

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 63 13 MARCH 2013 PAGES 6635 TO 6752

HELD AT

CIVIC CENTRE, RUSTENBURG, NORTH WEST PROVINCE



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1 [PROCEEDINGS ON 13 MARCH 2013]
 2 [09:36] CHAIRPERSON: The Commission resumes. Mr
 3 Magidiwana, you're still under oath.
 4 MZOXOLO MAGIDIWANA: Yes.
 5 CHAIRPERSON: Before you re-examine, Mr
 6 Mpofo, there are a few questions that members of the
 7 Commission would like to put to the witness.
 8 COMMISSIONER HEMRAJ: Mr Magidiwana, when
 9 you were referring to the fence that you said prevented
 10 entry to the settlement, is it your evidence that there are
 11 no gaps in the fence and no pedestrian gates through which
 12 you could have entered?
 13 MR MAGIDIWANA: No, there were none.
 14 COMMISSIONER HEMRAJ: And yesterday you
 15 said that you could have gone through the fence if you were
 16 able to hold the separate strands of wire apart.
 17 MR MAGIDIWANA: Yes.
 18 MR MPOFU: Sorry, Chairperson, I'm sorry,
 19 there's a small interpretation issue. The question was the
 20 question, but the interpretation basically repeated what
 21 the witness had said yesterday, which is that someone would
 22 hold, you would hold it down and someone else would hold it
 23 for you, and so he said yes to that, rather than to the
 24 question. I don't know if that's clear.
 25 COMMISSIONER HEMRAJ: Mr Mahlangu, would

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1 you like to clarify that perhaps?
 2 MR MAHLANGU: The question was, he said
 3 yesterday if he could only go through the fence if it is
 4 held down and somebody –
 5 COMMISSIONER HEMRAJ: If the wires are
 6 held apart, yes.
 7 MR MPOFU: Yes, which was not part of the
 8 question –
 9 MR MAHLANGU: Apart, and that is exactly
 10 what I interpreted, that the one picking it up and the one
 11 holding it down.
 12 MR MPOFU: You interpreted that because
 13 that's what he said yesterday, but the Commissioner had not
 14 mentioned the thing of someone else picking it up.
 15 MR MAHLANGU: I'm sort for that.
 16 COMMISSIONER HEMRAJ: If you would be so
 17 kind as to look at slide 194, please, Mr Magidiwana. Do
 18 you recall that your evidence was that initially you tried
 19 to go towards the settlement, but that the Nyala was in
 20 your way?
 21 MR MAGIDIWANA: Yes.
 22 COMMISSIONER HEMRAJ: And you see on that
 23 slide that the movement of the group is described in a bit
 24 of an arc there?
 25 MR MAGIDIWANA: I see it, yes.

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1 COMMISSIONER HEMRAJ: Now when the Nyala
 2 was blocking your way, was there a discussion about which
 3 direction to take amongst the groups, or did you just
 4 follow the people in front? How did it come about that you
 5 went in that direction?
 6 MR MAGIDIWANA: No, there was no such a
 7 discussion as to this is the direction we take. A person
 8 would see which side is a space and decide for himself to
 9 run that way.
 10 COMMISSIONER HEMRAJ: So why did you
 11 decide to go in that particular direction as opposed to
 12 across the veld towards the settlement?
 13 MR MAHLANGU: That's he himself?
 14 COMMISSIONER HEMRAJ: Yes, you.
 15 MR MAGIDIWANA: The reason I decided to
 16 run in that direction is the way to my residence goes
 17 through that way, through Marikana, and it's straight.
 18 COMMISSIONER HEMRAJ: Whose decision was
 19 it to come in that arc formation back in the direction that
 20 you did?
 21 MR MAGIDIWANA: The reason we turned
 22 around in that arc is because we were being sprayed with
 23 water.
 24 COMMISSIONER HEMRAJ: Did you just follow
 25 the group?

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1 MR MAGIDIWANA: Yes.
 2 COMMISSIONER HEMRAJ: Thank you very
 3 much.
 4 CHAIRPERSON: Mr Magidiwana, you told us
 5 a few days ago that when you were on the koppie one of the
 6 other workers on the koppie mentioned to you that there was
 7 no smoke coming from the chimney stacks of the smelter.
 8 You remember that?
 9 MR MAGIDIWANA: What I said, Mr
 10 Chairperson, was what was said there is that since the
 11 employer is not prepared to come to us to tell us when
 12 we're getting the money, we should also make it a point
 13 that those chimneys that usually smoke, stopped smoking.
 14 CHAIRPERSON: In other words, they
 15 couldn't smelt the ore because no platinum ore was being
 16 extracted from the mine. Is that correct? Because the
 17 rock drill operators weren't doing their work and no-one
 18 else was working. Is that correct?
 19 MR MAGIDIWANA: That is so, Sir.
 20 CHAIRPERSON: As long as the strike went
 21 on for so long no platinum would be mined, there'd be no
 22 smelting, there'd be no smoke, and the employer would lose
 23 money. Was that your understanding?
 24 MR MAHLANGU: Sorry, Mr Chairperson, the
 25 question again was?

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1 CHAIRPERSON: As long as the strike
 2 continued there would be no platinum mined, there'd be no
 3 platinum smelted, there'd be no smoke from the stacks, and
 4 there'd be no money for the employers.
 5 MR MAGIDIWANA: That is correct. Sir,
 6 that is the effect of a strike, yes. What happens in a
 7 strike is that the people who are on strike and not
 8 working, at a later stage feel hungry because they are not
 9 being paid. In the meantime the employer is also being hit
 10 because there is no production, there is no profit that
 11 he's making. This also has an effect where it actually
 12 hits the whole country and then a decision would be made.
 13 CHAIRPERSON: And the idea of the
 14 strikers was that this would force the employer to
 15 eventually come to you at the koppie and agree to pay you
 16 the amount that you were demanding. Is that correct?
 17 MR MAGIDIWANA: It is so, yes.
 18 CHAIRPERSON: Now why were you all
 19 congregating every day on the koppie? I know you only
 20 went, according to your evidence you only went on the 16th,
 21 but do you know why the miners were congregating on the
 22 koppie and why you decided to join them on the 16th?
 23 MR MAGIDIWANA: Sir, the knowledge I have
 24 is that people were looking for money.
 25 CHAIRPERSON: The best way to ensure,

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1 would it be correct to say your attitude was the best way
 2 to ensure that your employers gave you the money was to
 3 stay on the koppie, maintain the strike until the employers
 4 agreed to pay what was asked? Is that right?
 5 MR MAGIDIWANA: Yes, Sir, if he did not
 6 come we would have waited until coming back of Jesus
 7 Christ.
 8 CHAIRPERSON: Yes, now when you saw the
 9 police there, you got there early in the morning of the
 10 16th, didn't you?
 11 MR MAGIDIWANA: It is so.
 12 CHAIRPERSON: Before the police came.
 13 MR MAGIDIWANA: Yes, Sir.
 14 CHAIRPERSON: And when the police came,
 15 there were quite a lot of police, weren't there?
 16 MR MAGIDIWANA: They arrived in numbers,
 17 yes, until they added and became many.
 18 CHAIRPERSON: There were a lot of
 19 policemen there?
 20 MR MAGIDIWANA: Yes.
 21 CHAIRPERSON: And there were a number of
 22 Nyalas, I think there were at least five, which had
 23 trailers behind them with coils of barbed wire. Is that
 24 right?
 25 MR MAGIDIWANA: They were quite many,

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1 though I did not count how many they were.
 2 CHAIRPERSON: Now what did you think the
 3 police were going to do?
 4 MR MAGIDIWANA: I said so yesterday, Mr
 5 Chairperson, I said the police, because of there being a
 6 strike, they were there to keep order.
 7 CHAIRPERSON: But did you think that they
 8 needed Nyalas with barbed wire trailers and large numbers
 9 of police for that purpose?
 10 MR MAGIDIWANA: I was seeing this for the
 11 first time, Mr Chairperson, these Nyalas with the trailers,
 12 I was seeing that thing for the first time.
 13 CHAIRPERSON: And you told us that you
 14 were watching news bulletins on television in the period
 15 from, I think the 10th or 11th of August until the 16th. Is
 16 that right?
 17 MR MAGIDIWANA: I said some, some of the
 18 things I saw on TV.
 19 CHAIRPERSON: Yes, was there no coverage
 20 at all of the koppie and on previous days police being
 21 there?
 22 MR MAGIDIWANA: I had said that the event
 23 of the 13th where something had happened to the police and
 24 to some of the workers, that I saw, but I did not see the
 25 people gathering on the mountain on TV.

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1 CHAIRPERSON: I see. Now did you think
 2 it possible that the police might be there on the 16th in
 3 order to break the strike, bring the strike to an end?
 4 MR MAGIDIWANA: No, Sir, it did not occur
 5 to me, because at one time when I was hungry I went home
 6 and went through where the police were parked. Not one of
 7 them said to me, go away and don't come back.
 8 CHAIRPERSON: I see, and what would your
 9 attitude have been if you had thought that the police were
 10 going to try to disperse the people on the koppie, chase
 11 them away from the koppie, and bring the strike to an end?
 12 Would you have happily accepted that?
 13 MR MAGIDIWANA: Sir, if the police had
 14 mentioned that you people should go away here or otherwise
 15 we are going to shoot here, I would have done nothing else
 16 but go straight to my house.
 17 CHAIRPERSON: And would you have been –
 18 what would you have felt about that? Would you have been
 19 happy to have done that or would you have been
 20 dissatisfied?
 21 MR MAGIDIWANA: The going away, I would
 22 have done that peacefully, Sir, but because of the hurt I
 23 would have remained, not going to work until we received
 24 the money we wanted.
 25 CHAIRPERSON: I see, thank you. Mr

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1 Mpfu, are you ready now for your re-examination?
 2 MR MPOFU: Yes, Chairperson, I am.
 3 Chairperson, with your permission, before I start with my
 4 re-examination, there are just a couple of matters that I
 5 wanted to mention, to address the Commissioners on. The
 6 first one, Chairperson, is that we, since there was that
 7 evidence about the journalist and so on, we embarked on
 8 some kind of research which has yielded some good results
 9 and some others, unanticipated. I can safely say that we
 10 have identified at least two journalists who might fit the
 11 description, and we'll give, one of them I've got the name,
 12 another one I just have the first name, and we'll give
 13 those names over to the evidence leaders –
 14 CHAIRPERSON: Are you referring to the
 15 journalists who according to the witness were present –
 16 MR MPOFU: Yes.
 17 CHAIRPERSON: - when he was being
 18 assaulted?
 19 MR MPOFU: Correct.
 20 CHAIRPERSON: After the shot to the thigh
 21 and where he was lying on the ground?
 22 MR MPOFU: That's correct, Chairperson.
 23 The one that the Chairperson used the free kick example,
 24 which the witness understood very well, yes. Now one of
 25 those journalists is some – I'm going to see him on

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1 Saturday, but as I said, I will hand over the names to the
 2 evidence leaders. It might well be that we might even get
 3 more material, just apart from the identification. But in
 4 the process of doing that, and quite fortuitously,
 5 unfortunately, we stumbled across some footage which had
 6 not been played here, which I propose to play during the
 7 re-examination. Fortunately it does cover some of the
 8 aspects that were covered in cross-examination, so I would
 9 play it on that basis alone, but if – thank you,
 10 Chairperson.
 11 CHAIRPERSON: If it is footage which
 12 requires me to give a warning to people in the auditorium,
 13 please tell me at the appropriate time, because we've seen
 14 in the past when people inadvertently see this footage, not
 15 expecting it, and they have loved ones or family members
 16 who are people lying on the ground, who had been shot, it
 17 causes them great distress.
 18 MR MPOFU: Yes, Chairperson. There are
 19 two –
 20 CHAIRPERSON: Just let me know.
 21 MR MPOFU: Yes, I will. There are two
 22 pieces of footage. One is quite short and collateral, even
 23 if I say so myself, but the main footage certainly will
 24 require the warning, Chairperson, and I will remind the
 25 Chairperson at the appropriate time.

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1 CHAIRPERSON: Do you want to show the
 2 footage now, or do you want to show the footage at some
 3 stage in your re-examination?
 4 [09:56] MR MPOFU: At some stage in the re-
 5 examination, Chairperson.
 6 CHAIRPERSON: Alright, so please proceed.
 7 MR MPOFU: Thank you.
 8 MR MAHLANGU: Excuse me, Mr Mpfu, just
 9 before you proceed. I need to interpret too what has been
 10 said.
 11 MR MPOFU: Oh yes, sorry.
 12 MR MAHLANGU: The person recording is
 13 stopping me.
 14 CHAIRPERSON: Yes, there's one further
 15 aspect. I see that we've been handed up a copy of the
 16 medical report relating to this witness, which it contains
 17 three pages. Yesterday there was handed in as exhibit
 18 EEE15, the medical report on the witness that only
 19 contained two pages. So I take it you want to substitute
 20 the one we've now got for the one that was handed in
 21 yesterday?
 22 MR MPOFU: Thank you, Chairperson, yes,
 23 and keep the same exhibit number. This is the new EEE15,
 24 yes, thank you.
 25 CHAIRPERSON: Yes, thank you, I've marked

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1 my copy accordingly.
 2 MR MPOFU: Thank you, Chairperson. The
 3 second issue, Chairperson, is that the, because of what
 4 I've said, I may or may not stick to our non-binding
 5 agreement about finishing by lunchtime, but I'll advise my
 6 learned colleagues, so that there's no inconvenience to
 7 them or their witness, closer to lunchtime, then see how we
 8 go. I'll still try. Thank you, Chairperson.
 9 Chairperson, the third issue is quite an
 10 important issue that I would like the Commission to
 11 address. In the course of what I call this informal
 12 research that we did for the past three days, I have reason
 13 to believe that some of the media houses might still have
 14 material which could be of use to the Commission. I know
 15 that the Commission has taken steps before and made appeals
 16 in that regard. I would like those appeals, please,
 17 Chairperson, to be reiterated, not only –
 18 CHAIRPERSON: They promised us. We had a
 19 meeting with them before the Commission sat and maybe, it
 20 was either after, before or after the inspection in loco,
 21 because we had a meeting with the representatives of media
 22 houses and they promised to give us all the material, both
 23 material that had been broadcast and material that had not
 24 been broadcast. We were assured that that had been, the
 25 promise had been implemented. We subsequently discovered

1 that the SABC had certain, what they call raw material that
 2 they hadn't shown us, which they then gave us, but
 3 certainly I want to appeal to the media houses, if
 4 inadvertently or otherwise they haven't given us all the
 5 material they promised they would give us, I would appeal
 6 to them to do so now. As I said firstly, firstly I said
 7 they promised to do so, but in any event they will realise
 8 that regard being had to the Terms of Reference of this
 9 Commission and the necessity that we ascertain the truth as
 10 to what happened, any piece of video material which is
 11 relevant, even though it appears possibly to the media
 12 house not to be relevant, may as a piece in a jigsaw
 13 puzzle, when seen by the representatives of the parties or
 14 the evidence leaders, may well provide some important
 15 little aspect of evidence which is so far missing, which is
 16 important to assist us to do the job we've been called upon
 17 to do. So I take it there are representatives of the media
 18 houses here present. Please take careful note of what I
 19 said, and if there's anything that we haven't yet been
 20 shown, please take steps to make it available to the
 21 evidence leaders as soon as possible, and they can then
 22 endeavour to communicate what they receive to the
 23 representatives of the parties.

24 MR MPOFU: Thank you, Chairperson.

25 CHAIRPERSON: I'd like to repeat what

1 we received a promise in the terms which I have reported.
 2 MR MPOFU: Thank you, Chairperson. I
 3 would, Chairperson, like to make a special appeal through
 4 you to the SABC, because as a public broadcaster I think
 5 they have a special duty as an organ of State, this
 6 Commission being in a manner of speaking also an organ of
 7 State, to release the material, so that one organ of the
 8 State cannot be keeping evidence that another organ of the
 9 State is seeking –

10 CHAIRPERSON: Which I must say that, to
 11 be fair, I don't think Mr Matthews, who's in charge of that
 12 section, was aware of the fact that this material had not
 13 been given to us, and he actually went and looked for it
 14 when we went back to him recently and he then made the
 15 material available to us. I trust they've got no more, but
 16 if they have, what you said clearly applies.

17 MR MPOFU: Thank you, Chairperson.

18 CHAIRPERSON: So I don't think it's
19 necessary for us to give the –

20 MR MPOFU: No, no, no, neither can I say
21 definitely –

22 CHAIRPERSON: Because the impression that
23 we have is that they have very honourably and have done
24 their best to comply with the promise that was made.

25 MR MPOFU: Yes, I agree with that,

1 I've said to the media houses at the meeting to which I
 2 referred. I pointed out to them that if ever there was a
 3 commission in the history of this country on which the eye
 4 of history is focussed, this is it, and if we make findings
 5 in our report which were shown later by material which
 6 media houses had which they didn't make available, to be
 7 incorrect, the blame will attach to them. It's vitally
 8 important that we do our utmost to get to the truth. It's
 9 vitally important that all material that can assist us to
 10 do that is made available to us, and it would not be
 11 fortunate or desirable if subsequently after our report
 12 comes out, even years down the track possibly, it's
 13 discovered that important material was withheld from us
 14 which had caused us to make wrong findings, and either
 15 exonerates people who don't deserve to be exonerated, or to
 16 implicate people and attach responsibility to people who
 17 should not have such responsibility attached to them. So I
 18 hope what I've said will be taken very seriously. Yes, Mr
 19 Mpofo.

