

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 110 21 JUNE 2013 PAGES 11738 TO 11816



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1 [PROCEEDINGS ON 21 JUNE 2013]
 2 [09:38] CHAIRPERSON: The Commission resumes.
 3 Major-General, you're still under oath.
 4 WILLIAM MPEMBE: s.u.o.
 5 CHAIRPERSON: Mr Madlanga, you still have
 6 questions, I imagine.
 7 CROSS-EXAMINATION BY MR MADLANGA SC (CONTD.):
 8 Yes, Mr Chairman. General, yesterday you were overnight to
 9 look at entries 60 to 69 of exhibit FFF25. Did you do so?
 10 MAJOR-GENERAL MPEMBE: Correct,
 11 Chairperson.
 12 MR MADLANGA SC: Does it appear anywhere
 13 in those entries that the police stopped and disarmed
 14 protesters that were entering informal settlements on 14
 15 and 15 August 2012?
 16 MAJOR-GENERAL MPEMBE: Chairperson, I was
 17 yesterday also expected to bring the evidence in terms of
 18 whether if that has been done, were there any other
 19 weapons, or dangerous weapons that were confiscated. In
 20 the response, Chairperson, I would like first also to
 21 indicate from the plan itself –
 22 MR MADLANGA SC: Can you please first
 23 answer the first question I've asked you?
 24 MAJOR-GENERAL MPEMBE: Correct,
 25 Chairperson.

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1 MR MADLANGA SC: You spoke at the same
 2 time with Mr Mahlangu. Are you saying on 14 and 15 August
 3 2012 the police did intercept and disarm protesters who
 4 were entering the informal settlements on 14 and 15 August
 5 2012?
 6 MR NGALWANA: Chairperson, just for the
 7 record, I don't want to be interruptive this morning; just
 8 to remind my learned friend that that is not the basis on
 9 which I refer to these entries.
 10 MR MADLANGA SC: May you please answer
 11 the question then, General? I will bear what my learned
 12 friend is saying in mind.
 13 MAJOR-GENERAL MPEMBE: Yes, Chairperson,
 14 I might also indicate some of the weapons that were
 15 confiscated even since from the 13th.
 16 MR MADLANGA SC: Show me in respect of
 17 the 14th and 15th. I'm not saying there isn't, but I just
 18 want you to show us.
 19 MAJOR-GENERAL MPEMBE: Chairperson, on
 20 the 15th I will refer to CAS number 129/08/2012.
 21 CHAIRPERSON: Can you give us the entry
 22 number, please?
 23 MAJOR-GENERAL MPEMBE: Chairperson, when
 24 I look at the entry numbers I will also, I will look at the
 25 entry numbers and give first the entry numbers, then I'll

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1 go to them. On the 14th it's entry number 71, time is
 2 , and also OB number 73/77, 01:15. Still on the 14th,
 3 Chairperson, it's –
 4 MR MADLANGA SC: When you say 73/77, you
 5 mean entries 73 to 77, or what?
 6 MAJOR-GENERAL MPEMBE: Chairperson, it's
 7 SS, FFF25, paginated page 164.
 8 MR MADLANGA SC: Just for clarity,
 9 Chairperson, it's entry 73/77, if it's not clear.
 10 CHAIRPERSON: Yes, I saw that, but he
 11 gave the time of that entry, which is 1:15.
 12 MR MADLANGA SC: Yes, General.
 13 MAJOR-GENERAL MPEMBE: Chairperson, still
 14 the same exhibit number, paginated page 167, OB number 105,
 15 time 13:15. OB number 106, 13:40, on the same page, and OB
 16 number 108, OB number 112, 16:00, that's, it's paginated
 17 page 168.
 18 CHAIRPERSON: For those who are following
 19 on exhibit FFF25, you'll find it on page 11 of that
 20 exhibit.
 21 MAJOR-GENERAL MPEMBE: Chairperson, going
 22 to the date of the 15th, same exhibit number, paginated page
 23 176, OB number 231, time 19:15.
 24 CHAIRPERSON: That's page 19 on exhibit
 25 FFF25.

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1 MAJOR-GENERAL MPEMBE: Paginated page
 2 177, same exhibit number, OB number 252, Chairperson –
 3 CHAIRPERSON: That's page 20 of FFF25.
 4 MAJOR-GENERAL MPEMBE: Chairperson, with
 5 regard to FFF25, those are the OB number, but I also have
 6 another indication in terms of what did the police do since
 7 from the 13th, if I may also be allowed to do that.
 8 CHAIRPERSON: Please tell us about that.
 9 MAJOR-GENERAL MPEMBE: Chairperson, from
 10 the 13th on my arrival on my way to intercept the
 11 protesters, I did testify that we met other protesters
 12 along the settlement and they were searched, and we did get
 13 firearms. We take them to the police station where we
 14 verified - Chairperson, I'll refer to the SAP13 register
 15 which is also being disclosed to the Commission, but if
 16 it's not yet disclosed, I do have copies here, where those
 17 firearms are recorded, and also –
 18 CHAIRPERSON: I'm sorry to interrupt you.
 19 The evidence you're now giving is covered in paragraph 10
 20 of your statement GGG12, where you talk about the three
 21 people whom you recommended to be searched, two of them had
 22 firearms. They were taken to the Marikana Police Station
 23 and it was discovered, I think, that the firearms were in
 24 fact legal; the persons concerned had licenses to possess
 25 them. That's all set out in para 10 of your statement

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1 exhibit GGG12, and you say there are also, as one would
 2 expect, entries in the SAP13 register at the Marikana
 3 Police Station which reflect that. Is that correct, is it?
 4 MAJOR-GENERAL MPEMBE: Correct, Chair.
 5 Chairperson, Captain Thupe also is the member that did the
 6 work in terms of searching and also his statement has been
 7 disclosed to the Commission. Chairperson, CAS number
 8 115/08/2012 has already been disclosed to the Commission.
 9 SAP13 715/08/2012, one panga with brown handle, one
 10 knobkierie. Chairperson, also CAS number 117/08/2012,
 11 SAP13 716/08/2012 Marikana, one self-made spear, one
 12 knobkierie with blood. Chairperson, these ones they were
 13 also found in possession of the suspects, those that have
 14 been identified; they were followed but they were within
 15 the informal settlement. CAS number 118 –
 16 CHAIRPERSON: Those are cases to which
 17 you refer. What dates did the events which gave rise to
 18 the cases take place? On what dates?
 19 MAJOR-GENERAL MPEMBE: It's the case of
 20 the 13th, Chairperson.
 21 MR MADLANGA SC: General, without unduly
 22 interrupting you, can I take you back to where this all
 23 started from? I was –
 24 CHAIRPERSON: Sorry Mr Madlanga, if he's
 25 got other information of this kind he wants to give us, I

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1 think we should as a courtesy to him allow him to do so and
 2 then you can ask questions about it.
 3 MR MADLANGA SC: Thank you, Mr Chairman.
 4 MAJOR-GENERAL MPEMBE: Handle with
 5 painted axe with red colour, and SAP13 Marikana, it's SAP13
 6 713. Chairperson, it's CAS29/08/2012. This one is on the
 7 15th of August, possession of dangerous weapon.
 8 Chairperson, the statement of the arresting member, it also
 9 stipulates very clearly the incident happened at, on the
 10 15th at about 23:50, and the member said he further stated
 11 when he asked this person, "Why are you in possession of
 12 dangerous weapon at this time?" he further stated that the
 13 reason for him to be in possession is that they were
 14 instructed to bring weapons with them to the meeting at
 15 Wonderkop.
 16 MR NGALWANA: Chairperson, just for
 17 housekeeping purposes, I imagine copies of these should be
 18 made so that they are entered as exhibits, and that will be
 19 done in due course.
 20 CHAIRPERSON: Perhaps we could put them
 21 all in under the rubric HHH15, you know, point 1, point 2,
 22 point 3, whatever, if your side could attend to that, that
 23 will be helpful. I will describe them in a moment as
 24 HHH15, I don't know, how many documents are there that
 25 you've got for us?

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1 MAJOR-GENERAL MPEMBE: Chairperson, it's
 2 the statement of –
 3 CHAIRPERSON: Yes, yes, I understand, but
 4 just how many – I want it provisionally marked, or mark
 5 them as HHH15.1 to 15 point whatever the last number is.
 6 How many are there altogether? Five, so in other words
 7 it's HHH15.1 to 15.5 and it's documents, it's statements
 8 and SAP13 entries in dockets, or how does one describe
 9 them? Statements, etcetera, handed in by Major-General
 10 Mpeembe. Mr Ngalwana, do you have copies of the documents?
 11 I take it they're on the police hard drive, are they, or
 12 aren't they?
 13 MR NGALWANA: I would imagine so. This
 14 is the initiative of the witness, Chair –
 15 CHAIRPERSON: Yes, yes, I understand. So
 16 I was hoping you'd give those who have regard to these
 17 things the police hard drive reference, but if you can't,
 18 it doesn't matter; you'll give us copies of the documents
 19 in due course.
 20 MR NGALWANA: Yes, I believe that will be
 21 done, Chair.
 22 CHAIRPERSON: Thank you.
 23 MR NGALWANA: Perhaps the description
 24 should be more specific and include that it's - whether we
 25 use the word "purported" or "apparently" describing the

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1 documentation –
 2 CHAIRPERSON: Well, when we get them,
 3 when we get them we can then have detailed descriptions.
 4 Just for the moment as a sort of holding exercise I put
 5 that omnibus description on them and allocated exhibit
 6 numbers to them. But we will fill in the details when we
 7 get the documents duly marked.
 8 MR NGALWANA: I'll rely on your more –
 9 CHAIRPERSON: But you can prepare a
 10 schedule for us, if you like.
 11 MR NGALWANA: I'm comfortable with your
 12 superior memories.
 13 MR MADLANGA SC: General, do any of the
 14 incidents, entries or reports that you have just referred
 15 to relate to the interception and disarming of protesters
 16 that had left the koppie at 18:20 on the 14th of August
 17 2012, and at 18:40 on the 15th of August 2012 and that were
 18 intercepted and disarmed as they were entering or had just
 19 entered informal settlements.
 20 [09:58] MAJOR-GENERAL MPEMBE: Chairperson, the
 21 answer it will be yes for docket 29/08/2012, this person
 22 was in possession of a dangerous weapon and he was leaving
 23 the koppie between the times and the dates.
 24 MR MADLANGA SC: What time was he
 25 intercepted?

