why, therefore, our submission Mr

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1 Chairman is that until the families are here, until they
2 are here because they have told us they want to be here, it
3 would be improper for the Commission proceedings to
4 proceed.

5 If, as Mr Skosana has indicated, the regulation
6 will have been promulgated by today and that everything
7 would have been done to enable and facilitate the presence
8 of the families tomorrow, then let's wait for tomorrow and
9 see what happens tomorrow. I say so because on our
10 instructions, our clients were here when Mr, Colonel Botha
11 was testifying. They are keen to know what it is that Mr
12 Botha is going to say further. He was cross-examined by a
13 whole range of people, he was cross-examined closely by
14 some of those who represent AMCU, Adv Bruinders, very
15 closely by Adv Bizos, very closely by the Chairman of the
16 Commission – indeed the Chairman of the Commission enquired
17 from me as to whether I want to cross-examine him and I
18 said, in view of the issues that have been raised by some
19 of those who put questions, including the Chairman of the
20 Commission, I would like to consider a process of
21 approaching his evidence.

22 Now, we know because of the relationship that we
23 have with our clients, that they are interested in the
24 developments that will ensure in the further cross-
25 examination of Colonel Botha and they feel that they have a

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1 right to be here, to hear for themselves how that is going
2 to turnout. I am not trying to be difficult, Mr Chairman,
3 we have tried everything in our power all the time to make
4 sure that something must be done, but this is critical. We
5 are seeking to establish from a witness who, in his
6 statement, says he was called by a brigadier to get onto a
7 chopper to go and record an operation. And that is the
8 operation from what happened, the deaths of our clients'
9 relatives.

10 CHAIRPERSON: Mr Ntsebeza, I just want to
11 interrupt you at this stage. It seems to me that the
12 question of a possible postponement may well arise in
13 respect of one or other of the other aspects as well, so
14 perhaps we can deal with the aspects in the absence of the
15 question of whether they lead to a postponement at first.
16 And then if there's going to be a postponement application
17 or a series of postponements applications, they can be
18 dealt with conveniently together. So forgive me for
19 interrupting you but would you agree that that's the best
20 way of going forward at this stage?

21 MR NTSEBEZA SC: Yes, I do. I just
22 wanted to indicate, Chairman, that we have a difficulty as
23 things stand to accept, certainly on our instructions, the
24 veracity of what has been said. We are now told that there
25 was no statutory basis for the funding of the families and

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1 these families were here and the last time that they were
2 here, they were brought because we have said they ought to
3 be brought and we were made to believe that there is a
4 basis for them to be brought here. They were made to
5 believe that there is a basis – they even were told that
6 only one member per family will be allowed to come.

7 CHAIRPERSON: Yes, no, we know that, Mr
8 Ntsebeza. I don't know that we need to spend time further
9 on that aspect of the matter. If the regulation is
10 forthcoming today or even early tomorrow, then what you
11 said in this regard will have been rendered academic.

12 MR NTSEBEZA SC: Yes.

13 CHAIRPERSON: But anyway, we can get
14 there when we get there, if –

15 MR NTSEBEZA SC: Yes.

16 CHAIRPERSON: Any of the other counsel or
17 representatives –

18 MR NTSEBEZA SC: Can I just say?

19 CHAIRPERSON: - finish.

20 MR NTSEBEZA SC: I thought I could say
21 something else also about – there are three aspects that
22 you wanted attention to be drawn to, the first one I've
23 just dealt with. The second one is legal aid and I think
24 whilst it is so that we have been, that Socio-Economic
25 Rights Institute have been provided legal aid by the Legal

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1 Aid Board, there is a cloud that has never been uncovered
 2 about what that means and it is because it is now
 3 important, critically important now, some things must be
 4 called by their names. There will always be a view that
 5 now the families are properly represented and are equally
 6 represented. The truth of the matter is that Legal Aid has
 7 committed itself to fund one silk for 20 days for the
 8 entirety of your sitting here as a Commission, 40 days for
 9 juniors. Adv Bruinders and I are briefed to be here in
 10 this Commission to – and we will be paid only for our
 11 appearances here. You know as well as I do that a lot of
 12 work happens in preparation, consultations and all of that.
 13 We don't get paid for that. In fact, Adv Bruinders and I
 14 have donated our time and preparation for the entirety of
 15 the month of September that we were engaged. So there
 16 shouldn't be this illusion that there's – I for one am very
 17 grateful, Judge Mlambo is a person that I have a great deal
 18 of respect for but there shouldn't be created an illusion
 19 that at least now the families are properly represented.
 20 They are not even equally represented. Those silks who
 21 come into this team like Adv Bruinders, are people who
 22 should be asked whether they do not need their heads to be
 23 examined because it is unsustainable that anyone, even with
 24 the greatest or the largest of hearts, that any advocate
 25 would be able to spend the length of time that it is

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1 expected of us to spend here, to consult, to prepare, to go
 2 all, through all these reams of documents and electronic
 3 versions of documents and all that to be donated pro bono.
 4 We also, I mean I donate and I'm sure Adv Bruinders does
 5 so, we do a lot of work for pro bono. We do it because we
 6 want to do it, but it is unsustainable for purposes of this
 7 Commission and I have indicated to your, to the Commission
 8 and to you Mr Chairman, 20 days for me, 40 days for
 9 juniors. What happens thereafter?
 10 So the question again, if we were to go elsewhere
 11 – we are not talking here about other people in your
 12 Commission being dealt with on a Cinderella basis, we are
 13 talking here about the equity, the morality that says in
 14 order for me to get to the bottom, me and my commissioners
 15 to get to the bottom of the truth of what happened here,
 16 there needs to be a reasonable equality of alms that will
 17 afford those who represent those who are affected by the
 18 terms of reference of the Commission, to effectively deal
 19 with the issues that come before them. If it is – what is
 20 sauce for the gander should be sauce for the goose. I can
 21 do with another silk, I can do with another senior/junior,
 22 but we can't do that and I'm simply saying, we therefore
 23 need to say the fact that we have been funded to the extent
 24 that we have – and we are grateful for that – should not
 25 obscure the real issue. The real issue here is, your

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1 Commission should enquire equality of alms.
 2 Mr Dali Mpofo will deal with the other issues of
 3 arrests and again to some extent –
 4 CHAIRPERSON: I think we will stay with
 5 the first issue, namely the transportation and
 6 accommodation of the families', before we move onto the
 7 other issues. Do any of the representatives of any of the
 8 parties wish to say anything about the transportation and
 9 accommodation of the parties in the light of the statement
 10 which, speaking for myself, I'm inclined to accept that Mr
 11 Skosana told Mr Madlanga that he was busy with an amendment
 12 to the regulations.
 13 MR BIZOS SC: Perhaps we should listen to
 14 what Mr Mpofo has to say as well, because we want to
 15 address the Commission on both issues and very briefly what
 16 we want to say to the Commission is that we appeal to all
 17 of us here to seriously consider that almost a month after
 18 this Commission started, we have dealt with half a witness
 19 and this is something which is –
 20 CHAIRPERSON: I'm sorry to interrupt you,
 21 Mr Bizos, I thought you wanted to say it after Mr Mpofo has
 22 spoken.
 23 MR BIZOS SC: Yes.
 24 CHAIRPERSON: Perhaps if you say it when
 25 you say it and don't say it before you're going to say it,

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1 if you know what I mean.
 2 MR BIZOS SC: I will contain myself until
 3 then, Mr Chairman.
 4 CHAIRPERSON: Mr Mpofo?
 5 MR MPOFU: Thank you very much,
 6 Chairperson, and honourable commissioners. Chair, I just
 7 want to say that we, Mr Madlanga correctly, in referring to
 8 the arrests –
 9 CHAIRPERSON: I'm sorry Mr Mpofo, I want
 10 to hear counsel at the moment on the question of the
 11 transportation and accommodation of the families.
 12 MR MPOFU: Oh yes –
 13 CHAIRPERSON: I can deal with the other
 14 questions later, but it would be easier if we deal with
 15 them seriatim, as it were, one by one. Have you anything
 16 to say on that issue?
 17 MR MPOFU: Yes. Chair, all I want to say
 18 on that issue is that we support Mr Ntsebeza's submission
 19 and our understanding, if there's a legal basis that is
 20 needed, allow Mr Sibanyoni – the only legal basis can only
 21 be the fact that an undertaking or promise or whatever you
 22 call it, was made to the families that they would be here
 23 for the duration and I don't know what – number 1. Number
 24 2, if they're saying that they want to make amendments to
 25 the regulations, that can only mean that as the regulations

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1 stand now, the families are allowed to be here. Thank you,
2 Chair.

3 CHAIRPERSON: Do any of the other
4 representatives representing other parties wish to say
5 anything on the first aspect, that is to say the
6 transportation and accommodation of the families?

7 MR BURGER SC: Mr Chairperson –

8 CHAIRPERSON: It's Mr Bruinders? Mr
9 Bruinders, is it?

10 MR BURGER SC: It's Mr Burger on behalf
11 of CASAC.

12 CHAIRPERSON: Sorry Mr Burger, I couldn't
13 see you unfortunately –

14 MR BURGER SC: I'm in the back row.

15 CHAIRPERSON: You're fortunate not to be
16 in the front row, or perhaps the good fortune not to be in
17 the front row. Yes, please proceed.

18 MR BURGER SC: Thank you, Chairperson.
19 I'd just like to place on record that CASAC shares the
20 concerns that have been raised by Mr Ntsebeza and that in
21 fact a letter was sent to yourself as Chairperson of this
22 Commission yesterday. I'm advised that Adv Malunga said it
23 would be forwarded to you. The letter was also sent to the
24 evidence leaders.

25 CHAIRPERSON: Yes, it was. I received it

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1 yesterday.

2 MR BURGER SC: Thanks very much, I just
3 wanted to put that on record.

4 CHAIRPERSON: I think we can move on then
5 to the second aspect which was the subject of discussion,
6 namely the application for legal aid. It sounds as if
7 that's sub judice, if one remembers the Chairman of the
8 Legal Aid Board is a judge. We will only hear presumably
9 late this afternoon or we will hear tomorrow morning what
10 the outcome is in that regard, but does anyone wish to say
11 anything further on that at the moment while we are
12 stilling waiting to hear what the Legal Aid Board has
13 decided?

14 MR MPOFU: Chairperson, as you know, we
15 are in a worse position than even Mr Ntsebeza's sorry state
16 and Chairperson, we want to emphasise just one thing here
17 which is the fact that, as you said, this Commission is not
18 essentially an adversarial process, it is a process of fact
19 finding and we cannot understand how it is that anybody
20 thinks that that, the establishment – or rather the
21 establishment of the truth, which is what we all seek, can
22 ever be attained by listening only to one side of the story
23 - because that is the logical outcome of what is now being
24 engineered by only funding the alleged perpetrators and not
25 the victims. Because -

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1 CHAIRPERSON: I'm sorry, Mr Mpofo, but it
2 may be that the Legal Aid Board will come to your
3 assistance –

4 MR MPOFU: Well –

5 CHAIRPERSON: So at this stage we don't
6 know what they're going to do, so what I was suggesting to
7 you was that we must surely wait to hear what the decision
8 of the Legal Aid Board is going to be, before we take it
9 further, otherwise you are shooting at a moving target
10 which may not be in position by the time your bullets are
11 expected to take effect.

12 MR MPOFU: No, unfortunately now our
13 situation, Chair, the target is already dead because they
14 have already shot at us. We received a letter last week
15 that said in no uncertain words that they're not going to
16 fund us.

17 [09:46] CHAIRPERSON: I understood that that's
18 the subject of what Mr Madlanga spoke to Judge Mlambo about
19 and that's what they're going to have the conference about.
20 As I understand, as of last week you've been -

21 MR MPOFU: Yes.

22 CHAIRPERSON: - turned down.

23 MR MPOFU: Yes.

24 CHAIRPERSON: But I understand from what
25 Mr Madlanga said, that that may not be the position at the

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1 end of today when we hear what the Legal Aid Board decides
2 after this Chile conference which is to take place.

3 MR MPOFU: No, I accept that.

4 CHAIRPERSON: That's the point I'm
5 putting to you.

6 MR MPOFU: No, I accept that, Chair.
7 Then the only point I seek to make is that I don't want
8 this debate to be just about the Legal Aid Board.
9 Chairperson, you'll remember that when we raised this
10 initially, our point was that if there is what I now
11 understand to be R75 million which was set out, set aside
12 for this Commission, then that – the victims are equally
13 entitled to be funded on the same basis as everybody else.
14 I don't think there's a taxpayer worth his salt who would
15 say that the taxpayers' money should only be used for what
16 I call the alleged perpetrators, and that – so the legal
17 aid issue was always a fall-back position which as such was
18 set by Mr Madlanga, but our primary complaint is that we
19 should be treated like everybody else.

20 CHAIRPERSON: Yes, we hear you. Does
21 anyone wish to say anything further on the second aspect
22 and that is to say the legal aid aspect? I'll give Mr
23 Madlanga a chance to reply on all three aspects when we've
24 finished. Right, we now move onto the third one and that's
25 the question relating to the arrests which Mr Madlanga

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1 dealt with. Do any of the representatives of the parties
2 wish to say anything about that?

3 MR SEMENYA SC: Chair –

4 CHAIRPERSON: Mr Semenya, I see you've
5 turned your microphone on.

6 MR SEMENYA SC: Yes. Chair, when the
7 request was made, the nature of access requested was
8 broader than what Mr Madlanga now says it is. Without
9 conceding that they have a right of access to the docket,
10 my instructions are that just so that we can dispel any
11 thought that there is any form of impropriety, we will give
12 access to the evidence leaders to view the contents of the
13 docket and to satisfy themselves, also to talk to the
14 Brigadier Van Zyl, just so that they can authenticate the
15 basis in law for the arrest of these individuals.

16 CHAIRPERSON: Thank you, Mr Semenya. Any
17 of the representatives of the parties? I see Mr Bruinders
18 has left his seat and is talking to Mr Mpofo. Do you wish
19 to speak on this point, Mr Bruinders, or – it may be that
20 both of you want to speak. Do you want a short adjournment
21 so you can take instructions, so you don't have to take
22 instructions in front of everybody while we're sitting?

23 MR MPOFU: Thank you, Chair. May I –
24 thank you. Chairperson, I just want – let me start with
25 this last aspect so that we get it out of the way. This is

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1 not about dockets. By the time we get to dockets, you
2 know, all the damage has already been done. We happen to
3 have access to some of the charge sheets and I will refer
4 to them, but in any event I don't see how a perception of
5 impropriety which is held by our client can be cured by
6 giving access to the docket to Mr Madlanga. The issue here
7 is that these people are represented, the police know that
8 they are represented and all these arrests have been
9 effected without informing us, as much as just informing
10 us, but even when we make enquiries we get sent from pillar
11 to post.

12 This is the issue, Chair. Since, if you include
13 the first break and this last short break that we've had,
14 we have had not less than six and perhaps seven people
15 arrested at different twists and turns. The last four came
16 on Tuesday when we had called people to come here and, as
17 they were leaving, they were stopped, manhandled, made to
18 lie on the ground at night and then taken to – at least
19 four of them were arrested and taken to four different
20 police stations. So the perceptions that we have here are
21 not unfounded and unreasonable.

22 We could not understand, we thought that this was
23 intended to make us run from police station to police
24 station, which we ended up doing anyway. As I'm speaking
25 to you now, Chairperson, two of my attorneys are not here –

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1 one is attending to bail applications here in Rustenburg
2 for those four, another one is attending to a bail
3 application in Ga-Rankuwa for somebody who was subsequently
4 arrested, I think on Thursday – on Wednesday. This is on
5 top of the person that we had already requisitioned to come
6 here today that we had discussed on Tuesday, who was going
7 to assist us with the cross-examination of the Colonel and
8 we've now learnt that despite the fact that we had
9 requisitioned that person, he has also not been brought
10 here today.

11 So that almost talks to the question of the
12 postponement, even though we have not come to that, Chair,
13 because our own cross-examination, we hope to facilitate it
14 by consulting with him quickly so that by the time we start
15 or ask for a short adjournment, so that by the time – we
16 don't waste the time of the Commission.

17 Now what happened, Chair - and I'm not going to
18 give you the blow by blow, I'm just giving you the
19 highlights – on Friday, this Friday, we brought a bail
20 application. We brought a bail application in relation to
21 the four that I referred to and what subsequently happened,
22 if we – if anyone wants to dispel our perception that this
23 is meant to circumvent our participation in this Commission
24 then they have to explain this. Maybe before I say what
25 happened on Friday, I must say that the four people were

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1 charged with murder that had occurred on the 12th of August.

2 CHAIRPERSON: Yes.

3 MR MPOFU: So that leaves it without
4 doubt that those are matters that are covered by this
5 Commission and we raised this issue in court. Also the
6 bail application, or rather the people were brought to bail
7 after the 48, the statutory 48 hours, and so we raised
8 those two issues in the bail application.

9 The magistrate agreed with both submissions that
10 we made there and her ruling was the following. "In terms
11 of section 35(1)(d) emphasis to within 48 hours, not after
12 expiry only, state advanced no reason for delay." In other
13 words for not doing it within the 48 hours. This is a
14 cryptic note that she made. 2, she said, "The matter is
15 struck pending the outcome of Commission of Inquiry." This
16 was in response to the fact that we said that this matter
17 was covered by the outcome of this inquiry. And 3, "All
18 four accused to be released from custody without delay."

19 So this was a court order from a judicial officer
20 and this is what happened. Within minutes of this, when
21 our attorneys went down to the cells to release, to take
22 the people out, they were refused and the people were
23 rearrested and we were told that this was on the
24 instructions of the NDPP or rather the DPP. I'm not sure
25 whether it was the national one or the provincial one. I

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1 hope it was the national one because if it was the
2 provincial one, then this would mean it was the same
3 geniuses who charged these people with the murder of their
4 own colleagues.

5 So what we have here, Chair, is that – there are
6 two major complaints that we have. Not only does this
7 deprive us of the witnesses that we have brought there
8 obviously because they are needed, but what it has done now
9 is to instil a reign of terror among potential witnesses
10 because I cannot now, with a straight face, say to other
11 people in Ikaneng or the surrounding areas, "Oh, don't
12 worry, I've organised a Combi for you, you can come to the
13 Commission next week" – because they'll say, "Are you out
14 of your mind? Must I go there and make myself cannon
15 fodder for arrest like it happened to so-and-so and so-and-
16 so?" So it's much wider than the people who have been
17 arrested.

