

# 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 66    25 MARCH 2013    PAGES 6973 TO 7096

#### HELD AT

CIVIC CENTRE, RUSTENBURG, NORTH WEST PROVINCE



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1 [PROCEEDINGS ON 25 MARCH 2013]  
 2 [10:12] CHAIRPERSON: The Commission resumes. I  
 3 understood that counsel for the Human Rights Commission  
 4 wishes or might just wish to say something but I'll call on  
 5 him later. Mr Semenya?  
 6 MR SEMENYA SC: Chair, if I may be  
 7 permitted, we would place – we would want to place on  
 8 record that, as SAPS, it is with deep shock to learn of the  
 9 assassination of the sangoma implicated in the Marikana  
 10 muti rituals, who has been gunned down last, yesterday  
 11 morning, early hours in the morning and this was  
 12 immediately with an imminent attempt by the police to get  
 13 hold of him as a witness in these proceedings.  
 14 CHAIRPERSON: Where did this take place?  
 15 MR SEMENYA SC: In Bizana.  
 16 CHAIRPERSON: In Bizana. Yes, well,  
 17 thank you for giving us that information, putting it on  
 18 record. Some of the parties have said that they deny that  
 19 there was a sangoma involved, so all we can say is the  
 20 person who is alleged to have been the sangoma and alleged  
 21 to have done the things that were put to the witnesses, has  
 22 been assassinated and that's obviously – you say just  
 23 before the police were due to make contact with him. Well,  
 24 that's obviously a very serious matter and thank you for  
 25 drawing it to our attention. This is the second person who

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1 has links with this Commission in some way or other who has  
 2 been killed and it's a matter of great concern to the  
 3 Commission and I'm sure to everyone else involved.  
 4 National Commissioner, you're still under oath.  
 5 MANGWASHI VICTORIA PHIYEGA: s.u.o.  
 6 CHAIRPERSON: Mr Madlanga, I take it you  
 7 want to continue with your cross-examination?  
 8 CROSS-EXAMINATION BY MR MADLANGA SC (CONTD.):  
 9 Yes, Mr Chairman, thank you. National Commissioner, before  
 10 I start my cross-examination on the subject where we left  
 11 off, can I just briefly touch on a different subject. You  
 12 mention in your statement and in testimony that you were  
 13 briefed by certain commanders whom you mentioned, during  
 14 the night of the 16th of August 2012 on what had taken place  
 15 during the killings at Marikana on that day and you also  
 16 say that there was an update in the morning of the  
 17 following day, before you held the press conference, do you  
 18 remember that?  
 19 GENERAL PHIYEGA: Yes.  
 20 MR MADLANGA SC: What I'm interested to  
 21 find out is whether you ever received any further briefing,  
 22 update or whatever you choose to call it, on the details of  
 23 what happened on the 16th of August 2012, that is when the  
 24 killings took place. Did you ever get any other briefing  
 25 prior to the session at Potchefstroom?

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1 GENERAL PHIYEGA: Yes, I have said I  
 2 continued to receive briefing from this environment.  
 3 MR MADLANGA SC: I didn't hear the last  
 4 part, you said from?  
 5 GENERAL PHIYEGA: I said in my testimony  
 6 that I continued to receive briefings from this  
 7 environment.  
 8 MR MADLANGA SC: Are you able to tell us  
 9 who the people who gave you the further briefs or further  
 10 briefing were, besides those that you've already told us  
 11 about?  
 12 GENERAL PHIYEGA: In chief, it has been  
 13 the commanders led by General Mbombo.  
 14 MR MADLANGA SC: Would it have been a  
 15 different set of commanders or possibly the same set that  
 16 you have already told us about?  
 17 MR MAHLANGU: The question again, sir, if  
 18 –  
 19 MR MADLANGA SC: Would it, or was it the  
 20 same set of commanders that you have already told us about  
 21 or would it or was it a different set of commanders?  
 22 GENERAL PHIYEGA: I have said in chief,  
 23 it would have been the commanders that you've heard about,  
 24 led by General Mbombo.  
 25 MR MADLANGA SC: So would it be fair then

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1 to say that even in those further briefings, the only  
 2 people you knew to have been at the scenes of the killings  
 3 were the same two, that is General Naidoo and Lieutenant –  
 4 no, no, I can't think of his rank – and Brigadier Calitz,  
 5 so to your knowledge the only two that would have been at  
 6 the scenes would still have been just that two, even during  
 7 the further briefings, at least to your knowledge.  
 8 GENERAL PHIYEGA: From a commanders' side  
 9 I would say yes, but there are other sub-commanders that  
 10 report to them that would have been there.  
 11 MR MADLANGA SC: No, no, before we talk  
 12 about anybody who might have said something to the  
 13 commanders, so is your answer yes, to your knowledge, those  
 14 that briefed you or rather of those that briefed you, only  
 15 the two, according to your knowledge, had been at the  
 16 scenes. Your answer is yes to that.  
 17 GENERAL PHIYEGA: I would still say in  
 18 addition to those two, yes, those two but in addition to  
 19 those there were others that were there.  
 20 CHAIRPERSON: Would there have been  
 21 others who briefed you personally?  
 22 GENERAL PHIYEGA: No, Judge.  
 23 CHAIRPERSON: [Inaudible] those who  
 24 personally briefed you. I understand other people  
 25 [inaudible] briefed you. He's concerned with who actually

<p style="text-align: right;">Page 6977</p> <p>1 briefed you yourselves and it seems clear from what you say 2 that of the people who personally briefed you, as far as 3 you know, the only two – the only ones who were on the 4 scene at the time the incidents took place were General 5 Naidoo and Brigadier Calitz. That's correct, isn't it? 6 GENERAL PHIYEGA: Of the people who 7 briefed me, yes. 8 CHAIRPERSON: Yes, thank you. 9 MR MADLANGA SC: Thank you, Mr Chairman. 10 Did these further briefings bring to your attention 11 information that you had not received at the briefing and 12 update of the 16th and 17th respectively? 13 GENERAL PHIYEGA: I have stated in my 14 statements the information that was brought to my attention 15 and also the information that is sitting in our 16 presentation is part of the information that I have been 17 privy to. The question is a little bit broad for me to say 18 yes or no. 19 CHAIRPERSON: Mr Madlanga, think the 20 National Commissioner is correct, the question was what the 21 constitutional lawyers would call over-broad. Perhaps you 22 could narrow it a bit so that she could give a focused 23 answer. 24 MR MADLANGA SC: Thank you, Mr Chairman. 25 National Commissioner, you do know what you were told</p>	<p style="text-align: right;">Page 6979</p> <p>1 so the presentations that you saw of the police was a 2 consolidation of a lot of information that came from 3 various members. 4 MR MADLANGA SC: Thank you, Commissioner 5 Hemraj. Are you able to tell – I do see the difficulty 6 that you seem to have, National Commissioner, and I 7 appreciate that but let me try nonetheless. Are you in a 8 position to say that as at 20 August 2012 you had already 9 received some of these further briefings, that is after the 10 update of the 17th of August, or not? 11 GENERAL PHIYEGA: I continued to receive 12 updates because operations continued. We didn't wrap up 13 and go. 14 MR MADLANGA SC: And would all these 15 updates, less alleged briefings, have been about the, how 16 the killings had taken place or would it have been 17 briefings on some other issues related to the killings, 18 again focusing on the 20th of August, as at the 20th of 19 August. Would they have been about how the killings had 20 taken place? 21 GENERAL PHIYEGA: To my memory, a lot of 22 it has been the post-incident interventions, whether 23 statements were being taken, whether you know, post-mortems 24 were taking place, what is the status of those that were 25 injured, are they – what is the status of those that are</p>
<p style="text-align: right;">Page 6978</p> <p>1 during the briefing of the 16th of August 2012, just like 2 you would also know what you were told during the update of 3 the morning of 17 August 2012, not so? 4 GENERAL PHIYEGA: Yes. 5 MR MADLANGA SC: Now what I would like to 6 know is, what is it that you were told after the update of 7 the morning of 17 August 2012, but before the Potchefstroom 8 session, whatever the date or the first date of that 9 session was? What new material came to your attention 10 after the update of the morning of the 17th of August – but 11 before the Potchefstroom session? 12 GENERAL PHIYEGA: I would still say the 13 question you are asking me is extremely broad because the 14 information at hand was not only influenced by what you saw 15 on TV, what you heard from people, so it's very difficult 16 to put your pulse on the finger to say what in the – you 17 intend. 18 COMMISSIONER HEMRAJ: General, may I just 19 enquire whether any of those updates in that period 20 referred to by Mr Madlanga were in writing in the form of 21 memorandums or reports to you or were they all verbal 22 briefings, oral briefings? 23 GENERAL PHIYEGA: A lot of it was verbal 24 briefings because we consolidated our information into what 25 the joint was doing and the team that was there was doing,</p>	<p style="text-align: right;">Page 6980</p> <p>1 being arrested, it was almost on the overall incidents. 2 MR MADLANGA SC: So post the update of 3 the morning of the 17th and as at the 20th of August it 4 would have been about matters relating to, and not really 5 about how the killings had taken place, do I understand you 6 correctly? 7 GENERAL PHIYEGA: Likely so, and remember 8 we were also preparing ourselves now for the Commission, we 9 were starting to gather as much as we can and a lot of 10 investigations were still taking place, ballistic reports 11 and other things. 12 MR MADLANGA SC: Would it be correct or 13 accurate then to make the proposition that when you address 14 a parade, a police parade on the 20th of August 2012, you 15 had not received much more by way of further information 16 other than what you had received on the 16th and 17th? 17 GENERAL PHIYEGA: Yes, mostly. 18 MR MADLANGA SC: Thank you, National 19 Commissioner. Now let's go back to where we left off on 20 Tuesday last week. You will recall that you indicated in 21 your evidence that you stand by what you had said in the 22 press statement, subject to new information coming to your 23 attention and I said that what I would do today would be to 24 demonstrate that what, or at least part of it, part of what 25 you said in the press statement was in fact incorrect. So</p>

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1 I'm quite open with you, I'm quite candid with you and I'm  
 2 going to proceed to do that. Do you remember that that is  
 3 what I would be seeking to demonstrate? General, you have  
 4 indicated that you do know what the SAPS presentation is.  
 5 What I would like to know now is whether you are also aware  
 6 what the opening statement of the parties are and, in  
 7 particular, what I mean by the SAPS opening statement.  
 8 GENERAL PHIYEGA: Yes.  
 9 [10:32] MR MADLANGA SC: And you said that you  
 10 did have occasion to peruse the SAPS presentation. Did you  
 11 have occasion to peruse the SAPS opening statement?  
 12 GENERAL PHIYEGA: Yes.  
 13 MR MADLANGA SC: Mr Chairman,  
 14 commissioners, I'm being advised by Ms Pillay, and I think  
 15 correctly so, that because the AMCU opening statement was  
 16 handed in as an exhibit and marked as such, that perhaps we  
 17 need to hand this one up and also have it marked as an  
 18 exhibit.  
 19 CHAIRPERSON: For consistency we must do  
 20 that. What is the next – the next? It'll be FFF  
 21 something?  
 22 MS PILLAY: FFF9, Chair.  
 23 CHAIRPERSON: Thank you.  
 24 MR MADLANGA SC: Sorry commissioners, Mr  
 25 Chairman. The opening statement, General, actually sets

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1 out what the evidence that will be led by SAPS is going to  
 2 be and it also sets out the contentions that SAPS will be  
 3 making. Do you understand and accept that?  
 4 GENERAL PHIYEGA: Yes.  
 5 MR MADLANGA SC: Now, you recall that the  
 6 penultimate paragraph of the press statement that I  
 7 referred you to, your press statement, says that some of  
 8 the protesters charged at the police firing shots and that  
 9 this was at scene 2, or at least the latter part was my  
 10 contention, that is that in context this was plainly at  
 11 scene 2. Do you remember that your statement does refer to  
 12 protesters that charged at the police, firing shots?  
 13 CHAIRPERSON: That's the penultimate  
 14 paragraph on the second page.  
 15 MR MADLANGA SC: Of the second page,  
 16 thank you, Mr Chairman.  
 17 GENERAL PHIYEGA: Yes.  
 18 MR MADLANGA SC: Would you be surprised,  
 19 General, if I were to take you paragraph by paragraph in  
 20 the opening statement to find out that the opening  
 21 statement makes no such allegation? Would that surprise  
 22 you? This, of course, in relation to scene 2.  
 23 GENERAL PHIYEGA: No.  
 24 MR MADLANGA SC: Did you say you had read  
 25 the opening statement?

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1 GENERAL PHIYEGA: I have confirmed.  
 2 MR MADLANGA SC: And when did you read  
 3 it? Perhaps let me ask a different question. Did you read  
 4 it prior to evidence being led before this Commission?  
 5 GENERAL PHIYEGA: Yes.  
 6 MR MADLANGA SC: Just explain why would  
 7 it not surprise you if it says something different to your  
 8 media statement which you say you stand by, you continue to  
 9 stand by as of today?  
 10 GENERAL PHIYEGA: I shall ask you to  
 11 repeat your question because that – ja.  
 12 MR MADLANGA SC: I understood your  
 13 response to an earlier question to be that it would not  
 14 surprise you if you were to find out that the SAPS opening  
 15 statement does not say that in respect of scene 2 there  
 16 were any protesters who charged at the police, firing shots  
 17 at them, and you said no, that would not surprise you. So  
 18 my next question is, why would that not surprise you if it  
 19 is at variance with what you say in your media statement  
 20 which you say you continue to stand by to this day?  
 21 GENERAL PHIYEGA: It does not surprise me  
 22 because, as I've said, the statement I issued on the 16th  
 23 were the facts as given to me at that point in time and  
 24 I've said to the best of my knowledge they represent the  
 25 bona fide information that I received from those who were

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1 there.  
 2 MR MADLANGA SC: Do you accept that this  
 3 is a material difference or departure from what your media  
 4 statement says, that is, if the SAPS opening statement says  
 5 nothing about protesters charging at police, firing shots  
 6 at them? Don't you see that as a material difference?  
 7 GENERAL PHIYEGA: I would not agree  
 8 because the statements are presented in two different  
 9 fashions and unless you point me to a point where there is  
 10 that categoric point where you are saying there is a  
 11 material difference – I think they are different documents,  
 12 as I look at them.  
 13 MR MADLANGA SC: A difference or lack of  
 14 it, Commissioner, cannot lie in whether or not this  
 15 document is one and the same but would lie more in the  
 16 content and what I'm suggesting to you is – and I'm going  
 17 to go, I'm still going to do what you are inviting me to do  
 18 but now all I'm saying is, on the assumption that indeed  
 19 the SAPS opening statement, as I say it does or does not,  
 20 does not suggest that any of the protesters charged at the  
 21 police firing shots at them, whereas your press statement  
 22 says that some of the protesters did exactly that. Is that  
 23 not a material difference? That is what my question is.  
 24 GENERAL PHIYEGA: I do not see it like  
 25 that.

<p style="text-align: right;">Page 6985</p> <p>1 MR MADLANGA SC: Just explain that 2 answer, perhaps? 3 GENERAL PHIYEGA: I have already said 4 that the facts that are sitting in my statement of the 20th 5 were facts as presented to me by those who were there and I 6 have also said I believed in the bona fides of those facts 7 and I stand by them. 8 MR MADLANGA SC: Commissioner, this has 9 nothing to do with bona fides. Commissioner, this has to 10 do with what you say you were informed at the briefing of 11 the 16th that night, and the update you were given in the 12 morning of the 17th August 2012 and what you subsequently 13 read, what you yourself say you subsequently read in the 14 SAPS opening statement. So what I'm suggesting to you is, 15 there is in fact a material difference. I'm going to take 16 you through this. I'm saying there is a material 17 difference between the opening statement and what you said 18 in your media statement and that material difference is 19 this, your media statement says some protesters charged at 20 the police firing shots at them, and I say I'm going to 21 demonstrate to you that the SAPS opening statement does not 22 say so. If we accept for a minute, even before I take you 23 through the opening statement, if we accept for a moment 24 that indeed the opening statement says what I say it says, 25 do you accept that that is a material difference? It has</p>	<p style="text-align: right;">Page 6987</p> <p>1 statement says. It's your media statement. You stood up 2 there or you sat there and you told the nation and the 3 world what had taken place and, as the Chairman says, what 4 you said is that, in the media statement, the militant 5 group stormed at the police, firing shots at them. That is 6 what your media statement says. You understand me thus 7 far? Just to avoid any confusion, Commissioner, if you 8 could give me a yes or no. Do you understand me thus far, 9 yes or no? 10 GENERAL PHIYEGA: I'm going to ask you 11 again to just – it's a long sentence that you've given me. 12 What do you want me to understand? 13 MR MADLANGA SC: I want you to understand 14 the long thing that I've said, Commissioner, you presented 15 a media statement to the nation and the world, not so? 16 GENERAL PHIYEGA: Yes. 17 MR MADLANGA SC: Under cross-examination 18 by me you said that you stand by it, not so? 19 GENERAL PHIYEGA: Yes. 20 MR MADLANGA SC: Under cross-examination 21 by me today you have said that you know what the SAPS 22 opening statement is, yes or no? 23 GENERAL PHIYEGA: Yes. 24 MR MADLANGA SC: Still under cross- 25 examination by me you said that you read that opening</p>
<p style="text-align: right;">Page 6986</p> <p>1 nothing to do with what you have been told or what you have 2 not been told or the bona fides of those that told you or 3 did not tell you. 4 CHAIRPERSON: I'm sorry to interrupt you, 5 Mr Madlanga, before the witness answers – I may even go 6 further than you've put it. I think, in fairness, the 7 witness should get a chance to deal with what exactly she 8 said compared with the opening statement. In her statement 9 she didn't say some of them went to the police, she said – 10 you know, advanced on the police – she said the militant 11 group stormed towards the police. So it's the militant 12 group, is what she said. Your point, as I understand it, 13 is that that's not what the opening statement says. 14 Perhaps you could reformulate the question to incorporate 15 that, so the witness gets a chance to reply to a focused 16 question. 17 MR MADLANGA SC: Thank you, Mr Chairman. 18 Let me take a step back. Commissioner, I would understand 19 your stance if you had said to the Commissioners, no – no, 20 I never read the opening statement, I'm hearing about such 21 a document for the first time as you are cross-examining me 22 now, but you have said quite the opposite. You have said 23 you read it prior to evidence before this Commission 24 commencing. So you have read that opening statement, you 25 know what it says. You obviously also know what your media</p>	<p style="text-align: right;">Page 6988</p> <p>1 statement, not so? 2 GENERAL PHIYEGA: Yes. 3 MR MADLANGA SC: You read it prior to 4 evidence before this Commission commencing, not so? 5 GENERAL PHIYEGA: Yes. 6 MR MADLANGA SC: And I assume a person of 7 your level, with the experience that you have as a manager, 8 surely you must have read the opening statement with 9 understanding, not so? 10 GENERAL PHIYEGA: Correct. 11 MR MADLANGA SC: And do you accept also 12 that that media statement, amongst others, says that the 13 militant group stormed towards the police, firing shots at 14 them, not so? 15 GENERAL PHIYEGA: Correct. 16 MR MADLANGA SC: Now, what I'm saying and 17 where we were when we hit the snag was this, if I were to 18 demonstrate to you – and I am going to do so – that the 19 SAPS opening statement does not suggest that any of the 20 protesters stormed at the police firing shots at them, 21 would you accept that that is a material difference to what 22 you say in your press statement? 23 GENERAL PHIYEGA: I have said no and I am 24 waiting to hear your leading in - your point that you will 25 raise later.</p>