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1 MAJOR-GENERAL MPEMBE: I'm sorry, I just
 2 wanted to end, finish the other one then I'll come to this
 3 one.
 4 CHAIRPERSON: Please carry on, Major-
 5 General.
 6 MAJOR-GENERAL MPEMBE: These others,
 7 Chairperson, was the indication of the sector policing that
 8 I spoke about, that while we were doing sector policing and
 9 were actually saturating the informal settlement, this is
 10 what we were doing. Chairperson, according to the
 11 statement of the member he says it is on the 15th at about
 12 , and also to -
 13 MR MADLANGA SC: Sorry, sorry, General,
 14 aren't you making a mistake, is not CAS129? Not CAS29,
 15 129?
 16 MAJOR-GENERAL MPEMBE: It is possible
 17 because it is dark here.
 18 MR MADLANGA SC: And the officer you are
 19 talking about, is it not Officer Joel Molefe?
 20 MAJOR-GENERAL MPEMBE: Yes, that's
 21 correct.
 22 MR MADLANGA SC: Then it must be CAS129
 23 because I'm looking at his statement and that's what it
 24 says at the top, "Marikana CAS129/08/2012."
 25 MAJOR-GENERAL MPEMBE: It might, it,

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1 Advocate can be correct because to me it's dark here.
 2 CHAIRPERSON: If it's on the police hard
 3 drive you might like to give the police hard drive
 4 reference for those of your colleagues who have it on their
 5 computers.
 6 MR MADLANGA SC: I will defer to Ms
 7 Pillay on that, Mr Chairman.
 8 MS PILLAY: Chair, it's in the document
 9 sub-folder of the police hard drive and it's CAS129 on the
 10 15th.
 11 CHAIRPERSON: Thank you.
 12 MAJOR-GENERAL MPEMBE: Chairperson, I
 13 also just want to add to say in view when the people were
 14 moving some of them they were hiding this in their
 15 blankets, so you couldn't search anybody that you don't see
 16 visibly carrying a dangerous - but those that have been
 17 caught up we could have done it. Also taking into account,
 18 which I have already testified, to say that it was also the
 19 time of the negotiations. We were also targeting those
 20 that we know that they might be the convenors and those
 21 that were carrying them visibly, then they were confiscated
 22 and arrested.
 23 MR MADLANGA SC: General, the time that
 24 you give about this incident is 10 to 12, midnight on the
 25 15th. My question was do the entries report incidents that

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1 you have referred the Commission to relate to the
 2 interception of protestors that were leaving the koppie at
 3 on the 14th and at 18:40 on the 15th and approaching
 4 or entering informal settlements? So what you've referred
 5 does not qualify. Do any of the other entries do?
 6 MAJOR-GENERAL MPEMBE: Chairperson, the
 7 entries that I've referred to is between these ones that I
 8 do have, but also to indicate that the squatter camp was
 9 not only targeted on the 16th and policing was done. That's
 10 why I also gave the OB entries as well as the CAS numbers.
 11 MR MADLANGA SC: We will look at the
 12 entries ourselves, General, and make submissions at the
 13 end. I will not bother you further, but just one last
 14 question. On this one example that you give, the statement
 15 of Officer Joel Molefe, do you accept that it does not
 16 qualify for this second reason as well? I referred to
 17 informal settlements and it seems, according to what he
 18 says in paragraph 2 of his statement, that he encountered
 19 the person concerned in "Marikana Town." Do you agree?
 20 MAJOR-GENERAL MPEMBE: I agree,
 21 Chairperson, in response to the answer it was to say the
 22 people were not leaving only at those specific times. They
 23 were also leaving in different times, and probably the
 24 members that were on duty the whole night, they might also
 25 tell us what time that they were leaving. But the sector

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1 policing approach, it was also to look at what time, which
 2 weapons are they taking and also which areas are they going
 3 to.
 4 MR MADLANGA SC: Commissioners, may the
 5 statement of Officer Joel Molefe be handed in as an
 6 exhibit?
 7 CHAIRPERSON: I understood it was covered
 8 by the rubric HHH15.1 to 5. We're going to get copies of
 9 it presumably after tea, all neatly marked, with a
 10 schedule. So we don't have to anticipate that.
 11 MR MADLANGA SC: I agree, thank you, Mr
 12 Chairman. Thank you. Going back to the incident, the
 13 tragic incident of the 13th August 2012, General, if you had
 14 time on that day, how long would it have taken you to plan
 15 for disarming and dispersing the protestors that were
 16 coming from Karee?
 17 MR NGALWANA: No, no, no, Chairperson,
 18 that's an impermissible question that calls for the General
 19 to speculate about what could have happened. The witness
 20 is here to testify as to the facts of what he did, what he
 21 heard and what actually happened. He can't testify about
 22 what could have happened if circumstances were different.
 23 MR MADLANGA SC: Mr Chairman,
 24 Commissioners, right at the beginning of his testimony the
 25 witness emphasised how well-versed he is in Public Order

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1 Policing. I would imagine, therefore, that he should know
 2 how long it should take for him to plan for an operation
 3 and also to do the necessary briefing for an operation.
 4 That, under normal circumstances, should happen prior to an
 5 operation being implemented. It is on that basis that I'm
 6 asking or putting the question to the witness. With
 7 respect, Chair, that would depend upon the intelligence
 8 that he would have had at that time and other information
 9 he would have had at that time. So if he had certain
 10 information it could have taken quicker or longer, so he
 11 can't be expected to speculate in that regard.
 12 CHAIRPERSON: As an expert in the field
 13 he is able to answer questions of expertise which the
 14 ordinary witness can't be expected to answer. So I'll
 15 allow the question.
 16 MR MADLANGA SC: One correction for the
 17 record, Chair, this is not an expert in the field. He says
 18 he has experience in the field.
 19 CHAIRPERSON: Well an expert - if you
 20 look at the authorities on what is an expert, expert could
 21 include a person with experience in the field. He doesn't
 22 have to have formal training. As long as he's in a better
 23 position than the court is - this is not a court but I'm
 24 speaking by way of analogy - then he's permitted to give
 25 expert evidence. There's a whole series of appellate

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1 division authorities on the point; it's unnecessary for me
 2 to cite it, but he is an expert for the purposes of those
 3 authorities and I've allowed the question.
 4 MR MADLANGA SC: Should I repeat the
 5 question, General, or do you still remember it?
 6 CHAIRPERSON: Repeat it, because I can't
 7 still remember it.
 8 MR MADLANGA SC: General, if on the 13th
 9 of August 2012 you had time, how long would it have taken
 10 you to plan for disarming and dispersing the protestors
 11 that were coming from Karee?
 12 MAJOR-GENERAL MPEMBE: Chairperson, in
 13 determining the time I need also to check the activities
 14 that I should do, and after checking the activities then I
 15 need also to have certain information that I need to have,
 16 and then I also have to plan the actions as follows, and
 17 that will also give me to explain how long the time that I
 18 could have. Firstly, I need also to know, as I have
 19 indicated yesterday, this one of Marikana it's a
 20 spontaneous event. If Marikana was - or if in that, on
 21 that day a notice was served, it could have taken us seven
 22 days because firstly, a notice could have been served and
 23 then it should have been served within seven days. Then a
 24 golden triangle meeting has to be held where convenors,
 25 authorised officer and responsible officer had to plan.

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1 Chairperson, that could have taken plus or minus nine days,
 2 but more than seven days.
 3 CHAIRPERSON: What is the minimum time
 4 that you could have taken? Here you have a crisis; here
 5 are a whole lot of people marching along with weapons, it's
 6 an illegal gathering, something's got to be done. Now
 7 you're not going to tell me they respond to an urgent
 8 situation like that by saying well it'll take us nine days
 9 to deal with it. I mean that's obviously not what you mean
 10 and I don't think that's what Mr Madlanga means either. Mr
 11 Madlanga, perhaps you could reformulate the question. It
 12 seems to me there may be a misunderstanding between the
 13 witness and yourself.
 14 MAJOR-GENERAL MPEMBE: I'm sorry,
 15 Chairperson, I was firstly explaining where a notice has
 16 been served. I'm now coming to this one.
 17 CHAIRPERSON: This wasn't a case where
 18 there's a notice.
 19 MAJOR-GENERAL MPEMBE: Yes.
 20 CHAIRPERSON: So we don't need to know
 21 about the notice, but I understand that you're dealing with
 22 it systematically, dealing with the one case where there is
 23 a notice.
 24 MAJOR-GENERAL MPEMBE: Yes.
 25 CHAIRPERSON: But now we get to the one

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1 without the notice.
 2 MAJOR-GENERAL MPEMBE: Yes.
 3 CHAIRPERSON: Presumably an urgent
 4 situation has arisen, it's been reported that there's an
 5 illegal gathering, I don't know how many people there were
 6 but substantial, I think about 200, wasn't it? 200 people
 7 coming from Karee, many of them armed with dangerous
 8 weapons. It's a serious situation that's got to be dealt
 9 with promptly, and I think what Mr Madlanga wants to know
 10 from you is how long would it have taken you to plan, on
 11 the spur of the moment obviously, the action that was
 12 appropriate if you were going to disarm them. I think
 13 that's his question. But anyway, but if you want to
 14 complete the answer you were giving before, before you deal
 15 with that question, please go ahead. It's your evidence,
 16 you're entitled to give the evidence the way you wish.
 17 MAJOR-GENERAL MPEMBE: Thank you,
 18 Chairperson. Chairperson, to plan properly I would have
 19 got the intelligence in terms of how the protestors, their
 20 modus operandi, weapons that they could be having. That
 21 could have taken also another time, which at that time I
 22 did not have. Secondly, I had to study the area in terms
 23 of how can I best use the area, whether as a barrier, or as
 24 I've explained later, that will also take a certain time.
 25 I should know who are the convenors so that if I have to

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1 disarm and I need to know whom to arrest in terms of the
 2 Regulation of Gatherings Act. I could have called members
 3 to sit and plan after getting this information and that
 4 could also have taken some certain time.
 5 [10:18] I must also inform the responsible officer to say
 6 there is a spontaneous gathering. It will also have to
 7 take some certain, because he also have to give me the
 8 reasons, maybe how should we handle it, and so on.
 9 Chairperson, for me to have planned properly disarming
 10 those people, it could not have taken me less than three
 11 days, and it was not the case on the 13th. I did not have
 12 the luxury of doing that, taking into account what was
 13 already reported from, particularly from the 12th when the
 14 security members have been killed.
 15 MR MADLANGA SC: Must I understand you to
 16 mean, General, that when there is a spontaneous gathering,
 17 the police just call each other from wherever and just rock
 18 up without even the slightest discussion on how the
 19 incident should be handled by the police?
 20 MAJOR-GENERAL MPEMBE: No, Chairperson.
 21 MR MADLANGA SC: What are you required to
 22 do in order to avoid just rocking up without any discussion
 23 at all amongst yourselves?
 24 MAJOR-GENERAL MPEMBE: Chairperson, each
 25 police station and each cluster has what we call a

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1 contingency plan, and a contingency plan, it's a guiding
 2 document, not specifically to intercept a certain part, but
 3 it's to say in case of emergencies what different role-
 4 players are supposed to do. In the case of Marikana I did
 5 indicate that Lieutenant-Colonel Merafe had a contingency
 6 plan. On my arrival on the 13th it was just, it was not
 7 updated, but it is still a guiding document.
 8 MR MADLANGA SC: Is what you are
 9 referring to a document that is what you say was prepared
 10 by Colonel Merafe, is that a document, written document?
 11 Or are you talking about the plan of the 10th, contingency
 12 plan of the 10th of August?
 13 MAJOR-GENERAL MPEMBE: Correct,
 14 Chairperson.
 15 CHAIRPERSON: That's the document page 24
 16 and following, of your bundle volume A, your bundle of
 17 documents. It's part of exhibit SS3 and in fact starts at
 18 page 1 of SS3. Is that what you're referring to? That's
 19 the document headed "Contingency Plan: Strike by employees
 20 of Lonmin Eastern Western Platinum Mine, Karee Mine, on
 21 2012-08-10. Enquiries Lieutenant-Colonel Merafe,"
 22 etcetera. Is that the document you're referring to?
 23 MAJOR-GENERAL MPEMBE: Correct,
 24 Chairperson.
 25 MR MADLANGA SC: I'm not suggesting that

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1 it doesn't do so, but are you suggesting that it does deal
 2 with or address the question of spontaneous gatherings?
 3 MAJOR-GENERAL MPEMBE: Chairperson, a
 4 contingency plan, it's for any other eventualities that
 5 could happen. In this case I will say a spontaneous event,
 6 but it might also have a contingency plan for a natural
 7 disaster, but a contingency plan, its aim is to deal with
 8 any situation that is unplanned, but it's a guiding
 9 document of what to do in the case that event does happen.
 10 CHAIRPERSON: I'm sorry, Major-General, I
 11 may have referred you to the wrong document. I referred
 12 you to the document with Colonel Merafe's name on it, which
 13 is the document dated the 10th, but of course there appears,
 14 there's another document, the one immediately following,
 15 beginning at page 29 of your volume. It's page 6
 16 essentially of SS3. It's headed, the date of the heading
 17 is the 13th of August. It begins with your name, followed
 18 by, in the alternative by Brigadier Calitz. It appears to
 19 have been compiled in the morning of the 13th because it
 20 doesn't refer to the incidents on the afternoon to which
 21 you refer, and it's signed at the end on page 26 of your
 22 volume, looks like page 13 of the exhibit, it's signed by
 23 Brigadier Calitz and General Naidoo and by yourself, having
 24 been approved. So that must have been done, I would think,
 25 before you went out to the Karee railway line. Is that