18 It will literally hamper our participation in
19 this Commission and that, Chair, happens in the background
20 of the following facts and as I alluded to earlier – the
21 people that we represent, Chair, are the only people who
22 are capable of giving this Commission a version of what
23 happened, other than the version of the police. There is
24 no-one else. By definition, the mere fact that they were
25 injured at the scene, they were arrested at the scene, then

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1 it means by definition they were eye witnesses to at least
2 some of the things that happened there. As I pointed out
3 last week, Mr Ntsebeza's clients are deceased. So the
4 arrested and the injured are the only people who can assist
5 us.

6 Now, that is so much so that the evidence
7 leaders, and I'm sure they won't mind me saying this, had
8 already approached us to say whether we would mind bringing
9 our witnesses first after this, so that that perspective is
10 put into the Commission. And we had not yet agreed but we
11 were in negotiations because we understood why they asked
12 us to do that, because it's the only grouping that can
13 provide that.

14 Now if, for a period of the time we were running
15 from pillar to post making bail applications and not even
16 able to use the non-existent resources at our disposal,
17 then how are we going to be in a position to bring people
18 here, firstly because of our own capacity but also because
19 of their own fears of being brought here. That means our
20 participation is being rendered completely blunt,
21 Chairperson.

22 The second complaint which is the substantive
23 matter of the issue of equality that we raised on the
24 constitutional basis and I know I've raised this before but
25 I just want to re-emphasise it. If these people are being

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1 charged for the murders that happened during the period
2 that is being investigated here, then there is no basis for
3 not arresting the policeman who did, who also did the – who
4 at least at a prima facie level shot our people and
5 committed what in our view, also a criminal act.

6 And I just want to make the following last point,
7 Chair. We must never be heard here –

8 CHAIRPERSON: I'm sorry, doesn't it
9 depend upon which murders are the subject of the arrests?
10 I can understand in relation to the 16th. There are two
11 contrasting versions. Your clients say they were attacked
12 by the police while they were, as I understand their
13 argument is, they were lawfully proceeding to the informal
14 settlement beyond the point where the police were stationed
15 and they were attacked.

16 MR MPOFU: Ja.

17 CHAIRPERSON: The police say the other
18 way round, these people were coming to attack them and they
19 defended themselves. Now that, I can understand that's
20 very much a matter to be decided by the Commission.

21 MR MPOFU: Ja.

22 CHAIRPERSON: But if – and I don't know
23 whether this is so, I ask the question.

24 MR MPOFU: Yes.

25 CHAIRPERSON: If the murders in respect

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1 of which the arrests were taking place are different, for
2 example there was a witness who pointed out spots at the
3 inspection in loco who has subsequently been murdered. Now
4 this Commission is not going to decide whether his killing
5 amounted to a murder or a justifiable homicide. That's not
6 one of the issues.

7 MR MPOFU: Mm.

8 CHAIRPERSON: And if the police have – if
9 they have reasonable suspicion that someone has committed
10 that murder, the fact that this Commission is sitting to
11 decide what, other issues, wouldn't prevent, if the
12 circumstances were appropriate, an arrest. So we would
13 have to know what the murders are that you're talking
14 about, in respect of which these arrests took place but
15 perhaps we can get Mr Semanya to tell us that in a moment.
16 I'm sorry to have interrupted you but –

17 MR MPOFU: No, no Chair –

18 CHAIRPERSON: It seems to me to be a
19 point that we just bear in mind.

20 MR MPOFU: Thank you, Chair. No, you
21 make a very valid point, Chair, and it will assist to focus
22 what I'm saying. Of course, the murder of Mr Daluvuyo
23 Bongo which you have alluded to is a matter, firstly, that
24 falls outside of the terms of reference of this Commission.
25 So it is distinguishable on that basis alone. What I've

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1 just said, Chair, is that the murder for which the four
2 people have been charged, according to the charge sheet
3 here in front of me, happened on the 12th of August 2012.
4 So that's a different matter. In other words these murders
5 that are referred to here fall squarely within the terms of
6 reference. I accept the fact that they did not happen on
7 the 16th but the point I'm trying to make –

8 CHAIRPERSON: I'm sorry to interrupt you.
9 The point I'm making went further than that, that I'm not
10 sure whether it is intended that killing him on the 12th, if
11 someone was killed on the 12th – two people I think were
12 killed – I'm not sure whether it can be contended that
13 those killings were justifiable, didn't constitute crimes.
14 The question may well be, who committed the crimes, who
15 killed the people? But that also is not necessarily a
16 matter which this Commission will be called upon to decide
17 on, so it's not just that we're confined to what happened
18 on the 16th. If what was patently a murder took place on
19 the 12th and if the police have evidence which gives rise to
20 reasonable suspicion as to the identity of the murderer,
21 then prima facie I don't think the fact that this
22 Commission is sitting would preclude them from making an
23 arrest, provided it was a bona fide arrest and wasn't in
24 fact done for the ulterior motive which you've suggested.
25 I'm sorry to interrupt you.

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1 MR MPOFU: No, no, I think it's a useful
2 exchange, Chair, but the point of course is that the other
3 side of the coin must also apply and that's why I was
4 raising an equality point. Nobody can tell me now that
5 there is no reasonable suspicion that the police shot other
6 people on the 16th and that those people who shot there
7 should by now, are known. In fact, the only agency,
8 government agency that comes out of this smelling like
9 roses is the IPID because the IPID, to its credit, has
10 taken statements, even in relation to the 16th and has even
11 dubbed some of the people from whom it has taken
12 statements, suspects, and I suppose that means murder
13 suspects. But the issue is that those murder suspects are
14 roaming the streets and they are working in the police and
15 they have not even as much as been suspended and yet other
16 so-called murder suspects, of issues that are covered by
17 this Commission, are languishing for the past two weeks in
18 the cells. That is the fundamental issue. I'm not saying
19 that this Commission is going to find anybody guilty of
20 murder but what I'm saying is that the basis upon which we
21 got the long postponement of the 272 was exactly that these
22 are some of the issues.

23 Remember, Chair, that one of the terms of
24 reference currently is that the Commission may recommend
25 that people must be prosecuted. Now that is the nub of the

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1 issue and the point I wanted to make further, it is clear,
2 we are not saying that the murders – what Mr Rampile was
3 saying – the murders of the people that happened before the
4 16th are equally reprehensible, like any other murder. So
5 that must be made clear. We must never be heard to be
6 saying there's some murders that are bigger than others.
7 That is not what we're saying, but what we're saying is
8 that insofar as those murders can be called criminal
9 activities on behalf of the unknown murderers - and we
10 resist the temptation that is bandied about that it means
11 that those people who were killed by the 3 000 people who
12 were sitting at the koppie, or 300 of our clients who were
13 arrested – that we reject with the contempt it deserves.
14 But we are saying that – and we are not even saying, Chair,
15 that if the police know that Mr X who is one of the 270 was
16 involved in the murder of the 12, that they should sit and
17 do nothing.

18 [10:06] Surely there must be something that is less than
19 the drastic steps that are being taken which have a result
20 of hampering our participation in the commission of
21 Inquiry, ranking from informing us, of course not about the
22 details of the investigation, but that this person, we need
23 this person for fingerprinting because we think they had a
24 gun, or whatever it is, and then making arrangements that
25 those people are available for the Commission, and that

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1 their treatment is not such as to terrorise other potential
2 witnesses. But while we're sitting here, people know who
3 we are; nobody has engaged us, and as I say, even when we
4 try to engage we've been – Mr Semenya kindly on Tuesday
5 gave me the list of police stations where the four people
6 were held, but after that it was once again running up and
7 down at night and by lunchtime the following day we still
8 had not been able to locate the people, and that is the
9 gist of our complaint, Chair. I'm sure with all these
10 legal minds sitting here, some practical solution can be
11 found of how to balance the interests of the Police in
12 making sure that the evidence doesn't disappear. They
13 can't just sit and do nothing for six months or however
14 long the Commission is going to take, but at the same time
15 making sure that the interests of the Commissioner are also
16 safeguarded, and the interests of our clients.

17 CHAIRPERSON: Is that all that you
18 propose to say on the second aspect?

19 MR MPOFU: No, Chair. The other issue is
20 that there has been allegations which –

21 CHAIRPERSON: I'm sorry, Mr Mpofu, I'm
22 reminded that what you said so far hasn't been interpreted,
23 and in fairness to the interpreter, it might be helpful if
24 we stopped at this stage to give him an opportunity.

25 MR MAHLANGU: Thank you, Mr Chairperson.

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1 CHAIRPERSON: Please proceed, Mr Mpfu.
 2 MR MPOFU: Thank you, Chair.
 3 CHAIRPERSON: I was wrong, you're not
 4 dealing with the second issue now, you're actually dealing
 5 with the third –
 6 MR MPOFU: No, I'm still, I'm rounding up
 7 –
 8 CHAIRPERSON: Yes, round up then.
 9 MR MPOFU: - rounding up the second,
 10 thank you, Chair. The only point I want to record, put for
 11 the record is that there have been allegations in relation
 12 to the persons who have been arrested of torture and
 13 assault, and as I've already mentioned, manhandling, and
 14 that behaviour is also to us supportive of the fact that
 15 the, whether by design or result, the attitude is that
 16 these people should not even be here.
 17 The other point is that they were identified here
 18 clearly, because according to them they were followed from
 19 the Commission and clearly, I mean now that we understand
 20 there's a gentleman from SAPS who's taking videos, that
 21 makes us even more uncomfortable because it looks like when
 22 we bring people here, there is some undeclared identity
 23 parade that is conducted and they get identified.
 24 So all in all, Chair, our attitude, yesterday we
 25 had a consultation, the attitude of our clients is that

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1 firstly they do not see their way clear to coming here in
 2 the numbers that we would like them to come, or at least
 3 some of the specific people that we'd like to come, but
 4 also they might not see their way clear to further
 5 participation in the Commission if this is going to be the
 6 order of the day, or rather if nothing is done, which I'm
 7 sure the Commission will make some recommendations, or some
 8 of our learned colleagues. So I wouldn't expect that
 9 nothing will be done, but that something that needs to be
 10 done has got to be satisfactory and address the concerns
 11 that we have raised because otherwise it will not be
 12 possible for these victims and eyewitnesses to be of any
 13 assistance, or effective assistance to this Commission.
 14 CHAIRPERSON: Thank you. Is there anyone
 15 else who wishes to say anything on this matter before we –
 16 there is someone. I see Mr Bruinders is indicating, I'll
 17 give you a chance in a moment. Mr Semenya, is it correct
 18 that an undertaking was given that one of the persons who's
 19 been arrested would be brought here today so that his
 20 counsel could consult with him and obtain instructions for
 21 the cross-examination of Colonel Botha?
 22 MR SEMENYA SC: The undertaking, Chair,
 23 was that at all reasonable times Mr Mpfu and his legal
 24 team would have access to anyone who is in custody. If
 25 arrangements are made for them to be here, they will be

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1 here. They will give evidence when they're required to do
 2 so.
 3 CHAIRPERSON: Never mind giving evidence
 4 when required to do so. If it's necessary for the witness
 5 concerned to give instructions to Mr Mpfu to enable him to
 6 cross-examine Colonel Botha, then it would be appropriate
 7 for that person to be here today so that those instructions
 8 could be given. Is he close by? Is he somewhere in the
 9 district of Rustenburg? Can he be brought here by
 10 lunchtime today?
 11 MR SEMENYA SC: Chair, I'm instructed
 12 that the individual is busy with a bail application.
 13 CHAIRPERSON: Maybe during the tea
 14 adjournment it will be possible for you and Mr Mpfu to get
 15 together and exchange notes on that. It would seem from
 16 the way he's shaking his head that your instructions may
 17 not be correct. But anyway, let's not spend time on that
 18 now, but I understand to be implicit in what you said is
 19 that if he isn't involved in a bail application the
 20 necessary arrangements would be made to have him here so
 21 that Mr Mpfu can take instructions during the lunch hour.
 22 Is that okay?
 23 MR SEMENYA SC: Indeed, Chair.
 24 CHAIRPERSON: Alright, okay. Anyone
 25 further wish to say anything on the three aspects that we –

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1 I think we've already dealt with the first and the second,
 2 but Mr Bruinders, I beg your pardon, you indicated you
 3 wanted to speak next.
 4 MR BRUINDERS SC: Only about the third
 5 aspect. The people who have been arrested are all members
 6 of AMCU, and as you know, we act for AMCU. We have, of the
 7 four who were arrested we have three incomplete statements
 8 and we were hoping to complete them certainly this week.
 9 One of the reasons we were hoping to complete them was that
 10 at the end of last week the evidence leaders contacted us
 11 to ask us whether we would be prepared to lead in evidence
 12 some of the strikers, and they include Mr Mpfu's clients
 13 who happen to be our members. We gave an undertaking that
 14 we would, subject to their – because at that stage we knew
 15 that they were, they had been arrested – subject to their
 16 being released and subject to their being available here at
 17 the inquiry, so that we could take instructions from them
 18 for the purposes of preparing them for leading them, but
 19 secondly also as Mr Mpfu has already said, and I think we
 20 all now understand, the strikers are the only people with a
 21 different version than the Police. So we obviously also as
 22 AMCU, you will understand that Mr Mathunjwa left before the
 23 fatal shooting on the 16th and so he doesn't, he and his
 24 team were there, but I don't know either exactly how the
 25 shooting took place. But obviously AMCU's members do, and

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1 so we need instructions from them throughout the course of
2 this inquiry, not just for the purpose of leading them but
3 so that we can ask properly prepared questions of whoever
4 is giving evidence here, particularly the Police.

5 Now Commissioners, Chair, Mr Mpofu has quite
6 graphically painted the picture. Our difficulty is the
7 following. Our team really cannot participate in the way
8 that we would like to participate, and the way that the
9 evidence leaders have asked us to participate, if our
10 members are arrested and treated in this fashion. We
11 simply can't, Mr Chair. That's the first point.

12 The second point is that we now know, because not
13 just only has Mr Mpofu told us this, but our client has
14 been in contact with some of these people and they feel
15 hugely intimidated by what's happening here, and feel quite
16 reluctant to meet with us to complete those statements
17 because they feel that there will be further consequences
18 down the line –

19 CHAIRPERSON: I'm sorry to interrupt you.

20 Are they still in custody or have they been released?

21 MR BRUINDERS SC: Yes, they're still in
22 custody.

23 CHAIRPERSON: So you could, if
24 arrangements could be made for example to bring them here,
25 you could consult with them here and presumably you would

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1 consult with them away from the Police, out of earshot of
2 the Police. So I wouldn't think one could conclude that it
3 would be impossible to get instructions from them, and of
4 course any evidence they give here could never be used
5 against them in a criminal trial because of the provision
6 in the regulations to that effect.

7 MR BRUINDERS SC: That might be so,
8 Chair. Of course one could do that, but it doesn't take a
9 lot of adding up to conclude that this is a campaign of
10 intimidation of our members and our witnesses. It really
11 doesn't take a lot of adding up, and until they are
12 released so that they can participate fully in this
13 inquiry, as they should, the adding up won't stop. Now we
14 don't want things to be postponed and we agree with our
15 learned friend in the LRC that there's no need for a
16 postponement, but we certainly believe that we should stand
17 down now – I don't mean right now, I mean once you've heard
18 from all of us we should stand down so that we can sort
19 this out. You know, Commissioners, not all of us are
20 criminal advocates or lawyers, but I would have thought –

21 CHAIRPERSON: That's not a happy way of
22 putting it. I think we know what you mean.

23 MR BRUINDERS SC: No, but I would have
24 thought, Chair, that what the Police might have done,
25 because of course arrest is the last, it's the most extreme

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1 form of apprehending a suspect. I would have thought that
2 in the context of this inquiry, what the Police would have
3 done is sought our assistance so that we can arraign people
4 and have them arraigned properly, get them there, get
5 whatever processes have to be followed for criminal courts,
6 get that done and that, as far as I understand, has already
7 been done. The Police have simply gone and unlawfully
8 rearrested our members, so that they're acting in
9 contravention of an order by the Magistrate, but we can
10 come to a practical arrangement as to how to deal with
11 people whom the Police have identified and envisaged are
12 needed for other investigations. We can come to a
13 practical arrangement, and what we want to propose is that
14 we do that today before we proceed, so that we don't have
15 the situation where we have this guerrilla warfare between
16 the Police and us where on every second day somebody is
17 arrested or they can't be found or they won't get here
18 because they feel intimidated. Can we have that at least
19 sorted out before we proceed today, Mr Chair?

20 CHAIRPERSON: Mr Madlanga, in view of the
21 suggestion made by Mr Bruinders that we should give the
22 parties an opportunity to have discussions to where a way
23 forward can be reached by agreement, would it not be
24 appropriate for me to take the tea adjournment now and on
25 the basis that we would resume when told by you and the,

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1 for instance the other parties, either that some
2 arrangement has been reached, or there's no further point
3 in your having discussion?

4 MR MADLANGA SC: Chair, Commissioners,
5 it's a practical suggestion and it's acceptable to us.
6 Chair, there's an issue that my learned friend, subject to
7 how the Commissioners feel, Mr Chaskalson would like to
8 raise. It relates to, as I understand, to the definition
9 of the issue which is –

10 CHAIRPERSON: Yes, I understand that
11 matter has been receiving attention, but perhaps we could
12 deal with that when we resume?

13 MR MADLANGA SC: As the Commission
14 please.

15 CHAIRPERSON: Is that in order?

16 MR MADLANGA SC: Thank you.

17 CHAIRPERSON: Very well. We will take
18 the tea adjournment now. I won't say when we, for how long
19 it will be. It will be until I'm told by - I think we must
20 put the responsibility on Mr Madlanga – until I'm told by
21 Mr Madlanga either that an arrangement has been,
22 satisfactory arrangement has been worked out, or that
23 discussions have broken down and there's no point in having
24 discussions further and we must carry on with the inquiry.
25 So we will take the tea adjournment now.