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1 MR MADLANGA SC: So is your "no" based  
 2 purely on the fact that you have not as yet been taken  
 3 through what I'm promising to take you through and on no  
 4 other reason?  
 5 GENERAL PHIYEGA: I'm saying no because  
 6 it is not my understanding and that's how I respond to you.  
 7 CHAIRPERSON: Commissioner, would it be  
 8 fair to say that your approach is, you say no because it  
 9 hasn't been demonstrated to you that there is a conflict?  
 10 In the statement – if Mr Madlanga succeeds in demonstrating  
 11 to you there is a conflict, then obviously your "no" will  
 12 possibly, will no longer stand, but are you saying you  
 13 haven't yet demonstrated to me there's a conflict, I'm not  
 14 aware of a conflict, therefore I say what I said? Is that  
 15 a fair summary of what you're saying?  
 16 GENERAL PHIYEGA: That's what I'm saying.  
 17 I'm saying I'm not aware of the conflict at this point in  
 18 time but I'm willing to engage.  
 19 MR MADLANGA SC: May I take you to – and  
 20 what you should bear in mind throughout, Commissioner, is  
 21 that my focus is at scene 2 which I have indicated appears  
 22 to have been your focus as well in the penultimate  
 23 paragraph of the second page of your media statement. So  
 24 that is what my focus is. If there is any suggestion  
 25 anywhere else in the opening statement that some of the

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1 protesters charged with firearms, shooting at the police,  
 2 that has nothing to do with what I'm focusing on. You  
 3 understand that?  
 4 [10:52] GENERAL PHIYEGA: Yes, let's continue.  
 5 MR MADLANGA SC: Now let me take you to  
 6 paragraph 45.5 at page 19 of the SAPS opening statement.  
 7 CHAIRPERSON: I think it might be  
 8 sensible to begin on page 18, the heading D, "Scene 2:  
 9 koppie 3" in the middle of page 18 sets the scene as it  
 10 were, literally, for what follows on page 19.  
 11 MR MADLANGA SC: Thank you. That is very  
 12 correct, thank you, Mr Chairman. If I take you to page 18  
 13 first, against the marginal letter capital D, or upper case  
 14 D, there it says "Scene 2: koppie 3." So that indicates  
 15 that we are indeed dealing with scene 2, you see that?  
 16 GENERAL PHIYEGA: Yes.  
 17 MR MADLANGA SC: And then I take you to  
 18 paragraph 45.5 and do you see there the part that says,  
 19 "The evidence will be that some of the 13 protesters who  
 20 were shot and killed at koppie 3 had charged at the police  
 21 officers with dangerous sharp weapons and had been shot in  
 22 self-defence," do you see that?  
 23 GENERAL PHIYEGA: Yes, I see that.  
 24 MR MADLANGA SC: And do you see that at  
 25 least in this part of the opening statement there is no

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1 reference to protesters who were charging and also firing  
 2 shots at the police, at least not in this part. Do you see  
 3 that?  
 4 GENERAL PHIYEGA: Maybe I read a  
 5 different thing.  
 6 MR MADLANGA SC: Yes, tell me how you  
 7 read it?  
 8 GENERAL PHIYEGA: You were going to 45.5,  
 9 am I right?  
 10 MR MADLANGA SC: Yes.  
 11 GENERAL PHIYEGA: And you read paragraph  
 12 – is it the second sentence or the third sentence?  
 13 MR MADLANGA SC: Right from the  
 14 beginning, "The evidence will be that some of the 13  
 15 protesters" all the way up to "self-defence."  
 16 GENERAL PHIYEGA: I'm not sure how 45.5  
 17 is different from the statement that I've given.  
 18 MR MADLANGA SC: Show me where paragraph  
 19 45.5, National Commissioner, refers to protesters that  
 20 stormed at the police firing shots at them. Show me where  
 21 paragraph 45.5 says so?  
 22 GENERAL PHIYEGA: Perhaps it's a wording  
 23 issue because what I read there, it says "some of the 13  
 24 protesters who were shot and killed at koppie 3 had charged  
 25 at police officers with dangerous sharp weapons and had

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1 been shot in self-defence."  
 2 CHAIRPERSON: Yes, but doesn't say that  
 3 they were firing shots, which is what you said in the  
 4 penultimate sentence of the penultimate paragraph on page 2  
 5 of your statement.  
 6 GENERAL PHIYEGA: That may not be  
 7 reflected but I was focusing on the charging, so if the  
 8 question is about that, if the question is about, they  
 9 charged with sharp weapons but no guns, it's a different  
 10 story. If the focus is on the guns, their statement is not  
 11 saying –  
 12 CHAIRPERSON: Why do you say may not have  
 13 been reflected? It's either reflected or it isn't. Is it  
 14 reflected or isn't it?  
 15 GENERAL PHIYEGA: Judge, what's the  
 16 question?  
 17 CHAIRPERSON: You said it may not have  
 18 been reflected and I said to you, why do you say it may not  
 19 have been reflected? It was either reflected or it wasn't  
 20 reflected – [inaudible]. Was it reflected?  
 21 GENERAL PHIYEGA: Perhaps let me walk  
 22 that to say how do I read these two paragraphs.  
 23 CHAIRPERSON: Before you say how you read  
 24 the two paragraphs, it would be helpful if you answered the  
 25 question that has been put to you, then you can go back to

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1 the two paragraphs and give the explanation you wish to  
2 give.

3 GENERAL PHIYEGA: The paragraph I've read  
4 talks about sharp weapons and dangerous sharp weapons, it  
5 didn't refer to guns.

6 MR MADLANGA SC: You say it did not refer  
7 to guns.

8 GENERAL PHIYEGA: 45.5 refers to sharp  
9 weapons and it didn't talk about guns.

10 MR MADLANGA SC: And for me the operative  
11 words, and which I seek to emphasise, contained in your  
12 press statement, the penultimate sentence of the  
13 penultimate paragraph of page 2, "firing shots at the  
14 police." Those are the operative words. They did not only  
15 storm or charge but they stormed towards the police and I  
16 emphasise, "firing shots." Those are the operative words.  
17 Now, what I'm saying to you is, show me in paragraph 45.5  
18 where it's said that the people who charged at the police  
19 were firing shots. That's the emphasis. "Firing shots" –  
20 does paragraph 45.5 say any such thing?

21 CHAIRPERSON: I think you should give the  
22 witness a chance to read the whole paragraph to herself.

23 MR MADLANGA SC: Yes.

24 GENERAL PHIYEGA: Let me start with our  
25 paragraph in this statement and then I will go to the

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1 opening statement. I will start with, not with the  
2 penultimate paragraph, I will start with the paragraph  
3 preceding that because the context I think is important for  
4 me to grasp what you are asking me. "When the police  
5 started deploying the barbed wire fencing, a group of  
6 protesters armed with dangerous weapons and firearms  
7 hastily flanked the vehicles deploying the wire. They were  
8 met by members from the police who tried to riposte their  
9 advance with water cannon, teargas as well as stun  
10 grenades. The attempt was unsuccessful and the group – and  
11 the police members had to employ force to protect  
12 themselves from the charging group. The dispersion action  
13 had commenced at this time and the armed protesters were  
14 driven from their stronghold to a high bushy ground in the  
15 close vicinity. The police members encircled the area and  
16 attempted to force the protesters out by means of water  
17 cannons, rubber bullets and stun grenades. The militant  
18 group stormed towards the police, firing shots and wielding  
19 dangerous weapons. Police retreated systematically and  
20 were forced to utilise maximum force to defend themselves."  
21 45.5 says, "The evidence will be that some of the 13  
22 protesters who were shot and killed at koppie 3 had charged  
23 at police officers with dangerous sharp weapons and had  
24 been shot in self-defence. These are accounted for below.  
25 Others could have been killed with police officers returned

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1 sharp fire, believing shots to have been fired from the  
2 bushes and crevices in the koppie by protesters." And when  
3 I read these paragraphs up to there, I see commonality in  
4 the two. That's my position.

5 MR MADLANGA SC: I go back to my last  
6 question before you started reading from the two documents,  
7 National Commissioner. Please show me in paragraph 45.5  
8 where it does not only say some protesters charged at the  
9 police but it says they did so firing shots at the police,  
10 so they are charging or storming towards the police but at  
11 the same time firing shots at them. Show me where it says  
12 so in paragraph 45.5.

13 GENERAL PHIYEGA: I read, "Others could  
14 have been killed when police officers returned sharp fire,  
15 believing shots to have been fired from the bushes and  
16 crevices on the koppie by protesters."

17 MR MADLANGA SC: And where does that say  
18 that the protesters who might have been shot in that manner  
19 were charging at the police or storming towards the police?  
20 Where does that sentence say so? Where is the charging or  
21 the storming towards the police, if all that the sentence  
22 seems to say is that the police believed that some  
23 protesters might have been firing from within the bushes  
24 and crevices? Where is the charging or the storming, that  
25 is my question.

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1 GENERAL PHIYEGA: Paragraph 45 does say  
2 that because it says the evidence will be that some of the  
3 13 protesters who were shot had charged at police officers  
4 with dangerous weapons and it continues into other - it's  
5 part of one thing.

6 MR MADLANGA SC: Surely, Commissioner,  
7 you can understand these two sentences better than that.  
8 The first one, the first one that does talk about charging  
9 says that those protesters charged with dangerous sharp  
10 weapons and had been shot in self-defence and nowhere does  
11 it say that those protesters shot in that manner, were  
12 firing shots. Do you accept that that is how it reads?  
13 I'm going to take you to the next sentence, Commissioner.  
14 Let's deal with this one, let's deal with this one. Do you  
15 accept that yes, it does talk about charging, the  
16 protesters charging but it says they did so with dangerous  
17 sharp weapons and had been shot in self-defence and it says  
18 nothing about them firing shots at the police? Do you  
19 accept that that is what that sentence says?

20 GENERAL PHIYEGA: Yes, I continue to  
21 agree with that first sentence.

22 MR MADLANGA SC: Now you seem to suggest  
23 that the first and second sentence, the first and second  
24 sentences read together do say the same thing as what you  
25 said in your media statement. Now let us look at the

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1 second sentence.

2 CHAIRPERSON: I think it's the third

3 sentence actually.

4 MR MADLANGA SC: Sorry, Mr Chairman, yes,

5 I could even take you to the third but let's start with the

6 second.

7 CHAIRPERSON: The second is that these

8 are accounted for below. That's –

9 MR MADLANGA SC: I'm sorry, I'm sorry,

10 yes, yes –

11 CHAIRPERSON: The third sentence begins,

12 "Others could have been killed" –

13 MR MADLANGA SC: Yes –

14 CHAIRPERSON: Which I think is the one

15 you mean.

16 MR MADLANGA SC: Yes, yes, I guess I'm

17 referring to the second sentence that the Commissioner has

18 dealt with but you are quite correct, Mr Chairman, it's the

19 third sentence of paragraph 45.5. Now let's deal with the

20 third sentence of the opening statement but which is the

21 second sentence that you are relying on and it reads,

22 "Others could have been killed when police officers

23 returned sharp fire, believing shots to have been fired

24 from the bushes and crevices in the koppie by protesters."

25 Now my question is, does that talk about any protesters who

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1 were storming towards or charging at the police, firing

2 shots? Does that sentence say anything of the sort?

3 GENERAL PHIYEGA: I have answered this

4 and I've said I see those two sentences connected because -

5 linking with.

6 MR MADLANGA SC: You can't just link

7 without showing us how the link comes about, Commissioner.

8 You have agreed that the first sentence does not say so.

9 Now show me in the second sentence how exactly that link

10 that you refer to arises, where is it, where is it said in

11 the third sentence of paragraph 45.5, where is it said that

12 some protesters charged at or stormed towards the police

13 and then I emphasise, firing shots? Where does this say

14 so? Where does this sentence say so? Show me the link.

15 GENERAL PHIYEGA: My link remains the

16 fact that the third paragraph starts at "The evidence" and

17 that the sentence you are referring to starts by saying

18 "others," which means it already talks to what has happened

19 before and that's how I read it. I may be reading it not

20 the way you are reading it, but I read it as a connected

21 paragraph.

22 [11:12] CHAIRPERSON: Mr Madlanga, perhaps it's

23 appropriate to take the tea adjournment at this stage.

24 Thereafter the witness can deal with the fourth sentence

25 and how it's linked to the third. After we resume after

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1 the tea adjournment, I'm going to call upon Mr Malindi to

2 make a statement in relation to a press statement issued by

3 his clients yesterday.

4 [COMMISSION ADJOURNS COMMISSION RESUMES]

5 [11:35] CHAIRPERSON: The Commission resumes.

6 Before I remind the National Commissioner she's still under

7 oath, Mr Malindi, I understand you wish to make a

8 statement. The front row or are you happy to make it from

9 where you are?

10 MR MALINDI: It will save us five minutes

11 if I proceed from here.

12 CHAIRPERSON: All right -

13 MR MALINDI: Thank you Chair.

14 Chairperson, this morning I was in your chambers regarding

15 two media statements made by my client, the South African

16 Human Rights Commission. The one incident involves a radio

17 interview which I have not had the opportunity to listen

18 to. The second incident is where the Human Rights

19 Commission released a statement to the media on Friday the

20 22nd March. I confirm that a spokesperson of the Human

21 Rights Commission released the statement on 22 March 2013.

22 The statement made comment on the evidence of Commissioner

23 Phiyega in relation to the statement of Warrant Officer

24 Myburgh which was presented to her for purposes of cross-

25 examination. The statement goes further to comment on the

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1 quality of the Commissioner's evidence. Upon receiving

2 this statement yesterday afternoon I advised my client as

3 follows by email, "In regard to the FAHRC press release

4 client needs to be advised not to comment on the merits in

5 these proceedings until they have been concluded.

6 Innocuous comments on the facts such as dates of hearings,

7 adjournments and the actual evidence without commentary is

8 permitted." This morning I have attempted to get

9 instructions in order to have this statement retracted. I

10 have not been successful, Chairperson. I have spoken to Mr

11 Semenya and I propose, with your permission, Chairperson,

12 that my client be admonished for its conduct and to issue a

13 general statement to all parties involved to desist from

14 commenting on proceedings before they are concluded.

15 CHAIRPERSON: I don't see why we have to

16 admonish the other parties, because no other parties have

17 done that but if it's suggested they may follow your

18 client's example I suppose an admonition may be appropriate

19 but I'm not sure it's necessary at this stage. But please

20 carry on.

21 MR MALINDI: Chairperson, I suggested an

22 admonition to my client and a warning to other parties

23 which is a general warning that gets given to parties

24 involved in proceedings but if it's synonymous to

25 admonition I will not request you to make that warning and



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1 -

2 CHAIRPERSON: If I admonish one party not

3 to do this in future then all the other parties is

4 sufficiently intelligent to realise that the same comments

5 would apply to them but it's not necessary to admonish them

6 or warn them because they haven't done anything which calls

7 for an admonition or warning.

8 MR MALINDI: Thank you.

9 CHAIRPERSON: But what is more serious is

10 you dealing with the possible retraction of the statement,

11 you said you haven't been able to obtain instruction, does

12 that mean your client refused to withdraw the statement or

13 that you haven't had an opportunity to get instructions to

14 withdraw it?

15 MR MALINDI: I have made contact with the

16 client but the persons responsible have not been contacted

17 directly and I agreed with Mr Semenya that as soon as I

18 have those instructions I will approach you similarly to

19 indicate such instructions, Chairperson.

20 CHAIRPERSON: I think the way to do it is

21 I'll give you till 9:30 tomorrow morning to get

22 instructions regarding the possible retraction of the

23 statement which reflected very seriously and adversely on

24 the credibility of a witness who's still under cross-

25 examination and accused her, as I read it, of committing

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1 perjury before this Commission. If she did or she didn't

2 is a matter we will have to deal with at the end of the

3 hearing in our report but it's inappropriate for any party

4 to make a statement to that effect before we've dealt with

5 it in our report and au fortiori while she's still under

6 oath being cross-examined. With regard to the other

7 matter, you say you haven't yet had an opportunity to

8 listen to the radio interview, I understand a clip is being

9 sent to you electronically. It either has been or will be.

10 So by tomorrow morning at 9:30 I expect you to deal with

11 that as well. Mr Semenya, is there anything you wish to

12 say?

13 MR SEMENYA SC: Chair, thank you. We

14 will await the retraction and an explanation for why that

15 instruction happened in the first place. This is a Human

16 Rights Commission.

17 CHAIRPERSON: Thank you. I may well feel

18 called upon to make some general remarks tomorrow addressed

19 to the public in general -

20 MR SEMENYA SC: Thank you, Chairperson.

21 CHAIRPERSON: - relating to the other

22 matter which is dealt with on the radio interview but that

23 can stand over until tomorrow morning as well. Mr Madlanga

24 is there anything you wish to say at this stage?

25 MR MADLANGA SC: Not on this subject and

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1 not at this stage, Mr Chairman. If anything perhaps only

2 tomorrow, Mr Chairman.

3 CHAIRPERSON: Thank you. National

4 Commissioner you're still under oath. Mr Madlanga, please

5 proceed with your cross-examination.

6 MR MADLANGA SC: Thank you Mr Chairman.

7 General let's go to the sentence that the Chairman referred

8 to just before the tea adjournment. That sentence reads

9 and it follows the third sentence that you were relying on

10 or reading conjointly with the first sentence. It reads

11 "the police officers are prepared to accept that they may

12 have been responding to 'friendly fire' believing it to be

13 fire from the protestors," do you see that?

14 GENERAL PHIYEGA: Yes, I do.

15 MR MADLANGA SC: And looking at that

16 together with the third sentence that you were relying on

17 in support for the charging at or storming towards the

18 police, do you still maintain that this paragraph, that is

19 45.5, supports the view held in your media statement or

20 expressed in your media statement that a militant group

21 stormed towards the police, firing shots and were then shot

22 at by the police?

23 GENERAL PHIYEGA: Yes, I still stand by

24 that.

25 MR MADLANGA SC: Okay let's deal with it

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1 step by step. I will not again read the first sentence.

2 The second one says "these are accounted for below." Do you

3 see that?

4 GENERAL PHIYEGA: Yes.

5 MR MADLANGA SC: And those being

6 accounted for below being "those that were shot in self

7 defence when they were charging at the police with

8 dangerous weapons." Do you see that? That is in the first

9 sentence.

10 GENERAL PHIYEGA: I'm probably a bit lost

11 because after that sentence what I see is "these are

12 accounted for below, others could have been" I don't know

13 if I'm reading at the same place with you.

14 MR MADLANGA SC: I'm trying to clarify to

15 you based on my understanding of the opening statement what

16 the word "these" is referring to. The word "these"

17 obviously refers back to the sentence immediately preceding

18 the "these." Do you accept that?

19 GENERAL PHIYEGA: I think I'm confused

20 because I thought, maybe it's the interpretation that

21 confuses me. Maybe if you lead me again to tell me what

22 you are asking. Are you saying - you know just maybe

23 explain it again. You lose me.