20 MR MPOFU: Thank you, Chairperson, and I
 21 might add that we're all aware that there might be ethical
 22 and even commercial considerations which prevent people,
 23 but what the Chair has said –

24 CHAIRPERSON: - a direct express promise
 25 after those ethical and other aspects were considered, and

1 Chairperson. I do have reason to believe that we can get
 2 more, better than that. But I'll leave it at that,
 3 Chairperson. Now the last point, Chairperson, that I
 4 wanted to – or well, it is the last point that is not
 5 related to the witness, is that after this witness has
 6 testified we will address the issue that was addressed by
 7 SAPS regarding the Carte Blanche allegations of torture of
 8 some of our clients. There's just factual issues that we
 9 want to place on record relating to the statement –

10 CHAIRPERSON: Have you communicated that
11 to the representatives of the police –

12 MR MPOFU: I have. Yes, I have,
 13 Chairperson, and one of the reasons I'm not doing it now is
 14 because I know there are one or two other parties that have
 15 an interest in it. So I would rather do it between the
 16 witnesses. Thank you, Chairperson. Now coming to the
 17 witness, I'm going to start by dealing with a matter that
 18 at face value might look like it doesn't arise from the
 19 cross-examination, but I give you the assurance that it
 20 does, Chair, and I don't want too much of latitude but I
 21 would ask for some, and I'll ask the questions in a mix of
 22 English and Xhosa so that the witness hopefully will be –
 23 thank you, Chairperson.

24 RE-EXAMINATION BY MR MPOFU: Mr
 25 Magidiwana, you know that after you regained your

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1 consciousness and you were visited by us, that you and I
 2 had some discussions more of a personal nature, because I
 3 was just interested in what a 23-year old was doing working
 4 in the mines.

5 MR MAGIDIWANA: I do remember that.

6 MR MPOFU: And I told you that I had a
 7 son who was your age and you should be at school or
 8 university, not working in the mine.

9 MR MAGIDIWANA: It is so, Sir.

10 MR MPOFU: And in those discussions you
 11 revealed some personal issues, which I'm going to deal
 12 with. If I overstep and breach confidentiality, then you
 13 don't have to answer.

14 MR MAGIDIWANA: I understand you, Sir.

15 MR MPOFU: The Commission already knows
 16 that you come from the Eastern Cape, and you've been around
 17 – or at least you informed me that you've been around here
 18 since about 2007 in the Gauteng, or rather in the North
 19 West area.

20 MR MAGIDIWANA: Yes, Sir.

21 MR MPOFU: And you were looking for work,
 22 until you found work on the, or rather in 2011, as we know.

23 MR MAGIDIWANA: It is so.

24 MR MPOFU: Your mother died in 1999 when
 25 you were around 11. Is that so?

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1 MR MAHLANGU: The question was again,
 2 Sir?

3 MR MPOFU: Your mother died in 1999 when
 4 you were about 10 or 11 years old.

5 MR MAGIDIWANA: It is so.

6 MR MPOFU: And your father has remarried
 7 and is still based in the Eastern Cape. Correct?

8 MR MAGIDIWANA: It is so.

9 MR MPOFU: When, and you also informed me
 10 that your father used to work also in the Rustenburg area
 11 in the mines before he retired back to the Eastern Cape.

12 MR MAGIDIWANA: It is so.

13 MR MPOFU: And before he left the
 14 Rustenburg area and went back to the Eastern Cape, he – or
 15 let me put it this way. He is familiar with the goings-on
 16 in the mining industry, having worked there for a long
 17 time.

18 MR MAGIDIWANA: It is so.

19 MR MPOFU: And when the news went across
 20 the country of the miners' strike at Lonmin, what did your
 21 father say to you about your participation in it?

22 MR MAGIDIWANA: Yes, he said something.

23 MR MPOFU: What did he say?

24 MR MAGIDIWANA: He warned me not to go at
 25 all to the place where the strike is taking place. He also

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1 mentioned that I should come home.

2 MR MPOFU: Come home where?

3 MR MAGIDIWANA: Going home.

4 MR MPOFU: Yes, which home? We know you
 5 have two homes –

6 CHAIRPERSON: Do you mean the Eastern
 7 Cape?

8 MR MAGIDIWANA: Yes, Sir.

9 MR MPOFU: Yes, and you've already told
 10 the Commission in your statement that one of the reasons
 11 that you did not go to the Eastern Cape was because you
 12 feared that if the strike ends then you might lose your
 13 job. In other words, if other people go back to work and
 14 you are far away, you might lose your job.

15 MR MAGIDIWANA: It is so, Sir.

16 MR MPOFU: Now obviously just from your
 17 evidence of what we have, the fact that you went to the
 18 mountain on the 16th at least, it would seem that you did
 19 not carry out either the injunction of going back to the
 20 Eastern Cape, or not going to join the strikers.

21 MR MAGIDIWANA: I did not do what I was
 22 told to do.

23 MR MPOFU: Yes, okay, and how did your
 24 father feel about this when you communicated with him after
 25 your regaining of consciousness?

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1 MR MAGIDIWANA: He reprimanded me.

2 MR MPOFU: Okay, now it's also true that
 3 eventually after that bit of a standoff your lawyers sent
 4 money for your father to come while you were, or rather to
 5 be present while you were testifying. Is that correct?

6 MR MAGIDIWANA: It is so.

7 MR MPOFU: And was that then the first
 8 time that you saw him since you had been injured?

9 MR MAGIDIWANA: Yes.

10 MR MPOFU: And we know that –

11 CHAIRPERSON: Mr Mpofo, it looks to me as
 12 if your client is crying. I wonder whether it wouldn't be
 13 appropriate for us to take a short adjournment –

14 MR MPOFU: Just a short break –

15 CHAIRPERSON: - to enable him to regain
 16 his composure. I can understand these are emotionally
 17 laden matters that you're dealing with and it's not fair to
 18 expect him to continue with his evidence while he's in the
 19 present state.

20 MR MPOFU: Thank you.

21 CHAIRPERSON: So how long do you think we
 22 need?

23 MR MPOFU: Five to 10 minutes,
 24 Chairperson.

25 CHAIRPERSON: Right, we'll adjourn for 10

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1 minutes.

2 MR MAHLANGU: Just a minute, Sir.

3 MR MAGIDIWANA: Before the adjournment,

4 Mr Chairperson –

5 MR MPOFU: Let's have a break.

6 MR MAGIDIWANA: - I want to apologise to

7 the State President for appearing in the paper about what I

8 said yesterday. I'm really sorry.

9 [COMMISSION ADJOURNS COMMISSION RESUMES]

10 [10:27] CHAIRPERSON: The Commission resumes. Mr

11 Mpofo, has your witness now recovered his composure? Can

12 we now proceed?

13 RE-EXAMINATION BY MR MPOFU: Yes, thank

14 you so much, Chairperson. We much appreciate it. I wanted

15 to round off the point. Mr Magidiwana, you remember that

16 the Commission, when you started testifying, I think it was

17 the 27th of August and the Commissioners kindly allowed us

18 when we made a application for your father to be seated

19 there behind you to support you, you remember?

20 CHAIRPERSON: It could have been the 27th

21 of February.

22 MR MPOFU: 27th of February, that's

23 correct. Sorry, Chairperson.

24 CHAIRPERSON: I know it was a long time,

25 but not that long.

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1 MR MPOFU: Sorry, Chairperson, 27th of

2 February when the Chair and Commissioners allowed for your

3 father to sit behind you. You remember that?

4 MR MAGIDIWANA: I remember that.

5 MR MPOFU: And then on the 28th, which was

6 the following day, you remember that Mr Ngalwana made

7 suggestions about your presence at the koppie and its

8 duration. Let's call it that.

9 MR MAGIDIWANA: I remember that, yes.

10 MR MPOFU: And he suggested, at least he

11 suggested, as he's duty bound to do, that you might have

12 even been there on more days than what you had told the

13 Commission.

14 MR MAGIDIWANA: I remember that, yes.

15 MR MPOFU: Okay, I'll just ask you this.

16 Since that day your father has not been sitting there

17 behind you. Do you know where he is? Until now.

18 MR MAGIDIWANA: I know what happened,

19 yes.

20 MR MPOFU: Yes, what happened?

21 MR MAGIDIWANA: He again seriously

22 reprimanded me. He was angry and he decided to go home.

23 MR MPOFU: And he has not been back

24 since?

25 MR MAGIDIWANA: He hasn't been back

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1 since.

2 MR MPOFU: Okay, thank you, Chairperson.

3 That deals with that issue. The rest of it we'll deal with

4 at the end, Chairperson, thank you. Now Mr Magidiwana, you

5 have been told I think by the Chairperson, by Mr Ngalwana,

6 and by everybody, that you are quite an important witness

7 in the sense that most of the people in your position did

8 not live to tell the tale. Yes, and some of my colleagues

9 have correctly described you as a dead man walking, and

10 it's important that you describe to the Commission in great

11 detail things that perhaps nobody else can. Okay, now

12 there's been evidence – I'm now getting into some of the

13 evidence that has been led. The first issue I want to deal

14 with is this suggestion that you were there on other days,

15 which was dealt with. If you go to EEE7, the first five

16 photos, you'll see that they're marked "SAPS photos

17 Lieutenant-Colonel Mere 15th."

18 MR MAGIDIWANA: I see it, yes.

19 MR MPOFU: And you remember that my

20 learned friend for SAPS used those photos in an attempt to

21 establish, or rather to say that evidence would be led

22 later to show that you were at the koppie on the 15th?

23 MR MAGIDIWANA: I remember that, yes.

24 MR MPOFU: This is a matter maybe for

25 legal argument later, so you may comment if you want to,

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1 but I'm more addressing it maybe to the bench. Our

2 instructions, or our own investigations have indicated that

3 all that material in the SAPS hard drive is indicated as

4 having been material of the 14th, and this is something we

5 brought to the attention of the evidence leaders.

6 CHAIRPERSON: You say the 14th?

7 MR MPOFU: 14th, yes, Chairperson. Yes,

8 and this is a fact that we brought to the evidence, or

9 rather to the attention of the evidence leaders, and I know

10 from my interactions with Ms Pillay that it was also

11 brought to the attention of the representatives of SAPS.

12 MS PILLAY: Chair, if I may just confirm

13 that we have repeatedly been asking SAPS to provide us with

14 the pathways for each of the, first the order of the

15 material which they've placed to Mr Magidiwana during

16 cross-examination. Unfortunately that hasn't as yet been

17 forthcoming. We then were informed by SAPS that the path,

18 that the way in which the photographs were described, were

19 the pathways to be found on the SAPS hard drive, but Mr

20 Mpofo is correct that when we did our investigations, we

21 found that the photographs were stored under a folder

22 called the 14th of August and not the 15th of August. I'm

23 not sure - we did bring that to SAPS' attention and they

24 indicated that they have an explanation for it, but that is

25 where the matter stands at the moment.

<p style="text-align: right;">Page 6659</p> <p>1 COMMISSIONER HEMRAJ: Does that mean, Ms 2 Pillay, that we don't know whether the photographs are of 3 the incidents on the 14th or the 15th? There's no clarity 4 of this, is it? 5 MS PILLAY: The way things currently 6 stand, Commissioner, is that on the SAPS hard drive they 7 belong to a folder called the 14th. 8 COMMISSIONER HEMRAJ: Yes, but we don't 9 know for sure where they emanate from? 10 MS PILLAY: We don't know for sure. 11 That's a matter for SAPS evidence. 12 MR MADLANGA SC: Chairman, Commissioners, 13 what Ms Pillay has referred to is slightly better in the 14 sense that at least she is able to refer to where it comes 15 from. Chairman and Commissioners, you will remember that I 16 asked our learned friend Mr Ngalwana to assist us with 17 slide 198. That one we do not even have an idea where it 18 comes from. Can we be advised where it comes from? 19 MR MPOFU: Is that L198? 20 MR MADLANGA SC: L, ja slide, in exhibit 21 L, slide 198. Thank you. 22 MR MPOFU: I think Mr Mathibedi is in 23 charge today. 24 CHAIRPERSON: Yes, I must confess that I 25 had expected that we would get this information that was</p>	<p style="text-align: right;">Page 6661</p> <p>1 that these photos may have been taken on the 16th – 2 MR MPOFU: On the 16th, that's exactly 3 where I'm going, Chairperson. 4 CHAIRPERSON: That's where you're going, 5 yes alright, I see. 6 MR MPOFU: Ja. Especially seeing that 7 he's wearing what he says he was wearing on the 16th. 8 CHAIRPERSON: Yes, perhaps if you could 9 hold that over then until after the tea adjournment when Mr 10 Ngalwana will be here to give us, hopefully, the 11 information that is required. 12 MR MATHIBEDI SC: Mr Chairman, with 13 regard to slide 198, it was obtained from the Beeld, the 14 newspaper. 15 CHAIRPERSON: You say slide 198 was 16 obtained from the Beeld newspaper? 17 MR MATHIBEDI SC: Yes, it was downloaded 18 from – 19 CHAIRPERSON: That's Media 24, I take it. 20 MR MATHIBEDI SC: That's correct. 21 MR MPOFU: Ja. Chairperson, if that is 22 indeed so then can we also after tea be told as to how the 23 SAPS attached a specific time – if you remember, 24 Chairperson, there was an issue about when that slide was 25 taken –</p>
<p style="text-align: right;">Page 6660</p> <p>1 promised before you began your re-examination, and I 2 overlooked the fact that we hadn't – you see "we hadn't 3 been given," but I – 4 MR MPOFU: Ja, I gave up. 5 CHAIRPERSON: I don't know whether you'd 6 been [inaudible] before you're starting your re- 7 examination, but it is a matter in respect of which 8 information is owed to us by SAPS. Perhaps you can assist 9 us? 10 MR MATHIBEDI SC: Thanks, Mr Chairman. 11 This, all these aspects were being handled by Mr Ngalwana. 12 Can I revert after tea? He's not available at the moment. 13 CHAIRPERSON: If you can't provide the 14 information, you can't. Mr MPOFU, are there other aspects 15 that you can deal with in the meantime? 16 MR MPOFU: Yes. 17 CHAIRPERSON: Of course if this material 18 in EEE7 was taken on the 14th, it still reflects your client 19 as being on the koppie at a time when he says he wasn't 20 there. Whether he wasn't there on the 15th – or he says he 21 wasn't there at all until the 16th. So if he was there on 22 the 15th, which is the point the police made, a certain 23 inference can be drawn, but if that's not right, that he 24 was there on the 14th, then similar inferences can be drawn. 25 So of course it may well be also that the confusion is such</p>	<p style="text-align: right;">Page 6662</p> <p>1 CHAIRPERSON: On the bottom right-hand 2 corner it's reflected – 3 MR MPOFU: It says 15:47. 4 CHAIRPERSON: 15:47. 5 MR MPOFU: Yes. 6 CHAIRPERSON: And obviously, I assume 7 that the police would, as they undertook to do, lead 8 evidence in due course proving all the assertions made in 9 exhibit L, and identifying where identification is 10 required, all the slides and photographs. So, but you 11 would obviously like it earlier as far as these particular 12 aspects are concerned, because it's relevant for your 13 witness. 14 MR MPOFU: Yes, Chairperson. If you 15 remember, as long ago as Mr Phatsha's evidence, the time at 16 which that particular picture was taken was made an issue 17 in the Commission. And what I will propose to do then, 18 Chairperson, is there are other issues that I wanted to 19 raise about the dates, whether it's the 15th or the 14th. 20 I'll leave that, all the issue of the dates to until we 21 have been given the pathways. 22 CHAIRPERSON: That seems a sensible - 23 MR MPOFU: Ja, thank you, Chair. 24 CHAIRPERSON: - way of proceeding. 25 MR MPOFU: But just to round off this</p>

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1 issue, while we are on photo 198, can I just ask one or two
 2 questions from the witness, for what it's worth. You
 3 remember the Chairperson made the remark, when this
 4 photograph was shown, that the Chairperson made a remark
 5 about our – meaning everybody's inability to be able to
 6 tell where the pole, the pylon – which was called a pole, I
 7 think – is in relation to the Nyala, for example, because a
 8 photograph cannot give you the depth. Remember that kind
 9 of discussion?

10 MR MAGIDIWANA: I remember that.

11 MR MPOFU: You remember that. Now I just
 12 want you to help us with something, because you know the
 13 area maybe more than us, and before I do that, in fact I'm
 14 going to ask you two small aspects. In line with what the
 15 Chairperson is saying, would you agree that if you look at
 16 this photograph, those of us who don't live there or
 17 someone who has never been there, a person could say that
 18 the workers are walking alongside the power station?

19 MR MAGIDIWANA: Yes, when you're looking
 20 at the photograph as it is, you think they're walking just
 21 in front next to the power station.

22 MR MPOFU: Yes, but if you have been
 23 there, you would know that that is humanly impossible in
 24 that the power station is situated far to the right of even
 25 the large koppie. In fact, the location of the power

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1 station in relation to the koppies, the relevant koppies,
 2 is depicted in slide 181. It's not the clearest of slides,
 3 but the power station are those three blocks on the bottom
 4 of the picture.