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1 [INQUIRY ADJOURNS INQUIRY RESUMES]
 2 [13:49] CHAIRPERSON: The Commission resumes.
 3 Those members of the public who are sitting in the
 4 auditorium who may have been puzzled at the long delay in
 5 coming back, the fact that we adjourned just after half
 6 past 10, will be pleased to hear that the time that has
 7 been spent in the interim has resulted, as I understand, in
 8 an accord between the Police Services on the one hand and
 9 certain of the other parties on the other. Mr Semenya, are
 10 you able to tell us the details of that?
 11 MR SEMENYA SC: Perhaps, Chair, I don't
 12 share the good news you would have been told. Mr Mpfu
 13 wants to address us, I think.
 14 CHAIRPERSON: Mr Mpfu, I'll call upon
 15 you but I must point out to you we haven't got the
 16 interpreter at the moment.
 17 MR MPOFU: Oh.
 18 CHAIRPERSON: So as soon as he comes you
 19 can start, I think. I had been told that there was an
 20 accord and it was good news. I hope that I was not
 21 misinformed but in view of the fact that the interpreter is
 22 now with us, you can address us.
 23 MR MPOFU: Okay. Chairperson yes, I must
 24 say that until about five, 10 minutes ago I was also of the
 25 same view as you. The news was indeed good when we

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1 adjourned the meeting, the off-site meeting. It has since
 2 transpired that – or maybe I can just summarise without
 3 taking away from what Mr Semenya is going to say. Part of
 4 the good news was that the police were prepared to release
 5 the persons concerned upon certain conditions today and
 6 hopefully be able to have them coming here today and we
 7 indicated that in relation to the others, you know the time
 8 didn't matter except for one, the one person that we had
 9 needed for the consultation.
 10 Unfortunately, our attorneys on the ground at the
 11 Ga Rankuwa court have now informed us that the first bail
 12 conditions that were granted were quite onerous and
 13 unacceptable, as it were. The amount of bail that has been
 14 suggested is R5 000 per person. They are still engaging
 15 there and obviously the possibility of raising that amount
 16 of money, either at all or within the space of time that
 17 would be required for us to continue seems quite remote at
 18 the moment. I'm not very optimistic but we are still
 19 engaging with Mr Semenya on trying to relax the bail
 20 conditions, particularly in relation to the amount, and I
 21 have pointed out to him that in relation to the –
 22 CHAIRPERSON: I'm sorry to interrupt you,
 23 Mr Mpfu.
 24 MR MPOFU: Yes.
 25 CHAIRPERSON: You've obviously been

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1 involved in these negotiations, you know what happened.
 2 Those of us who were not involved don't know what happened.
 3 I simply heard that an accord had been reached and it was
 4 agreed that there would be a release of certain persons on
 5 bail, that's all I know. I know nothing more than that and
 6 the people sitting in the audience who are entitled also to
 7 know what's happening, know even less than I do. So I
 8 think before you deal in detail with the problems, you
 9 might give us a general outline so we can better follow
 10 what you're going to tell us.
 11 MR MPOFU: Thank you, Chair. Once again
 12 I'm sure my colleagues who were part of the meeting,
 13 evidence leaders and Mr Semenya in particular, might want
 14 to add but my understanding was that at the meeting three
 15 issues were addressed. One was the issue of giving access
 16 to the evidence leaders to some of the dockets in order to
 17 satisfy them about the grounds for arrest and I think that
 18 matter was resolved.
 19 The second issue was the issue was the arrest of
 20 the persons and I must add that we, upon checking with my
 21 attorneys, the number of people involved is nine, nine
 22 people. I had forgotten earlier but there were two people
 23 who were denied bail last week on the basis that members of
 24 NUM were demonstrating outside the court and they were
 25 denied for their own safety. I'm just putting that as an

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1 aside. So that's the issue that I was addressing.
 2 The third issue, Chairperson and honourable
 3 commissioners, was what we suggested from our side, that
 4 there should be some kind of protocol of dealing with this
 5 kind of issue in the future involving, for example, us
 6 being informed promptly if someone has been arrested and
 7 that was resolved - not completely resolved but we were
 8 happy with the suggestion that such a protocol will have to
 9 be crafted bilaterally between us and the South African
 10 Police Services. So to that extent that matter was also
 11 resolved.
 12 It would seem that of those three matters, the
 13 two are resolved subject to those qualifications and the
 14 third matter that we thought was resolved, was this issue
 15 of releasing people on bail and what – the rest of what I
 16 said then applies to that. Thank you. Chairperson before,
 17 if I may just interject for a second, maybe in terms of
 18 putting something concrete on the table, our proposition
 19 would be that it would seem that the attendance of the
 20 persons, even with the best will in the world, will not be
 21 secured now in the next couple of hours. Unfortunately we
 22 can't – I cannot predict how long it will take before we
 23 can find each other with the police, so that's all I'm
 24 prepared to say at this stage.
 25 CHAIRPERSON: Mr Semenya, is there

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1 anything you wish to say at this stage?

2 MR SEMENYA SC: Chair and members of the
3 Commission, the real sharp question is, we have been
4 attempting to assist the Commission as best we can and bail
5 was finally secured for the affected individuals at R5 000
6 per person. And the other contention on the other side is
7 that they must be released on warning. We're talking about
8 people who are arrested for triple murders, possession of
9 firearms, intimidation of individuals – there is serious
10 apprehension about the possibility of continued violence
11 with their release but that notwithstanding, we have
12 attempted to do the best we can and the odds are - on
13 either side, we have a deep appreciation that this does not
14 necessarily fall within your province for the determination
15 of bail, but at the point of stand down we were talking
16 about four people. Now we're talking about nine people.
17 It's just impossible to comply, Chair.

18 CHAIRPERSON: Yes, well, clearly –

19 MR TIP SC: Mr Chairman –

20 CHAIRPERSON: Yes, I'm sorry? Mr Tip?

21 MR TIP SC: Yes, may I just put something
22 on record in respect of the position of NUM. When this
23 matter was adjourned early this morning or at about 10:30,
24 we had understood very clearly that it was a question of
25 discussion between, essentially, the South African Police

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1 Service and the affected counsel who wished to call the
2 individuals concerned and that this was a discussion that
3 would go around facilitating access for the purpose of
4 consultation. We thought it inappropriate for NUM to be
5 present at a discussion about consultations with
6 essentially AMCU members and so we remained out of that
7 discussion.

8 It was with considerable shock that we learnt at
9 the end of it that an agreement had been struck that a
10 number of people would be released on bail and these are
11 people, as my learned friend Mr Semanya has just said, are
12 – some of them involved in allegations of being culpable in
13 respect of three murders. Now those are essentially
14 killings of NUM members and at least in some of those cases
15 the person to whom you referred earlier, Mr Bongo who was
16 the man who pointed matters out to the Commission and by
17 the end of that week had been shot dead. So that we had
18 understood, at the very worst, that there was a discussion
19 that would take place about four people and they were the
20 four people who'd been arrested at the conclusion of the
21 proceedings last Tuesday.

22 I now hear for the first time that there's talk
23 about nine people. Now even Mr Semanya appears to be
24 surprised at that.

25 Now Mr Chairman, we are absolutely of the view

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1 that this is not a matter that is really within the
2 Commission's jurisdiction but it has arisen and various
3 facilitations have been attempted. From the perspective of
4 NUM, though, we must place on record that the release of
5 persons who have been arrested on charges of this nature is
6 extremely prejudicial to other NUM members and officials
7 and also to our already very fragile prospect of securing
8 the witnesses who will be prepared to come and testify
9 before this Commission. So I'd hoped, Mr Chairman, that
10 whenever I had anything to address the Commission on, it
11 would be positive and would readily advance the position of
12 the Commission. In this instance unfortunately that's not
13 possible. It is a matter of very, very grave concern to
14 us.

15 CHAIRPERSON: Yes, thank you. As you
16 said, it's not a matter within the province of the
17 Commission. If there are bail applications and there are
18 contentions as to what conditions would be appropriate,
19 that's a matter for the court in which the bail application
20 is brought. It wouldn't be proper for us as commissioners
21 to express our views and try to influence the judicial
22 officer concerned with the bail application in one way or
23 the other.

24 The only reason it came here was that Mr
25 Bruinders suggested when the matter was debated, that it

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1 might be possible if there was a meeting between the
2 representatives of the various parties, for an accord or an
3 agreement of some kind to be worked out and it's for that
4 reason that we adjourned and I indicated, if it became
5 clear at any point that agreement would not be possible,
6 that was to be reported to me so we could resume. And it
7 was eventually reported to me that an accord had been
8 reached, which is why we came back, but it would seem at
9 the moment from what you said that there isn't an accord
10 and it doesn't seem likely there will be one before the end
11 of the hearing today, so we may as well proceed, subject to
12 any application people may wish to bring. But Mr Bizos,
13 you want to say something? You raised your hand.

14 MR BIZOS SC: Yes, Mr Chairman, we
15 started almost a month ago and we are halfway through the
16 first substantial witness. Your patience led you to
17 adjourn the proceedings in the hope that there would be an
18 accord. We all thought, when we dispersed before the lunch
19 adjournment, that there was an accord.

20 I want to make a submission for your
21 consideration, Mr Chairman. We know that there are
22 difficulties and that Mr Dali Mpofu, Mr Mpofu has, but the
23 witness is in the witness box, we are in the afternoon of
24 the day that we thought that we would finish him. We are
25 mindful of the difficulties of the would-be cross-examiner

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1 but surely he can proceed to cross-examine. If there is
2 anything that he wants to check or cross-examine on, on
3 which he is not ready, he will have the evening and early
4 in the morning to get instructions. But we cannot, with
5 the greatest respect, in a matter of such importance – not
6 only to the parties but the country as a whole – to kick
7 for touch so often that this Commission is going to last
8 far beyond the envisaged period that anyone may have had,
9 never mind the four months.

10 So what I would submit for your consideration is
11 that we proceed this afternoon and sit late in order to
12 make up for lost time so that the substantial portion of
13 the cross-examination of the witness can take place during
14 the time available and we are accustomed – I am sure as Mr
15 Mpfu is – of getting instructions during non-court hours,
16 so to speak. That is the submission that I make for your
17 consideration.

18 CHAIRPERSON: Thank you, Mr Bizos. There
19 is, of course, a further consideration that Colonel Botha
20 was present at the inspection in loco, he pointed out
21 points at the inspection in loco in the presence of
22 counsel. Parties – other people who weren't present at the
23 time, came later. There would have been an opportunity for
24 instructions to be taken then. My own instinct at the
25 moment is along the lines that you suggest and to sit late

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1 if they're so minded, to ask further questions in the light
2 of what is on the video and thereafter an opportunity would
3 be afforded to the would-be cross-examiners to cross-
4 examine.

5 I am also minded to sit until six o'clock tonight
6 to make up for some of the time that we've lost. Time –
7 the time available to this Commission is not unlimited and
8 it behoves us to make as much use of the time that's
9 available to us and if, for whatever reason, time cannot be
10 spent during the day on the main work of this Commission,
11 then we must be prepared to sit longer hours in order to
12 compensate, to some extent, for that. I think Mr Mpfu
13 raised his hand and so did Mr Bizos.

14 MR BIZOS SC: Yes.

15 CHAIRPERSON: But should we not get the
16 statement read first, because I don't think that many
17 people know what exactly the Minister has said and it's
18 certainly important in respect of one aspect, so Mr
19 Madlanga you've now got the document in front of you –
20 would you be kind enough to read it to us?

21 MR MADLANGA SC: Thank you Chair,
22 commissioners. It says, "Document issued by Mr Mthunzi
23 Mhaga, the spokesperson of the Department of Justice and
24 Constitutional Development." It reads as follows,
25 "Minister of Justice, Jeff Radebe, has instructed the state

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1 if necessary, to make up some of the lost time subject to –
2 there will be an application, I understand, for a
3 postponement or there may be, which we'd have to deal with
4 and I must keep as open a mind as I can on that. But
5 before you proceed, there are two points I want to make
6 that may be relevant to what is now under discussion.

7 The first is that I understand that the question
8 of transportation and accommodation of the families has
9 been addressed and the Minister of Justice has issued a
10 statement which I understand Mr Madlanga has a copy of in
11 his possession, so I shall ask him to read. He says he
12 hasn't. Well Mr – he now has it in his possession. I'll
13 ask him to read it. That's the first point, so that means
14 that the family attendance issue is now out of the way.

15 The second point I want to make is, I understand
16 from something I was told during the adjournment, that a
17 request has come from the side of the – what Mr Bizos
18 called the would-be cross-examiners – that Colonel Botha
19 should show the video that he took, or rather the video
20 which he took when he was in the helicopter should be shown
21 as a necessary preliminary to his, to the further cross-
22 examination. And subject to what people may say, I was
23 minded to grant that request and once the video has been
24 seen – I understand it takes about 40 minutes, 40-odd
25 minutes – to allow those who have already cross-examined,

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1 law advisers to amend the regulations governing the
2 Marikana Commission of Inquiry to ensure that the state
3 makes arrangements to assist representatives of the
4 deceased victims of the tragic incidents to attend and to
5 remain in attendance for the duration of the inquiry or for
6 such time as they wish to remain in attendance.
7 [14:09] The department has liaised with the Commission
8 this morning to convey its intention to submit the proposed
9 amendment to the President before the end of business. The
10 Minister of Justice and Constitutional Development, Mr Jeff
11 Radebe, regrets any confusion and misconception that may
12 have been created by the decision taken by the Department
13 this past Saturday. Government has the interests of the
14 families of victims at heart, hence that we are working
15 tirelessly to salvage the situation. It should also be
16 noted that the interests of the families are safeguarded by
17 the seasoned legal representatives currently participating
18 in the inquiry which is underway." Thank you, Chair.

19 CHAIRPERSON: Before I call upon one of
20 the seasoned legal practitioners who was referred to, I'd
21 like to enquire from – I think it's Mr Budlender is the one
22 I was asked the question of – whether it is correct, when I
23 said that I'd been told that there had been a request that
24 Colonel Botha's video be seen, the practitioners concerned
25 nodded their heads. Is it possible for us to see that

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1 video this afternoon?

2 MR MADLANGA SC: It is possible, Chair.

3 Arrangements have already been made with the gentleman who

4 takes, or rather who does the video recording for the

5 Commission and copies are up there already. Thank you.

6 CHAIRPERSON: Thank you.

7 MR MPOFU: Yes Chair, if –

8 CHAIRPERSON: Sorry, I think that was

9 recorded. It seems sensible we should watch the video and

10 it can be seen – I just want to enquire from Mr Budlender

11 whether there's anything, I don't know whether any members

12 of the family are here. I know some of the local people

13 may well be here. Is there anything which is likely to

14 cause distress because if so, we should give that warning

15 beforehand.

16 MR MADLANGA SC: Chair, commissioners –

17 CHAIRPERSON: Mr Madlanga, you are

18 [indistinct] not Mr Budlender, forgive me.

19 MR MADLANGA SC: Thank you. Chair,

20 commissioners, we have viewed Colonel Botha's video. I do

21 not think there's any material that might be offensive in

22 it but Chair, may I take this opportunity to make a

23 request? Colonel Botha approached me and he assured me

24 before saying anything that he was not going to discuss the

25 case as he is under cross-examination. He said he's aware

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1 of the ethics around that issue but he insisted on talking

2 to me and he made the request that, prior to anything

3 relating to him taking place today, he would like to say

4 something to the Commission. I do not even know what it is

5 but he said he would really, really like to say something

6 to the Commission. Thank you, Chair.

7 CHAIRPERSON: I suppose I must grant his

8 request. Colonel? Before you speak, is this going to be

9 part of your evidence because if so, I may as well remind

10 you anyway, you're still under oath in respect of the oath

11 you took last time. Mr Mpofu, what do you want to say now?

12 MR MPOFU: Mr Chair, I just wanted to

13 address the issues that were raised in relation to what we

14 said, but also touch on this issue of the cross-examination

15 that you, the sequence that you have suggested. Chair, I

16 just want to say that we are as keen as everyone to have

17 the matter moved on and we don't take kindly to suggestions

18 of kicking for touch. And also we cannot have people

19 detained forever simply because a grouping of people will

20 not like it. I mean that's not how it works.

21 CHAIRPERSON: Mr Mpofu, you don't have to

22 tell me that. I've already indicated that as far as the

23 bail is concerned, that's a matter for another court. It

24 would be improper for us to say anything, so you don't have

25 to make the speech you're making to me now because if you

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1 want to make it, make it in the magistrate's court when the

2 bail application comes –

3 MR MPOFU: It has been made there, Chair.

4 CHAIRPERSON: Well, good. It's not

5 necessary to repeat it now, just carry on with your

6 argument.

7 MR MPOFU: Yes. Chairperson, I'm sorry I

8 have to insist on this – if remarks have been made

9 regarding my clients about their ability to attend here, I

10 have to correct them now. For example, it has been said

11 here that we've said anything about four people. We never

12 said anything about four people. This morning's record

13 will show that I said about six or seven people and all I

14 did was to explain about another two, but two people have

15 misrepresented what I said and therefore I have to make the

16 speech. Thank you.

17 Thank you. The next issue that I wanted to talk

18 about was the issue of the video that, Chairperson, you've

19 touched on. We made the request this morning, since we

20 were in the middle of the cross-examination, that the video

21 should be prepared in order to be interposed in that cross-

22 examination. So we would kindly request that the – or

23 rather it's two videos but I think the important one is the

24 one that is ascribed to Colonel Botha. So we would kindly

25 request that if anybody else is going to ask questions

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1 regarding those videos, that that should be done after we

2 have dealt with the issues that we wish to deal with, for

3 which we asked for the video to be played in the first

4 place.

5 CHAIRPERSON: Mr Burger, you look as if

6 you want to say something?

7 MR BURGER SC: Chair, I just do not

8 follow the process. Is the idea now that we will watch a

9 video and then certain people will cross-examine and my

10 learned friend Mr Mpofu will then ask for a postponement,

11 or is the application for a postponement not there anymore

12 or when does it come or when can we go on with this

13 evidence, I would like to know?