24 MR MADLANGA SC: I was trying to avoid

25 reading something that we have read over and over again but

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1 maybe I need to do that then, General.  
 2 GENERAL PHIYEGA: Do so.  
 3 MR MADLANGA SC: Paragraph 45.5 starts by  
 4 saying "the evidence will be that some of the 13 protestors  
 5 were shot and killed at Koppie Three had charged at police  
 6 officers with dangerous sharp weapons and had been shot in  
 7 self defence." Do you see that?  
 8 GENERAL PHIYEGA: Yes, I do.  
 9 MR MADLANGA SC: The very next sentence  
 10 reads "these are accounted for below."  
 11 GENERAL PHIYEGA: Okay. Yes.  
 12 MR MADLANGA SC: And when you got  
 13 confused by my question I was saying the word "these" that  
 14 is at the beginning of the second sentence is an obvious  
 15 reference to the protestors who had charged at police  
 16 officers with dangerous, sharp weapons and had been shot in  
 17 self defence. Do you accept that?  
 18 GENERAL PHIYEGA: Yes.  
 19 MR MADLANGA SC: And now, Commissioner,  
 20 to avoid confusion and I understand that you are reading  
 21 the two sentences conjointly to arrive at your conclusion  
 22 but just so as to go step by step and for me to understand  
 23 you do you accept that in first sentence that I have read  
 24 again nothing says that the protestors who charged at the  
 25 police with dangerous, sharp weapons were firing shots at

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1 the police. Do you accept that in the first sentence? I'm  
 2 not talking about other sentences in the paragraph, in that  
 3 sentence nothing refers to the protestors themselves firing  
 4 shots. Do you accept that?  
 5 GENERAL PHIYEGA: Yes.  
 6 MR MADLANGA SC: Now let us go to the  
 7 third sentence. That sentence starts with the word  
 8 "others" do you see that?  
 9 GENERAL PHIYEGA: I do.  
 10 MR MADLANGA SC: And I read that to  
 11 distinguish these protestors that the third sentence is  
 12 going to talk about, to distinguish them from "those" that  
 13 are referred to in the first sentence, do you accept that?  
 14 GENERAL PHIYEGA: I understand.  
 15 MR MADLANGA SC: Do you accept?  
 16 GENERAL PHIYEGA: I do say I understand  
 17 because you started off by saying "I read it as a conjoint  
 18 statement" and this is why yes I understand.  
 19 MR MADLANGA SC: I want to make sure that  
 20 you agree with me, if you don't I would prefer for you to  
 21 say that you do not agree with me. Now what I'm saying is  
 22 the first sentence mentions a specific category of  
 23 protestors and says they were shot in self defence and the  
 24 second sentence obviously as you accept refers back to  
 25 those same protestors that says "these are accounted for

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1 below." And then the third sentence says "others" and I say  
 2 by the use of "others" that sentence cannot possibly, even  
 3 by the most benevolent reading, it cannot possibly still be  
 4 referring to the same protestors that are referred to in  
 5 the first and second sentences. Do you accept that?  
 6 GENERAL PHIYEGA: I have answered this  
 7 question and I have said I read this paragraph as one  
 8 flowing whatever, it's just a qualification.  
 9 CHAIRPERSON: May I intervene and ask a  
 10 question, it's related to what you're asking about, it may  
 11 shorten proceedings a bit I hope. You see that 45.5 first  
 12 sentence talks about 13 protestors. Evidence will be that  
 13 some of the 13 protestors who were shot had charged and had  
 14 been shot in self defence. Then it goes on "these are  
 15 accounted for below" and then you look at 45.6 you'll see  
 16 there's reference to 13 bodies and when you look at 45.8  
 17 you will see that there are a number of sub paragraphs  
 18 45.8.1 going all the way through to 45.8.5. Now if you go  
 19 through paragraphs 45.8.1 to 45.8.5 you will see they deal  
 20 with 13 bodies. Where they were found and so forth. So  
 21 quite clearly when the second sentence of paragraph 45.5  
 22 says "these are accounted for below" that's a reference to  
 23 what one can call the accounting in respect of the 13  
 24 bodies in paragraphs 45.8.1 through to 45.8.5. Would you  
 25 accept that that's correct? I've counted them, if you want

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1 to check my accounting skills you can count them again.  
 2 [11:55] GENERAL PHIYEGA: Chair, I will trust  
 3 your accounting and then on the basis of that take the next  
 4 question.  
 5 CHAIRPERSON: The next question is, it's  
 6 not accounting, its counting actually. The next question  
 7 is the third sentence at 45.5 "others could have been  
 8 killed" clearly relates to persons other than the 13 who  
 9 are accounted for below i.e. in 45.8.1 through to 45.8.5.  
 10 I take it that must be right.  
 11 MR MADLANGA SC: In the first, Mr  
 12 Chairman, if perhaps, Mr Chairman, if you agree, if you  
 13 could tweak your question to cover what I'm going to  
 14 suggest.  
 15 CHAIRPERSON: I never believe in tweaking  
 16 questions -  
 17 MR MADLANGA SC: It is some of the 13 Mr  
 18 Chairman. It is some Mr Chairperson.  
 19 CHAIRPERSON: But then there are 13  
 20 bodies and the 13 are all dealt with. Oh I see.  
 21 MR MADLANGA SC: It's some of the 13 that  
 22 charged and were killed in self defence, so it's not all  
 23 13.  
 24 CHAIRPERSON: I see, alright.  
 25 MR MADLANGA SC: And that "these" refers

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1 to some, not all 13, Mr Chairman.  
 2 GENERAL PHIYEGA: I think it's getting a  
 3 bit more complicated when I listen to what you have said  
 4 and the tweaking that you're putting in and I'd like to say  
 5 my simple answer is that when I read the statement I read  
 6 it as a conjoint process.  
 7 MR MADLANGA SC: General, how can you  
 8 read the word "others" that introduces the third sentence  
 9 to be still a reference to some of the 13 referred to in  
 10 the first sentence and that "these" in the second sentence,  
 11 that obviously refers to some of the 13 contained in the  
 12 first sentence. How can you read the "others" to still  
 13 refer to the same people?  
 14 GENERAL PHIYEGA: Perhaps you are not  
 15 accepting my answer but I still say I look this as a common  
 16 process.  
 17 CHAIRPERSON: Commissioner, may I ask you  
 18 a question on the same point, to see if I can get clarity  
 19 in my own mind? The first part of 45.5 talks about people  
 20 who were shot in self defence.  
 21 GENERAL PHIYEGA: Yes.  
 22 CHAIRPERSON: The second part as I read  
 23 it deals with persons who weren't shot in self defence but  
 24 who the police believed they had shot in self defence. You  
 25 see, "others could have been killed when the police

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1 officers returned sharp fire believing shots were being  
 2 fired from the bushes and crevices by the protestors, by  
 3 protestors." Then it goes on "the police officers are  
 4 prepared to accept that they may have been responding to  
 5 'friendly fire' believing it to be fire from the  
 6 protestors. Without forensic evidence we're unable to give  
 7 an unqualified account."  
 8 So what that says is this, some people were shot  
 9 in self defence other people were shot by police who say  
 10 they may not have actually be acting in self defence. They  
 11 may have believed that they were acting in self defence  
 12 because they may have believed the protestors were shooting  
 13 at them but they now are prepared to accept that they may  
 14 have been mistaken because the shots which they thought  
 15 came from the protestors may have come from what is  
 16 described as friendly fire. So in other words what they're  
 17 saying is look some people definitely self defence, other  
 18 people may be not self defence because we're prepared to  
 19 accept that we thought we were defending ourselves because  
 20 they were firing at us. We now accept we may have been  
 21 wrong because the shots that we thought were coming from  
 22 them may have been friendly fire fired by policemen from  
 23 the other side of the hill. That seems to be what the  
 24 statement says. Would you agree with that? And it depends  
 25 obviously on the forensic evidence. Subject to the

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1 forensic evidence they say we can't say categorically in  
 2 the case of these others that they were definitely shot in  
 3 self defence because it may not have been self defence. It  
 4 may have been based on a mistaken belief that they were  
 5 shooting. That must be right surely, that's what it says.  
 6 GENERAL PHIYEGA: Chair the "may be" is  
 7 very critical because that last sentence actually says  
 8 "without forensic evidence we are unable to give an  
 9 unqualified account explaining some of these persons." So  
 10 the "may" is very operative in that sentence.  
 11 CHAIRPERSON: No I understand that, I  
 12 understand. In other words the point is this, your  
 13 statement contained on this part effectively two averments  
 14 what I'll call A and B. A was the people had sharp  
 15 weapons, B was all of them because this statement is  
 16 without exception. B is they fired shots. What now  
 17 appears is your statement requires revision, at least in  
 18 respect of the "others" because the maybe comes in. So  
 19 what one now has to say is A plus B maybe if you understand  
 20 what I mean. So the point that I think Counsel is making  
 21 and if I'm wrong he will, as he's shown previously, not  
 22 hesitate to correct me. The point I think Counsel is  
 23 making is this; that when you said you stood by the whole  
 24 of your statement you should actually have said the  
 25 statement was what I believed at the time but in the light

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1 of what the police now say about what I call the B maybe,  
 2 it may be subject to revision because some of the people  
 3 may not actually have been shot in self defence. They may  
 4 have been shot by police who thought they were acting in  
 5 self defence but were misled by what amounts to friendly  
 6 fire. Is that your point Mr Madlanga?  
 7 MR MADLANGA SC: Definitely, Mr Chairman,  
 8 thank you.  
 9 MR SEMENYA SC: Chair, can I make two  
 10 statements? The one is to the extent that there may be  
 11 contradictions between the two, our submission is that that  
 12 contradiction is better explained by -  
 13 CHAIRPERSON: But hang on a second aren't  
 14 you answering the question for the witness?  
 15 MR SEMENYA SC: No, I'm not.  
 16 CHAIRPERSON: You can make your  
 17 submissions later but surely unless the question is unfair  
 18 or misleading then the witness - Mr Madlanga is entitled to  
 19 have an answer to it and in fact it might even be better  
 20 for your client to rather give an answer without having the  
 21 benefit of hearing what you're going to submit later  
 22 because it might add force and credibility to what she  
 23 says.  
 24 MR SEMENYA SC: Indeed Chair the second  
 25 part of the statement we propose to make is that the

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1 paragraph is not strictly as my learned colleague is  
2 putting it which renders it unfair. Clearly the ordinary  
3 reading which is a possible interpretation of that is that  
4 the "others" does not relate to people other than some of  
5 the 13. If we know, as we do, that there were 16 people  
6 who were killed it says some of those 13 have been killed  
7 in self defence but some of those 13 may have been killed  
8 in intuitive self defence, that interpretation is competent  
9 on paragraph 45.3. Now to disaggregate them and say the 13  
10 is put one side and the "others" is the other is with  
11 respect misleading.

12 CHAIRPERSON: I don't agree with that  
13 objection and I overrule it and the witness may now answer  
14 the question put.

15 GENERAL PHIYEGA: I think after all this,  
16 I will ask you to state your question again.

17 CHAIRPERSON: That's a further question,  
18 Mr Madlanga.

19 MR MADLANGA: It was your question, Mr  
20 Chairman.

21 CHAIRPERSON: I put - it was intended to  
22 be a statement of what your - If it was something new I  
23 apologise, if you don't want to put any new bits then you  
24 don't have to.

25 MR MADLANGA SC: I understand, Mr

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1 Chairman, I understand. General, let me just read the  
2 third sentence all he way down to just before "without  
3 forensic evidence." I'll read that sentence and the ones  
4 that follow up to that point. "Others could have been  
5 killed when police officers returned sharp fire believing  
6 shots to have been fired from the bushes and crevices in  
7 the koppie by protestors. The police officers are prepared  
8 to accept that they may have been responding to 'friendly  
9 fire' believing it to be fire from the protestors." And I  
10 stop there. Do you see that? The first sentence of the  
11 paragraph makes the categorical point that the people who  
12 were shot in self defence were charging at the police with  
13 dangerous, sharp weapons. Do you see that?

14 GENERAL PHIYEGA: Yes, I do see that.

15 MR MADLANGA SC: Whereas on my reading of  
16 it or rather on my reading of them the third and fourth  
17 sentences say that the other lot of protestors may well  
18 have been shot at by mistake, that's the essence of it.  
19 The "others" may well have been shot by mistake when the  
20 police returned fire that they believed to be coming from  
21 the bushes and crevices whereas it may well be that that  
22 fire was fire by other police which is what they refer to  
23 by this friendly fire. Do you accept that?

24 GENERAL PHIYEGA: I accept that with the  
25 highlighted "may" and the last sentence that actually said

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1 "we were not able to pass judgement when this statement was  
2 made.

3 MR MADLANGA SC: Even if one tries to put  
4 it at its lowest by using the word "may" it is still a far  
5 cry from the categorical point made in the first sentence  
6 which is that "protestors charging at the police were shot  
7 at - charging at the police with dangerous, sharp weapons  
8 were shot in self defence." Saying that protestors may well  
9 have been shot by mistake is totally different from saying  
10 that they were charging at police with dangerous weapons  
11 and were shot in self defence. Those are two different  
12 statements, not so?

13 GENERAL PHIYEGA: I continue to disagree.

14 CHAIRPERSON: Mr Madlanga, I think you've  
15 taken this point as far as it can go. Your point is  
16 clearly put I think. Her reply is clearly put, it's for us  
17 perhaps later after the benefit of the argument Mr Semenya  
18 promises to give us to decide whether this is a good point  
19 or a bad point. Isn't that so? I don't know if you can  
20 take it any further by questioning or she can take her  
21 answer any further by further replies but I think we should  
22 move on unless you feel strongly about that.

23 MR MADLANGA SC: Thank you I'll move on,  
24 Mr Chairman. We will argue at the end that the witness was  
25 obviously being evasive on this point. I'm now proceeding

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1 to do what I said I would do which is to demonstrate to you  
2 that those that the opening statement says in second  
3 sentence "are accounted for" that it's those who charged at  
4 the police with dangerous weapons, charged only with  
5 dangerous weapons and not with firearms that were being  
6 fired at the police. I take you to paragraph 45.8.1 of the  
7 opening statement and that paragraph refers to a group that  
8 charged with pangas, spears and knobkerries. Take your  
9 time and read and it does not refer to that group charging  
10 with firearms or it does not mention firearms, let alone  
11 firearms being fired at the police. Do you see that?

12 GENERAL PHIYEGA: Yes, I see that.

13 MR MADLANGA SC: Mr Chairman,  
14 Commissioners I'm going to be mentioning the names of some  
15 of deceased. Not showing any pictures, I do not think that  
16 warrants a warning but perhaps for what it's worth the  
17 warning may be given.

18 CHAIRPERSON: Some of the persons who  
19 were killed at scene two are going to be mentioned by name.  
20 If there are family members or loved ones of persons who  
21 were killed at scene two who feel that even hearing their  
22 names being mentioned in the context of their being killed  
23 will cause them distress I ask that what I say is  
24 interpreted into isiXhosa and that the cross-examination  
25 should only proceed with the naming of these people two

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1 minutes after what I've said has been interpreted.  
 2 MR MADLANGA SC: Mr Chairman, even though  
 3 the two minutes may not be up it doesn't look like there's  
 4 any movement. Shouldn't I continue perhaps?  
 5 CHAIRPERSON: I suggest that you  
 6 continue, yes.  
 7 [12:15] MR MADLANGA SC: General, according to  
 8 the opening statement, the same paragraph 45.8.1, Mr Anele  
 9 Mdizeni and Mr Thabo Thelejane whose bodies are  
 10 respectively referred to as A and B, were part of this  
 11 group, that is the group that is said to have charged with  
 12 pangas, spears and knobkerries. Do you see that? Of  
 13 course only mention of A and B is made, not the two names  
 14 that I've given.  
 15 GENERAL PHIYEGA: Yes, I do see that.  
 16 MR MADLANGA SC: And both of them were  
 17 shot dead, you see that as well.  
 18 GENERAL PHIYEGA: Yes.  
 19 MR MADLANGA SC: Mr Thobile Mpumza, whose  
 20 body was subsequently marked C, is referred to in paragraph  
 21 45.8.2 and he is said to have come out running towards the  
 22 police armed with a spear and knobkerrie, again no mention  
 23 of a firearm and that he lunged at a police officer with  
 24 the spear. Do you see that? Take your time to read it.  
 25 And he too was shot dead.

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1 GENERAL PHIYEGA: Yes.  
 2 MR MADLANGA SC: In paragraph 45.8.4 the  
 3 opening statement says that Mr Makhosandile Mkhonjwa, whose  
 4 body was subsequently marked N, was part of a group that  
 5 came from inside the koppie to the edge of the koppie armed  
 6 with spears, pangas, knobkerries – again no mention of  
 7 firearms, let alone firearms that were being fired at the  
 8 police, do you see that?  
 9 GENERAL PHIYEGA: I see that.  
 10 MR MADLANGA SC: Mr Mkhonjwa and another  
 11 person from the group charged towards the police, who  
 12 killed Mr Mkhonjwa and injured the other person. Do you  
 13 see that?  
 14 GENERAL PHIYEGA: I am trying to –  
 15 MR MADLANGA SC: Mr Mkhonjwa is the N,  
 16 the letter N I referred to.  
 17 GENERAL PHIYEGA: You lost me because you  
 18 didn't name the N before. I see that.  
 19 MR MADLANGA SC: In paragraph 45.8.5 the  
 20 opening statement says Mr Nkosinati Xalabile whose body was  
 21 subsequently marked O, was among the group that was inside  
 22 the koppie, armed with pangas, spears and knobkerries, do  
 23 you see that?  
 24 GENERAL PHIYEGA: Yes, I see that.  
 25 MR MADLANGA SC: The opening statement

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1 does, of course, state that the group in which Mr O was,  
 2 was in the vicinity from where gunshots were fired at  
 3 police officers who were walking to the koppie. The police  
 4 returned fire in the direction from which the gunfire came.  
 5 And it goes on and says, "A person charged at the police,  
 6 who were in the koppie in the vicinity of O and the police  
 7 shot at the person." Do you see that?  
 8 GENERAL PHIYEGA: Yes, I see that.  
 9 MR MADLANGA SC: Crucially, do you notice  
 10 that the opening sentence does not say that as Mr Xalabile  
 11 was charging towards the police he was firing shots at  
 12 them? Do you see that no such allegation is made?  
 13 GENERAL PHIYEGA: I do see that but you  
 14 have also alluded to a statement there where you were  
 15 saying the person is in the vicinity from where gunshots  
 16 were fired at police.  
 17 MR MADLANGA SC: No, I'm satisfied with  
 18 the part where you accept that the statement does not say  
 19 he charged at the police firing shots at them. I'll take  
 20 you to the next point. Nor does the opening statement say  
 21 that as he charged at the police, he was part of a group  
 22 that was firing shots at the police and as they fired the  
 23 shots they were also charging at the police. So, one, not  
 24 a group firing shots and, crucially, charging at the  
 25 police. The group was just him, do you see that?