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1 right?
 2 MAJOR-GENERAL MPEMBE: No, Chairperson, I
 3 did in my testimony indicate that that was done on the 13th
 4 after the incident. In my testimony I said I relied on my
 5 experience.
 6 CHAIRPERSON: This document appears to
 7 have been prepared before the incident in the morning of
 8 the 13th, because it doesn't refer to it and it's headed
 9 "Amended contingency plan: Strike by employees of Lonmin
 10 Eastern Western Platinum Mine, Karee Mine, from 2012-08-
 11 13." So it appears to be the plan operative from the 13th.
 12 The previous plan though to which I referred you appears to
 13 have been prepared by Colonel Merafe and approved by
 14 Brigadier Seboloke. Is that the contingency plan which you
 15 were referring to?
 16 MAJOR-GENERAL MPEMBE: Correct,
 17 Chairperson.
 18 MR MADLANGA SC: And you are saying that
 19 document would have made police officers that were
 20 approaching armed protesters to know what to do, without
 21 any prior specific, operation specific planning and
 22 briefing?
 23 MAJOR-GENERAL MPEMBE: No, Chairperson,
 24 in my answer I said a contingency plan is made for an
 25 event. In the case of that event does happen then the

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1 people know what to do, and I did also testify to say in,
 2 on my way to the interception I did ask Colonel Merafe, and
 3 he did tell me to say "I did brief the people, General,
 4 according to the contingency plan, and I did also say when
 5 I look at the contingency plan it was not yet updated.
 6 Secondly, it was that, General," that's the answer of
 7 Colonel Merafe, "I am still orientating the member. Since
 8 I am working with them, I will still orientate them
 9 further."
 10 MR MADLANGA SC: General, let me take you
 11 to your statement, exhibit GGG12. Can you please read
 12 paragraph 5 into the record?
 13 MAJOR-GENERAL MPEMBE: Chairperson, I
 14 just want to get the paragraph.
 15 MR MADLANGA SC: 5, General.
 16 MAJOR-GENERAL MPEMBE: Yes, I could see
 17 it.
 18 MR MADLANGA SC: Please read it, the
 19 whole of it.
 20 MAJOR-GENERAL MPEMBE: "Shortly
 21 thereafter Brigadier Calitz, who was monitoring the Lonmin
 22 CCTV footage in the JOC, informed us that there were about
 23 2 000 to 3 000 people at the Wonderkop koppie. Later some
 24 of these protesters left the koppie and were seen headed in
 25 the direction of the Karee Mine. They then marched back

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1 from the Karee Mine towards the koppie."
 2 MR MADLANGA SC: Would you agree with me,
 3 General, that the second sentence of that paragraph in
 4 context means that the protesters, or the small group of
 5 protesters were not only seen headed in the direction of
 6 Karee, but they were actually seen leaving the koppie as
 7 well? Is that not a proper reading of what you say there?
 8 MAJOR-GENERAL MPEMBE: Correct,
 9 Chairperson, even though I did not know at what time.
 10 MR MADLANGA SC: That was going to be my
 11 next question, is what time it was. Aren't you in a
 12 position to even relate it to what was happening and just
 13 give an estimation, a rough estimation, General? That is
 14 the time they were seen leaving the koppie, headed for
 15 Karee Mine.
 16 MAJOR-GENERAL MPEMBE: Chairperson, I'm
 17 unable because I did indicate in paragraph 4 that I was in
 18 the briefing meeting of the mine management.
 19 MR MADLANGA SC: I know, General, that
 20 you not less than three times in your evidence-in-chief
 21 said that you are not good with distances. Do you have any
 22 idea perhaps what the distance is between the koppie and
 23 Karee Mine? Again rough estimation. In a straight line or
 24 a circuitous route -
 25 MAJOR-GENERAL MPEMBE: Chairperson -

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1 CHAIRPERSON: I don't know whether it's
 2 eagles that fly or crows fly in straight lines, but - I
 3 don't know about eagles in straight lines, but crows always
 4 fly in straight lines according to the proverb, so perhaps
 5 we can ask him about that.
 6 MR MADLANGA SC: General, to the extent
 7 that you may be aware of the area, what would your
 8 estimation of the distance, say if somebody was walking
 9 from the koppie to Karee - I know my learned friend or
 10 perhaps some other person may raise the question of but
 11 which route would the person be taking, but taking the most
 12 possible direct route.
 13 MAJOR-GENERAL MPEMBE: Chairperson,
 14 really, I am not in a position to speculate. I just want
 15 maybe to state facts. It's going to be difficult for me.
 16 MR MADLANGA SC: Were you present at the
 17 first inspection in loco at the scene of the 13th, not - I
 18 do know you were present at the second one, or the last
 19 one. Were you present at the first one?
 20 MAJOR-GENERAL MPEMBE: I don't remember,
 21 but I don't think that I was there, Chairperson. But I can
 22 give the, if maybe I can use a Google map, but really to
 23 speculate, it's going to be very difficult for me.
 24 MR MADLANGA SC: Can you please do that?
 25 Is it possible perhaps in terms of the facilities available

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1 to you to do that during the tea break, or not?
 2 MR BURGER SC: Chair, my learned friend,
 3 with respect, can put the distance and then get on with the
 4 questions. I was at those inspections; I don't have the
 5 foggiest idea what that distance is. So it seems to be an
 6 objective fact. Put the version and then let's get on with
 7 it.
 8 MR MPOFU: Chairperson -
 9 CHAIRPERSON: Mr Mpofo, have you measured
 10 the distance? Can you tell us what it is?
 11 MR MPOFU: Yes, Chairperson, but I know
 12 Mr Madlanga's question relates to Karee. The distance
 13 between where we did the inspection and the koppie is, all
 14 the witnesses, the police witnesses and I think our
 15 witnesses have said it's about eight kilometres. So if
 16 that's the distance he's looking for, or if he wants the
 17 further distance - no, sorry, Mr Madlanga didn't hear me.
 18 No, I was saying the distance between the, where the
 19 General addressed the crowd and the koppie has been
 20 estimated in the police statements at eight kilometres,
 21 which we accept. So if that's the distance you're looking
 22 for, then it's common cause, but if it's the further one to
 23 Karee then obviously it's eight plus whatever it is.
 24 [10:38] CHAIRPERSON: Is the question asked in
 25 order to ascertain approximately how long it would have

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1 taken for the distances concerned to be travelled? Because
 2 I notice that according to exhibit FFF25, page 4 thereof,
 3 there's an entry at 12 o'clock, entry number 36, "Lonmin
 4 Security report that approximately 200 people were walking
 5 near the railway line to K3 Shaft." I take it that's
 6 Karee. "Lieutenant-Colonel Tsiloane and the members of
 7 Pretoria POP to attend to situation." Then in his
 8 statement the witness says in the paragraph that's been
 9 read that, "Some time after the meeting with Lonmin
 10 Brigadier Calitz who was monitoring the Lonmin CCTV
 11 footage," presumably following on the situation report at
 12 12 o'clock, "informed us that there were about 2 000 to 3
 13 000 people at the Wonderkop koppie. Later some of these
 14 protesters left the koppie," that's the passage that you
 15 read, "and were seen headed in the direction of the Karee
 16 Mine. They then marched back from Karee Mine towards the
 17 koppie." That's recorded at 12 o'clock and presumably –
 18 no, not recorded at 12 o'clock, there's no time given, but
 19 the people walking to the shaft is recorded as having taken
 20 place at about 12 o'clock. The next entry that's time-
 21 linked is entry 37. That relates to the visit to the JOC
 22 by the Provincial Commissioner, who made a note in the
 23 occurrence book, which is set out there, and which is
 24 summarised essentially in paragraph 6 of the witness's
 25 statement, GGG1 – sorry, GGG, not 1, it's 12. So one gets

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1 some kind of an idea of the time by taking those entries
 2 together. I don't know whether that assists at all, but
 3 the witness was in the JOC, as I understand it, and the
 4 Provincial Commissioner gave him an instruction which she
 5 in fact recorded in the occurrence book and which he sets
 6 out in his statement, after which he proceeded to take
 7 certain action. What had happened before that we can see
 8 was that people had left the koppie, gone to Karee, and
 9 then come back, and that could be seen from the close-
 10 circuit TV coverage which Brigadier Calitz was monitoring,
 11 as far as I can see. Have I stated it correctly, Major-
 12 General?
 13 MR NGALWANA: Chairperson, may I say
 14 this? Of course the Chairperson and the Commissioners will
 15 recall the difficulties, or the challenges to which the
 16 witness referred regarding the times recorded in FFF25. So
 17 that it is recorded at 12 o'clock –
 18 CHAIRPERSON: That was when they were –
 19 MR NGALWANA: - doesn't necessarily mean
 20 that it actually happened at 12 o'clock.
 21 CHAIRPERSON: Ja, that is when things
 22 were happening very quickly on the 16th, but we're dealing
 23 with the 13th now. But it's only an approximate time
 24 obviously, can't be more than that. Anyway, that's an
 25 attempt to provide such clarity as we can get from the

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1 material before us, but if that helps I'd be pleased. If
 2 it doesn't, I apologise.
 3 MR MADLANGA SC: Thank you, Mr Chairman,
 4 but regarding what sounded like annoyance at, or rather –
 5 ja, from my learned friend Mr Burger, may I just indicate
 6 what the basis of what I was doing was, because it now
 7 sounded like I had not the foggiest idea of what I was
 8 doing. What the position is, I seem to have a recollection
 9 that at the first inspection in loco at the scene of the
 10 13th somebody had mentioned that the distance from the
 11 vicinity of the railway line to the koppie was seven
 12 kilometres, which to an extent tallies with what Mr Mpofo
 13 is saying. But I did not want to just put that as a
 14 version, because (1), I do not have the slightest idea who
 15 that person was, and (2), whether that person even put that
 16 on record. So it's not as though I'm just working in the
 17 dark here, not knowing what I'm doing. That is why I was
 18 trying to elicit from the witness as to what he himself
 19 knows so that we can then move from that point, moving
 20 together.
 21 CHAIRPERSON: That is the explanation
 22 from Mr Madlanga. Can you help us? Do you know the
 23 distance? I think you said you don't. It is suggested
 24 that the distance from that spot near the railway line to
 25 the koppie is about eight kilometres. The question which

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1 we don't know is how far it is from that spot by the
 2 railway line to Karee. Are you able to help us on that, or
 3 must we endeavour to get information on that from somebody
 4 else?
 5 MAJOR-GENERAL MPEMBE: Chairperson, even
 6 this Karee Mine, it might have got different shafts. So I
 7 need also to ascertain which particular shaft that they
 8 were coming from.
 9 CHAIRPERSON: According to the occurrence
 10 book, entry 36, page 4 of the occurrence book - that's 4 at
 11 the bottom; I don't know what number it is in your bundle –
 12 they went to the K3 Shaft.
 13 MR NGALWANA: But is that what my learned
 14 friend has in mind, Chair, K3?
 15 MR MADLANGA SC: I do not know which
 16 Karee Mine they went to. It's the police who know. It's
 17 their evidence that the people were seen leaving the
 18 koppie, going to Karee Mine. So the General should know
 19 which Karee Mine he's talking about.
 20 CHAIRPERSON: It's Brigadier Calitz who
 21 said that actually, so perhaps we can ask him that when he
 22 comes. But it does appear to be something that was picked
 23 up from the Lonmin close-circuit TV system and that's
 24 recorded, Mr Ngalwana thoughtfully reminded us that the
 25 time is not necessarily correct, but it's recorded in the

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1 occurrence book as having been round about 12 o'clock and
 2 as being the K3 Shaft.
 3 MR MADLANGA SC: General, would you
 4 accept that it would take a considerable length of time for
 5 people to walk from the koppie to whichever Karee Mine?
 6 MAJOR-GENERAL MPEMBE: Correct,
 7 Chairperson.
 8 MR MADLANGA SC: During the time
 9 available, taking into account of course the fact that this
 10 was a spontaneous gathering, as you say, should you not
 11 have attempted to use that time, that is the time that
 12 people were moving from the koppie to Karee, to quickly,
 13 quickly plan for how you would deal with them?
 14 MAJOR-GENERAL MPEMBE: No, Chairperson, I
 15 did indicate that I was from leave and you need to
 16 understand the history and the modus operandi of the
 17 people.
 18 MR MADLANGA SC: To understand their
 19 modus operandi so as to be able to deal with them, correct?
 20 MAJOR-GENERAL MPEMBE: To disperse them.
 21 MR MADLANGA SC: So if you do not have
 22 time and therefore you've not been able to study their
 23 modus operandi, so the alternative for you is to just go
 24 straight without even trying to plan and brief the people
 25 on how that plan should be effected?