14 CHAIRPERSON: I understand – I suppose I

15 shouldn't say that I understand, maybe Mr Mpofu will tell

16 us but first I will say what I understand. My

17 understanding is, we're going to see the video of the

18 Colonel after the Colonel has made the statement he wants

19 to make. I had indicated that I would then allow further

20 cross-examination based on the video and I would go back to

21 where we started in cross-examination and allow counsel

22 who've already cross-examined, to cross-examine if they

23 wish on matters emerging from the video. Mr Mpofu has

24 pointed out that he's the one who requested the video to be

25 shown. It being shown is really to be regarded as part of

1 his cross-examination and he'd like to cross-examine on it
 2 before the others get a chance. It seems to be a
 3 reasonable suggestion in the circumstances.
 4 I didn't understand him to be saying he doesn't
 5 want to cross-examine, he doesn't want – he wants a
 6 postponement. I understood him to say he would like to
 7 cross-examine before Mr Bizos and Mr Semenya and you and Mr
 8 Tip get a chance to cross-examine, and Mr Bruinders, get a
 9 chance to cross-examine further. So it sounds to me, if I
 10 may say so – if I'm wrong, Mr Mpofo, I'm sure you will
 11 immediately hasten to correct me but that's my
 12 understanding. Have I got it right, Mr Mpofo?
 13 MR MPOFU: Yes, you've got it right, at
 14 least to the extent that I never mentioned the word
 15 "postponement" this afternoon.
 16 CHAIRPERSON: No, you did mention it this
 17 morning but not this afternoon, right. No, I take what you
 18 said. Right, now Colonel, I've already reminded you,
 19 you're still under oath. Oh sorry, Mr Ntsebeza indicated
 20 he wanted to say something. Have you still got something
 21 you wanted to say, Mr Ntsebeza?
 22 MR NTSEBEZA SC: Yes, regrettably so, Mr
 23 Chairman and members of the Commission. I just wanted to
 24 place on record the fact that we also got to know about the
 25 reported statement of the Minister of Justice and

1 relevant at this stage. If you want to ask for a
 2 postponement for the cross-examination to stand over till
 3 they come, you can make the application. I don't
 4 understand the relevancy of what you're saying at the
 5 moment. You correctly point out we don't know what exactly
 6 the regulations are going to say, so once we know that you
 7 will obviously be in a position to address further
 8 submissions to the Commission if, in the light of the
 9 regulations say, you feel they fall short of what you
 10 consider appropriate. But I don't think we should spend
 11 any more time on this aspect of the matter now. I think we
 12 should rather proceed with the Colonel's statement and
 13 viewing the video.
 14 MR NTSEBEZA SC: Well, if that's your
 15 ruling, Mr Chairman, that's your ruling, I cannot take it
 16 further but I was submitting that the families were here
 17 when the cross-examination of Colonel Botha started and
 18 they would like to be here when his cross-examination
 19 continues.
 20 CHAIRPERSON: I understand that but on
 21 the other hand, as I pointed out earlier, the time
 22 available to this Commission is not limitless. We have to
 23 make the best use of it. I could understand that the
 24 families would want to be present when evidence is given
 25 about the actual killing of their loved ones, but it seems

1 Constitutional Development during the adjournment and we
 2 immediately consulted our attorneys and established as to
 3 what their instructions are. Our attorneys have asked us
 4 to indicate to you that there is a lack of specificity
 5 about what is intended to be done and your experience, Mr
 6 Chairman and members of the Commission, will testify to the
 7 fact that not everything that has been stated as being the
 8 intention has actually actualised.
 9 The families were here when Mr Botha was cross-
 10 examined and since then have expressed a further wish of
 11 being present when further cross-examination of Mr Botha
 12 takes place. We now are told that that may be as soon as
 13 tomorrow or we do not know when it is going to be. Our
 14 request is that whatever arrangements are made to transport
 15 and get the families to be here, made by the Commission or
 16 by people on behalf of the Commission, should be done in
 17 liaison with the attorneys who are in constant contact with
 18 the families.
 19 We keep on being told that the families have said
 20 this to representatives from the Department of
 21 Constitutional Development and Justice, that they have
 22 preferred money instead of being transported to here. When
 23 we –
 24 CHAIRPERSON: Mr Ntsebeza, I don't want
 25 to interrupt you but really, I don't think that point is

1 to me that regard being had to the nature of the evidence
 2 the Colonel is giving, it would be in order if that
 3 evidence – if they wished to know what he says – could be
 4 interpreted to them from the transcript when they arrive.
 5 They can also be shown the video. I'm not sure whether
 6 they'd be able to give any meaningful instructions on the
 7 cross-examination, regard being had to the nature of the
 8 evidence he's giving, but if they were to give meaningful
 9 instructions to counsel then an application could be made
 10 for the recall of the witness and if it was considered
 11 appropriate, the recall of the witness would be allowed so
 12 that these meaningful instructions, if any, could be the
 13 subject of further cross-examination. That is my ruling.
 14 Colonel, would you please make your statement?
 15 LT-COL BOTHA: Mr Chairman, I've got one
 16 thing to say and then I've got a request after that. The
 17 last remark on Tuesday afternoon, last Tuesday afternoon by
 18 Adv Mpofo was actually that he will bring someone that, or
 19 a witness that sounds to me that said that they were shot
 20 at from the chopper and it made me think what could or
 21 could not have happened where I was which could've given
 22 that impression. And just before we walked out of here, we
 23 already broke, I remembered that two stun grenades were
 24 released from the chopper while I was in the chopper. I
 25 didn't remember it by then, I remembered it just as we

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1 broke and I didn't want to – I mean I couldn't inform
2 anyone in the meantime because I was under oath, so I
3 didn't want to go that way. I decided this morning early
4 that I would rather come and say it here than say it to
5 someone else at some other place.

6 CHAIRPERSON: I understand you're going
7 to show, we're going to see your video. By way of
8 introduction I'd just like to ask you something about it.
9 How many helicopters were there in the air at the time?

10 LT-COL BOTHA: Sir, according – as far as
11 I can remember there were four, four choppers.

12 CHAIRPERSON: Four choppers. I think you
13 said you were in the air for about 41 minutes, I think
14 that's – that's either in what you said or it's in the
15 statement that you made, which is part of the IPID trial,
16 is that correct?

17 LT-COL BOTHA: It must've been in the air
18 for a bit longer than 41 minutes because the video is 41
19 minutes.

20 CHAIRPERSON: I see. Right, can we now
21 see the video? Do you want to say something further,
22 Colonel, before we see the video?

23 LT-COL BOTHA: Sir, then I've got a
24 request. I'm going to ask the Chairman to make a ruling on
25 that, that I just express myself better in Afrikaans, I

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1 would prefer to testify further in Afrikaans although I
2 started in English but I will stick to your ruling if you
3 feel it's not appropriate.

4 CHAIRPERSON: We will have the difficulty
5 that I think some of the people here don't understand
6 Afrikaans, so we'd have to have it interpreted twice, once
7 into English and once into isiXhosa. I hope you'll forgive
8 my saying that I found your English very good but I take it
9 you forgive me for saying that.

10 [14:29] May I suggest that you give your evidence in
11 English, but if at any time, you are at loss for a word, or
12 you feel you can express yourself on a particular topic
13 better in Afrikaans, then feel free to switch over to
14 Afrikaans, and then the interpreter can interpret what you
15 said in Afrikaans. Would that meet the thrust really of
16 your request?

17 LT-COL BOTHA: Mr Chairman, I am fine
18 with that, thank you.

19 CHAIRPERSON: Alright, okay.

20 MR MPOFU: Chairperson, just to try and
21 save time, I just wanted to indicate that there are two
22 videos that we had asked for, this one, we would like it to
23 be played in full, but to save time, the next one can just
24 play even five minutes or so because it's more for
25 comparative purposes rather than the content.

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1 CHAIRPERSON: It's the other video that
2 you want to see?

3 MR MPOFU: It's another, it's the same,
4 it's a helicopter shoot, footage rather from a different
5 helicopter.

6 CHAIRPERSON: Alright, that sounds
7 alright. That sounds acceptable. Colonel, perhaps you
8 can, if you consider it necessary, you might give us a
9 little bit of commentary from time to time, for example, I
10 take it what we have on the screen at the moment is the
11 beginning of the video. Is that true? I will ask those
12 who are responsible for the lighting to turn the lights
13 off, so that we can see the screens better. Mr Bizos has
14 said that we can start while the switch is being looked
15 for. I think that's the problem. So shall we start? And
16 if there's something that we can't see when the lights are
17 turned off, we can perhaps go back to that point.

18 [VIDEO BEING SHOWN]

19 [14:29] [VIDEO BEING SHOWN]

20 [14:49] [VIDEO BEING SHOWN]

21 [15:09] [VIDEO BEING SHOWN]

22 [15:44] CHAIRPERSON: The Commission resumes.
23 Are the lights all fully back on? Are you happy to
24 continue then, semi in darkness, Mr Mpofo? We will throw
25 some light on the matter by your cross-examination.

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1 MR MPOFU: I can see.

2 CHAIRPERSON: Colonel, you were still
3 under oath. U is nog steeds onder eed.

4 MR MPOFU: Thank you, Colonel we left off
5 where I was asking you a non-contentious issues. I am just
6 going to continue with those for a while. It is so, isn't
7 it, that you are a video, you have been a video camera
8 operator for the past 26 years?

9 LT-COL BOTHA: Yes, I am a video camera
10 operator.

11 MR MPOFU: For 26 years?

12 LT-COL BOTHA: I did training 26 years
13 ago, yes, let's say 26 years is correct.

14 MR MPOFU: You are also a crime scene
15 expert?

16 LT-COL BOTHA: That is correct, Mr Chair.

17 MR MPOFU: And on the 16th at least you
18 were asked to come and film a particular crime scene.

19 LT-COL BOTHA: I was requested to film
20 the dispersal and disarmament of people, that should have
21 taken place.

22 MR MPOFU: Did you do that?

23 LT-COL BOTHA: Yes, I did.

24 MR MPOFU: Is part of what you observed
25 the fact that the particular scene was surrounded by Nyalas

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1 and dogs – the Dog Unit members, as well as members on
2 horseback?

3 LT-COL BOTHA: Sir, I cannot say on the
4 video who is there, are members on horseback or I didn't –
5 or Dog Unit members or something like that.

6 CHAIRPERSON: I take it you saw the
7 Nyalas. You can confirm there were Nyalas?

8 LT-COL BOTHA: Yes.

9 CHAIRPERSON: You can confirm they were
10 Nyalas. Your inability relates to confirm what you saw, as
11 it's put to you relates to Dog Unit handlers and what else?

12 LT-COL BOTHA: And people on horseback.

13 CHAIRPERSON: People on horseback.

14 MR MPOFU: Alright, further it is when
15 you still airborne or when you were grounded, you did see
16 some policemen on horseback.

17 LT-COL BOTHA: Mr Chair, at no stage did
18 I see policemen on horseback.

19 MR MPOFU: What is known as the Mounted
20 Unit, does that refer to police on horseback?

21 LT-COL BOTHA: That is correct, Mr Chair.

22 MR MPOFU: And if someone says there were
23 members of the Mounted Unit, would you be surprised or
24 rather what would your evidence be?

25 LT-COL BOTHA: I cannot confirm or either

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1 deny that.

2 MR MPOFU: And if I tell you that there
3 were also members of the Dog Unit, what – would your
4 response be the same?

5 LT-COL BOTHA: I cannot – well, if you
6 say so, I'll either have to believe you or don't believe
7 you.

8 CHAIRPERSON: What that means, I take it
9 is that there could have been members of the Dog Unit, it's
10 possible they were there. You can't confirm it, you also
11 can't deny it? Is that correct? It is possible that they
12 were there. Would that be a fair comment?

13 LT-COL BOTHA: It's possible that they
14 were there, I did not see them at the specific scene.

15 MR MPOFU: Well, I was asking you this,
16 because I thought you might be helpful, having seen it from
17 a vantage point but my last question in that line is, you
18 also cannot deny that the two koppies were effectively
19 surrounded by various units of the police.

20 LT-COL BOTHA: Sir, I cannot, I won't say
21 they were surrounded, what I say is there was a lot of
22 policemen, you could see them on the video.

23 MR MPOFU: The question is, you cannot
24 deny that they were surrounded.

25 LT-COL BOTHA: I cannot deny it, but I

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1 also cannot confirm it.

2 MR MPOFU: But what you can confirm
3 surely, is that they were Nyalas behind the small koppies.

4 LT-COL BOTHA: The small koppie, just
5 qualify the small koppie for me?

6 MR MPOFU: Sorry, yes, it's what we now
7 call Scene 2, you remember the large koppie, the kraal, in
8 terms of your diagrams, the kraal, the large koppie, and
9 the one behind it is the one we call the small koppie or
10 Scene 2.

11 LT-COL BOTHA: Are we talking about Scene
12 2, not the small koppie next to the big koppie? You are
13 talking about Scene 2, the one that's further away?

14 MR MPOFU: Ja, if you go to B1 –

15 LT-COL BOTHA: Do you refer to number K?

16 MR MPOFU: Yes. I refer to number K as
17 the large koppie.

18 LT-COL BOTHA: Mr Chair, Mr Mpofo just
19 said K as the large koppie, is that what you confirm to as
20 the small koppie or the large koppie?

21 MR MPOFU: No, my understanding is the
22 first shooting happened near the kraal, is that correct?

23 LT-COL BOTHA: That is correct.

24 MR MPOFU: Okay, where in relation to B1
25 is that?

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1 LT-COL BOTHA: The kraal is J, Mr Chair.

2 MR MPOFU: Okay. Yes, then H, if that is
3 the case, would be the large koppie, isn't it?

4 LT-COL BOTHA: That is correct, Mr Chair.

5 MR MPOFU: And K would be the small
6 koppie.

7 LT-COL BOTHA: That is correct, Mr Chair.

8 MR MPOFU: So the gist of my question
9 therefore was that you can confirm that there were Nyalas
10 which were located behind location K.

11 LT-COL BOTHA: That is correct, Mr Chair.

12 MR MPOFU: And there were Nyalas that
13 were still around position J.

14 LT-COL BOTHA: I think it's visible on
15 the videos so I am not 100% sure now, but it is visible on
16 the video, that's correct, yes.

17 MR MPOFU: It is yes. And I think your
18 evidence was that some of the people who were running from
19 J to K, towards K, from H, the vicinity of J and H towards
20 K.

21 LT-COL BOTHA: No, Mr Chair, I did not
22 say that they were running from a specific point, what I
23 did say, you can see on the video that people are running.
24 Even at a later stage in the video, you can clearly see
25 that people are running.

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1 MR MPOFU: Are you aware of people who
2 were hiding at position K?
3 LT-COL BOTHA: No, Mr Chair, not evening
4 the video can you – it is just too high up, you cannot see
5 those people hiding there.
6 MR MPOFU: What do you mean, you were too
7 high up? Which helicopter were you in, of the two that we
8 saw?
9 LT-COL BOTHA: I was in the first one.
10 MR MPOFU: Your evidence earlier was that
11 part of the activities of the people in your helicopter was
12 to throw a stun grenade, two stun grenades if I am correct.
13 Is that right?
14 LT-COL BOTHA: That is correct, Mr Chair.
15 MR MPOFU: At whom or at what? What was
16 the target?
17 LT-COL BOTHA: Sir, it was a operation
18 proceeding taken by Brigadier Fritz he just gave the
19 instruction.
20 MR MPOFU: Well what will your comment
21 be, I am going to argue at the end that if you were close
22 enough to throw stun grenades, then you would have been
23 close enough to see the people because you wouldn't be
24 throwing stun grenades from so high up, otherwise they
25 could have gone anywhere.

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1 LT-COL BOTHA: Mr Chair, you can clearly
2 hear in the video on the sound of the chopper that it went
3 up and down and when it made that loud noise, it is either
4 tilting up or tilting down. We did not fly at the same
5 height the whole time.
6 MR MPOFU: Thank you. So at times, you
7 were low enough to be able to throw stun grenades onto the
8 ground.
9 LT-COL BOTHA: That is correct, Mr Chair.
10 MR MPOFU: And you will correct me if I
11 am wrong, I would have seen that stun grenades were being
12 thrown at people, so you would have been close enough at
13 those times to be able to observe the people at whom you
14 were throwing the stun grenades, correct?
15 LT-COL BOTHA: Sir, there were people on
16 the ground where the stun grenades were thrown.
17 MR MPOFU: Thank you. Now, the
18 helicopter that you were flying in, you've already
19 testified, I think more than once, that – well, let me put
20 it like this, the distance between the Nyalas that were
21 behind position K, which are, I put to you were part of the
22 surrounding group, I know you said you can't confirm or
23 deny it so I don't want to put words in your mouth. So I
24 will only confine myself to the Nyalas that we both agree
25 were at the back of K, and the ones that were at the front.

