

# 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 126      29 AUGUST 2013      PAGES 13078 TO 13190



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<p style="text-align: right;">Page 13078</p> <p>1 [PROCEEDINGS ON 29 AUGUST 2013]  2 [09:31] CHAIRPERSON: The Commission resumes. We  3 were asked to wait before commencing this morning so that  4 some of Mr Mpfu's clients had an opportunity to be here  5 but he's now informed me that they've not yet arrived.  6 Perhaps you can say something further on that so we can  7 start in their absence. Do you think they may well arrive  8 while you're busy?  9 MR MPOFU: Yes, thank you very much,  10 Chairperson.  11 CHAIRPERSON: Let's put that on record.  12 MR MPOFU: Thank you, Chairperson, thanks  13 or the indulgence. The reason why we're starting half an  14 hour late is because I requested the Commissioners in  15 chambers to await my clients. We've just called them, they  16 said they are not very far, they're crossing the last  17 bridge. Unfortunately I don't know which – yes, too many  18 rivers to cross for them, I think. So we have agreed that  19 we should start. If their arrival seems to cause any  20 disruption then we'll ask for a five minute adjournment but  21 hopefully - I'm going to ask my attorneys to make sure that  22 they try and move, come in as quietly as possible,  23 Chairperson.  24 CHAIRPERSON: Thank you. Now what we're  25 doing this morning is you're going to tell us orally what</p>	<p style="text-align: right;">Page 13080</p> <p>1 help us to tailor what we are going to say. At this stage  2 the only party that has indicated that it will oppose the  3 application are the evidence leaders. They indicated so at  4 the meeting of the 21st of August. As far as we know, all  5 the other parties – at least obviously they're not bound by  6 the positions they took in the previous application but in  7 that application they had indicated that they would abide  8 by the decision of the Commission.  9 MR SEMENYA SC: Chair, my instructions  10 are to oppose so Mr Mpfu must proceed on that basis.  11 MR BUDLENDER SC: Chair, as far as our  12 position is concerned, we will reserve our position until  13 we've heard the application. We certainly will want to  14 respond to it but whether we, what formal position we take  15 up will depend on what relief is sought, what the grounds  16 are, what the facts are.  17 MR SHOZI: Chair, we similarly reserve  18 our position until we've heard the application and the  19 grounds of the application. Thank you.  20 CHAIRPERSON: Thank you. Does anybody  21 else representing any of the parties wish to state at this  22 stage already what the attitude of the party concerned will  23 be?  24 MR NTSONKOTA: As the Chair pleases, it's  25 Thando Ntsonkota on behalf of NUM. We would also like to</p>
<p style="text-align: right;">Page 13079</p> <p>1 the relief is that you seek as far as postponement is  2 concerned, you're going to tell us what the facts are on  3 which you rely, so this can then be transcribed or in  4 effect be the written notice of motion and the factual  5 averments upon which it rests and we will then proceed with  6 the evidence. That will be transcribed. I'm assured it  7 will be available by 9 o'clock tomorrow. It can then be  8 given to the parties and they will then have until Tuesday  9 to respond. I was informed this morning that the  10 Department of Justice wishes to oppose the application, so  11 I stated that they were also to be then given a copy of the  12 transcription of what you tell us. Mr Mpfu, would you  13 like to commence?  14 MR MPOFU: Yes. Thank you, Chairperson.  15 Exactly as the Chairperson outlined, we intend to have the  16 transcript, as it were, serving as the founding affidavit  17 so we'll make both the factual and the legal averment.  18 Chairperson, before we start, just a matter of  19 housekeeping. Thank you for informing us about the  20 Department of Justice. We'll consider our position as to  21 whether they're entitled to oppose the matter in these  22 proceedings but that's another story.  23 What we would like, Chairperson, with your leave,  24 is maybe an indication at some stage, either now or at some  25 stage of who is opposing the application because it might</p>	<p style="text-align: right;">Page 13081</p> <p>1 put forward our position once we've heard the basis for the  2 application, Chair. For now we'd like to reserve our  3 rights, thank you.  4 MR MPOFU: Thank you very much,  5 Chairperson. Maybe it's appropriate to start with  6 outlining the relief that would have been in a notice of  7 application.  8 CHAIRPERSON: Effectively you're going to  9 read what would amount to the notice of motion.  10 MR MPOFU: Yes.  11 CHAIRPERSON: I see we've been given some  12 documents, I –  13 MR MPOFU: Chair, yes, I'll refer to  14 those –  15 CHAIRPERSON: One of them is the amended  16 Notice of Motion –  17 MR MPOFU: In the –  18 CHAIRPERSON: In the High Court.  19 MR MPOFU: Yes.  20 CHAIRPERSON: Yes, that's been marked 1A.  21 MR MPOFU: 1A yes. No, hold on,  22 everyone's got this, Chair. It's just cross-referencing,  23 it's not – the others are just cases.  24 CHAIRPERSON: I take it you're not going  25 to argue the application today, are you? You're just going</p>

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1 to tell us what –

2 MR MPOFU: Well, the basis – well, what

3 I'll do is, Chair, what I propose to do is not necessarily

4 to argue it but as one would do in an affidavit, you'd put

5 factual and some of the legal –

6 CHAIRPERSON: Yes, yes –

7 MR MPOFU: - legal basis.

8 CHAIRPERSON: No, I understand.

9 MR MPOFU: But I would – thank you.

10 MR BUDLENDER SC: Sorry to interrupt,

11 Chair. The parties don't have copies of that. We will,

12 once we've been given copies by the Commission, arrange to

13 distribute to everybody.

14 CHAIRPERSON: I will listen patiently to

15 Mr Mpofo and, well, Adv Hemraj is ahead of me in proffering

16 her copy so her copies will be taken away and extra copies

17 will be made and made available to the evidence leaders and

18 if there's anyone else who wants copies, will they please

19 raise their hands.

20 MR MPOFU: It's just the amended Notice

21 of Motion which I'll read into the record. I don't think

22 anyone needs to have a copy as such or alternatively they

23 already have copies, we served it on everybody.

24 CHAIRPERSON: You carry on. Copies are

25 being made in the meanwhile, it doesn't prejudice anybody

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1 and those who get the copies will appreciate, so the police

2 want a copy and the evidence leaders want a copy. Anybody

3 else? Mr – perhaps 10 copies could be made.

4 MR MPOFU: Okay. Thank you then,

5 Chairperson, I think that would cover then the issues of

6 housekeeping. Chairperson –

7 CHAIRPERSON: I'm sorry, that 10, does

8 that include the Human Rights Commission as well? You want

9 a copy too, I take it?

10 MR BUDLENDER SC: Chair, what we're doing

11 is we're making 10 copies will be enough to cover everyone

12 who's here for the moment and we're getting it scanned and

13 we will circulate to everyone electronically.