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1 MR SEMENYA SC: Chair, can we make the  
 2 objection again on grounds of fairness? Both the opening  
 3 statement as well as the media statement are statements  
 4 informed by a whole host of evidence and if the inquiry is  
 5 whether there was this group or not, may I refer the  
 6 witness properly to the statement of Modiba which we all  
 7 have, where both the charging and the firing happened. So  
 8 to take the two documents as though they are a conclusive  
 9 total picture of what happened is unfair to the witness,  
 10 with respect.  
 11 CHAIRPERSON: [Inaudible]  
 12 MR SEMENYA SC: The statement of Colonel  
 13 Modiba of the NIU, paragraph 7 thereof.  
 14 CHAIRPERSON: I see. Mr Madlanga, you've  
 15 heard what Mr Semanya says. What reply do you have?  
 16 MR MADLANGA SC: Which paragraph did my  
 17 learned friend say?  
 18 MR SEMENYA SC: Paragraph 7 of the  
 19 statement of Colonel Modiba.  
 20 CHAIRPERSON: I think I'm correct in  
 21 saying that statement, although it is part of the SAPS hard  
 22 drive, is not an exhibit so I haven't seen it, but Mr  
 23 Madlanga is in possession of a copy and so he'd be able to  
 24 respond to what you say.  
 25 MR MADLANGA SC: May the Commissioners

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1 please just give me a bit of time?  
 2 CHAIRPERSON: Someone's phone has got a –  
 3 what do you call it – a call tone which we can hear, which  
 4 – a ring tone which I think that cell phone should be  
 5 turned off because it interrupts the proceedings.  
 6 MR MADLANGA SC: Mr Chairman,  
 7 Commissioners, may I just ask for a few minutes'  
 8 adjournment. We're having a debate that's not coming to an  
 9 end. I hope we will not be long at all.  
 10 CHAIRPERSON: The Commission will adjourn  
 11 for more than a moment, for some time and as soon as you  
 12 are in a position to continue, please let us know and we'll  
 13 come back.  
 14 [COMMISSION ADJOURNS COMMISSION RESUMES]  
 15 [12:40] CHAIRPERSON: I understand you're ready  
 16 to continue, is that correct? You're still under oath,  
 17 National Commissioner.  
 18 MANGWASHI VICTORIA PHIYEGA: s.u.o.  
 19 CHAIRPERSON: Mr Madlanga?  
 20 CROSS-EXAMINATION BY MR MADLANGA SC (CONTD.):  
 21 Thank you, thank you Commissioners, for the indulgence.  
 22 Perhaps it's fair to the National Commissioner to read the  
 23 paragraph that my learned friend Mr Semenya referred to,  
 24 which is paragraph 7 of the statement of Mr Kaizer Ntlou  
 25 Modiba.

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1 CHAIRPERSON: I gather he's a member of  
 2 the police service?  
 3 MR MADLANGA SC: Yes.  
 4 CHAIRPERSON: What's his rank?  
 5 MR MADLANGA SC: Lieutenant-Colonel.  
 6 CHAIRPERSON: Thank you.  
 7 MR MADLANGA SC: And he is a member of  
 8 the NIU, Mr Chairman.  
 9 MR MAHLANGU: The Commissioner does not  
 10 seem to have the statement. I will – I'll just read the  
 11 whole of –  
 12 CHAIRPERSON: I haven't got it either.  
 13 I'll listen and she can listen too.  
 14 MR MADLANGA SC: Yes – yes. This  
 15 paragraph reads, Commissioner, "I immediately directed the  
 16 members of National Intervention Unit to move to the  
 17 mountains (scene 2) in order to have them swept. Upon  
 18 approaching at the mountains, there were warriors that came  
 19 from hiding behind the rocks, armed with pangas, assegais,  
 20 knobkerries, axes and spears at a distance of about 12  
 21 metres, charging at us. I therefore shouted at them by  
 22 saying, 'stop, stop' while firing warning shots from my  
 23 pistol number PX1722E, into the ground. At that time there  
 24 were shots fired from the group towards our team. Some of  
 25 the members discharged their firearms with an effort to

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1 defend themselves." Do you see that, or rather you heard  
 2 that?  
 3 GENERAL PHIYEGA: I heard that.  
 4 MR MADLANGA SC: Prior to today you were  
 5 not aware of this statement and the content of paragraph 7  
 6 that I've just read.  
 7 GENERAL PHIYEGA: Can you ask your  
 8 question again?  
 9 MR MADLANGA SC: Prior to today you were  
 10 not aware of the existence of the statement of Colonel  
 11 Modiba and, in particular, paragraph 7 which I read to you.  
 12 GENERAL PHIYEGA: The statement of  
 13 Colonel Modiba and some of the issues that you are raising,  
 14 I was aware of.  
 15 MR MADLANGA SC: Does that mean you read  
 16 this statement itself? I'm not asking you about the issues  
 17 that the statement addresses, do you mean you read the  
 18 statement yourself prior to today?  
 19 GENERAL PHIYEGA: I have not read the  
 20 statement of Modiba.  
 21 MR MADLANGA SC: Next question, were you  
 22 aware of its existence – not the issues that it addresses,  
 23 the existence of this statement.  
 24 GENERAL PHIYEGA: I'm aware that he's a  
 25 commander and that he would have taken a statement

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1 MR MADLANGA SC: But you were not aware  
 2 that he had in fact made a statement and in it made the  
 3 allegations that he makes.  
 4 GENERAL PHIYEGA: I'm aware of the issues  
 5 that are being raised in that statement.  
 6 MR MADLANGA SC: Let me move on to the  
 7 address you made to the police at –  
 8 CHAIRPERSON: Before we do that, are you  
 9 going to deal with 45.8.3, anything further about that,  
 10 because if you're not, I'm going to ask a question.  
 11 MR MADLANGA SC: 45? No, please do, Mr  
 12 Chairman.  
 13 CHAIRPERSON: Yes. The last sentence of  
 14 paragraph 45.8.3 – it may well be relevant in the context  
 15 we're busy with – it refers to eight of the protesters who  
 16 were killed at the koppie, that's the small koppie, and it,  
 17 the last sentence reads, "The evidence may reveal that the  
 18 response of some police officers may have been  
 19 disproportionate to the danger they faced from the group of  
 20 more than 200 armed protesters." That means they may not  
 21 have, they may not be able to rely on the defence of self-  
 22 defence or private defence if their response was  
 23 disproportionate to the danger they faced. So in the  
 24 opening statement Mr Semenya, on behalf of the police,  
 25 concedes that the evidence may reveal that in the case of

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1 some of the police officers who killed protesters, their  
2 conduct was not proportionate to the danger they faced and  
3 therefore they would not be entitled to rely on the defence  
4 of private defence. Do you see that?

5 GENERAL PHIYEGA: I do.

6 CHAIRPERSON: Isn't that – now that reads  
7 as if the police attitude is that in the case of some, at  
8 least, of the people who are listed in 45.8.3, their  
9 killing may not be able to be justified on the grounds of  
10 self-defence or private defence, depending again on the  
11 ballistic reports which were referred to in the previous  
12 sentence. Now if that's so, that the police may not be  
13 able to rely, in the case of some of the deaths, on the  
14 defence of self-defence or private defence, doesn't it mean  
15 that at least to that extent the statement that you made,  
16 that you stand by the media statement you made on the 17th,  
17 may have to be qualified in the light of this partial  
18 concession contained in the sentence that I've read from  
19 45.8.3?

20 GENERAL PHIYEGA: Judge, my answer is  
21 that the statement that I gave on the 20th, subject to 45.5,  
22 without forensic evidence we are unable to give an  
23 unqualified account explaining the death of some of the  
24 persons. I do believe that through the process of this  
25 hearing that evidence will be given and at that point I'm

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1 sure we then may have to revisit my original statement but  
2 at this point in time I'm saying I'm standing, you know, on  
3 the statement because I do not see that qualification and  
4 that issue that answers that question under 45.5.

5 MR MADLANGA SC: General, may I ask to  
6 refer you to the statement of Lieutenant-Colonel Cheston  
7 Gaffley, I will give you a copy.

8 CHAIRPERSON: Does it become an exhibit?

9 MR MADLANGA SC: Yes, Mr Chairman,  
10 Commissioners, and a copy –

11 CHAIRPERSON: That will be FFF10. Can  
12 you make copies for us?

13 MR MADLANGA SC: Yes, copies will be  
14 provided to the Commissioners. For context I will read a  
15 few paragraphs, in particular to indicate that the  
16 Lieutenant-Colonel is referring to scene 2. I'll start at  
17 paragraph 10. Or perhaps let me start at 9, paragraph 9.  
18 He says, "I could notice that a large group of protesters  
19 ran into the bushes and rocks at koppie 3." Paragraph 10,  
20 "The Casspir and the water cannon arrived at koppie 3 at  
21 the same time and at this stage the water cannon was still  
22 spraying at the crowd. At this stage I ordered the members  
23 in the Casspir to stay inside the vehicles as I could see  
24 that the forces on the ground were still far behind us and  
25 that it would be looking for trouble to send nine members

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1 into the koppie after the protesters." And perhaps for  
2 completeness let me mention that the Lieutenant-Colonel is  
3 attached to the special task force or the STF. In  
4 paragraph 11 he continues, "We waited inside the Casspir  
5 for a little while and then I saw the canine unit  
6 approaching from behind us. I ordered my members to get  
7 out of the vehicle but not to approach as yet, but just to  
8 line up next to the Casspir. I also got out of the vehicle  
9 and started talking to the crowd, ordering them to lay down  
10 their weapons but this had no effect. I could, however,  
11 not identify any person within the crowd that was visible  
12 to me with any firearm in his hand. At this stage I heard  
13 gunshots coming from the direction of the bushes in front  
14 of us but could not see any person shooting. Then the  
15 canine members also started firing from behind us into the  
16 koppie. I also heard shots from our left and right. At  
17 this stage the Scorpions has joined us and the members had  
18 formed a line in front of the Casspir, ready to approach  
19 the koppie on foot. I ordered the members to fall back and  
20 take position behind the vehicles as it was clear that the  
21 police are firing from different directions and members  
22 could be caught in cross-fire." You heard all that or  
23 you've seen all of that because you have a copy.

24 GENERAL PHIYEGA: Yes.

25 MR MADLANGA SC: Now, taking you to the

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1 paragraph that we earlier dealt with in the opening  
2 statement, the third and fourth sentences of paragraph  
3 45.5, did I understand you correctly that you eventually  
4 accepted that the protesters referred to in those sentences  
5 may well have been shot by mistake?

6 GENERAL PHIYEGA: I do not recall putting  
7 my facts that way you've changed it.

8 CHAIRPERSON: - Mr Madlanga used that  
9 language, I've got an idea you agreed with it but -

10 MR MADLANGA SC: An idea that she agreed  
11 with it?

12 CHAIRPERSON: That she agreed. I think  
13 that was your language, probably by mistake, she certainly  
14 didn't say that herself.

15 MR MADLANGA SC: Yes, yes.

16 CHAIRPERSON: But I got the impression  
17 that she didn't – she either agreed or didn't dissent from  
18 it.

19 MR MADLANGA SC: Yes. National  
20 Commissioner, I used that language, paraphrasing what I see  
21 in those two sentences and my recollection is that you  
22 agreed with me.

23 GENERAL PHIYEGA: Perhaps to be corrected  
24 is, are you reading the last paragraph, "The police  
25 officers are prepared to accept that they may have been

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1 responding to" – is that what you are referring to?

2 MR MADLANGA SC: I'm referring to that

3 and the sentence preceding that one, National Commissioner.

4 GENERAL PHIYEGA: And I recall you

5 saying, when we closed this one, that your conclusion is

6 that I did not answer you the way you wanted me to answer

7 you because I kept on saying if we read the mail in context

8 I would understand what you say.

9 MR MADLANGA SC: Let me perhaps ask the

10 question again then. Looking at the two sentences

11 together, is that not indicative of an acceptance by the

12 police that they may well have shot and killed some of the

13 protesters by mistake?

14 [13:00] GENERAL PHIYEGA: If I paraphrase what

15 you're saying, may have – may have, I think that's very

16 operative for me to say the statement as it stands there

17 captured our standpoint.

18 CHAIRPERSON: I'm not sure – you say you

19 stand by what you said in your original media statement.

20 In your media statement you didn't say people, some of the

21 people who were shot may have been shot in self-defence.

22 You said they were, and what this statement appears to say

23 is that they may have been shot in self-defence in the

24 belief that the fire to which the police were responding

25 came from them, but in fact that those shots may have been

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1 what are described as friendly fire. Isn't that an

2 accurate way of putting it?

3 GENERAL PHIYEGA: Judge, I am on record

4 saying we should read that with the last sentence because

5 at this point in time I have said I have not – without that

6 forensic evidence and all those issues it makes it very

7 difficult to just give a categoric yes and no.

8 CHAIRPERSON: You haven't been asked to

9 give a categoric yes or no, you're being asked to give a

10 categoric maybe and the maybe is based upon the last

11 sentence because if there is ballistic evidence on the

12 point, it may put it either into a yes category or a no

13 category but at the moment it's maybe because we don't know

14 but the police are prepared to accept that they may have

15 been responding to friendly fire. Isn't that a fair

16 summary of the position?

17 GENERAL PHIYEGA: I'm comfortable in

18 saying maybe.

19 CHAIRPERSON: Well, on that comfortable

20 note I suggest we take the lunch adjournment. We will

21 resume at 1:30 but you don't have to be back here, National

22 Commissioner, for that because we're going to have an

23 argument from the Human Rights Commission on a question of

24 discovery and I take it Mr Tip will be responding and the

25 evidence leaders as well and while I won't encourage other

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1 parties to take part in the debate, if they have

2 submissions they wish to make, if they believe the ruling

3 we're called upon to make may affect their clients, then

4 obviously I can't stop them, but hopefully the relevant

5 points will be fully covered by the arguments we will

6 receive, so it won't be necessary for other interventions

7 but we'll now adjourn to half past one.

8 [COMMISSION ADJOURNS COMMISSION RESUMES]

9 [13:33] CHAIRPERSON: The Commission resumes.

10 After we adjourned I told the National Commissioner that we

11 would be dealing with this matter about the discovery of

12 documents, as I'd indicated earlier, at half past one. If

13 we concluded it before two o'clock I would adjourn and we'd

14 reassemble at two o'clock. I said if the matter went on

15 beyond two o'clock then I wouldn't adjourn but I told her

16 she only had to be back by two o'clock. So that was the

17 discussion I had with her. Mr Malindi, you wish to bring

18 an application?

19 MR MALINDI: Thank you, Chairperson. In

20 fact, the NUM is objecting to our request for discovery but

21 if Mr Chairperson finds it convenient that I begin, I shall

22 begin.

23 CHAIRPERSON: You're bringing the

24 application. You would bear the onus of showing that

25 you're entitled to the relief you seek, so obviously you

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1 must start.

2 MR MALINDI: I will start then,

3 Chairperson. Chairperson, on 10 January 2013 the Human

4 Rights Commission made a request for discovery by the NUM

5 and that appears on page 23 of the bundle which I've been

6 made to believe has been made available to the

7 Commissioners and the evidence leaders. The documents

8 required to be discovered are set out in paragraphs 5.1 and

9 5.2 of the request and that is that the NUM should discover

10 records of discussions relating to disputes over benefits

11 associated with employment at Lonmin over the five years

12 preceding August 2012 and their records on format of

13 interaction between the unions and the employer. This

14 includes correspondence as well as individual member's

15 complaints regarding benefits, especially housing.

16 We submit, Chair, that the discovery request

17 falls within the topics that the Human Rights Commission

18 has indicated that it wishes to address in phase 2. These

19 are training and career pathing for mineworkers at Lonmin's

20 Marikana mine, as appears on page 26 of the bundle,

21 especially under topic number 2, specifically under topic

22 number 2 which reads that, the topic deals with the lived

23 experience of mineworkers, point 1, conditions of work for

24 mineworkers at Lonmin's Marikana mine. Point 2, living

25 arrangements for the mineworkers at Lonmin's Marikana mine.



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1 Point 3, training and career pathing for mineworkers at  
 2 Lonmin's Marikana mine and the extent to which Lonmin has  
 3 failed to comply with its Mining Charter obligations and  
 4 the reasons therefor as appears on page 32 of the bundle,  
 5 especially specifically under topic 16 which reads, "Mining  
 6 Charter issues. Point 1, the identification of Lonmin's  
 7 obligations under the Mining Charter, the extent to which  
 8 Lonmin has failed to comply with these obligations and the  
 9 reason for such non-compliance. Point 3, the  
 10 responsibility of the Department of Mineral Resources for  
 11 not taking steps in relation to any non-compliance."  
 12 The NUM, by letter of 15 March 2013 –  
 13 CHAIRPERSON: Letter of?  
 14 MR MALINDI: 15 March 2013, which appears  
 15 on page 37 of the bundle, has objected to the discovery  
 16 requirement request for the reasons set out in paragraphs 2  
 17 and 3 of the letter. Essentially, Chairperson, the  
 18 objection is that the request does not fall within the  
 19 parameters of paragraph 7.1 of the timetable issued as a  
 20 ruling of the Commission on 12 March 2013.  
 21 Paragraph 7.1 requires that the topics – let me  
 22 start with the main paragraph. The discovery obligations  
 23 are subject to the following conditions, point 1, the  
 24 topics do not in any way supersede the terms of reference  
 25 of the Commission. So a party is obliged to make discovery

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1 of documents in relation to a topic only insofar as the  
 2 topic is relevant to the events in Marikana which led to  
 3 the deaths of approximately 44 people, the injury of more  
 4 than 70 persons and the arrest of more than 250 people.  
 5 We contend, Chairperson, that the request for  
 6 discovery is relevant for the following reasons. 1,  
 7 considering the topics that the HRC wishes to address under  
 8 phase 2, under the second and 16th topics, there is an  
 9 overlap between what we request from Lonmin, AMCU and NUM.  
 10 For example, the HRC's request to Lonmin under page 23 of  
 11 the bundle, paragraph 4.1, 4.5, 4.6, 4.7 to 11 –  
 12 CHAIRPERSON: 4.1, 4 point?  
 13 MR MALINDI: 5, 6, 7 to 11, are matters  
 14 that both the NUM and AMCU would have concerned themselves  
 15 with and as Chairperson can see from the paragraphs that  
 16 have been referred to, it's matters that have a bearing on  
 17 the social and labour plan of Lonmin. 4.5 employment  
 18 contracts of all levels of mineworkers, including benefits.  
 19 4.6 salary scales of all Lonmin employees, with benefits.  
 20 4.7 to 4.11 are similarly relevant as they refer to matters  
 21 of career development of miners, et cetera and other  
 22 benefits.  
 23 These requests, Chairperson, are relevant to  
 24 paragraphs 1.1.3 and 1.1.5 of the terms of reference and I  
 25 will refer to page 5 where those are captured, page 5 of

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1 the bundle, which require that the conduct of Lonmin must  
 2 be investigated in the following regard – whether it, being  
 3 Lonmin, by act or omission created an environment which was  
 4 conducive to the creation of tension, labour unrest,  
 5 disunity among its employees, or other harmful conduct, to  
 6 examine generally its policy, procedure, practices and  
 7 conduct relating to its employees and organised labour.  
 8 In this context, Chairperson, it is important  
 9 that the Commission knows whether the NUM pursued the  
 10 issues set out in paragraph 4 of page 23 of the bundle,  
 11 against Lonmin and whether Lonmin responded thereto and  
 12 how.  
 13 CHAIRPERSON: Whether Lonmin responded  
 14 thereto and how, would be a document you'd presumably get  
 15 from Lonmin but I understand the point about whether NUM  
 16 pursued the point.  
 17 MR MALINDI: Absolutely, Chair.  
 18 Regarding the how, Chairperson, NUM might be helpful to  
 19 indicate how Lonmin has responded to its own application  
 20 for the attainment of the matters that we ask that need to  
 21 be investigated. It is also important to know whether  
 22 these matters were pursued as a united front by the trade  
 23 unions or whether they acted separately and whether  
 24 individual miners were left to their own devices.  
 25 The relevance to paragraph 7.1 on page 35 is that

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1 it may be relevant, therefore, to know whether the unions'  
 2 approaches to these matters caused any tension, labour  
 3 unrest, disunity among employees, or other harmful conduct,  
 4 and whether Lonmin conducted itself in such a way as to  
 5 contribute to the environment referred to in paragraphs  
 6 1.1.3 and 1.1.5 of the terms of reference. The terms of  
 7 reference require that NUM's conduct be investigated in  
 8 regard to whether it had exercised its best endeavours to  
 9 resolve any dispute or disputes which may have arisen,  
 10 industrial or otherwise, between itself and Lonmin and/or  
 11 AMCU or any other parties. That will appear on paragraph  
 12 1.4.1 of the terms of reference. It is submitted  
 13 therefore, Chairperson, that should the HRC find itself  
 14 able to continue with phase 2, the NUM is required to  
 15 comply with the request to discover.  
 16 Having made these submissions, Chairperson, I am  
 17 further instructed to indicate that the short time frame  
 18 that remains before the conclusion of the Commission on 31  
 19 May 2013 militates heavily against the HRC's continuation  
 20 in phase 2 as it originally envisaged. There is currently  
 21 no ruling by the Commission on whether the topics set out  
 22 on page 26 to 34 fall within the terms of reference.  
 23 CHAIRPERSON: Has any of the parties  
 24 contended that it's not? Has any of the parties contended  
 25 that they do not?