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1 I don't know, do you know what a radius is?
2 LT-COL BOTHA: Yes, Mr Chair.
3 MR MPOFU: Okay, if those two sets of
4 Nyalas were forming part of a circle, what would be the
5 radius of that circle, the distance between the two points?
6 LT-COL BOTHA: Mr Chair, let me just
7 confirm, I said there was Nyalas behind the people. I
8 cannot recall saying they were on the other side of the
9 koppie. I can remember that there was I think a water
10 canon, because it looks a bit different than an Nyala, on
11 the other side of the koppie.
12 MR MPOFU: Okay, sorry, Captain, no, you
13 did say, remember when I took you to the map, you did
14 confirm that there were Nyalas behind position K. So I
15 don't want us to go back there.
16 LT-COL BOTHA: So, can we just get where
17 is behind, is it on J side, on let's say G's side of the
18 map?
19 MR MPOFU: Well, where do you think it
20 was when you said, yes, there were Nyalas.
21 LT-COL BOTHA: I thought on J side that
22 you were talking about, on the eastern side.
23 MR MPOFU: Okay, so that moves us right
24 back. Did you observe Nyalas way from J and K, and I
25 suppose that's the western side, in other words, behind the

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1 position K on the western side.
2 LT-COL BOTHA: There were Nyalas at the,
3 let me, if you look at the video, can I just explain it in
4 that way? At some stage in the beginning of the video you
5 can see that there are Nyalas behind, let's say to the
6 eastern side of K. I did look at the video even now, and I
7 can't recall now if there was any on the western side of K,
8 but if the video shows that, then it's obviously there.
9 MR MPOFU: Okay, what I am getting at is
10 the following, and I am going to put it like this, between
11 the position J where you and I agree there were Nyalas and
12 position, behind position K, that distance would be about a
13 kilometre.
14 LT-COL BOTHA: I think it was measured at
15 6 – between 5 and 600 metres. It's somewhere on the key.
16 MR MPOFU: No –
17 LT-COL BOTHA: Not?
18 MR MPOFU: - that's the one distance you
19 did not –
20 LT-COL BOTHA: Is it not there?
21 MR MPOFU: No.
22 LT-COL BOTHA: Okay, sorry.
23 MR MADLANGA: Mr Chair, Commissioners –
24 CHAIRPERSON: Yes, Mr Madlanga.
25 MR MADLANGA SC: It was measured, except

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1 that I cannot quickly go there, it is around 500 indeed.
 2 But it is somewhere in B.
 3 MR MPOFU: Thank you, Chair. Okay, do
 4 you want to go to B2 please, for me?
 5 CHAIRPERSON: Mr Madlanga, it's not on
 6 B2.
 7 MR MADLANGA SC: On B16, Chair. It's a
 8 sketch plan.
 9 CHAIRPERSON: Mr Madlanga, I think the
 10 problem is that the Ks, Js and Hs, on B16 are not the same,
 11 do not denote the same positions, as they do on B1.
 12 MR MADLANGA: Perhaps, Chair, let me just
 13 say, this will be clarified by Warrant Officer Tamai when
 14 he testifies. He drew the sketch at B16.
 15 CHAIRPERSON: Yes, I understand that. I
 16 think, I hope Mr Mpofo won't mind if I interrupt his cross-
 17 examination.
 18 MR MPOFU: No.
 19 [16:04] CHAIRPERSON: So you are busy trying to
 20 ascertain particular distance, presumably as a basis from
 21 which you're going to proceed to the next point.
 22 MR MPOFU: Correct.
 23 CHAIRPERSON: So if the witness can't
 24 help you on the distance, then I'm afraid you're going to
 25 have to proceed to the next point without it, but perhaps

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1 if you can indicate to him something else. He did say he
 2 couldn't remember seeing Nyalas on the – I think it's the
 3 western side of K, though he says if they're on his video
 4 then they were there, but he can't remember them, but, as
 5 far as I can remember, he said he did see a water canon
 6 there.
 7 MR MPOFU: Yes –
 8 CHAIRPERSON: So it might be helpful to
 9 ask him, if I may suggest, the distance between the water
 10 canon to the west of K, and the Nyalas on the Eastern side,
 11 and that may then give you the distance that you need for
 12 your further cross-examination.
 13 MR MPOFU: Thank you, Chair. The water
 14 canons that were there, they were about two of them, is
 15 that correct?
 16 LT-COL BOTHA: Mr Chair, that's correct.
 17 MR MPOFU: One of them was right in the
 18 middle of scene 2, correct?
 19 LT-COL BOTHA: Sir, if I recall the video
 20 correct, there was a water canon in the middle at the end,
 21 where we circled around the koppie at some stage, yes.
 22 MR MPOFU: And so the other that you
 23 referred to which was behind position K, would be the
 24 second one?
 25 LT-COL BOTHA: If I must look at the map,

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1 it's more or less in the south western side, yes.
 2 MR MPOFU: Thank you. Now, I don't want
 3 to waste time on this, because as the chair says, it's
 4 actually leading up to the next point. I don't want to tie
 5 you to a particular distance, but would you agree that –
 6 and the distance will be confirmed later by another
 7 witness, that the distance between the first set of Nyalas
 8 and the water tank was in the vicinity of a kilometre or
 9 less.
 10 LT-COL BOTHA: Sir, if we talk about the
 11 first set of Nyalas, at what stage of the videos are you
 12 talking about the first set of Nyalas? Sorry, I'm not
 13 trying to be difficult, I really don't understand.
 14 MR MPOFU: No, Sir, I don't think you are
 15 being difficult. I'm saying we're using the water tank
 16 that was behind the position K as a marker.
 17 LT-COL BOTHA: Okay.
 18 MR MPOFU: Ja, between that and the set
 19 of Nyalas that were at scene 1, would you agree with me
 20 that the distance would be about a kilometre or less?
 21 LT-COL BOTHA: If you talk about when the
 22 video starts, there are Nyalas in like a half moon, if
 23 that's the Nyalas you are talking about, that is more or
 24 less – it must be less than a kilometre.
 25 MR MPOFU: Thank you. Right, and that –

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1 let's generously say it was a kilometre, that radius is
 2 what would define the scene, correct?
 3 LT-COL BOTHA: That is the radius of?
 4 MR MPOFU: Between the distances that you
 5 have now said it was less than a kilometre.
 6 LT-COL BOTHA: That's correct, Mr Chair.
 7 MR MPOFU: Thank you.
 8 CHAIRPERSON: Sorry, I'm not sure that I
 9 understand. If you join the water canon to the Nyalas, you
 10 get a line.
 11 MR MPOFU: Yes.
 12 CHAIRPERSON: Now if you regard the
 13 Nyalas being the one end of the circle, and the water canon
 14 the other, then the distance between the water canon and
 15 the Nyalas would be diameter of the circle, not the radius.
 16 MR MPOFU: Correct, correct.
 17 CHAIRPERSON: Now do you mean the radius,
 18 which is half the diameter, or do you mean the diameter,
 19 itself?
 20 MR MPOFU: Okay, Chair, ja well, I
 21 suppose I would have to guess the centre of the circle, and
 22 then we get into geometry –
 23 CHAIRPERSON: No, if the distance between
 24 the two is roughly a kilometre –
 25 MR MPOFU: And then it's the straight

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1 line –

2 CHAIRPERSON: Ja, then the straight line

3 between the two would be the diameter of a circle.

4 MR MPOFU: Okay.

5 LT-COL BOTHA: If you took the middle of

6 that line as being the centre, and got a compass and –

7 MR MPOFU: Yes, and the equidistance –

8 CHAIRPERSON: Ja, for the purpose of

9 clarity, when you talk about radius do you really mean

10 radius or do mean diameter of the imaginary circle?

11 MR MPOFU: Of the imaginary circle, in

12 that sense I mean the diameter, Chair. In other words, the

13 distance, let's say the straight line – let's just simplify

14 it, let's forget the geometry. The straight line between

15 the Nyalas and the second water tank would be about a

16 kilometre or less?

17 LT-COL BOTHA: That is correct, Mr Chair.

18 MR MPOFU: And that straight line would

19 determine the scene?

20 LT-COL BOTHA: If you take it as that,

21 yes, Mr Chair.

22 MR MPOFU: Now the purpose of this is to

23 suggest to you that in the video that we observed for about

24 40 minutes, or 41 minutes, the time that you spent at the

25 scene, as you have now defined it, and this is not a

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1 scientific estimation, is in the region of 10 to 20% to be

2 generous, would that be fair?

3 LT-COL BOTHA: Mr Chair, if I know at

4 that stage that that was a scene, I most probably would

5 have concentrated more on that, but there was the people

6 went into different directions and I video graphed that

7 also.

8 CHAIRPERSON: Colonel, I understand your

9 answer, but you haven't really answered the question the

10 witness ask – the counsel asked you. Counsel said do you

11 accept that 10 to 20% of the total time of the video is

12 devoted to pictures of what he called the scene, by which

13 he means the scene which is covered by that imaginary

14 circle which we spoke about. Your answer, I understood,

15 implied that the answer was yes, but you said the reason

16 was – and did what witnesses shouldn't do, is you thought

17 what the next question would be and you answered it in

18 advance, which is not always a smart thing for a witness to

19 do, but the point is you do concede, I take it, that

20 counsel is right when he says that about only 10 or 20% of

21 the video is devoted to, what he called the scene, would

22 that be right?

23 LT-COL BOTHA: What we described as the

24 scene now, yes.

25 MR MPOFU: Thank you.

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1 CHAIRPERSON: And then you went on to

2 say, the reason for that was that you didn't realise at the

3 time that that was where most of the action was going to

4 be, if you had, there would have been far greater

5 percentage of video pictures of what was happening at that

6 scene, is that correct?

7 LT-COL BOTHA: If we could fly there, and

8 we were allowed to, Sir, most probably yes.

9 MR MPOFU: I take it that Brigadier Van

10 Zyl, when he commissioned you to partake in this mission,

11 did inform you that the activities would be taking place at

12 the koppie?

13 LT-COL BOTHA: Brigadier Van Zyl informed

14 me that they were going to disarm and disperse people. I

15 cannot remember if he said the koppie, but that was the

16 scene, yes.

17 MR MPOFU: But anyway, you knew that the

18 people were at the koppie?

19 LT-COL BOTHA: I knew that.

20 MR MPOFU: Yes. And you knew that the

21 people were not at the mine operations?

22 LT-COL BOTHA: That's correct, Mr Chair.

23 MR MPOFU: And you knew that the people

24 were not at the housing units, including the hostels, which

25 are far away from there?

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1 LT-COL BOTHA: That is not where the

2 koppie is.

3 MR MPOFU: And you knew that the people

4 were not in the rest of the open veld further away from the

5 koppie?

6 LT-COL BOTHA: Mr Chair, that's not where

7 they were gathered.

8 MR MPOFU: Thank you. And yet, your

9 video devotes about 80 to 90% of its attention, among

10 others, to those areas that I've just mentioned.

11 LT-COL BOTHA: When I arrived on the

12 scene, there weren't anyone on the koppie anymore, and

13 there were people dispersing in the veld into the area

14 where the people live, and I also video graphed that.

15 MR MPOFU: In your sworn affidavit, which

16 was –

17 CHAIRPERSON: Mr Mpofo, all affidavits

18 are sworn.

19 MR MPOFU: Well –

20 CHAIRPERSON: Please get your terminology

21 right, I mean it's irritating. A sworn affidavit is what

22 illiterate people say, an affidavit is a statement which is

23 sworn. So I'm sorry to interrupt you, but get it right.

24 MR MPOFU: Chairperson, okay, I don't

25 want to be involved in a debate about grammar, but this is

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1 for emphasis, and I'm talking to a lay witness, I'm just
 2 trying to cover two things at the same time, otherwise I'm
 3 going to have to ask him two questions. Did you swear to
 4 this statement, because your signature does not appear to
 5 it?

6 CHAIRPERSON: In short, he confirmed on
 7 oath, last time, that that statement was correct, that's
 8 enough, isn't it?

9 MR MPOFU: Yes –

10 CHAIRPERSON: That's enough isn't it?

11 MR MPOFU: Yes. Thank you, I'm sorry
 12 about this Colonel, all I'm trying to establish is the
 13 statement which you confirmed under oath – maybe if I put
 14 it like that it will be better. In the statement that you
 15 confirmed under oath, you stated at paragraph 7, and I'm
 16 reading from it now, "On 16 August 2012, I made an aerial
 17 video recording of the SAPS operation at Wonderkop,
 18 Marikana." Is it correct that you did not do anything of
 19 the sort?

20 LT-COL BOTHA: That is not correct, Sir.

21 MR MPOFU: So according to you, what we
 22 saw here is a video recording of the SAPS operation at
 23 Wonderkop?

24 LT-COL BOTHA: According to me, I was
 25 video graphing people that's been dispersed – that are

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1 dispersing into the job into the area, into the living area
 2 also, and because you can see it on the video.

3 MR MPOFU: And the disarming, did you
 4 shoot any disarming of anybody?

5 LT-COL BOTHA: Sir, it's too high up, you
 6 will not see if someone is disarmed, and if it was
 7 disarmed, then it could have shown on the video, but I
 8 don't see anything like that on the video.

9 MR MPOFU: I'm also going to suggest that
 10 the – or let me put it this way, when did you first see the
 11 footage of your coverage?

12 LT-COL BOTHA: I cannot remember
 13 specifically when, but when it was downloaded. When I
 14 downloaded it.

15 MR MPOFU: Okay, I'm going to suggest to
 16 the Commission that the video footage that we saw does not
 17 accord with the evidence that you gave, and I'm now going
 18 to deal with that. And I'm going to suggest, in that
 19 light, that you were either in a different helicopter, or
 20 in the second one that we saw, but maybe in – the question
 21 is, your evidence is that you were sitting right next to
 22 Brigadier Fritz, correct?

23 LT-COL BOTHA: That is correct, Mr Chair.

24 MR MPOFU: And Brigadier Fritz was giving
 25 instructions or communicating with people on the ground?

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1 LT-COL BOTHA: Sir, I knew he was
 2 communicating, it could have been with been pilot also. I
 3 cannot remember what he said. I did say that.

4 MR MPOFU: Was he communicating with the
 5 people on the ground?

6 LT-COL BOTHA: I know, at some stage, he
 7 tried to communicate with the people on the ground, but he
 8 had difficulty doing that.

9 MR MPOFU: Where does this come from now?
 10 On Tuesday you told us that Brigadier Fritz was
 11 communicating with the people on the ground? When was it
 12 just an attempt?

13 LT-COL BOTHA: I said that he tried to
 14 communicate with the people on the ground, or he did
 15 communicate with the people on the ground, but I cannot
 16 remember, and at some stage he tried to communicate there
 17 were the chopper hovered and he just couldn't get hold of
 18 the people.

19 MR MPOFU: How do you know that? I
 20 thought your evidence was that you could not remember
 21 anything that Brigadier Fritz said, so how do you know that
 22 he tried to communicate with people and he couldn't reach
 23 them?

24 LT-COL BOTHA: I cannot remember what he
 25 said, I can remember that he tried to communicate. It's on

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1 the video. You can also hear him talk at some stage, that
 2 he tried to communicate with someone.

3 MR MPOFU: Well, that's exactly the
 4 aspect that I wanted to query, Colonel, that if indeed you
 5 were sitting next to Colonel Fritz, as you explained, and
 6 he was communicating with people on the ground, then surely
 7 that audio material would have been audible on your video,
 8 inasmuch as the helicopter noise was audible.

9 LT-COL BOTHA: Sir, I was sitting next to
 10 Brigadier Fritz in the chopper.

11 MR MPOFU: Sorry, I did not get that
 12 answer?

13 LT-COL BOTHA: I said I did sit with the
 14 video camera next to Brigadier Fritz in the chopper.

15 MR MPOFU: No, that's not what I'm
 16 asking. You heard on the second video that you could
 17 clearly hear the communication of the people talking in the
 18 chopper?

19 LT-COL BOTHA: Yes, Mr Chair.

20 MR MPOFU: In your video, or the one that
 21 you say is your video, there is none of that type of audio
 22 material.

23 LT-COL BOTHA: Mr Chair, I don't what the
 24 technology was that was used in the second video. My video
 25 is a normal handheld video camera.

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1 MR MPOFU: Yes. But whatever the
 2 technology was on your video camera, it was able to pick up
 3 the noise of the helicopter, we all heard it, correct?
 4 LT-COL BOTHA: That's correct, Mr Chair.
 5 MR MPOFU: And it is on that basis that I
 6 want to suggest that the activities that you described on
 7 Tuesday, which happened inside the helicopter, are not
 8 confirmed by the footage, and therefore it is possible – I
 9 won't put it higher than that, that that footage came from
 10 a different person?
 11 LT-COL BOTHA: Mr Chair, if you look at
 12 the – at the reflection in the video that I took in the
 13 chopper, you can clearly see my yellow watch reflecting in
 14 the video. I made that video.
 15 MR MPOFU: Okay, where is this yellow
 16 watch on the video?
 17 CHAIRPERSON: For the benefit of those
 18 who later have to read the transcript, the witness put up
 19 his hand at that point and showed wrist watch that he has
 20 on his left wrist.
 21 [16:24] MR MPOFU: Alternatively, what you have
 22 described on Tuesday as the conversation between the
 23 Brigadier and the people on the ground, did not take place.
 24 LT-COL BOTHA: Mr Chair, at some stage
 25 you can hear the Brigadier talking. I even talk on the

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1 video and you can't really hear my voice, the noise is
 2 overwhelming. For some reason the noise that's caught by
 3 the camera is overwhelmed by the video camera.
 4 CHAIRPERSON: Sorry, I think you mean the
 5 noise as captured on the camera is overwhelmed by the noise
 6 of the helicopter, not by the video camera – or am I saying
 7 it incorrectly?
 8 LT-COL BOTHA: No, that's what I meant,
 9 Mr Chair.
 10 MR MPOFU: Okay, so are you now saying
 11 that the verbal conversations were drowned out by the
 12 helicopter noise?
 13 LT-COL BOTHA: I said some of the verbal
 14 conversation can be drowned out because you can hear
 15 clearly at some stage that someone is calling and, if I'm
 16 not mistaken, that is Brigadier Fritz's voice.
 17 MR MPOFU: You also testified that when
 18 you disembarked from the helicopter, the shooting at scene
 19 1 had already happened but the shooting – no, no, I'm
 20 sorry, that you were told when you disembarked that the
 21 shooting at scene 1 had already happened and that there was
 22 a shooting at scene 2, if I'm quoting you correctly.
 23 LT-COL BOTHA: No, that's not what I
 24 said, Mr Chair.
 25 MR MPOFU: Okay, let's take it one step

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1 back. When you went to the scene at about 4 o'clock, you
 2 testified that the shooting at scene 1 had already
 3 happened, correct?
 4 LT-COL BOTHA: Is that when I went on the
 5 ground to the scene or in the air to the scene?
 6 MR MPOFU: In the air to the scene at
 7 about 4 o'clock, sir.
 8 LT-COL BOTHA: Mr Chair, in hindsight, if
 9 I look at the video, I mean then I can see it already
 10 happened.
 11 MR MPOFU: And you said that somebody –
 12 that the shooting at scene 2 had not yet happened.
 13 LT-COL BOTHA: I said that I wasn't sure
 14 at what stage the shooting at scene 2 happened, so I'm not
 15 sure if it had happened or not.
 16 MR MPOFU: Okay, I'll look for the
 17 passage but my recollection was that you said the video –
 18 in fact, not my recollection, that's what the transcript
 19 says. Mr Tip said to you, "As far as you able to tell, at
 20 that time did you capture the entire operation on your
 21 video recording?" And your answer was, "No, Mr Chair,
 22 definitely not. The video, we determined that the video
 23 actually started after the shooting at scene 1 had already
 24 happened." And then elsewhere, I think you – and in any
 25 event, you did not observe the shooting, the second