14 MR MPOFU: That's fine. Chairperson,

15 this is – oh sorry, just one more housekeeping matter. I

16 was asked to convey the apologies of my learned colleague

17 Mr Ntsebeza who unfortunately could not change his flight

18 for his Bloemfontein engagement. His attorney Mr Mosikidi

19 is here but since he had promised, he asked me to convey

20 his –

21 CHAIRPERSON: Thank you.

22 MR MPOFU: Thanks, Chairperson.

23 Chairperson, this is an application for the postponement of

24 the Commission pending the attainment of funding, either

25 from private sources or the outcome of the application for

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1 state funding which has been set down for hearing on the

2 25th and 26th of September 2013, whichever happens first. I

3 will therefore start by unpacking, as it were, these two

4 events, the happening of which will mark the end date of

5 the postponement period, of the proposed postponement

6 period.

7 Firstly, I'll talk about the outcome of the

8 application or the main application set down for 26 and 26

9 September. That application, Chairperson, in a nutshell is

10 for – I'm referring to the document marked 1A and "Ad B"

11 thereof says the following, it's an application for an

12 order in the following terms, "1. Declaring the conduct of

13 the first, second and fourth respondents" – that is the

14 President, the Minister of Justice and the Legal Aid Board,

15 Legal Aid South Africa as it's called these days – "in

16 failing and/or refusing to provide the applicants with

17 legal aid in respect of the Commission proceedings

18 unlawful, unconstitutional and accordingly invalid. 2.

19 Ordering the first, second and third respondents to take

20 all reasonable steps to provide adequate, fair and

21 equitable legal aid to the applicants in respect of the

22 future proceedings of the Commission on the scale or tariff

23 ordinarily employed by the third respondent, in other words

24 on legal aid rates, including all reasonable costs incurred

25 to date, less any amount received from third parties." The

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1 rest is just the usual prayers for alternative relief and

2 so on. Those are the principal prayers, Chairperson.

3 In other words, Chairperson, what is – if the

4 Chairperson could just bear with me one second. That

5 prayer or rather those prayers must be read in the context

6 of what was said in the Constitutional Court in summing up

7 the position at paragraph 2 of the Constitutional Court

8 judgment, Chairperson, which says that the Commission –

9 paragraph 1 talks about when the Commission commenced and

10 so on and then 2 says, "To cover the legal and other

11 expenses incurred by their participation in the

12 Commission's proceedings, the applicants procured funding

13 from a non-governmental entity, the Raith Foundation.

14 However, this funding was only secured for the six month

15 period from October 2012 until March 2013. The applicants

16 have been unable to secure funding for the period April

17 2013 until October 2013, neither have they been able to

18 secure contingent funding should the Commission's term be

19 extended once again." The Constitutional Court summed up

20 therefore in that paragraph the position. In other words,

21 Chairperson, we've unscientifically postulated that the

22 Commission may be extended and let's say for another five

23 months, in which case it would last 18 months, that's just

24 a working figure. If it does, what is being said that the

25 funding requested is for the 18 months minus the six

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1 months, which would be the 12 months. That's the period  
 2 for which no funding has been secured and is being sought.  
 3 The other issue that I'd like to point out in  
 4 relation to that application is that although some of the  
 5 parties are cited as respondents, in reality and in keeping  
 6 with the posture they assumed in the Constitutional Court,  
 7 in reality the applicants are the injured and arrested, the  
 8 deceased families, AMCU, the LRC representing the  
 9 Ledingwane family and the Human Rights Commission to some  
 10 extent. And the practical arrangements in court were that  
 11 those parties would be entitled to argue and reply as if  
 12 they were applicants. I'm told that the clients are here,  
 13 thank you Chairperson.  
 14 CHAIRPERSON: Do you want us to take a  
 15 short adjournment so that they can come in without  
 16 disturbing –  
 17 MR MPOFU: Let's see how it goes,  
 18 Chairperson, let's see if it's disruptive. If it's not,  
 19 we'll just carry on, thanks. Yes, in any event I'll deal  
 20 with the preliminary issues, Chairperson. So that's the  
 21 other thing I wanted to bring to the attention of the  
 22 court, of the Commission, in relation to the application.  
 23 The second issue is or second event which may or  
 24 may not curtail the period of postponement is the  
 25 attainment of funds from other sources other than the

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1 state, and Chairperson, in respect of that we would submit  
 2 that there are reasonable prospects of, at the very least,  
 3 at the minimum, being able – yes, Chairperson, I think  
 4 we'll have to ask for five minutes.  
 5 CHAIRPERSON: We'll adjourn for five  
 6 minutes.  
 7 [COMMISSION ADJOURNS COMMISSION RESUMES]  
 8 [10:02] CHAIRPERSON: The Commission resumes. I  
 9 see quite a lot of your clients have now arrived.  
 10 MR MPOFU: Yes.  
 11 CHAIRPERSON: So we're able to proceed?  
 12 MR MPOFU: We'll proceed. Thank you very  
 13 much, Chairperson, for the indulgence. There are problems  
 14 with buses, and so on, but they're here now. Thank you  
 15 very much, Chairperson, much appreciated. Chairperson, I  
 16 was at the point where I was talking about the second  
 17 trigger event, which is the attainment of funds, and I was  
 18 saying that we believe, Chairperson, in the High Court we  
 19 were always called eternal optimists, but we have to be  
 20 optimistic when we are involved in this kind of struggle,  
 21 but we believe that there are reasonable prospects of the  
 22 attainment of funds, at the very least for quicker or  
 23 speedier interim return, even before the hearing. That  
 24 optimism is based on, as I indicated yesterday, firstly the  
 25 fact that the clients that we represent, the workers, the

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1 protesters, so eager are they to come back to the  
 2 Commission that they themselves made a collection at the  
 3 commemoration service, using buckets that were passed  
 4 around there, which I call their own version of the bucket  
 5 system, and they collected – the exact amount is  
 6 R17 201.50. It came mostly in coins and every South  
 7 African coin was there, from 1 cent, to the R5-coin, and my  
 8 favourite part is that when the money was being counted, we  
 9 found on top of this money one American dollar and one  
 10 Maloti from Lesotho. So it means it has both an African  
 11 and an international flavour in this collection, and they  
 12 did this in the name of assisting the effort for their  
 13 lawyers to return to the Commission.  
 14 Secondly, Chairperson, I know that they are busy  
 15 trying to devise other ways of similar fundraising, but  
 16 secondly there are other more conventional ways of  
 17 fundraising that have been initiated. Most notably there's  
 18 a new organisation which calls itself Citizens4Marikana.  
 19 Mr Eric De Ridder, who's sitting there – you can lift your  
 20 hand – comes from that organisation, and they have  
 21 approached us because they in turn have been approached by  
 22 people from all walks of life and citizens and  
 23 organisations who also want to assist in the effort to  
 24 assist the legal representation of the victims, and  
 25 thirdly, there's always the – although I'm not holding my