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1 MAJOR-GENERAL MPEMBE: No, Chairperson.
 2 MR MADLANGA SC: General, you repeatedly
 3 referred the Commission to the principle of situational
 4 appropriateness. You recall that you've done that a few
 5 times, not so?
 6 MAJOR-GENERAL MPEMBE: Correct,
 7 Chairperson.
 8 MR MADLANGA SC: Now in accordance with
 9 that principle or notion, if you had not had time to plan
 10 for the dispersal, nor held a briefing on the dispersal,
 11 did that principle not dictate that the police should
 12 rather let the protesters go back to their destination,
 13 than just pouncing on them without any plan whatsoever?
 14 MAJOR-GENERAL MPEMBE: Chairperson, the
 15 video which I addressed the protesters, it's an objective
 16 evidence.
 17 MR MADLANGA SC: That's not answering my
 18 question, General. What I'm saying is, is it not so that
 19 in accordance with the principle of situational
 20 appropriateness that because you had not had time to plan
 21 for the disarming and dispersal, nor therefore had you held
 22 a briefing on such planning and dispersal, is it not so
 23 that this notion or principle dictated that you should
 24 rather let the people go back to the koppie rather than
 25 pounce on them without a plan, nor a briefing on the plan?

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1 MAJOR-GENERAL MPEMBE: It is correct,
 2 Chairperson. The objective evidence that I wanted to talk
 3 about, I need just to qualify it. Chairperson, it's before
 4 this Commission that I did brief POP members before the
 5 people could be dispersed at the intersection. I did also,
 6 passionately so, requested the protesters to leave their
 7 weapons. I did indicate to the esteemed Commissioners and
 8 the Commission that I did take it upon myself as an
 9 operational commander even not to send Brigadier Calitz,
 10 that I can talk to these people because I know them.
 11 Chairperson, I did indicate to this Commission that I spoke
 12 the language that they did understand, and it is my
 13 submission to this Commission that had they been, listened
 14 to me to have handed their weapons by the time when I
 15 requested them, if when they entered the informal
 16 settlement and we dispersed them, they could not have
 17 attacked the police because they could not have got the
 18 dangerous weapons. In those circumstances, Chairperson,
 19 yes, the principle of situational appropriateness was
 20 applied.
 21 MR MADLANGA SC: Is the POP briefing that
 22 you are referring to in the several matters that you
 23 itemised, the one that took place in the middle of your
 24 negotiation with the protesters?
 25 MAJOR-GENERAL MPEMBE: Correct,

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1 Chairperson, it was the time when we also spoke to Colonel
 2 Merafe and when I have warned them that we should really
 3 act in a very careful manner. I did even use the Tatane
 4 case.
 5 MR MADLANGA SC: General, perhaps we are
 6 talking at cross purposes. I am referring to planning and
 7 briefing prior even to your negotiation with the
 8 protesters, and my question in that context is if you had
 9 not planned, nor held a briefing on the plan, did the
 10 principle of situational appropriateness not dictate that
 11 you should rather not try to intercept the people, rather
 12 let them go back to their destination? That's the
 13 question.
 14 MAJOR-GENERAL MPEMBE: Chairperson, I did
 15 indicate that the situation went very worse from the 12th
 16 after the security people were killed. I did testify that
 17 protesters, those who were getting at work on the 13th, in
 18 the morning of 13th another one was killed, another one was
 19 left to the dead. The community and everybody called the
 20 top senior management of the province to intervene.
 21 Esteemed Commissioners and Chairperson, there was no time
 22 that I could let the people go with dangerous weapons
 23 without intervening. The approach was in line with
 24 situational appropriateness.
 25 MR MADLANGA SC: But can I look at –

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1 COMMISSIONER HEMRAJ: Can I just follow
 2 up on something, please? You've told us that you did not
 3 have time to plan a dispersal because you were on leave,
 4 you didn't know the history and you didn't know the modus.
 5 The question is, could you not have delegated this to one
 6 of your commanders who had been on the scene who did know
 7 the history, who did know the modus? Could you not have
 8 delegated it to one of them to plan the dispersal in the
 9 time that was available?
 10 MAJOR-GENERAL MPEMBE: Chairperson,
 11 Brigadier Calitz was there and Lieutenant-General Merafe
 12 was there, but what I'm indicating is that when I arrived
 13 and in terms of the planning, that could not have been
 14 possible, taking into account the history that I've said
 15 now. I could still have delegated them to plan, but surely
 16 they could not have finished the plan because we did not
 17 know these people, where they were going to, what were they
 18 going to do.
 19 MR MADLANGA SC: General, SAPS on your
 20 own admission in paragraph 5 saw the people leaving the
 21 koppie in the direction of Karee, and you have admitted now
 22 under cross-examination that it would have taken them a
 23 considerable length of time to walk from there to Karee,
 24 and going that way, SAPS did not do anything to the
 25 protesters. They let them go. So my question is, why

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1 should SAPS not have let them go back in the face of the
 2 fact that there wasn't even the slightest planning and
 3 briefing on how SAPS would disperse them and disarm them?
 4 [10:57] MAJOR-GENERAL MPEMBE: Chairperson, in my
 5 briefing I did indicate that we are going to leave them,
 6 but I said without weapons, and we are pleading with them
 7 to leave weapons.
 8 MR MADLANGA SC: From those that were
 9 monitoring them, did you receive any report that on their
 10 way from the koppie to Karee there had been any incidents?
 11 MAJOR-GENERAL MPEMBE: No, Chairperson,
 12 but surely what has happened in the morning of Monday could
 13 have been the protesters.
 14 CHAIRPERSON: You said the morning of
 15 Monday. Don't you mean the morning of Sunday? Lonmin
 16 Security guards were killed the morning of Sunday. We
 17 don't know – unless I'm misunderstanding. We don't know of
 18 anything in particular on the Monday morning, do we?
 19 Except that these people went, or some of them went to
 20 Karee, then turned around and came back. Do you not mean
 21 what happened on the Sunday morning?
 22 MAJOR-GENERAL MPEMBE: Chairperson, what
 23 I'm saying is, you'll remember that, the testimonies that
 24 there is a protester who was reporting on duty who was
 25 killed on his way to work, and there is another one who was

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1 left to dead and when he was admitted at Saffy Hospital he
 2 saw his assailants, after I have met them at the
 3 intersection, coming at the same hospital. He ran away and
 4 he told the police that who assaulted him and wanted to
 5 kill him was in the morning of Monday.
 6 CHAIRPERSON: You learned all that later,
 7 but in answer to the question Mr Madlanga gave you, is it
 8 not perhaps relevant to refer to what you say in para 6 of
 9 your statement GGG12, where you refer to the instructions
 10 the Provincial Commissioner gave you at 12:45. The first
 11 was the gathering at the koppie and those who were marching
 12 illegally from the Karee Mine had to be dispersed. The
 13 second was the police must disarm the protesters at the
 14 koppie, and the illegal marchers, confiscate all dangerous
 15 weapons, and arrest those protesters and marchers refusing
 16 to lay down their weapons. So that was the instruction you
 17 got from the Provincial Commissioner, and now in order to
 18 carry out that instruction did you have time to do any
 19 planning, or did you have to go as quickly as you could to
 20 meet the people while they were marching? Is that correct?
 21 MAJOR-GENERAL MPEMBE: Correct,
 22 Chairperson, after the interception I did task Brigadier
 23 Calitz. He tasked Colonel Merafe, and by that time Colonel
 24 Scott was there, and it did happen on the 13th.
 25 CHAIRPERSON: Yes, so what happened is

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1 you got these instructions from the Provincial
 2 Commissioner. You went to meet the people who were coming
 3 back from Karee. You tried to disarm them by addressing
 4 them and pleading with them to lay down their weapons.
 5 They didn't listen to you and started walking away. In
 6 your judgment as commanding officer, applying the
 7 principles of situational appropriateness, you decided not
 8 to attempt to disarm them at that stage because you feared
 9 there'd be a bloodbath. Is that correct?
 10 MAJOR-GENERAL MPEMBE: Correct,
 11 Chairperson.
 12 CHAIRPERSON: If you had followed Colonel
 13 Merafe's advice, there would probably have been a far
 14 greater, almost certainly have been a far greater loss of
 15 life than actually occurred. Is that correct?
 16 MAJOR-GENERAL MPEMBE: Chairperson, with
 17 the benefit of hindsight, yes.
 18 CHAIRPERSON: Yes, and one of the
 19 principles of situational appropriateness is that if it's
 20 appropriate, people can be arrested later and not on the
 21 scene, because if you arrest them on the scene, the
 22 situation may get out of hand. That's what it says in
 23 paragraph 3.3.4 on page 150 of the document which deals
 24 with situational appropriateness.
 25 MAJOR-GENERAL MPEMBE: Correct,

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1 Chairperson.

2 CHAIRPERSON: It's perhaps an appropriate

3 stage for us to take the tea adjournment. We will take

4 tea.

5 [COMMISSION ADJOURNS COMMISSION RESUMES]

6 [11:32] CHAIRPERSON: The Commission resumes.

7 Major-General, you're still under oath.

8 WILLIAM MPEMBE: s.u.o.

9 CHAIRPERSON: Mr Madlanga.

10 MR MADLANGA SC: Mr Mpofu has indicated

11 that he would like to say something before the Commission.

12 CHAIRPERSON: Well, I suppose we can't

13 stop him. Yes, Mr Mpofu, what would you like to say to us?

14 MR MPOFU: You can, Chairperson -

15 CHAIRPERSON: Stop you, but I won't. I'd

16 very much like to know what you have to tell us.

17 MR MPOFU: Thank you. Chairperson, yes,

18 I just wanted to make an announcement on a relatively

19 serious matter which I've spoken to most people informally

20 about but I thought - I've been instructed to put it on the

21 record because the, well this might be the last time that

22 you see the likes of me here because of the situation that

23 was described before and as a result of that we have

24 launched an application in court to deal with the issue of

25 the assistance to be granted to the applicants.

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1 Chairperson, I just wanted to say one or two

2 things. Firstly, that the application has deliberately

3 been set down for the time during the recess so as to

4 minimise any possible disruption to the important work of

5 the Commission. And also to say that depending on the

6 outcome of course, it may mean the end of the road for us

7 and the applicants that we represent in terms of the

8 participation in the Commission. But we are optimistic.

9 The Commission has been cited, for reasons that would be

10 obvious to lawyers.

11 CHAIRPERSON: It's clearly a necessary

12 party -

13 MR MPOFU: A necessary party.

14 CHAIRPERSON: It is quite appropriate to

15 cite us and you've also cited the other interested parties

16 who are here for the same reason. We were necessary

17 parties.

18 MR MPOFU: Yes.

19 CHAIRPERSON: Some technically-minded

20 practitioner might have taken the point of non-joinder if

21 we hadn't been right joined.

22 MR MPOFU: If you hadn't, yes.

23 CHAIRPERSON: You wouldn't have wanted

24 that, would you?

25 MR MPOFU: Thank you very much,

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1 Chairperson, yes, in fact one of the reasons is exactly

2 that. We would prefer this matter not to be resolved or

3 even to go the technical route. The sooner we get to the

4 substance, the better, and the less likely that it might be

5 disruptive to the work of the Commission.

6 On a lighter note, Chairperson, I just wanted to

7 refer to the fact that this matter has leaked. Yesterday

8 we took the precaution of clearing the room and discussing

9 it here, but it turned out that the speaker system is

10 available to all the rooms. So all the people that were

11 cleared out were listening outside and they were waiting

12 for me when I got out of here. But now it is - the reason

13 why we are doing the formal announcement now is the fact

14 that the papers have now been served, or are in the process

15 of being served.