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1 shooting?
 2 LT-COL BOTHA: No sir, I did not observe
 3 the second shooting.
 4 MR MPOFU: But you said, "I was told" –
 5 I'm quoting again – "I was told that there was a shooting
 6 at scene 2." Do you remember that?
 7 LT-COL BOTHA: I remember that.
 8 MR MPOFU: Who told you that?
 9 LT-COL BOTHA: Sir, when I arrived at
 10 scene 1, I was looking for my Captain and they told me that
 11 he is at another shooting. That's when I learned that
 12 there was another shooting.
 13 MR MPOFU: What's his name?
 14 LT-COL BOTHA: Captain McClarky.
 15 MR MPOFU: And I think we established on
 16 Tuesday that you could not say whether, on the other three
 17 or four helicopters, there was video footage being taken?
 18 LT-COL BOTHA: No, I did not know, Mr
 19 Chair.
 20 MR MPOFU: Were you aware that there was
 21 a Lonmin chopper at the scene, also circling the scene?
 22 LT-COL BOTHA: I know there was one
 23 chopper that was not a police chopper. I did not know that
 24 it was a Lonmin chopper.
 25 MR MPOFU: Okay, I think it will be

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1 common cause that the non-police chopper was a Lonmin
2 chopper but you say you did observe a non-police
3 helicopter?
4 LT-COL BOTHA: That is correct, Mr Chair.
5 MR MPOFU: In fact –
6 SPEAKER: - to be common cause.
7 MR MPOFU: Okay, according to the
8 evidence that we will given, it might not be common cause.
9 The second video that we saw this afternoon came from
10 something identified as a Lonmin helicopter but in any
11 event, all I want to establish, which you have established,
12 is that there was at least one helicopter which did not
13 belong to the police.
14 LT-COL BOTHA: That is correct, Mr Chair.
15 MR MPOFU: This was a very sensitive
16 operation, correct?
17 LT-COL BOTHA: Sir, I can't really answer
18 on it. It was a displacing and a disarmament operation.
19 MR MPOFU: It was a big operation.
20 LT-COL BOTHA: Yes, it was a big
21 operation.
22 MR MPOFU: There was – there were members
23 of the tactical response unit.
24 LT-COL BOTHA: I didn't – yes, if that's
25 the guys with the black next to their legs then it's

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1 tactical response unit, yes. Sorry, Mr Chair, there was.
2 MR MPOFU: There was also the national
3 intervention unit.
4 LT-COL BOTHA: I'm not sure if they were
5 there. I can only know the guys on their uniform. I'm not
6 sure if they were national intervention people.
7 MR MPOFU: Okay.
8 LT-COL BOTHA: At that stage I wasn't
9 sure if they were there. In hindsight, I think they were
10 there, yes.
11 MR MPOFU: Okay, I'll make it easier.
12 You cannot dispute that there were also members of the
13 following units, special task force,
14 LCRC, dog unit, mounted unit, air wing, crime
15 intelligence, detectives, crime prevention unit and
16 negotiators.
17 LT-COL BOTHA: No sir, I cannot dispute
18 that.
19 MR MPOFU: And at some point in your
20 video I observed there was a group of Nyalas. I counted
21 about 62 Nyalas clustered in one area. It is –
22 MR SEMENYA SC: That can't be true.
23 LT-COL BOTHA: No, sir.
24 MR MPOFU: Do you remember that spot
25 where there are – there's a collection of Nyalas on the

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1 video? I don't want us to go back there. If you can't
2 remember it, you can't remember. Do you know the spot
3 where there was a cluster of videos – or rather of Nyalas?
4 CHAIRPERSON: Mr Semenya has turned on
5 his microphone.
6 MR MPOFU: I'm sorry.
7 CHAIRPERSON: Do you want to say
8 something before we proceed?
9 MR SEMENYA SC: I think, Chair, with the
10 greatest of respect, the video we have seen has not shown
11 anything close to 62 Nyalas on it, there never were.
12 CHAIRPERSON: I must say I thought Mr
13 Mpofo [indistinct] – he was carrying on, but any rate Mr
14 Mpofo –
15 MR MPOFU: Ja, I was, Chair. Don't worry
16 about it, we will come to it. In the course of the next
17 four months you'll see the 62 Nyalas, but let's leave it
18 for now. Let's leave it for now. The only issue I'm
19 really making at this point is that this was a major and
20 big operation, but whether there were 59 or 62 Nyalas –
21 CHAIRPERSON: Sorry, Mr Mpofo, I think Mr
22 Burger now has indicated he wants to say something.
23 MR MPOFU SC: Yes.
24 CHAIRPERSON: The best thing to do is to
25 turn your microphone on, then I can see the red light.

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1 MR BURGER SC: Mr Chair, I'm just asking
2 my learned friend Mr Mpofo what he puts – if he just makes
3 it clear to us that he puts it as the version of his client
4 or as his own evaluation of the video we've all seen, then
5 we know what to look for in the next four months.
6 MR MPOFU: Thank you, Chairperson. I
7 think Mr Burger was not listening. The last time I
8 checked, the word "I" refers to me, Mpofo. So I said I
9 observed 62 Nyalas. Anyway, we agree it was a big
10 operation.
11 LT-COL BOTHA: Chair, if you look at the
12 amount of people there and the amount of vehicles, it is a
13 big operation.
14 MR MPOFU: Is it usual in such
15 operations, big operations involving so many units of the
16 police, to allow a private helicopter concurrently with the
17 police helicopters to be hovering above the scene?
18 LT-COL BOTHA: Mr Chair, I cannot answer
19 the question. I am not sure, I cannot tell you if it is
20 usual or not usual. I don't know.
21 MR MPOFU: But in your 26 years – in your
22 26 years' experience, is it something that usually happens,
23 not very often, never, or none of the above, as questioners
24 usually say?
25 LT-COL BOTHA: Mr Chair, although I was

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1 in the police or I'm in the police for 28 years, an expert
 2 for 26 years, this was the first such big operation where
 3 there were so many police choppers involved where I was
 4 involved and I'm not sure if it's usual or not, I cannot
 5 say.

6 MR MPOFU: Okay, fair enough but you
 7 yourself have never observed a private helicopter hovering
 8 with police helicopters.

9 LT-COL BOTHA: Not in an operation where
 10 I was involved.

11 MR MPOFU: You didn't notice whether the
 12 other helicopters also released stun grenades?

13 LT-COL BOTHA: No, Mr Chair, I will not
 14 know.

15 MR MPOFU: And you didn't know whether,
 16 in addition, there were shots that were fired from one of
 17 the other helicopters?

18 LT-COL BOTHA: No, Mr Chair, I don't.

19 MR MPOFU: I don't know if you can help
 20 us with this, maybe just as an expert – as accepting for
 21 now that you're not in the Lonmin helicopter or the other
 22 helicopter, the audiovisual or rather the audio material
 23 from that helicopter seems to suggest that the people,
 24 despite the higher altitude that they were flying at, that
 25 they were able to identify people and objects and vehicles

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1 with amazing clarity. Is that related to the type of
 2 equipment they were using or are you not –

3 MR MADLANGA SC: Chair, commissioners,
 4 I'm not altogether sure that I follow the part that my
 5 learned friend prefaced his question with, that accepting
 6 that you were not in the Lonmin chopper or the other
 7 choppers –

8 CHAIRPERSON: He asked the question, as I
 9 understood it, on the basis that the witness is an expert
 10 and he was asking him, can you as an expert tell us the
 11 reason why the clarity of the audio material on the other
 12 video – even if one assumes it was higher up – is much
 13 better than on your video. Can you tell us, is that due to
 14 the fact that it was superior equipment? Can you give us
 15 that opinion in your capacity as an expert? That's what I
 16 understood the question to be.

17 MR MPOFU: Terms and conditions, Mr
 18 Chairman.

19 MR MADLANGA SC: I must have been
 20 confused by the word "accepting", thank you Chair.

21 LT-COL BOTHA: Mr Chair, I'm not a video
 22 or a sound expert. I can presume that it's because of
 23 better quality. That is – but I'm not an expert in that
 24 field.

25 MR MPOFU: Okay. I'll just maybe amplify

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1 the question and thank you for your assistance. In the
 2 unscientific transcript that we have compiled of what was
 3 said in the other helicopter, and no doubt that will be
 4 debated at the time when it is properly identified, the
 5 following, for example it had, "Go forward, go forward,
 6 Nyala drive and the Casspir, papa 7 and I think 16.
 7 Protection of the water cannon please. Okay papa 1, the
 8 people is now moving out of the koppie, out of the koppie.
 9 Water cannon come forward, come forward." And then there's
 10 another part where it says, "Some of the vehicles in the
 11 small koppie, there are several people in the small koppie,
 12 hiding in the small koppie." These are just examples.
 13 Would you accept that that kind of comment would suggest
 14 that the people were able to observe some of the minute
 15 details such as this Nyala going forward and this person
 16 hiding?

17 LT-COL BOTHA: Mr Chair, I don't know who
 18 made that comment, so I don't know where the persons are at
 19 that stage that made the comment, so I cannot answer the
 20 question.

21 CHAIRPERSON: I think the question is put
 22 to you on the assumption which you are asked to make and
 23 which Mr Mpofu hopes to be able to prove later to be a
 24 correct assumption, that that was what was said by someone
 25 in the other helicopter from which the other video pictures

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1 were taken. He says, and they have had, subjected that to
 2 some kind of analysis, produced the transcript. He says if
 3 that is what happened, it was what somebody said in the
 4 other helicopter and it's been correctly transcribed, would
 5 you accept that even from the height at which the
 6 helicopter was, they could see, amongst other things, that
 7 people were hiding in the, at the koppie below? I think
 8 that's the question that you asked, is that correct, Mr
 9 Mpofu?

10 [16:44] MR MPOFU: Yes, thank you Chair, for the
 11 clarity. Is the question now clear?

12 LT-COL BOTHA: It's clear. Mr Chair, I
 13 cannot accept that the people can just see because I don't
 14 know if it's a police radio talking to the chopper, or the
 15 chopper, passenger in the chopper talking downwards. So if
 16 I know where the person was that made the comment, then I
 17 can answer it, but I can't answer it before then.

18 MR MPOFU: Okay. Now, thank you,
 19 Colonel, it was a little bit unfair, I was just hoping
 20 you'd help us as an expert, but I accept that you were not
 21 in that particular helicopter. In your helicopter, the
 22 video equipment that you were using, was it of such a
 23 standard and quality that you would have been able, had you
 24 concentrated on the copy, you would have been able to pick
 25 up the people there?

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1 LT-COL BOTHA: Mr Chair, it is a normal
 2 hand held video, I think it's a Panasonic video camera. As
 3 you've seen on the footage, the moment you zoom in, it
 4 vibrates a lot, and the chopper is also vibrating. I am
 5 not sure, you can see people on the ground, it's – but if I
 6 could keep it so still by zooming in, I am not sure if that
 7 would have been possible.
 8 MR MPOFU: Yes. And we established on
 9 Tuesday that you did have the zoom function which should
 10 have allowed you to zoom to closer targets.
 11 CHAIRPERSON: Mr Mpofo, he said he did
 12 zoom in, but he says when he did zoom in, there was a
 13 vibration, the camera vibrates, and the helicopter was
 14 vibrating, and that's why one can't see so clearly, so he
 15 doesn't deny that he used his zoom facility -
 16 MR MPOFU: Yes.
 17 CHAIRPERSON: - but he gave the
 18 explanation which I have repeated to you.
 19 MR MPOFU: Yes.
 20 CHAIRPERSON: So I don't think your
 21 question, with respect, proceeds from the correct premise,
 22 but perhaps you can reformulate it, and take the point
 23 further.
 24 MR MPOFU: Thanks, Chair, no, all I was
 25 saying is he established or rather you can establish when I

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1 asked you, maybe I must quote from the thing, when I asked
 2 you on Tuesday that your camera a zoom function and that
 3 you utilised it, you confirm that on Tuesday.
 4 LT-COL BOTHA: That is correct, Mr Chair.
 5 MR MPOFU: And this vibration that makes
 6 it a bit difficult that you described was not seen on the
 7 video, was it?
 8 LT-COL BOTHA: It was seen on the video,
 9 you can see by zooming, that it shakes quite a lot, and
 10 sometimes I will zoom in and zoom out because of the
 11 vibration. It is seen in the video.
 12 MR MPOFU: Okay, you obviously, as the
 13 person who took the footage would know at which points you
 14 had zoomed in and zoomed out, but my question is simply
 15 that at the question at which you had zoomed in, were you
 16 able to pick up smaller targets?
 17 LT-COL BOTHA: You will be able to see,
 18 well, we will have to define smaller targets, but you will
 19 be able to see smaller things on the ground.
 20 MR MPOFU: Finally, I want to ask you,
 21 you testified that when you are assigned – before we do
 22 that, was Brigadier van Zyl at the scene?
 23 LT-COL BOTHA: I can't – was it at, with
 24 the operation or at the scene afterwards?
 25 MR MPOFU: Both.

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1 LT-COL BOTHA: I cannot recall seeing
 2 Brigadier Van Zyl at the scene at all.
 3 MR MPOFU: And at the operation
 4 afterwards?
 5 LT-COL BOTHA: No, I haven't seen him
 6 there.
 7 MR MPOFU: And at the JOC when you
 8 returned the chopper?
 9 LT-COL BOTHA: I found Brigadier Van Zyl,
 10 I think we've confirm that on Tuesday, at the JOC.
 11 MR MPOFU: And you reported –
 12 CHAIRPERSON: I am sorry to interrupt,
 13 you say you saw him at the scene, sorry, not the scene,
 14 that's misleading, you saw at JOC. Did you see him at the
 15 JOC both before you left in the helicopter and also when
 16 you returned or did you only see him when you returned?
 17 LT-COL BOTHA: Before I left, and after I
 18 returned, Sir.
 19 MR MPOFU: Yes, just another issue of
 20 clarity, please, Brigadier, have you got your statement in
 21 front of you?
 22 LT-COL BOTHA: No, Mr Chair.
 23 MR MPOFU: Okay, I will just read out
 24 something. You said in paragraph 4, "On 13 August 2012, I
 25 attended at the processed" or rather, "and processed a

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1 crime scene involving Marikana case 117, 118 and 119 at
 2 Wonderkop Marikana, wherein thee people died, two of which
 3 were police officers and one civilian." Would I understand
 4 that to be a mistake or not in conformity with your
 5 evidence? And I'll just explain in what way. I understood
 6 you to be saying in your evidence that at the points, I
 7 think B, C, D and E, four bodies, or rather three bodies
 8 were found and one of the policemen was injured.
 9 LT-COL BOTHA: When I explained it, I
 10 said C was the body of the policeman, D was the blood of
 11 the policeman, presumably, allegedly, where he was removed,
 12 and he died afterwards in hospital, and E was the body of
 13 the civilian.
 14 MR MPOFU: Yes, my question is, regarding
 15 F, F was a body as well, wasn't it?
 16 LT-COL BOTHA: That is correct, Mr Chair.
 17 MR MPOFU: And that was a civilian?
 18 LT-COL BOTHA: That is correct, Mr Chair.
 19 MR MPOFU: So in other words, this
 20 paragraph is not correct.
 21 LT-COL BOTHA: Mr Chair, the paragraph is
 22 correct, I did not process the scene of F and the scene of
 23 G.
 24 MR MPOFU: G was not processed by you?
 25 LT-COL BOTHA: Neither F or G was

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1 processed by me.

2 MR MPOFU: I see, so cases 117, 118, 119

3 do they or do they not involve the person who died in, or

4 rather the civilian, the second civilian, if you know what

5 I mean.

6 LT-COL BOTHA: No, what do you mean with

7 the second civilian, sorry?

8 MR MPOFU: Well, I am using, I am saying

9 the person at F, at least our evidence will be that two

10 civilians died on that day, one of them died at E, and the

11 other died, that was trying to cross the river, and died at

12 4, or rather at F, I accept, I mean, you may or may not

13 have been involved. I am just clarifying whether your

14 information is in accordance with our evidence. In other

15 words, our evidence is that two policemen died and two

16 civilians died.

17 LT-COL BOTHA: Mr Chair, I've got it

18 different, that two – one policeman died on the scene, one

19 policeman died in hospital –

20 MR MPOFU: Correct.

21 LT-COL BOTHA: - and three civilians

22 died.

23 MR MPOFU: And three – so there was,

24 okay. But one of them died across the river.

25 LT-COL BOTHA: That will be point G.

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1 MR MPOFU: Thank you, so, E, F, G would

2 be the civilians.

3 LT-COL BOTHA: That is correct, Mr Chair.

4 MR MPOFU: Thank you, Mr Chairman, that

5 will be all, thank you.

6 CHAIRPERSON: Thank you, Mr Mpofo. Mr

7 Ntsebeza, have you questions for the witness?

8 MR NTSEBEZA SC: Yes, I do, Mr Chairman.

9 Colonel Botha, let's just begin with the last question that

10 was put to you by Mr Mpofo, relevant to G, you did not

11 process that crime scene. Is that right?

12 LT-COL BOTHA: No, Mr Chair, I did not

13 process it.

14 MR NTSEBEZA SC: It was your colleague

15 who did so?

16 LT-COL BOTHA: One of my colleague

17 processed the scene.

18 MR NTSEBEZA SC: Captain Moshwana.

19 LT-COL BOTHA: That is correct, Mr Chair.

20 MR NTSEBEZA SC: I don't know where I

21 picked this up. I seem to have picked up a suggestion that

22 when we did an inspection in loco you were present, is that

23 correct?

24 LT-COL BOTHA: I actually walked far

25 behind the Commission, I first picked up my cones at my

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1 scene, after I had put out. And then I walked with, but I

2 never – I can't, ja, I did come to the scene, yes because I

3 met one of the Commissioners, he was walking up and I

4 actually stopped apart away from the scene.

5 MR NTSEBEZA SC: The short answer will be

6 that you were present at the inspection.