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1 breath on this one – there's always the off-chance that the  
 2 government will come to its senses and settle the matter  
 3 before the hearing, and a combination of those  
 4 possibilities might see an earlier return than the dates  
 5 postulated.  
 6 COMMISSIONER HEMRAJ: Mr Mpofo, when you  
 7 talk about returning before the court date, what sort of  
 8 period are you looking at, if you're talking about interim  
 9 funding?  
 10 MR MPOFU: I'm sorry, Commissioner, I  
 11 missed the second part of the question.  
 12 COMMISSIONER HEMRAJ: If you're talking  
 13 about interim funding and returning possibly before the  
 14 court date in the High Court, what sort of periods are you  
 15 looking at? What timeframes are you looking at?  
 16 MR MPOFU: Oh, yes, thank you, Madam  
 17 Commissioner. Well, it's difficult to say. I know for a  
 18 fact that there's a public march that is being planned,  
 19 which is also part of the fundraising effort. I'm thinking  
 20 that by the time that happens, which I've been told is  
 21 within a week or two, then all these things that I've  
 22 mentioned would have been pulled together somehow and  
 23 communicated to us, and if the indication is that there is  
 24 enough for us to come back, we will come back, and I must  
 25 indicate that that, as far as I'm concerned it would mean

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1 covering costs of overheads and things like that, not  
 2 necessarily the fees, because we have gone so long without  
 3 fees, so another three weeks would not necessarily be  
 4 prohibitive, because we also have to contribute, we have to  
 5 contribute – at least speaking for myself, I would  
 6 contribute to the effort of coming back even if my fees  
 7 were not covered. So a couple of weeks at worst.

8 But I think, Commissioner Hemraj, the importance  
 9 of that happening would not only relate to the period,  
 10 let's say between that coming back and the case. It would  
 11 obviously, even the period of awaiting judgment or whatever  
 12 would have happened, so the advantage would be quite a  
 13 profound one indeed.

14 Chairperson, it was correctly pointed out and  
 15 intimidated by the Commission itself and by my learned  
 16 colleagues Mr Budlender and Mr Semanya that this  
 17 application is no trivial matter, but one whose outcome  
 18 will have a profound effect on the complexion and texture  
 19 and the credibility of the ultimate outcome of this  
 20 Commission. We agree that this is not your conventional  
 21 postponement application.

22 CHAIRPERSON: Mr Mpofo, I understood you  
 23 were just going to tell us effectively the relief you seek  
 24 and the facts on which you rely.

25 MR MPOFU: Yes, I'm getting there.

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1 CHAIRPERSON: Okay.

2 MR MPOFU: I'm saying that it's profound  
 3 simply because your unenviable task, Chairperson and  
 4 Commissioners, will be to make a determination as to  
 5 whether the Commission continues in the absence of the  
 6 majority of the victims, or whether it is postponed to  
 7 enable them meaningfully to participate in the Commission,  
 8 which cannot be an easy decision. But I would like to  
 9 venture to say that the decision you make might also have  
 10 an impact as to whether at the end of the Commission there  
 11 is ground to suggest that an irregularity has been  
 12 committed or not, in view of a potential refusal and maybe  
 13 even a granting; who knows?

14 So the decision you take may or may not deal a  
 15 fatal blow to the perceived credibility of the outcome. As  
 16 the Constitutional Court put it that the outcome would be  
 17 compromised. This is what the Constitutional Court said –  
 18 I know I've quoted it before, it says, "Ordinarily a  
 19 functionary setting up a Commission," in this case that  
 20 would mean the President, "has to ensure an adequate  
 21 opportunity to all who should be heard by it. Absent a  
 22 fair opportunity, the search for truth and the purpose of  
 23 the Commission may be compromised."

24 Well, I'll come back to this point, but just to  
 25 finalise what I'll call the legal point, I just make a

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1 point that it is trite that the dominant issue in an  
 2 application of this kind is a question of prejudice or  
 3 potential prejudice to the applicants, or indeed to both  
 4 sides.

5 CHAIRPERSON: Mr Mpofo, I have to say to  
 6 you, I understand you're not arguing –

7 MR MPOFU: I understand that, Chair.

8 CHAIRPERSON: You're going to give us  
 9 effectively the notice of motion, the relief you seek, and  
 10 then you're going to give us the facts on which you rely.  
 11 You're going a little beyond that at the moment. If this  
 12 is by way of introduction –

13 MR MPOFU: It is.

14 CHAIRPERSON: - I'll give you a little  
 15 bit more leeway, but please don't take too much time for  
 16 that.

17 MR MPOFU: Well Chairperson, as I  
 18 understand it, a founding affidavit is not just crudely  
 19 composed of facts alone; it also sets out the legal basis  
 20 for which the application –

21 CHAIRPERSON: Yes, yes, I understand, but  
 22 you haven't got to your founding affidavit yet.

23 MR MPOFU: Ja.

24 CHAIRPERSON: You're still – are you  
 25 going to give us a notice of motion first, the relief you

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1 seek?

2 MR MPOFU: No, I've gone past – oh, I  
 3 understand, Chairperson. No, no, I've gone past that.

4 CHAIRPERSON: So I'm interested in what  
 5 relief you seek.

6 MR MPOFU: The relief – if I may repeat,  
 7 it's quite short – it's the postponement of the Commission  
 8 pending attainment of funding from private sources, or the  
 9 outcome of the application for State funding, which has  
 10 been set down for hearing on 25/26 September, whichever  
 11 happens first. That's it. So I'm unpacking now that  
 12 relief.

13 CHAIRPERSON: Now you're giving us the  
 14 founding affidavit.

15 MR MPOFU: Absolutely.

16 CHAIRPERSON: Thank you. We have now the  
 17 virtual founding affidavit.

18 MR MPOFU: Thank you, Chairperson. I was  
 19 saying, Chairperson, that the dominant issue is prejudice  
 20 and convenience, obviously looked at from both sides. I'd  
 21 like to start with that, Chairperson, but maybe before I do  
 22 so, let me – so that the Chairperson doesn't have to remind  
 23 me again - just outline some of the facts, the crude facts,  
 24 as it were. One is that –

25 CHAIRPERSON: [Microphone off, inaudible]

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1 the facts, I suppose you should really outline all the  
2 relevant facts.

3 MR MPOFU: All the relevant facts, but  
4 some of them are obviously contained in what are fairly  
5 legal submissions.

6 CHAIRPERSON: I see, alright.

7 MR MPOFU: Yes. But yes, these are the  
8 main facts. (1), that we represent more than 300 persons  
9 who are described in the terms of reference either as  
10 falling under the category of injured or which I think is  
11 estimated at 78 in the terms of reference, but the numbers  
12 are not important, and arrested, which in the terms of  
13 reference is again estimated at about 250. The actual  
14 number is 272, but once again the numbers are not –

15 CHAIRPERSON: I take it some of the  
16 arrested people, or possibly all of the injured people were  
17 arrested, were they?

