

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 59 05 MARCH 2013 PAGES 6236 TO 6330

HELD AT

CIVIC CENTRE, RUSTENBURG, NORTH WEST PROVINCE



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1 [PROCEEDINGS ON 05 MARCH 2013]
 2 [10:03] CHAIRPERSON: I'm sorry that we're
 3 starting later this morning than was anticipated, but we
 4 were attending to an administrative matter relating to the
 5 proposed removal of the Commission to Pretoria and that's
 6 the reason why we were late this morning. Mr Magidiwana,
 7 you're still under oath. Are you feeling better today? Mr
 8 Ngalwana, have you got further questions to ask the witness
 9 in cross-examination?
 10 MR NGALWANA: Yes, thank you, Chair.
 11 CHAIRPERSON: Well, please proceed.
 12 CROSS-EXAMINATION BY MR NGALWANA (CONTD.):
 13 "Since I was in front I joined the first group that dashed
 14 in the direction of Nkaneng." I'm quoting you in your
 15 statement, Mr Magidiwana, and that's in paragraph 12.
 16 Three paragraphs later, paragraph 15, you say, "This was
 17 the only way or gap open to us." Do you still persist in
 18 that version?
 19 MR MAGIDIWANA: Yes.
 20 MR NGALWANA: Can I take you to slide 193
 21 of exhibit L? The police version is that at about 15:43
 22 barbed wire was deployed as a barrier to protect the media
 23 and members around the vehicles and deflect the dispersal
 24 movement towards the west, to the open ground.
 25 CHAIRPERSON: Don't you think it might be

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1 more helpful for the witness if you tell him that that was
 2 just after Mr Mathunjwa left the area? You see the top
 3 left-hand corner says "AMCU president leaving the area,"
 4 and I think that event might fix the time more clearly in
 5 his mind than the figure 15:43. It's just a suggestion.
 6 You don't have to adopt it if you don't like to.
 7 MR NGALWANA: Thank you, Chairperson.
 8 That has just been articulated by the interpreter. Sir,
 9 this photo that I have just referred you to, which is slide
 10 193, it says it was at the time Mr Mathunjwa was just
 11 leaving the koppie after he had addressed the workers.
 12 That is when the police started deploying the barbed wire.
 13 The police's version will be that as soon as that happened,
 14 a number of protesters started dispersing of their own
 15 volition. If you look at the long white arrow pointing
 16 towards 15:43 at the bottom of that picture, that is the
 17 main path to Nkaneng. Do you see that that path is not
 18 blocked by any police presence?
 19 MR MAGIDIWANA: Yes.
 20 MR NGALWANA: Do you see that there are
 21 people who are walking on that road towards Nkaneng?
 22 MR MAGIDIWANA: Yes.
 23 MR NGALWANA: Why did your group not
 24 disperse at that time, leave the koppie together with those
 25 people who we are seeing dispersing towards Nkaneng on the

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1 main route?
 2 MR MAGIDIWANA: I told you yesterday. I
 3 told you that it was said that we must not run away, that
 4 we must just walk because we have not done anything.
 5 MR NGALWANA: Yes, but why couldn't you
 6 have walked in the direction of Nkaneng on the main path as
 7 is shown on the photograph, that there are people walking
 8 towards Nkaneng.
 9 MR MAGIDIWANA: The question you are
 10 asking is self-explanatory, because we wanted to walk on
 11 that road but in fact it got blocked.
 12 MR NGALWANA: No, but you can see on the
 13 picture there is no blockage. I thought we understood
 14 that, we agreed on that. At that time, 15:43, there's no-
 15 one blocking that path and there are people who are walking
 16 there towards Nkaneng. So why didn't you at that time when
 17 there was no-one blocking that path?
 18 MR MAGIDIWANA: You are still saying one
 19 and the same thing, whereas I have clarified to you. I
 20 don't know now what you want me to say.
 21 CHAIRPERSON: Can I ask you a question,
 22 before counsel continues? On that slide we see a red oval
 23 with an arrow pointing down to it and there's a group of
 24 people in the middle of that oval. You see that?
 25 MR MAGIDIWANA: I can see that.

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1 CHAIRPERSON: Now that appears to be the
 2 front group. I take it you are somewhere there. Obviously
 3 we can't see which of the people is you, but I take it you
 4 are somewhere among that group. Is that right?
 5 MR MAGIDIWANA: Yes.
 6 CHAIRPERSON: Yes, please proceed, Mr
 7 Ngalwana.
 8 MR NGALWANA: Thank you, Chair. Mr
 9 Magidiwana, why did your group depicted within that red
 10 oval not leave the koppie at that time when there was no-
 11 one blocking that main route towards Nkaneng?
 12 MR MAGIDIWANA: I told you that all that
 13 was wanted was the employer. In fact, second thing is that
 14 at that time the barbed wire had been deployed, but not
 15 completely deployed, or all of it, and again then it was
 16 discovered at that time that things were going to be bad
 17 and it is at a time the police were busy wearing at the
 18 time. When then the workers realised that it was going to
 19 be bad, things were going to be bad, it was then that they
 20 started singing and then were on their way with the
 21 intention of going to Nkaneng and it was clear at that time
 22 that the police in fact had targeted that group that was
 23 singing.
 24 MR NGALWANA: But when you realised that,
 25 in your words, things were going to be bad with the

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1 deployment of the barbed wire, surely that was the time to
 2 leave the koppie so that you don't give the police the
 3 excuse to, as you allege, target your group.
 4 MR MAGIDIWANA: I had to give the reason
 5 because when we were just walking towards the road, then
 6 they closed that road.
 7 MR NGALWANA: No, we established
 8 yesterday that you were on the first attempt to breach the
 9 police line, you were not headed towards the main route;
 10 you were headed towards one of the, shall I call them,
 11 tributaries. So you were not headed towards the main route
 12 that leads to Nkaneng.
 13 MR MAGIDIWANA: There is no such a thing.
 14 MR NGALWANA: Are you now denying your
 15 evidence of yesterday that you sought to access the smaller
 16 path?
 17 MR MAGIDIWANA: Do you see here where is
 18 the smaller path?
 19 MR NGALWANA: Mr Magidiwana, if you look
 20 at slide 194, the police version is that that also shows
 21 people dispersing in the open veld, not towards the police.
 22 If the deployment of the barbed wire spelt trouble for the
 23 protesters, why didn't your group disperse towards the open
 24 veld, away from the danger that Mr Mathunjwa had warned you
 25 about?

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1 MR MAGIDIWANA: Do you see what is
 2 appearing there? In that picture in fact we had already
 3 been sprayed on with water and had already run away from
 4 that. That is when that, after that we went back and on,
 5 through that small path because towards the kraal there is
 6 where the small path joins the bigger one near the kraal,
 7 but it joins the bigger one that leads to Marikana. It was
 8 at that stage that a Nyala started then closing there near
 9 the kraal and we went around the kraal.
 10 MR NGALWANA: Your answer is not helpful
 11 at all to the Commission. I'm not asking you about your
 12 advance or dashing towards the police line. I'm asking you
 13 why your group did not disperse away from the police line,
 14 away from the kraal in the open veld, away from the danger
 15 about which Mr Mathunjwa had warned you when he said, "The
 16 life of a black man is cheap. These people are going to
 17 kill you."
 18 MR MAGIDIWANA: There's this thing that
 19 you repeatedly mention that we dashed into the police line.
 20 That is a complete lie because in fact it was the police
 21 who moved, who approached and stood near the road in order
 22 to close the road.
 23 MR NGALWANA: Please Sir, answer the
 24 question.
 25 MR MAGIDIWANA: I hear your question. I

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1 even answered you in the beginning that in fact we were
 2 singing.
 3 MR NGALWANA: I will ask you now for the
 4 last time. Why did not your group upon seeing that there
 5 shall be trouble not run towards the open veld?
 6 MR MAGIDIWANA: It should then be clear
 7 to you people who were running to Nkaneng are people who
 8 are staying in Nkaneng. The people who were running
 9 towards Marikana and died there in fact on the veld, were
 10 the people who were in fact staying in Marikana.
 11 MR NGALWANA: Clearly you have no answer
 12 for my question.
 13 CHAIRPERSON: You're not here to make
 14 comments; you're here to ask questions.
 15 MR NGALWANA: I take it you're refusing
 16 to answer my question, Mr Magidiwana?
 17 [10:23] MR MAGIDIWANA: What do you want me to
 18 say to you?
 19 MR NGALWANA: Slide 197 again shows
 20 people – that will be the police version – dispersing away
 21 from the police line. Some of them are on the main path
 22 towards Nkaneng in the direction of where the yellow arrow
 23 is pointing, but on the main path that passes the kraal.
 24 Others are scattered below where that road is, in the
 25 direction of Nkaneng.

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1 MR MPOFU: Chairperson –
 2 MR NGALWANA: Your group is still
 3 remaining huddled there –
 4 MR MPOFU: Sorry, Chairperson. This is
 5 an objection. The evidence of, or at least my recollection
 6 of the evidence of this witness in chief was that those
 7 people were running. Now of course Mr Ngalwana might have
 8 a version that they were walking, but if that's his version
 9 then he must say so. He mustn't just ask the question on
 10 the basis of that assumption.
 11 MR NGALWANA: You can see the people
 12 dispersing in the direction of Nkaneng on the main path and
 13 below the main path. No-one on that slide is blocking the
 14 way to Nkaneng. Why did your group not disperse with
 15 everyone else?
 16 MR MAGIDIWANA: What there we were
 17 singing, and it was first said to us that we did not do
 18 anything wrong against anyone, so we should not run away.
 19 All we wanted was money, so we were told not to run, and
 20 then after the barbed wire was deployed, water was sprayed
 21 on us and then it was after that, that the road then was
 22 closed, and the only place, or the only road to which we
 23 could run is the one which in fact was closed.
 24 MR NGALWANA: Slide 200 also shows that
 25 as your group is embarking on the second approach, other

1 protesters are dispersing in the open veld. Why didn't
2 your group follow them and disperse?
3 MR MAGIDIWANA: Those people are people
4 who were behind us and were also on their way to Nkaneng.
5 Don't lie; tell the truth.
6 CHAIRPERSON: Sir, that's an improper
7 observation for you to make. Counsel is merely asking you
8 questions. It's not for you to accuse him of telling lies
9 or admonishing him to tell the truth. He's simply putting
10 his case and he's asking you about your case. So please
11 behave yourself. I don't want that kind of outburst from
12 you. Do you understand?
13 MR MPOFU: Chairperson, I agree with the
14 admonishment, but once again if Mr Ngalwana is going to
15 have evidence that shows that the people in 194, that the
16 direction of their movement, then he must say so. He can't
17 just – the witness, I suppose out of frustration is now
18 saying that those people were following them to a
19 particular direction. Mr Ngalwana puts it on a different
20 proposition. He's entitled to do so if he has evidence to
21 –
22 CHAIRPERSON: I take it he – well, we'll
23 ask if he's got evidence. I take it his argument is that
24 that's what's depicted on the slide, but I must confess, I
25 have a bit of difficulty understanding the whole point

1 because obviously it could be said those going to Nkaneng
2 you could follow, but some of the people we see on the
3 slide were presumably going elsewhere. So it doesn't help
4 to point to other people and say, why didn't you follow
5 them, if they were going somewhere else. His case is we
6 were all going to Nkaneng. So anyway, I think Mr Ngalwana
7 will reformulate the question in the light of your point.
8 In any event, this point we've spent a lot of time with
9 yesterday afternoon and I trust there are other points
10 which we're going to deal with quite soon, otherwise we'll
11 be here till, not exactly doomsday, but much longer than we
12 expect. But Mr Ngalwana, the point that Mr Mpofu made
13 cannot be ignored. He wants to know whether you have
14 evidence, and you're not just in other words relying on
15 what you believe one can see on the slide. But do you
16 actually have evidence to the effect that certain people
17 ran or walked, as the case may be?
18 MR NGALWANA: Chair, you will recall that
19 I prefixed this line of questioning by saying the police's
20 evidence will be, and so all that applies to each and every
21 one of the slides that I've been referring to.
22 CHAIRPERSON: So the answer to the
23 question is you have that evidence. That's fine.
24 MR NGALWANA: We shall lead that evidence
25 –

1 CHAIRPERSON: That's Mr Mpofu's point
2 that's been dealt with.
3 MR NGALWANA: Just to wrap this point up,
4 Chair, the important issue that we seek to make here is not
5 about where people are going. The important point is
6 people were dispersing, regardless of where they were
7 going. You will recall, Mr Magidiwana, that yesterday I
8 mentioned two reasons to you regarding why you and your
9 group should have dispersed. I said to you that there was
10 a third reason, and did not articulate it to you. I didn't
11 tell you what that reason was. I now will tell you. When
12 asked whether you are a coward or a brave man, your answer
13 was that you are a coward. Now having heard Mr Mathunjwa
14 warning you, the group of protesters on the koppie, about
15 the bloodbath that was going to ensue, and having come to
16 believe Mr Mathunjwa when the barbed wire was rolled out by
17 the police, a coward would have dispersed, have left the
18 koppie, not so?
19 MR MPOFU: No, Chair, the translation,
20 the question was that a coward would have left the
21 mountain, not ran from the mountain.
22 MR HANABE: I said [Xhosa words].
23 MR MPOFU: You didn't.
24 MR NGALWANA: Can you please answer my
25 question?

1 MR MAGIDIWANA: We ran, but we failed
2 because the road was blocked, but in the only way which we
3 could access was blocked.
4 MR NGALWANA: That was not your answer
5 yesterday. Yesterday you said you didn't leave because you
6 were waiting for the employer to come and address you.
7 What I'm saying to you is that a coward would have left
8 because there was danger that they were about to be killed.
9 Would you care to comment?
10 MR MAGIDIWANA: I want to comment. I can
11 say, Sir, that in the way you are talking to me, you are
12 really disappointing me, but you cannot hear or feel that
13 you are disappointing me. Because leaving is something we
14 wanted to do, we attempted and that road was closed. Then
15 what is it that we could have done?
16 CHAIRPERSON: You're not answering the
17 question, you know. The question was that yesterday you
18 said that initially you didn't leave because why should you
19 leave, because you were waiting for the employer to come
20 and talk to you about the money. That's what you said
21 yesterday. What counsel is suggesting to you is that
22 answer you gave yesterday differs from the answer you give
23 today, and he's asking you, or giving you an opportunity to
24 explain what he said is a difference. So I think you
25 should deal with that question.