16 Finally, Chairperson, I just wanted to say that

17 addressing myself to you and the other parties, that we

18 really have tried to avoid reaching this point. You know,

19 Chairperson, that we raised this matter as long ago as

20 October last year and we've done everything within our

21 power to avoid being here. It is actually a miracle that

22 we've managed to get this far and make whatever humble,

23 small contribution that we have made. And also to assure

24 you and the other parties that we are aware that there are

25 interests beyond ours that are affected here, including the

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1 Commission itself, and therefore the matter will be dealt

2 with, with the requisite decency and sensitivity, and

3 always trying to have the least disruption to the work of

4 the Commission. Thank you, Chairperson.

5 CHAIRPERSON: Thank you, Mr Mpofu, and

6 thank you very much for what you've said, which we

7 appreciate very much. We appreciate that serious efforts

8 have been made to ensure that such disruptions as there may

9 be for the Commission and its very important work will be

10 kept to the minimum. Thank you.

11 MR MPOFU: Thank you.

12 CHAIRPERSON: Now Mr Madlanga, are you

13 ready to proceed with your cross-examination?

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

15 Yes, Mr Chairman. General, just to make sure I follow your

16 evidence relating to the couple of questions that were

17 asked by the Chairman just before the adjournment, you are

18 not suggesting that the principle of situational

19 appropriateness is irrelevant prior to the police actually

20 being at the scene? You are not suggesting that, are you?

21 MAJOR-GENERAL MPEMBE: Chairperson,

22 situational appropriateness, it's a tactical decision

23 principle.

24 MR MADLANGA SC: Let me ask it

25 differently. You can, sitting at the JOC, look at the

<p style="text-align: right;">Page 11778</p> <p>1 situation and say it is not advisable, it is not prudent to 2 even go to the scene to do something. You can do that? Or 3 that would be – 4 MAJOR-GENERAL MPEMBE: No, Chairperson. 5 MR MADLANGA SC: I will not waste time on 6 that; we will argue otherwise. I do not want to be 7 misunderstood and to be taken as being insensitive to the 8 killings that had taken place, that's the last thing, 9 General, but all I'm doing by testing your evidence is to 10 try to establish whether SAPS could not have handled the 11 situation differently. Now, General, may I refer you to 12 the statement of Colonel Vermaak, which is GGG17? 13 Paragraph 4 of the statement, have you found it, General? 14 MAJOR-GENERAL MPEMBE: Chairperson, I 15 just want to find - is it the manuscript one or the - 16 MR MADLANGA SC: It is typed, General. 17 It's dated 30, three, zero, August 2012. 18 CHAIRPERSON: Your second bundle and it's 19 behind tab 2 and it's page – no, Vermaak. 20 MAJOR-GENERAL MPEMBE: Is it GGG17? 21 MR MADLANGA SC: Yes, correct, General. 22 MAJOR-GENERAL MPEMBE: I do have it. 23 MR MADLANGA SC: Thank you. I hope the 24 Afrikaans linguists won't laugh at me, let me just try to 25 read from the statement, paragraph 4. Not from the</p>	<p style="text-align: right;">Page 11780</p> <p>1 on the same page and we can proceed, as people do when 2 they're all on the same page. 3 MR MADLANGA SC: Thank you, Mr Chairman. 4 General, I will start from the fifth line, the very last 5 word on that line. "Ek het om 12:13 oor die koppie gevlieg 6 en 'n foto van die groep geneem, foto 1439, wat op die 7 koppie vergader het, en van daar af na die punt gevlieg 8 waar die groepie wat aan die onwettige optog deelgeneem 9 het. Ons die groep gekry waar hulle langs die pad op 'n 10 grondpad langs 'n brug gesit het. Die Lonmin sekuriteit 11 het die groep gemonitor wat op die oog af uit die 12 helikopter vreedsaam gelyk het, alhoewel hulle gewapen was 13 met tradisionele wapens." Do you see the part that says 14 that - 15 CHAIRPERSON: Maybe that could be 16 translated for the benefit of those who don't understand 17 Afrikaans. Perhaps one should begin a little bit earlier 18 by saying "om oor die gebied te vlieg" - or sorry, "met my 19 aankoms." "On my arrival at the JOC at the emergency 20 services offices Lonmin I received an instruction to fly 21 over the area and to give a situation report in connection 22 with a group of people who were participating in a march," 23 I suppose it is. "I flew over the" - this is where you 24 started - "I flew over the koppie at 12:13 and I took a 25 photograph of the group who gathered on the koppie, and</p>
<p style="text-align: right;">Page 11779</p> <p>1 beginning. 2 CHAIRPERSON: I'm sorry page 29. My copy 3 is marked HHH4. There are two statements by Vermaak. 4 MS PILLAY: Chair, there are four of 5 Lieutenant-Colonel Vermaak's statements which are marked as 6 exhibits. This particular one is GGG17. 7 CHAIRPERSON: So is that behind tab 2 in 8 the file? Is that page 25 in the second police file? The 9 way to solve the problem is to look at the dates. There's 10 a statement made at Potchefstroom. 11 MS PILLAY: It is page 25 of - under tab 12 2. 13 CHAIRPERSON: It is page 25 of their 14 bundle and what exhibit number is that? 15 MS PILLAY: GGG17. 16 CHAIRPERSON: GGG17, and does that begin 17 with the words "op" - well I'm reading paragraph 4, "op 18 2012-08-13 was ek aan diens en ontplooi na Lonmin myn." 19 MR MADLANGA SC: That paragraph yes, Mr 20 Chairman, but General - 21 CHAIRPERSON: All I want to know is 22 because there are two statements by Vermaak, or at least 23 two – yes, sorry there are four, well behind tabs 2, 3, 4 24 and 5 are various statements by Vermaak. You're referring 25 to one behind tab 2, which is GGG17, page 25, we're now all</p>	<p style="text-align: right;">Page 11781</p> <p>1 from there I flew to the point where the group had 2 participated in an unlawful procession, or march. We got 3 to the group, or reached the group where they were next to 4 the road, on a ground, a gravel road," I suppose it would 5 be, "who were sitting next to a bridge. The Lonmin 6 security monitored the group who appeared, out of the 7 helicopter, to be peaceful, although they were armed with 8 traditional weapons, knobkieries, assegais, spears, and 9 blankets." That's where you stopped. 10 MR MADLANGA SC: Do you see that, 11 General, especially – 12 MAJOR-GENERAL MPEMBE: Correct, 13 Chairperson. 14 MR MADLANGA SC: - especially the part 15 that says they, "hulle vreedsaam was." They were peaceful. 16 CHAIRPERSON: "Op die oog af," they 17 appeared to be peaceful, I think. 18 MR MADLANGA SC: Yes, yes. Do you see 19 that, General? 20 MAJOR-GENERAL MPEMBE: Correct, 21 Chairperson. 22 MR MADLANGA SC: Now can I refer you to 23 the fifth line, just above the number 5, for paragraph 5 24 starting from the word "ons" where it reads "Ons het om 25 die," it says "groeg," I think it should be "groep gesirkel</p>

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1 met die helikopter en die groep het rustig aangeloop en die
 2 polisiemanne versprei agter die groep myners.”
 3 CHAIRPERSON: That is I take it “we
 4 circled around the group with the helicopter and the group
 5 walked peacefully forward,” I suppose proceeded peacefully,
 6 “and the policemen were scattered, or behind the group of
 7 miners.” Scattered or spread I suppose, “and the police
 8 were spread out behind the group of miners.”
 9 MR MADLANGA SC: Do you see that as well,
 10 General?
 11 MAJOR-GENERAL MPEMBE: Correct,
 12 Chairperson.
 13 MR MADLANGA SC: Just before the throwing
 14 of teargas, stun grenades and then the killings, had any
 15 reports of rowdiness or even any other incidents been
 16 reported to you by this particular group? I’m not talking
 17 about what had happened in the morning. By this group
 18 from, as it was being monitored, walking from the koppie,
 19 down that way and Colonel Vermaak sees them appearing to be
 20 peaceful, “en rustig aangeloop,” and so on.
 21 MAJOR-GENERAL MPEMBE: No, Chairperson.
 22 MR MADLANGA SC: Now, General, as a
 23 police officer who, from your evidence we understand has
 24 experience in Public Order Policing, can you tell the
 25 Commission what you consider the value of planning and of

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1 holding a briefing on the planning to be? That is planning
 2 a crowd management operation, what is the value of the two,
 3 that is one planning and then briefing, having a briefing
 4 on the planning. Is there any intrinsic value in the two?
 5 MAJOR-GENERAL MPEMBE: Correct,
 6 Chairperson, there is a value.
 7 MR MADLANGA SC: And what, very briefly,
 8 would you say it is?
 9 MAJOR-GENERAL MPEMBE: You need to know
 10 precisely - first of all you have to determine what is a
 11 problem and formulate the mission, link the mission with
 12 what you want to achieve, and then from there you need also
 13 to check the environment.
 14 [11:52] You need also to check the means that is,
 15 resources that you have, and then also you need to check in
 16 terms of the legal principles and everything should be in
 17 the plan, and later each and every person has to understand
 18 what is expected of him or her.
 19 MR MADLANGA SC: Is it not so that lack
 20 of planning and briefing, rather than avert - whatever it
 21 is that the crowd management might have been intended to
 22 avert, it just might cause harm? It’s a possibility. Is
 23 that so or not?
 24 MAJOR-GENERAL MPEMBE: I just want – may
 25 you please repeat your question?

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1 MR MADLANGA SC: Is it not so that if
 2 police do not plan for a crowd management operation, the
 3 lack of planning and therefore even the lack of briefing or
 4 a briefing on the plan, rather than avert possible harm
 5 that the crowd management operation is intended to avert,
 6 just might have the opposite effect, which is actually
 7 result in harm? Is that a possibility?
 8 MAJOR-GENERAL MPEMBE: Chairperson, maybe
 9 if I may be given an example? Because according to me the
 10 situations differ.
 11 MR MADLANGA SC: General, I will not give
 12 an example. Let me just to cut to the chase say that in
 13 argument we will submit that what I’m suggesting might
 14 happen, and then I will move on to the next question. What
 15 is your comment to that?
 16 MAJOR-GENERAL MPEMBE: Chairperson, I did
 17 indicate that in crowd management there are two instances.
 18 The first one is where a notice has to be served.
 19 According to the doctrine of the police and the history, we
 20 have never had any problem with regard to that one. We had
 21 what we call a spontaneous gathering and in my experience I
 22 have said I’ve intervenes in many spontaneous gatherings
 23 and if these spontaneous gatherings are illegal, we try to
 24 make them legal and we avert any other matter, and the
 25 planning does take place in a correct way. According to

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1 the Regulations of Gatherings, Standing Order 262 and the
 2 Constitution, if all role-players play according to the
 3 law, planning does take place. Chairperson, in my
 4 experience all the gatherings then could take place, even
 5 though in the spontaneous gathering we do open a docket.
 6 MR MADLANGA SC: General, first I must
 7 apologise to the Commission, but this is something I’m
 8 going to, because of the answers that I am getting –
 9 may I refer to exhibit 221 – TT1, I’m sorry. TT1.
 10 CHAIRPERSON: Tell us what that is, Mr
 11 Madlanga.
 12 MR MADLANGA SC: It’s the Goldstone
 13 Commission –
 14 CHAIRPERSON: Oh yes, the extract from
 15 the book.
 16 MR MADLANGA SC: Yes, and typed page 37,
 17 Commissioners and General, typed page 37.
 18 MAJOR-GENERAL MPEMBE: Chairperson, I’m
 19 sorry, is it with regard to exhibit FFF1?
 20 MR MADLANGA SC: General, I see from the
 21 signalling from my colleague Mr Wesley that you are there
 22 now. Let me just read under the heading, “Command and
 23 control of police,” the following appears –
 24 CHAIRPERSON: - page of TT1 –
 25 MR MADLANGA SC: Typed 37, Mr Chairman,

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1 foot of the page.

2 MAJOR-GENERAL MPEMBE: Correct,

3 Chairperson.

4 MR MADLANGA SC: Yes, it reads, "Each of

5 the preceding scenarios presumes the effective deployment

6 of tactics within some clearly formulated strategy. It is

7 of the utmost importance that the policing of public order

8 operations is characterised by thorough planning and

9 preparation. Senior officers must consider and make

10 contingency plans for various scenarios from those thought

11 to be highly probable through to those considered possible,

12 however unlikely. Through these means the police will

13 avoid being surprised by unexpected events, and thus retain

14 maximum control over their own officers and the events

15 themselves." You see that?