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1 MR MALINDI: There is no party that has  
 2 so contended, Chairperson.  
 3 CHAIRPERSON: Then why is the ruling  
 4 called for?  
 5 MR MALINDI: Because, Chairperson, the  
 6 HRC has concerns on the engagement of expert witnesses at  
 7 great expense on public funds if, in the process leading up  
 8 to the filing of such expert reports there is an objection  
 9 on a topic that the HRC wishes to address and therefore  
 10 that will be a problem regarding the HRC's endeavours to  
 11 participate in these proceedings and especially in view of  
 12 all the endeavours that the HRC has engaged in,  
 13 Chairperson, to have a lot of these matters clarified  
 14 before it expends money in pursuit of phase 2 topics.  
 15 Even if a ruling were made today, the experts  
 16 that the HRC has approached to testify on matters pertinent  
 17 to corporate social responsibility and in terms of the  
 18 Mining Charter, have advised that the time frame is  
 19 insufficient for a full and proper analysis to be  
 20 undertaken. The second impediment is the one that I have  
 21 just addressed, Chairperson, in regard to the expenditure  
 22 that a chapter 9 body cannot justify without a ruling on  
 23 the topics that are permissible.  
 24 CHAIRPERSON: Again, has there been any  
 25 suggestion by any of the parties that these topics are not

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1 permissible? So why must we come and make a ruling that's  
 2 not asked for on a matter where everyone seems to agree  
 3 that the topics are covered because no-one has objected?  
 4 MR MALINDI: Chairperson, the reason that  
 5 there's been no objection is not necessarily because the  
 6 parties have no objection to any of the topics, it's  
 7 because the parties have been non-compliant with many of  
 8 the deadlines that have been set for responding to these  
 9 matters.  
 10 CHAIRPERSON: That's a different matter.  
 11 I can understand the parties suddenly waking up after it  
 12 was too late and coming and saying, we're sorry, we  
 13 overlooked this matter, we'd like now to raise the point  
 14 and we ask you to condone our failure to come in time, but  
 15 nothing of that's happened either. So what are you  
 16 expecting us to do?  
 17 MR MALINDI: Chairperson, we =  
 18 CHAIRPERSON: You can't rule on an  
 19 application, whether it's in time or out of time, that's  
 20 not been brought. You can't give a ruling on a matter  
 21 which you're not asked to give a ruling on, as I say,  
 22 timeously or non-timeously, so how does that point help us?  
 23 MR MALINDI: Chairperson, the HRC has  
 24 itself requested the Commission to rule on these matters  
 25 because it is of concern to it that it cannot proceed with

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1 the engagement of experts when there's uncertainty whether  
 2 these topics will be dealt with –  
 3 CHAIRPERSON: Why is there uncertainty?  
 4 No-one has suggested these topics aren't relevant, so why  
 5 is there uncertainty on the matter?  
 6 MR MALINDI: Because –  
 7 CHAIRPERSON: I could understand if there  
 8 was a dispute, I could understand you then saying the  
 9 Commission's got to give a ruling, we don't know which side  
 10 will be successful in contending either these are topics  
 11 that are covered or these are not topics that are covered,  
 12 but absent any dispute of that kind, surely the point  
 13 doesn't arise?  
 14 [13:53] MR MALINDI: Chairperson, may I refer to  
 15 paragraph 7.4 on page 36, after which I will take this  
 16 point no further and –  
 17 CHAIRPERSON: Paragraph –  
 18 MR MALINDI: Page 36 of the bundle.  
 19 CHAIRPERSON: Yes?  
 20 MR MALINDI: 7.4 which reads as follows,  
 21 "If any party seeks any topic but seeks a ruling  
 22 [inaudible] in the terms of reference [inaudible] if it is  
 23 held to be within the terms of reference and 2, seek a  
 24 [inaudible] in this regard from the Commission." Now,  
 25 Chairperson, I have made the point, I can't take it any

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1 further, that our hands are held at our backs because we  
 2 are a public body, we can't justify the engagement of the  
 3 experts that [inaudible] calling, we [inaudible] in terms  
 4 of 7.4.1 – addressing these issues because we have got to  
 5 justify the expenditure before we do so and that is the  
 6 angle from which the HRC comes from and stating that from  
 7 November and, in particular, in February, I think it must  
 8 have been the 21st of February when we were in the  
 9 Commission's chambers, we sought rulings on various things  
 10 including discovery by various parties. We also sought  
 11 rulings on phase 2 issues upon which the Chairperson  
 12 advised that the matter should be deferred accordingly and  
 13 in a further in which the HRC was in attendance with the  
 14 evidence leaders, again it was emphasised that the phase 2  
 15 issues need to be addressed urgently because there has been  
 16 no compliance by any of the parties, a situation that has  
 17 created the hesitancy on our part to proceed with phase 2  
 18 matters as we end this phase, because of the reasons that I  
 19 have stated. That situation has persisted –  
 20 CHAIRPERSON: What happened was, the  
 21 matter was left over for discussions between the parties or  
 22 evidence leaders in the hope that they could, it could be  
 23 settled outside the Commission, as it were, by consensus  
 24 among the parties and my understanding was that there's  
 25 been a substantial degree of consensus in that regard.

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1 There have been a number of meetings, I understand,  
2 convened by the evidence leaders, which Mr Chaskalson can  
3 tell us about, if necessary, and what exactly is still  
4 outstanding according to you? I know there's a complaint  
5 about – which isn't relevant to what you're talking about  
6 now – about statements that you seek from the police.  
7 That's the subject of a missive that I received on Friday  
8 but that's not, we're not busy with that now. Anything  
9 else?

10 MR MALINDI: Chairperson, if I'm not  
11 getting across on the impediments to the HRC on the phase 2  
12 issues, I will pass that submission which we persist on and  
13 – because I have stated the two main impediments and absent  
14 a ruling as to whether those topics under topic number 2  
15 and topic number 16 are relevant, we are unable to proceed  
16 with procuring sufficient funds to engage expert witnesses  
17 who must compile reports and make those statements  
18 available to the Commission, if I remember well by 22  
19 April, and with the reply thereto which takes us into the  
20 middle of May and we make those submissions, Chairperson,  
21 and the Chairperson will make a ruling as to whether the  
22 submission has merit or not.

23 For these reasons the HRC gives notice that it  
24 will not lead expert witness evidence under phase 2. It  
25 will pursue these topics in terms of its mandate as a

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1 chapter 9 body. The HRC will play a limited role under  
2 phase 2 by presenting its previous report to the Commission  
3 on relevant topics and by presenting evidence, evidence of  
4 fact, if any. Those are our submissions, Chair.

5 CHAIRPERSON: Thank you.

6 COMMISSIONER HEMRAJ: Mr Malindi, is  
7 there any relevance or particular import that attaches to  
8 the five year period because it sounds rather onerous,  
9 requesting documents for five years. Is there any  
10 particular reason for that period?

11 MR MALINDI: It is –

12 CHAIRPERSON: What happened in 2007 which  
13 set the clock ticking in respect of relations between NUM  
14 and Lonmin, because you go back five years, from 2012 you  
15 go back to 2007. So why 2007, what happened then, anything  
16 in particular?

17 MR MALINDI: Chairperson, as I stand I  
18 can't point to anything in particular but it is common  
19 cause that the existence of AMCU has been for a period  
20 longer than the preceding five years and if I'm mistaken in  
21 that regard –

22 CHAIRPERSON: AMCU started in the coal  
23 mines. I mean I'm not quite sure when AMCU moved into the  
24 platinum belt of the North-West Province, so I'm not sure  
25 if the mere fact that AMCU was in existence in 2007 is a

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1 sufficiently powerful factor to set the clock ticking in  
2 respect of discovery obligations.  
3 MR MALINDI: Chairperson, it's the period  
4 that experts would normally regard as relevant for them to  
5 conduct a proper study and analysis and I understand, I  
6 mean the question there is really whether the period of  
7 five years is justified or not and a period short of five  
8 years may just be adequate for our expert witnesses to  
9 conduct –

10 CHAIRPERSON: It's not easy, though.  
11 You're asking for NUM to go to a lot of trouble and  
12 presumably it might apply to AMCU as well, I don't know,  
13 but NUM must go to a lot of trouble, go into their  
14 archives, produce lots of documents – sorry, NUM, sorry,  
15 did I say AMCU? NUM must go into their archives, go to a  
16 lot of trouble, produce documents that go back five years.  
17 Once it's conceded that five years is too long a period,  
18 the question arises what is a proper period? And unless  
19 the period is defined then NUM will say, well, what must we  
20 do? Must we go back five years, four years, three years,  
21 what do you want? You can't impose a discovery obligation  
22 of a vague nature like that.

23 MR MALINDI: Chairperson, firstly, that  
24 has not been the objection of NUM, the period, as I  
25 understand it. It's been a different objection but –

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1 CHAIRPERSON: Maybe they didn't raise the  
2 objection. You're asking us to make a ruling.

3 MR MALINDI: Yes.

4 CHAIRPERSON: And if you're asking us to  
5 make a ruling that it's five years, you've got to justify  
6 it and if it's not five – you concede, well, five years may  
7 be too long, it's just an arbitrary figure, then I'll say  
8 what period is relevant because – I mean I can't say to  
9 NUM, look here, you must give documents which go back over  
10 a reasonable period. They say what's a reasonable period,  
11 how can you expect us to comply with an order that's so  
12 vague. I have to put that problem to you in the hope of  
13 getting an answer from you.

14 COMMISSIONER TOKOTA: Furthermore, you  
15 are the one who is bringing an application, so the onus is  
16 on you to justify the period which you seek us to rule that  
17 NUM should produce those documents.

18 MR MALINDI: Chairperson, in that regard  
19 I am instructed that the experts require the five years  
20 because they consider it a reasonable period –

21 CHAIRPERSON: But that's not enough. We  
22 would have to be satisfied that five years is a reasonable  
23 period. You'd have to satisfy us. I mean can you imagine,  
24 it's not just going to the archives and taking our five  
25 years' worth of files. What would be required would be for

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1 NUM to go through five years' worth of documents, looking  
 2 for documents that are relevant as opposed to documents  
 3 that are irrelevant. Can you imagine the time and the  
 4 expense that would be involved in that exercise? So if you  
 5 ask us to make a ruling like that, regarding being had to  
 6 the facts that I've mentioned, you've got to justify it.

7 MR MALINDI: Chairperson, the issues that  
 8 we have addressed you, the Commission, on are matters that  
 9 have been with the mining industry or in particular Lonmin  
 10 in this instance, for a long period. For the experts to be  
 11 able to make a proper analysis of say, for example, the  
 12 social labour plan, they need to know what it was in 2010,  
 13 if it existed –

14 CHAIRPERSON: Who is going to tell them  
 15 that?

16 MR MALINDI: Well –

17 CHAIRPERSON: What the social labour plan  
 18 is, is a matter that can easily be ascertained from the  
 19 Department of Mineral Resources and from Lonmin. What do  
 20 you expect NUM to tell you about that, that you can't find  
 21 out from these other people?

22 MR MALINDI: Chairperson, as we  
 23 indicated, all the issues that are set out there, there's  
 24 an overlap between what Lonmin was doing and what NUM was  
 25 agitating should –

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1 CHAIRPERSON: I can't understand an  
 2 overlap in respect of the social economic plan. The plan  
 3 is the plan. Lonmin and the department would know about  
 4 that. There's nothing extra you can expect from NUM on  
 5 that, surely? An overlap means you've got two things that  
 6 overlap at a certain point but it doesn't mean that if you  
 7 get – that there's a total identity of coincidence, as it  
 8 were.

9 MR MALINDI: Chairperson, as I was  
 10 saying, we refer to a number on issues under page 23 of the  
 11 bundle and they range from 4.1, 4.5, 4.6, 4.7 up to 4.11  
 12 and that is on the Lonmin side of the request. Those are  
 13 matters that the NUM as a union would have agitated that  
 14 they happen. NUM and AMCU are in a position to indicate  
 15 where there are gaps, if we don't get that information from  
 16 Lonmin, what they have done and what the responses have  
 17 been to themselves by the – by Lonmin.

18 As paragraph 5.2 on page 24 indicates, that we  
 19 seek information especially on housing arrangements by the  
 20 mining house, from NUM and NUM would have had that as an  
 21 issue with the mine as to hostel dwellings, of the hostel,  
 22 of premises, and that is the overlap of this one aspect and  
 23 other aspects that we have alluded to.

24 As to the question of five years being arbitrary,  
 25 we obviously can – we can take instructions on that. Our

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1 initial instructions from our experts who had given us an  
 2 outline of what the scope of their work would be, was the  
 3 requirement of five years which we believed to be  
 4 reasonable but it's a period that –

5 CHAIRPERSON: But shouldn't you have  
 6 taken instructions? It's a bit late now to talk about  
 7 taking instructions. Once you decide to bring an  
 8 application in respect of which you bore the onus, wasn't  
 9 that the appropriate time for you to take an instruction  
 10 and seek to justify the five year period? You haven't done  
 11 that, so what are you going to do? Do you want a  
 12 postponement or, if you lose this application, do you want  
 13 to go back to your experts and then come with a new  
 14 application? I mean there must be an element of  
 15 responsibility in the way that the proceedings of this  
 16 Commission are conducted, regard being had to the fact that  
 17 there's no provision for cost orders or anything of that  
 18 kind. You're seeking to put a heavy onus on NUM, which  
 19 would – I would imagine would involve them in expenditure  
 20 of considerable sums of money to get the information you  
 21 seek. If it's not required, if it's not reasonably  
 22 required then what can they do about it? They can't sue  
 23 you for the cost, surely. I mean one has got to approach  
 24 this in a practical, reasonable fashion, surely. I  
 25 understand that all matters that are reasonably relevant to

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1 the issues before us have to be investigated. I understand  
 2 there is a great responsibility on us to ensure that we  
 3 give a proper, adequate report on these matters, regard  
 4 being had to the importance of the events which  
 5 precipitated this Commission, but having said that, the  
 6 other factors I have mentioned cannot be ignored.

7 MR MALINDI: Chairperson, obviously I  
 8 don't have instructions beyond the fact that the experts  
 9 require information for that period and our request for  
 10 that discovery will then, it appears, stand or fall on this  
 11 aspect alone and it has – this proceeding has been  
 12 characterised as an application by the HRC, whereas the HRC  
 13 complied with the ruling of the Commission that parties  
 14 must make requests for discovery by a set date, which we  
 15 did, and now there's an objection to that –

16 CHAIRPERSON: [Inaudible]

17 MR MALINDI: And –

18 CHAIRPERSON: - declining to give you the  
 19 discovery because they say you're not entitled to it.  
 20 That's not an objection as = please carry on, you  
 21 understand the point.

22 MR MALINDI: So in the event,  
 23 Chairperson, if this be construed as an application for us  
 24 to compel NUM to make discovery, which it declines, we have  
 25 made our submissions on relevance and the Commission seems

1 disinclined to, if it's inclined to order discovery, to  
 2 order it for the period that we requested and I have made  
 3 submissions based on the instructions as we received from  
 4 our experts for a period of five years, which has not been  
 5 one of the grounds of declining the request for discovery  
 6 and we shall therefore stand or fall on our submissions.  
 7 MR MALINDI: Thank you, Mr Malindi.  
 8 [14:13] CHAIRPERSON: Mr Tip?  
 9 MR TIP SC: Thank you, Chair,  
 10 Commissioners. Before we adjourned for the lunch break,  
 11 Chair, you made the observation that this particular  
 12 application and the response to it and the input from the  
 13 evidence leaders might well be of interest to parties other  
 14 than merely the Human Rights Commission and NUM and we  
 15 would, with respect, endorse that observation. We consider  
 16 this to be a significant application and a significant  
 17 objection and a significant hearing because what it brings  
 18 to focus is the relationship between 20 topics in phase 2  
 19 and the manner in which they are to be dealt with at a  
 20 practical level and the manner in which they are to find  
 21 their way ultimately into the report, conclusions,  
 22 recommendations of the Commission in respect of the terms  
 23 of reference viewed as a whole. And I say that in this  
 24 particular sense, that not one of the 20 topics that has  
 25 been identified could be described as comprising material

1 potentially that is of no interest and perhaps not of great  
 2 interest to anybody examining a situation in the mining  
 3 environment which has led to difficulties, led to, in this  
 4 case, acute conflict and tragically, a number of deaths.  
 5 But that of course requires it, those topics to be  
 6 funnelled through the process of relevant and we have  
 7 observed with pleasure the introduction of paragraph 7.1 in  
 8 the most recent version of the timetable that the evidence  
 9 leaders have prepared and circulated and 7.1, it's worth  
 10 repeating – I know that my learned friend Mr Malindi has  
 11 already read it out but it's a very important paragraph and  
 12 the pertinent part is that "The topics do not in any way" –  
 13 and that's all 20 of the topics – "do not in any way  
 14 supersede the terms of reference of the Commission, so a  
 15 party is obliged to make discovery of documents in relation  
 16 to a topic only insofar as the topic is relevant to the  
 17 events" and of course the events are then described. And  
 18 that is why this particular argument this afternoon is a  
 19 significant one because it brings into relief the need to  
 20 examine precisely what is entailed with that phrase, "to  
 21 the extent that it is relevant" and that is really where we  
 22 join issue with our learned colleagues for the Human Rights  
 23 Commission and that is why, in our letter of the 15th March,  
 24 we did not confine ourselves to issues around vague  
 25 formulations or a period of five years as opposed to 10