<p style="text-align: right;">Page 6248</p> <p>1 MR MAGIDIWANA: What you are saying, Sir, 2 it is clear we left at the time the barbed wire was being 3 deployed. 4 MR NGALWANA: No, you didn't. Slide 193 5 shows the first Nyala deploying barbed wire and there are 6 people dispersing in the direction of Nkaneng. You 7 remained huddled in that group. You didn't leave the 8 koppie. 9 MR MAGIDIWANA: Now these people who are 10 encircled by this red, this oval, in this oval, in which 11 direction are we facing? 12 MR NGALWANA: That's irrelevant. 13 CHAIRPERSON: No, I think it's a fair 14 comment he makes. I take it that you're facing the front. 15 You're looking in the direction of the pole that was 16 referred to yesterday, and the line of police vehicles 17 that's below them on the picture. Is that correct, Mr 18 Ngalwana? 19 MR NGALWANA: Yes, Chair, that's my 20 understanding. 21 CHAIRPERSON: That's the answer that Mr 22 Ngalwana should have given you, but I've given it to you 23 instead. So now you've got the answer to the question, you 24 can deal with something else. 25 MR MAGIDIWANA: Can you please repeat?</p>	<p style="text-align: right;">Page 6250</p> <p>1 MR MPOFU: Yes. 2 CHAIRPERSON: Then when Nyala number 4 3 started – 4 MR MPOFU: Yes. 5 CHAIRPERSON: - then it is said the 6 protesters moved forward. 7 MR MPOFU: Yes. 8 CHAIRPERSON: Now Nyala 4, as far as I 9 understand it, started deploying from the pole. 10 MR MPOFU: Correct. 11 CHAIRPERSON: And so we see that on slide 12 198. 13 MR MPOFU: Correct. 14 CHAIRPERSON: And it's difficult to tell 15 from the photograph, but the group is certainly moving 16 forward. 17 MR MPOFU: Yes. 18 CHAIRPERSON: How far they are from the 19 small path and how far they are from the big path is 20 difficult to tell from a photograph of this kind. 21 MR MPOFU: Yes. 22 CHAIRPERSON: But that was all covered 23 yesterday. We won't go into it again. 24 MR MPOFU: Yes. 25 CHAIRPERSON: But one has to bear in mind</p>
<p style="text-align: right;">Page 6249</p> <p>1 MR NGALWANA: You said as the barbed wire 2 was being deployed, you left, or you moved. I don't 3 remember what you said. You left. You said you attempted 4 to leave the koppie, but you were blocked. You didn't in 5 fact do that because the police version is that, looking at 6 slide 193, people were dispersing in the direction of 7 Nkaneng on the main path, yet you remained huddled in that 8 same group. 9 MR MPOFU: No, Chairperson, I'm sorry, 10 that question is unfair and inconsistent with the so-called 11 police version. On the police version in 198 the barbed 12 wire is being deployed and the people are leaving. That 13 slide is disputed for other reasons, but at least on their 14 own version, while the barbed wire is being deployed, the 15 people are leaving. So – 16 CHAIRPERSON: No, Mr Mpofu, it's not as 17 simple as that. According to the evidence, well according 18 to the police version as set out in exhibit L, there were 19 four Nyalas. 20 MR MPOFU: Yes. 21 CHAIRPERSON: And the first three Nyalas 22 deployed the barbed wire in a straight line. 23 MR MPOFU: Correct. 24 CHAIRPERSON: Now according to slide 196 25 the protesters didn't do anything.</p>	<p style="text-align: right;">Page 6251</p> <p>1 that there was firstly deployment of wire, without any 2 movement apparently by the protesters, by Nyalas 1, 2 and 3 3. What becomes relevant is Nyala 4. Now as I see it, as 4 far as I understand it, Nyala 4 becomes relevant in 5 relation to incident 2. 6 MR MPOFU: Yes. 7 CHAIRPERSON: I think, but I'll be 8 corrected if I'm wrong, that counsel at the moment is still 9 dealing with incident 1, so that your objection, if that is 10 correct, is premature. But perhaps we can ask Mr Ngalwana 11 to start again to see in the light of what I've set out, if 12 your objection is still a good one. If it is, I'll rule on 13 it. If it isn't, it will disappear. 14 MR MPOFU: Yes, before he comes in – 15 thank you, Chair, I accept everything you've said, but the 16 question was formulated in the following words. "You said 17 that you were moving while the barbed wire was being 18 deployed." It didn't say at the beginning or number 2, 19 number 3, number 4. Now all I'm saying is that on their 20 own version they were moving while the barbed wire was 21 being deployed. As to whether they moved immediately from 22 when it was Nyala 1 or Nyala 2, I agree with the 23 Chairperson. So then the question must be made clear. 24 CHAIRPERSON: I'm sure in the light of 25 our discussion Mr Ngalwana will revisit his question –</p>

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1 MR MPOFU: Thank you.

2 CHAIRPERSON: - and put it in a way that

3 satisfies both of us.

4 [10:43] MR NGALWANA: The police version will be

5 that - we haven't even reached the fourth Nyala - when the

6 barbed wire, when the police started deploying the first

7 barbed wire, people started dispersing in drips and drabs.

8 The protesters, or that group could have dispersed at that

9 time. That main path was not blocked by anyone. There are

10 people who are moving freely on that path. You did not

11 disperse at that time. Why not?

12 MR MAGIDIWANA: Now you are putting it

13 right now. You are making sense. It was at the time it

14 was said to workers we must not run. We must just walk and

15 go to our places of residence because we have not done

16 anything. As we were then moving away as there in the

17 place where we were, there is a pole that is erected there.

18 We left that pole, and when we left then it was on our

19 north side and then we were on the south side, or it was

20 above is and we were below. As we were leaving, it was at

21 the time that now the Nyalas were beginning to deploy the

22 barbed wire exactly on the path on which we were walking.

23 That is when then now we turned and walked on the narrow

24 path. When we were close to the main path, it was then

25 that the first, the Nyala that was in front then wanted to

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1 close that gap that was near the kraal, at the kraal. They

2 sprayed on water. We ran away from that place, but we

3 never tried to resist or moved forward or run in, jump into

4 the kraal. Then we took the other road we are familiar

5 with, that is on the lower side, or at the other side of

6 the kraal. When we reached there, there were already two

7 Nyalas that had already blocked there. There were two

8 police officers who were then busy shooting. As I was

9 passing and looking on the other side, I saw here are the

10 other police officers who were standing in a line. They

11 fired shots, but when we moved initially from that place

12 those police officers were not at that place. They were

13 there at the time we had turned around the kraal. So it

14 shows that it's not us in fact who dashed into the police

15 line; it is the police in fact who moved from wherever they

16 were and then they approached us.

17 COMMISSIONER HEMRAJ: Mr Magidiwana, do I

18 understand from that, that your group started to move when

19 the first Nyala started to deploy the barbed wire?

20 MR MAGIDIWANA: In fact we moved at the

21 time that Nyala was deploying the barbed wire. It was at

22 that stage that it was said that, "You see now, they are

23 pulling or deploying the barbed wire. I don't know whether

24 they are going to kill us or are they going to arrest us,

25 but what we must do in fact, we must leave here." If there

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1 was any other thing we were thinking of doing at that

2 stage, because as that Nyala was busy deploying the barbed

3 wire, there were police officers who were standing beyond,

4 or on the other side of the Nyala; they were walking.

5 COMMISSIONER HEMRAJ: If you look at

6 slide 193, you say that when that first Nyala started to

7 deploy that barbed wire, that your group from the oval had

8 already started moving?

9 MR MAGIDIWANA: At this time, or the

10 stage when this Nyala was pulling the barbed wire, it was

11 at this time that the workers started standing up, saying

12 that "Let us leave here because now it is time for, it is

13 their time for them to do this thing that was, they will do

14 that thing that was in fact said, that had been said."

15 COMMISSIONER HEMRAJ: So had you started

16 moving already when this first Nyala deployed the wire?

17 MR MAGIDIWANA: Yes, after they finished

18 talking we then moved away from that place for where the

19 pole was and we moved, we went down.

20 COMMISSIONER HEMRAJ: And at that stage

21 you could see in front of you that there were other Nyalas

22 there also with these trailers with barbed wire?

23 MR MAGIDIWANA: Yes, but by then the

24 barbed wires had not yet been deployed. They were just in

25 the trailers.

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1 COMMISSIONER HEMRAJ: And you could see

2 that the first trailer was already deploying this barbed

3 wire?

4 MR MAGIDIWANA: Yes.

5 COMMISSIONER HEMRAJ: And your group

6 moved in the direction of where these other three or four

7 Nyalas were parked with the trailers and the barbed wire?

8 MR MAGIDIWANA: Yes, but we were moving

9 on the small path that is next to the main road that is

10 from Marikana.

11 COMMISSIONER HEMRAJ: If you look at

12 slide 198, are you able to tell us what your group was

13 doing at that stage when you came alongside Nyala 4?

14 MR MAGIDIWANA: They were walking at that

15 stage, my group.

16 COMMISSIONER HEMRAJ: Yes, where were you

17 walking to?

18 MR MAGIDIWANA: To Nkaneng.

19 COMMISSIONER HEMRAJ: The evidence has

20 been that that group were singing and chanting at that

21 stage when it came alongside Nyala 4.

22 MR MAGIDIWANA: The singing started in

23 the early morning and even at the time there would be some

24 who would talk, then the singing would be stopped and after

25 they would continue singing a song. Even at this place the

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1 song were being sung at this stage.
 2 COMMISSIONER HEMRAJ: And your group then
 3 returned from this position where you were next to Nyala 4.
 4 You went somewhere else.
 5 MR MAGIDIWANA: Yes, we moved away from
 6 where this Nyala was.
 7 COMMISSIONER HEMRAJ: Where did you go
 8 to?
 9 MR MAGIDIWANA: We moved away and, but
 10 the road on which we were walking as we were moving away,
 11 it was joining the one that leads to Nkaneng.
 12 COMMISSIONER HEMRAJ: Thank you.
 13 MR MPOFU: Ja, I'm sorry, once again
 14 maybe Mr Ngalwana will agree with me, that translation of
 15 "uguguta" is not moving away, it's probably moving along.
 16 It's like moving along something.
 17 MR HANABE: Maybe I didn't clarify, but
 18 the moving away I was referring to the Nyala –
 19 CHAIRPERSON: Mr Tokota agrees with what
 20 you say about the meaning of the isiXhosa word.
 21 MR MPOFU: Thank you, Chairperson.
 22 COMMISSIONER TOKOTA: Yes.
 23 MR NGALWANA: Chair, I beg leave to hand
 24 out yet another exhibit which will perhaps put things
 25 somewhat in perspective. I suspect this may be EEE8, Ms

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1 Pillay?
 2 MS PILLAY: That's correct, Chair, EEE8.
 3 MR NGALWANA: The informal settlement,
 4 just to get our bearings, the informal settlement will be
 5 to the top of the page. Is that Nkaneng, Mr Magidiwana?
 6 MR MAGIDIWANA: Yes.
 7 MR NGALWANA: Is it that whole area?
 8 MR HANABE: Come again, Sir?
 9 MR NGALWANA: Is the entire informal
 10 settlement Nkaneng?
 11 MR MAGIDIWANA: Yes, it is the entire
 12 settlement, but the site which is on the left side of the
 13 picture is the one that is called New Stand.
 14 MR NGALWANA: And I take it you lived in
 15 New Stand?
 16 MR MAGIDIWANA: Can you repeat again?
 17 MR NGALWANA: I take it you lived in New
 18 Stand?
 19 MR MAGIDIWANA: I was not staying there.
 20 MR NGALWANA: Okay. Your evidence is
 21 that you sought to access this small path that appears to
 22 be veering off the main path, running alongside the pole.
 23 You see that small path that goes up? I don't know how
 24 else to describe this. It's not running across the page;
 25 it's running up. You see that small path? Please speak

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1 into the mike so all of us can hear you. Perhaps I should
 2 ask the question –
 3 CHAIRPERSON: Just before you ask the
 4 question, can you help me? Is this an extract from a
 5 photograph, or a blown-up version of a photograph already
 6 in the file?
 7 MR NGALWANA: As I understand it, that is
 8 correct, Chair. It's one of the –
 9 CHAIRPERSON: Which one is it? One of
 10 the problems is I don't know where north and south is on
 11 this photograph. I found the, at least I think I found the
 12 pole, which seems to be at the bottom, an inch or two from
 13 the bottom of the page to the right of the path which we
 14 see coming towards the bottom of the page. That seems to
 15 be the pole. There are a number of other paths there. I'm
 16 trying to work out which, the paths that we see on this
 17 photograph, where do we see them on things like slide 200
 18 and 197. In order to do that one's got to know where north
 19 is. Now if we could be referred to a slide of which this
 20 is a partial enlargement, we would then know the answer to
 21 that.
 22 MR NGALWANA: It's not an enlargement of
 23 any of the slides in exhibit L, Chair –
 24 CHAIRPERSON: Well, then we must be told,
 25 I would think, where north is so that we can then –

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1 because, you know, if you have a photograph that's taken
 2 from a different angle to the ones you have, then it leads
 3 to more confusion actually than clarity. But I see it's
 4 now 11 o'clock. Perhaps those who are instructing you can
 5 bring a compass and tell you where the north is and we can
 6 resume the debate after tea.
 7 MR NGALWANA: Well, as the Chairperson
 8 pleases. I was hoping to conclude this line of questioning
 9 before tea.
 10 CHAIRPERSON: No, no, but I'm afraid you
 11 – I understand that it is your ambition, one that I would
 12 like to have shared, but I've got a difficulty, and that is
 13 I can't follow this photograph in relation to the others
 14 until I know where it was taken from, where north is.
 15 MR NGALWANA: If the Chairperson has
 16 regard to slide 190, I think the angle is similar, just
 17 that in 190 one doesn't see the informal settlement –
 18 CHAIRPERSON: Yes, yes, I see the small
 19 kraal below the big kraal on 190, so north then would be
 20 more or less from the right-hand side of the page to the
 21 left, aiming a little bit towards the top corner, as it
 22 were. Is that right?
 23 MR NGALWANA: That is correct, Chair.
 24 CHAIRPERSON: Okay, if that's so then you
 25 can carry on.