16 MAJOR-GENERAL MPEMBE: Correct,

17 Chairperson.

18 MR MADLANGA SC: When you left the JOC,

19 did you not foresee that the protesters coming from Karee

20 might not heed whatever instructions you gave them, might

21 not agree to disarm voluntarily. Did you not foresee that?

22 MR NGALWANA: Chairperson, to be fair to

23 the witness, the excerpt that my learned friend has just

24 read into the record begins with "Each of the preceding

25 scenarios presumes," and then it goes on, and the witness

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1 is not aware what these preceding scenarios are. So to the

2 extent that that may be relevant there is no context to the

3 question –

4 CHAIRPERSON: How do we know he doesn't

5 know? This is a book I would expect any person of his rank

6 to have studied at some stage?

7 MR NGALWANA: Well I ask –

8 CHAIRPERSON: It's a leading work

9 effectively on Public Order Policing. It's commentary to

10 the act which was prepared while the act was still a bill,

11 by the people who drafted the bill. You mean to tell me

12 this witness doesn't know the book?

13 MR NGALWANA: Well, two things, Chair.

14 Firstly it would have –

15 CHAIRPERSON: I find that extraordinary.

16 MR NGALWANA: It would have helped for

17 our learned friend to have, if you like, precognise the

18 witness that this is one of the documents to which he would

19 refer him. He hasn't done that. Secondly, you'll recall

20 that in examination-in-chief I think I asked the witness

21 have you published any book, have you read any published

22 work, to which the answer was no.

23 CHAIRPERSON: I missed that, but if

24 that's what you say then obviously the point make is a

25 valid one. The witness is entitled to know what the

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1 preceding scenarios are.

2 MR MADLANGA SC: General –

3 CHAIRPERSON: Mr Madlanga, can you just

4 shortly indicate to him what the preceding scenarios are so

5 that he then will be able to deal with the passage that

6 you, in particular that you are putting to him?

7 MR MADLANGA SC: General, if I understand

8 the document correctly, I would say the scenarios are those

9 appearing in the bullets just above where I read from. Do

10 you see those? Let me just quickly, quickly read them.

11 "When there is a specific reason to believe that the

12 participants in a demonstration are likely to vastly

13 outnumber the available police and are likely to do grave

14 injury to the police if they are not stopped, units armed

15 with lethal weapons, including shotguns, should be

16 available, but at a distance behind the most exposed and

17 endangered frontlines of the police, attempting to block

18 the demonstration. Preferably they should be kept out of

19 sight until needed. Under ordinary circumstances police

20 performing duties in connection with the demonstration

21 should not be armed with a shotgun or any other lethal

22 weapon other than a holstered pistol. Every effort should

23 be spent on developing and dispensing the most effective

24 range of sub-lethal distancing devices. Lethal force

25 should not ordinarily be used to prevent demonstrators from

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1 reaching a location where they are likely to destroy

2 property, but not endanger lives. Lethal force is never

3 justified to prevent a demonstration encircling and

4 overrunning a police blockading position if it is possible

5 to bring forth sufficient reinforcement to eliminate the

6 reasonable and imminent risk of death or serious injury to

7 the police officers. Specially armed units can be called

8 upon only at the request of the officer in charge of

9 policing the demonstration. Even thereafter use of lethal

10 force should only be on the order of the commander of the

11 special unit, who must be satisfied that the lives of

12 officers would be severely endangered by any delay in the

13 use of lethal force. The Commissioner of Police should

14 attempt to define with greater precision the situations in

15 which lethal force should be used to prevent a

16 demonstration from moving toward its goal, despite the

17 likely cost in lives and the damage that may be done by a

18 crowd dispersed into small and angry groups prone to riot.

19 Any resulting directive should be open for comment by

20 interested parties before it is publicly promulgated by the

21 Minister of Law and Order."

22 MR NGALWANA: Chairperson, with respect,

23 this is ambush cross-examination. The Chairperson has made

24 a ruling before that if a document is going to be referred

25 to, if a witness is going to be referred to a document, it

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1 should be given at least the day before. Secondly, what my
 2 learned friend terms "scenarios" appear to be
 3 recommendations on a quick glance of this document.
 4 Scenarios seem to appear from page 30, and there's a whole
 5 host of writing on what those scenarios are. It starts
 6 with picketing –
 7 CHAIRPERSON: Mr Ngalwana, I wonder
 8 whether the answer isn't that, it looks to me as if you're
 9 not going to finish your cross-examination by the time we
 10 adjourn today; it's going to resume next term, if I can
 11 call it that, after the short recess we're taking. So
 12 perhaps if the witness can be asked to study this book -
 13 which he should actually have studied before, but anyway,
 14 we won't go into that now – and you can then ask him about
 15 it next term. I think Mr Ngalwana is right; the scenarios
 16 actually are set out from page 30 and following and it will
 17 take quite a lot of time now anyway to undo the effect of
 18 any possible ambush. I'm not saying there was an ambush,
 19 but if there was one it's difficult to undo the effect of
 20 it in the time available, so perhaps you could keep this
 21 point for next time. The witness will then actually be
 22 able to give you a more informed answer, which will help us
 23 more than would otherwise be the case.
 24 MR MADLANGA SC: Thank you, Mr Chairman,
 25 and I take my learned friend's point. Thank you. General,

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1 you said you received your instruction at 12:45 from
 2 Lieutenant-General Mbombo to go to disperse the protesters
 3 coming from Karee. I understand your evidence, and this is
 4 something you said repeatedly, to be that an operational
 5 commander is the one who ultimately decides whether or not
 6 a crowd management operation should take place at all. Did
 7 I understand you correctly?
 8 MAJOR-GENERAL MPEMBE: No, Chairperson.
 9 I did not say so, but what I'm saying is an overall
 10 commander is appointed by either a National Commissioner,
 11 Provincial Commissioner, and even a cluster commander,
 12 hence I submitted the structure, and then the overall
 13 commander then does appoint the operational commander. By
 14 the OB entry, to me it was to say I appoint him as an
 15 overall commander.
 16 [12:12] MR MADLANGA SC: But also it's an
 17 instruction to go and disperse the crowd coming from Karee,
 18 not so?
 19 MAJOR-GENERAL MPEMBE: That is the
 20 mission.
 21 MR MADLANGA SC: And you were the
 22 operational commander.
 23 MAJOR-GENERAL MPEMBE: No, Chairperson.
 24 MR MADLANGA SC: Does your evidence not
 25 say that in respect of what was happening on the 13th you

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1 were the operational commander? Is that not your evidence?
 2 MAJOR-GENERAL MPEMBE: No, Chairperson.
 3 MR MADLANGA SC: General, I do understand
 4 that in respect of the events throughout the entire period,
 5 you were the overall commander -
 6 CHAIRPERSON: I'm sorry, Mr Madlanga, no
 7 I think the answer to what you're putting is in paragraph 3
 8 of the witness's statement, page 1 of the police statement
 9 bundle. He says on Monday 13 August, 8:30 he attended the
 10 interim joint operational centre established at Lonmin. He
 11 arrived with Lieutenant-General Mbombo and Major-General
 12 Naidoo. "Lieutenant-General Mbombo then appointed me as
 13 the commander, joint operational centre. In that capacity
 14 I was also the overall commander of the operation to
 15 restore public order to the Marikana area. Brigadier
 16 Calitz had already been appointed as the operational
 17 commander. Brigadier Seboloke the acting [inaudible]
 18 commander was the operation room commander," and then later
 19 on in his, I think it was his supplementary statement –
 20 yes, his supplementary statement, page 3A, in paragraph 6
 21 he says that, he gives the reason why he did not task
 22 Brigadier Calitz, who was the operational commander, to
 23 lead this interception of marchers near the railway line,
 24 and the reasons you see set out in the paragraph. So I
 25 understand you may be making a slightly different point,

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1 but he's correct in saying that his evidence was he was the
 2 overall commander appointed by Lieutenant-General Mbombo.
 3 Brigadier Calitz was the operational commander, but for
 4 this particular operation he didn't give him the task of
 5 doing it for the reasons he mentions, and he effectively
 6 took charge of it himself. I think that's a fair summary
 7 of what he said. If I'm wrong, he will correct me.
 8 MAJOR-GENERAL MPEMBE: Chairperson, it's
 9 correct.
 10 MR MADLANGA SC: General, was there an
 11 operational commander for the crowd management operation
 12 that sought to disperse the protesters that were coming
 13 from Karee? Was there an operational commander for that
 14 specific crowd management operation?
 15 CHAIRPERSON: I think you mean de facto.
 16 Mr Ngalwana can translate that for us into English, but you
 17 mean the de facto operational commander, don't you?
 18 MR MADLANGA SC: Yes, yes, yes, Mr
 19 Chairman.
 20 CHAIRPERSON: Mr Ngalwana is not
 21 listening, so it's in fact the operational commander.
 22 MR MADLANGA SC: Yes, I don't mean
 23 somebody sitting in an office somewhere. As the police are
 24 going with the specific purpose of dispersing the
 25 protesters coming from Karee, was there somebody who

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1 physically acted as the operational commander, and if there
 2 was, who was that?
 3 MAJOR-GENERAL MPEMBE: According to GGG12
 4 read by the Chairperson, Brigadier Calitz was already been
 5 appointed before my arrival as an operational commander.
 6 CHAIRPERSON: But the point is you didn't
 7 send him to be in charge of that particular operation for
 8 the reasons you gave, and one of them was you understand
 9 the people, you speak the language and he doesn't. So you
 10 didn't send him; you went yourself. So what's being put to
 11 you is that he wasn't in fact in charge of that operation
 12 because for the reasons that you mentioned, and what Mr
 13 Madlanga wants to know is who was in charge of the
 14 operation, to use that expression. Was it you, or was it
 15 somebody else? Am I reading your question correctly?
 16 MAJOR-GENERAL MPEMBE: I did testify
 17 according to my statement that I went there as an overall
 18 commander with POP commanders.
 19 MR MADLANGA SC: But by relieving him of
 20 his duties in respect of that specific task, you assumed
 21 those tasks yourself, did you not?
 22 MAJOR-GENERAL MPEMBE: Chairperson,
 23 Brigadier Calitz reports also to me.
 24 MR MADLANGA SC: General, if the reasons
 25 that you give for relieving General Calitz of his tasks

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1 were not in existence, is it not so that as operational
 2 commander he is the one who would have physically gone to
 3 attend to the dispersal of the protesters on the 13th of
 4 August? Is that not so?
 5 CHAIRPERSON: We've just received copies
 6 of the statements, exhibit HHH15.1 and following, which
 7 were promised to us. Thank you, Mr Ngalwana, for arranging
 8 it.
 9 MR NGALWANA: Thank you, Chair. Would
 10 this perhaps be an appropriate time to give it an
 11 appropriate description?
 12 CHAIRPERSON: I think let's attend to
 13 that first business when we resume after the recess. You
 14 can prepare, you can get one of your people sitting here to
 15 prepare a schedule of what they are, and so we can work
 16 from there.
 17 MR NGALWANA: Thank you, Chair.
 18 MR MADLANGA SC: Now but for the reasons
 19 that you give, General, my question is, is it not so that
 20 Brigadier Calitz would have been the one that would perform
 21 all the tasks of an operational commander in respect of the
 22 dispersal of the protesters that were coming from Karee?
 23 MAJOR-GENERAL MPEMBE: Correct,
 24 Chairperson, under my guidance.
 25 MR MADLANGA SC: But because you relieved