18 MR MPOFU: Not all –

19 CHAIRPERSON: Or are there some –

20 MR MPOFU: There is an overlap, but it's  
21 not complete, Chairperson.

22 CHAIRPERSON: I see. I see.

23 MR MPOFU: Yes, that's why the number  
24 then jumps to over 300, yes, and then of course my learned  
25 colleagues represent mostly the deceased's families, which

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1 we'd say the number is probably, that we're talking about  
2 is probably just more than 350, give or take.

3 CHAIRPERSON: The deceased's families  
4 are, I understand, receiving legal aid. Is that correct?

5 MR MPOFU: They are – well, not  
6 adequately. I think Mr –

7 CHAIRPERSON: No, no –

8 MR MPOFU: But I don't want to speak for  
9 some –

10 CHAIRPERSON: The adequacy –

11 MR MPOFU: Some legal aid.

12 CHAIRPERSON: Adequacy is another matter.

13 MR MPOFU: Yes.

14 CHAIRPERSON: They did make an  
15 application to the Legal Aid Board and they were granted  
16 legal aid.

17 MR MPOFU: They were granted some legal  
18 aid. Mr Ntsebeza explained it in detail on the 26th of  
19 February –

20 CHAIRPERSON: Well, there may be a debate  
21 about the adequacy –

22 MR MPOFU: Yes, 26th of February, the  
23 transcript would assist you, Chairperson, Mr Ntsebeza  
24 outlined it. But in any event, the point is that they are  
25 applicants now to this postponement application. That's

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1 the point I'm making.

2 CHAIRPERSON: Will the High Court then be  
3 called upon to decide to what extent the legal aid which  
4 has been granted to the families is inadequate and falls  
5 short of what should be granted, and then make an order in  
6 respect of that? Because I don't see that in the notice of  
7 motion.

8 MR MPOFU: No –

9 MR MOSIKIDI: Chair, Thabo Mosikidi from  
10 SERI. I represent the families of the deceased. Chair,  
11 just to clarify the position, the families are indeed  
12 funded by the Legal Aid Board and as much as we are  
13 applicants in the High Court, or at least we are applicants  
14 in the Constitutional Court and we are supporting the High  
15 Court application, it is not our aim to seek relief to  
16 review the equality of arms or the adequacy thereof, or  
17 lack of adequacy of the current fund that's been provided.  
18 It might be something that comes along the line, but it's  
19 certainly not our relief at this stage.

20 CHAIRPERSON: So the relief sought only  
21 relates actually to the people who've been described as the  
22 injured and arrested –

23 MR MPOFU: Correct.

24 CHAIRPERSON: - miners.

25 MR MPOFU: Yes, Chairperson. That is

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1 correct.

2 CHAIRPERSON: The families are applicants  
3 – I'm not sure whether they've locus standi to apply, but  
4 that's not a matter that I have to concern myself with.  
5 They're only applicants on a sort of solidarity basis, if  
6 that's the correct word one can use. Is that right?

7 MR MOSIKIDI: For a lack of a better  
8 word, yes, we can assume it that way, Chair, thank you.

9 MR MPOFU: Yes, Chairperson, maybe for  
10 the sake of completion on that point, my understanding,  
11 subject to what my learned colleague would say, is that is  
12 also the position of AMCU, which is an applicant but in  
13 solidarity, as the Chairperson explained it. The only  
14 distinction is that the deceased's families - and I'm sure  
15 Mr Mosikidi will deal with that – have made what I think is  
16 a profound statement in their own papers of saying that  
17 because the people that they represent are deceased, they  
18 rely for their own closure and knowing the truth on the  
19 testimony of the survivors, namely the injured and  
20 arrested, and that without the participation of the injured  
21 and arrested, their own participation would be meaningless,  
22 and they've made that statement here. Thank you,  
23 Chairperson, thank you for seeking that clarity.

24 CHAIRPERSON: We've got clarity on that.  
25 That's all I'm asking.

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1 MR MPOFU: Ja, at least so that the  
 2 facts –  
 3 CHAIRPERSON: - made the point which I  
 4 hadn't even thought of asking you, but I should have,  
 5 what's the position of AMCU, but you've explained that.  
 6 [10:22] MR MPOFU: Thank you, Chairperson, yes,  
 7 so that's fact number 1, so to speak. The applicants that  
 8 I represent, as you know, Chairperson, just for the record,  
 9 are represented by one advocate and assisted by attorneys  
 10 whose number varies from time to time but who comes from  
 11 what we call the triumvirate of law firms, that's all  
 12 explained in the papers.  
 13 The third issue is that – or rather fact, is that  
 14 the main dispute in these proceedings, there are many  
 15 disputes so I don't want to be drawn into that but the  
 16 overriding dispute is whether or not these people that we  
 17 represent and that they represent were killed or injured by  
 18 the police in self-defence or not.  
 19 CHAIRPERSON: I think it's actually self  
 20 or private defence – that's effectively the only defence  
 21 raised by the police.  
 22 MR MPOFU: That's correct, Chairperson.  
 23 Thank you, Chairperson, yes, self or private defence. The  
 24 other fact is that at least the version of the people I  
 25 represent is that their calamities, of whichever type, were

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1 caused by a toxic collision between SAPS and Lonmin, that's  
 2 their version and that those parties in combination are  
 3 represented by about 12 advocates.  
 4 The next fact is that the witness who is  
 5 testifying at present, General Mzembe, is easily the most  
 6 important witness in that he was the overall commander of  
 7 the operation that led to the massacre.  
 8 Fact number 6 is that the evidence leaders are  
 9 currently re-cross-examining that important witness,  
 10 purportedly to put, among other things, the version of the  
 11 people that we represent.  
 12 Fact number 6 is something that we've already  
 13 covered, which is that the matter is set down for the 25th  
 14 and 26th September.  
 15 Fact number 7, number 8 is also a matter that  
 16 we've just covered, namely that the applicants that I  
 17 represent, with at least two other parties, have  
 18 provisionally withdrawn from these proceedings.  
 19 Fact number 9 is also a matter that we covered  
 20 when we were dealing with the relief, which is that there  
 21 are fundraising efforts which may yield earlier temporary  
 22 relief.  
 23 Fact number 10 is an issue we covered yesterday  
 24 about possible or alleged ongoing harassment of witnesses.  
 25 CHAIRPERSON: You covered it yesterday