5 MR MAHLANGU: On the bottom of the
 6 picture, just above the 181, the number, is that it?

7 MR MPOFU: No, in the middle, next to the
 8 box that says "stage 3," and do you see that there's a
 9 graphic depiction of the Nyalas which are made to look to
 10 be red?

11 MR MAGIDIWANA: I see it, yes.

12 MR MPOFU: Alright, I'll –

13 CHAIRPERSON: Sorry, Mr Mpofo. If one
 14 looks at 169 –

15 MR MPOFU: 169, Chair, yes?

16 CHAIRPERSON: Is that the power station
 17 one can see in the distance?

18 MR MPOFU: Yes.

19 CHAIRPERSON: Beyond the people sitting
 20 on the ground?

21 MR MPOFU: Yes, absolutely.

22 CHAIRPERSON: That would indicate I think
 23 the point you're making.

24 MR MPOFU: Thank you, Chairperson. We'll
 25 deal with this aspect, Chairperson, at another stage when

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1 we talk about when, if this was indeed taken at 15:47, at
 2 what stage it must have been, or rather where the workers
 3 must have been facing in relation to the power station.

4 Thank you, Chairperson. Suffice to say, Mr Magidiwana,
 5 would you agree that if someone were to capture both the
 6 big pole and the power station, then that person could only
 7 have been facing south and probably standing on the
 8 northern side of the koppie?

9 [10:47] MR MAGIDIWANA: I would agree with you,
 10 yes.

11 MR MPOFU: Yes, and we'll leave it at
 12 that for now, but if that is so, then it will be able to
 13 show us which way the workers must have been walking.

14 Right, now I just wanted to – you, in the course of your
 15 long evidence, you have dealt with a number of issues and
 16 you've been asked a number of questions. You've asked a
 17 number of questions yourself and you posed what I would
 18 call some rhetorical questions, some of which I will give
 19 you an opportunity to try and answer yourself. Yes, but
 20 you've also given us a crash course, I suppose, in labour
 21 relations, for example when you and the Chairman had a
 22 discussion about the chimneys. One of the things you said
 23 was that it would be better to be fired, when you were told
 24 about the prospect of dismissal, that it would be better to
 25 be fired as part of a large group than to be fired alone.

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1 Can you elaborate on what you meant by that?

2 MR MAGIDIWANA: I meant, Sir, if one was
 3 to leave the job all by himself it even becomes difficult
 4 for him to explain why he left the job. If one is asked by
 5 others why he left the job he has, he finds it difficult to
 6 explain why he leaves the job if there is not, say
 7 something, a question of being ill.

8 MR MPOFU: Sorry, but what I really want
 9 to know is, is it in your view better to be, or rather
 10 which of those situations would have an adverse effect on
 11 your prospects of losing your job; the one of leaving on
 12 your own, versus the other one of leaving in a large group?

13 MR MAHLANGU: The question is exactly
 14 what prospect –

15 MR MPOFU: Which one. Ja, which one
 16 would have adverse prospects on the –

17 CHAIRPERSON: I take it you mean more
 18 adverse prospects?

19 MR MPOFU: More adverse prospect on the
 20 retention of your employment.

21 MR MAGIDIWANA: The question of being
 22 fired alone, that is the most difficult one.

23 MR MPOFU: Ja, you also said that if the
 24 employer was fed up with you, its recourse should have been
 25 to dismiss you rather than sending the police to you, I

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1 think something to that effect.
 2 MR MAGIDIWANA: It is so, yes.
 3 MR MOTAU SC: Chairperson, can I just
 4 correct something? It arises from the interpretation and
 5 it's not completely linked to my learned friend's question.
 6 The question has got nothing to do with the employer
 7 sending people to be injured and to be killed, which is
 8 what is suggested in the interpretation, and I think Mr
 9 Mpofo agrees with that.
 10 MR MAHLANGU: I said rather than -
 11 MR MPOFU: Yes, I deliberately left it at
 12 sending the police, setting the police at your or sending
 13 the police.
 14 MR MAHLANGU: Did I not say "Rather than
 15 being killed?" If I used the -
 16 MR MPOFU: Ja, you did -
 17 CHAIRPERSON: - part of the problem.
 18 Maybe Mr Mpofo can repeat the question. You can then
 19 interpret it exactly as he's asked it, and then we -
 20 MR MAHLANGU: Thank you, Chair.
 21 MR MPOFU: Thank you. You also testified
 22 at some stage that if the employer was fed up with you, he
 23 or it should have dismissed you rather than sending the
 24 police to you.
 25 MR MAGIDIWANA: It is so.

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1 MR MPOFU: And without spoiling the good
 2 discussion you had with the Chairperson this morning about
 3 chimneys, it was put to you by Mr Motau that at some stage
 4 there was what one can describe as a stalemate in that the
 5 employer was saying they're not going to talk to you while
 6 you are at the moment, and you were saying you're not going
 7 to leave and go back to work before the employer comes to
 8 talk to you, which is a classical description of a
 9 stalemate. How would that stalemate have been resolved in
 10 the end?
 11 MR MAGIDIWANA: Sir, if the employer
 12 wasn't bending and the employees, the workers were also not
 13 bending, it would, what would have determined the end of
 14 this thing would have been the one who felt the pain of
 15 hunger. If the employer on the other side would have felt
 16 he's going down, he's getting finished, he would have then
 17 decided workers, please come back to work, we'll talk about
 18 the money.
 19 MR MOTAU SC: Chairperson, I don't want
 20 to interrupt the re-examination unnecessarily. My learned
 21 friend will remember the point that I was debating with the
 22 witness was the employer was saying, get off the koppie,
 23 and the employees were saying, come talk to us at the
 24 koppie. It's really in that context, not -
 25 MR MPOFU: Okay, so I'm happy to - yes,

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1 no, in whatever formulation, the reality is that if there
 2 was such an impasse of whatever description between the
 3 workers and the employee, do I take it that the answer you
 4 gave would still apply?
 5 MR MAGIDIWANA: That is it.
 6 MR MPOFU: Then you said something
 7 yesterday about if the employer, I think it was interpreted
 8 as if the employer had cried, but I should think that you
 9 meant that if the employer had complained that your demand
 10 was too high, that the employer then should have come and
 11 put something on the table. Can you explain that to the
 12 Commission?
 13 MR MAGIDIWANA: That's exactly what I was
 14 explaining.
 15 MR MPOFU: No sorry, the question was can
 16 you explain to the Commission what you meant by if the
 17 employer had cried or complained regarding the level of
 18 your demand, what you think it should have done?
 19 MR MAGIDIWANA: We expected the employer
 20 to say, come to us to say, what you people are demanding, I
 21 cannot afford, but what I can afford is this.
 22 MR MPOFU: Yes, thank you. Then to round
 23 off this issue about collective bargaining and labour
 24 relations, can you just explain to us, there was a
 25 discussion, you remember the discussion about your salaries

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1 as the RDOs and so on?
 2 MR MAGIDIWANA: I remember that, yes.
 3 MR MPOFU: Now there was evidence, and we
 4 will probably seek answers more from my colleagues from
 5 Lonmin on this, but is it your understanding that the
 6 grading system at Lonmin is based on categories of
 7 employees, and if so, what category were you in?
 8 MR MAGIDIWANA: It is so, yes, in terms
 9 of categories.
 10 MR MPOFU: And what is your category, and
 11 if you know, what is the category of the RDOs?
 12 MR MAGIDIWANA: I am in the same category
 13 as the RDOs. There's no difference.
 14 MR MPOFU: Okay, thank you. We'll
 15 clarify that later with Lonmin.
 16 CHAIRPERSON: Can you maybe remember what
 17 grade you were?
 18 MR MAGIDIWANA: When, Mr Chair?
 19 CHAIRPERSON: Before the 16th of August.
 20 MR MPOFU: Grade or category.
 21 MR MAGIDIWANA: I don't remember it.
 22 MR MPOFU: Okay, thank you -
 23 CHAIRPERSON: Because it appears from the
 24 agreement between Lonmin and the various unions and the
 25 delegates, as I recall, that the rock drill operators were

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1 promoted from Paterson Grade A4 to B1 with effect from the
 2 1st of October, from which I assume they were Paterson Grade
 3 A4, and all surface and underground general workers were
 4 promoted from Paterson Grade A3 to A4. So I'm interested
 5 to know which grade you fell into, but – that's page 93 of
 6 exhibit XX2.

7 MR MPOFU: Thank you, Chair.

8 CHAIRPERSON: Can you not help? You
 9 can't remember what grade or category you were in?

10 MR MAGIDIWANA: I only hear of these
 11 grades.

12 MR MPOFU: Yes, Chairperson, I'm sure we
 13 can submit that information by way of admission between
 14 Lonmin and ourselves. Thank you, Chairperson. Right, Mr
 15 Magidiwana, I'm now going to be moving from topic to topic,
 16 just clarifying some of the issues that you testified on.
 17 You gave evidence – and you'll forgive me if I move from
 18 the kraal back to the mountain, it's just to clarify a few
 19 aspects. You testified at some stage under cross-
 20 examination that the person – you remember that there is a
 21 video which showed one, maybe two persons from your group
 22 shooting in the direction of those two policemen?

23 MR MAGIDIWANA: Yes, I remember that.

24 MR MPOFU: Yes, and it's common cause
 25 that at least one of those people had a firearm in his

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1 hand. The other one, there's a bit of gray area, but
 2 that's not important for what I'm going to ask you now.
 3 Now you said under cross-examination that that person, or
 4 both of them were shooting back. What did you mean by
 5 that?

6 MR MAGIDIWANA: Just repeat the question
 7 again, Sir.

8 MR MPOFU: Yes, I'm saying when you were
 9 giving answers to Mr Ngalwana, you described what those
 10 people were doing as "shooting back at the police," and the
 11 emphasis is on back, and I wanted to understand from you
 12 what you meant by that. Or maybe I should ask you, in that
 13 exchange of fire, so to speak, who attacked first?

14 MR MAGIDIWANA: Sir, as I said earlier,
 15 these people that came over shooting, we saw them for the
 16 first time when they shot, when these others, that is the
 17 people who were in my side, started shooting long after the
 18 police had started shooting.

19 MR MPOFU: Yes, I think the part that was
 20 not translated is where you were saying the very first
 21 person to observe those two policemen shooting was?

22 MR MAHLANGU: I am sorry, Sir. He said -

23 MR MAGIDIWANA: I am the first person to
 24 see them. That is the police.

25 MR MPOFU: And we've already gone

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1 through, I think L206 actually is a good picture that
 2 explains at least a moment in that shootout, and I think we
 3 established earlier that this is the photo where you
 4 testified that you were crying and, or screaming, as the
 5 person who has emblazoned on his back "Police" was shooting
 6 in your direction. Correct?

7 MR MAGIDIWANA: Yes, I was crying.

8 MR MPOFU: Right, you've also testified
 9 regarding that particular episode, that it was the stage
 10 where you were in a gap between two Nyalas which were
 11 parked alongside the fence, opposite the kraal. Correct?

12 [11:07] MR MAGIDIWANA: Yes.

13 MR MPOFU: And this was also evidence in
 14 which I think you asked one of your rhetorical questions,
 15 which I would like you to explain to the Commission, where
 16 you said if your intention was to attack the police, why
 17 would you have left those two and attacked the many who
 18 were on the other side. Can you elaborate on that to the
 19 Commission?

20 MR MAGIDIWANA: I keep asking myself that
 21 question even today, Sir, because if it is alleged that we
 22 were attacking, why would we leave these two policemen who
 23 were shooting at us if we intended attacking?

24 MR MPOFU: Chairperson, is this an
 25 appropriate time?

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1 CHAIRPERSON: I was going to ask at
 2 quarter past 11, but if you would prefer me to take the
 3 adjournment now, I should think so. We need Mr Ngalwana's
 4 information after tea, so we have to have a tea
 5 adjournment.

6 MR MPOFU: Ja, thank you, Chairperson.

7 CHAIRPERSON: If it's convenient –

8 MR MPOFU: It is, Chair.

9 CHAIRPERSON: It's an appropriate stage
 10 in your cross-examination to take the adjournment now,
 11 we'll do so.

12 MR MPOFU: Yes, Chairperson, it's a
 13 natural break. Thanks.

14 CHAIRPERSON: Right, we can now adjourn
 15 for tea.

16 [COMMISSION ADJOURNS COMMISSION RESUMES]

17 [11:44] CHAIRPERSON: The Commission resumes, Mr
 18 Magidiwana, you are still under oath. Mr Mpofo, please
 19 proceed with your re-examination.

20 MR MPOFU: Thanks, Chairperson. If I may
 21 place on record that the information from SAPS is still
 22 outstanding, but there's an understanding between us that
 23 we will defer that part of the re-examination. I
 24 understand that they are still trying to trace Mr Ngalwana,
 25 and I've accepted their assurances that it will be given to

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1 me as soon as possible.

2 CHAIRPERSON: - you've said has been

3 confirmed.

4 MR MPOFU: Thank you, Chairperson. Mr

5 Magidiwana, you were asked questions about what Mr

6 Mathunjwa said and what the police did not say, and so on,

7 in the following context, in the context of the leaving

8 your weapons, or putting your weapons down. Now, I just

9 want to ask you, to clarify that issue with a direct

10 question that, on the 16th, did anyone whether it was Mr

11 Mathunjwa, whether it was the police, whether it was

12 whoever, did anyone ever address the group of workers on

13 the 16th and ask them to put down their weapons?

14 MR MAGIDIWANA: No, there was never such

15 a person.

16 MR MPOFU: Thank you. And it's been

17 suggested, I think yesterday under cross-examination that

18 you should have guessed that the police expected you to

19 hand over your weapons. Do you remember the evidence which

20 was given of General Mpembe on the 13th, when he very

21 clearly told that group what he expected them to do with

22 the weapons?

23 MR MAGIDIWANA: I heard it when it was

24 being said.

25 MR MPOFU: Yes. I am quite aware that

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1 you – this would be secondary knowledge to you because you

2 were not there when General Mpembe was making the

3 statements but the question that I really want to ask you,

4 or rather we will argue at the end, that the approach that

5 was followed by General Mpembe on the 13th, which is to warn

6 the people, tell them what the police expect, and so on, is

7 actually in accordance with the police regulations which

8 say that the first thing you do, is to tell the people

9 explicitly what it is that they should or should not do.

10 Now the question to you is simply, do you know of any

11 reason why on the 16th, the police did not follow those

12 regulations, why they did not say to you, put down the

13 weapons otherwise we will shoot and so on and so on?

14 MR MAGIDIWANA: I don't know why they did

15 not do that.

16 MR MPOFU: And the next question which I

17 was going to ask you, you've already answered. I think

18 Commissioner Hemraj or somebody else asked you, as to what

19 you would have done had the police given such a warning or

20 made such an order. Do you remember that? Yes, now

21 because you were not informed, you gave evidence that when

22 the barbed was pulled, you did not know what was going to

23 happen, and what did you think might happen?

24 MR MAGIDIWANA: I thought perhaps we were

25 going to be arrested or that the employer will arrive

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1 there.

2 MR MPOFU: You've also said that at some

3 stage during the pulling of the barbed wire, you realised

4 that what Mathunjwa had warned about, might be about to

5 happen, do you remember that?

6 MR MAGIDIWANA: Yes.

7 MR MPOFU: And at that point, once you

8 made that realisation, what was the decision that was

9 taken?

10 MR MAGIDIWANA: It was to leave.

11 MR MPOFU: And is it correct that Mr

12 Mathunjwa in saying that he was going to be killed, or

13 warning that you were going to be killed, his advice was

14 that you should leave the koppie.

15 MR MAGIDIWANA: It is so.

16 MR MPOFU: Now, you've now told us that

17 you –

18 MR MOTAU SC: Chairperson, can I just get

19 clarity on this part? My learned friend is asking on this

20 side, and I thought the witness's answer was, he did not

21 hear.

22 MR HANABE: He said [African language].

23 MR MOTAU SC: No, I am asking a different

24 – I am raising a different issue, I thought the witness had

25 said he did not hear Mr Mathunjwa's address because you

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1 remember there's the part that Mathunjwa said, the employer

2 says he is not talking about 12 500, it is not coming. It

3 was put by Mr Ngalwana.

4 MR MPOFU: Okay. No, Sir, it is

5 addressed to me. Chairperson, I think my learned friend is

6 maybe mixing up two issues. The issue I am addressing is

7 simply that Mathunjwa said to them that you are going to be

8 killed, and so on and so on, and knelt down to ask them to

9 leave the koppie. There was no such a thing that that did

10 not happen. But about the issue of the weapons and so on,

11 it's true that the witness had said that it was not said.

12 I think my learned friend is nodding, understandingly.

13 Yes, thank you, Mr Magidiwana, that issue has been cleared

14 up. Yes, the issue has now been cleared up. All I was

15 asserting to you, was that Mathunjwa said you must leave,

16 otherwise you are going to be killed. Obviously you said

17 you did not believe him. When you started to believe him,

18 you took a decision to leave, as he had advised, and

19 whatever else happened, is what I am now going to ask you

20 about. When you then decided to leave, as once you

21 realised that Mathunjwa's warning had been true, how did

22 you decide to – or rather what route did you decide to take

23 to leave the koppie?