<p style="text-align: right;">Page 6260</p> <p>1 MR NGALWANA: Yes, thank you.</p> <p>2 CHAIRPERSON: You've answered my problem.</p> <p>3 MR NGALWANA: Thank you, Chair. Mr</p> <p>4 Magidiwana, you see the numerous paths that appear on that</p> <p>5 exhibit?</p> <p>6 MR MAGIDIWANA: I can see them.</p> <p>7 MR NGALWANA: Nkaneng includes –</p> <p>8 MR MPOFU: Sorry, Chairperson, can we</p> <p>9 identify the exhibit?</p> <p>10 CHAIRPERSON: It's been identified as</p> <p>11 EEE8.</p> <p>12 MR MPOFU: Oh, I missed that. Sorry,</p> <p>13 Chair.</p> <p>14 CHAIRPERSON: But what I didn't make a</p> <p>15 note of is compare with slide 190.</p> <p>16 MR MPOFU: 190, thanks.</p> <p>17 CHAIRPERSON: Which gives us the compass</p> <p>18 bearing.</p> <p>19 MS PILLAY: Chair, the only remaining</p> <p>20 issue would be for Mr Ngalwana to tell us where to find</p> <p>21 this particular picture in the discovered documents.</p> <p>22 MR NGALWANA: We'll endeavour to do that,</p> <p>23 Chair.</p> <p>24 CHAIRPERSON: Alright, we'll carry on</p> <p>25 until quarter past 11 –</p>	<p style="text-align: right;">Page 6262</p> <p>1 That you shouldn't have difficulty giving him that</p> <p>2 information after tea.</p> <p>3 MR NGALWANA: No.</p> <p>4 CHAIRPERSON: The same applies to this</p> <p>5 document, and he's not sure whether he's got EEE6, but ex</p> <p>6 abundanti cautela, you can give him that information as</p> <p>7 well, if you don't mind, after tea. But let's carry on</p> <p>8 with the cross-examination for the meanwhile. Mr Mpofo is</p> <p>9 prepared to be patient until after tea for that</p> <p>10 information.</p> <p>11 MR NGALWANA: Thank you, Chair. There</p> <p>12 are numerous paths, Mr Magidiwana, that criss-cross all</p> <p>13 around this picture. You can see that - yes, paths.</p> <p>14 MR MAGIDIWANA: I can see them.</p> <p>15 MR NGALWANA: Your group could have taken</p> <p>16 any one of these paths away from the police line in order</p> <p>17 to get to Nkaneng. It could have taken, from where it had</p> <p>18 started, which would be at the bottom of the page, almost</p> <p>19 symmetrical to the pole, it could have taken the road that</p> <p>20 goes, shall we say northwards, or any one of those two</p> <p>21 parallel roads that go northwards. In other words, the</p> <p>22 roads that go to the left of the page, and then veer off</p> <p>23 rightwards into Nkaneng, far from the kraals and the</p> <p>24 police. Would you care to comment?</p> <p>25 MR MAGIDIWANA: Where would this lead us,</p>
<p style="text-align: right;">Page 6261</p> <p>1 MR MPOFU: Chairperson, sorry –</p> <p>2 CHAIRPERSON: - and during that</p> <p>3 adjournment you can then ascertain that information. Yes,</p> <p>4 Mr Mpofo?</p> <p>5 [11:03] MR MPOFU: Yes, just so that Mr Ngalwana</p> <p>6 can also use the tea break, can they also give us the, what</p> <p>7 Ms Pillay calls the pathways for, to the photos EEE7, so</p> <p>8 that we know where to find them in the discovered</p> <p>9 documents?</p> <p>10 CHAIRPERSON: Have you already got the</p> <p>11 pathways to EEE6?</p> <p>12 MR MPOFU: Yes, I think we found those on</p> <p>13 our own. We might as well get all of them, Chairperson.</p> <p>14 CHAIRPERSON: Yes, alright. Okay, so</p> <p>15 those, I'm sure Mr Ngalwana can have a cup of tea and those</p> <p>16 who are assisting him can get that information for him.</p> <p>17 MR MPOFU: Thank you, Chairperson.</p> <p>18 MR NGALWANA: I don't understand what</p> <p>19 information Mr Mpofo seeks, Chair, but as regards to EEE7 –</p> <p>20 CHAIRPERSON: Yes, yesterday you handed</p> <p>21 in EEE7 and he says he hasn't got, whether you gave it him</p> <p>22 is neither here nor there. I don't know if you did, but</p> <p>23 let's assume – it doesn't matter whether you did or didn't;</p> <p>24 he hasn't got it, so he says he'd be grateful after tea if</p> <p>25 you could tell him where he can find it in the hard drive.</p>	<p style="text-align: right;">Page 6263</p> <p>1 this?</p> <p>2 MR NGALWANA: On top of the top kraal</p> <p>3 there are about, there is a road that runs there just</p> <p>4 before the main cluster of dwellings. Do you see that?</p> <p>5 MR MAGIDIWANA: Which one?</p> <p>6 MR NGALWANA: We understand that that is</p> <p>7 a road that's used by cars. That's a car road.</p> <p>8 MR MAGIDIWANA: Where is this road?</p> <p>9 MR NGALWANA: Perhaps we should get it on</p> <p>10 the screen and the people who do the technology can draw a</p> <p>11 line there. Perhaps we can do this after tea, Chair, and</p> <p>12 during tea we can endeavour to show it clearly, if possible</p> <p>13 –</p> <p>14 CHAIRPERSON: Some people will be very</p> <p>15 busy during tea, but that will be worthwhile.</p> <p>16 MR NGALWANA: Thank you, Chair. Or</p> <p>17 perhaps if they can do it now, then all of that – I was</p> <p>18 suggesting that perhaps during tea we can endeavour to find</p> <p>19 how we can do that so that can be depicted clearly on</p> <p>20 screen.</p> <p>21 CHAIRPERSON: Yes, the only thing is your</p> <p>22 cross-examination will be more streamlined if that's been</p> <p>23 done. So perhaps you can approach, you can deal with a</p> <p>24 slightly different point at the moment until teatime, which</p> <p>25 will be in seven minutes' time.</p>

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1 MR NGALWANA: As the Chairperson pleases.
 2 In your evidence-in-chief, well in your statement, Mr
 3 Magidiwana, you say that you noticed that "the police were
 4 moving rapidly, and then that they were fencing us in."
 5 Now I just want to make this clear. Although you do say
 6 from the direction of the residential area, you are not
 7 suggesting that the police were surrounding you with barbed
 8 wire, are you?
 9 MR MAGIDIWANA: There, Sir, we were
 10 there, we were surrounded, because even at the back they
 11 were behind us. There were police officers.
 12 MR NGALWANA: You mean behind the koppie?
 13 MR MAGIDIWANA: Yes.
 14 MR NGALWANA: The main koppie?
 15 MR MAGIDIWANA: Yes, behind the big
 16 koppie there were police officers and those two koppies are
 17 close to each other.
 18 MR NGALWANA: At around which time are we
 19 now talking about?
 20 MR MAGIDIWANA: As we were being
 21 assaulted, during the time we were assaulted there are some
 22 who were even running to that other side. Even when they
 23 would get there, they would also be assaulted on that side
 24 there.
 25 MR NGALWANA: No, no, no, in paragraph 11

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1 you're talking within few minutes of Mr Mathunjwa's
 2 departure. So there's been no shooting of teargas or water
 3 canon at this stage that you are referring to when you say
 4 you were fenced in.
 5 MR HANABE: Can you repeat the last part
 6 again, Senior Counsel?
 7 MR NGALWANA: When you say you noticed
 8 that the police were fencing you in, you are talking about
 9 the time when Mr Mathunjwa, or shortly after Mr Mathunjwa
 10 had left the koppie. At that stage there had been no
 11 shooting of water canons or rubber bullets or any kind of
 12 shooting by the police. So when were the police behind
 13 you, encircling you in that koppie on the 16th?
 14 MR MAGIDIWANA: Sir, when we left we
 15 walked towards our places of residence. As we were walking
 16 towards our place of residence, our way was then blocked.
 17 We were sprayed on with water and the spray gun that you
 18 just mentioned was also used. We then ran away. We ran to
 19 the side and went back again because there was only one way
 20 which the one which we were going to access, or go through.
 21 They closed it, and when they closed it and we then went
 22 around the kraal, as we were being shot by those police
 23 officers who were in front of us, there were other police
 24 officers also who just emerged on the side and I don't even
 25 know where they emerged from. No-one at that stage then

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1 ran back, turned back and ran. People then ran towards,
 2 they jumped into the kraal. When there was no longer
 3 shooting at that stage in the kraal, there were shots that
 4 were fired elsewhere, but at that stage at that place at
 5 the kraal there were police officers who were present.
 6 MR NGALWANA: Are you talking about a few
 7 minutes after Mr Mathunjwa's departure?
 8 MR MAGIDIWANA: That's what I'm saying.
 9 MR NGALWANA: How many minutes?
 10 MR MAGIDIWANA: I didn't have my watch
 11 with me at that time.
 12 MR NGALWANA: Look at slide 193. Do you
 13 see any police behind that koppie?
 14 MR MAGIDIWANA: This white arrow at the,
 15 above on the left side, what is it pointing?
 16 MR NGALWANA: That's Mr Mathunjwa leaving
 17 the koppie.
 18 MR MAGIDIWANA: When Mathunjwa left,
 19 which road away did he use?
 20 MR NGALWANA: Do you see any police
 21 behind this koppie on this slide?
 22 MR MADLANGA SC: Mr Chairman,
 23 Commissioners, I'm a bit loath to raise the point that I
 24 want to raise because I have noticed that this witness
 25 understands English and he may then, should the

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1 Commissioners rule against the point that I want to raise,
 2 then he will have been given an answer by me.
 3 CHAIRPERSON: There are two
 4 possibilities. Firstly we can ask him to leave;
 5 alternatively can you put it in Afrikaans?
 6 MR MADLANGA SC: My non-existent
 7 Afrikaans, Mr Chairman.
 8 CHAIRPERSON: Mr Madlanga, I see it's
 9 quarter past 11. So I was proposing to take the tea
 10 adjournment anyway. So I suggest we take the tea
 11 adjournment; you come and raise the point in chambers in
 12 the presence of Mr Ngalwana and Mr Mpofo, and then we can
 13 then decide about it thereafter.
 14 MR MADLANGA SC: Thank you.
 15 CHAIRPERSON: Take the tea adjournment at
 16 this stage. Mr Ngalwana will come to chambers and his
 17 assistants and those instructing him will get the
 18 information that he's been asked for. We'll now take the
 19 tea adjournment.
 20 [COMMISSION ADJOURNS COMMISSION RESUMES]
 21 [11:51] CHAIRPERSON: The Commission will resume
 22 -
 23 MR MPOFU: Apologies for the delay,
 24 Chairperson.
 25 CHAIRPERSON: The Commission resumes. Mr

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1 Magidiwana, you're still under oath.
 2 MZOLOLO MAGIDIWANA: s.u.o.
 3 CHAIRPERSON: Mr Ngalwana, you're cross-
 4 examining, but before you proceed with your cross-
 5 examination, you owe us some information.
 6 MR NGALWANA: Yes, thank you, Chair. My
 7 people have done some inquiries. It appears that the
 8 person who procured the photographs that form the, shall we
 9 say subject of EEE6 and EEE7, that person is not here and
 10 only he can trace the pathway, so we've been trying to get
 11 hold of him. It's possible that we can get hold of him
 12 possibly during the lunch break. Well, we're trying to get
 13 hold of him as we speak now - it shouldn't be a difficult
 14 exercise to perform - then he'll be able to tell us where
 15 he got those photographs.
 16 CHAIRPERSON: I take it the same point
 17 applies to EEE8?
 18 MR NGALWANA: Yes, Chair.
 19 CHAIRPERSON: Alright. Okay, we'll have
 20 to restrain our impatience a little bit longer. Mr
 21 Ngalwana, please proceed.
 22 CROSS-EXAMINATION BY MR NGALWANA (CONTD.):
 23 Thank you, Chair. I'm indebted for the indulgence. Mr
 24 Magidiwana, just before we broke for tea I just wanted to
 25 clarify something by way of a question. When you say you

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1 noticed that the police were moving rapidly and then "that
 2 they were fencing us in from the direction of the
 3 residential area," you are not suggesting that the police
 4 were putting barbed wire all around where the protesters
 5 were, are you?
 6 MR MAGIDIWANA: No, Sir, I never said we
 7 were encircled by the barbed wire.
 8 MR NGALWANA: If I can take you to EEE8,
 9 the one we've just handed in as an exhibit, I believe now
 10 the technicians are able to put it on the screen and
 11 indicate the various pathways. Now the first pathway I
 12 want to talk about is to show where the police are saying
 13 you were moving. If we can show that, you see the line
 14 depicted by yellow -
 15 MR MAGIDIWANA: Yes.
 16 MR NGALWANA: It is your evidence that
 17 you were headed towards that path, correct?
 18 MR MAGIDIWANA: You mean "nandesea
 19 paklantela?"
 20 MR NGALWANA: Yes. Your evidence, as I
 21 understand it, is that you sought to join that path as you
 22 were moving in the direction of that pole, correct?
 23 MR MAGIDIWANA: Do you see that that road
 24 that is from Marikana and leading to Nkaneng at the bottom,
 25 it's the red one, the one marked red.