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1 him of those duties, therefore he did not go there
 2 physically; you yourself assumed those duties. Yes, I
 3 understand you're the overall commander, but because you do
 4 not let the operational commander go there, so you assumed
 5 the duties of an operational commander. Is that so? So
 6 you were carrying – or rather, you had on two caps, so to
 7 speak; overall commander performing the duties of an
 8 operational commander as well. Is that so?
 9 MAJOR-GENERAL MPEMBE: Correct,
 10 Chairperson, as a senior officer I'm also expected and as a
 11 General I'm also expected to do hands-on management.
 12 MR MADLANGA SC: General, very sadly with
 13 the loss of five lives, I would expect that you agree with
 14 me that the operation was a complete failure. Do you not
 15 agree?
 16 CHAIRPERSON: You picked a big word, Mr
 17 Madlanga. He did say that with hindsight, in response to a
 18 question he was asked earlier, if he hadn't done what he
 19 did, there might – and had carried out what Lieutenant-
 20 Colonel Merafe wanted him to do, there would have been a
 21 much greater bloodbath than there in fact was. So there
 22 would have been far more bloodshed than actually took
 23 place. He said with hindsight one realised that. So to
 24 describe what he did as a complete failure is I think
 25 possibly going a bit far. He may well agree that it didn't

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1 turn out as it should have done and was a failure to some
 2 extent, but I doubt very much whether the word "complete"
 3 is appropriate.
 4 MR MADLANGA SC: Let me ask it
 5 differently then, Mr Chairman. General, was it a success?
 6 MAJOR-GENERAL MPEMBE: Chairperson, I did
 7 say, also to use the words of Adv Madlanga, *condictio sine*
 8 *qua non*. Had the protesters listened to me, leave the
 9 weapons and go without weapons to the hill, they could not
 10 have attacked the police, and therefore to me the plan that
 11 I had could not be judged in that light because the plan
 12 that I had, it could have been a complete success.
 13 MR MADLANGA SC: But the plan that you
 14 are referring to was, so to speak, a contingency plan, a
 15 plan that you thought of on the spur of the moment once the
 16 protesters did not heed what you were suggesting to them
 17 when you were negotiating with them, not so?
 18 MAJOR-GENERAL MPEMBE: Chairperson, not
 19 necessarily that, but the manner in which that march or
 20 demonstration was handled, it is completely within crowd
 21 management policing in terms of negotiation, continue
 22 negotiation, persuasion, move away from them, don't
 23 antagonise them, and use proper continuum force. That has
 24 been complied within the policies of South African Police
 25 Service, including enduring the threats and the manner in

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1 which they were talking to us. We handled ourselves with
 2 tolerance and we handled the police with constraint, even
 3 if after the shooting, Chairperson, I was the person who
 4 said to the police, "Let us withdraw."
 5 MR MADLANGA SC: General, I want you to
 6 bear this context in mind before I ask you the next
 7 question. What the police had set out to do was to disarm
 8 and disperse - or I'm not quite sure, you sometimes use the
 9 reverse order - the protesters. Now bearing that in mind,
 10 now with the exception of two knobkieries and one sharpened
 11 iron that according to Lieutenant-Colonel Botha were picked
 12 up at the scene of the killings of the 13th, the protesters
 13 were not even dispossessed of their weapons on that day.
 14 Correct?
 15 MAJOR-GENERAL MPEMBE: Correct,
 16 Chairperson.
 17 MR MADLANGA SC: In retrospect, General,
 18 do you not think that the operation might well have been
 19 handled differently?
 20 MAJOR-GENERAL MPEMBE: No, Chairperson, I
 21 even said that situational appropriateness was applied.
 22 MR MADLANGA SC: Now as somebody who had
 23 assumed the tasks of an operational commander, do you agree
 24 that you had a discretion either to implement, or rather
 25 carry out, or not to carry out the instructions that you

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1 had received from Colonel Mbombo? Do you accept that you
 2 had a discretion?
 3 CHAIRPERSON: Lieutenant-General Mbombo.
 4 MR MADLANGA SC: Lieutenant-General
 5 Mbombo.
 6 MAJOR-GENERAL MPEMBE: Correct,
 7 Chairperson.
 8 MR MADLANGA SC: If you had that
 9 discretion, don't you think it would have been prudent not
 10 to attempt to disperse and disarm the protesters without
 11 having planned how you would go about it, and briefed the
 12 participants on the matter?
 13 MAJOR-GENERAL MPEMBE: Chairperson, I've
 14 already testified that the situations from Sunday, Monday
 15 in the morning, and senior top police officials being
 16 called at, in, at the Lonmin area to intervene, and the
 17 community's fear, it could not have been possible to, not
 18 to intervene at that time.
 19 CHAIRPERSON: Major-General, you've in
 20 fact answered this question in anticipation in paragraph 7
 21 of your supplementary statement, which is page 4A of the
 22 statement bundle. Is that still your answer that you give
 23 to the question, or do you now in response to what Mr
 24 Madlanga has put to you wish to change that answer?
 25 MAJOR-GENERAL MPEMBE: I just want maybe

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1 to check on my supplementary.
 2 [12:32] CHAIRPERSON: Paragraph 7 of your
 3 supplementary statement, which is page 4A of the statement
 4 file that's been prepared for your evidence. In para 7 you
 5 deal with the criticism which is effectively being put to
 6 you now by Mr Madlanga that there was no plan for your
 7 interception of the group near the railway line, and you
 8 set out your answer to that criticism, and the question I'm
 9 asking you, is that the answer you still give to the point
 10 that Mr Madlanga has now put to you, or do you wish to
 11 amplify or vary or qualify what you say there in answer to
 12 the point that Mr Madlanga has put?
 13 MAJOR-GENERAL MPEMBE: Chairperson, I
 14 will stick to the one that is here. Thanks, Chairperson.
 15 MR MADLANGA SC: General, you agree that
 16 the use of - or rather the use of teargas and stun grenades
 17 constitutes the use of force in terms of crowd management
 18 by Public Order Police?
 19 MAJOR-GENERAL MPEMBE: Correct,
 20 Chairperson, it's called minimum force. It's called
 21 continuum force.
 22 CHAIRPERSON: Non-lethal force.
 23 MAJOR-GENERAL MPEMBE: Correct,
 24 Chairperson.
 25 MR MADLANGA SC: Can you have a look,

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1 General, at paragraph 11(5) of exhibit SS2, that is
 2 Standing Order General 262.
 3 CHAIRPERSON: [Inaudible]
 4 MR MADLANGA SC: 11(5), Mr Chairman.
 5 CHAIRPERSON: Page 143 of the first
 6 bundle handed in by the police in regard to this witness's
 7 evidence.
 8 MR MADLANGA SC: Just to make sure,
 9 General, that you're at the right place, I'm not referring
 10 to - see for instance 11, that is 11.1, 2, and then under 2
 11 there's 1, 2, 3, 4, 5. I'm not referring to that 5. Below
 12 that five you'll see (3) and then the 5 that I'm referring
 13 to is at the next page.
 14 CHAIRPERSON: That's why I told him it's
 15 page 143.
 16 MR MADLANGA SC: Thank you, Mr Chairman.
 17 Are you there, General?
 18 MAJOR-GENERAL MPEMBE: Correct,
 19 Chairperson.
 20 MR MADLANGA SC: And you do see that it
 21 reads, "Force may only be used on the command or
 22 instruction of the CJOC or operational commander, if
 23 appointed. Members may never act individually without
 24 receiving a command from their commander." Do you see
 25 that?

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1 MAJOR-GENERAL MPEMBE: Correct,
 2 Chairperson. Also just maybe to say when we talk about
 3 Standing Order 262, we need also to check the background of
 4 it so that it should also be interpreted in the right
 5 context.
 6 MR MADLANGA SC: I understood your
 7 evidence, if I understood it correctly, to be that you as
 8 CJOC and as the person who had assumed the duties of an
 9 operational commander never gave an instruction for the use
 10 of teargas. Did I understand you correctly?
 11 MAJOR-GENERAL MPEMBE: Correct,
 12 Chairperson.
 13 CHAIRPERSON: In fact you said that at
 14 Potchefstroom somebody said that you had given the order
 15 and you said it was not correct, and that's still your
 16 stance; you didn't give the order. The person who alleges
 17 you did was not telling the truth, mistaken or something of
 18 that sort. Is that right?
 19 MAJOR-GENERAL MPEMBE: That's correct,
 20 Chairperson.
 21 MR MADLANGA SC: It stands to reason then
 22 that the use of teargas and stun grenades on that day was
 23 in violation of this specific prescript, correct?
 24 MAJOR-GENERAL MPEMBE: No, Chairperson.
 25 MR MADLANGA SC: How is that so if you as

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1 the person that was working as the operational commander
 2 and who was also the CJOC did not give the instruction, and
 3 11(5) days that you should give the instruction? How is it
 4 that it cannot be in violation of that specific paragraph?
 5 MAJOR-GENERAL MPEMBE: Chairperson, in
 6 any operation firstly I will say Warrant-Officer Kuhn said
 7 he heard an instruction. Secondly I would say that in any
 8 operation, even if when you are an operational commander,
 9 there are section commanders that can give an instruction.
 10 But in that day I did not give an instruction, but what I
 11 also said, keeping earlier on with my briefing there at the
 12 scene, I did indicate that people should not go through the
 13 informal settlement.
 14 MR MADLANGA SC: Show me a provision –
 15 MAJOR-GENERAL MPEMBE: I'm sorry,
 16 Chairperson, may I just have some few minutes just to –
 17 CHAIRPERSON: You want me to take a short
 18 adjournment?
 19 MAJOR-GENERAL MPEMBE: Please.
 20 CHAIRPERSON: Yes, of course. We will
 21 take the adjournment for five minutes and if it's not long
 22 enough you can tell me. We will resume when you tell us
 23 so.
 24 MAJOR-GENERAL MPEMBE: I'm just rushing
 25 out.

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1 CHAIRPERSON: Yes, yes, I understand.
 2 We'll now adjourn.
 3 [COMMISSION ADJOURNS COMMISSION RESUMES]
 4 [12:45] CHAIRPERSON: The Commission resumes.
 5 After that short comfort break, Major-General, you're still
 6 under oath.
 7 WILLIAM MPEMBE: s.u.o.
 8 CHAIRPERSON: Mr Madlanga, you're still
 9 cross-examining.
 10 CROSS-EXAMINATION BY MR MADLANGA SC (CONTD.):
 11 Yes, thank you, Mr Chairman. General, if I'm not mistaken
 12 you were at the point where you were about to explain why
 13 it is that the use of teargas and stun grenades on the 13th
 14 was not in violation of paragraph 11(5) of Standing Order
 15 262, seeing that no instruction had been given by the
 16 person who had assumed the duties of an operational
 17 commander, or by the CJOC.
 18 MR NGALWANA: Sorry, my learned friend
 19 seems to move from the premise - my learned friend's
 20 premise seems to be that the only persons who can give an
 21 order in terms of Standing Order 11(5) if the CJOC
 22 operational commander. Now if that's the proposition that
 23 he's putting to the witness, it's clearly not correct.
 24 Perhaps he would want to –
 25 CHAIRPERSON: No, it's based upon the

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1 wording of paragraph 11(5) of the Standing Order, which you
 2 will find at page 143 of the bundle of documents the SAPS
 3 handed in.
 4 MR NGALWANA: Yes, that's what I'm
 5 reading. It doesn't say what he's putting to the witness.
 6 CHAIRPERSON: Alright, well let's – you
 7 hear the, perhaps I misunderstood the objection. Mr
 8 Madlanga, you heard the point made by your learned friend.
 9 Perhaps you can take it aboard and reformulate your
 10 question?
 11 MR MADLANGA SC: Perhaps I would be able
 12 to do so, Mr Chairman, if my learned friend indicates what
 13 his own reading of 11(5) is.
 14 CHAIRPERSON: Never mind his objection;
 15 you just put the question in terms of what paragraph 11(5)
 16 says and as long as you stick to the wording of 11(5) then
 17 I don't know that any other reading can change what the
 18 wording says.
 19 MR MADLANGA SC: Let me read the first
 20 sentence. "Force may only be used on the command or
 21 instruction of the CJOC or operational commander, if
 22 appointed." That is what it says. So –
 23 CHAIRPERSON: You've told us that you
 24 were functioning as the, effectively as the operational
 25 commander because the operational commander that had been

1 appointed wasn't there and you explained that you very
2 properly were exercising those functions, as I understand
3 it. You were also the CJOC. So you were the only person,
4 it would seem, who was authorised under the Standing Order
5 to give an instruction for the use of force. I think
6 that's the proposition being put and you have made it quite
7 clear that for reasons which you've explained you gave no
8 order that force be used. Is that correct?