24 MR MAGIDIWANA: With the one that is from

25 Marikana and leading to Nkaneng.

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1 MR MPOFU: Yes, and there's already
 2 evidence which has been led, I won't refer you to the
 3 slide, but a number of the people, I don't know how many,
 4 indeed also made that, or seemed to have made that
 5 decision, because they left the koppie, and all I want to
 6 ask you is what route did they take, those who had
 7 successfully executed Mathunjwa's advice?
 8 MR MAGIDIWANA: They walked on the one on
 9 which we also had intended to walk.
 10 MR MPOFU: Yes, and in a way you followed
 11 them, but what happened when it was your turn to take that
 12 road near the kraal?
 13 MR MAGIDIWANA: It was then being blocked
 14 by barbed wire, and also being sprayed on with water, and
 15 where we ran away. When we made a turn on the road, around
 16 the kraal, with the intention of also engaging or appearing
 17 on that very same road, the police left a place where they
 18 were, and they had already closed that gap or the place
 19 where we had intended to walk or pass, and they shot at us.
 20 MR MPOFU: Thank you. This is quite a
 21 crucial piece of evidence, can you please tell the
 22 Commission whether when you say you were blocked near the
 23 kraal, which we've heard a lot about, when that road was
 24 blocked, and before you turned around the kraal, did you
 25 see that line of policemen, the ones who eventually shot at

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1 you, that you've seen in the videos, were they in that
 2 position or were they not in that position?
 3 MR MAGIDIWANA: We never saw the police
 4 officers. We only saw the police after we had in fact
 5 emerged, and we said, there, because they had already left
 6 the place where they were, and then all of a sudden they
 7 were there. And they were on the path or the road where we
 8 had intended to pass, and they had already blocked in fact
 9 that road.
 10 MR MPOFU: Yes, and I really would like
 11 you to explain this so the Commission, we see you, you've
 12 answered that question, we see you now in picture L206,
 13 looking at the two policemen who were shooting, and then I
 14 think in the video, we then see you sort of being obscured
 15 from them by one of the Nyalas, can you please take the
 16 Commission then, exactly what – step by step, what happened
 17 to you from the time you were looking at these policemen,
 18 two policemen who were shooting, and crying out as you are
 19 in 206, to the point at which you were shot down?
 20 MR MAGIDIWANA: Oh, Sir, many things
 21 happened there.
 22 MR MPOFU: Yes – sorry, just for clarity,
 23 I am just asking, I know many things were happening. I was
 24 asking in relation to you, what happened to you from what
 25 we see there, to the time when we see you on the ground?

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1 MR MAGIDIWANA: When I appeared in front
 2 of those two police officers, by then it was a time there
 3 was already a smoke, and they fired shots. At that stage,
 4 it was then that I screamed and then running, leaving them
 5 where they are as I was running. As I had left them, and
 6 then went further, I then realised that they were in fact
 7 the others who were in front of me, but standing in a line.
 8 They, those then are the police officers who shot at us.
 9 MR MPOFU: Yes, now I just want to ask
 10 you this, in this period that you've just described now, on
 11 L206, we can see you holding on your left-hand side a stick
 12 and you are holding it almost at the halfway point, in the
 13 middle of the stick. Can you see that?
 14 MR MAGIDIWANA: I can see that.
 15 MR MPOFU: Now the evidence of the police
 16 is probably going to be that in the period that you've just
 17 described to the Commission, you were in some, what they
 18 call, attacking formation. Do you understand that?
 19 MR MAGIDIWANA: No.
 20 MR MPOFU: Yes, I see you are shake your
 21 head, I know you've already denied that, I was just telling
 22 you what they are going to say. My question is, and I
 23 think it's common cause now that you were holding, that was
 24 the only weapon that you were holding, well, maybe that's
 25 too much because there's the issue of the gun and so on.

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1 Let me say, the only traditional/dangerous weapon apart
 2 from the disputed gun, that you were holding.
 3 MR MAGIDIWANA: It is so.
 4 MR MPOFU: Now what I want to know from
 5 you are two things, firstly are you left-handed or right
 6 handed?
 7 [12:04] MR MAGIDIWANA: I am right handed.
 8 MR MPOFU: And between the time that we
 9 see in L206 where you are holding this stick in the middle
 10 of the stick with your left hand side, did you ever change
 11 that position in relation to you and the stick?
 12 MR MAGIDIWANA: No there was never such a
 13 moment.
 14 MR MPOFU: And in one of the footages
 15 that we are going to show there is a portion which I'll ask
 16 you to watch out for when we do that, where we can see the
 17 stick being pulled away from your body while you are down.
 18 Do you remember that?
 19 MR MAGIDIWANA: Yes I remember that, is
 20 the one in fact I wanted, the one I said there is a clip in
 21 fact which shows the time where my stick was being taken
 22 from me.
 23 MR MPOFU: Thank you. Happily you've
 24 been subsequently proven right by the, our discovery of
 25 some footage which I'm going to show you. Before we go to

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1 the video, I also, I'd like you to ask the, you to explain
 2 another supposedly rhetorical question which you asked to
 3 the commission. You said something like if you ran away
 4 from water why would you not run away from guns. Can you
 5 explain what you meant by that?
 6 MR MAGIDIWANA: The reason why I asked
 7 that rhetorical question, when this whole thing started,
 8 where we were eventually shot at, we in fact were running
 9 away from the water. But in fact we were looking for this
 10 path with which we were going to go through. Now what was
 11 being said was that we were attacking the police, how can
 12 we do that, how can do that as we were running away from
 13 the water, how can then run to the firearm.
 14 MR MPOFU: Yes okay. I'm also not going
 15 to answer that question. Maybe one day in argument it will
 16 be answered. Right there was also evidence about the exact
 17 route and path that you did or did not follow between the
 18 place where your group was sitting and the kraal, you
 19 remember that?
 20 MR MAGIDIWANA: Yes.
 21 MR MPOFU: And I think this issue was
 22 also touched on this morning. In relation to slide number
 23 194. Commissioner, I am right 194. First I want to inform
 24 you that this exhibit is not yet evidence and therefore the
 25 question of where those arrows should be or should not be

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1 is a matter that hopefully the police will educate us on at
 2 a later stage. But be that as it may I really would like
 3 you to explain something which I thought became one of the
 4 most confusing pieces of evidence and I did suggest in your
 5 presence to the commission where at least I thought the
 6 confusion came from. But I'd like to take you through it.
 7 When, Mr Ngalwana, was and unfortunately he's not here, was
 8 questioning you about what he terms as the first approach
 9 you made to through, to put it neutrally. He was referring
 10 to that yellow arrow, do you understand that? That one,
 11 the straight one and you, when you are talking about the
 12 first approach or whatever you call it, the first time what
 13 were you referring to?
 14 MR MAGIDIWANA: I said as he was pointing
 15 there on that path I, we did not walk on that path in fact
 16 that he had mentioned.
 17 MR MPOFU: On the yellow line?
 18 MR MAGIDIWANA: Yes.
 19 MR MPOFU: Where was your first time?
 20 MR MAGIDIWANA: It was in the koppie, but
 21 we were walking on the path in fact which is leading
 22 directly to the veldt.
 23 MR MPOFU: Yes you traced that, I think
 24 it's triple.
 25 MS HEMRAJ SC: Mr Mpofu don't you have

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1 this in the witness's own hand on expert EEE8.3?
 2 MR MPOFU: That's exactly what I'm
 3 saying.
 4 MS HEMRAJ SC: Yes.
 5 MR MPOFU: Ja. You have that on EEE8, or
 6 rather you've traced your version of the route on EEE8.3.
 7 MR MAGIDIWANA: Yes.
 8 MR MPOFU: And in terms of that route
 9 when was it that for the first time you were, something
 10 happened to you and you were sent, rather sprayed with
 11 water and so on?
 12 MR MAGIDIWANA: We started on that small
 13 path, when we were about to reach the one that leads to
 14 Nkaneng.
 15 MR MPOFU: Yes and when you were giving
 16 evidence referring to the small path was there any other
 17 small path that you were referring except for the one that
 18 you've just told us about now?
 19 MR MAGIDIWANA: The small paths that I
 20 talked about are two, there are two of them.
 21 MR MPOFU: Yes.
 22 MR MAGIDIWANA: Then the other one in
 23 fact is in front and before you, it joins that path that is
 24 in fact from Marikana but this particular one is near the
 25 kraal.

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1 MR MPOFU: Yes and the other one?
 2 MR MAGIDIWANA: The other one, small path
 3 is the one you use to turn around the, when you walk to
 4 turn around the kraal. It has got some weeds in it, in
 5 fact that is where the, in fact it has got cow dung
 6 according to him and that is where the cattle usually move.
 7 MR MPOFU: Yes and you said [African
 8 Language] okay that's, we can, for the question of - for
 9 the sake of this question you can eliminate that, is that,
 10 you're referring to the spot where you were more or less
 11 when we're talking about L206?
 12 MR MAGIDIWANA: Yes.
 13 MR MPOFU: Alright, thank you. Before we
 14 go to the footage. I just want to refer, you know that you
 15 were referred many times to, are you okay, sorry,
 16 Chairperson, the witness did indicate at tea time that he
 17 was not feeling well, but he could continue. So I'm just
 18 inquiring as to whether he's still fine.
 19 MR MAGIDIWANA: You can continue, Sir.
 20 Just a little bit, I will tell you then I maybe there is
 21 something.
 22 MR MPOFU: Thank you. You know that you
 23 were asked extensively about a certain Mr X.
 24 MR MAGIDIWANA: I remember, Sir.
 25 MR MPOFU: Yes and his version was put to

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1 you in some great detail.

2 MR MAGIDIWANA: It is so, Sir.

3 MR MPOFU: Well I'd like to, there were

4 certain important parts which were skipped, so to speak

5 from his version, which I'd like to bring to your attention

6 and it was explained to you that the police would rely a

7 lot on what Mr X's, on Mr X's evidence regarding what

8 happened in the period in question, do you remember that?

9 MR MAGIDIWANA: Yes.

10 MR MPOFU: Okay well this is one of the

11 things that Mr X says. This is about the 12th. You

12 remember, you were told about -

13 CHAIRPERSON: Just, paragraph?

14 MR MPOFU: As it happens, yes, Chair, but

15 it's also about the 12th, you remember the, Chairperson,

16 asked you a few questions and even, Mr Ngalwana, about

17 relating to the killing of security officials on the 12th.

18 MR MAGIDIWANA: I remember.

19 MR MPOFU: Now Mr X says this about that

20 incident, "I saw two security officials try to get into

21 their vehicle and we blocked them and assaulted with our

22 weapons. I personally stabbed one of the security

23 officials, somewhere on the mouth or face. I stabbed him

24 with a butcher knife I had with me". Yes and we know from

25 what you were told that this, that person possibly died and

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1 then you remember being asked about whether or not you had

2 gone with a group that went to K4.

3 MR MAGIDIWANA: I remember, Sir.

4 MR MPOFU: Well this is what Mr X says

5 about that incident, at paragraph 16, Chairperson. "I

6 remember while attacking the people who were reporting for

7 duty, I saw one lying on the ground whom we assaulted and I

8 personally stabbed him on the lower part of his stomach or

9 hip. I stabbed him with a bush knife I had in my

10 possession, I do not know whether that person was still

11 alive or not when I stabbed him". So that's the second

12 person that was possibly killed by Mr X and then do you

13 remember, you were asked by Mr Ngalwana regarding a group

14 that went to Eastern Platinum in the early hours of the

15 morning, I think.

16 MR MAGIDIWANA: I remember.

17 MR MPOFU: About that one Mr X says, on

18 that incident, Mr X at paragraph 17 says this, he's

19 describing the incident at which somebody was killed there,

20 yes in the, during that episode. He says, okay "before the

21 man can finish someone and someone assaulted him on the

22 back of his head with a bush knife and someone else also

23 stabbed him with a spear on his left front chest".

24 Then it says, "The man fell down on his back and

25 I also stabbed him on the abdomen." We also know that that

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1 person died, and that's the third person. Now these were

2 the parts that were not put to you about Mr X's version.

3 When the parts that were put, were put to you, you said Mr

4 X was a liar. Do you have any comment on what I've just

5 said to you now?

6 [12:24] MR MAGIDIWANA: Yes, Sir.

7 MR MPOFU: Yes.

8 MR MAGIDIWANA: Do you see this X? He is

9 the real murderer. It's obvious that he's the one who

10 murdered people.

11 MR MPOFU: And, well it might be

12 argument. Do you have any comment about the fact that the

13 police will rely on such a person -

14 CHAIRPERSON: That's point of argument -

15 MR MPOFU: It is, Chair, thank you.

16 CHAIRPERSON: You can say it from the bar

17 later if you like, but -

18 MR MPOFU: Yes. No, I accept that -

19 CHAIRPERSON: - the submission won't be

20 strengthened by the fact that you relied on his evidence

21 being -

22 MR MPOFU: From the witness, yes.

23 Chairperson, yes, thank you very much. Thank you, yes,

24 we'll leave that for argument. Thank you, Mr Magidiwana.

25 I think, ja, this stage might be appropriate for, to do

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1 that footage, Chairperson.

2 CHAIRPERSON: Which - the warning?

3 MR MPOFU: Yes, and the warning, thank

4 you, Chairperson.

5 CHAIRPERSON: Yes, what I'm saying now is

6 addressed to people in the auditorium. I'm told that we're

7 going to be shown video clips which show, which depict some

8 of the people who died on the 16th of August, and the sight

9 of them on the clips, particularly after they've been shot,

10 is likely to cause distress and hurt to their loved ones

11 and relations. So if anyone in the auditorium falls in

12 that category, is either a loved one or a relation of any

13 of the people who were killed on the 16th of August, I will

14 ask that the clip not be shown for two minutes after what

15 I've just said has been translated, to enable them to leave

16 the auditorium if they wish.

17 MR MPOFU: Thank you, Chairperson. While

18 that is happening, if I may just give some instructions.

19 We're going to be doing item 2 and 3 on the list, and if

20 you can - item 1 is the longer eNews clip. Item 3 is the

21 SABC clip which is marked "shorter," and if you can, on the

22 eNews clip there are intervals where you see words written,

23 which you can pause in those intervals and I'll ask

24 questions for each segment. Thank you.

25 CHAIRPERSON: Have these clips been shown

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1 already? Do they have exhibit numbers or do we have to
 2 give them new exhibit numbers?
 3 MR MPOFU: It's definitely new footage,
 4 Chairperson, so it would – although it does contain some of
 5 the footage we've seen, but it's new itself.
 6 CHAIRPERSON: Ms Pillay, can you please
 7 help us, tell us how we must describe this exhibit, or
 8 these exhibits?
 9 MR MPOFU: That would be eNews, I think.
 10 MS PILLAY: Chair, the eNews clip would
 11 be EEE16. I believe that Mr Mpofu's team has caused copies
 12 of DVDs with these clips to be distributed.
 13 CHAIRPERSON: And the second clip is the
 14 SABC clip. Is that also new material as far as the
 15 Commission is concerned, Mr Mpofu?
 16 MS PILLAY: Chair, as far as I'm aware,
 17 it is new material.
 18 CHAIRPERSON: So that will be EEE17?
 19 MS PILLAY: EEE17 would be the SABC clip,
 20 and I believe there are DVDs of this clip also available.
 21 MR MPOFU: Yes.
 22 MS PILLAY: If parties don't have it, we
 23 can distribute it lunchtime.
 24 MR MPOFU: Yes, Chairperson, if I may
 25 just clarify, it would seem that with regard to the eNews

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1 clip there was some understanding that it would be
 2 distributed to the evidence leaders and they would
 3 distribute it, but if that has not been done, we'll take
 4 the responsibility. As far as the SABC clip is concerned,
 5 we've got copies which we can hand out quickly. Thanks,
 6 Chair.
 7 CHAIRPERSON: They don't have to be
 8 distributed now; they can be distributed later, I'm sure.
 9 MR MPOFU: Yes, it can, actually.
 10 CHAIRPERSON: No-one is going to –
 11 MR MPOFU: Yes.
 12 CHAIRPERSON: - look at the DVD that's
 13 being given to him or her now.
 14 MR MPOFU: Yes, and this one is
 15 relatively short. Thank you. Okay –
 16 CHAIRPERSON: I don't know if what I've
 17 said has been heard by the relevant person. You don't have
 18 to give them out just yet; you can give them out at
 19 lunchtime.
 20 MR MPOFU: At lunchtime, thank you,
 21 Chairperson. Okay, then can we start with the eNews? Mr
 22 Magidiwana, can you have a look –
 23 [VIDEO RECORDING PLAYED]
 24 CHAIRPERSON: I missed the – sorry, could
 25 we go back to the front? I missed the wording. Before

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1 that, the very first –
 2 MR MPOFU: Yes, stop right at the
 3 beginning.
 4 CHAIRPERSON: - image had something that
 5 I didn't read. Is that the beginning?
 6 MR MPOFU: Yes, it is.
 7 CHAIRPERSON: That's it. That's it.
 8 MR MPOFU: Thank you.
 9 [VIDEO RECORDING PLAYED]
 10 MR MPOFU: Okay, thank you. Now,
 11 Mzoxolo, I know it's not easy for you to watch some of
 12 these things, but I'm going to ask you a few questions. In
 13 the same way, if there's an objection, to try and save time
 14 I'll lead you on the issues that are patently from the
 15 video, but I'm sure if I overstep then my learned
 16 colleagues will object.
 17 MR HANABE: The witness is crying, Senior
 18 Counsel.
 19 CHAIRPERSON: I was just looking at him
 20 as you spoke –
 21 MR MPOFU: Yes.
 22 CHAIRPERSON: And we're having the same
 23 reaction we had before, and again one can understand, as I
 24 said this was the, brings back the most cataclysmic event
 25 in his life. Imagine the emotional turmoil that he's

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1 undergoing while he watches it. Perhaps we can ask, has
 2 someone got some sugar water perhaps to take to him, and
 3 ask him whether he feels able to continue? There's no
 4 point in torturing him by asking him questions about,
 5 particularly about this matter, at a time when he's really
 6 upset.
 7 MR MPOFU: When he's upset, yes,
 8 Chairperson.
 9 CHAIRPERSON: I don't think –
 10 MR MPOFU: Chairperson, can I just get an
 11 indication –
 12 CHAIRPERSON: Yes, it might be sensible
 13 to take the lunch adjournment and continue at say half past
 14 1 –
 15 MR MPOFU: In any event, yes.
 16 CHAIRPERSON: Maybe the missing Adv
 17 Ngalwana will have been found by the search party by then.
 18 MR MPOFU: Thank you, Chairperson.
 19 Mzoxolo, can we continue with this after lunch? The
 20 Chairperson thinks you should take a, use the lunch break
 21 maybe to recover.
 22 CHAIRPERSON: I can see from here that
 23 there are tears on his face actually.
 24 MR MPOFU: Yes, Chairperson.
 25 Chairperson, yes, we do accept –

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1 CHAIRPERSON: Even if he's prepared to
2 carry on, I don't know if we should subject him to it, even
3 if he's willing to be subjected. We'll adjourn till half
4 past 1.