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1 MR NGALWANA: Yes? That's not where you
 2 were, is it?
 3 MR MAGIDIWANA: Where it's marked and
 4 where you say we were walking, in fact it's not where we
 5 were walking.
 6 MR NGALWANA: Which path did you seek to
 7 join as you were dashing towards Nkaneng?
 8 MR MAGIDIWANA: The road we wanted to
 9 join is that which has people in it.
 10 MR NGALWANA: Please indicate by way of a
 11 colour. There is a colour code for these paths.
 12 MR MAGIDIWANA: There where there are
 13 many people.
 14 MR NGALWANA: The one depicted in the red
 15 colour?
 16 MR MAGIDIWANA: Yes.
 17 MR NGALWANA: Is that not the main path
 18 to Nkaneng?
 19 MR MAGIDIWANA: It is the main road that
 20 leads to Nkaneng.
 21 MR NGALWANA: Was your evidence earlier
 22 not that you did not take that road, but you took the
 23 smaller route towards the pole, or past the pole, at the
 24 first incident?
 25 MR MAGIDIWANA: Look again beyond the

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1 road where there's a yellow marking -
 2 MR MPOFU: There's a red -
 3 MR MAGIDIWANA: - the red one, marking.
 4 MR NGALWANA: Yes?
 5 MR MAGIDIWANA: Do you see the road where
 6 there is that person, the one who's appearing on the blue
 7 line, or marking?
 8 MR NGALWANA: Are you saying that's the
 9 path you took on which -
 10 MR MAGIDIWANA: That is the small path.
 11 Do you see where it joins the other route?
 12 MR NGALWANA: Mr Magidiwana, that is not
 13 the evidence you gave earlier.
 14 MR MPOFU: Chairperson, I'm sorry to do
 15 this. We're going back to what happened yesterday. I at
 16 least pointed out to Mr Ngalwana when he was dealing with
 17 the small road that him and the witness were talking about
 18 two different approaches. When the witness was talking
 19 about the small road, he was talking about the one next to
 20 the kraal, and Mr Ngalwana was talking about another one,
 21 and that's why we went round and round in circles for about
 22 an hour or two.
 23 CHAIRPERSON: I must admit that's not my
 24 recollection. My recollection was, because I also took
 25 part in the discussion at one stage and my recollection was

1 that he said that he didn't go down the main, what was
 2 described as the main path, but he went down a smaller
 3 path, a narrower path, which one can see if one looks at
 4 197, I think I'm correct in saying, that look at 197;
 5 you've got the bigger path going towards the left –
 6 remember, this is all the time of the first incident – and
 7 then he didn't go that way. He said he went another path,
 8 which is a smaller path, which you can see also on 197.
 9 There was a debate as to how close it was to the pole and
 10 there was also a debate as to whether 198 isn't misleading.
 11 He now seems to be telling a different story about the
 12 path. It may be that there's a misunderstanding between
 13 the two, but –

14 MR NGALWANA: Can I try and –
 15 CHAIRPERSON: Have another –
 16 MR MPOFU: Chairperson, this can be –
 17 MR NGALWANA: I'll try and dispose of –
 18 MR MPOFU: It can be resolved by asking,
 19 this witness has constantly talked about the small road and
 20 it is only one small road that he refers to and it can be
 21 established which one it is. I don't want to suggest what
 22 –
 23 CHAIRPERSON: Well, okay. Let's hear.
 24 MR NGALWANA: Mr Magidiwana, if you have
 25 regard to slide 197, you will see that there is a small

1 path that appears to be veering off from the main path
 2 which you say leads to Nkaneng. Can you see that small
 3 path?
 4 MR MAGIDIWANA: Clarify, because there
 5 are two roads, or paths that are from the main one. The
 6 other one is behind the Nyala, so clarify.
 7 MR NGALWANA: I'm talking about the road,
 8 if you see the dotted yellow line which shows which
 9 direction the Nyalas were deploying barbed wire, you see
 10 that?
 11 MR MAGIDIWANA: I can see.
 12 MR NGALWANA: If you continue further you
 13 will meet with a small path, a narrow path. Do you see
 14 that path?
 15 MR MAGIDIWANA: I see.
 16 MR NGALWANA: In your evidence, as I
 17 understood it, you said you were headed for that path at
 18 the first instance. Correct?
 19 MR MAGIDIWANA: Okay Sir, you didn't hear
 20 it right. That was not the road, because had we wanted to
 21 walk on that road, we would have done that.
 22 MR NGALWANA: So which road now did you
 23 say you were headed for at the first instance?
 24 MR MAGIDIWANA: The road in fact that we
 25 headed for is the one that is in front of the Nyala, that

1 which you can see.
 2 MR NGALWANA: If that is the road that
 3 you sought to join at the first instance as the Nyala was
 4 deploying barbed wire, I take it the fourth Nyala was
 5 deploying barbed wire, I understand that slide 198 doesn't
 6 give one an accurate sense of a distance from the pole, but
 7 why would your march, or your dashing take you closer to
 8 the pole, alongside that lamp pole?
 9 MR MAGIDIWANA: The pole was behind us
 10 and we were in front of it and we were away from it, a
 11 distance away from it.
 12 MR NGALWANA: Well, I shall argue at the
 13 end that this evidence you are now giving is vastly
 14 different from the evidence you've given before, but let's
 15 move on. If we go back to the EEE, is it EEE8? Can you
 16 make it smaller so that we can see the various paths? Now
 17 -
 18 CHAIRPERSON: The problem I have – I'm
 19 sorry to interrupt you, Mr Ngalwana, but the problem I have
 20 with that is that my recollection of yesterday was that the
 21 path he indicated was, I think, the yellow path as we have
 22 it for about three-quarters of its distance, but it then
 23 didn't go off to the right as is shown on the screen, but
 24 in fact you see there's a, what looks almost like a right
 25 angle where there's a portion of the path proceeding

1 towards Nkaneng, and my understanding of his evidence,
 2 that's the way he was going to go, but he wasn't going to
 3 go, in other words the full length of the yellow as marked
 4 on the screen, but about two-thirds, three-quarters of it,
 5 and he was going to turn slightly to his left to go towards
 6 Nkaneng. That's my recollection of his evidence yesterday.
 7 That's now marked.
 8 MR NGALWANA: Yes, no I understand –
 9 CHAIRPERSON: That's the path I think
 10 that he was talking about yesterday because his evidence
 11 was that they couldn't go very far along the path because
 12 the Nyala came and blocked their way, which is why they
 13 then went back in an arc and then tried to pass very close
 14 to the kraal and there's a further obstruction at that
 15 point, so they then tried to go around the kraal, with the
 16 consequences that we know about.
 17 MR NGALWANA: Yes. No, I understand that
 18 perfectly, Chair. The purpose of this was to show the path
 19 that they sought to join, not that they were going to
 20 continue all the way up. We know that there's another path
 21 that joins, that was where –
 22 CHAIRPERSON: My point was it was
 23 misleading though to have that section at the end on the
 24 right-hand side, whereas the path they were intending to
 25 join was the one that's now indicated by the first section

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1 of yellow and then the lighter yellow section. But I
 2 thought, I was afraid there might be a misunderstanding
 3 between the two of you if that wasn't made clear.
 4 MR NGALWANA: Mr Magidiwana, the first
 5 part of that yellow line, of the path depicted by the
 6 yellow line, is what you testified yesterday as the path
 7 which you intended to join. Correct?
 8 MR MAGIDIWANA: That is where in fact we
 9 were disagreeing and where you said really I'd confused
 10 you, and then we couldn't understand each other.
 11 MR NGALWANA: So you are now saying that
 12 the first part of the path depicted by the yellow line is
 13 not the path that you intended to join?
 14 MR MAGIDIWANA: Yes.
 15 MR NGALWANA: Which path on the first
 16 occasion as the Nyala is deploying, the fourth Nyala is
 17 deploying, which path were you headed for?
 18 MR MAGIDIWANA: Can you please repeat?
 19 MR NGALWANA: Which path did you want to
 20 head for?
 21 MR MAGIDIWANA: It's the one that leads
 22 to Nkaneng where there's a red mark, line.
 23 MR NGALWANA: The main path?
 24 MR MAGIDIWANA: Yes.
 25 MR NGALWANA: You do realise that I've

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1 asked you on numerous occasions yesterday, and you
 2 repeatedly said that you were not on the main path, you
 3 were on the narrow path?
 4 MR MAGIDIWANA: Sir, I don't know how you
 5 want me to say it, but I will repeat again. I think a
 6 better thing is for me or you or for us to go so that I can
 7 show you where this road is, because you are disagreeing
 8 with me on the path on which I walked, whereas you don't
 9 even know it.
 10 CHAIRPERSON: Mr Magidiwana, you don't
 11 have to be personal about Mr Ngalwana. Yesterday – the
 12 record will show that you indicated that you intended
 13 walking along the narrow path, which is the yellow one.
 14 You were asked why you didn't take the wide path, which is
 15 the red one, and you gave various reasons at great length
 16 as to why you didn't go that way, why you intended to go
 17 along the narrow path. You're now saying something very
 18 different from what you said yesterday, and counsel is
 19 putting the difference to you and giving you an opportunity
 20 to explain. If you don't want to explain, well then fine,
 21 so be it. The difference will remain on the record,
 22 unexplained, but all that's happening is counsel is putting
 23 to you, quite correctly as I see it, that what you're now
 24 telling us is different to what you said yesterday. Now
 25 there may be a number of reasons why that's so, and he's

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1 trying to give you a chance to explain that.
 2 MR MPOFU: Chairperson, thank you,
 3 Chairperson, but with the greatest respect, I think the
 4 witness's suggestion has to be taken. There seems to be
 5 utter confusion about this. It's such a simple thing. The
 6 witness testified only about one small path, and let him
 7 show us which small path he's talking about.
 8 CHAIRPERSON: Now he said he wasn't, he
 9 didn't mean the small path, he meant the big path –
 10 MR MPOFU: No, no, no, Chairperson, no –
 11 CHAIRPERSON: I'm not sure if there's
 12 confusion. There may be another explanation for it –
 13 [12:11] MR MPOFU: No, there is an explanation.
 14 The explanation is the one I gave yesterday. All along
 15 when all that evidence was being given, Mr Ngalwana was
 16 talking about the first approach and the witness was
 17 talking about the second approach, and I made that very
 18 clear yesterday and that's why I said we'll be here all
 19 day, and it's now, it's that confusion that is now bringing
 20 us to this. The witness must with Mr Ngalwana or with
 21 anyone else go and point the road on that, the road that
 22 he's talking about, otherwise – and this is crucial
 23 evidence, Chairperson, I can't just let this one go because
 24 it is very important, and I think his suggestion is
 25 sensible.

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1 CHAIRPERSON: Mr Mpofo, when will we get
 2 the transcript of yesterday's evidence?
 3 MR MPOFU: It's usually about two days,
 4 Chair.
 5 CHAIRPERSON: Yes, well I suggest we wait
 6 until we get the transcript and we then consider afresh
 7 whether it's necessary. I understand the point; I think Mr
 8 Ngalwana will agree with you, it's a very important point.
 9 MR MPOFU: Yes.
 10 CHAIRPERSON: And it's important, in
 11 fairness to both sides, that neither side should be able to
 12 argue that there was confusion –
 13 MR MPOFU: Yes –
 14 CHAIRPERSON: - when in fact there
 15 wasn't, and so it may well be that we will have to accede
 16 to your suggestion.
 17 MR MPOFU: Thanks, Chair.
 18 CHAIRPERSON: On the other hand, if the
 19 record is clear that it's not a question of confusion, but
 20 a stark contradiction which can't really be explained, then
 21 it may not be necessary, but let's wait and see, get the
 22 transcript and look at it, and then we can revisit the
 23 matter and perhaps the parties can then address the
 24 Commission on whether a further inspection is necessary.
 25 It may also be, of course, that we've learned a great deal

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1 since we've had the inspection in October and it may well
 2 be useful for all of us to reorient ourselves in the light
 3 of the evidence we've heard, by having another look at the
 4 scene. But that's something we can also consider when we
 5 look at the matter again.

6 MR MPOFU: Thank you, Chair.

7 CHAIRPERSON: If we do go again – I'm not
 8 saying we will because I'm not sure how the application
 9 that I've suggested should be made, will be decided, but
 10 what the parties might consider, all the parties and the
 11 evidence leaders, is that if there are other aspects that
 12 we can look at, in other words speaking for myself, I'd be
 13 reluctant to go just for this point, but it may be
 14 necessary even for that, but it may also be that if we're
 15 going to go, there are a number of other things we should
 16 look at also, or relook at in some cases, which, so it
 17 might justify a further inspection. But anyway, we don't
 18 have to decide that yet, but the parties might think about
 19 that because it might strengthen the hand of those who want
 20 another application, if there are points that we can look
 21 at in addition to this particular point.

22 MR MPOFU: Thank you, Chairperson. Yes,
 23 thank you, Chairperson, and as we have hinted through the
 24 witnesses, we do intend to make such an application, but I
 25 agree with the Chairperson, it might be better to do it at

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1 a time when more will be gained than one or two points. So
 2 we'll discuss it with the evidence leaders. Thank you,
 3 Chairperson.

4 CHAIRPERSON: Thank you, Mr Mpofo. Mr
 5 Ngalwana, can you carry on with your cross-examination now?

6 MR NGALWANA: In staccato fashion I
 7 proceed, Chair. Chair, I just want to make one point and I
 8 won't belabour it. For purposes of ascertaining whether or
 9 not this witness had testified that he and his group
 10 intended to take the yellow path or not, there is
 11 absolutely no dispute and that is not an issue that is
 12 going to be resolved by an inspection in loco –

13 CHAIRPERSON: No, you don't have to deal
 14 with that now. I said let's look at the transcript to see
 15 how clear it is and, as I've said, it may be in any event
 16 desirable that we should have another inspection to look at
 17 other spots and, if so, while we're there we can look at
 18 this one as well. It's a very important point, as you will
 19 concede, I'm sure, and Mr Mpofo will concede, and if we
 20 have to get to the truth of the matter I wouldn't want any
 21 finding we make to be attacked by either your side of we
 22 find against you, or Mpofo's side if we find in your
 23 favour, on the basis that there was room for confusion
 24 which we didn't clear up. But we'll see when we look at
 25 the transcript if there is truly room for confusion.

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1 MR NGALWANA: Now you say you intended to
 2 join the main path. Did you say you intended to join or
 3 that you were on that main path to Nkaneng, on slide 198?

4 MR MAGIDIWANA: In this picture in fact
 5 we were not on the main road to Nkaneng. We were on that
 6 one which is in fact crossing and leading towards the veld.

7 MR NGALWANA: Can we go back then to
 8 EEE8? Are you saying you were on the path – there are two
 9 parallel paths that run across the red path. Are you
 10 talking about the one depicted, is it green? I can't quite
 11 see if it's blue or green, the top parallel path?

12 MR MAGIDIWANA: I said, Sir, do you see
 13 this person? This person?

14 MR NGALWANA: No, I don't. That's why
 15 we're using colours. Can you refer to colours, please?

16 MR MAGIDIWANA: Here is a person near
 17 that group of people.

18 MR NGALWANA: Chairperson, the witness is
 19 not really assisting. The reason why we use colour coding
 20 is to make things easier for all of us to understand. Now
 21 he's referring to people.