7 LT-COL BOTHA: I was present at the

8 inspection.

9 MR NTSEBEZA SC: And on the second day,

10 you did point things out, did you?

11 LT-COL BOTHA: The day of the inspection?

12 MR NTSEBEZA SC: Yes.

13 LT-COL BOTHA: Yes, I did.

14 MR NTSEBEZA SC: You would recall or

15 perhaps you were still far back at that time, but you will

16 recall if you were there you saw it, that relevant to body

17 G, there was an explanation given by your colleague. Do

18 you recall that?

19 LT-COL BOTHA: But Chair, that's why I

20 said I can't just unequivocally say I was there, because I

21 was way behind. When I arrived at the point this, on the,

22 let's call it the western side of the stream, Captain

23 Moshwana and some people was on the other side of the

24 stream, I never crossed the stream that day with the

25 inspection.

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1 MR NTSEBEZA SC: No one was brave enough

2 to do so. I remember. Yes, we also wanted to cross the

3 stream but we were quite content with Captain Moshwana

4 going over and standing to where he said the body was. You

5 recall that, that incident?

6 LT-COL BOTHA: He was already on the

7 other side. I can't say when he was there, that he showed

8 the point of the body, because I didn't hear a conversation

9 beforehand, he was already there, I cannot remember if he

10 was every on his way back already, when I arrived at that

11 specific scene.

12 MR NTSEBEZA SC: Well, thank you very

13 much, Colonel, I won't pursue you the question relevant to

14 that. I will reserve it for Captain Moshwana but you do

15 confirm that he was where he went to, to indicate it as

16 having been the place where the body was found of a

17 civilian.

18 LT-COL BOTHA: Yes, I can confirm that.

19 MR NTSEBEZA SC: Were you also around

20 when at some place this side of the stream he indicated the

21 place to be where cartridges or casings were found from

22 rifles?

23 LT-COL BOTHA: No, sir, I had not arrived

24 on the scene when he showed that.

25 MR NTSEBEZA SC: Yes. Very well, now

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1 I've always wanted to ask you whether you made any report
2 after you had gone to do the aerial video recording of the
3 operation at Wonderkop Marikana, did you?
4 LT-COL BOTHA: With report, what do you
5 mean, Sir?
6 MR NTSEBEZA SC: You will forgive me if I
7 am ignorant, I would have thought that having been asked to
8 come and do a particular task, you would then file a report
9 with whomever had asked you. Is that not the process?
10 LT-COL BOTHA: Mr Chair, I normally, the
11 video downloaded, then I give out a statement, and then
12 whoever must receive the video, will receive the video in a
13 statement.
14 MR NTSEBEZA SC: I see. And that would
15 constitute your report? It would be the video, and the
16 statement accompanying the video that you have downloaded.
17 LT-COL BOTHA: That is correct, Mr Chair.
18 MR NTSEBEZA SC: Now, you have been asked
19 this, I just want to confirm it, the operation that you
20 were to video record on the 16th, seems to have a
21 culmination of at least a series of events that started
22 with you attending crime scenes on the 13th of August 2012.
23 Is that right? In other words, you had started on the 13th
24 doing these video recordings in respect of various crime
25 scenes which you have described in your statement which you

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1 made on the 22nd of October.
2 LT-COL BOTHA: Sir, I was called to
3 process the crime scene of the CAS 117, 118, and 119. I
4 actually called for help, for the other two on that, that
5 was on the 13th. The 14th, I've also processed the scene of
6 the –
7 MR NTSEBEZA SC: The body behind the
8 koppie.
9 LT-COL BOTHA: - the body behind the
10 koppie, yes, and on the 14th, I was not at the JOC, then I
11 was called by Brigadier Van Zyl, then asked him to come to
12 the JOC because they are going to need a videographer.
13 MR NTSEBEZA SC: Where were you called
14 from?
15 [17:04] LT-COL BOTHA: I was called from the
16 scene of the 13th. I did the – I attended to the post-
17 mortems of six people that morning and I went back to the
18 scene with ballistics. I was on the scene when the
19 Brigadier called me.
20 MR NTSEBEZA SC: Maybe I was not very
21 clear in my question. Where are you based at? In other
22 words, when you say I was called, where were you called
23 from? Where are you based? Where is your head –
24 LT-COL BOTHA: Mr Chair, I'm based at
25 Phokeng police station.

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1 MR NTSEBEZA SC: And how far is that from
2 Marikana – from the crime scenes where you went to do work?
3 LT-COL BOTHA: I think it's more or less
4 40 kilometres.
5 MR NTSEBEZA SC: Would it be fair to say
6 that on the 13th of August 2012 you had become aware that
7 there was a joint operational centre that had been
8 established at the Lonmin mine rescue section?
9 LT-COL BOTHA: That's correct, Mr Chair.
10 MR NTSEBEZA SC: So on the 13th, if we
11 just start there, so on the 13th when you came to attend at
12 and to process the crime scenes you describe in paragraph 4
13 of your statement, you understood the joint operations
14 centre to be at the Lonmin mine in Marikana.
15 LT-COL BOTHA: No, Mr Chair, let me just
16 explain it.
17 MR NTSEBEZA SC: yes.
18 LT-COL BOTHA: When I went to the scene
19 at Marikana on the 13th, I went straight to the scene. I
20 was actually collected by, I think, a policeman of
21 Marikana, I can't remember. After I processed the scene, I
22 only became aware there's a joint operations centre at
23 Marikana.
24 MR NTSEBEZA SC: I see. And you were
25 aware, were you not, that there were several people from

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1 Pretoria who were in that joint operations centre? For
2 instance, we have a statement by one, Duncan George Scott,
3 do you know Duncan Scott?
4 LT-COL BOTHA: I came to know him
5 afterwards.
6 MR NTSEBEZA SC: You came to know him as
7 a person stationed at the special task force national
8 office in Pretoria.
9 LT-COL BOTHA: I don't know where he's
10 stationed but I do know he's from the special task force.
11 MR NTSEBEZA SC: You came to know of
12 Brigadier Fritz, the section head of the special task
13 force?
14 LT-COL BOTHA: I came to know of him.
15 Let me just qualify that. I don't know, I can't tell you
16 that he was there on the 13th but what I do say is, I came
17 to know Brigadier Fritz during this whole process.
18 MR NTSEBEZA SC: Yes, because on the 16th
19 he is the one with whom you went into the sky in the
20 chopper, isn't it?
21 LT-COL BOTHA: That is correct, sir.
22 MR NTSEBEZA SC: But the one thing that
23 you came to establish on the 13th was that there had been an
24 unfortunate incident in which two policemen got killed.
25 LT-COL BOTHA: Sir, I processed the

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1 scene. It was two policemen and three civilians that died
2 in the process.

3 MR NTSEBEZA SC: And in your processing
4 of the crime scene, did you pay attention to the bodies of
5 the policemen?

6 LT-COL BOTHA: There was one body of a
7 policeman on the crime scene and at that –

8 MR NTSEBEZA SC: And the other one you
9 got to know after he had died in hospital, was that your
10 evidence?

11 LT-COL BOTHA: That is correct, Mr Chair.

12 MR NTSEBEZA SC: And did – yes. Both of
13 those policemen - I'm asking you now about you as a
14 photographer and a video camera operator of many years –
15 did you take photographs of the bodies of those two police
16 officials?

17 LT-COL BOTHA: I did, Mr Chair.

18 MR NTSEBEZA SC: Many photographs?

19 LT-COL BOTHA: I attended to their post-
20 mortems.

21 CHAIRPERSON: You haven't answered the
22 question. You were asked did you take many photographs?

23 LT-COL BOTHA: Sorry Mr Chair, yes, many
24 photographs.

25 MR NTSEBEZA SC: From various angles?

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1 LT-COL BOTHA: Where are you referring
2 to, on the scene or on –

3 MR NTSEBEZA SC: No, from various angles
4 of the bodies. From various angles of the bodies – in
5 other words, did you take detailed photographs of the
6 bodies?

7 LT-COL BOTHA: Sir, I photographed the
8 bodies from different sides and then I posed, I
9 photographed the post-mortems in the mortuary.

10 MR NTSEBEZA SC: Did you take digital
11 photographs of the bodies that depicted the injuries to the
12 police persons?

13 LT-COL BOTHA: Yes, it was digital
14 photos.

15 MR NTSEBEZA SC: And what did you do with
16 the digital images?

17 LT-COL BOTHA: It was downloaded on a
18 disk and then given to me so that I can compile an album.

19 MR NTSEBEZA SC: So you compiled an album
20 of the photos.

21 LT-COL BOTHA: That is correct, Mr Chair.

22 MR NTSEBEZA SC: I am told that they were
23 a gruesome sight. Would you confirm that?

24 LT-COL BOTHA: Sir, people were hacked to
25 death, it didn't look good and there was a person that was

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1 shot that, for the same reason, didn't look good.

2 MR NTSEBEZA SC: How did you feel? I'm
3 talking about an experienced photographer and video camera
4 operator of 26 years, how did you feel when you saw these
5 images of your colleagues hacked in the manner in which you
6 have described?

7 LT-COL BOTHA: Sir, we've just said it
8 didn't look good but after 28 years you learn to cut
9 yourself off from scenes like that because you've got a
10 duty to do, no matter if it's a civilian or a policeman.

11 CHAIRPERSON: I'm sorry, Colonel, you
12 haven't answered the question. Again I think you've
13 answered what you think will be the next question. The
14 question you were asked is how did you feel. Perhaps
15 counsel would like to elaborate on the question so you'll
16 understand it clearly and then when you've given your
17 answer, you've already given the answer to the next
18 question but answer that question first.

19 LT-COL BOTHA: It's going to be, it's
20 going to sound terrible to say that – I mean I can't say I
21 didn't feel anything because it's dead people lying there,
22 but I've got a job to do and I'm cutting myself off from
23 feelings at that stage.

24 MR NTSEBEZA SC: I understand, Colonel.
25 Sometimes it is easy to be philosophical about these things

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1 but these were colleagues of yours. What was your – I see
2 you nod – what was your first reaction at seeing these?
3 It's one thing to see a dead colleague and it's one other
4 to see a colleague in the nature which you have left to our
5 imagination.

6 LT-COL BOTHA: I cannot answer it in any
7 other way. After 26 years of seeing dead policemen, dead
8 people, when you get to a crime scene, no matter how
9 gruesome it is, you know you've got to do a job and you cut
10 yourself off from that because otherwise if you get – nou
11 het ek nie die Engelse woord nie.

12 CHAIRPERSON: Gebruik maar die Afrikaanse
13 woord en die toek –

14 LT-COL BOTHA: If you get emotional
15 you're not going to do a decent job.

16 MR NTSEBEZA SC: Can I just push you a
17 little bit and say, did it not cross your mind that whoever
18 was responsible for that must be brought to book?

19 LT-COL BOTHA: Can you qualify "brought
20 to book" please?

21 MR NTSEBEZA SC: To put it in colloquial
22 language, did it not cross your mind that whoever did this
23 must pay for it? That is, you -

24 LT-COL BOTHA: Whoa, whoa, I don't think
25 I want to answer the question.

<p style="text-align: right;">Page 471</p> <p>1 CHAIRPERSON: The question –</p> <p>2 LT-COL BOTHA: Mr Chair –</p> <p>3 CHAIRPERSON: The question has been</p> <p>4 asked, I understand why counsel asks the question. I think</p> <p>5 he's entitled to an answer. Would you like him to repeat</p> <p>6 the question or do you understand the question?</p> <p>7 LT-COL BOTHA: I understood the question.</p> <p>8 Just repeat the question?</p> <p>9 MR NTSEBEZA SC: Colonel, it appears to</p> <p>10 me that you are affected by these questions.</p> <p>11 LT-COL BOTHA: I saw the question as an</p> <p>12 insult. All criminals are supposed to be brought to book,</p> <p>13 no matter who he is. If you kill a policeman you're</p> <p>14 supposed to be brought to book, if you kill a civilian</p> <p>15 you're supposed to be brought to book.</p> <p>16 MR NTSEBEZA SC: I see. I agree, I don't</p> <p>17 disagree. The only thing I find difficult is that you</p> <p>18 didn't find it was necessary for you to answer the question</p> <p>19 the first time I put it to you and you said you don't want</p> <p>20 to answer it. You called the question an insult.</p> <p>21 LT-COL BOTHA: Because I didn't want to</p> <p>22 say I see the question as an insult.</p> <p>23 MR NTSEBEZA SC: Why do you think it is</p> <p>24 an insult, Colonel?</p> <p>25 LT-COL BOTHA: To say that I pick people</p>	<p style="text-align: right;">Page 473</p> <p>1 objection well taken?</p> <p>2 MR NTSEBEZA SC: It's a very sensitive</p> <p>3 area, Mr Chairman, I will not take it –</p> <p>4 CHAIRPERSON: The objection is that you</p> <p>5 asked him what other colleagues would react and the</p> <p>6 question, the objection taken is that he can't speak for</p> <p>7 his other colleagues. That's the objection taken. Now if</p> <p>8 you persist with the question I may have to rule on it. If</p> <p>9 you're not going to go further on this issue, having made</p> <p>10 the points possibly that you set out to make, then I don't</p> <p>11 have to give a ruling.</p> <p>12 MR NTSEBEZA SC: No, Mr Chairman, I don't</p> <p>13 always seek to have you make a ruling on everything that I</p> <p>14 say. No, I take the point that my learned friend – it's a</p> <p>15 touchy area we are working – Let me just ask one last</p> <p>16 question on this aspect and – do you know if these images</p> <p>17 were circulated widely among your colleagues?</p> <p>18 [17:24] LT-COL BOTHA: No, Mr Chair. I had my</p> <p>19 disk with me and images I downloaded, it's downloaded by</p> <p>20 Rustenburg LCRC. I get a working copy and they make a</p> <p>21 master copy that's sent to province, so it's not</p> <p>22 distributed widely.</p> <p>23 MR NTSEBEZA SC: I accept that, but you</p> <p>24 wouldn't say that it wasn't circulated. You wouldn't know</p> <p>25 that?</p>
<p style="text-align: right;">Page 472</p> <p>1 to be punished. That's not the way that I do things.</p> <p>2 MR NTSEBEZA SC: I do not recall that I</p> <p>3 said so or I did so.</p> <p>4 CHAIRPERSON: I think the witness is</p> <p>5 saying that was the insinuation which he picked up.</p> <p>6 Whether he was correct in picking it up is neither here nor</p> <p>7 there, but that seems to be the answer.</p> <p>8 MR NTSEBEZA SC: Yes. Colonel, let me -</p> <p>9 right from the beginning or in the middle of my cross-</p> <p>10 examination say to you that I do not enjoy to ask people</p> <p>11 questions that would insult them, please accept that.</p> <p>12 LT-COL BOTHA: Mr Chair, I accept it and</p> <p>13 if I interpreted it like that, I'm sorry.</p> <p>14 MR NTSEBEZA SC: Apologies accepted,</p> <p>15 Colonel. Now, I want to push you a little bit on this</p> <p>16 aspect. If many of your colleagues came it see those</p> <p>17 images which you saw, which you took graphically and you</p> <p>18 put on digital mode, do you think they would've felt – and</p> <p>19 I'll use the word I noted – as revolted as what you were</p> <p>20 because of what they saw?</p> <p>21 MR SEMENYA SC: Chair, I really</p> <p>22 appreciate where Mr Ntsebeza is seeking to go but it is not</p> <p>23 in the province of this witness to tell what his other</p> <p>24 colleagues would think of a similar image he's seeing.</p> <p>25 CHAIRPERSON: Mr Ntsebeza, isn't that</p>	<p style="text-align: right;">Page 474</p> <p>1 LT-COL BOTHA: No, I cannot say that.</p> <p>2 MR NTSEBEZA SC: Now my learned junior</p> <p>3 reminds me that you said earlier that you attended six</p> <p>4 post-mortems.</p> <p>5 LT-COL BOTHA: That is correct, Mr Chair.</p> <p>6 MR NTSEBEZA SC: Were those in respect of</p> <p>7 your attendance at the crime scene on the 13th and the 14th?</p> <p>8 LT-COL BOTHA: I've done the post-mortems</p> <p>9 for all five people of the 13th and then the body that was</p> <p>10 found behind the koppie of the 14th.</p> <p>11 MR NTSEBEZA SC: I see. I'm told by my</p> <p>12 learned junior here, who whispers into my ear, that only</p> <p>13 three post-mortem reports have been received. Would you</p> <p>14 know where the – on the 13th only three of those that were</p> <p>15 dealt with on the 13th.</p> <p>16 LT-COL BOTHA: I would not know where</p> <p>17 their post-mortem reports are, sir.</p> <p>18 MR NTSEBEZA SC: Well, perhaps that's</p> <p>19 something that we'll take up with the leaders of evidence.</p> <p>20 Now, I am keen to get a sense of the atmosphere that was</p> <p>21 prevailing in Marikana from the 13th to the day on which you</p> <p>22 say you were summoned by Brigadier Fritz, was it, Brigadier</p> <p>23 Fritz?</p> <p>24 LT-COL BOTHA: Brigadier Van Zyl, sir.</p> <p>25 MR NTSEBEZA SC: Oh, I see. Brigadier</p>