5 MR MPOFU: Yes, Chairperson, thank you.

6 [COMMISSION ADJOURNS COMMISSION RESUMES]
7 [13:34] CHAIRPERSON: The Commission resumes. Mr
8 Magidiwana, you're still under oath. I take it you have
9 further questions in re-examination. Are there further
10 video clips that you want to show?

11 MR MPOFU SC: Yes, Chairperson.

12 CHAIRPERSON: I take it that those in the
13 auditorium are aware that the warning I gave still stands.

14 MR MPOFU: Chairperson, before I
15 continue, I just wanted to place on record that my learned
16 colleague for SAPS and I had a another discussion about the
17 pathway. It seems like there are still two of them which
18 are outstanding, but we have sort of reached an arrangement
19 in terms of which I will defer, for lack of a better word,
20 my cross-examination on the issue of dates. And possibly –
21 should we still have grants to dispute the date and so on
22 when SAPS leads that evidence on Exhibit L, we would then
23 deal with it that way, otherwise we'll find ways of having
24 admissions between ourselves.

25 CHAIRPERSON: The witness has committed

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1 to a version.

2 MR MPOFU: Yes.

3 CHAIRPERSON: That he wasn't there on the
4 14th or the 15th.

5 MR MPOFU: Hm.

6 CHAIRPERSON: So if it's established that
7 those photographs were indeed taken on the 14th or the 15th,
8 then he may have problems. If on the other hand it's not,
9 and it's – it seems clear that they were taken on the 16th,
10 then obviously the situation will be different. There will
11 be no need for him to explain further, because his version
12 is already on record.

13 MR MPOFU: Thanks.

14 CHAIRPERSON: As you say it's a matter to
15 be dealt with primarily with the police when they set out
16 to prove the evidential material contained in Exhibit L.

17 MR MPOFU: Thanks, Chairperson.

18 CHAIRPERSON: Thank you.

19 MR MATHIBEDI SC: Thanks, Mr Chairman, I
20 confirm the arrangement.

21 CHAIRPERSON: Mr Mpofo, you did indicate
22 to me in chambers that, as to how long you thought you
23 would be with the witness. Perhaps you could put that on
24 record as well, because as a consequence of it, which I
25 think in fairness we should tell everybody in the

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1 auditorium about, because they might want to make other
2 arrangements once they've heard what you're going to say.

3 MR MPOFU: Thanks, Chairperson. Yes,
4 Chairperson, just to confirm that through discussions in
5 chambers and with our learned colleagues, Mr Semanya and Mr
6 Mathibedi and Mr Madlanga and also in the interest of this
7 particular witness, we agreed that we would try and finish
8 him at least today and –

9 CHAIRPERSON: I think finish his evidence
10 might be more correct.

11 MR MPOFU: Yes, especially in the
12 circumstances, ja, finish his evidence today, which might
13 have one of two consequences. In the unlikely event that
14 we finish before four, then the Chairperson indicated that
15 we'd adjourn and then the next witness would then be –
16 would start tomorrow morning. In the more likely event
17 that by four we are still dealing with him, we will sit for
18 next 15 or so minutes and try and round him off. Thanks,
19 Chairperson.

20 CHAIRPERSON: It would be longer if we
21 have to, but the main point is that the National
22 Commissioner who was going to give evidence today, the
23 first witness called by the police, will not be giving
24 evidence this afternoon. She'll be giving evidence
25 tomorrow.

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1 MR MPOFU SC: She'll be giving evidence
2 tomorrow, yes.

3 CHAIRPERSON: I understand you've already
4 been told that so that you can excuse your witness if you
5 wish to do so.

6 MR MATHIBIDE SC: We're indebted to the
7 Chair.

8 MR MPOFU: Thank you, Mr Chairperson, I
9 did phone Mr Semanya with the message during the last
10 break. Now and coming back to this witness, Chairperson,
11 thank you for giving us the break. The witness has
12 indicated that he – we've discussed this quite extensively
13 yesterday, this particular evidence, and I must express my
14 gratitude to Mr Madlanga and subsequently Mr Mathibedi,
15 because to try and avoid the distress. I had to seek their
16 permission to show the video to the witness yesterday, who
17 strictly speaking was still under cross-examination and my
18 colleagues were quite happy with that arrangement. Yes,
19 and that exercise seems to have made a difference, Chair.
20 He is prepared to go on.

21 CHAIRPERSON: I think we have to see the
22 tail end of the e-news clip, which is EEE16 and that will
23 be followed by the SABC clip, which is EEE17.

24 MR MPOFU SC: Yes. Chair, what I propose
25 to do was sort of to punctuate this video which – where the

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1 words appear, which is what we have done now. Then I'll
 2 just ask a few questions in the manner that I have
 3 suggested, unless there is an objection, just for the
 4 section that we have seen, thank you. Mr Magidiwana, on
 5 the part of this Exhibit EEE16 that we have already seen,
 6 let me start with the original issue that we were looking
 7 for and then we found other things. Did you observe a
 8 person who looks like a journalist, a white person who was
 9 – who have shown at the first early stages of that clip?
 10 MR MAGIDIWANA: I saw.
 11 MR MPOFU SC: And does that person seem
 12 like the journalist that you referred to when you gave the
 13 evidence a day or two ago?
 14 MR MAGIDIWANA: It is so.
 15 MR MPOFU SC: Yes. And as I have
 16 indicated to the, Chairperson, we have traced the person
 17 and he still has to see the footage and confirm if it is
 18 him, but after that we'll hand over his name to the
 19 evidence leaders. Right. And then, were you able to hear,
 20 apart from the commentary to that effect, were you able to
 21 hear the sound of the choppers or helicopters?
 22 MR MAGIDIWANA: I also saw them.
 23 MR MPOFU SC: Yes, on the day.
 24 MR MAGIDIWANA: On that day.
 25 MR MPOFU SC: Okay. And then coming to

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1 you, we now know where you were lying among those people.
 2 Did you observe the place where we see you for the first
 3 time, lying on your back with your left knee up?
 4 MR MAGIDIWANA: Yes.
 5 MR MPOFU SC: There was also another
 6 place where the camera almost zoomed onto your face and we
 7 could see your eyes open, you were looking towards the side
 8 of the road as it were?
 9 MR MAGIDIWANA: It is so.
 10 MR MPOFU SC: And so now in addition to
 11 the positions that you had already testified about, where
 12 you were lying on your side, taking off the towel and then
 13 the one that we all know where you are facing the ground.
 14 We have to add this position where you are facing upwards
 15 with your knee up. Would that be correct?
 16 MR MAGIDIWANA: Yes, it is so.
 17 MR MPOFU SC: And finally, did you see
 18 another journalist, a Black journalist who doesn't seem to
 19 be the Rastafarian you're referring to, who was also
 20 running basically almost out of the footage, out of the
 21 picture?
 22 MR MAGIDIWANA: Yes, I saw that
 23 journalist.
 24 MR MPOFU SC: Sorry, I said finally, but
 25 I was wrong. The – one of the points of showing this

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1 particular footage, was when Ms Pillay had played UU3 and
 2 AAA7 our joint intention as it were was to explain, because
 3 the one I think it's UUU7 shows the police in one position
 4 and then the next one shows them among the people and we
 5 would have asked the Commission as it were, to extrapolate
 6 that they must have moved in. But in this video, did you
 7 observe that we actually see the moving in between those
 8 two positions?
 9 MR MAGIDIWANA: Yes, I saw them.
 10 MR MPOFU SC: Finally now this time, on
 11 this part, the – did you see the one policeman holding a
 12 small gun, moving in, almost at a faster pace towards where
 13 the people were lying.
 14 MR MAGIDIWANA: Yes.
 15 MR MPOFU SC: Thank you. Can you see the
 16 second segment, thank you very much.
 17 [VIDEO SHOWN]
 18 MR MPOFU SC: Thank you. Mr Magidiwana,
 19 in this segment just a few issues. You saw the journalist
 20 again, did you?
 21 MR MAGIDIWANA: I saw him.
 22 MR MPOFU SC: And when I was examining
 23 you in chief, we dealt with the other material of cease
 24 fire and the shots that followed thereafter. But on this
 25 clip, were you able to detect more shots and I'm not asking

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1 where they were coming from, after the shout of 'cease
 2 fire'?
 3 MR MAGIDIWANA: Yes, they were – so they
 4 could be heard, I could hear them.
 5 MR MPOFU SC: And then if you remember
 6 there was a debate between you and Mr Ngalwana about the
 7 reasons why the police may or may not have been retreating.
 8 On this video were you able to observe the fact that the
 9 police, members of the police seemed to be overcome by the
 10 tear gas and some of them were even coughing?
 11 MR MAGIDIWANA: I could hear they were
 12 coughing there that day.
 13 MR MPOFU SC: And in the course of that
 14 particular debate there was a suggestion of that the police
 15 – that your evidence could not be correct, because they
 16 could use masks. Did you see any policeman wearing a gas
 17 mask?
 18 MR MAGIDIWANA: No, they didn't put them
 19 on.
 20 MR MPOFU SC: Thank you, Chairperson. If
 21 the – I'm trying to make this as quick as possible. Thank
 22 you, Chair.
 23 [VIDEO SHOWN]
 24 MR MPOFU SC: Okay, can you stop, please
 25 and rewind, just to save time, so that we can repeat just

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1 this part. And please when you redo this, if you can give
2 us a little bit more volume. The question I wanted to put,
3 Mr Magidiwana, is whether you can hear the – what seems to
4 be a loudhailer saying “media go away, media go away.”

5 MR MAGIDIWANA: Yes, I heard.

6 MR MPOFU SC: Thank you. Okay. If you
7 can play it from the beginning, just so that everybody’s
8 attention can be drawn to that. I said the beginning, I
9 don’t mean the very beginning, the beginning of this
10 segment.

11 [VIDEO SHOWN]

12 [13:54] MR MPOFU: Thank you, just I think three
13 questions on this one. Were you able to see the police
14 approaching or running – not really running, but let’s say
15 rushing towards the area of the – towards the road, the
16 road side of the picture?

17 MR MAGIDIWANE: Yes, I saw them.

18 MR MPOFU: And when the volume was put up
19 were you able to hear the cocking of the guns before the
20 actual shooting?

21 MR MAGIDIWANE: No, Sir, I just heard the
22 clicking sound, but I don’t know exactly what they were
23 doing.

24 MR MPOFU: Okay, fine, we’ll establish
25 that through the police themselves. And then, once again,

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1 you saw the people who were running – or rather some of the
2 policemen holding to their mouths, seeming to be affected
3 by the teargas?

4 MR MAGIDIWANE: It is obvious that indeed
5 they are affected by the teargas there.

6 MR SEMENYA SC: No, Chairperson, if this
7 is re-examination, then the witness must testify. It is
8 not proper for Mr Mpofo to be doing what he’s doing now.

9 MR MPOFU: Okay, Chairperson, Mr Semenya
10 has obviously not been here. The arrangement that we had
11 reached was that I would lead the witness for the sake of
12 not going through this over a long time, but if it’s on a
13 contentious issue, then obviously then I’ll – either I,
14 voluntarily, will change the mode of questioning or
15 there’ll be an objection.

16 CHAIRPERSON: Yes, well there is an
17 objection, but I don’t know we need waste time on it. The
18 video is before us now as an exhibit. We are in as good a
19 position as the witness is to decide whether people are
20 putting their hands over their mouths, whether they’re
21 dealing with teargas. He’s put on record what he sees, we
22 can, at later stage, if there’s argument about it, study
23 the clip carefully, and there can then be argument. We
24 don’t have to have further evidence on it at this stage.
25 You’ve established what you want to establish, whether it

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1 is in fact indicative of the fact that they were suffering
2 from the teargas is a matter on which we’re in as good a
3 position as the witness is to decide that.

4 MR MPOFU: Yes. Chair, on the subject of
5 this, the only reason I’m doing this is really because it
6 might look like that now, but six months later, when we
7 have to argue, at least these will be pointers. Of course
8 it may be argued that that would be –

9 CHAIRPERSON: No, but the clip will be
10 there, so if there’s an issue during argument, the clip can
11 be shown in argument. I don’t like to hear in six month’s
12 time, but it would be - during examination, I would trust,
13 but never mind, carry on.

14 MR MPOFU: Thank you, Chairperson. Okay,
15 I’ll take care, Chair, to really just deal with the non-
16 contentious stuff. Thank you, Chair. Okay, thank you.

17 [VIDEO SHOWN]

18 MR MPOFU: Okay, you can continue, we’ve
19 already seen that footage.

20 [VIDEO SHOWN]

21 MR MPOFU: Okay, I think that one does
22 speak for itself.

23 [VIDEO SHOWN]

24 COMMISSIONER HEMRAJ: I’m sorry,
25 Chairperson, I’m sorry to interrupt. Has the warning been

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1 repeated, just before these images continue?

2 MR MPOFU: Yes, it was.

3 COMMISSIONER HEMRAJ: It was. Thank you.
4 [VIDEO SHOWN]

5 MR MPOFU: Mr Magidiwana, I’ll ask you
6 just two or three issues which I wish to place on the
7 record. Were you able to see that during the movement of
8 the police towards the bodies, and at other different
9 places, that some of the people on the ground, some of the
10 protestors, were still moving and, in particular, did you
11 observe Mr Ntenetya in the reddish top, who seemed to be
12 trying to struggle off the ground.

13 MR SEMENYA SC: Chair, no, Dali Mpofo
14 can’t be testifying.

15 MR MPOFU: Okay, Chairperson, I think –

16 CHAIRPERSON: Mr Mpofo, at suitable stage
17 in the argument this video can be shown, you can say what
18 you see there, Mr Semenya can then get up and say he
19 doesn’t see it and –

20 MR MPOFU: Yes, Chairperson, that’s fine.
21 I’ll do it the long way. Mr Magidiwana, you previously
22 identified a gentleman that you said as Bai, which we
23 established at that time in chief that it was Mr Ntenetya,
24 do you remember that?

25 MR MAGIDIWANE: I know him.

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1 MR BURGER SC: In that video did you
2 observe him, and if you did, what was he doing?
3 MR MAGIDIWANE: I saw Bai, and when he
4 got shot, I also thought that he was shot below – his
5 pointing below, yes, because in the lower body. As he was
6 directly behind me, he was talking.
7 MR MPOFU: Yes?
8 MR MAGIDIWANE: Even when they helped
9 him, as he was behind me, I could hear that in fact there
10 was this gun where a shot was being fired. As I was also
11 lying there at sometimes, I would also shake, move a little
12 bit, and look in the direction of the Mambush. And I saw
13 that in fact he was dead, but Bai, I am sure that they
14 finished him off.
15 MR MPOFU: Thank you. Yes, can we see
16 the next segment?
17 [VIDEO SHOWN]
18 Thank you. Can you tell us this time what you
19 observed about Mr Ntenetya?
20 MR MAGIDIWANE: I could see that he moved
21 and then sat. Even though he was busy, because at some
22 stage he fell again.
23 MR MPOFU: Yes, and were you able to
24 identify the other person who was dragged and dropped on
25 the floor?