22 CHAIRPERSON: I hear what he says, Mr
 23 Ngalwana. Do you see the blue marking on the screen? The
 24 path -

25 MR MAGIDIWANA: I can see it.

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1 CHAIRPERSON: Blue as the sky. Then you
 2 can also see the green line. Green as the grass. You see
 3 that?

4 MR MAGIDIWANA: Yes, the one that is
 5 pointing to the top.

6 CHAIRPERSON: Yes, now as I understand
 7 it, you were nowhere near the path that's green as the
 8 grass, were you?

9 MR MAGIDIWANA: The narrow path is in
 10 this, in fact, blue line but it joins there ahead in front.

11 CHAIRPERSON: Yes, let's take it step by
 12 step to avoid – it's bad enough if you're confused, but
 13 it's even worse if I'm confused. We don't want that. Now
 14 we've got the blue path. We've also got a red path. Can
 15 you see that? And then we've got a yellow path as well.
 16 You see that? Now if they move the image slightly to the
 17 left, I think we may just be near the pole, you see the
 18 pole?

19 MR MAGIDIWANA: Can you show the one that
 20 is marked black as to where it leads to?

21 CHAIRPERSON: Yes, alright, you can deal
 22 with that later if you want to, but let's just concentrate
 23 on the paths –

24 MR MAGIDIWANA: Do you see those 1, 2, 3,
 25 4 people who are walking on that road?

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1 CHAIRPERSON: Yes, no, forget about the
 2 people for the moment. Just concentrate on the paths and
 3 the pole. Can you see the pole?
 4 MR MAGIDIWANA: I can see where that pole
 5 is.
 6 CHAIRPERSON: Right, now I take it then
 7 as one looks at that slide, the Nyala that we can see on
 8 slide 198 was situated to the left of the pole as we look
 9 at it on the slide. Is that right?
 10 MR MAGIDIWANA: Yes, the hippo was on the
 11 left-hand side, on the left side.
 12 CHAIRPERSON: Right, and then your group
 13 was to the left of the hippo, the Nyala, is that right?
 14 MR MAGIDIWANA: Yes, we were on the left
 15 side.
 16 CHAIRPERSON: Right, now if we look at
 17 the slide very carefully, we will see to the left of the
 18 pole, we see this spot where the hippo, the Nyala was.
 19 Then to the left of that we see where you were. Now can
 20 you tell us where more or less your group was? It's
 21 difficult to tell from slide 198. Can you see, if you go
 22 to the left of where the cursor is at the moment, can you
 23 see there's a red path and a blue path and there's also a
 24 little path that's not marked, slightly to the right of
 25 that path. Can you see that there's a little path there

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1 which is marked by the cursor, which join up with the
 2 yellow path? Now where was your group in relation to those
 3 paths that we see? Was it to the right of the unmarked
 4 path? Was it near the red path? Was it near the blue
 5 path, or was it near the yellow path? Can you tell us?
 6 MR MAGIDIWANA: We were not there.
 7 CHAIRPERSON: Where were you then?
 8 MR MAGIDIWANA: We were close to those
 9 four people that I had pointed you to. When we left that
 10 pole, we went straight ahead.
 11 CHAIRPERSON: Can you please assist the
 12 operators to indicate the four people that you're talking
 13 about? Perhaps you can show the – I understand you've got
 14 –
 15 MR MPOFU: Maybe Mr Mahlangu – ja.
 16 CHAIRPERSON: - you've got difficulty
 17 moving yourself, but perhaps you could show Mr Mahlangu and
 18 he can show us on the screen. I wanted Mr Mahlangu to do
 19 it because I know you have difficulty moving, but if you
 20 want to go yourself, that's fine.
 21 MR HANABE: It seems like he prefers
 22 going to the screen and showing it there, Commissioner.
 23 MR MAGIDIWANA: When the talking started,
 24 I believe we were at the place where I had just indicated
 25 there on the screen. After the talking was over, then we

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1 moved to that direction where I'm just pointing. We didn't
 2 move to that direction because there, there was a Nyala.
 3 We moved next to the road and moved that side. You can see
 4 there that there's a narrow path there. When we reached
 5 that placed where I have just indicated, and there they had
 6 already closed as we were there and water was sprayed on
 7 and so we ran away. When we ran, we were closer and we
 8 took that other direction. When we were then there then
 9 the water was sprayed on again and we moved away and went
 10 around to that and appeared on that other side. We didn't
 11 go towards this, move to this direction.
 12 CHAIRPERSON: Alright, thank you.
 13 Perhaps we could ask Mr Mahlangu to mark on the copy of
 14 exhibit EEE8 which you have there at the witness table,
 15 perhaps indicating with some kind of arrow the way that you
 16 went so that it will be part of the record of the
 17 Commission and it could be shown to the parties and they
 18 could all understand it. I see you're marking it yourself,
 19 thank you.
 20 [12:31] MR HANABE: According to this EEE8, in
 21 the picture this is how we had pointed the direction, there
 22 is a drawing here where he has drawn a line showing where
 23 the starting of the deploying of the barbed wire in fact
 24 started and moved and at that time the barbed wire was
 25 being deployed. The pole that he showed in fact the wire

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1 moved on the left side of the pole towards the main road.
 2 Whereas they were moving, according to this from point A to
 3 B on the left side. So when they were just joined, the
 4 small road which is near the kraal it was then that he
 5 started being sprayed on with water. Then they moved back
 6 from there and then went around to the place or the spot in
 7 this picture which is indicated with an F there is an F on
 8 top of it and Mr Mahlangu will come and explain to the
 9 Commissioners.
 10 CHAIRPERSON: To not only the
 11 Commissioners but to the parties as well and then hopefully
 12 copies can be made of this document so we could all have
 13 them but yes Mr -
 14 MR MAHLANGU: There razor wire which is
 15 drawn from one point up to the kraal and where it takes a
 16 turn and then indicated they were at point A then, then
 17 they proceeded to point B and from point B to point E where
 18 they were sprayed with water and from there they ran across
 19 the kraal to point F where the incidents took place.
 20 CHAIRPERSON: Behind the kraal?
 21 MR MAHLANGU: Behind the kraal it's as
 22 indicated.
 23 CHAIRPERSON: Yes thank you. Mr Mahlangu
 24 perhaps you can show the - the others I take it can see it
 25 later but Mr Ngalwana needs to see it now as does Mr Mpofo

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1 and the evidence leaders of course.

2 CHAIRPERSON: Mr Ngalwana, I think

3 everyone who needs to know at this stage what he pointed

4 out has been shown what he pointed out, so perhaps you can

5 proceed with your cross-examination?

6 MR NGALWANA: Thank you, Chair.

7 MR BIZOS SC: That lots of colours and

8 lots of directions have been noted in pencil is what we

9 have, may I suggest to the evidence leaders in association

10 with the parties it's an important document from which we

11 need to cross-examine on and to also argue but a proper

12 document with what A stands for and what B stands for and

13 C, a complete document so that we have - it will facilitate

14 -

15 CHAIRPERSON: I think if I may say so

16 that's an excellent suggestion and I'm sure Mr Ngalwana

17 will, I take it, appreciate the importance of the point.

18 We'll see to it that your request is complied.

19 MR BIZOS SC: Thank you.

20 MR NGALWANA: Well, Chairperson, not

21 being one to shirk responsibility at the best and worst of

22 times I'm not sure why I should be or my team should be the

23 one that explains the depiction done by the witness as

24 regards what A and B and C represents.

25 CHAIRPERSON: That was already said by Mr

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1 Mahlangu on record, so you'll get it from the transcript.

2 All that Mr Bizos wants is a copy prepared which

3 incorporates what's been said already which is on the

4 record and the colours to which reference was made in the

5 course of the evidence, you know the red and the blue and

6 so on so that that is all available for us on a single

7 sheet. So it's not a question of explaining what the

8 witness said it's simply recording on a sheet what's

9 already before the Commission in the form of the evidence

10 that we've heard because when we reach the argument stage

11 we may not all remember where the red was and the blue was

12 and the green was.

13 MS PILLAY: Chair, I think the evidence

14 leaders will prepare such a document and distribute it

15 amongst the parties.

16 CHAIRPERSON: You're off the hook, Mr

17 Ngalwana, and we're grateful to Ms Pillay for releasing you

18 there from. Shall we carry on?

19 MR NGALWANA: Thank you Chair, thanks Ms

20 Pillay. Mr Magidiwana, can I get you to commit that

21 Nkaneng is at the top of the page of EEE8?

22 MR MAGIDIWANA: I don't know.

23 CHAIRPERSON: Come on, Mr Magidiwana, if

24 you look at EEE8 there are a whole lot of houses at the top

25 of the page, do you see them? A lot of houses. Is that

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1 right?

2 MR MAGIDIWANA: Yes, I can see the

3 houses.

4 CHAIRPERSON: And you can also see

5 immediately above the bigger kraal there are also some

6 houses.

7 MR MAGIDIWANA: I can see that.

8 CHAIRPERSON: Are they not part of

9 Nkaneng?

10 MR MAGIDIWANA: Ja, Nkaneng.

11 CHAIRPERSON: Well I'm glad we've sorted

12 that problem out. Carry on please Mr -

13 MR NGALWANA: Mr Magidiwana, I see you

14 have grave difficulty in answering that simple question.

15 Can you explain why?

16 CHAIRPERSON: Everyone has -

17 MR NGALWANA: No, I have to put that on

18 record.

19 CHAIRPERSON: Don't go there. Witnesses

20 of this kind often have difficulty in following plans and

21 photographs and so on, that's been my experience with over

22 50 years in the courts. That may be the explanation here

23 now, it may not be but it may be. I think let's move to

24 another -

25 MR NGALWANA: Can I just proceed with my

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1 cross-examination, Chair?

2 MR MPOFU: Chairperson can I just - sorry

3 Mr Ngalwana, Chairperson, just enquire if the witness is

4 okay, I think there's a problem.

5 MR NGALWANA: The point will still be

6 here Chair, it's not going anywhere.

7 CHAIRPERSON: - Mr Ngalwana that's not a

8 point that's worthy of you or the client for whom you

9 appear. The witness has had problems in the past and if

10 you want to get answers from him that you can use at the

11 end of the case, you don't want points to which the answer

12 was given the witness wasn't at his best at the time and

13 the answer should be discounted. It's, if I may so, also

14 not good advocacy. What was the answer to Mr Mpofo's

15 question?

16 MR MAGIDIWANA: Yes, there is a problem.

17 CHAIRPERSON: What's the problem?

18 MR MAGIDIWANA: The problem is that I'm

19 explaining the things just as they are so - I explain

20 things as they are and I don't know what he wants now and I

21 think now I'm no longer on the point, I'm completed

22 diverted from what I've been asked.

23 CHAIRPERSON: Well that's a matter we can

24 easily solve by ensuring that you get asked focus directed

25 questions and that you give focus directed answers to the

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1 questions you're asked. So would you please proceed with
 2 your cross-examination Mr Ngalwana?
 3 MR NGALWANA: Thank you, Chair. Mr
 4 Magidiwana, can you confirm that the units or the living
 5 area that we see at the top of that page is Nkaneng?
 6 CHAIRPERSON: You have already, when I
 7 asked you the question you confirmed that they were so I
 8 take it that confirmation stands.
 9 MR MAGIDIWANA: Nkaneng is where I'm
 10 looking at here. The one I see here.
 11 MR NGALWANA: Are you able to indicate on
 12 the slide, the photograph that you see of Nkaneng where
 13 about you lived, just pointing in a general direction of
 14 where you lived?
 15 MR MAGIDIWANA: Yes, I am able.
 16 MR NGALWANA: Please do.
 17 MR HANABE: He is pointing and indicating
 18 with his hand towards the right side of the picture yes at
 19 the bottom but on the right, at the top on the right.
 20 CHAIRPERSON: It looks like the right
 21 hand top of the photograph, somewhere in that vicinity. Is
 22 that what he's saying?
 23 MR MAGIDIWANA: Yes.
 24 MR NGALWANA: In your statement you
 25 indicated that you joined the first group that dashed in

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1 the direction of Nkaneng. Do you recall that evidence?
 2 MR MAGIDIWANA: Yes.
 3 MR NGALWANA: You also indicated in your
 4 evidence in chief that the purpose for your dashing in the
 5 direction of Nkaneng was to go home, do you remember that?
 6 MR MAGIDIWANA: Yes.
 7 MR NGALWANA: Now you must accept that
 8 when you move from point A and we by no means accept that
 9 you started at point A but that's a different point, when
 10 you move from what you depict as point A to point B and
 11 then to point C you are leaving your home where you say you
 12 lived behind you. Can you dispute that?
 13 CHAIRPERSON: I don't understand that
 14 question, what was behind there was a koppie, he was moving
 15 to the left, if he was going to go around the kraal as he
 16 said he was he would then have ended up facing the top
 17 right hand corner of the photograph and his hand wouldn't
 18 have been behind him at all. I don't understand the
 19 question.
 20 MR NGALWANA: Well I'm not there yet,
 21 Chair. I'm at the first movement when he moves from point
 22 A to point B and then he proceeds from point B to point
 23 whatever, that's E I think. You moved from point A towards
 24 the main path that would take you to Nkaneng, which was
 25 depicted in EEE8 in red but you headed in the direction of

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1 the lower path which is depicted by I think the colour
 2 black in EEE8.
 3 [12:51] CHAIRPERSON: The witness has now got his
 4 arms folded in front of him and he's got his head down on
 5 his - He has been in the witness box for a long time. I
 6 was proposing we adjourn now and resume at ten to 2.
 7 MR MPOFU: Chairperson, can we, since
 8 he's under cross-examination normally we shouldn't interact
 9 with him, can I get permission from Mr Ngalwana just to
 10 interact with him, not for the purposes of consulting but
 11 simply to try and comfort him?
 12 CHAIRPERSON: I take it you haven't got a
 13 problem with that, Mr Ngalwana.
 14 MR NGALWANA: Well, I'll leave that to be
 15 ruled upon by the Chair, I'm not going to make any -
 16 CHAIRPERSON: You abide with my ruling.
 17 Thank you. Mr Mpofo, I'm sure we can rely on you to behave
 18 yourself properly and appropriately. Under the
 19 circumstances your request is granted.
 20 MR MPOFU: Thank you Chairperson.
 21 [COMMISSION ADJOURNS COMMISSION RESUMES]
 22 CHAIRPERSON: The Commission resumes.
 23 I'm sorry that meeting I mentioned earlier took longer than
 24 we expected, so I apologise for the delay, but I see that
 25 during the delay the evidence leaders have presented to us

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1 copies of exhibit EEE8 with colour markings, for which
 2 we're grateful; it will help us a lot. Thank you very
 3 much. It could be EEE8.1. I see that A and B and whatever
 4 haven't been marked in yet, but that presumably can be done
 5 at the end of today. You're still under oath, Mr
 6 Magidiwana. Are you feeling a bit better now? You were
 7 looking a bit tired just before we adjourned. A bit better
 8 now?
 9 MZOLOLO MAGIDIWANA: Yes, I'm better now.
 10 CHAIRPERSON: Good. Mr Ngalwana, would
 11 you proceed with your cross-examination?
 12 CROSS-EXAMINATION BY MR NGALWANA (CONTD.):
 13 Thank you, Chair, members of the Commission. Chair, there
 14 was a second document which the evidence leaders say
 15 depicts the version of the witness, which should be placed
 16 before you but Ms Pillay has gone to make some corrections
 17 because apparently it didn't reflect accurately -
 18 CHAIRPERSON: I see. Well, when we get
 19 it we'll look at it, not before.
 20 MR NGALWANA: So for that reason I will
 21 pend my cross-examination on both documents because I need
 22 them to be read together. I'll move on to another point.
 23 CHAIRPERSON: Have you finished with what
 24 one can describe as the first approach, or will you
 25 continue -

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1 MR NGALWANA: No, Chair, and that is the
2 only approach I'm dealing with.