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1 but I'm not sure it's necessarily on the record unless you  
 2 just want to refer to the transcript of what you said  
 3 yesterday.  
 4 MR MPOFU: Oh yes, thank you,  
 5 Chairperson, yes you're quite correct, so that this one is  
 6 compact. Yes, thank you, Chairperson. That matter, in a  
 7 nutshell, related to the arrest, wave of arrests that have  
 8 taken place since last Thursday which involves about 10  
 9 people, five of whom have already been arrested and  
 10 released on bail and five of whom are - actually as we  
 11 speak, two of my attorneys are not here now, they are doing  
 12 the, making the bail applications of the other five right  
 13 now. And the only relevance of that to you, Chairperson  
 14 and Commissioners, or to this application is the fact that  
 15 all those bail conditions, just like the one of the 272  
 16 accused, have been held over until the conclusion of the  
 17 Commission. I'll find it later, but that fact should be  
 18 viewed in conjunction with the wording of phase 1 in this  
 19 Commission which, among other things, seeks – I'm  
 20 paraphrasing because I don't have it on hand now – seeks to  
 21 determine, if I may just, Chairperson – yes, thank you  
 22 Chairperson. Phase 1, you'll remember – I'm reading this  
 23 from the affidavit of the Human Rights Commission in the  
 24 papers with the quote, phase 1, this is what the legal, the  
 25 Human Rights Commission says. "The 16th respondent," which

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1 is them "is also of the view that the applicants are  
 2 entitled to proper legal representative before the  
 3 Commission. This view is based on the fact that the  
 4 Commission is investigating the applicants and their  
 5 actions during the week 9 to 16 August 2012. This view is  
 6 made even stronger by virtue of the fact that the  
 7 Commission has made a ruling on the scope of phase 1 of the  
 8 proceedings before the Commission to include '1. an  
 9 investigation into whether participants in the crowd of  
 10 protesters at Wonderkop on 16th August 2012 should be held  
 11 criminally liable for the deaths of 34 of their fellow  
 12 protesters and/or in respect of the alleged attempted  
 13 murder or assault of SAPS members at the scene, and 2. the  
 14 direct causes of and legal responsibility of any party for  
 15 the deaths and injuries to any persons and damage to  
 16 property at Marikana during the period 9 to 16 August  
 17 2012.'"  
 18 At the risk of stating the obvious, we are  
 19 currently busy with that phase 1 which will determine,  
 20 among other things, the things that I've just set out. And  
 21 therefore we say that the terms of reference or rather the  
 22 phase as described deals specifically with the criminal  
 23 liability of the injured and arrested or rather the  
 24 arrested, mostly, and some of the people who have now been  
 25 arrested or rather, subsequently arrested.

<p style="text-align: right;">Page 13102</p> <p>1 Fact number 11 is that what we call the state 2 parties or the government is of the view that there is no 3 need for the legal representative of the applicants, while 4 the state intends to keep its own representation by private 5 lawyers. 6 And then lastly in the dozen of factual averments 7 is what I call some of the statistical issues or the 8 figures. We know now from what the Minister of Justice 9 said last week that the state proposes, on the assumption 10 that the Commission will finish at the end of October - 11 which we know is not going to happen - has made a provision 12 of some R115 million to be spent on the Commission, made up 13 as R32 million in the year 2012/2013 and a further R83 14 million in the financial year 83, or rather 2013/2014 and 15 that includes the money that they use for, that they spend 16 on legal representatives and that it was made clear that in 17 that amount of 115 million there's no place for the 18 assistance for the victims or, to be fair, no place for the 19 victims who were not in the employ of the state. 20 Secondly, because of the already skewed nature of 21 the representation, the estimate of what has been spent on 22 legal representation which was submitted in the 23 Constitutional Court at least and not contested, which is 24 contained at the last page of 1A in front of you there, 25 Chairperson, and according to those estimates - and it's</p>	<p style="text-align: right;">Page 13104</p> <p>1 represent, one advocate, SAPS seven, Lonmin five, evidence 2 leaders seven. 3 CHAIRPERSON: I think - 4 MR MPOFU: Oh ja, Mr Madlanga - 5 CHAIRPERSON: - this elevation of Mr 6 Madlanga to the Constitutional Court, it's now down to six. 7 MR MPOFU: Well, six and a half. Six and 8 a half. At least he was here for the, until the 1st of 9 August but I accept that correction. 10 CHAIRPERSON: As far as the relief you 11 seek is concerned, it relates to the future, not the past. 12 MR MPOFU: Yes. 13 CHAIRPERSON: It would be six, but anyway 14 presumably that's a matter the evidence leaders will deal 15 with. 16 MR MPOFU: It's taken into account. 17 CHAIRPERSON: It doesn't affect the 18 principle. 19 MR MPOFU: No, it doesn't but I concede 20 that point, Chairperson. And in terms of the seniority, we 21 state that the number of silks or recommended silks, or 22 someone at the Bar calls it silkworms, these are the people 23 who have been recommended for silk but are awaiting a 24 judgment - one for the first applicant, four for SAPS, 25 three for Lonmin and four for evidence leaders or three now</p>
<p style="text-align: right;">Page 13103</p> <p>1 worked on a rounded 20 day month - the applicants that we 2 represent, the injured and arrested, and these are figures 3 just for what would be advocates' fees, for such a 20 day 4 month at legal aid rates obviously, the cost for the one 5 advocate who represents the applicants would be about 6 R340 000 and the estimate that is given for the monthly 7 spend for SAPS is R3 million. The estimate that's given 8 for the monthly spend for Lonmin is R2 million and the 9 estimate for what is spent on the evidence leaders is about 10 R3 million per month. Based on the current lifespan of the 11 Commission which will end at the end of October, which 12 would be a 13 month lifespan, the spend on the first 13 applicant would be 4.4 million, on SAPS it would be 39 14 million, Lonmin 24 million, evidence leaders 39 million. 15 And based on the 18 month life span, which is more 16 realistic if there's going to be an extension, the 17 breakdown would be for the applicants 6.1 million, for SAPS 18 54 million, for Lonmin 36 million, evidence leaders 54 19 million and those figures might not be exactly fitting with 20 the 115 million that has been admitted by the Minister but 21 they are more or less in line. Of course we accept that in 22 the 115 million there are other costs of running the 23 Commission. 24 And then the breakdown of the number of advocates 25 as extended - those representing the applicants that I</p>	<p style="text-align: right;">Page 13105</p> <p>1 that Mr Madlanga is not here. 2 CHAIRPERSON: I see, you included 3 recommended silks. That's - 4 MR MPOFU: Ja, that's what I - 5 CHAIRPERSON: That's where you get the 6 three from as far as the evidence leaders - 7 MR MPOFU: That's correct, silkworms, 8 that's what we call them at the Bar. They are neither 9 butterflies nor worms. Thank you, Chairperson. So that 10 then, Chairperson, circumscribes the 12 main factual bases 11 for the application. 12 If I may then return to the matter of - let me 13 put it this way, the possible effect of not granting the 14 postponement, which is the same thing as saying what 15 prejudice would be, could be suffered by either the 16 applicants or the public in general. Chairperson, it has 17 been said that an application - or rather let me put it 18 this way. My starting point would be that this is 19 effectively a sui generis kind of postponement application 20 because there's a lot of law on applications for 21 postponement based on seeking legal representation and 22 that's really what this is. It's a postponement for, a 23 postponement while the applicants are seeking to assert 24 their right to legal representation, which right by the way 25 is enshrined in the terms of reference, term of reference</p>