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1 MR SEMENYA SC: I won't allow Mr Mpofo to
2 do this at all. He must accept that we are going to object
3 if he testifies.
4 MR MPOFU: Fine. Did you observe anybody
5 else being handled by the police?
6 MR MAGIDIWANE: I, in fact, never looked
7 at his direction on his side, but I have just seen this one
8 on the video.
9 MR MPOFU: Yes, thank you. Sorry, it is
10 completely my fault. When I'm asking the questions now,
11 I'm referring to what you've observed on the video more
12 than what you observed on that day, and I think from that
13 answer I did not make it clear.
14 Chairperson, if that clip can be played again,
15 there is a particular portion which I'm not sure that it –
16 okay, I'm told it was on this clip, and I'll indicate when
17 to pause please. Thank you.
18 [VIDEO SHOWN]
19 Okay, can you do it almost like bit by bit,
20 because the part I'm looking for is close, and I'll tell
21 you when to stop? I'm sorry, can you play it back slowly,
22 like you did?
23 [VIDEO SHOWN]
24 [14:14] If we can go back slowly and just play this part,
25 and Mr Magidiwana, can you just observe the feet of the

Page 6709

1 policemen and their boots.
2 [VIDEO SHOWN]
3 Okay. Yes, can you just play that part for the
4 last time? Mr Magidiwana, can you then tell the Commission
5 what you've observed in relation to pointers I gave you.
6 Alright, what you observed on that question of the clip, Mr
7 Magidiwana.
8 MR MAGIDIWANE: He's kicking someone, a
9 person who's lying down. I should think that his foot is
10 just on this party's – pointing at his cheek, right cheek,
11 Commissioner.
12 MR MPOFU: Okay, what is he kicking the
13 person with? What did you see exactly?
14 MR MAGIDIWANE: With the boots.
15 MR MPOFU: And is the person who is being
16 kicked with the boot, does it look like he is attacking
17 that policeman?
18 MR MAGIDIWANE: No, Sir.
19 MR MPOFU: Thank you, can we move on?
20 [VIDEO SHOWN]
21 Thank you very much. Can you move to the next
22 clip, thank you – the next segment?
23 [VIDEO SHOWN]
24 Thank you. Mr Magidiwana, just one question on
25 that section. What did you observe in relation to the

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1 protestors and the Nyalas?
2 MR MAGIDIWANE: What I saw, it was the
3 Nyalas that were in fact pursuing the people.
4 MR MPOFU: Yes, thank you. Next segment.
5 [VIDEO SHOWN]
6 Thank you. Just one or two questions here.
7 Until now the evidence seems to suggest that all the
8 arrests were made at scene 2, when the people have been put
9 on the ground. What did you observe on this clip in
10 relation to the arrest of protestors?
11 MR SEMENYA SC: Chair, this witness
12 cannot be an eyewitness to that, and he cannot testify on
13 it.
14 CHAIRPERSON: - Mr Mpofo. You know I
15 don't think that it takes the case very much further by
16 getting one witness to say what he sees on the video. The
17 videos are before us. There may well be argument later as
18 to what one can see, and as I say, your argument as to what
19 is on the video won't be strengthened or corroborated by
20 what the witness has to say. So I think there's something
21 to be said for what Mr Semenya said.
22 MR MPOFU: Yes, Chairperson, I'll
23 withdraw the question, more so on this one, the loaded
24 words, like arrest, which might have legal meanings. So
25 can we move on to the next segment?

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1 [VIDEO SHOWN]
 2 MR MPOFU: Okay, thank you, Chairperson,
 3 everyone will be relieved to hear that is the last segment
 4 of that video. There's still –
 5 CHAIRPERSON: - see on that segment.
 6 MR MPOFU: Well, I'm going to deal with
 7 it now, Chair.
 8 CHAIRPERSON: Do you remember what I
 9 said, that –
 10 MR MPOFU: Yes, no, no, I'm bearing that
 11 in mind, Chair, I'm not going to go to town at this stage.
 12 Mr Magidiwana, with particular reference to the people who
 13 were lying on the ground, if you observed them, and then
 14 there are the policemen who are standing, are you able to
 15 say if the people who are lying on the ground are all dead,
 16 or some are still alive, with indication to the movements,
 17 if any, that you might have observed?
 18 MR SEMENYA SC: Chair, I don't know Mr
 19 Magidiwana's talents, but if he's able to say somebody
 20 lying down is dead or alive -
 21 MR MPOFU: Okay, were they moving? I'm
 22 sure he has talents to see movement.
 23 CHAIRPERSON: The only problem is that we
 24 can see it as much as the witness can. I mean, what's the
 25 point in calling a witness to say, "I'm looking at a video

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1 and I could see something moving," and we all look at a
 2 video –
 3 MR MPOFU: I'm just leading up to the
 4 question, I just need to – thank you. Did you see people
 5 moving?
 6 MR MAGIDIWANE: Yes, there are people who
 7 were moving.
 8 MR MPOFU: And did you observe whether or
 9 not the policemen who were standing there were attending to
 10 the people who were moving and possibly still alive?
 11 MR MAGIDIWANE: I said on the other day
 12 that they were laughing and taking out their phones and
 13 shooting photos of us.
 14 MR MPOFU: Thank you, yes, no, that's
 15 fine. We do have evidence – objective evidence of the
 16 laughing, but it is only at scene 2. Thank you,
 17 Chairperson. If you can – on this one, I just want you to
 18 try and observe the journalist that you testified about.
 19 It's quite a fleeting appearance, so it's a very short one.
 20 Can you play the last one, the SABC news? Chairperson, if
 21 I may indicate, this footage was on the 7 o'clock news two
 22 days ago, and I just spotted it fortuitously, and it seems
 23 to deal with this issue.
 24 [VIDEO SHOWN]
 25 MR MPOFU: Thank you. Apart from the

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1 journalist, Mr Magidiwana, in that clip, what did you
 2 observe in relation to the policemen who were handling
 3 guns?
 4 [14:34] MR MAGIDIWANA: I saw that they were
 5 standing on the line.
 6 MR MPOFU: Yes and when they got closer
 7 to the bodies to where you were lying down?
 8 MR MAGIDIWANA: They were coming closer.
 9 The gunshots in fact as they were shooting at the time we
 10 were lying they could be heard.
 11 MR MPOFU: Thank you Chairperson, some of
 12 the material as the Chairperson has repeatedly indicated
 13 will be dealt with in argument. Thank you Chair.
 14 CHAIRPERSON: In something else, re-
 15 examination proper?
 16 MR MPOFU: Yes Chairperson.
 17 CHAIRPERSON: I think I should indicate
 18 at this stage that inasmuch as some of the matter that you
 19 introduced was new matter. I understand you did it because
 20 you only found the footage later. I will obviously give
 21 any party wishing to cross-examine on new matter the
 22 opportunity to do so.
 23 MR MPOFU: Yes Chairperson, in the event
 24 that there is new matter I was careful to deal with issues
 25 that were dealt with in the re-examination such as the

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1 teargas and so on but if -
 2 CHAIRPERSON: If you're referring to the
 3 videos which -
 4 MR MPOFU: Yes no I'm saying -
 5 CHAIRPERSON: - the things were on the
 6 videos which people may not agree are visible and I give
 7 them the opportunity to cross-examine if they wish to do
 8 so. They may take the line but they'll argue it later and
 9 the video can be seen during argument but it would only be
 10 fair in accordance with procedural fairness for me to
 11 permit them to cross-examine if they wish to do so.
 12 MR MPOFU: Yes. The police version is
 13 that when or rather just before the volley of shots were
 14 fired the protestors were approaching the police in an
 15 attacking formation. And we've already dealt with exhibit
 16 L206. If you can turn to L207, exhibit L207 I'm sure it
 17 would be common cause that these were people who were
 18 coming behind you, behind your group and according to the
 19 caption it says "they are moving past the kraal and it
 20 seems to be near the same tree" that you testified about
 21 earlier in the -
 22 CHAIRPERSON: I doubt that it would be
 23 common cause that they were in a separate group, it may
 24 well be contended that they were part of one group but
 25 anyway let's not spend time on it.

<p style="text-align: right;">Page 6715</p> <p>1 MR MPOFU: Fair enough, thank you 2 Chairperson. Yes we can eliminate the group thing but we 3 know from the video and I don't want to play the video 4 again, you know from the video that there were only three 5 people in front of you. One of them was Mr Noki. It is on 6 that basis that I was suggesting that they were behind you 7 and also the caption put by the police to that photo. And 8 the question which you may or may not be able to answer is 9 whether from that picture one can observe what is called an 10 attacking formation whatever that is.</p> <p>11 MR MAGIDIWANA: It is not so, Sir.</p> <p>12 MR MPOFU: Thank you. Now can we just 13 deal with - there seems to be another confusion which needs 14 to be cleared up if you may assist the Commission. The 15 impression that was given at least by the cross-examiner 16 was that the numbers allocated to the protestors that 17 appear in exhibit L206 and in L208 are supposed to 18 correspond. I just want us to deal with that and clear it 19 out. Firstly let's start with you, your number there is 20 number one is that correct? On L206 you are number one.</p> <p>21 MR MAGIDIWANA: Yes I can see it.</p> <p>22 MR MPOFU: And on L208 you are still 23 number one.</p> <p>24 MR MAGIDIWANA: Yes I can see it.</p> <p>25 MR MPOFU: Yes the only confusion there</p>	<p style="text-align: right;">Page 6717</p> <p>1 made the point that you want to make. So, I don't want to 2 be unduly technical because I understand you have a 3 difficult job to do but you know we must have regard to the 4 expense that is incurred every day in this hearing.</p> <p>5 MR MPOFU: Well, Chairperson, you know my 6 answer to that. It's only those who get paid who might 7 know the expense but just one more question, Chairperson. 8 The only question really that I wanted to ask is the person 9 identified as number three in L208 is Mr Noki isn't it?</p> <p>10 MR MAGIDIWANA: Yes, this person here who 11 is referred to as number three is Mambush and I'm facing 12 him but what really also confuses me is that I'm facing 13 him, there is just this small gap between myself and him in 14 the picture.</p> <p>15 MR MPOFU: Yes despite that the only 16 issue really is whether, if you go to L206 the person 17 pointed as number three is that Mr Noki?</p> <p>18 MR MAGIDIWANA: It's not him.</p> <p>19 MR MPOFU: Okay thank you. Another 20 aspect that I'd like you to clarify - okay alright, 21 Chairperson, this is something that I can achieve by other 22 means. The issue which was conversed with you in cross- 23 examination about there being two groups at the koppie, do 24 you remember that?</p> <p>25 MR MAGIDIWANA: I remember when that was</p>
<p style="text-align: right;">Page 6716</p> <p>1 seems to be the fact that Mr Semenya put it to a previous 2 witness that that was Mr Noki. We now know that it is you.</p> <p>3 CHAIRPERSON: The point was made by Mr 4 Ntsebeza in his cross-examination.</p> <p>5 MR MPOFU: Yes anyway -</p> <p>6 CHAIRPERSON: You might undo it in the 7 process I don't think Mr Ntsebeza would like you to do 8 that.</p> <p>9 MR MPOFU: No it is in consultation with 10 him, Chairperson, or in collaboration. And although as Mr 11 Semenya pointed out that I'm not a witness I think it can 12 be observed that number two is also number two on L206, on 13 both 206 and 208 and I'm sure you won't quarrel with that.</p> <p>14 MR HANABE: He's nodding the head.</p> <p>15 CHAIRPERSON: You know, Mr Mpofo, I don't 16 want to stop you unduly but when the police come and give 17 evidence and they try to establish that the factual 18 material, the evidential material in exhibit L is correct 19 you will then obviously have an opportunity to deal with it 20 and you'll be cross-examining on the basis of what one can 21 see on the photographs. So as I've said to you before your 22 cross-examination then the argument you'll advance 23 later in this regard, isn't going to be rendered any 24 stronger by the fact that this witness has already in 25 response to questions, some leading and some not, already</p>	<p style="text-align: right;">Page 6718</p> <p>1 said.</p> <p>2 MR MPOFU: And it was suggested because 3 there was a gap between the so called front group and the 4 rest.</p> <p>5 MR MAGIDIWANA: Yes, I remember when that 6 was said.</p> <p>7 MR MPOFU: Can you just go to slide 190? 8 And maybe in your own words in relation to whatever gaps 9 you might see there identify how many groups you can see 10 there.</p> <p>11 MR MAGIDIWANA: There are many of them.</p> <p>12 MR MPOFU: And in relation to the gap, 13 you'll see that there are people in that picture who are on 14 the big mountain, on koppie one.</p> <p>15 MR MAGIDIWANA: Yes.</p> <p>16 MR MPOFU: And between them and the other 17 people that are grouped in front of them there's a gap - 18 the question is when you look at that picture the gap 19 between that front group and what I will call the middle 20 group and the gap between the people on the koppie and that 21 middle group, which gap is bigger?</p> <p>22 MR MAGIDIWANA: It is this gap that is 23 between the people in fact who are in the big koppie.</p> <p>24 MR MPOFU: Yes but the big koppie and 25 what I've termed the middle group.</p>

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1 MR MAGIDIWANA: Yes.

2 MR MPOFU: And in relation to the other

3 gap which I suppose is the smaller gap from what you have

4 said between the people who are sitting in the two

5 different koppies there's another gap and which one is the

6 bigger gap between that gap and the gap in front?

7 MR HANABE: Sorry Counsel, I didn't

8 follow.

9 MR MPOFU: Sorry. No I'm saying there

10 are also - you can also observe on that picture that

11 there's a group that's on groot koppie and there's another

12 gap that is on koppie two yes koppie two, the smaller

13 koppie. And I'm asking the same question about the gaps in

14 relation to what is between those two groups and the front

15 group gap that was testified about in cross-examination.

16 MR MAGIDIWANA: It is between the two of

17 these groups there is indeed a distance or a gap but this

18 one looks even wider.

19 MR MPOFU: I thought the witness said the

20 [African language] which is wider.

21 MR HANABE: He is referring to the gap,

22 it's wider than the other one, that's why I'm saying it's

23 wider. I was referring to the first one.

24 MR MPOFU: No but the witness didn't.

25 Okay that's fine. Alright look we'll also leave the rest

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1 of that issue to argument.

2 CHAIRPERSON: What we all can do, during

3 argument bring our magnifying glasses along and have a look

4 at the photographs and decide for ourselves which gap is

5 wider. We don't need, with respect, the assistance of Mr

6 Magidiwana to solve that problem.

7 MR MPOFU: Ja but, Chairman, when they're

8 making - so I won't even justify it. Okay alright, okay

9 the issue about slide 191 and the measurements there,

10 Chairperson, I'm going to assume - I was going to deal with

11 the measurements given on slide 191 but on the safe

12 assumption that there will be another inspection then I

13 will defer that. Oh yes among the key or rather what I

14 call the rhetorical questions this one might have been made

15 as statement. You asked a question which may become

16 important at the end so I'd like you to clarify that for

17 the Commission. You said that if the police had waited

18 until you either crossed the road or turned left into

19 Nkaneng you would understand their action and I'd like you

20 to please, because this is, at least from our version, is

21 going to be quite important. I'd like you to explain that

22 evidence to the Chairperson and the Commissioner.

23 [14:54] MR HANABE: You said if or as they had

24 turned left.

25 MR MPOFU: Words to that effect, the gist

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1 of it is that if they had waited, he said something like if

2 they had waited until they crossed the road or do something

3 else then he would understand. I'm not quoting him

4 verbatim.

5 CHAIRPERSON: Do you remember making a

6 statement along those lines?

7 MR MAGIDIWANA: Yes I remember,

8 Commissioner.

9 CHAIRPERSON: Explain it us because I

10 think it needs more explanation for me to understand it.

11 MR MAGIDIWANA: I still remember the

12 thing I said on that day. The reason why I said that when

13 we had got shot we had not even reached the road. As I was

14 lying my body was not even on the road and it was my hands

15 that were near or close to the road. That's why then I

16 asked a question that if we had intended to attack them why

17 did they not at least wait for us to cross the road and it

18 was going to be obvious that indeed by crossing the road we

19 were approaching or going to them.

20 MR MPOFU: Thank you and we know you

21 never reached the road but as far as you know what would

22 you have done once you had reached that road?

23 MR MAGIDIWANA: If I had reached the road

24 I was going to go Nkaneng where I had intended to go.

25 MR MPOFU: Thank you very much. The next

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1 topic I want to deal with is the - it was dealt with

2 indirectly, the issue of the muti and the belief that was

3 ascribed to yourselves. In relation to - let's start with

4 the issue of the alleged incisions which were made there.

5 There are two aspects that I want to deal with. The first

6 one is to confirm that you have stated that such incisions

7 as might be on your body were done in the Eastern Cape

8 during rituals at your home but more importantly you have

9 agreed that if the police have an expert which might age

10 those incisions then they should do so.

11 MR MAGIDIWANA: Yes I said so, Sir.

12 MR MPOFU: Thank you and secondly

13 according to Mr X the incisions that were done after the

14 burning of the sheep were done on people's ears and you

15 indicated that you had no incisions on your ears, is that

16 correct?

17 MR MAGIDIWANA: Yes.

18 MR MPOFU: Now well before we move to

19 another issue Mr X also testified that there was a request

20 for a white sheep and a black sheep which were quickly

21 procured from nearby. Well do you know if - well have you

22 ever seen a black sheep in your life?

23 MR MAGIDIWANA: Never, I've never seen

24 it. Hence I said that the relevant person for that is him

25 so that he can come he can and explain as to where he ever

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1 went and bought such a sheep. The relevant person for that
2 is him.

3 MR MPOFU: Sorry Chairperson.
4 Chairperson, I see that it's tea time.

5 CHAIRPERSON: I'm still hopeful we will
6 conclude the re-examination before the end of the day and
7 because there may be extra cross-examination. We'll take a
8 fairly short tea time, it's now three minutes past 3, we
9 must be back here by twenty past, at the latest.

10 MR MPOFU: Yes, Chairperson I'm doing my
11 best to cut out some of the material.

12 CHAIRPERSON: I'm not suggest you're not,
13 I'm just reminding you. We'll take the adjournment.

14 [COMMISSION ADJOURNS COMMISSION RESUMES]
15 [15:21] CHAIRPERSON: The Commission resumes in
16 the absence of the witness who will be here shortly I take
17 it. Mr Mpofo, unfortunately there's no way that we can
18 devise whereby you continue your re-examination in the
19 absence of the witness.