3 CHAIRPERSON: I see. Alright, okay, well
4 carry on with the other points, the next point you're going
5 to deal with.

6 MR NGALWANA: Mr Magidiwana, on the 16th
7 of August 2012, between what time and what time were you at
8 the koppie? From what time to what time were you there?

9 MR MAGIDIWANA: I said I was there in the
10 early morning and I left at the time the pastor was there,
11 talking, and Mathunjwa had already left and promised to
12 come back. I didn't have a watch with me.

13 MR NGALWANA: I understand that, but
14 would you say at the time you left when the reverend was
15 there, would you say that was during midday or before
16 midday or after midday?

17 MR MAGIDIWANA: No, then I don't know.

18 MR NGALWANA: It is correct, isn't it,
19 that Mr Mathunjwa's first address was around 1:30 on that
20 day? Is that correct?

21 MR MAGIDIWANA: I don't know. I didn't
22 have a watch.

23 MR NGALWANA: But it was during the day,
24 isn't it?

25 MR MAGIDIWANA: I don't know.

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1 MR NGALWANA: It was not in the early
2 morning and neither was it at night; it was just during the
3 day, daylight, isn't it? Please answer the question.

4 MR MAGIDIWANA: I said I don't know.

5 MR NGALWANA: You're saying you do not
6 know whether it was during the evening or not?

7 MR MAGIDIWANA: It was not in the
8 evening, neither was it in the early morning. It was not
9 very early in the morning.

10 MR NGALWANA: So then it was during mid-
11 morning, around 10?

12 MR MAGIDIWANA: I don't know what time it
13 was since I didn't have a watch with me on that day,
14 neither did I look at the time.

15 MR NGALWANA: Was it during the day?

16 MR MAGIDIWANA: Maybe it was during the
17 day.

18 MR NGALWANA: Then Mr Mathunjwa left and
19 came back later for his second address. I think it is
20 common cause that by that time it was after 2PM, maybe
21 around 2:30 or so. Would you dispute that?

22 MR MAGIDIWANA: I said I don't know
23 because I didn't have a watch. You are the one who knows
24 what time it was.

25 MR NGALWANA: At least we know that he

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1 would have left, or was preparing to leave at about quarter
2 to 4 that afternoon, as slide 193 depicts.

3 MR HANABE: Was it quarter to 3 or
4 quarter to 4?

5 MR NGALWANA: Quarter to 4. That's the
6 time he was leaving the koppie. So it is fair to say that
7 he didn't address you in the morning?

8 MR HANABE: He didn't address you in the
9 morning?

10 MR NGALWANA: On the second address it
11 was not in the morning.

12 MR MAGIDIWANA: Yes.

13 MR NGALWANA: And it is fair to say that
14 he didn't address you, the speech that he made didn't take
15 three hours either?

16 MR MAGIDIWANA: I don't know even that
17 one because I didn't have a watch. I was never observant
18 of the time as to how long he spoke.

19 MR NGALWANA: Very well. Reverend Seoka
20 in his evidence said that 16th was a hot day. You have no
21 way of disputing that, do you?

22 MR MAGIDIWANA: I did explain that in the
23 early morning it was cold and that during the midday or
24 daylight it gets hot and it changed then again and becomes
25 cold.

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1 MR NGALWANA: Yes, we are now talking
2 about the period during which Mr Mathunjwa is addressing
3 the crowd. That was during the warmer part of the day.

4 MR MAGIDIWANA: Yes.

5 MR NGALWANA: May I direct you –
6 Chairperson, may I hand up some more exhibits?

7 CHAIRPERSON: Yes, you can.

8 MR NGALWANA: Thank you, Chair. The
9 first page –

10 CHAIRPERSON: - single bundle of
11 documents, so we can give it a generic title as EEE9 and
12 then 1, 2, 3, 4, etcetera.

13 MR NGALWANA: Yes, Chairperson.
14 Chairperson, perhaps we should give it two distinct
15 numbering because the first page –

16 CHAIRPERSON: [Inaudible].

17 MR NGALWANA: Yes, and the rest would be
18 EEE10, I would imagine, and the last page, being page 9,
19 would also be a separate bundle maybe, EEE11. It will
20 become clearer during the cross-examination, Chair.

21 CHAIRPERSON: Photo 2461, which is page 9
22 of the bundle you've handed up, do you want that to be
23 exhibit –

24 MR NGALWANA: EEE11.

25 CHAIRPERSON: EEE11. Right.

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1 MR NGALWANA: Mr Magidiwana, page 1 of
 2 EEE9 is a summary of a weather report that the police
 3 obtained from the South African Weather Bureau. You will
 4 see that during the period that Mr Mathunjwa would have
 5 been there, which the police place generously between
 6 midday, which is 12, and 16:00, would have been rather
 7 warm. Do you see that? In fact, for purposes of the
 8 record let me just help you. If you look at the top column
 9 which is shaded brown, if I'm not colour blind, and you
 10 look at H12, run your finger down to the very last column
 11 at the bottom, you will see 19.9. Do you see that?
 12 MR MAGIDIWANA: I can see it, but there's
 13 nothing I will do about it, but I just see it.
 14 MR NGALWANA: And if you run your finger
 15 down from H13, which depicts 1 o'clock, and all the way
 16 down to where it corresponds with 16, which depicts the
 17 date, that would be the 16th of August. The temperature
 18 depicted there is 21.8°C. Do you see that?
 19 MR MAGIDIWANA: I can see it.
 20 MR NGALWANA: Then at 14:00 it was
 21 23.1°C. Do you see that?
 22 MR MAGIDIWANA: I can see it.
 23 MR NGALWANA: And at 3 o'clock and 4
 24 o'clock respectively it was 23.8° and 24.6°.
 25 MR MPOFU: Sorry, Chairperson, this is

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1 all very interesting, but can we be told if this, firstly
 2 this is evidence that's going to be led, whether it's
 3 forecasts, whether it's actuals, what is it?
 4 CHAIRPERSON: No, I think we can accept
 5 it's actuals, if you look at it carefully. They couldn't
 6 have forecast what the temperature would have been at 15:26
 7 in the afternoon, which they reflect here. So I think it's
 8 actuals. Presumably it's going to be evidence because if
 9 it's not evidence it's wasting our time.
 10 MR MPOFU: Okay.
 11 CHAIRPERSON: Now if necessary, are you
 12 going to call evidence to prove, witness to prove it?
 13 MR NGALWANA: Absolutely, Chair.
 14 CHAIRPERSON: Unless it's admitted.
 15 MR NGALWANA: Absolutely, Chair.
 16 CHAIRPERSON: Alright, so that answers
 17 your two questions.
 18 MR MPOFU: Thanks, Chairperson.
 19 MR NGALWANA: The maximum temperature on
 20 that day is depicted with, at the, if you look at 1, 2, 3,
 21 4 columns from the right in the colour that resembles the
 22 colour of your blanket on those days, something on black-
 23 red or maroon, you will see that the maximum is depicted as
 24 having been almost 25°, as 24.9°. Do you see that?
 25 MR MAGIDIWANA: I can see it.

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1 MR NGALWANA: You cannot dispute, can
 2 you, that if when evidence is led that those temperatures
 3 are actual temperatures on that day, the temperatures that
 4 I've just referred you to, you cannot say that during those
 5 hours it was cold at Marikana on the mountain. Can you?
 6 CHAIRPERSON: I don't think, with
 7 respect, that's an appropriate question. I mean it's one
 8 thing to be faced with a statement like this from the
 9 weather bureau. What is more to the point is at 6:45 in
 10 the morning, which is about the time he went to the koppie,
 11 it was a minimum temperature of 9.9. So what time did you
 12 go to the koppie in the morning? About 6:30, 6 o'clock?
 13 MR MAGIDIWANA: Around 6, but I went
 14 there in the early morning.
 15 CHAIRPERSON: You see, so at that time
 16 according to the weather bureau it was about 9, just under
 17 10°C. So I take it, it was a bit chilly when you went in
 18 the early morning to the koppie.
 19 MR MAGIDIWANA: Yes.
 20 CHAIRPERSON: That's the minimum
 21 temperature, and then it got hotter, as it would have done,
 22 and what's suggested here by the weather bureau is at round
 23 about, just before half past 3 in the afternoon it was at
 24 its hottest, and they say it was just under 25°. I take it
 25 that, do you know what temperatures are? Is that something

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1 that you have some understanding of?
 2 MR MAGIDIWANA: I have no knowledge about
 3 the weather report, but though I have no knowledge about
 4 the weather report, but in the early morning it was cold
 5 and during the day it became hot, and in the later that day
 6 it became cold again. It quickly became cold.
 7 MR NGALWANA: When you went home for
 8 lunch, it was hot?
 9 MR MAGIDIWANA: Yes, it was hot.
 10 MR MPOFU: Chairperson, it might be an
 11 appropriate time; I had promised to give an objective time
 12 of when the bishop is said to have been there, in the
 13 context of – I was going to do it in re-examination, but at
 14 1650, page 1650 of the SAPS documents, there is an entry of
 15 what is called the situation report which says that, "P1
 16 [whoever that is] reported that there was a white Q7 I
 17 think, standing at the people and the driver is addressing
 18 the people, registration number of the vehicle is CDX826L,"
 19 which is the bishop's car, and it's 13:40. 13:40, 13h40.
 20 [14:41] CHAIRPERSON: We have not been handed the
 21 other document, which will be EEE8.2, but anyway, carry on
 22 with the point you're busy with now and then when you're
 23 finished you can get back to these two exhibits, EEE8.1 and
 24 EEE8.2. So –
 25 MS PILLAY: Chair, I think the document

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1 handed out now would be EEE8.3. 8.1 is the picture without
 2 any marking; 8.2 is the picture with the different coloured
 3 markings, and 8.3 is the picture with the witness's version
 4 of the movement of the strikers.

5 CHAIRPERSON: I will alter the marking
 6 then on EEE8 to EEE8.1, and then the other two will be as
 7 you've described them. Thank you. So the position is that
 8 you didn't have a watch; you can't give us exact times, but
 9 you can by reference to other events help us to ascertain
 10 when you were at the scene. So you say you went there
 11 early in the morning, about 6 o'clock, half past 6. You
 12 left when the bishop was speaking. Is that right?

13 MR MAGIDIWANA: Mmm.

14 CHAIRPERSON: And we were told the bishop
 15 was there, arrived there at about 20 to 1 – sorry, 20 to 2,
 16 20 to 2, so you must have left shortly after that.

17 MR MAGIDIWANA: Yes, after his arrival I
 18 left.

19 CHAIRPERSON: And you came back shortly
 20 before Mr Mathunjwa's second address.

21 MR MAGIDIWANA: Yes, Sir.

22 CHAIRPERSON: And according to the
 23 police, Mr Mathunjwa returned to the koppie – this is slide
 24 185 – at about 20 to 3, at 14:40, and seems to, appears to
 25 have left round about 15:43, just before quarter to 4.

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1 That's slide 193 which depicts his vehicle leaving the
 2 area. So now that we've got that, you were still busy with
 3 the weather report, Mr Ngalwana?

4 MR NGALWANA: I want to get away –

5 CHAIRPERSON: EEE9, have you finished
 6 with this?

7 MR NGALWANA: I'm getting away, Chair. I
 8 just want to deal with the 15th. Similarly on the 15th of
 9 August the maximum temperature was 28.3°C and from the time
 10 of 12 midday until about 16:00 the temperature was in the
 11 twenties, from 23° to about 26.8°.

12 MR HANABE: You mean on the 15th?

13 MR NGALWANA: On the 15th.

14 MR HANABE: 15th?

15 MR NGALWANA: Yes.

16 MR HANABE: Did you say the maximum was
 17 28.3 and from 12 o'clock until 4 o'clock it was 26, is it
 18 23 or 26.8?

19 CHAIRPERSON: He said it was in the
 20 twenties. He said it was in the twenties from 12 o'clock.
 21 In fact, the exhibit indicates that from 11 o'clock it was
 22 already 21, so it was in the twenties from 11 o'clock in
 23 the morning through till some time after 6 o'clock, because
 24 at 6 o'clock in the evening it was 24.5, but by 7 o'clock
 25 it was 18.7. So from round about 11 in the morning till

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1 some time between 6 and 7 in the evening the temperature
 2 was in the twenties, and the maximum was 28.3 and that was
 3 just before half past 3 in the afternoon, 15:24. Is that
 4 correct, Mr Ngalwana?

5 MR NGALWANA: That is correct, Chair.
 6 The police evidence will be that, as I have intimated
 7 previously, you were at the koppie on the 15th of August
 8 during that time, in other words at least between 11 in the
 9 morning and 17:00. You may have been there for a longer
 10 period, but the period that you were certainly there would
 11 have included from between 11 and 17:00, is what the police
 12 will say. I know you've already denied having been at the
 13 koppie, but do you have any comment to what I've just put
 14 to you? On the 15th.