9 MAJOR-GENERAL MPEMBE: Correct,
10 Chairperson. I also maybe want to give my understanding of
11 that Standing Order. It also says members may never act
12 individually without receiving a command from their
13 commander and in my understanding is that if an operational
14 commander is not there, or a CJOC, any command of the
15 section, if the operation is too big he can give a command
16 in terms of the utilisation of the teargas.

17 CHAIRPERSON: The trouble is you've got
18 to read of course subparagraph (5) on the basis that that's
19 the one that deals with force, but if you get an order from
20 someone and you don't know the person is your commander,
21 and in fact you have no knowledge as to who is giving you
22 the so-called command, is it appropriate to carry it out?
23 Remember, I think he's Warrant-Officer, Warrant-Officer
24 Kuhn says according to his statement, he didn't know who
25 gave the so-called command, if it was in fact given. So

1 making the assumption in favour of him for the moment that
2 such a command was given, he didn't know who gave it; he
3 didn't know it was given by his, someone who was in command
4 of him. How many officers were there on the scene apart
5 from you, commissioned officers? Sorry, I put the question
6 too broadly. How many section commanders were on the
7 scene?

8 MAJOR-GENERAL MPEMBE: Chairperson, I did
9 have Lieutenant-Colonel Merafe. I also have, had
10 Lieutenant-Colonel Tsiloane.

11 CHAIRPERSON: Who is Warrant-Officer
12 Kuhn's section commander?

13 MAJOR-GENERAL MPEMBE: Warrant-Officer
14 Kuhn come from Johannesburg. It's either Lieutenant-
15 Colonel Tsiloane and also Lieutenant Baloyi was also coming
16 from Johannesburg.

17 CHAIRPERSON: Baloyi we know was in a
18 Nyala some distance away. He didn't give any command, and
19 it's not suggested, as I understand, that the other
20 gentleman you mentioned gave a command either. So
21 therefore it would seem that Warrant-Officer Kuhn had no
22 basis to believe, on what we know, that he'd received this
23 command from his section commander, and he certainly hadn't
24 received it from you. So the question that's been put to
25 you is - I understand a stun grenade may be different

1 because by the time the stun grenade was used, there was a
2 situation where situations of self-defence or private
3 defence may have operated, but as far as the teargas was
4 concerned, the point being put to you by counsel is that
5 the action of Warrant-Officer Kuhn in firing off the
6 teargas canister appears to be unauthorised and contrary to
7 the Standing Order. Now do you agree with that proposition
8 that he's putting to you?

9 MAJOR-GENERAL MPEMBE: Chairperson, in my
10 understanding is that Standing Order 262, that the same
11 paragraph says "may," I thought, or I'm thinking that it
12 does also give Warrant-Officer Kuhn a discretion, but as
13 Warrant-Officer Kuhn said he didn't hear, that is also what
14 I had in mind.

15 CHAIRPERSON: Well you know, 11(5) says
16 "may only," it's not "may" by itself, it's "may only be
17 used on the command or instruction of the CJOC or
18 operational commander, if appointed." Now we won't go into
19 the sectional commander point that you raised, which may or
20 may not be right, but it's not relevant for purposes of the
21 present discussion. I mean the whole system of the
22 Standing Order would fall apart if the position was that
23 any warrant-officer could take it upon himself to fire off
24 a teargas canister when he thought it appropriate. The
25 whole point of the Standing Order, I think you'll agree, is

1 that the use of force, even non-lethal force like a teargas
2 canister, is something that has to be strictly controlled
3 in the interest of the police and the interest of the
4 public. Isn't that right?

5 MAJOR-GENERAL MPEMBE: Correct,
6 Chairperson.

7 CHAIRPERSON: Thank you.

8 MAJOR-GENERAL MPEMBE: Chairperson, based
9 on the interpretation and the understanding, I do agree
10 that there should have been a command.

11 CHAIRPERSON: The teargas canister
12 appears to have been the "vonk," the spark that led to the
13 trouble, and that's not something that can be laid at your
14 door at all; you didn't give any such command. If you
15 considered it necessary, you would have, I take it. So
16 what went wrong can't be blamed on you. Would you agree
17 with that?

18 MAJOR-GENERAL MPEMBE: Chairperson,
19 firstly I need to explain that on the proposition that Kuhn
20 had an instruction, I also said that with regard to my
21 earlier briefing that people should not go, I did also have
22 an understanding that who might ever have given an
23 instruction should have been in accordance with my earlier
24 briefing.

25 CHAIRPERSON: Whoever gave the

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1 instruction had to be authorised to do so. Some officer
 2 couldn't, if it was an officer, couldn't just take it into
 3 his head to give an instruction; it had to be someone
 4 authorised. Is that correct? I don't think you can
 5 quarrel with that too.
 6 MAJOR-GENERAL MPEMBE: Correct,
 7 Chairperson.
 8 MR NGALWANA: Chair, in that vein it may
 9 or may not be helpful, the Chairperson asked the witness to
 10 list the number of commissioned officers who were there.
 11 He had started along that path –
 12 CHAIRPERSON: We're not talking about
 13 commissioned officers. We were talking about firstly in
 14 terms of the Standing Order it's got to be the CJOC or the
 15 operational commander, if there was one. He talked about
 16 the sectional commanders and the question was, I mean
 17 someone who is a sectional commander from another section
 18 can't, couldn't give an order to Kuhn, and in any event,
 19 this is a matter you can deal with in re-examination if you
 20 consider it appropriate. Mr Madlanga, please carry on.
 21 MR MADLANGA SC: Mr Chairman, I just -
 22 may I –
 23 MR BIZOS SC: Mr Chairman, I have been
 24 waiting for an opportunity, with your permission, to make a
 25 simple comment. Counsel has the right to object, but not

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1 offer exonerating suggestions.
 2 CHAIRPERSON: What you said has been
 3 taken aboard by those affected. Thank you, Mr Bizos. Mr
 4 Madlanga, please proceed. It's nearing the end of today's
 5 sitting, Mr Madlanga, so when you reach an appropriate
 6 stage -
 7 MR MADLANGA SC: Yes, yes.
 8 CHAIRPERSON: - please tell me.
 9 MR MADLANGA SC: Yes. Mr Chairman, just
 10 for the record, at this stage I don't think it should be
 11 taken as a fact that – let me loosely refer to it as the
 12 pandemonium – that it only started, or rather that it
 13 started immediately after the use of the teargas because
 14 there is another view that suggests that it was only after
 15 the use of the stun grenades, yes. But it doesn't change
 16 the point you're making.
 17 CHAIRPERSON: Yes, I may have put my
 18 prima facie view too strongly. I thought I, I think I
 19 intended to say, but I may not have succeeded, generally to
 20 say that it may well be that as far as the stun grenade was
 21 concerned, that that may have been thrown by Lieutenant
 22 Baloyi in circumstances of private defence. It may be.
 23 MR MADLANGA SC: Yes, yes, yes. No, no,
 24 that -
 25 CHAIRPERSON: And that, because it

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1 depends on what was happening when he threw the stun
 2 grenade.
 3 MR MADLANGA SC: yes.
 4 CHAIRPERSON: But, and if I said anything
 5 contrary to that, you have rightly drawn my attention to
 6 the possible error of my ways.
 7 MR MADLANGA SC: As I say, Mr Chairman,
 8 it does not at all alter the thrust of the point that you
 9 were making. May I with the leave of the Commission just –
 10 I still have a few matters relating to what I'm going to
 11 suggest were violations of both Standing Order 262 and the
 12 policy on Public Order Policing, but I just want to step
 13 off that and just introduce one little subject and –
 14 CHAIRPERSON: Okay, one little subject –
 15 MR MADLANGA SC: Yes.
 16 CHAIRPERSON: And then I understand on
 17 the basis that we were adjourning at 1, so people have made
 18 aeroplane bookings and so on and that you'll bear in mind
 19 when you introduce your one little point.
 20 MR MADLANGA SC: Thank you very much.
 21 Thank you very much, Mr Chairman. General, in your
 22 evidence you said that when the operational plan was
 23 discussed on 14 August 2012, it was, a decision was taken
 24 to reject a cordon and search as a first step in the
 25 operational plan. Am I correct?

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1 MAJOR-GENERAL MPEMBE: Correct,
 2 Chairperson.
 3 MR MADLANGA SC: And you gave a number of
 4 reasons why that was so, amongst others the reasons being
 5 that there needed to be some information gathered first,
 6 for example you didn't know who the convenors were, and you
 7 didn't even know where they stayed and so on, and so on.
 8 You gave several reasons why it could not be done as a
 9 first stage, that there had to be some information
 10 gathering, correct?
 11 MAJOR-GENERAL MPEMBE: Correct,
 12 Chairperson, including what the, what types of weapons are
 13 they having.
 14 MR MADLANGA SC: And I do know that the
 15 cordon and search became the sixth stage of the operational
 16 plan, but what I would like to find out from you is whether
 17 any concrete steps were – rather than just having there as
 18 part of the plan on paper, were any concrete steps ever
 19 taken towards the implementation of stage 6 of the plan?
 20 MAJOR-GENERAL MPEMBE: Correct,
 21 Chairperson, it was done.
 22 MR MADLANGA SC: Just very briefly, very
 23 briefly, what steps were those?
 24 MAJOR-GENERAL MPEMBE: Cordon and search
 25 was done on the 15th and the 16th of September, Karee Hostel

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1 and all the other hostels that were searched, and many,
 2 many dangerous weapons were confiscated.
 3 CHAIRPERSON: I don't know how important
 4 this is, but where exactly were these cordon and search
 5 exercises done on the 15th? You say one was Karee Hostel.
 6 Where were the others, or was that the only one?
 7 MAJOR-GENERAL MPEMBE: Chairperson, the
 8 other one, if I'm correct, I might also check it according
 9 to the records, it could have been Wonderkop and also the
 10 informal settlements, just to check the firearms there, and
 11 weapons. But there were hostels that were thoroughly
 12 searched.
 13 CHAIRPERSON: You say Karee and other
 14 hostels as well.
 15 MAJOR-GENERAL MPEMBE: Correct,
 16 Chairperson.
 17 CHAIRPERSON: Yes, I see.
 18 MR MADLANGA SC: Before the 16th of
 19 August, were any steps taken? Before 16 August 2012,
 20 cordon and search, any concrete steps?
 21 CHAIRPERSON: You say the 15th? So
 22 effectively – is that right? You said the 15th? Or were
 23 they done later?
 24 MAJOR-GENERAL MPEMBE: I said the 15th –
 25 CHAIRPERSON: The 15th.

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1 the adjournment, Mr Chairman?
 2 CHAIRPERSON: The Commission will now
 3 adjourn until 9:30 on the 15th of July.
 4 [COMMISSION ADJOURNED]
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1 MAJOR-GENERAL MPEMBE: And 16 September.
 2 CHAIRPERSON: I see, so that effectively
 3 stage 6 of the plan – sorry, we're talking about August or
 4 September? Was it done in September or August?
 5 MAJOR-GENERAL MPEMBE: September,
 6 Chairperson.
 7 CHAIRPERSON: I see.
 8 MR MADLANGA SC: Any concrete steps
 9 before 16 August 2012?
 10 MAJOR-GENERAL MPEMBE: Chairperson, may I
 11 understand what is meant by "concrete steps?"
 12 [13:05] MR MADLANGA SC: General, you do have
 13 stage 6 on paper. So that is not self-executing. Were
 14 steps taken towards the implementation of what is on paper
 15 prior to 16 August 2012?
 16 CHAIRPERSON: That is stage 6.
 17 MR MADLANGA SC: Yes, stage 6.
 18 MAJOR-GENERAL MPEMBE: Chairperson, in my
 19 statement it's very clear to say stage 6 will be based on
 20 intelligence-driven operations, based on the arrests, and
 21 arrests were made from the 13th towards working to stage 6.
 22 And Chairperson, I also said that there were reasons, as it
 23 was alluded earlier on, why we could not take, we make
 24 stage 6 as the first one or in the middle one.
 25 MR MADLANGA SC: May the Commission take

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