1 years or six months, because it's ultimately a broad  
 2 question of relevance under which rubric potentially  
 3 questions of period, of documentation, may fall for  
 4 scrutiny.  
 5 Now, paragraph 7.1 is, I've said, a welcome  
 6 addition and I, in discussion with many of my colleagues  
 7 that is a common view of it. Of course it doesn't say  
 8 anything that is already not within the legal framework  
 9 that guides the Commission, which is that ultimately there  
 10 are terms of reference which prescribe that certain matters  
 11 must be investigated and that defines, in one way or  
 12 another, the parameters of what must be done.  
 13 To step sideways perhaps for a moment, if one  
 14 looks at a topic, one of the 20 listed topics, the subject  
 15 of migrant labour, now that potentially of course is a  
 16 colossal topic. That is a topic that could engage a  
 17 dedicated commission of inquiry for years, with the input  
 18 of a multitude of experts, governments not only from  
 19 departments here in South Africa but from Lesotho,  
 20 Mozambique, provincial governments that have a direct  
 21 interest, the history, the financial implications of any  
 22 change, what's possible in terms of rearrangement, housing,  
 23 et cetera. It's a colossal topic, so one can never  
 24 imagine, with respect, that everything relating to migrant  
 25 labour should fall for the consideration of this Commission

1 and that it would, in its findings, make a full-on  
 2 assessment of migrant labour as a topic and have  
 3 recommendations on that. The Commission would frankly,  
 4 with respect, never come to an end because there are 20  
 5 topics.  
 6 So hence I say it is a matter of looking at any  
 7 topic and determining what the relevant fineness of the  
 8 filter is that must be applied. Is it a broad filter or is  
 9 it a very fine filter? And that is, in our respectful  
 10 submission, a question of the application of the  
 11 conventional criteria and of what relevance means in a  
 12 particular purpose, in a particular hearing and in order to  
 13 secure a particular result as expeditiously as can be.  
 14 So against that – and that is again, Mr Chair, if  
 15 I may just echo, that is why we imagine that the parties  
 16 have not been swift to object to topics as a whole.  
 17 Migrant labour may well play a role and there may be  
 18 sufficiently distilled material that is relevant for the  
 19 findings of the Commission that bear on the topic of  
 20 migrant labour for it to be dealt with but then it must be  
 21 dealt with in that way.  
 22 Now against that, if I may turn to the particular  
 23 request which NUM has received from the Human Rights  
 24 Commission and say this also, that we are here in the  
 25 capacity of an objecting party because this is in fact the

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1 only request that has come to us from any of the parties  
 2 here for discovery, so that it was then an opportune – and  
 3 we hope helpful – step to let us say well, let us test just  
 4 what the parameters are of this process. And that is why  
 5 we are engaged in the way that we are today.  
 6 Now, my learned friend Mr Malindi has tried to  
 7 identify topics in respect of which the requests that are  
 8 set out in the letter to us of 10 January of this year  
 9 falls and he's referred to the lived experience of  
 10 mineworkers and he's referred to the Mining Charter and  
 11 he's referred to matters such as career pathing and the  
 12 like, but what is in fact the scene in that letter and it,  
 13 again it bears repetition. My learned friend has read it  
 14 but I want to dwell on the particular content a little  
 15 longer perhaps than did he. They say they want the  
 16 following from NUM, paragraph 1, records of discussions  
 17 relating to disputes over benefits associated with  
 18 employment at Lonmin over the five years preceding August  
 19 2012. Now that's the only paragraph – there's a second one  
 20 which I'll read in a moment, this is the only one that has  
 21 a period attached to it. I'd read that as arbitrary, my  
 22 learned friend says well, that's what experts say is a good  
 23 time and of course if you say two weeks it's too little, if  
 24 you say 10 years it might be too much, but what is really  
 25 being asked for here – records of discussions relating to

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1 disputes over benefits. Now, that is a very, very  
 2 substantial request and I may say, Mr Chair, it was no  
 3 exaggeration to say that digging all this sort of material  
 4 out from archives of NUM, which are not necessarily  
 5 arranged under the topic headings that we have in this  
 6 Commission, is a very substantial task but what is to be  
 7 done with it for the purpose of this Commission? And  
 8 perhaps that question may best be addressed by a reference  
 9 to paragraph 2 of this letter addressed to us, which is  
 10 that the HRC wants their records on format of interaction  
 11 between the unions and the employer. The format of  
 12 interaction between the unions and the employer, all  
 13 records on that. Now, frankly, we're not sure what that  
 14 means. We can say, well, there's a recognition agreement  
 15 that says how we interact but of what utility is that? And  
 16 it goes on then –  
 17 CHAIRPERSON: Presumably interactions  
 18 would presumably be minuted meetings and there are many  
 19 matters, topics, many topics covered in minutes of meetings  
 20 or in correspondence between the union and the employer  
 21 would be totally irrelevant to any approach to the terms of  
 22 reference of the Commission –  
 23 MR TIP SC: It's indefinite. And then  
 24 the second part of that says this includes – so it doesn't  
 25 confine that – this includes correspondence as well as

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1 individual member's complaints regarding benefits,  
 2 especially housing. So what we're asked for is again a  
 3 vast amount of information but as my learned friend Mr  
 4 Malindi said in relation to this, NUM would also be in a  
 5 position to say what Lonmin did in respect of a dispute.  
 6 So what, for this to percolate into some form that would be  
 7 of value to the Commission in discharging its  
 8 responsibilities in terms of the terms of reference, would  
 9 be that it would receive a copious amount of complaints  
 10 raised by NUM members at Lonmin over an indefinite period  
 11 now, because this is not even confined to five years.  
 12 Complaints regarding benefits, especially housing but not  
 13 limited to housing. Now what does that mean? It means,  
 14 first of all, that there's got to be some kind of  
 15 assessment for it to be useful, for it to be processed to a  
 16 point where any inference can be drawn from it. What was  
 17 the complaint? Can one say whether it was a bona fide  
 18 complaint? Did the branch committee of NUM attend to it?  
 19 If not, did it go to regional? If not, did it go to  
 20 national? What attention was given to it? Was it ripened  
 21 into a dispute that went to the bargaining council? Did it  
 22 find its way into the Labour Court? Then how was it  
 23 processed in relation to Lonmin, what was said by NUM about  
 24 this particular member's complaint about this particular  
 25 benefit? And when NUM got the response from Lonmin, was

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1 that a proper response? All of this would have to be  
 2 evaluated – and was NUM's reaction to that appropriate?  
 3 So one really just has a vast amount of  
 4 information which, in itself, would require a tremendous  
 5 amount of –  
 6 CHAIRPERSON: Did the member concerned  
 7 later leave the service, the employment of Lonmin, take his  
 8 complaint with him back to Pondoland or wherever he came  
 9 from and was there any causal connection between his  
 10 complaint and the fact that it wasn't dealt with and the  
 11 events of the 16th of August? I mean –  
 12 MR TIP SC: Well, ultimately Chair,  
 13 absolutely, with respect, because ultimately we come to  
 14 that week, to that awful week and all of this has somehow  
 15 to be in a form where it can be of value to the Commission  
 16 in determining the conduct of the parties set out in the  
 17 terms of reference in respect of those events. So much as  
 18 the HRC would be glad to have a very, very broad  
 19 interpretation of the terms of reference – and it says as  
 20 much in the submissions that it lodged in November, said  
 21 this is a unique opportunity for matters to be examined  
 22 throughout the extractive industry, not just platinum,  
 23 unions and employers in South Africa. So it's – their view  
 24 is that really you have an opportunity to examine  
 25 everything that is a difficulty in and around mines and,

1 more generally, in South Africa.  
 2 We take a different view. We say that there is a  
 3 task that the President has given this Commission. Had he  
 4 wanted an examination, an evaluation, a conclusion making  
 5 process of the scale that the HRC evidently contemplates,  
 6 the President would, with respect, never have said you've  
 7 got four months to complete your work. So in our  
 8 submission this, with respect, is not a good application,  
 9 request for discovery, and we would ask that our objection  
 10 to it be upheld.

11 CHAIRPERSON: Do any of the other parties  
 12 wish to say anything before I ask the evidence leaders to  
 13 give us their submissions? It doesn't seem so. Which of  
 14 the evidence leaders is going to address on this, is it  
 15 you, Mr Chaskalson?

16 MR CHASKALSON: It is, Mr Commissioner.  
 17 Mr Commissioner, while I propose to deal with this specific  
 18 application, I would like also to make certain general  
 19 submissions about the discovery process and the powers of  
 20 the Commission in relation to the discovery process  
 21 because, as Mr Tip has pointed out, this application may  
 22 serve to guide all of the parties, at least as to the  
 23 position of the evidence leaders in relation to discovery  
 24 and the powers of the Commission on compulsion.

25 With that introduction, I propose to deal with

1 four topics. The first is, what are the Commission's  
 2 powers in relation to compelling discovery or in relation  
 3 to discovery? The second is to link these proceedings to  
 4 the discovery timetable that has been issued as a ruling by  
 5 the Commission. The third is to turn to the specific  
 6 application and to make certain submissions on how we  
 7 submit the Commission should exercise its powers in this  
 8 particular case. And the fourth is briefly to respond to  
 9 the complaint of the SAHRC about the absence of a terms of  
 10 reference ruling in relation to the possible calling of  
 11 expert evidence.

12 To start then with the Commission's powers, we  
 13 submit that the Commission has two separate powers in  
 14 relation to discovery. The first is the power to compel  
 15 production of documents, to order a party or a witness to  
 16 produce documents.

17 The second is a slightly different power, it's  
 18 the power to rule that in the absence of production of  
 19 documents relevant to an issue, a party in control of those  
 20 documents who refuses to make discovery of the documents  
 21 will not be permitted to participate in the hearing.

22 If I might take those two powers separately, the  
 23 power to compel flows from section 3 of the Commissions Act  
 24 and 3.1 states, "For the purposes of ascertaining any  
 25 matter relating to the subject of its investigations a

1 Commission shall, in the Union, have the powers which a  
 2 provincial division of the Supreme Court of South Africa  
 3 has within its province to summon witnesses, to cause an  
 4 oath or affirmation to be administered to them, to examine  
 5 them and to call for the production of books, documents and  
 6 objects." So that's a power of subpoena, essentially.

7 "The power is a coercive power and it's fortified  
 8 with criminal sanction, so it must be exercised with  
 9 precision. In particular the Commission cannot issue an  
 10 order in open-ended terms because the person on the wrong  
 11 side of the order must know exactly what is and what isn't  
 12 expected of him or her because non-compliance might give  
 13 rise to criminal liability." And we'd refer the Commission  
 14 in this regard, by analogy, to the judgment in S v Mulder  
 15 1980 (1) SA 113 in the old Transvaal Provincial Division,  
 16 where the court emphasised the need for precision in the  
 17 terms of reference of the commission of inquiry because  
 18 coercive powers would be exercised within those terms of  
 19 reference, a fortiori an order to produce documents must be  
 20 in precise terms.

21 [14:33] The second aspect of the power is, is it a  
 22 discretionary power? And we would submit that in  
 23 exercising its discretion the Commission would weigh up the  
 24 relevance and importance of the documents to its enquiry  
 25 against the invasion of the private rights of the party who

1 may be compelled to produce documents against its will. So  
 2 it's a balancing exercise. It's not a situation of, if a  
 3 party can show that any document is relevant to an issue  
 4 within the terms of reference a fortiori automatically the  
 5 Commission must issue an order. There is a balancing  
 6 exercise. One weighs up the invasion of the rights of the  
 7 party who will have to produce the documents against the  
 8 relevance of the document that is sought and of course the  
 9 inquiry is fact specific, because one cannot engage in that  
 10 balancing exercise without looking at the specific facts.

11 In the context of this Commission, we would  
 12 submit that one of the factors relevant in this  
 13 discretionary inquiry is that the parties have reached an  
 14 agreement on a discovery process, subject to the  
 15 constraints of the terms of reference. That's the power of  
 16 compulsion.

17 We'd submit that there is a separate power, which  
 18 is a power to make parties' participation in the Commission  
 19 conditional on proper discovery. Parties have no automatic  
 20 right to be here. Their right to participate in this  
 21 Commission flow from the Commission's duties in respect of  
 22 procedural fairness and we would submit that the corollary  
 23 to this is that their participation can be made subject to  
 24 reasonable conditions relating to fair procedure generally.  
 25 In particular, if the Commission doesn't want to resort to

1 the coercive step of compelling production of documents in  
2 a particular case, it can make the continued participation  
3 of a party subject to the production of those relevant  
4 documents. So those are the two powers.

5 If we link the present application to the  
6 discovery timetable that was agreed, very briefly to run  
7 through that timetable, it started at 30 November 2012  
8 where it was agreed at a pre-hearing meeting. The  
9 timetable was then subsequently ignored by most parties and  
10 had to be extended by the evidence leaders and on 12 March  
11 a ruling was issued by the Commission to give effect to the  
12 remaining stages of the timetable and that's the document  
13 in the bundle from pages 35 to 36.

14 The ruling took place after certain of the  
15 earlier stages of the discovery process had already passed  
16 and if I might go back to identify the important provisions  
17 of the agreed timetable that preceded the ruling, the first  
18 was that the parties would identify topics within the terms  
19 of reference that they wanted to address in phase 2. The  
20 second was that the evidence leaders would circulate a  
21 consolidated list of topics. This was ultimately done on 8  
22 February 2012. The third was that by a specified date,  
23 which was ultimately extended to 11 March 2013, parties  
24 would address requests to other parties to make discovery  
25 on particular topics on the consolidated list. So if there

1 was a topic on the list in respect of which you wanted  
2 discovery, you could ask a party to make discovery.

3 Now, these first three stages were not included  
4 in the ruling issued by the Commission on the 12th of March  
5 because they'd already been concluded by the 12th of March.  
6 The remaining stages that were included in the ruling are,  
7 for present purposes, the following. The first is that the  
8 discovery obligations were obviously subject to the terms  
9 of reference and that's paragraph 7 of the ruling which  
10 both Mr Tip and Mr Malindi have addressed, I don't propose  
11 to dwell on that, but the first stage of the timetable  
12 relevant to the current dispute was set out in paragraph 1  
13 of the ruling and that was by 18th of March parties had to  
14 make discovery of documents relevant to any topics that  
15 they proposed to address in phase 2 and to any topics in  
16 respect of which they'd been requested to make discovery by  
17 other parties. If I might draw an analogy to civil  
18 proceedings, that would be ordinary discovery in terms of  
19 Rule 35(2).

20 The next stage of the timetable was set out in  
21 paragraph 2 of the ruling and it's the equivalent of Rule  
22 35(3) of the Rules of Court. Parties had until 25 March  
23 2013, in other words today, to address requests to other  
24 parties for supplementary discovery. Discovery, original  
25 discovery has already been made, parties can now peruse

1 that discovery and say there are missing documents, I want  
2 you to discover this document and the parties requested to  
3 make supplementary discovery then had until 3 April to make  
4 supplementary discovery.

5 Now, in terms of that timetable, we would submit  
6 that the present request is, if anything, premature. It's  
7 framed as a section 35(3) request, it's framed as a request  
8 for certain specific categories of documents, at any rate,  
9 but the time for making supplementary discovery only  
10 expires on 3 April 2013. Now, as NUM is willing to engage  
11 with the request head-on, I don't suggest that the  
12 Commission should refuse to hear it but I would emphasise  
13 that ordinarily the Commission will be better placed to  
14 adjudicate on section 35(3) or rule paragraph 2 disputes  
15 after 3 April because by that stage the Commission will  
16 have received all of the discovery and supplementary  
17 discovery made by all of the parties and this will put it  
18 in a much better position, first of all to know what  
19 documents have already been obtained, secondly to identify  
20 what other documents are out there and thirdly and most  
21 importantly, to assess the importance of obtaining those  
22 out there documents in the light of documents that the  
23 Commission has already gathered through the discovery  
24 process. But as NUM is the parties who is going to be  
25 prejudiced by any adverse ruling or any ruling on this

1 application and NUM is prepared to argue this application,  
2 we don't suggest to the Commission that it should be  
3 rejected on the basis that it's premature.

4 If I might turn to the application and the  
5 attitude of the evidence leaders to this application, we  
6 would concede that the documents requested are probably  
7 relevant to issues that fall within the terms of reference.  
8 We say probably because we see them as probably having some  
9 relevance to certainly some of the issues in paragraphs 1.1  
10 of the terms of reference to which Mr Malindi referred the  
11 Commission, but despite the probable relevance of these  
12 documents to some of the issues covered by the terms of  
13 reference, we don't suggest that the order should be  
14 complied with and we do so for several reasons. First, we  
15 submit it's too vague and too broad. We emphasise the need  
16 for precision in orders compelling the production of  
17 documents and we would submit that certainly paragraph 3.2  
18 of the request is too vague to support an order for  
19 compulsion. We had difficulty understanding what would be  
20 and what wouldn't be covered by 3.2. 3.2 is "records on  
21 format of interaction between unions and the employer, this  
22 includes correspondence as well as individual member's  
23 complaints regarding benefits, especially housing." We  
24 submit that one needs far greater precision for an order  
25 compelling the production of documents.



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1 If 3.2 is, we submit, too vague, we submit both  
2 3.1 and 3.2 are too broad. They embrace potentially  
3 thousands of documents which would put NUM to an extremely  
4 arduous task to identify and to collate and we would submit  
5 that the relevance of the documents or the immediately  
6 apparent relevance of the documents is not of such a nature  
7 to justify a request of this broad nature and the Human  
8 Rights Commission hasn't set out a case for pressing  
9 relevance in this application, so we can only go by the  
10 apparent relevance of these documents.

11 Finally, we would submit that if there is to be a  
12 request for documents of this nature, we would submit that  
13 they are more appropriately requested from Lonmin than from  
14 NUM because they appear to be more relevant to passages of  
15 the terms of reference specifically dealing with Lonmin.  
16 We don't see passages of the terms of reference relating to  
17 NUM, to which these documents would be relevant. So we  
18 would oppose the application on those grounds.

19 Finally, we must briefly respond to the complaint  
20 that there hasn't been a ruling on topics 2 and, I think,  
21 18 and that this has prejudiced the Human Rights Commission  
22 in relation to expert evidence. We specifically included  
23 paragraph 7.4 of the ruling, 7.4 of the ruling that was  
24 issued on the 12th of March to cover this situation. 7.4  
25 says that if any party seeks to lead expert evidence on a

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1 topic but seeks a ruling that the topic falls within the  
2 terms of reference before it incurs the expenditure  
3 necessary to engage an expert, that party must, on or  
4 before 15 March 2013, 1) formally commit itself to calling  
5 expert evidence on the topic if it is held to be within the  
6 terms of reference and 2) seek a terms of reference ruling  
7 from the Commission. Now, to the best of my knowledge, the  
8 SA Human Rights Commission never did this, so we don't see  
9 how they can now complain that there hasn't been a ruling  
10 and that they never saw it. Those are our submissions.

11 CHAIRPERSON: Thank you. Mr Malindi,  
12 anything you wish to say in reply?

13 MR MALINDI: Yes please, Chairperson.  
14 Chairperson, ironically the HRC is the only party that has  
15 complied with the deadline to request discovery and the NUM  
16 also acted within the time frames to register its  
17 objection. Having listened to my learned friend  
18 Chaskalson, I would urge the Commission to exercise its  
19 powers, as he has set out and especially use its discretion  
20 as set out on page 6 of the bundle before the Commissioners  
21 in reference to paragraph 5 of the terms of reference,  
22 which is that the Commission shall, where appropriate,  
23 refer any matter for prosecution, further investigation or  
24 the convening of a separate inquiry to the appropriate law  
25 enforcement agency, government department or regulator

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1 regarding the conduct of a certain person. And as Mr Tip,  
2 my learned leader here, has indicated as well, some of the  
3 topics are very important but cannot be dealt with  
4 satisfactorily within the compressed time frames that this  
5 Commission has and to the extent that the Commission is  
6 inclined to see those topics, all 20 topics which have not  
7 been objected to as relevant, the Commission can use its  
8 powers to narrow the requests that are made by the parties  
9 to each other, as Chaskalson has indicated, to not make a  
10 ruling on this application pending any further narrowing of  
11 the request by the HRC on discovery to NUM or any other  
12 party. That will be our submission, Chairperson, because  
13 if it turns out that the topic is too broad for ventilation  
14 before the Commission, it may be referred as provided by  
15 the terms of reference.