15 MR MAGIDIWANA: Yes, I would like to
 16 comment.

17 MR NGALWANA: Go ahead.

18 MR MAGIDIWANA: I'm still saying it that
 19 I don't recall ever being there on the 15th.

20 MR NGALWANA: May I ask you to turn to
 21 page 2 of exhibit EEE9?

22 CHAIRPERSON: I've marked that exhibit
 23 EEE10.1.

24 MR NGALWANA: Sorry, yes. Thank you,
 25 Chair. Exhibit EEE10.1. The police will lead evidence

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1 that that photograph shows that you were part of the group
 2 which is shown on the photograph, and that this was an
 3 armed group, and dressed in fairly layered clothing, in
 4 other words with blankets and layers of clothing, and that
 5 the golden arrow that is pointing down, is pointing at you.
 6 Would you care to comment on the clothing aspect, in other
 7 words that this group, which included you, was dressed in
 8 layers of clothing and had blankets, some of them had
 9 blankets around them?

10 MR MAGIDIWANA: Not everyone here is
 11 dressed in so much layer of clothing.

12 MR NGALWANA: But the majority of them
 13 are.

14 MR MAGIDIWANA: Then a person dressed in
 15 a way whichever he feels is right for him, and there is a
 16 saying that goes, "There is no elephant that finds its
 17 trunk too heavy for itself."

18 MR NGALWANA: Well, the next page is a
 19 more close-up version of you in that group, and the
 20 police's version, or evidence will be that this photograph
 21 was taken during the time when it was hot on the 15th of
 22 August. The next photograph depicts, it's got page 4 at
 23 the bottom, is again taken on the same day during the same
 24 time.

25 CHAIRPERSON: That's exhibit EEE10.3.

<p style="text-align: right;">Page 6308</p> <p>1 MR NGALWANA: Yes, Chairperson. Thank 2 you. You can see a wider picture showing most of the 3 people in that group covered with blankets, and the 4 evidence of the police will be it was hot. The next page, 5 which will be EEE10.4, will show people who are not part of 6 that front group, who was sitting on the mountain and are 7 fairly scantily dressed in comparison to the front group, 8 which is dressed in layers of clothing and covered with 9 blankets. The evidence will be that this photograph would 10 have been taken at a similar time as the time when the 11 photograph showing the front group with layers of clothing 12 and blankets was taken. Would you care to comment on the 13 difference between on the one hand the front group which is 14 shown in the pictures dressed in thick layers of clothing 15 and blankets, on the one hand, and the other people who are 16 sitting on the mountain, not being part of the front group, 17 who are not dressed as warmly as the main group? 18 MR MAGIDIWANA: What then is happening 19 with these people who have blankets there? 20 MR NGALWANA: You can see that the 21 majority of the people who are sitting on that koppie are 22 not warmly dressed, can you not? 23 MR MAGIDIWANA: If there at home he 24 doesn't have anything to wear, then is that my baby? 25 MR NGALWANA: Is that your explanation</p>	<p style="text-align: right;">Page 6310</p> <p>1 MR NGALWANA: Yes, I accept that some of 2 them have sticks, but most of them do not. Can you see? 3 MR HANABE: You say most of them are not 4 carrying sticks? 5 MR MAGIDIWANA: Which ones are not 6 carrying sticks? 7 MR NGALWANA: I'm sure you can see them. 8 The majority of them are not carrying sticks on that 9 photograph. 10 MR MAGIDIWANA: Because you see these 11 ones that are visible here, what if then their sticks are 12 then beyond them, what are you going to say in that case? 13 MR NGALWANA: Yes, I am talking about 14 what we see in the photograph, Mr Magidiwana. 15 CHAIRPERSON: He's given you his answer. 16 He's saying look here, it's true you can't see sticks 17 there, but you're therefore suggesting they were unarmed, 18 but they may have had arms behind them, so he says how 19 could you ask me to say they're not armed. So it's not a 20 direct answer, but it's sufficiently clear, I think, what 21 he's trying to say. 22 MR NGALWANA: Can you show us where these 23 arms that you are talking about are on these people? 24 CHAIRPERSON: He's not saying there are 25 arms. He says there may be arms. He says there may be</p>
<p style="text-align: right;">Page 6309</p> <p>1 for why they would be dressed, shall I put it, more 2 scantily than the group of which you were part? 3 MR MAGIDIWANA: Yes, because when I look 4 here some other people are dressed warmly and others are 5 not. I think that those who are not dressing warmly, they 6 don't have those warmer clothes even where they are coming 7 from. 8 MR NGALWANA: I'll then take you to, it 9 will be page 7 at the bottom, I don't know, it will be 10 EEE10.5 or 6. You will see the front group which is 11 carrying what appears to be arms, and the golden arrow 12 pointing at you as being part of that group. Can you see 13 that? 14 MR MAGIDIWANA: Yes, I can see that. 15 MR NGALWANA: Before I finish with that 16 photograph, if I can take you back to the previous 17 photograph of people sitting idly on the koppie, page 5 of 18 EEE, 10.4 photograph, it's got 5 at the bottom right-hand 19 corner. You will see that they are virtually unarmed. Can 20 you see that? There are a few of them who have some, what 21 looks like kieres, but the vast majority of them appear to 22 be unarmed. Can you see that? 23 MR MAGIDIWANA: What I see here in this 24 picture, there are people that are depicted here as that 25 they are having sticks.</p>	<p style="text-align: right;">Page 6311</p> <p>1 arms behind them. 2 [15:01] Look at that clump of people in the middle there, 3 one of them whom has a green and looks like a white jersey, 4 the whole batch of them there, how do you know they haven't 5 got a whole batch of sticks behind them? That's what he's 6 saying. He doesn't say they have. He says, how do you 7 know they haven't? That's your point. Is that right? 8 MR MAGIDIWANA: Yes. 9 MR NGALWANA: The evidence of the police 10 will be that these people are not armed. Would you be in a 11 position to dispute that, since you're saying you were not 12 on the koppie on the 15th? 13 MR MAGIDIWANA: I say I don't recall ever 14 being on the koppie on the 15th. 15 MR NGALWANA: Yes, you've said that. 16 That's not the question. 17 MR MAGIDIWANA: I can say that in the way 18 in which your line of questioning shows that you are trying 19 to correct something that is not correct. 20 MR HANABE: He has just said, 21 Commissioner, that "Your line of questioning shows that you 22 are trying to correct something that is not correct." 23 MR NGALWANA: Mr Magidiwana, if on your 24 version you were not on the koppie on the 15th of August 25 2012, you cannot possibly dispute whether or not the people</p>

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1 who were there on the koppie on the 15th were armed or not,
 2 can you? I'm talking about those who are sitting on the
 3 koppie.
 4 MR MAGIDIWANA: I won't dispute that, as
 5 I also asked you a question as how do you know if those
 6 people didn't put their arms behind them?
 7 MR NGALWANA: That will be evidence that
 8 the police will lead.
 9 CHAIRPERSON: In effect he's saying,
 10 you're asking me to draw inferences from photographs. I
 11 say I wasn't there, I don't think I can draw the inference
 12 from photographs. That's where it ends. I don't know
 13 that, with respect, we're going to get many answers on this
 14 line of questioning which are going to assist us, but I
 15 won't stop you, but I've just indicated how I feel.
 16 MR NGALWANA: Thank you, Chair. You will
 17 see at photograph EEE10.6, which has 7 at the bottom, I
 18 think I've just referred to that, and the next page, which
 19 will be 10, well, that's 10.6, then followed by 10.7, page
 20 8 at the bottom. That depicts you on the koppie as part of
 21 the first group on the 15th of August 2012. The photograph
 22 at 10.7 shows you clearly that you were carrying a sharp
 23 weapon, together with the kerie that you said you carried
 24 only on the 16th of August.
 25 MR HANABE: You said something about the

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1 16th of August, Senior Counsel?
 2 MR NGALWANA: The knobkierie that you
 3 said you were carrying on the 16th of August. Would you
 4 care to comment?
 5 MR MAGIDIWANA: I can see this thing.
 6 MR NGALWANA: Is that your complete
 7 answer, or comment?
 8 MR MAGIDIWANA: Yes.
 9 MR NGALWANA: If you have regard to the
 10 last page of that swath of paper, what we've termed EEE11,
 11 the police will give evidence that places you with the -
 12 shall we call it the Noki group - next to the railway line,
 13 which was addressed by General Mpmembe and the golden arrow
 14 is pointing to you. Would you care to comment?
 15 MR MAGIDIWANA: That is not true.
 16 MR NGALWANA: Do you deny that that is
 17 you that is being shown by that golden arrow?
 18 MR MAGIDIWANA: This person that you have
 19 shown me here is that person that you showed me on the 14th,
 20 and this is not me, and this person is wearing a tracksuit
 21 that is almost orange, or that seems to be orange.
 22 MR NGALWANA: Very well. Chairperson,
 23 I'm moving to the next aspect now. Are we taking tea at
 24 3:15 or now?
 25 CHAIRPERSON: I suppose we could take tea

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1 at 3:15 because we started later, but when it's convenient
 2 from now one when you've reached a stage, then you can let
 3 us know and we can consider taking the tea adjournment
 4 then.
 5 MR MPOFU: Sorry, Chairperson, before my
 6 learned friend moves to another topic, we still haven't
 7 received the pathways that we asked for in the morning, of
 8 EEE6 and 7.
 9 CHAIRPERSON: That's a good point to
 10 raise when we take the tea adjournment so he can try to get
 11 them during the tea adjournment; no good raising it now,
 12 but let him carry on.
 13 MS PILLAY: Chair, I should just indicate
 14 that the SAPS team have given us certain pathways and we're
 15 just double-checking whether they're correct before we put
 16 them on record.
 17 CHAIRPERSON: Thank you, Ms Pillay. I
 18 take it Mr Mpofu will enjoy his tea more because of that
 19 information.
 20 MR NGALWANA: EEE8.3 -
 21 MR HANABE: The witness is saying
 22 something. No, he says it's fine, you can proceed. He was
 23 saying something.
 24 MR NGALWANA: I take you to EEE8.3. In
 25 this version you say when the barbed wire was deployed, or

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1 as I understand it, when the fourth Nyala deployed the
 2 barbed wire, you moved from point A to point B. Is that
 3 correct?
 4 MR HANABE: Okay, he's pointing at point
 5 B in this picture, saying that here at this point, it was
 6 then that they were busy speaking.
 7 MR NGALWANA: Are you saying when the
 8 fourth Nyala deployed barbed wire in the area of that
 9 lamppost, you started moving or dashing, to use your word,
 10 from point A to point B?
 11 MR MAGIDIWANA: After we had finished
 12 speaking.
 13 MR NGALWANA: What were the police doing
 14 at the time when you dashed from point A to point B?
 15 MR MAGIDIWANA: They were where they were
 16 initially, sitting where they were sitting initially.
 17 MR NGALWANA: So what triggered your
 18 dashing from point A to point B if the police were just
 19 sitting there?
 20 MR MAGIDIWANA: You want me to explain to
 21 you?
 22 MR NGALWANA: Yes.
 23 MR MAGIDIWANA: They stood where they
 24 were standing, but the others were standing next to the
 25 Nyalas.

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1 MR NGALWANA: Where exactly?

2 MR MAGIDIWANA: Those that were about to
3 deploy the barbed wire.

4 MR NGALWANA: Mr Magidiwana, there were
5 six Nyalas that were stationed in order to deploy the
6 barbed wire.

7 MR MAGIDIWANA: I don't know how many
8 they were.

9 MR NGALWANA: Well, I'm telling you. So
10 I'm trying to ascertain –

11 MR MAGIDIWANA: But they deployed the
12 barbed wire.

13 MR NGALWANA: I'm trying to ascertain
14 from you when you say the police were standing there when
15 you moved from point A to point B, where is "there" on
16 EEE8.3?

17 MR MAGIDIWANA: Then when I made this
18 drawing I was trying to make it easy for you so that now
19 you cannot give me a tough time, and now you are giving me
20 a tough time.

21 MR NGALWANA: Can you please answer my
22 question?

23 MR MAGIDIWANA: The place we were, or
24 what we were heading for is clear; it is that path that
25 leads to Nkaneng.

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1 MR NGALWANA: That doesn't answer my
2 question.

3 MR MAGIDIWANA: "Jô."

4 MR NGALWANA: You said when you dashed
5 from point A to point B, the police were standing there.
6 What I'm asking you is, where were they standing on this
7 photograph, EEE8.3?

8 MR MAGIDIWANA: I am saying, Sir, that
9 you are giving me a hard time because I, tough time,
10 because I'm trying to, I tried to make it easy for you so
11 that you would understand as to how we moved from the one
12 point to the other point.

13 MR NGALWANA: Chairperson, I see we are
14 close to teatime, in fact past by two minutes. I just want
15 to rephrase this question in Xhosa and give the witness an
16 opportunity to mull over it over tea and perhaps come with
17 a more relevant answer. You said in this diagram, when you
18 moved from letter A to letter B, the police were standing
19 there. When I asked you as to what the police were doing
20 when you moved from A to B -

21 MR HANABE: What Mr Ngalwana said was,
22 "Show us then that where this police that you said were
23 standing. The point was, where were they standing," and
24 the answer is, "The police, is it not that they were
25 standing next to the Nyalas that were deploying the barbed

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1 wire, the other police officers?"

2 MR NGALWANA: Please Sir, think about
3 this and then give us an answer after the teatime. Which
4 Nyalas that had barbed wire trailers that you say the
5 police were standing next to? Where were they like in this
6 picture that we have in front of us? If you want, you can
7 answer us now or you can answer us after tea break. Do you
8 choose to answer us after tea break?

9 CHAIRPERSON: Well, think about the
10 question over the tea break and I'll ask counsel to put the
11 question to you again after we've had tea, just in case
12 you've forgotten the exact question, and then we'll get
13 your answer. We can now take the tea adjournment.

14 [COMMISSION ADJOURNS COMMISSION RESUMES]

15 [15:48] CHAIRPERSON: I'm sorry about the delay
16 in resuming; there were matters that we had to attend to in
17 chambers. Mr Magidiwana, you're still under oath.