20 MR MPOFU: It crossed my mind,
21 Chairperson, but I couldn't find the way here.

22 CHAIRPERSON: If you do Mr Semenya will
23 complain you're giving evidence.

24 MR MPOFU: Chair I could go and sit there
25 then Mr Semenya won't complain. Chairperson I must

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1 apologise.

2 CHAIRPERSON: Well cross-examine instead.
3 MR MPOFU: The good news, Chairperson, is
4 that the end is in sight.

5 CHAIRPERSON: The thing is the witness
6 isn't in sight. Mr Magidiwana, you're still under oath.
7 Mr Mpofo please proceed with your re-examination.

8 MR MPOFU: Thank you very much,
9 Chairperson. I've assured Mr Magidiwana that we'll finish
10 with him today, he has been sitting there since the 27th
11 February. Mr Magidiwana, it's just a small point that I
12 wanted go through from one of the videos if you can
13 remember. It's just to deal with what the Chairperson
14 called the "free kick formation." Were you able to see the
15 journalist that you were talking about at some stage behind
16 the police, the policeman standing in front of you?

17 MR MAGIDIWANA: I last saw the journalist
18 that was before they could stand in that way, in that
19 manner.

20 MR MPOFU: Okay from where you were lying
21 ja.

22 MR MAGIDIWANA: Yes.

23 MR MPOFU: Thank you. And then another
24 quick aspect. You testified or rather you timed your going
25 to lunch on the 16th with the arrival of thereabouts of the

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1 bishop, of Bishop Seoka, do you remember that?
2 MR MAGIDIWANA: Yes it is so.

3 MR MPOFU: And do you remember we
4 established that he was there by 20 to 2 so maybe he
5 arrived round about 1:30 or so, that's not in contention,
6 it's from the police documents that he was at least already
7 there by 20 to 2. Now the question really that I wanted to
8 ask you is did you - you went to lunch and then you came
9 back, did you ever find out or hear whatever happened to
10 the Bishop of the Pastor as they call them?

11 MR MAGIDIWANA: It was like he had
12 promised to come back.

13 MR MPOFU: Okay. I think it was
14 yesterday you said, or let's start by saying this. There
15 was evidence about the shot on your thigh, do you remember
16 when my learned friend Ms Lupuwana was asking you
17 questions?

18 MR MAGIDIWANA: Yes, I remember.

19 MR MPOFU: And then there was a debate
20 about which one was the entrance wound, which one was the
21 exit wound and so on.

22 MR MAGIDIWANA: I remember.

23 MR MPOFU: Yes okay subject to that
24 debate and irrespective of which one is the exit or
25 entrance can you just tell the Commission how many wounds

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1 and say where they are that are on your body as a result of
2 that attack?

3 MR SEMENYA SC: Can Mr Mpofo explain to
4 us when the witness was attacked Chair?
5 MR MPOFU: 16th August 2012 Chairperson.
6 MR SEMENYA SC: And I object, there's no
7 evidence of the witness being attacked.

8 CHAIRPERSON: I think Mr Mpofo would like
9 further and better particulars.

10 MR MPOFU: Thank you, Chairperson. Well
11 okay, Chairperson, yes, I will rephrase the question.
12 After the shooting incident I just wanted to ask for you to
13 describe to the Commission how many wounds you sustained
14 and where they are on your body.

15 MR MAGIDIWANA: Okay when the police
16 attacked me then -

17 MR HANABE: He's pointing at the right
18 thigh there are two wounds or scars. There is one, he's
19 pointing on the left side and then on the further right
20 side which he says on the lower side he says there's also
21 another scar. He says the wound and also in the private
22 parts and also on the left side, he's pointing at that.

23 And then he's also pointing at the pelvic area.

24 MR MADLANGA SC: Pubic area.

25 MR HANABE: Pubic area, sorry. Okay he's

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1 pointing on the right side of the rib at the same time and
 2 he's pointing at the rib but saying also this arm, elbow.
 3 CHAIRPERSON: He seems to be pointing to
 4 his left elbow.
 5 NR HANABE: Yes the elbow, sorry
 6 Commissioner.
 7 MR MPOFU: Okay yes you've pointed at
 8 about eight places. The issue really or what I wanted to
 9 clarify is I there has been a confusion with the
 10 translation in respect of the wound on your -
 11 CHAIRPERSON: I counted six, perhaps we
 12 should check it again.
 13 MR MPOFU: He can check, he can just
 14 count. Okay can you just count, don't tell us where it is
 15 just count where the wounds are.
 16 MR MAGIDIWANA: Eight, eight of them.
 17 MR MPOFU: Thank you.
 18 CHAIRPERSON: Mr Mpofo, your arithmetic
 19 is better than mine.
 20 MR MPOFU: Thank you very much. Now the
 21 evidence that you led regarding this which is more
 22 important than the number of wounds is that you said at
 23 some stage that the injury on your testicle could not have
 24 been sustained while you were standing up. Can you explain
 25 that to the Commission?

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1 CHAIRPERSON: I don't think it's a matter
 2 for laughter at all. The witness is describing a very
 3 painful and a very embarrassing injury that he received and
 4 I think he should be treated in an appropriate spirit.
 5 Dignity should be displayed.
 6 MR MPOFU: Thank you, Chairperson, in
 7 fact before you answer my question let's first clarify is
 8 there a problem with the translation on this issue? You
 9 had pointed to a wound in your private parts, I think let's
 10 call it that and you've also pointed to a separate wound in
 11 what Mr Madlanga correctly referred to as "a pubic area."
 12 Is that correct?
 13 MR MAGIDIWANA: Yes.
 14 MR MPOFU: Okay thank you. Now that
 15 that's been cleared up that these are two separate wounds
 16 your evidence was that the wound that is in your private
 17 parts could not have been sustained while you were standing
 18 up. Can you explain that to the Commissioner?
 19 MR MAGIDIWANA: If I was standing there
 20 is no way I could have been shot.
 21 MR HANABE: He's pointing at the
 22 testicles.
 23 MR MAGIDIWANA: And whilst standing.
 24 MR MPOFU: Right. The second issue is
 25 the other wound, Chairperson, and myself and my learned

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1 friend Ms Lupuwana debated about yesterday, in the end we
 2 all agreed that the entrance wound on your leg is at the
 3 back of the leg. Do you remember that?
 4 MR MAGIDIWANA: I remember that.
 5 MR MPOFU: Now assuming it is correct
 6 that the bullet entered from the back of your thigh and
 7 given the evidence at least from the police that you were
 8 approaching towards the people who were shooting could that
 9 particular wound have been sustained while you were making
 10 that approach?
 11 MR SEMENYA SC: Chairperson, this is a
 12 matter for expert evidence. I don't see how this witness
 13 would assist us in giving accurate information about what
 14 an entrance wound would suggest. These are ballistic
 15 issues.
 16 CHAIRPERSON: I think Mr Semenya is
 17 right. I mean I don't know if the witness takes it any
 18 further but according to the medical report the gunshot
 19 wound at the front of the thigh is described as an exit
 20 wound.
 21 MR MPOFU: That's correct.
 22 CHAIRPERSON: And the gunshot wound -
 23 MR MPOFU: At the back.
 24 CHAIRPERSON: At the back is described as
 25 an entrance wound.

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1 MR MPOFU: That's correct.
 2 CHAIRPERSON: All the other wounds are
 3 from the front.
 4 MR MPOFU: Yes.
 5 CHAIRPERSON: So I can understand an
 6 argument being based on those facts to indicate that when
 7 the wound of the thigh was sustained he must have been shot
 8 from a different angle, a diametrically opposed direction
 9 in fact from the direction from which the other shots were
 10 fired. That's something that we can argue about based upon
 11 the objective facts as set out in the medical report. I
 12 don't with respect if anything he may say on the point is
 13 going to take it any further but so I think Mr Semenya's
 14 right.
 15 MR MPOFU: No Chairperson, I have a
 16 different view. I mean Mr Semenya's quite correct but some
 17 of this might involve ballistic evidence. But what I'm
 18 proposing with your permission, Chair, is what certainly
 19 what the witness has enacted on is there was any stage
 20 where he was taken away from the shooters. That what I'm
 21 going to ask, thank you. Now Mr Magidiwana given the fact
 22 that the entrance wound on your thigh is at the back is
 23 there any stage during the time that we described between
 24 your - what we've seen L206 and your falling down was there
 25 any stage where you were facing away or where you had your

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1 back to the shooters?
 2 MR SEMENYA SC: Objection, Chair.
 3 MR MPOFU: Yes.
 4 MR SEMENYA SC: We know as a matter of
 5 fact that there was somebody with a firearm behind Mr
 6 Magidiwana in his own group. Unless there is a basis to
 7 establish that this gunshot wound from the back is linked
 8 to police missile, the basis for the point in the question
 9 is without foundation.
 10 CHAIRPERSON: I think he's right but
 11 let's approach it differently. At the stage before you
 12 fell down did you hear any shots being fired in your
 13 vicinity from behind you while you were facing forward
 14 towards the police?
 15 MR MAGIDIWANA: As I had already said at
 16 the beginning that those people who were shooting I never
 17 saw them. In my group in fact I never saw those who were
 18 shooting. This that the senior counsellor has just said is
 19 shocking me.
 20 CHAIRPERSON: You see but the question is
 21 whether it's possible that that wound was inflicted by
 22 someone standing behind you who fired and that's why I
 23 asked you whether you were aware of any shot being fired in
 24 your vicinity from behind you at the stage when you were
 25 facing the police before you fell down.

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1 MR MPOFU: Sorry, Chairperson, I'm also
 2 not sure so I don't want to blame the interpreter whether
 3 the question that the Chairperson related to him being shot
 4 before he fell down or any shots?
 5 CHAIRPERSON: Whether he was aware of any
 6 shots being fired in his vicinity from behind him at a time
 7 where he was standing up facing the police who were ahead
 8 of him and before he fell, obviously before he fell down.
 9 [15:41] MR MPOFU: Thank you, Chairperson.
 10 MR HANABE: I will repeat the question to
 11 him again, Commissioner.
 12 MR MAGIDIWANA: I say no.
 13 MR MPOFU: Alright, now the – okay, we
 14 will leave that for argument. The only issue that I wanted
 15 to ask you is, I don't know if you've already answered this
 16 question, is whether at any stage you were facing away from
 17 the people who were shooting.
 18 MR SEMENYA SC: I must make a firm
 19 objection, Chair.
 20 MR MPOFU: Which is?
 21 MR SEMENYA SC: That unless we are given
 22 a premise that none of the people who were behind him with
 23 those firearms, fired. This question cannot be a proper
 24 question.
 25 MR MPOFU: No, Chairperson, with the

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1 greatest respect –
 2 CHAIRPERSON: I don't know that - I
 3 understood the question to be, unless I misunderstood it,
 4 was there any stage before you fell, when you were facing,
 5 by what previously - here, was that you turned your back
 6 upon the police and were looking the other way. That's the
 7 question.
 8 MR MPOFU: Yes, Chairperson, and what
 9 conclusion I might be drawing to that –
 10 CHAIRPERSON: My colleague, Commissioner
 11 Hemraj, says you didn't make it clear that he would have
 12 had his back to the police. So perhaps you can rephrase
 13 the question, in a way which follows the line that I set
 14 out, and I think you may be able to resist an objection
 15 from Mr Semenya.
 16 MR MPOFU: Between the time that you
 17 observed the shooting group that was lined up in front of
 18 you, and the last time that you were – you sustained any
 19 shots, did you face away from that line, what is called the
 20 TRT line, the police that were shooting towards the
 21 protesters.
 22 MR MAGIDIWANA: You mean, are you saying
 23 I looked where I was coming from?, directly, where I was
 24 coming from?
 25 MR MPOFU: Yes, exactly were you faced

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1 back where you had been coming from?
 2 MR MAGIDIWANA: No.
 3 MR MPOFU: Thank you. Now, I just want
 4 to, this is something that Mr Ngalwana put to you which I
 5 assume is going to be the evidence of the police, and I
 6 want you to check with you whether you agree with what Mr
 7 Ngalwana said or you don't. He said that when the first
 8 Nyala deployed the barbed wire, some people started to move
 9 to Nkaneng, do you remember that part?
 10 MR MAGIDIWANA: Yes.
 11 MR MPOFU: But this is how he ended that
 12 sentence, he said then, at that stage, the police were
 13 nowhere near the road to Nkaneng, which is next to the
 14 kraal. Would you agree with that?
 15 MR MAGIDIWANA: Yes.
 16 MR MPOFU: Thank you, and do you agree
 17 with him on that?
 18 MR MAGIDIWANA: Yes, he is telling the
 19 truth.
 20 MR MPOFU: Thank you. Now, the – I am
 21 sure Mr Ngalwana will be pleased here, could we move to the
 22 last batch. There was also evidence, remember once again
 23 yesterday and I think on another day from Mr Ngalwana,
 24 there was the issue of where the fence that we see on
 25 exhibit B16M, which we resolved yesterday, you remember

<p style="text-align: right;">Page 6735</p> <p>1 that discussion about where the fence ends and where it 2 becomes, it first becomes possible for people to enter the 3 informal settlement. Remember the discussion? 4 MR MAGIDIWANA: Yes. 5 MR MPOFU: Now, the two aspects that I 6 need to deal with there, if the Chairman can just excuse me 7 for one second. Okay, let's just start by you clarifying 8 to the Commission, in answer to that, when it was put to 9 you yesterday, you said that place where we all agree it 10 becomes possible to enter the township, you said it was 11 far. Now, can you explain to the Commission the – your own 12 reasons why you would have taken the option you took as 13 opposed to going to – using that other road. 14 MR MAGIDIWANA: My reason is that I am 15 not staying at the new stands, I am staying at Nkaneng, and 16 further that that road, that is from Marikana and leading 17 to Nkaneng, I usually walk on it, and it led me straight to 18 my place of residence. 19 MR MPOFU: Yes, I don't want to be 20 unfair to you, I know you don't like giving specific 21 measurements, but on B16, the distance from somewhere 22 behind the kraal towards where the sand ends, at least on 23 that slide, is measured at 210 metres. That would be 24 something like two soccer fields and a little bit. Would 25 that be more or less the distance as you remember it?</p>	<p style="text-align: right;">Page 6737</p> <p>1 yesterday. 2 MR SEMENYA SC: I am told that during the 3 earlier cross-examination, it was your evidence that there 4 is video material which has not been shown but which you 5 had seen, either in consultation or something. 6 MR MPOFU: No, Chairperson, that's not 7 true. He never said that evidence that he had seen any 8 videos in consultation or something. If I may be of 9 assistance to Mr Semenya, since he was not here, what the 10 witness said, which he repeated today, was simply, he kept 11 on saying, not everything has been shown, not everything 12 has been shown. And one of the things he referred to was 13 his stick being removed which has now been shown here. But 14 he didn't refer to consultation. 15 MR SEMENYA SC: I will move on, thank 16 you, Chair. You would recall your evidence at least, that 17 you were shot at the first time, when the volley of fire 18 happened, and you were shot again at a later stage, right? 19 MR MAGIDIWANA: Yes. 20 MR SEMENYA SC: Now, I know it may be 21 very difficult for you to tell us, but are you able to 22 estimate the time lapse between the first injury you 23 sustained, and the subsequent time you say you were shot 24 at. 25 MR MAGIDIWANA: If you were here at the</p>
<p style="text-align: right;">Page 6736</p> <p>1 MR MAGIDIWANA: That place is a bit far, 2 it's really far, very far. 3 MR MPOFU: And if I can ask you, in 4 relation to what was going on there on that day, the option 5 of running on the veldt for that distance, whatever the 6 distance is, where you say is far, was that option one that 7 occurred to you, and if it did not, why not? 8 MR MAGIDIWANA: That never occurred to 9 me, and further that running to the veldt was really a big 10 or great danger because in fact there were helicopters that 11 were flying above us, if there were not three, there were 12 four in number. 13 MR MPOFU: Thank you, Chairperson, I have 14 nothing further. 15 CHAIRPERSON: I indicated that if any of 16 the parties' representatives wish to cross-examine on the 17 new matter, particularly in relation to the videos, I 18 permit them to do so. I see Mr Semenya is raising his 19 hand. Does anybody else wish to do so? Mr Semenya, you 20 may proceed. 21 MR SEMENYA SC: Thank you, Chair. Mr 22 Magidiwana, the last battery of video material you are 23 being shown, when do you see those for the first time? 24 MR MAGIDIWANA: The video clips that were 25 shown or played here, I saw them for the first time</p>	<p style="text-align: right;">Page 6738</p> <p>1 time I kept saying this. 2 CHAIRPERSON: It's not fair to make snide 3 remarks like that. You have been asked a question, please 4 answer it. 5 MR MPOFU: Chairperson, I am sorry, I 6 agree that the witness is not entitled to do that but in 7 fairness, Mr Semenya was not here when the cross- 8 examination on this issue was done at – extensively by Mr 9 Ngalwana, and my objection specifically is, I don't see how 10 this particular issue arises from the video, because it was 11 canvassed extensively, but extensively by Mr Ngalwana. 12 CHAIRPERSON: Yes, this particular 13 question wasn't asked, and the question doesn't actually 14 derive so much from the video, as from the medical report, 15 which you put in for the first time in re-examination, 16 which reveals the exit and entrance wounds. So I will 17 allow the question to be put. 18 MR MPOFU: Chairperson, I am not, I want 19 – sorry, Mr Semenya, I am not challenging the ruling, all I 20 want to understand is, whether this invitation was or was 21 not confirmed – confined to the video. 22 CHAIRPERSON: I did say to the video. 23 But then I corrected myself and I remembered that the 24 medical report had also been handed in, in re-examination. 25 So I extend my ruling in respect of that.</p>