16 And Chairperson, Mr Fisher was trying to retrieve  
17 a document or documents that we have forwarded to the  
18 evidence leaders and the Commission regarding our request  
19 that there be rulings on these matters, but it seems like  
20 we don't have it red lettered.

21 MR TIP SC: Mr Chairman, if I might  
22 assist there because I must withdraw the submission that I  
23 made in that regard because a request for a ruling has been  
24 drawn to my attention and possibly I can assist there. On  
25 the 11th of March the Human Rights Commission did address a

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1 letter to the evidence leaders calling for a ruling,  
2 indicating that they intended to call expert evidence on  
3 the following two broad topics, one, business and human  
4 rights aspects with a particular focus on social and labour  
5 plans and Lonmin's compliance in this regard and, two,  
6 environmental management issues and they sought a terms of  
7 reference ruling from the Commission in this regard. I  
8 must apologise for suggesting that they hadn't. If they  
9 persist in that ruling then, in seeking that ruling, we  
10 will have to –

11 CHAIRPERSON: I didn't understand that to  
12 be what was set down for hearing today.

13 MR TIP SC: No, no, it's not set down for  
14 the hearing today.

15 CHAIRPERSON: So it's still there,  
16 though, so they can still bring that if they wish.

17 MR TIP SC: I think the evidence leaders  
18 and the Human Rights Commission must just chat about  
19 whether that ruling is still sought and, if so, we must  
20 arrange a convenient time –

21 CHAIRPERSON: Yes, yes and it may be that  
22 the evidence leaders will agree with the Human Rights  
23 Commission that these are topics that are appropriate, in  
24 which case it may be unnecessary for a formal application  
25 before the Commission but these are matters which can best

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1 be dealt with once there has been the discussion you  
2 suggest between the Commission and the evidence leaders,  
3 yes.

4 MR TIP SC: From my side I must just  
5 apologise on two counts, the first is for making the  
6 submission that there had been no application, the second  
7 is for not attending to it in the time period since it's  
8 been made.

9 CHAIRPERSON: Well, you can now attend to  
10 it. We'll give you an extension of two days to do that.  
11 Mr Malindi, anything further you wish to say?

12 MR MALINDI: Nothing further and what's  
13 the word, thanking my learned friend for, indebted to my  
14 learned friend for assisting –

15 CHAIRPERSON: - to your learned friend.  
16 I'm sure [inaudible]. We will reserve judgment on this  
17 matter, we'd like to think about it, the points that have  
18 been put to us but we will give our ruling as soon as  
19 possible. We'll indicate to the parties [inaudible]. We  
20 understand that [inaudible]. Thank you. I did say the  
21 Commission, I hoped very much, would be ready to proceed at  
22 2 o'clock with the evidence. I suggest that it might be  
23 appropriate, if the reporter from the City Press is here,  
24 for us all to adjourn to have tea and we'll reassemble  
25 after the tea adjournment to continue with the cross-

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1 examination.

2 MR MALINDI: Chairperson, before you  
3 adjourn may I interrupt you? Chairperson, Mr Chaskalson  
4 has gone through the various agreements on discovery that  
5 parties had to adhere to and we have been bombarding the  
6 evidence leaders and the SAPS with our insistence that they  
7 should discover. It's been over some two weeks now that  
8 the Chairperson indicated that if there's still no  
9 satisfaction on the part of SAPS to discover as we  
10 requested, or the inadequacy of their discovery, they may  
11 be put on terms, in fact they were to be put on terms  
12 before the commencement of the SAPS evidence. Chairperson,  
13 if you permit us we would like –

14 CHAIRPERSON: To interpose, as far as I  
15 understand what you're going to say to me, based on  
16 something you told me in Mr Semanya's presence last week, I  
17 think it was, there are still some statements that you're  
18 asking for, asking the SAPS for which they haven't given.  
19 I understood they're in the process of getting them for  
20 you. They relate to individuals who were involved in the  
21 events of the 16th, I think primarily. I understand they  
22 are going to be given to you. I don't think the evidence  
23 we're hearing at the moment or the evidence of the next  
24 witness, for example, are likely to be of such a nature  
25 that you require those documents but certainly if we reach

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1 a stage where a witness is going to come and give evidence  
2 and those documents are necessary, certainly you can raise  
3 the matter again and we'll deal with it but I understood Mr  
4 Semanya to say in your presence that I give you an  
5 undertaking, and in my presence, that he would see to it  
6 that as soon as reasonably possible you would get the  
7 documents you sought. I think that's correct, Mr Semanya,  
8 is it not?

9 MR SEMENYA SC: It is correct, yes.

10 CHAIRPERSON: So we can leave that –  
11 let's go and enjoy our tea with the City Press and then  
12 come back -

13 [COMMISSION ADJOURNS COMMISSION RESUMES]

14 [15:12] CHAIRPERSON: The Commission resumes.  
15 National Commissioner, before I remind you you're under  
16 oath, I would apologise to you. I proved to be a very poor  
17 prophet as to how long the argument would take and the  
18 application, so you were due to come back here at 2 o'clock  
19 to continue your evidence. You weren't able to do so, I'm  
20 sorry that your time has been wasted in this way. You're  
21 still under oath.

22 MANGWASHI VICTORIA PHIYEGA: s.u.o.

23 CHAIRPERSON: Mr Madlanga, I take it  
24 you're to proceed with your cross-examination.

25 CROSS-EXAMINATION BY MR MADLANGA SC (CONTD.):

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1 Yes, thank you, Mr Chairman. General, before the lunch  
2 adjournment I took you to the statement of Lieutenant-  
3 Colonel Gaffley that indicates that some SAPS members or  
4 rather SAPS members were shooting from different directions  
5 and thereafter I took you to, or back to paragraph 45.5  
6 where it appears that some protesters may have been killed  
7 when some SAPS members might have been firing in response  
8 to friendly fire by other SAPS members. Now, I want to  
9 take you to the statement of Mr de Rover, I hope I'm  
10 pronouncing the name correctly, it's the lower case d-e and  
11 then the surname is R-o-v-e-r. I ask that a copy be placed  
12 in front of you –

13 CHAIRPERSON: I think we have to make it  
14 an exhibit, do we? FFF11.

15 MR MADLANGA SC: Thank you, yes, Mr  
16 Chairman. Do you have a copy there, General?

17 GENERAL PHIYEGA: Yes, I do.

18 MR MADLANGA SC: Yes. Now General, if  
19 you want you may read perhaps the two paragraphs that  
20 precede the paragraphs that I want to focus on and the  
21 paragraphs I want to focus on are paragraphs 81 and 82 of  
22 that statement. If you've read the paragraphs before that,  
23 please indicate then I will read paragraphs 81 and 82 into  
24 the record. And whilst you are reading let me, for the  
25 record, indicate that Mr de Rover is the South African

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1 Police Service expert on public order policing, are you  
 2 aware of that?  
 3 GENERAL PHIYEGA: Yes, I'm aware.  
 4 MR MADLANGA SC: Please indicate then  
 5 when I should go ahead and read paragraphs 81 and 82.  
 6 GENERAL PHIYEGA: I have read 79 and 80.  
 7 MR MADLANGA SC: Thank you, thank you,  
 8 General. Now, paragraph 81 reads, "At the time of scene 1  
 9 and immediately thereafter, the problems with the analogue  
 10 radio network conspired to prevent the overall commander to  
 11 stay abreast of developments and to call a halt to police  
 12 operations in a bid to regroup and reassess. It virtually  
 13 goes without saying that SAPS doctrine and experience in  
 14 crowd management dictate such a decision." Do you see  
 15 that?  
 16 GENERAL PHIYEGA: Yes, I see.  
 17 MR MADLANGA SC: And obviously the  
 18 analogue radio network referred to must be the SAPS  
 19 analogue radio network, not so?  
 20 GENERAL PHIYEGA: Yes.  
 21 MR MADLANGA SC: Paragraph 82 reads, "In  
 22 the absence of a countermanding order, the implementation  
 23 of the operation at scene 2 went ahead with the on scene  
 24 commander unaware of the incidents that had just produced  
 25 at scene 1." Do you see that?

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1 GENERAL PHIYEGA: Yes, I do.  
 2 MR MADLANGA SC: Now let me paraphrase,  
 3 and I do believe of course that this is quite plain, the  
 4 language of these two paragraphs is quite plain but just to  
 5 make sure that we are on the same page I will attempt to  
 6 paraphrase. I read this to mean that had the overall  
 7 commander followed all developments at scene 1, he or she  
 8 would have halted the operation and the 18 people who died  
 9 as a result of the police shooting at scene 2 would not  
 10 have died. Or let me just take one step back, let me take  
 11 one step back. Let me say I read this to mean, had the  
 12 overall commander followed all developments at scene 1, he  
 13 or she would have halted the operation, do you accept that?  
 14 GENERAL PHIYEGA: I do not know.  
 15 MR MADLANGA SC: Alright. What Mr de  
 16 Rover says does not end there. He says, "It virtually goes  
 17 without saying that SAPS doctrine and experience in crowd  
 18 management dictate such a decision," such a decision being  
 19 the halting of the operation, do you see that? That is the  
 20 last sentence of paragraph 81.  
 21 GENERAL PHIYEGA: I see that.  
 22 MR MADLANGA SC: It is on that basis then  
 23 that I made the last proposition I made to you, which is  
 24 that according to what Mr de Rover says and which he says  
 25 would have been based on SAPS doctrine, had the overall

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1 commander followed all developments at scene 1, he or she  
 2 would have halted the operation. Do you still not agree?  
 3 GENERAL PHIYEGA: I said I do not know  
 4 because the commander is the best person to answer this,  
 5 it's not me.  
 6 MR MADLANGA SC: I'm not asking you about  
 7 your own knowledge. I am asking you purely based on what  
 8 the SAPS' own expert is saying, that is what I'm basing  
 9 this on. It flows from what the SAPS expert himself is  
 10 saying and he says, he says but for the problems with the  
 11 analogue radio network which made it impossible or  
 12 difficult for the overall commander to follow developments  
 13 at scene 1, the operation would have been halted. Do you  
 14 agree that that is what this thing says? I'm not asking  
 15 you about whether you know for a fact what the commander  
 16 would have done. I'm asking you isn't that what paragraph  
 17 81 says?  
 18 GENERAL PHIYEGA: I'm not sure where  
 19 we're missing each other. You've asked me, you've read  
 20 that. You've asked me whether I saw it and I said yes.  
 21 CHAIRPERSON: The question really is  
 22 whether you understand it and the question is, further  
 23 question, is what is meant by the phrase "such a decision"  
 24 at the end of the second sentence of paragraph 81. Now  
 25 reading back to the first sentence, it does look as if what

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1 Mr de Rover meant was a decision to call a halt to police  
 2 operations in a bid to regroup and reassess. That seems to  
 3 be the plain meaning of the paragraph, doesn't it?  
 4 GENERAL PHIYEGA: And I have answered,  
 5 Judge, to say I do not know. The operational person may  
 6 answer that well because I'm not qualified to actually  
 7 underscore or not underscore that statement.  
 8 CHAIRPERSON: Yes, no – well, I'm not  
 9 [inaudible] whether you were asked whether you agree with  
 10 what Mr de Rover says and, as you correctly say, this is a  
 11 field of expertise which is different from your normal  
 12 field of expertise. The question is, is that what Mr de  
 13 Rover is saying?  
 14 GENERAL PHIYEGA: I have said yes to that  
 15 already but I was asked a different question, as I  
 16 understood. Maybe I was wrong.  
 17 MR MADLANGA SC: National Commissioner, I  
 18 did not ask you a different question, I asked you exactly  
 19 the question that Mr Chairman put to you just now. It's  
 20 not a different question. What I'm asking you for is  
 21 meaning and right now, after the two or so answers that you  
 22 have given I'm confused as to what your answer is. Do you  
 23 accept that what this paragraph says is what the Chairman  
 24 has just articulated? Do you accept that that is what this  
 25 paragraph means? I'm not asking you about commanders, what

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1 commanders would have decided, meaning that's what my  
 2 question is about.  
 3 GENERAL PHIYEGA: I understand it even  
 4 better in Xhosa. I have read the contents of this  
 5 paragraph and I recognise what the contents of the  
 6 paragraph says, yes.  
 7 MR MADLANGA SC: And this Mr de Rover  
 8 bases on what he calls SAPS doctrine and he says SAPS  
 9 doctrine, doctrine and experience – he bases it on SAPS  
 10 doctrine and experience and in crowd management and he says  
 11 that those, that is doctrine and experience, dictate in  
 12 those circumstances a decision that the operation be  
 13 halted, again meaning you accept that?  
 14 CHAIRPERSON: It's fair to say that she  
 15 accepts that's what Mr de Rover says. I think she makes it  
 16 clear that she can't be heard, she's not in a position to  
 17 say whether Mr de Rover is right or wrong.  
 18 MR MADLANGA SC: I agree, Mr Chairman,  
 19 and is why I keep emphasising that all I'm concentrating on  
 20 is meaning, meaning the meaning of paragraph 81. Do you  
 21 accept the last proposition?  
 22 GENERAL PHIYEGA: I must say you, at  
 23 times, confuse me. When you say meaning, meaning maybe  
 24 differs. I say I read, I see, I understand it as the  
 25 English language puts it in this document in 81 and 82.

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1 MR MADLANGA SC: Yes, I keep –  
 2 CHAIRPERSON: Mr Madlanga, I think if you  
 3 say the meaning of Mr de Rover then there won't be a  
 4 problem. I think I understand why she's reluctant to  
 5 answer the question in unqualified affirmative but if it's  
 6 qualified by saying Mr de Rover's meaning, I don't think  
 7 she should have a problem.  
 8 MR MADLANGA SC: Thank you. May I  
 9 rephrase the question then and say, to my last proposition,  
 10 do you accept that that is what Mr de Rover means?  
 11 GENERAL PHIYEGA: Yes, I have read what  
 12 is written here.  
 13 MR MADLANGA SC: But I'm asking a  
 14 different question. Do you accept that Mr de Rover means  
 15 what I have suggested he means?  
 16 CHAIRPERSON: I understood her to say  
 17 yes, and then she gave her reasons for saying yes, because  
 18 she's read what's written here. I don't think it – I don't  
 19 think one dare suggest she's not answering the question.  
 20 MR MADLANGA SC: I get confused, Mr  
 21 Chairman, because of the lengthy and qualified responses to  
 22 very simple questions, I honestly get confused.  
 23 CHAIRPERSON: I don't think that was a  
 24 lengthy or a qualified response to your question. I really  
 25 think that's a comment that certainly doesn't apply to the

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1 last answer she gave.  
 2 MR MADLANGA SC: But just to make sure,  
 3 is your short answer yes, to my last proposition?  
 4 GENERAL PHIYEGA: My problem is the word  
 5 you have used "accept." It's got a deeper and stronger  
 6 meaning.  
 7 MR MADLANGA SC: I will avoid the use of  
 8 the word "accept." Does what Mr de Rover is saying mean  
 9 what I have suggested it means?  
 10 GENERAL PHIYEGA: You've gone back to  
 11 meaning and you've used meaning before. You confuse me.  
 12 MR MADLANGA SC: What exactly confuses  
 13 you about meaning?  
 14 MR SEMENYA SC: Chair, this must  
 15 constitute the badgering of the witness.  
 16 CHAIRPERSON: No, he's not –  
 17 MR SEMENYA SC: This must constitute the  
 18 badgering of the witness, Chair.  
 19 CHAIRPERSON: Well, some people might  
 20 argue that it's something that's got two sides to it, but  
 21 let's not get involved in that. I think the problem is  
 22 that the questions are framed in a way that the witness  
 23 doesn't fully understand them and she's reluctant to – if  
 24 she's not quite sure what they mean, she's reluctant to  
 25 answer yes or no because of the consequences she can't

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1 foresee, so I can understand that. That's why I've been  
 2 trying to help her a bit, but anyway, Mr Madlanga will bear  
 3 in mind what you've said. I don't think you went quite as  
 4 far as badgering but maybe you were approaching the borders  
 5 of badgerdom, so maybe you must move back a bit.  
 6 MR MADLANGA SC: The last question,  
 7 Commissioner, was – when Mr de Rover says that SAPS  
 8 doctrine and experience in crowd management dictate such a  
 9 decision, does he mean that SAPS doctrine and experience in  
 10 crowd management dictate that after events like those that  
 11 had taken place in scene 1 have taken place, there should  
 12 be a halting or stoppage of the operation –  
 13 GENERAL PHIYEGA: I have –  
 14 MR MADLANGA SC: Is that what Mr de Rover  
 15 means? I've avoided "acceptance" – yes, I can't avoid  
 16 using the word "mean."  
 17 CHAIRPERSON: I think to be fair, she  
 18 can't say she necessarily knows what Mr de Rover meant.  
 19 All she can say is that's what he appears to mean. He may  
 20 have had some mental reservation or may have expressed  
 21 himself badly but all she can be expected to answer is what  
 22 he appears to mean on an ordinary meaning of the sentence.  
 23 Perhaps if the question is put that way, the witness  
 24 shouldn't have a problem.  
 25 [15:32] MR MADLANGA SC: Thank you, Mr Chairman.

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1 I've asked her the question a few times, I will not ask the  
2 full question again. All I will do is just to add this.  
3 On your reading of what Mr de Rover says, do you accept the  
4 meaning that I've suggested to you?  
5 GENERAL PHIYEGA: Maybe ask the question  
6 again.  
7 MR MADLANGA SC: Mr de Rover says or  
8 refers to the SAPS doctrine and experience in crowd  
9 management, do you see that?  
10 GENERAL PHIYEGA: Yes.  
11 MR MADLANGA SC: Do you see that he also  
12 says that those, that is doctrine and experience in crowd  
13 management, dictate the taking of a decision, do you see  
14 that?  
15 GENERAL PHIYEGA: I do.  
16 MR MADLANGA SC: Do you also see that if  
17 you read "decision" in the last sentence, that must be a  
18 reference back to a decision to halt, to call a halt of the  
19 operation.  
20 GENERAL PHIYEGA: So you're reading  
21 "decision" with the previous sentence?  
22 MR MADLANGA SC: Yes, decision – what I'm  
23 suggesting to you is that decision refers back to a  
24 decision to call a halt to police operations.  
25 GENERAL PHIYEGA: Yes.