18 MZOXOLO MAGIDIWANA: s.u.o.

19 CHAIRPERSON: Mr Ngalwana, would you like
20 to repeat the question you asked him before the adjournment
21 and let's see whether he thought of the answer in the
22 meanwhile?

23 MR NGALWANA: May I give him a further
24 couple of seconds to consider, Chair, while Mr Mathibedi
25 makes a statement on behalf of the team and the police?

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1 CHAIRPERSON: Yes, certainly.

2 MR MATHIBEDI SC: Thanks, Mr Chairman.

3 On behalf of the South African Police Service, SAPS, I
4 issue the following statement. On the 3rd of March 2013 M-
5 Net broadcast the programme Carte Blanche in which persons
6 interviewed made allegations of arrest, torture and
7 intimidation against members of the South African Police.
8 Another interview expresses the view that the alleged
9 conduct of SAPS may affect the willingness of witnesses to
10 testify before the Commission. SAPS is concerned that the
11 content and timing of the broadcast creates the wrong
12 impression that SAPS is or may be impeding the work of the
13 Commission. Needless to say, this may affect how the
14 public perceives the role of SAPS at the Commission, to the
15 prejudice of SAPS. We place on record that no arrest
16 relating to the events in Marikana have occurred since
17 November 2012. SAPS is fully supportive of the work of the
18 Commission and has offered its full cooperation to the
19 Commission. The police denies allegations of torture and
20 intimidation made against them. Any arrest that has
21 occurred so far was done within the confines of the law.
22 Thanks, Mr Chairman.

23 CHAIRPERSON: Thank you. That assurance
24 is noted. Are you ready now to proceed with cross-
25 examination?

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1 CROSS-EXAMINATION BY MR NGALWANA (CONTD.):
 2 Yes, Chairperson. Thank you. Before tea break, Mr
 3 Magidiwana, I asked you a question as you said that when
 4 you moved from A to B the police were standing there. I
 5 then asked you to show me in the picture as to where
 6 exactly the police officers were standing.
 7 MR MAGIDIWANA: No Sir, what I will tell
 8 you is before the police officers deployed the barbed wire,
 9 I don't know how many Nyalas were there, but this in the
 10 picture, where I indicated in the picture that the barbed
 11 wire was pulled in that direction, that's where the Nyalas
 12 were, they were moving, the ones in fact that were
 13 deploying the barbed wire.
 14 MR NGALWANA: Can you have regard at
 15 L200? Is that dotted yellow line indicating where the
 16 police were standing according to you?
 17 MR MAGIDIWANA: Yes, the police Nyalas
 18 were in fact parked, or stationary in this fashion that is
 19 depicted in this picture.
 20 MR NGALWANA: Well, that is the second
 21 attempt to go, as you say, to Nkaneng. Correct? Could you
 22 answer my question, please?
 23 MR MAGIDIWANA: Yes.
 24 MR NGALWANA: I am talking about the
 25 first incident. Can I ask you to turn to slide 197 of that

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1 same bundle? Is that where the police were standing on
 2 where the dotted line is, when you moved from point A to
 3 point B?
 4 CHAIRPERSON: I'm sorry, I don't
 5 understand the question. It's quite a long dotted line
 6 from the Nyala in the top right-hand corner through to the
 7 end of the, the tip of the golden arrow. Now what is meant
 8 by saying where the police were standing on the dotted
 9 line? I mean that's not an accurate question, surely.
 10 MR NGALWANA: At the time you moved from
 11 point A to point B, where did the police line end of police
 12 Nyalas, if you have regard to slide 197?
 13 MR MAGIDIWANA: The police were standing
 14 at the place that I had mentioned, but we didn't go
 15 towards, or dashed into their line, but we were on our way
 16 to Nkaneng, walking next to the road.
 17 MR NGALWANA: On slide 197, are you able
 18 to indicate where exactly the police were standing, Mr
 19 Magidiwana?
 20 MR MAGIDIWANA: There is that Nyala that
 21 is behind the pole. There were police officers who were
 22 standing beyond that Nyala. We didn't go to that spot. In
 23 fact, we walked towards the path where you see there are
 24 people. We joined then the other one that joins that one
 25 that is from Marikana to the informal settlement.

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1 MR NGALWANA: May I ask for the exhibit
 2 EEE8.1 to be shown so that he can indicate by colouring
 3 where he was talking about? The photograph that shows red,
 4 yellow, black and blue and green. Is it 8.2 or 8.1? 8.2,
 5 that's the one. Can you indicate, referring to the colours
 6 indicating each of those paths, which paths you are talking
 7 about that you sought to take, Mr Magidiwana, towards
 8 Nkaneng?
 9 MR MAGIDIWANA: I did that. Did you not
 10 believe in what I did?
 11 MR NGALWANA: You have EEE8.2 in front of
 12 you, correct? Correct? Is it correct that you have
 13 exhibit EEE8.2 in front of you, Mr Magidiwana? Can you
 14 explain then with reference to -
 15 CHAIRPERSON: It doesn't look as if he's
 16 got the photograph, so it's pointless asking him the
 17 question until he has the photograph.
 18 MR HANABE: We only have, Commissioner,
 19 EEE8.1 and EEE8.3. We don't have 8.2.
 20 CHAIRPERSON: That sounds like a barrier
 21 that can't be traversed before the question based on 8.2 is
 22 asked.
 23 MR NGALWANA: We're endeavouring to
 24 remedy that, Chairperson. Referring to the colours that
 25 depict each of the pathways that are indicated on that

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1 photograph, can you indicate where you moved?
 2 MR MAGIDIWANA: Yes.
 3 MR NGALWANA: Please do. Can you please
 4 speak louder and into the microphone so that all of us can
 5 hear you?
 6 CHAIRPERSON: He's busy drawing something
 7 on the photograph.
 8 MR HANABE: Commissioner, he has
 9 explained but it is in line with 8.3 because he has made
 10 the same drawing in 8.2, which will require me for it to
 11 make sense, to be able to explain individually, yes
 12 Commissioner. Should I come -
 13 CHAIRPERSON: - us here and then, I
 14 suppose you'd better and then explain to Mr Ngalwana and Mr
 15 Mpofo and the evidence leaders.
 16 MR HANABE: Yes, Commissioner.
 17 CHAIRPERSON: Alright, carry on.
 18 MR HANABE: Should I go on and explain
 19 now, Commissioner? Okay. He's explaining here like it's
 20 shown here in this EEE8.3 is that they moved like he has
 21 marked here, just as he did in EEE8.3 that they moved from
 22 point A to point B, and then he says then they moved from
 23 there to E, and so when they moved towards where WC is
 24 written in EEE8.3, it was then that they were sprayed on
 25 with water. So they moved to the left side. So when they

1 moved again towards the direction of N4, it was then that
2 for the second time they were sprayed on with water. From
3 there they ran around the kraal towards the direction of F,
4 and then the other side, it was then that the Nyalas that
5 were on the right-hand side and the two Nyalas that were
6 then closing that gap, there were two of them, and then he
7 says that that is where now then they fell in front of
8 those Nyalas. That's the explanation that he just gave to
9 me.

10 MR NGALWANA: Chairperson, I'm going to
11 move on because the witness hasn't explained to us where
12 the police are standing as he's moving from point A to
13 point B. It appears this is an insurmountable barrier for
14 him. I interpret it as his refusal to tell us exactly
15 where the police are because I've asked this question on
16 numerous occasions.

17 CHAIRPERSON: Perhaps his counsel can
18 deal with it in re-examination if it's considered to be
19 important.

20 MR NGALWANA: I take it that when you
21 moved from A to B on EEE8.3, and as you say that the police
22 were standing "there" - you don't describe where they were
23 standing - there were no police Nyalas on, or no police
24 blocking the way in the path that is indicated with the
25 black line on EEE8.2. Is that correct?

1 MR HANABE: You said the black line in
2 EEE8.2? Okay, thank you, Sir.

3 MR MAGIDIWANA: The things that were
4 there were the Nyalas which were about to deploy the barbed
5 wire.

6 MR NGALWANA: On the path depicted with
7 the colour black? On EEE8.2, not EEE8.3.

8 MR MAGIDIWANA: Oh. Yes, there was no
9 Nyala there. It was the path on which we were walking.

10 [16:08] MR NGALWANA: Are you saying you were
11 walking on that path from A to B?

12 MR MAGIDIWANA: Yes.

13 MR NGALWANA: But if you look at EEE8.3,
14 where you've drawn your path is not on that path, is it?

15 MR MPOFU: Sorry, Chairperson -

16 MR NGALWANA: In fact, it deviates away -

17 MR MPOFU: I'm sorry. Is it being
18 suggested that these hundreds of people were walking in one
19 line? You know, really.

20 MR NGALWANA: Chairperson, the witness
21 was requested to indicate which path his group followed.
22 He drew a line to show where the group was going, or the
23 path it was following. It is on that, that I base the
24 question -

25 CHAIRPERSON: Yes, I don't think there's

1 any substance in the objection. In EEE8.2 there is a black
2 line along a path which we see on the bottom left-hand
3 corner of EEE8.3, and the blue line, which depicts the path
4 followed by the witness and the people with him, according
5 to him, which runs from A to B to E, at no point touches
6 the black line path which is on EEE8.2. That's the point.

7 MR NGALWANA: So when you say, Mr
8 Magidiwana, that you were walking or dashing along the path
9 on EEE8.2 which is depicted by the black line, that is not
10 correct because your own version on EEE8.3, you said you
11 were moving not on that path but alongside it and then you
12 deviated away from it.

13 MR MAGIDIWANA: But also according to, or
14 if you observe you can see this narrow path in between this
15 road. We were not then going to queue up on that road.

16 MR NGALWANA: I'm not talking about the
17 smaller path. You've just testified that you were
18 following the black line on EEE8.2, and I'm saying your
19 earlier version was that you were not on that path; you
20 depicted in EEE8.3 that you were walking alongside it from
21 A to B and then you deviated away from it from B to E. Let
22 me make it simple. You must accept that you were not on
23 the black line when you dashed from point A to B to E.

24 That is correct, isn't it?

25 MR MAGIDIWANA: Sir, I repeat again, I'm

1 telling you, I said to you, I said we were from the veld at
2 the place where the cows are grazing and we walk to the
3 smaller path which leads to the main one that is from
4 Marikana.

5 MR NGALWANA: At the time you dashed from
6 point A to point B there were no police blocking the line
7 that is depicted in blue and red, was there?

8 MR MAGIDIWANA: The police closed that
9 road upon seeing that we were going to join that path on
10 which we had intended to walk, but then it was at that
11 stage that they sprayed on water and we then ran away.

12 MR NGALWANA: Why didn't you continue on
13 the path, join the path that is depicted by - let me phrase
14 it this way. It was possible, was it not, for your group
15 to follow the path depicted by black line and then further
16 on go up to join the path depicted in blue, and then follow
17 the path depicted in green, to go towards Marikana, then
18 turn - sorry, towards Nkaneng, and then turn right on that
19 car path on the other side of the big kraal, was it not?

20 MR MAGIDIWANA: Which is the road where
21 cars are moving there?

22 MR NGALWANA: It was possible, you see
23 the big kraal?

24 MR MAGIDIWANA: I can see it.

25 MR NGALWANA: There is a road that runs

1 on the other side immediately, or the other side of that
 2 kraal that joins the main road the top. Can you indicate
 3 by colour, please, on the screen, perhaps the green?
 4 MR MAGIDIWANA: All that you are
 5 referring to as a road is in fact a wire fence which is
 6 used to block the cattle from going to the informal
 7 settlement.
 8 MR NGALWANA: There is a path that runs
 9 alongside there, is there not?
 10 MR MAGIDIWANA: From the spot at the
 11 place where you pointed and started there, towards to the
 12 left [as he's indicating with the hand] that is, there is a
 13 wire fence there and what really forced us to run to that
 14 place where we were shot is when we knew that there was in
 15 fact there a wire fence and there was nowhere else we could
 16 run to.
 17 MR NGALWANA: We have a photograph that
 18 in fact shows a car on that road. If you are ready to play
 19 it, could you please show that photograph, Technician? No,
 20 I'm told one of our officers who should be there is not
 21 there and he's the one who has that picture.
 22 CHAIRPERSON: Mr Ngalwana, it looks as if
 23 you're not going to finish today anyway.
 24 MR NGALWANA: No, Chair, not by a long
 25 shot.

1 or less you're likely to finish?
 2 MR NGALWANA: I'd like to finish
 3 tomorrow, Chair. That's the indication I can give, but I'm
 4 not hopeful.
 5 CHAIRPERSON: I see. So what you're
 6 telling me is that there's a, what one calls a distinct
 7 possibility that you'll still – because we're not sitting
 8 Thursday and Friday – that you'll still be busy on Monday,
 9 and so you should finish some time on Monday, one hopes.
 10 MR NGALWANA: That is a distinct
 11 possibility, Chair.
 12 CHAIRPERSON: Yes, I see. Alright. No,
 13 thank you very much for the information; it's helpful. At
 14 this point shall we take the adjournment till tomorrow
 15 morning, half past 9? The Commission will adjourn until
 16 half past 9 tomorrow morning.
 17 [COMMISSION ADJOURNED]
 18 .
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1 CHAIRPERSON: I only intended to be
 2 sitting until quarter past 4 to make up for some of the
 3 time we lost earlier, and then I thought maybe we could sit
 4 till half past 4 to make up even more of the time, but if
 5 in fact you're not ready with the point that you want to
 6 put to the witness now, then maybe we must hold it over
 7 till tomorrow morning. You say you're not finished by a
 8 long shot.
 9 MR NGALWANA: Not by a long shot, Chair.
 10 CHAIRPERSON: Can you give us an
 11 indication – I know it's very difficult because it depends
 12 on all sorts of unforeseeable things, but can you give us
 13 an indication more or less when you think you are likely to
 14 finish?
 15 MR NGALWANA: When I started I was hoping
 16 that we would be done in a day and a half, but here we are.
 17 The difficulty is the manner in which the witness answers
 18 the questions, Chair, with respect.
 19 CHAIRPERSON: Well, he would say maybe
 20 the difficulty is the way you put the questions, but
 21 anyway, we won't get into that. What I'm asking you, look,
 22 this is, to get people to explain where they moved on the
 23 terrain and so on is not easy and get a person in turn to
 24 explain where he was is also not easy. So let's not be
 25 critical of either you or him, but when do you think more

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