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1 MR MPOFU: Okay, Chairperson, in that,
 2 yes, I understand that. In that respect, can I point out
 3 therefore that Mr Ngalwana indicated to me that he had the
 4 medical report at the same time as you did.
 5 CHAIRPERSON: The further point is I have
 6 a general discretion to allow questions to be asked to help
 7 us to get to the truth and this is one of those questions,
 8 and I am prepared to allow it to be asked. But obviously,
 9 I am not going to give a general licence or what some
 10 people in some quarters might call carte blanche to Mr
 11 Semenya, to ask any question he likes.
 12 MR MPOFU: Thank you, Chairperson,
 13 MR MAGIDIWANA: As I said, already said
 14 that my, the first bullet hit me.
 15 MR HANABE: And he's looking on the left
 16 side, I cannot see where he is pointing Commissioner.
 17 CHAIRPERSON: His left thigh, the side of
 18 it actually.
 19 MR HANABE: Okay, thank you,
 20 Commissioner.
 21 MR MAGIDIWANA: And after that, I fell.
 22 CHAIRPERSON: More or less the hip area
 23 actually.
 24 MR HANABE: Thank you, Commissioner.
 25 MR MAGIDIWANA: The time then that you

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1 want from me, in fact, I didn't have it with me.
 2 MR SEMENYA SC: Maybe you did not
 3 understand my question.
 4 MR MAGIDIWANA: And I think you wanted to
 5 know in fact what the time that had passed, the time frame,
 6 MR SEMENYA SC: Yes.
 7 MR MAGIDIWANA: Hence I am saying that I
 8 never had a watch to look at what time it was.
 9 MR SEMENYA SC: Okay, let me try again.
 10 To the extent you are able, can you estimate the time lapse
 11 between the first shooting, and what you say was the second
 12 time shooting with the police, with you lying down?
 13 MR MAGIDIWANA: Sir, when I was shot on
 14 this side, and upon hearing the footsteps as I was lying
 15 like this, when I lifted my head, as I was lying there,
 16 they then spoke, saying that I must take of the towel. As
 17 I was busy then taking off that towel, and then he shot me
 18 here.
 19 MR HANABE: He is pointing at the left
 20 elbow.
 21 [16:01] MR MAGIDIWANA: I threw it there, and I
 22 lied down again. They passed through, so I don't know what
 23 time it was when they passed.
 24 MR SEMENYA SC: So the first shooting –
 25 the second shooting rather, would have happened almost

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1 immediately after the first time.
 2 MR MAGIDIWANA: Yes, immediately when
 3 they came back from where they were, they came straight to
 4 me.
 5 MR SEMENYA SC: That's the time lapse I
 6 am trying to work through, Mr Magidiwana.
 7 MR MAGIDIWANA: I am telling you that I
 8 didn't have a watch.
 9 MR SEMENYA SC: Just for illustration,
 10 did they come back after an hour?
 11 MR MAGIDIWANA: I don't know that.
 12 MR SEMENYA SC: Could it have been long
 13 as an hour, when they came for the second time?
 14 MR MAGIDIWANA: If you mention or talk
 15 about time on that date to me, Sir, you will no be talking
 16 to me, because I am in no position to estimate or to tell
 17 you about the time lapses to the time when they left me,
 18 and then came back again. I cannot know, I don't know
 19 that.
 20 MR SEMENYA SC: Alright. As we see you
 21 lying on the clips, with your arms outstretched, had you at
 22 that stage sustained the second injuries caused by the
 23 second shooting?
 24 MR MAGIDIWANA: How was I lying, Sir?
 25 MR SEMENYA SC: With your chest to the

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1 ground, and your arms outstretched in front of you, as we
 2 see in these clips.
 3 MR MAGIDIWANA: If then there I don't
 4 have my towel with me, by then in fact I was already fired
 5 with two shots.
 6 MR SEMENYA SC: Not the two shots, I am
 7 trying to say the second occasion you are alleged to have
 8 been shot.
 9 MR MAGIDIWANA: When I was shot for the
 10 second time, when they had returned, I was not lying on my
 11 chest –
 12 MR SEMENYA SC: No, Mr –
 13 MR MAGIDIWANA: - and then you saw me
 14 also with, I am demonstrating outstretched arms.
 15 MR HANABE: He was not lying down in that
 16 fashion.
 17 MR SEMENYA SC: On the video clip we see
 18 you lying in that way. All I am trying to establish is had
 19 you sustained injuries as a result of being shot for the
 20 second time?
 21 MR MAGIDIWANA: Those people shot at me,
 22 when they came back from there, and the people was talking
 23 to, and the one who shot me in fact shot at me whilst I was
 24 lying on my back.
 25 MR SEMENYA SC: That's not an answer to

<p style="text-align: right;">Page 6743</p> <p>1 my question. Can we play maybe the video footage?</p> <p>2 MR MAGIDIWANA: What then do you want me</p> <p>3 to say, Sir?</p> <p>4 MR SEMENYA SC: I'll tell you. Speak.</p> <p>5 Should we play you the video clip indicating you lying with</p> <p>6 your outstretched arms, chest to the ground.</p> <p>7 MR MAGIDIWANA: If you feel like, you can</p> <p>8 play it.</p> <p>9 MR SEMENYA SC: Can you please play all</p> <p>10 the series of second video clips.</p> <p>11 MS PILLAY: Chair, I would imagine that's</p> <p>12 EEE16 but there are a few portions to it, I am not sure</p> <p>13 exactly – I suppose the first one EEE16.</p> <p>14 MR MPOFU: If I may assist, Chairperson,</p> <p>15 I think it's the first segment.</p> <p>16 (VIDEO SHOWN)</p> <p>17 MR SEMENYA SC: Yes, if you can stop at</p> <p>18 that frame. Yes, at this point. At this time, had you</p> <p>19 sustained injuries as a result of being shot the second</p> <p>20 time?</p> <p>21 MR MAGIDIWANA: On this picture, or video</p> <p>22 clip in fact, I had already been shot with two shots.</p> <p>23 MR HANABE: He is pointing the first one</p> <p>24 on the, near the hip, and this other one on the left thigh,</p> <p>25 I mean elbow.</p>	<p style="text-align: right;">Page 6745</p> <p>1 also has the clan name of Bai on that video. I don't think</p> <p>2 it's significant for Mr Semenya's question, but I don't</p> <p>3 want it be ascribed to me.</p> <p>4 MR SEMENYA SC: Do you remember a clip</p> <p>5 with the police dragging somebody next to where you were</p> <p>6 lying?</p> <p>7 MR MAGIDIWANA: I said I never saw, I did</p> <p>8 not see that person.</p> <p>9 MR SEMENYA SC: On the video clip?</p> <p>10 MR MAGIDIWANA: I saw him today in the</p> <p>11 video clip.</p> <p>12 MR SEMENYA SC: At that stage, are you</p> <p>13 able to say that you had been shot for the second time?</p> <p>14 MR MAGIDIWANA: At that stage when they</p> <p>15 did that.</p> <p>16 MR MPOFU: Chairperson, I am really</p> <p>17 sorry, this question is at worst unfair to the witness. If</p> <p>18 the witness says as he has said, that that dragging</p> <p>19 incident, he did not witness it on the 16th, but he saw it</p> <p>20 on the video. Then how on earth can he be asked whether at</p> <p>21 the time, whether he saw it six months later here, he had</p> <p>22 been shot on the 16th, I mean that's really –</p> <p>23 CHAIRPERSON: Mr Semenya, that sounds</p> <p>24 like a good point, if he didn't know at the time that this</p> <p>25 dragging incident had taken place, and he now knows from</p>
<p style="text-align: right;">Page 6744</p> <p>1 MR SEMENYA SC: And you say that the</p> <p>2 police went past where you were lying.</p> <p>3 MR MAGIDIWANA: Yes.</p> <p>4 MR SEMENYA SC: Only to come back later.</p> <p>5 MR MAGIDIWANA: They came back again.</p> <p>6 MR SEMENYA SC: But you agree that these</p> <p>7 video footages also show long after, with even mounted</p> <p>8 police on the scene. You agree? That's what we saw.</p> <p>9 MR HANABE: Can you repeat, senior</p> <p>10 counsel, I didn't get the question.</p> <p>11 MR SEMENYA SC: The battery of video</p> <p>12 clips you have seen, show the episodes where the police</p> <p>13 were approaching after the first burst of fire, and they</p> <p>14 also saw footages, long after, with the mounted police,</p> <p>15 even on the scene.</p> <p>16 MR MAGIDIWANA: Hence I am saying, Sir,</p> <p>17 in what happened there, those clips that are being shown,</p> <p>18 in fact not everything is shown, rather, it's not shown in</p> <p>19 the correct way, because many things happened there.</p> <p>20 MR SEMENYA SC: When Mr Bai was, as Mr</p> <p>21 Mpofo uses the word, dragged, had you been shot for the</p> <p>22 second time?</p> <p>23 MR MPOFU: Chairperson, sorry, I don't</p> <p>24 want to interrupt, not that it's important obviously, but</p> <p>25 the person who was being dragged was not Mr Ntenetya, who</p>	<p style="text-align: right;">Page 6746</p> <p>1 the video that it took place at some stage, he can't tell</p> <p>2 us what the time lapse was between either that incident</p> <p>3 he's been short or he's been short in that incident. So I</p> <p>4 understand the relevance of your cross-examination, but I</p> <p>5 am not sure that an attempt to use that dragging incident</p> <p>6 as one of the six points from which to determine the time</p> <p>7 lapse is appropriate, if he didn't know at the time that it</p> <p>8 had happened.</p> <p>9 MR SEMENYA SC: Chair, I am desirous in</p> <p>10 completing my cross, because it's one point, but –</p> <p>11 CHAIRPERSON: You told us you were shot,</p> <p>12 and you told us you fell on the ground. You also told us</p> <p>13 the police came back later. I know you didn't have a watch</p> <p>14 and even if you had a watch, you wouldn't have been looking</p> <p>15 at it, but did you, in the time you were lying on the</p> <p>16 ground, before the police came back, did you hear a lot of</p> <p>17 shots being fired some distance away at the next koppie?</p> <p>18 MR MAGIDIWANA: Even at the time I was</p> <p>19 lying down, I could hear the shots being fired.</p> <p>20 CHAIRPERSON: After that, did the police</p> <p>21 come back and shoot you, as you've described?</p> <p>22 MR MAGIDIWANA: It is so.</p> <p>23 MR SEMENYA SC: Okay, let's look at this</p> <p>24 frame. We see the police approaching you there, correct?</p> <p>25 MR HANABE: You mean to them as a group</p>

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1 or –

2 MR SEMENYA SC: That's right.

3 MR HANABE: Okay, thank you, Senior

4 Counsel.

5 MR SEMENYA SC: And on your version you

6 would have sustained the thigh injury. Correct?

7 MR MAGIDIWANA: Talk, I am listening,

8 Sir.

9 MR SEMENYA SC: Am I right?

10 MR MAGIDIWANA: Yes, it is so.

11 MR SEMENYA SC: When do you turn to face

12 up?

13 MR MAGIDIWANA: Sir, this thing, a

14 bullet, is really painful, and when you are being shot,

15 it's not like when you've just been kissed. I, after

16 seeing that they went, gone past, I turned again.

17 MR SEMENYA SC: And none of that appears

18 in any of the clips when you are now facing up. Would you

19 agree?

20 MR MAGIDIWANA: If it's not here, you

21 should then bring it, because I think I saw the other one

22 here where I was lying on my back where I had bended my

23 knee.

24 MR SEMENYA SC: The statement, your

25 statement at paragraph 18, you say, and it is a statement

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1 assisted by your legal representatives. You say, "After

2 the gunfire stopped for a while," you say, "shortly

3 thereafter I could hear voices of police approaching the

4 place, where most of us had fallen." That is captured on

5 these clips. Then you say in paragraph 19, "When they got

6 to me, I was shot again several times, from close range

7 whilst I was on the ground." None of the video footages

8 could capture that, you tell us.

9 [16:21] MR MAGIDIWANA: For you to see that, do

10 you want to see the body?

11 MR SEMENYA SC: Am I correct?

12 MR MAGIDIWANA: Sir, for you then to be

13 able to see it, do you want to see the body?

14 MR SEMENYA SC: Do you agree that none of

15 the video clips we have been seeing, with the police

16 approaching you, while you are lying on the ground, and who

17 according to your statement, you hear voices coming to you,

18 and when they get to you, you get shot several times from

19 close range. That must have been immediately after this

20 frame, and I am saying, do you agree none of that episode

21 with you being shot as you described is depicted in any of

22 these video footages.

23 MR MAGIDIWANA: Sir, which one then is

24 not appearing there?

25 CHAIRPERSON: The video we saw, the

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1 videos we saw, none of them shows policemen approaching you

2 and then shooting you at close range while you are lying on

3 the ground. I take it, you've got to admit that, because

4 we saw the videos together and we didn't see that incident

5 depicted on those videos. That must be right, surely.

6 MR MAGIDIWANA: There is a video here,

7 where I was in fact ordered to take off that towel. What

8 were those police officers doing?

9 CHAIRPERSON: No, no, that's not an

10 answer to the question. The question is, there is no video

11 that we saw which shows policemen shooting at you, while

12 you are lying on the ground.

13 MR MAGIDIWANA: In these videos that are

14 shown here, in fact I had already been shot with two

15 bullets, hence I am saying when they went past and came

16 back there was this police officer who had a firearm, and

17 talking to me, asking me things I know nothing about. He

18 is the one in fact who shot at me.

19 CHAIRPERSON: He shot at you, it wasn't

20 captured on any of the videos we saw, do you agree with

21 that?

22 MR MPOFU: Well, Chairperson, with

23 respect, this is exactly what I was trying to avoid, by

24 asking questions to the witness, which Mr Semenya

25 curtailed, there is indeed, and it might be a matter of

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1 argument or whatever, but there is, on our version at least

2 on one of those segments, a situation where we see a

3 policeman with a jerking movement accompanied by a sound,

4 and we will argue once if we – we will ask the police, I

5 suppose they will call an expert or whatever which I've

6 discussed with Mr Bizos. So unless if anybody –

7 CHAIRPERSON: [Inaudible].

8 MR MPOFU: Yes, if that – thank you,

9 Chairperson.

10 CHAIRPERSON: In fact, that wasn't

11 recorded. Perhaps the point can be left there, let's see

12 how Mr Semenya responds to it.

13 MR SEMENYA SC: Are you able to point us

14 to any of these battery of witnesses depicting what you say

15 happened to you on the video clips, depicting what you say

16 happened to you. Let me tell you what you say

17 happened. At paragraph 16, you say, "As soon as he emerged

18 on the other side of the kraal, we were met with more rapid

19 gunfire. I was hit on my left leg. I think it was

20 corrected to hip. I stumbled and fell behind the other

21 workers who had been shot, including Mr Noki. The gunfire

22 stopped for a while. Shortly thereafter I could hear

23 voices of policemen approaching the place where most of us

24 had fallen." And that is the frame we see the police

25 approaching you. When they got to me I was shot again

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1 several times from close range while I was on the ground."
 2 I am saying do you accept at the very least none of these
 3 clips we have been seeing depict that which you are saying
 4 in your statement there.

5 MR MAGIDIWANA: I am saying, as I was
 6 being shot.

7 MR HANABE: He is pointing on the side.

8 MR MAGIDIWANA: And when that police
 9 officer who was busy questioning me, that one in fact is
 10 not appearing.

11 MR SEMENYA SC: That's precisely my
 12 point, because it didn't happen, I'll argue.

13 MR MAGIDIWANA: Am I the one then, who
 14 inflicted these injuries on myself?

15 MR SEMENYA SC: I will argue that you
 16 sustained your injuries at the first time of the shooting
 17 that happened as the Noki group, in which you were a part,
 18 was approaching the police.

19 MR MAGIDIWANA: Then it means you are not
 20 truthful.

21 MR SEMENYA SC: Those are my –

22 CHAIRPERSON: That's not a necessary
 23 comment. Counsel was just putting his instructions to you.
 24 But you said that you were shot several times when you were
 25 already lying on the ground after you'd fallen, and counsel

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1 puts to you on behalf of the police, they say that's not
 2 true, that you were only shot while you were coming towards
 3 them. Is that a summary of this –

4 MR SEMENYA SC: That will be our
 5 argument, Chair. Thank you.

6 CHAIRPERSON: The Commission will now
 7 adjourn until 09:30 tomorrow morning. You are excused, Mr
 8 Magidiwana. I take it, it may be necessary at some stage
 9 for you to come back. It may not be, but subject to the
 10 fact that you may have to come back, if requested to do so,
 11 you are excused from further attendance.

12 MR MAGIDIWANA: Thank you, Sir.

13 [NO FURTHER QUESTIONS – WITNESS EXCUSED]

14 [COMMISSION ADJOURNED]

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