<p style="text-align: right;">Page 13106</p> <p>1 number 8 of this Commission.  2 [10:41] In numerous - too numerous to mention - cases, it  3 has been found that the right to legal representation, or  4 the refusal of a postponement based on an applicant seeking  5 the right to legal representation may amount to a gross  6 irregularity, which undermines or vitiates the proceedings  7 per se, and that is covered very briefly in what I've given  8 you as case number 1, which is the judgment of Plasket J,  9 in S versus Lusu, where he said, just to summarise at the  10 end, "In these circumstances I'm of the view that the  11 accused's fundamental right to a fair trial was infringed  12 by the dismissal of his application for a postponement to  13 allow him the opportunity to apply for legal aid. That  14 being so, the proceedings that led to the conviction of the  15 accused were irregular. This irregularity is of such a  16 nature that it vitiates the proceedings per se." I'm  17 sorry, I'm reading from paragraph 19, the very last  18 paragraph.  19 In other words, the risk, obviously that was said  20 in the context of a criminal trial, but the risk, fairness  21 is fairness; it doesn't matter whether, whatever it is.  22 The risk of vitiating the proceedings themselves looms  23 large when one is considering the question of a  24 postponement for the purposes of obtaining legal  25 representation, and in relying on that, one of the passages</p>	<p style="text-align: right;">Page 13108</p> <p>1 MR MPOFU: Well, that's the spectre that  2 one doesn't even wants to – as the saying goes, too ghastly  3 to contemplate, Chairperson. But very two quick points  4 that I want to make about that is that, as I said, fairness  5 is fairness, but in the particular case of the people I  6 represent it must always be remembered that their own  7 criminal liability is at issue, (1); they have already been  8 arrested and accused, and therefore they are not, you know,  9 ordinary participants.  10 The next point, Chairperson, covers both the  11 point I've just made, but also the point of – because  12 really the issue is this, Chairperson; I think it's common  13 cause, as we had the discussion yesterday, that the  14 continuation of the Commission under the present  15 circumstances is something that's not ideal. That goes  16 without saying. So the question is not so much whether  17 there's prejudice or not, because there is. It's patent;  18 anyone just has to look at Mr Magidiwana, and if I say here  19 I am, standing with seven bullet wounds, is it prejudicial  20 or not that a Commission about that fact should continue in  21 my absence? Clearly it is. So that goes without saying.  22 The question is whether the measures that the  23 Commission seeks to implement in the meantime would serve  24 to cure that blatant prejudice. So that specific question,  25 Chairperson, and it's a matter I touched on yesterday about</p>
<p style="text-align: right;">Page 13107</p> <p>1 relied on came from England in the case of Gideon versus  2 Wainwright – no, actually it's the US decision of Black,  3 the well-known Black, J in Gideon versus Wainwright, who  4 said that, and I'm reading against letter E at 542,  5 "Similarly there are few defendants charged with crime, few  6 indeed who fail to hire the best lawyers they can get to  7 prepare and present their defences. That the government  8 hires lawyers to prosecute and defendants who have the  9 money hire lawyers in criminal courts are necessities" – or  10 rather, "hire lawyers to defend, are the strongest  11 indication of the widespread belief that lawyers in  12 criminal courts are necessities, not luxuries," and that  13 can be postulated to proceedings of this kind. "The right  14 of one charged with crime to counsel may not be deemed  15 fundamental and essential to fair trials in some countries,  16 but it is in ours. From the very beginning our State and  17 national constitutions and laws have laid great emphasis on  18 the procedural and substantive safeguards designed to  19 assure fair trials before impartial tribunals, in which  20 every defendant stands equal before the law. This noble  21 ideal cannot be realised if the poor man charged with a  22 crime has to face his accusers without a lawyer to assist  23 him."  24 CHAIRPERSON: On the retrial Mr Gideon  25 was acquitted.</p>	<p style="text-align: right;">Page 13109</p> <p>1 the fairness or otherwise of presenting, or representing or  2 presenting a version of someone with whom one has not even  3 consulted. That was dealt with in the case of Seri(?),  4 which is number 2 of those cases, Chairperson. That case  5 dealt with the issue of the irregularity, but more  6 specifically relevant to the measures, it says the  7 following. I'm reading from page 36 from the letter C, and  8 pardon my accent. It says, "Ek het reeds gemeld dat nie  9 een van die appellante die staatsgetuies ondervra het nie  10 en dat nie een van hulle getuies afgelê of getuies geroep  11 het nie. Daar is geen aanduiding dat hulle versuim in  12 hierdie opsig aan iets anders toegeskryf kan word nie dan  13 dat hulle, toe hulle hulself onverwags sonder hul  14 regsverteenvoorderiger bevind aan wie hulle hul verdediging  15 toevertrou het, nie voorbereid was om hul eie verdediging  16 te behartig nie. Onder hierdie omstandighede was hulle  17 klaarblyklik ernstig benadeel en het geregtigheid inderdaad  18 nie geskied nie. Die appèl moet gevolglik slaag." Okay,  19 Mr Shoji has dared to asked me to paraphrase. What has  20 been said is that the –  21 CHAIRPERSON: [Microphone off, inaudible]  22 translate in English.  23 MR MPOFU: Thank you, Chairperson. I was  24 going to do it in Tswana for him.  25 CHAIRPERSON: [Microphone off,</p>

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1 inaudible]. "I've already mentioned that not one of the  
 2 appellants questioned the State witnesses and that not one  
 3 of them gave evidence or called witnesses. There's no  
 4 indication that their failure in this respect can be  
 5 attributed to anything other than the fact that they found  
 6 themselves unexpectedly without their legal representative,  
 7 to whom they had entrusted their defence. They were not  
 8 prepared to conduct their own defence. Under the  
 9 circumstances they were clearly seriously prejudiced and  
 10 justice accordingly did not take place. The appeal must  
 11 accordingly succeed."

12 MR MPOFU: Thank you. Yes, and the –  
 13 thank you, Chairperson, that's – not all of us come from  
 14 Cape Town, as the Chairperson, but –

15 CHAIRPERSON: Are you going to want to  
 16 interpret that into Xhosa?

17 MR MAHLANGU: I did.  
 18 CHAIRPERSON: You did, I see.  
 19 MR MAHLANGU: Yes, very well.  
 20 MR MPOFU: Thank you, Chairperson.  
 21 CHAIRPERSON: And Mr Mpofu wants to  
 22 interpret it into Tswana.  
 23 MR MPOFU: Chair, that was an idle threat  
 24 which I wouldn't be able to carry out. Chairperson, yes,  
 25 the relevance of that of course is that the, what has been

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1 said here is that these were people, the appeal here  
 2 succeeded on the basis that the proceedings had to be  
 3 nullified because the lawyers on whom these people had  
 4 entrusted their defence, so to speak, had not been able to  
 5 represent them and as a result they were not able  
 6 themselves to cross-examine or ask any questions of the  
 7 other side, so to speak.