<p style="text-align: right;">Page 475</p> <p>1 Van Zyl, he is the one who summoned you on the 16th.</p> <p>2 LT-COL BOTHA: That is correct.</p> <p>3 MR NTSEBEZA SC: But who you went into</p> <p>4 the chopper with was Brigadier Fritz?</p> <p>5 LT-COL BOTHA: That is correct, Mr Chair.</p> <p>6 MR NTSEBEZA SC: Now, I'm just confirming</p> <p>7 with you but I understand that from the 13th – and I don't</p> <p>8 want to say necessarily it was because of the unfortunate</p> <p>9 deaths of the police officers, but it does appear that</p> <p>10 there developed a plan, and I don't know if you know about</p> <p>11 it, that was conceptualised for the deployment of a police</p> <p>12 strategy by using various available forces in the South</p> <p>13 African Police Service. Are you aware of that?</p> <p>14 LT-COL BOTHA: No.</p> <p>15 MR NTSEBEZA SC: So would that mean that</p> <p>16 although you were aware that, I thought this is what I</p> <p>17 heard you say, you were aware that there was public order</p> <p>18 policing at the place in the joint operations centre, you</p> <p>19 were aware of that?</p> <p>20 LT-COL BOTHA: Sorry, just rephrase the</p> <p>21 question? Not rephrase, just repeat the question, please?</p> <p>22 MR NTSEBEZA SC: I could rephrase it.</p> <p>23 You were aware that there was, in the JOC, the public order</p> <p>24 policing unit.</p> <p>25 CHAIRPERSON: Mr Ntsebeza, you don't in</p>	<p style="text-align: right;">Page 477</p> <p>1 MR NTSEBEZA SC: Okay. Did you get a</p> <p>2 sense that these units had come from all over the country</p> <p>3 or from most provinces from the country?</p> <p>4 LT-COL BOTHA: I'd say in the parking</p> <p>5 there were vehicles from different areas. I can recall for</p> <p>6 instance Bethlehem or – that's the one I can recall now, so</p> <p>7 it's normal to assume for me then that this is not only</p> <p>8 people from Rustenburg.</p> <p>9 MR NTSEBEZA SC: The question, was</p> <p>10 Mthatha?</p> <p>11 LT-COL BOTHA: No sir, I don't know about</p> <p>12 Mthatha.</p> <p>13 MR NTSEBEZA SC: Okay. Were you aware</p> <p>14 that there were armoured vehicles with barbed wire trailers</p> <p>15 at the joint operations centre?</p> <p>16 LT-COL BOTHA: Yes, Mr Chair, I saw it in</p> <p>17 the parking.</p> <p>18 MR NTSEBEZA SC: Now I know that you said</p> <p>19 you were not aware of any plan, but may I just ask you just</p> <p>20 in case you may remember, that part of the plan would be to</p> <p>21 use SAPS helicopters for conveying information to the JOC</p> <p>22 and to the ground forces. Were you aware of this plan?</p> <p>23 LT-COL BOTHA: No, Mr Chair.</p> <p>24 MR NTSEBEZA SC: For instance,</p> <p>25 Lieutenant-Colonel George Scott in his statement states</p>
<p style="text-align: right;">Page 476</p> <p>1 your question say when he was aware. You started talking</p> <p>2 about – after the 13th. Now you're dealing with his</p> <p>3 awareness –</p> <p>4 MR NTSEBEZA SC: Yes.</p> <p>5 CHAIRPERSON: - of public order policing</p> <p>6 being involved. I think it only right that you should</p> <p>7 indicate from when you suggest or ask whether that</p> <p>8 awareness was present on his part.</p> <p>9 MR NTSEBEZA SC: I understand, I</p> <p>10 understand, Chairman. Thank you very much. Maybe I should</p> <p>11 preface this by saying after your first operation which you</p> <p>12 talk about in your statement, 13th of August, is it fair for</p> <p>13 me to think that you became aware that at the joint</p> <p>14 operations centre they had assembled a number of units?</p> <p>15 LT-COL BOTHA: That's correct, after the</p> <p>16 13th.</p> <p>17 MR NTSEBEZA SC: Yes.</p> <p>18 LT-COL BOTHA: That is correct, Mr Chair.</p> <p>19 MR NTSEBEZA SC: And those units were the</p> <p>20 ones that Mr Mpfu asked you about, tactical response</p> <p>21 teams, national intervention unit, special task force, air</p> <p>22 wing, dog unit.</p> <p>23 LT-COL BOTHA: Mr Chair, I said that I'm</p> <p>24 not sure that everyone was there but I cannot dispute that</p> <p>25 they were there.</p>	<p style="text-align: right;">Page 478</p> <p>1 that part of the plan would include – and this is where</p> <p>2 you'd come in – providing photographs and video footage of</p> <p>3 the crowd and the environment to the JOCC to enhance</p> <p>4 situational awareness. You were not aware of this.</p> <p>5 LT-COL BOTHA: I was briefed by Brigadier</p> <p>6 Van Zyl, that I was going to video graph a dispersal and a</p> <p>7 disarmament operation.</p> <p>8 CHAIRPERSON: I think counsel is asking</p> <p>9 you about the previous day or days, whether there was going</p> <p>10 to be use made of helicopters to obtain visual material</p> <p>11 which could be used for intelligence purposes as to what</p> <p>12 was going on, not just on the 16th but before that. Is that</p> <p>13 correct, Mr Ntsebeza?</p> <p>14 MR NTSEBEZA SC: That was the plan which</p> <p>15 was, which developed from the 13th, yes.</p> <p>16 CHAIRPERSON: I'm asking if that was your</p> <p>17 question.</p> <p>18 MR NTSEBEZA SC: Yes, that was the</p> <p>19 question, Mr Chairman.</p> <p>20 LT-COL BOTHA: Can I answer the question?</p> <p>21 MR NTSEBEZA SC: Yes.</p> <p>22 LT-COL BOTHA: I didn't understand the</p> <p>23 question like that, sorry. That is why I was in the air on</p> <p>24 the 14th, is to take aerial photos and a video but earlier</p> <p>25 on the 14th I switched off my, the video camera, and I took</p>

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1 aerial photos of the area and the people on the koppie.
 2 MR NTSEBEZA SC: Perhaps you can explain
 3 this for me. One of what Colonel Scott says was going to
 4 be the usage of the SAPS helicopters, he says one of the
 5 SAPS helicopters would become an aerial command post should
 6 the police need to mobilise outside of the planned
 7 activity. Now can you just explain in lay terms what that
 8 means, if you are able to?
 9 LT-COL BOTHA: Sir, you'll have to ask
 10 Colonel Scott.
 11 MR NTSEBEZA SC: Indeed. Now, you
 12 testified that there were four choppers on the 16th of
 13 August that were –
 14 LT-COL BOTHA: That is correct, Mr Chair.
 15 MR NTSEBEZA SC: I don't know whether I'm
 16 correct in recalling, you seemed to be uncertain as to
 17 which they were, other than the one in which you were.
 18 LT-COL BOTHA: Mr Chair, I said we were
 19 two police shoppers, the big White one, according to my
 20 information, was an Oryx. I'm not sure if – I think it's
 21 an air force chopper – and then another one.
 22 MR NTSEBEZA SC: I see. And the two
 23 others, you do not know who they belonged to or what – ja,
 24 who they belonged to?
 25 LT-COL BOTHA: No, I found out later that

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1 the Oryx is an air force chopper. The other one was either
 2 blue or black, I can't even remember the colour, I know it
 3 was a dark chopper.
 4 MR NTSEBEZA SC: The air force meaning
 5 the South African Air Force?
 6 LT-COL BOTHA: That was what I was
 7 informed, sir.
 8 MR NTSEBEZA SC: So at some stage would
 9 you not say there was anticipated – or let me put the
 10 question differently. Was the South African Air Force, to
 11 your knowledge, part of the joint operation or was the South
 12 African Air Force helicopter on loan to SAPS or don't you
 13 know?
 14 LT-COL BOTHA: I don't know, sir.
 15 MR NTSEBEZA SC: Well, at least the
 16 statement by Colonel Scott explains what it was but I
 17 thought you might know what it was all about. Now, you do
 18 not know the other two. You have described the Oryx and
 19 then the SAPS and then – oh ja, the one – you do not know
 20 where that other one belonged, who that one belonged to?
 21 LT-COL BOTHA: I don't know who belonged
 22 to it, who it belonged to, sir.
 23 MR NTSEBEZA SC: No, I'm asking because
 24 one of the videos, the high flying sort of video was
 25 presented to us by evidence leaders as labelled "Lonmin

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1 video."
 2 LT-COL BOTHA: I cannot confirm that,
 3 sir.
 4 MR NTSEBEZA SC: Yes, okay. Your chopper
 5 – because this is something that I think you'll assist me
 6 with – I read through some of these documents that we
 7 received from the police, I don't know whether one uses
 8 "chopper" and "papa" interchangeably. Do you understand
 9 what I'm saying? When you say chopper 1 are you also
 10 saying the same thing as papa 1?
 11 LT-COL BOTHA: Sir, normally call signs
 12 won't be confusing, so what I mean by that is you won't
 13 give me a call sign chopper 1 and papa 1. Does that answer
 14 the question?
 15 CHAIRPERSON: I think the question is, do
 16 they mean the same thing? So a reference in a document to
 17 chopper 1 and in the same document or perhaps another
 18 document a reference to papa 1, will that be a reference to
 19 the same thing? I think that's what counsel wants.
 20 MR NTSEBEZA SC: Yes. Yes, Mr Chairman,
 21 thank you.
 22 LT-COL BOTHA: Sir, I don't know. It's
 23 not supposed to be, that's the closest I can come to the
 24 answer.
 25 [17:44] MR NTSEBEZA SC: You see because I want

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1 to be sure that I did not put things to you that you didn't
 2 say or I do not proceed on the basis of an assumption that
 3 when somebody else says papa 1, it means chopper 1. You
 4 see, why it is important is because there are certain
 5 questions that the Chairman put to you on – what was the
 6 day – on Tuesday. The first one was to establish when you
 7 think you took off from JOC and there was a little bit of
 8 uncertainty. I think in the end you said 15:58, to which
 9 the Chairman said that basically is two minutes to four.
 10 Do you recall that evidence?
 11 LT-COL BOTHA: I said, if I recall, my
 12 video starts at more or less 15:58 and I think we still
 13 said give or take a few minutes because how long will you
 14 fly there. I'm not – I think that's what was said.
 15 MR NTSEBEZA SC: No, I checked the record
 16 and in fact the record does – yes. As I say, I think it is
 17 – one just wanted to be sure that when we – let me
 18 rephrase. I just wanted to be sure that the time was more
 19 or less, according to your estimation, 15:58. When you say
 20 give or take five minutes, would it have been 15:53 when
 21 you took off perhaps or –
 22 LT-COL BOTHA: Mr Chair, if I start my
 23 video at plus-minus 15:58, let's say give or take or let's
 24 say take five minutes.
 25 CHAIRPERSON: So that means you could've

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1 taken off at 15:53? In other words, you could've taken off
 2 at seven minutes to four and turned your video on at two
 3 minutes to four. Is that what you're saying?
 4 LT-COL BOTHA: I started my video at more
 5 – at about 15:58, it's either 15:58 or 15:57, there's not
 6 more than a minute difference, I'm sure about that but then
 7 I had to be in the air by then and more or less close to
 8 the scene.
 9 MR NTSEBEZA SC: And if we could just
 10 deal with one uncertainty, your chopper, the chopper which
 11 you went into the air in was chopper 1.
 12 LT-COL BOTHA: I think I said chopper 1
 13 but I wasn't sure when I said I think it's chopper 1. I
 14 cannot recall the call sign that was given to that chopper,
 15 sir.
 16 MR NTSEBEZA SC: Yes, chopper 1 actually
 17 is mentioned in CEPT – I am told they are CEPT log reports.
 18 Are you familiar with that?
 19 LT-COL BOTHA: No, sir.
 20 MR NTSEBEZA SC: It's A192 and 00614,
 21 that's where it starts. It records Thursday 2012-08-16.
 22 CHAIRPERSON: I think that's the
 23 occurrence book, Mr Ntsebeza.
 24 MR NTSEBEZA SC: The OB, okay, okay. It
 25 comes with your experience, Mr Chairman. Now, why I want

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1 some clarification relevant to your time when you took off
 2 in chopper 1, as you think chopper 1 was the aircraft, is
 3 that this log or this occurrence book on the Thursday, this
 4 Thursday we are talking about, 16th of August, serial
 5 number/volgnommer 1016, time 15:45, aard van voorval/nature
 6 of occurrence situation report, chopper 1 reported that the
 7 people are moving from the koppie. Now, I was puzzled as
 8 to whether this is a correct reflection of a report from
 9 the aircraft in which you were, the chopper in which you
 10 were or to the extent that the times are different, it
 11 might be a reflection of your mistake as to when you took
 12 off maybe – but you can explain it. Maybe there's some
 13 explanation which is not –
 14 LT-COL BOTHA: Sir, I said I'm not sure
 15 if the call sign was chopper 1. I could've been in chopper
 16 2, chopper 3. I didn't give attention to the call sign
 17 that was given to our chopper, so – I was definitely not in
 18 the chopper that got into there at quarter to four.
 19 MR NTSEBEZA SC: I see, I see, but if you
 20 were in chopper 1, as you thought you were or as you think
 21 you were, then if this log report in this occurrence book
 22 is correct then it would be reasonable to say that you are
 23 probably mistaken about when you took off.
 24 LT-COL BOTHA: But then I wasn't in the
 25 chopper, in that specific chopper.

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1 MR NTSEBEZA SC: Now, the Chairman
 2 reminded me about occurrence books. In the old days, the
 3 good old days, police officers used to have pocket books.
 4 Do they still have those today?
 5 LT-COL BOTHA: Yes, Mr Chair.
 6 CHAIRPERSON: I don't know what you mean
 7 by good old days, Mr Ntsebeza.
 8 MR NTSEBEZA SC: Now did you have, on the
 9 16th of August, a pocket book and did you record any of the
 10 activities of the 13th and the 16th August 2012 in your
 11 pocket book?
 12 LT-COL BOTHA: Mr Chair, I've got a
 13 diary. Officers in the South African Police Service have a
 14 diary, it's not pocket books, and I did note some times. I
 15 did not note the time of the chopper, I did note the time
 16 that I arrived at the JOC and the time that I left the JOC
 17 again. I did make an entry that it ook aerial photos. I
 18 did not note the times because my diary was in the vehicle,
 19 not with me in the chopper.
 20 MR NTSEBEZA SC: Right. Where is the
 21 diary?
 22 LT-COL BOTHA: The diary is at the
 23 office.
 24 MR NTSEBEZA SC: I'm sure you will make
 25 it available to the evidence leaders if we request for it,

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1 just to check.
 2 LT-COL BOTHA: If I have to I will, sir.
 3 CHAIRPERSON: I'm afraid you will have to
 4 if we ask for it because I have to check what you say, the
 5 accuracy of your memory for example, or your evidence, is
 6 an appropriate reason for asking for your diary. So I
 7 would be grateful if you'd make it available to us. Thank
 8 you.
 9 MR NTSEBEZA SC: Now there's one other
 10 reason that I would seek to persuade you that you probably
 11 are wrong about when you took off. You seem, other than
 12 the statement which you made on the 22nd day of October
 13 2012, to have made two other statements. There is one here
 14 which is 813001120 and in paragraph 4 thereof you say the
 15 following – I take it that if you need to prove, we'll put
 16 it to you because you – this one was sworn to before a
 17 commissioner of oaths, Mr Mosweu Paul Mohilwa. Now in that
 18 statement in paragraph 4 you say the following, "On 2012-
 19 08-16 at 15:49 I made a recording of a scene at Wonderkop,
 20 Marikana. The duration of the recording is 41 minutes 18
 21 seconds. The original CD of the recording is kept at
 22 Rustenburg LCRC." Do you remember making this statement?
 23 LT-COL BOTHA: Mr Chair, that's correct,
 24 after I made the statement I compared my times with my
 25 digital camera and the time of the video and I realised

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1 that the video camera is – because my watch and the digital
 2 camera’s time was the same and I realised that the digital,
 3 that the video camera’s time is plus-minus eight minutes
 4 out and in the statement that’s in my docket – I can send
 5 someone to go and collect it – I’ve rectified that.
 6 MR NTSEBEZA SC: Now, if I proceed on the
 7 basis that what you say in paragraph 4 is what it says and
 8 I read what is logged in the occurrence book about how, at
 9 15:45 there was a report from a chopper 1 that the people
 10 are moving from the koppie, isn’t it most likely that it is
 11 so, in fact, that at quarter to four chopper 1 was the
 12 chopper in which you were when in fact you were recording
 13 at 15:49 the scene at Wonderkop, Marikana?
 14 LT-COL BOTHA: Mr Chair, I can just say
 15 that I did say I’m not sure what the call sign of my
 16 chopper was and I did realise after that statement go out,
 17 went out, that the digital time on my video or the time on
 18 my time on my video – and it doesn’t show when you make the
 19 video – and the time on my digital camera differs with
 20 about eight minutes and my digital camera is correct with
 21 my watch, so I presume that’s the correct time.
 22 CHAIRPERSON: Mr Ntsebeza it’s now – Mr
 23 Ntsebeza, it’s now just after six o’clock. I’m not going
 24 to adjourn until you tell me you wish me to adjourn because
 25 you may be busy with a point. I don’t want to interrupt

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1 extent – we could adjourn at this stage.
 2 MR NTSEBEZA SC: Very well. The
 3 Commission will adjourn until nine o’clock tomorrow
 4 morning.
 5 CHAIRPERSON: Sorry, before the legal
 6 teams depart, we undertook that we’d revert to you with an
 7 attempt to define phase 1 more precisely. We formulated a
 8 document which we’ll distribute electronically. If anyone
 9 wants to pick up a hard copy now, I have approximately 50.
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1 you but when you are, considerate it appropriate for us to
 2 take the adjournment till tomorrow morning, I’ll adjourn
 3 but it’s for you to say when.
 4 MR NTSEBEZA SC: If I could just put,
 5 just – I’m not very clear about these digital things but
 6 I’ve seen in some videos an indication of the time and the
 7 date on the footage itself. Does your camera not do that
 8 kind of thing, because then I suppose it would put beyond
 9 doubt any conjectures you are making.
 10 LT-COL BOTHA: No, Sir, unfortunately
 11 not.
 12 MR NTSEBEZA SC: Mr Chairman, I’m going
 13 to seek to explore this area in a bit more detail.
 14 [18:04] CHAIRPERSON: I put it to you that I’m
 15 not rushing you. I understand sometimes counsel, where
 16 he’s busy with a point, wants to take it to the end before
 17 the adjournment is taken.
 18 MR NTSEBEZA SC: Yes.
 19 CHAIRPERSON: So I’m not –
 20 MR NTSEBEZA SC: No, I appreciate that.
 21 CHAIRPERSON: It’s for you to tell me
 22 when you consider that you’ve dealt with the point
 23 adequately and you’re happy we adjourn till tomorrow.
 24 MR NTSEBEZA SC: This point, I think I
 25 will develop another aspect of the video camera and to the

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