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1 MR MADLANGA SC: I'll go to the next  
2 question. Can that decision, that is the decision to call  
3 a halt to the operation, had that decision been taken do  
4 you accept that the killings at scene 2 would not have  
5 taken place?  
6 CHAIRPERSON: I don't think that's a fair  
7 question, Mr Madlanga, because to call a police – to call a  
8 halt to police operations in a bid to regroup and reassess.  
9 Now, if the police operations had been halted and there was  
10 then a regrouping and a reassessment, we do not know what  
11 the result of the reassessment would've been. The  
12 reassessment might have involved a decision to advance on  
13 scene 2 and take certain action which might have led to the  
14 death of some of the people. So I'm not sure that the  
15 question in the absolute form that you put it, was a fair  
16 one in the circumstances.  
17 MR MADLANGA SC: Let me ask the question  
18 differently. Would you accept that if the operation had  
19 been halted, the police had regrouped and reassessed, any  
20 number of possible decisions could have been taken? One  
21 could have been that let's go ahead, let's pursue them to  
22 koppie 3. Just like one could well have been that because  
23 we as SAPS have already killed 16 people at scene 1, let us  
24 not pursue those that have run to koppie 3 because there  
25 may again be a large number of casualties.

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1 MR SEMENYA SC: The question calls for  
2 conjecture again, Chair.  
3 GENERAL PHIYEGA: Yes –  
4 MR SEMENYA SC: Where are we going?  
5 CHAIRPERSON: He's entitled to ask her  
6 this kind of question to engage in some conjecture but I  
7 don't think it should be taken too far and if he takes it  
8 much further, I'll stop him.  
9 MR MADLANGA SC: Let me ask you this  
10 question. Thank you, Mr Chairman. I know that you were  
11 new at SAPS at the time but I want to find out what your  
12 own thinking is. If, as Mr de Rover says, in such  
13 circumstances there would have been a need to regroup and  
14 reassess, what do you think the purpose of the regrouping  
15 and reassessing would have been?  
16 GENERAL PHIYEGA: I sincerely find that a  
17 hard question to answer. I would say I do not know.  
18 MR MADLANGA SC: Would it not possibly,  
19 amongst others, have involved a taking of decisions as to  
20 whether or not to continue with the operation?  
21 GENERAL PHIYEGA: I would like to avoid  
22 speculating.  
23 CHAIRPERSON: I think these are matters  
24 for argument, aren't they? I could understand if the  
25 National Commissioner had been on the scene at the time, in

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1 charge of the operations, conjectural questions of this  
2 kind might be directly relevant but regard being had to the  
3 fact she wasn't there and there is a strong element of  
4 conjecture, I'm not sure we are assisted by the answers she  
5 gives or her reluctance to give answers. I'm sure there  
6 are other matters you can ask her about which do not  
7 involve conjecture of this kind.  
8 MR MADLANGA SC: But you accept that part  
9 of the problem that made it impossible even for the  
10 regrouping and reassessing to be done was the problem with  
11 the analogue radio network.  
12 GENERAL PHIYEGA: I'm sure the commanders  
13 would be able to talk to that. I do not know.  
14 CHAIRPERSON: May I ask you a question  
15 about that? It appears from Mr de Rover's statement that  
16 he must have been informed by those who briefed him that  
17 the overall commander had a problem in staying abreast of  
18 developments because of problems with the analogue radio  
19 network. That seems a fair inference, you'd agree with  
20 that, I'm sure. No conjecture required. Now that's a fair  
21 inference, isn't it? He must have been told that. He  
22 didn't take that himself out of the air. Now when you  
23 received your various briefings about what had happened on  
24 the night of the 16th, morning of the 17th and thereafter,  
25 were you ever told that the overall commander had problems

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1 with the analogue radio network?  
 2 GENERAL PHIYEGA: On the 16th and the  
 3 17th, Judge, I was not informed of the radio thing.  
 4 CHAIRPERSON: Were you informed a bit  
 5 later?  
 6 GENERAL PHIYEGA: As we were preparing  
 7 our statements to come to the Commission and many, most of  
 8 the information was coming, we noted the issue of the  
 9 radio.  
 10 CHAIRPERSON: Was that at the time of the  
 11 Potchefstroom conference or meeting?  
 12 GENERAL PHIYEGA: I missed that?  
 13 CHAIRPERSON: Was that at the time of the  
 14 Potchefstroom meeting?  
 15 GENERAL PHIYEGA: I think –  
 16 CHAIRPERSON: The evidence is that  
 17 various police generals and others gathered at  
 18 Potchefstroom, I think it was for over a week, and prepared  
 19 a number of things, particularly exhibit L which is the  
 20 police presentation. Was it before then that this was, you  
 21 were told about the analogue radio network problem?  
 22 GENERAL PHIYEGA: Maybe let me answer  
 23 this way, Judge. The building of our submission was a  
 24 progressive process and we continued to pick up input along  
 25 the process that took the submission to come to yourselves.

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1 And I would also say I visited Potchefstroom only once. It  
 2 is for that reason that maybe it is difficult for me to  
 3 pinpoint the time when the information came but I did note  
 4 the information in our submission.  
 5 CHAIRPERSON: You must forgive me for  
 6 saying I don't like this maybe answer. I'm not being  
 7 unkind, I know it's just a way you express yourself but it  
 8 doesn't help to say it may be the case or it may not be the  
 9 case. We're not interested so much in maybe's as in facts  
 10 but I think it's fair to say, I think what you're saying is  
 11 you're not sure whether you heard about it before or after  
 12 Potchefstroom and so you can't tell us. Would that be a  
 13 fair inference, that's what you're saying?  
 14 GENERAL PHIYEGA: Yes, Judge.  
 15 CHAIRPERSON: I see. You see, the reason  
 16 I asked the question is if there was a problem with the  
 17 analogue radio network, I take it the commanding officer,  
 18 the overall commander would have known about it at the  
 19 time.  
 20 GENERAL PHIYEGA: Mm.  
 21 CHAIRPERSON: It's not something he  
 22 discovered days or weeks or months later.  
 23 GENERAL PHIYEGA: Mm.  
 24 CHAIRPERSON: So I would've expected that  
 25 fact, which the overall commander must have been aware of

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1 at the time, to have surfaced fairly early on in the  
 2 development of the, what one can call the police case, but  
 3 I don't think it's fair to ask you that question. That's  
 4 something, that's a question the overall commander will  
 5 have to deal with when he comes there. That's right, isn't  
 6 it?  
 7 GENERAL PHIYEGA: Yes, Judge.  
 8 MR MADLANGA SC: When you say that you  
 9 read the issue about the problems with the analogue radio  
 10 network in the submission, are you referring to the SAPS  
 11 presentation, exhibit L?  
 12 GENERAL PHIYEGA: I'm hoping that it was  
 13 mentioned in that, or also in the statements of the  
 14 members.  
 15 MR MADLANGA SC: Please bear with me,  
 16 Commissioners. Now, at the risk of sounding, being  
 17 repetitive but may the Commissioners and you, General,  
 18 please bear with me because after what may sound repetitive  
 19 I am leading to a question. From the information that we  
 20 have received from SAPS and which I've debated with you  
 21 after the tea break, one believes the following therefrom.  
 22 Some SAPS members fired shots in response to what may have  
 23 been "friendly fire" from other SAPS members. Do you  
 24 accept that? Do you accept that one does glean this from  
 25 the information that you and I have been debating?

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1 GENERAL PHIYEGA: Just refer me again to  
 2 –  
 3 CHAIRPERSON: The word "accept" has  
 4 caused her trouble in the past and I can understand why.  
 5 I'm sure you can put it in a way which doesn't raise the  
 6 kind of problems which encourage her to be cautious, for  
 7 which one cannot blame her.  
 8 MR MADLANGA SC: Is it so – thank you, Mr  
 9 Chairman – is it so that it does appear from the  
 10 information that you and I have debated, that some SAPS  
 11 members fired shots in response to what may have been  
 12 "friendly fire" from other SAPS members? This is in  
 13 paragraph 45.5 of the opening statement.  
 14 MR SEMENYA SC: No Chair, I think my  
 15 learned colleague should have used the word "may."  
 16 CHAIRPERSON: They don't say in 45.5 it  
 17 was friendly fire. They say it may have been friendly  
 18 fire. They don't know that it was friendly fire, they  
 19 don't know that it wasn't friendly fire, that's why they  
 20 were hoping ballistic evidence would solve the problem. We  
 21 will find out in due course if it does but the point Mr  
 22 Semenya puts is correct, if you can – you've got to use the  
 23 subjunctive "may" when you convey the point that you make.  
 24 MR MADLANGA SC: Mr Chairman, I only did  
 25 not use the "may" and I accept what Mr Semenya says in

<p style="text-align: right;">Page 7089</p> <p>1 respect of the "fired" at the beginning of this sentence,  2 but where the Chairman is referring to I actually did use  3 it but I will just again read what I said and then I will  4 insert the "may" that Mr Semenya so correctly says should  5 be inserted. Is it so that what paragraph 45.5 says may be  6 read to mean this, some SAPS members may have fired shots  7 in response to what may have been "friendly fire" from  8 other SAPS members?  9 GENERAL PHIYEGA: Yes, the statement is  10 saying that.  11 MR MADLANGA SC: And does the statement  12 also say that some protesters may have been killed when the  13 SAPS members concerned might have been firing in response  14 to the "friendly fire" by other SAPS members?  15 GENERAL PHIYEGA: I'm not sure is it  16 something you are reading or is it an interpretation?  17 MR MADLANGA SC: I introduced this  18 present debate by saying that on my reading of the material  19 provided by SAPS, this is what one gleans from the  20 material.  21 CHAIRPERSON: I think it's Mr Madlanga's  22 paraphrase. I think it's Mr Madlanga's paraphrase -  23 GENERAL PHIYEGA: Okay, that's different.  24 CHAIRPERSON: - of the relevant section  25 of paragraph 45.5.</p>	<p style="text-align: right;">Page 7091</p> <p>1 to fall back and take position behind the vehicles as it  2 was clear the police were firing from different directions  3 and members could be caught in cross-fire."  4 MR MADLANGA SC: Yes, that is where I'm  5 reading from or rather I'm paraphrasing from that  6 paragraph, Mr Chairman. Do you accept my paraphrase?  7 GENERAL PHIYEGA: I'm going to ask you to  8 paraphrase again because I just read that state – I didn't  9 have the statement, I read what is written here, now I can  10 listen to the paraphrase.  11 MR MADLANGA SC: According to Lieutenant-  12 Colonel Gaffley, SAPS members were firing shots from  13 different directions and some SAPS members could have been  14 shot by SAPS members in the cross-fire.  15 GENERAL PHIYEGA: I'm not able to accept  16 your paraphrasing.  17 MR MADLANGA SC: Why not?  18 GENERAL PHIYEGA: As I read the  19 statement, it doesn't give me that understanding.  20 CHAIRPERSON: How would you paraphrase  21 it?  22 MR MADLANGA SC: As the Chairman has just  23 asked, how would you paraphrase it?  24 GENERAL PHIYEGA: My understanding of  25 this, I ordered the members to fall back and take position</p>
<p style="text-align: right;">Page 7090</p> <p>1 MR MADLANGA SC: What is your response or  2 should I repeat the question?  3 GENERAL PHIYEGA: I think you should.  4 MR MADLANGA SC: Some protesters may have  5 been killed when the SAPS members concerned might have been  6 firing in response to "friendly fire" by other SAPS  7 members?  8 GENERAL PHIYEGA: I would go more with  9 the statement as we've put it because I think the  10 paraphrasing makes many, many more issues than what I read  11 here.  12 MR MADLANGA SC: I will move on, General.  13 According to Lieutenant-Colonel Gaffley, SAPS members were  14 firing shots from different directions and could have shot  15 other police in cross-fire.  16 MR MAHLANGU: If I may just ask, where  17 are we reading from?  18 [15:52] MR MADLANGA SC: Again it's my paraphrase  19 of the information that we have received. I did read to  20 the witness a paragraph or some paragraphs from the  21 statement of Lieutenant-Colonel Gaffley, Mr Mahlangu.  22 MR MAHLANGU: I've got it, I've got the  23 statement.  24 CHAIRPERSON: That's apparent from para  25 13 at the foot of the second page, "I ordered the members</p>	<p style="text-align: right;">Page 7092</p> <p>1 behind the vehicles as it was clear that the police are  2 firing from different directions and members could be  3 caught – could be caught – in cross-fire. And I'm also  4 seeing, he's talking about shooting from different  5 directions and I'm sure he can talk about that – earlier on  6 he said he looked into the bushes and did not see somebody  7 with the firearms. I'm not even sure whether his statement  8 – he needs to be questioned on that so that your  9 paraphrasing can be put into context. I'm the wrong person  10 to do that.  11 MR MADLANGA SC: You can take time to  12 read the statement again, General. When Lieutenant-Colonel  13 Gaffley is talking about not having identified any person  14 within the crowd that was visible to him with any firearm  15 in his hand, it does not appear to be talking about the  16 police that he says were firing from all directions,  17 including some even firing from behind them – "them" being  18 his unit, the STF. Do you not agree with me?  19 GENERAL PHIYEGA: No, I don't because I  20 don't know who that, any person shooting is and this is why  21 I'm saying I'm the wrong person to try and interpret that  22 any person shooting. It is Gaffley who can say who he  23 means by any person shooting.  24 MR MADLANGA SC: In any event, General, I  25 do not see why you want to go back to paragraph 11. I am –</p>

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1 CHAIRPERSON: I think paragraph 12, the  
 2 first sentence in para 12. "At this stage I heard gunshots  
 3 from the direction of the bushes in front of us but I could  
 4 not see any person shooting." There were – I think the  
 5 test is "in the bushes in front" and it would appear that  
 6 there may well have been policemen as well. So the word  
 7 "any" as you know is a very wide word, so it could cover  
 8 either protesters or policemen, so. It's now 4 o'clock.  
 9 When you think it's a suitable stage for us to take the  
 10 adjournment, please let me know.

11 MR MADLANGA SC: Thank you, Mr Chairman.  
 12 In paragraph 12, the same paragraph that the Chairman read  
 13 from, which is the paragraph before the one that I'm  
 14 focusing or was focusing on, the following sentence  
 15 appears, second last sentence, "Then the canine members  
 16 also started firing from behind us into the koppie. I also  
 17 heard shots from our left and right." And then in  
 18 paragraph 13 he says, "At this stage the Scorpion had  
 19 joined us and the members had formed a line in front of the  
 20 Casspir, ready to approach the koppie on foot. I ordered  
 21 the members to fall back and take position behind the  
 22 vehicles." You accept that he's – or rather let me avoid  
 23 accept – he is referring to SAPS members, is he not?

24 GENERAL PHIYEGA: Yes.  
 25 MR MADLANGA SC: And he gives the reason

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1 why he made that order and he says, "as it was clear that  
 2 the police are firing from different directions," do you  
 3 see that?

4 GENERAL PHIYEGA: Yes, I read that.  
 5 MR MADLANGA SC: - "and members could be  
 6 caught in cross-fire," do you see that?

7 GENERAL PHIYEGA: Yes, I see that.  
 8 MR MADLANGA SC: Would you not accept  
 9 that the cross-fire refers also by, or refers also to fire  
 10 by SAPS members?

11 GENERAL PHIYEGA: I actually read in his  
 12 statement that he says the police are firing from different  
 13 directions. That's what he writes in his statement.  
 14 MR MADLANGA SC: And members, that is  
 15 SAPS members, could be caught in cross-fire. What I'm  
 16 suggesting to you is, whatever the source of the cross-fire  
 17 might have been, but he is certainly suggesting that part  
 18 of that cross-fire would have been fire from or by the  
 19 police, do you accept that?

20 GENERAL PHIYEGA: What is important is  
 21 what you've said, part of the cross-fire could have been.  
 22 In that sense I agree.  
 23 MR MADLANGA SC: You spoke at the same  
 24 with Mr Mahlangu. What, your answer may not appear in the  
 25 transcript. So you say because I have used the word "part"

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1 of the cross-fire may have emanated from SAPS, you accept  
 2 what I'm putting to you?

3 GENERAL PHIYEGA: I'm saying you have  
 4 used the phrase "part," particularly having listened to, I  
 5 did not see any person shooting and the police, so the  
 6 "part" represents a better understanding of what you're  
 7 saying.

8 MR MADLANGA SC: And because he says that  
 9 he gave an instruction or a command that they should go  
 10 behind the vehicles to avoid the fire, so effectively he  
 11 means that part of that cross-fire which emanated from the  
 12 police could have injured the police themselves, do you  
 13 accept that? Do you agree? Do you agree that this is what  
 14 this means?

15 GENERAL PHIYEGA: From what I've read, I  
 16 understand that part of that could have been.  
 17 CHAIRPERSON: I take it one can go  
 18 further. One could even say all of it might have been  
 19 friendly fire. There's no basis for saying that only part  
 20 of it may have been friendly fire. Of course it's again  
 21 speculation –

22 GENERAL PHIYEGA: It is.  
 23 CHAIRPERSON: - we're in the area of  
 24 conjecture, aren't we, but while we're busy conjecturing,  
 25 we may as well get it right. It was fire. The police,

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1 according to the statement 45.5, are prepared to accept it  
 2 may, some of it may have been – they didn't say some of it,  
 3 they're prepared to accept that they may have been  
 4 responding to friendly fire. Now in the police statement  
 5 it said that there may have been friendly fire.  
 6 GENERAL PHIYEGA: Mm-mm.  
 7 CHAIRPERSON: The possibility of the fire  
 8 being friendly fire appears to be corroborated by what  
 9 Colonel Gaffley says in the passage that Mr Madlanga put to  
 10 you. I think that's a fair summary, isn't it, of what  
 11 we've seen?

12 GENERAL PHIYEGA: Judge, I would still  
 13 say there are many talks about possibilities and we still  
 14 say that that phrase, that very paragraph at the end says  
 15 when all evidence has been presented, then it is a better  
 16 point to actually start accepting corroborating and that.  
 17 At this point in time I think I would be irresponsible to  
 18 do so.

19 CHAIRPERSON: That answer may be the  
 20 subject of argument at later stage but is this perhaps an  
 21 appropriate stage to take the adjournment until tomorrow  
 22 morning, half past nine?

23 [COMMISSION ADJOURNED]  
 24 .  
 25 .



<p style="text-align: center;"><b>A</b></p> <p><b>able</b> 6975:8 6979:5 7001:11 7015:1 7020:23 7024:21 7025:9,13 7036:14 7045:11 7071:19 7084:13 7091:15 <b>abreast</b> 7073:11 7084:17 <b>absence</b> 7058:9,18 7073:22 <b>absent</b> 7039:12 7041:13 <b>absolute</b> 7082:15 <b>absolutely</b> 7035:17 7056:13 <b>accept</b> 6982:3 6984:2 6985:22,23,25 6988:11,21 6996:12 6996:15,19 7003:11 7004:18 7005:17,23 7006:1,4,13,15,24 7007:5,25 7010:4,13 7010:19,20 7014:8,23 7014:24 7019:18 7028:25 7030:14 7074:13 7076:23,24 7077:13,21 7078:10 7078:14 7079:5,8 7081:3 7082:4,18 7084:8 7087:24,24 7088:3,25 7091:6,15 7093:22,23 7094:8,19 7095:1,13 7096:1,3 <b>acceptance</b> 7029:11 7080:15 <b>accepted</b> 7028:4 <b>accepting</b> 7009:15 7096:16 <b>accepts</b> 7077:15 <b>account</b> 7010:7 7011:9 7025:23 <b>accounted</b> 6994:24 6997:8 7004:2,6,12 7005:10 7006:25 7007:15,22 7008:9 7016:3 <b>accounting</b> 7007:23 7008:1,3,6 <b>accurate</b> 6980:13 7030:2 <b>accused</b> 7001:25 <b>act</b> 7035:3 7058:23 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