8 The last one, Chairperson, is case number 3, and  
 9 that's State versus Yelani, where his lordship Mr Van  
 10 Rensburg J said, and once again I'll just paraphrase.  
 11 Firstly he relied, at page 806 against the letter G, he  
 12 relied on the following extract from the case of Mthetwa,  
 13 or firstly, he started with the Seri case which I've just  
 14 read out, and then relied on the Mthetwa case which says,  
 15 "Every person is entitled to obtain for himself legal  
 16 representation at his trial and should be afforded an  
 17 opportunity for doing so when it is reasonably demanded."  
 18 It's obviously the last part that's important, asking for  
 19 an opportunity for doing so when it is reasonable demanded.  
 20 Then I jump, Chairperson, to the following page,  
 21 which is more relevant to this application. Unfortunately  
 22 the letters are not clear, but let's say against the letter  
 23 C on the other side of the page where the learned judge  
 24 says, "The result of the finding that the appellant was  
 25 entitled to a postponement is that it is not necessary to

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1 consider whether the sentence imposed on the appellant was  
 2 a proper one, for the entire sentence will have to be  
 3 satisfied and the matter remitted for another magistrate  
 4 for the question of sentence to be considered anew." In  
 5 other words what they were saying is that once a  
 6 postponement was refused for the opportunity to obtain  
 7 legal representation, it was not even necessary to look at  
 8 the outcome of the proceedings. All the proceedings  
 9 themselves were just tainted irretrievably by that refusal  
 10 of the postponement.

11 Moving towards the end of the founding affidavit  
 12 then, Chairperson, I would say that in –

13 CHAIRPERSON: I'm sorry, Mr Mpofu, every  
 14 now and again you raise your two hands in the air and you  
 15 make what amounts to quotation mark signs –

16 MR MPOFU: Yes, that is so, Chair.  
 17 CHAIRPERSON: Those of course won't find  
 18 their way into the transcript, so I suggest if you want to  
 19 do that you should say "quote, unquote" rather than –  
 20 MR MPOFU: Quote, unquote or so-called –  
 21 CHAIRPERSON: - rather than make gestures  
 22 which the transcribers won't see when they transcribe.  
 23 MR MPOFU: Okay, Chairperson, thank you  
 24 very much. The point I really wanted to make is that the –  
 25 I've already made the point about prejudice. As these

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1 matters are determined by looking at, then counterweighing  
 2 that against the other prejudice that might be suffered by  
 3 other parties. Now it's undeniable, Chairperson, that a  
 4 postponement would itself –

5 CHAIRPERSON: Mr Mpofu, I don't want to  
 6 interrupt you unduly. I'm proposing to take the  
 7 adjournment at some stage shortly after 11, but I don't  
 8 want to interrupt you at this point. Tell me when it is  
 9 appropriate for us to take the adjournment and we can then  
 10 adjourn.

11 MR MPOFU: Yes, Chairperson, this would  
 12 be a natural place because these are, as I say, the kind of  
 13 concluding remarks.

14 CHAIRPERSON: We will take the tea  
 15 adjournment, which I hope will be not longer than 15  
 16 minutes.

17 MR MPOFU: Thank you, Chairperson.  
 18 [COMMISSION ADJOURNS COMMISSION RESUMES]  
 19 [11:29] CHAIRPERSON: The Commission resumes. Mr  
 20 Mpofu?  
 21 MR MPOFU: Thank you, Chairperson.  
 22 Chairperson, before I move on to the last few points I just  
 23 want to read out very shortly some of the extracts from Du  
 24 Toit's Commentary on Criminal Procedure. One says at page  
 25 22 point 28B dealing with postponements which are dealt

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1 with in section 158 of that Act –

2 CHAIRPERSON: Paragraph?

3 MR MPOFU: 22–28B, capital letter B. The

4 first sentence really, says “An adjournment will normally

5 be allowed to enable an accused to obtain legal

6 representation.” And then a few cases including Sihari is

7 quoted. I jump to the next paragraph which says, “A

8 failure to grant any postponement at all to enable the

9 accused to obtain legal representation may lead to the

10 quashing of a conviction.” Then a whole lot of other

11 cases, in line with what I've already said. And then more

12 importantly on what one might call the remedial attempt at

13 remedial measures on the next page 22-28C, relying on a

14 case of Bayer v Director of Public Prosecutions Western

15 Cape 2003 (1) SACR 164 (C) it talks about that case but the

16 relevant part says, “In that case Selikowitz, J indicated

17 that the idea of being legally represented cannot simply

18 mean having someone stand up and speak on one's behalf.

19 Representation entails that the legal adviser will act in

20 the client's best interest and will say all that needs to

21 be said in favour of the client. This involves calling

22 such evidence as is justified in the circumstances in order

23 to put the best defence before the court.” The court then

24 referred with approval to S versus Hilani which I think is

25 number 3. It was held that the applicant was deprived of

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1 effective legal representation, the conviction and sentence

2 were set aside on the ground that the applicant did not

3 have a fair trial. So to transport that to this case it

4 would simply mean that, with due respect, the evidence

5 leaders are not in a position to present the interests of

6 the clients because, through no fault of their own, they

7 would not be able to do what Selikowitz says of being able

8 to present all that needs to be said.

9 CHAIRPERSON: The person whose cell phone

10 went off please must turn it off. Everyone else must turn

11 their cell phones off and if another cell phone goes off

12 I'll ask the owner of that phone to leave the room.

13 MR MPOFU: Thank you, Chairperson, that

14 then rounds off that point. And when we went to the break

15 I was at the point where I was saying, Chairperson, one is

16 obviously dealing with a weighing process here. It would

17 be silly for me to deny that the granting of the

18 postponement somehow will cause some general prejudice to

19 others, I think that goes without saying. The question is,

20 which prejudice should prevail really in terms of the

21 impact thereof in the larger scheme of things.

22 Now one of the tempting things of course is what

23 I call, you know, the bane of modern societies is short-

24 termism. So it must be tempting to want to finish, you

25 know, get on with it and all those important things but the

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1 danger of that approach is that where you might have paused

2 for a couple of weeks and maybe save the whole process, we

3 may proceed in faith, which is understandable, and cause

4 irreparable damage. So we might be faced with a choice

5 between, as I say, tempting instant gratification of

6 reaching the finishing line, between that and the real

7 achievement of sustainable lasting peace, accepting that

8 justice is, by its nature, a very slow animal. That takes

9 me, sorry, that takes me to two points –

10 CHAIRPERSON: I think Mr Mahlangu wanted

11 to interpret what you said –

12 MR MPOFU: Yes, yes.

13 CHAIRPERSON: About the slow animal.

14 MR MPOFU: Thank you, Chairperson. Thank

15 you, Mr Mahlangu and I had a private deal before we

16 started, Chair. I was saying, Chairperson, Mr Mahlangu and

17 I had a private deal before we started but we are both not

18 implementing it at the right time.

19 MR MAHLANGU: I said I will try not to –

20 CHAIRPERSON: If I could be aware I can

21 bear them in mind but if you don't tell me I'd have to do

22 the normal –

23 MR MPOFU: Thank you, yes. Yes, we won't

24 ask for it to be made a ruling. That, Chairperson, takes

25 me to two very, very, very important points about the

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1 prejudice to the general public interest and I'll take it

2 beyond what I said yesterday about the cost of [inaudible]

3 sitting in the Commission and all that, to what is really

4 crucial and it is this, we have always to remember that

5 when all is said and done and one has gone through the

6 terms of reference and so on, the purposes of this

7 Commission can be reduced to two crucial things. One, it

8 is to establish the truth of what happened during those

9 fateful days, which is important and in which the people we

10 represent have an obvious interest so I don't have to

11 belabour that, but the second one and maybe even more

12 profound is to ensure that something like this never

13 happens again. That second aspect is sometimes – because

14 even in this debate about representation the issue of the

15 truth is obviously one that lends itself to that debate and

16 sometimes people forget that the second aspect of ensuring

17 that this doesn't happen again is equally, if maybe not

18 more important in the sense that we cannot bring back the

19 people who died but at least we can ensure that this never

20 happens again.

21 Now that aspect is more nebulous, so to speak,

22 and maybe subtle but it relates to something that I want to

23 bring to the Commission, that these people who are victims

24 have actually a right to participate in this process almost

25 as a self standing right, irrespective of the outcome,

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1 irrespective of what happened, but their right to  
2 participate, to be part of the process is crucial and  
3 should not be underestimated.

4 Now I say that, Chairperson, because this  
5 Commission has achieved things even before – and as I say,  
6 irrespective of whatever the outcome is, the mere fact that  
7 the Commission has sat and to that I must say particularly  
8 the way that it has been conducted by yourselves as the  
9 Commissioners has had many, well, I wouldn't say unintended  
10 but let's say bonus outcomes already by the mere way in  
11 which the victims are treated, the very fact that on the  
12 very first day the first thing that happened was reading  
13 out of the names – of a minute of silence and so on. Those  
14 things were, as I say, intangible but would have  
15 contributed a lot to what we all want to see after the  
16 Commission.

17 Now, and I think there are moments in this  
18 Commission where that gets realised, obviously by different  
19 people at different times but for me that moment was  
20 yesterday, Chairperson, when the widows of the police  
21 victims and some, and the security guards, said to me we  
22 want you back here, we started this together and we would  
23 like all the victims to be here. That was a moment which I  
24 think was more profound than any witness that has given  
25 evidence here and that, Chairperson, I'm no longer going to

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1 quote to you cases, I'm going to quote that legal document  
2 called The Sowetan of today where it is said there that,  
3 particularly quoting Mrs Ayesha Fundi who is the lady in  
4 the black veil, the widow of security guard Hassan Fundi  
5 who was killed during the unrest, said she sympathised with  
6 the rest of those affected by the events at Marikana and  
7 wanted closure. Fundi said she wanted to hear what  
8 happened to her husband's missing organs including his  
9 tongue and lower jaw and she went on to explain the  
10 gruesomeness. But the point is when they approached me and  
11 spoke to me but also when they obviously before that spoke  
12 to the media, what they were saying is that for the truth  
13 to be found and for true reconciliation, everyone should be  
14 heard. And that cannot have come easy, Chairperson,  
15 because when she says that she is saying that about the  
16 people I represent who allegedly are the people who are the  
17 killers of her husband or associated with them, whoever  
18 those killers might be.

19 So this Commission is not an ordinary Commission,  
20 it's a mini TRC, so to speak, where not only the truth but  
21 reconciliation and justice will hopefully eventuate and  
22 that experience of talking to those widows taught me that  
23 it's possible through this Commission, as I say,  
24 irrespective of the outcome, to achieve things that one  
25 could not even have dreamt of when we started.

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1 The point of that story, Chairperson, is that  
2 without the participation of the majority of the victims,  
3 those kinds of outcomes both intended and unintended, will  
4 be lost and that we will have, really we will have  
5 finished, so to speak, quote/unquote, the race as it were  
6 and we'll all put our books and go home and do whatever it  
7 is that we do, but we would have left a yawning gap in the  
8 real outcomes which is reconciliation and never again  
9 having to face this.

10 Last two points - and I must say Chairperson,  
11 that I had a discussion this morning again with Mrs Fundi  
12 just to explain the importance of what transpired here  
13 yesterday – the last two points is that the Chairperson,  
14 I'd like to appeal to you who has to make this unenviable,  
15 who have this unenviable task of making this decision, to  
16 consider that of course a postponement application is a  
17 matter which is in your discretion, as we know, which must  
18 be exercised judicially.

19 CHAIRPERSON: Sorry to interrupt you, Mr  
20 Mpofo, it sounds to me, if you'll forgive my saying this,  
21 as if you're now busy arguing the matter.

22 MR MPOFU: No.

23 CHAIRPERSON: At the moment you're  
24 telling us what's in your founding affidavit. Obviously  
25 the point you want to make to us is a point that would be

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1 included in your founding affidavit –

2 MR MPOFU: Yes.

3 CHAIRPERSON: - and you can carry on, but  
4 if it's really the peroration of the end your argument, I  
5 think you must reserve it for the argument.

6 MR MPOFU: Yes, yes, Chairperson, I  
7 appreciate that. These are literally, as I say what, if it  
8 was an affidavit, a real affidavit I would put it as a  
9 conclusion, concluding the matter.

10 CHAIRPERSON: Well, on that basis please  
11 proceed.

12 MR MPOFU: Thank you, Chairperson. And  
13 it's simply to say, Chairperson, that at least the  
14 perception of the people that we represent is that, you  
15 know, everyone has turned their backs on them, starting  
16 from the employer, the police, some government officials or  
17 ministers, there are BEE partners and all sorts of people  
18 but they do have confidence in this Commission, as I've  
19 already indicated before, and we hope that the Commission  
20 will not find itself joining that illustrious list and we  
21 know that if they feel like that, we will be the first ones  
22 to point out that, about the difficulty of the task that  
23 you have in balancing the interests of everybody. So I  
24 just wanted to assure you, Chairperson, that we will, as  
25 we've always done, ensure that whatever the outcome of the

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1 application, that it's not construed in a manner that  
 2 indicates that indeed everyone has turned their back on  
 3 them. And their only voice, Chairperson, even if I say so  
 4 myself at this point, are the people who represent them  
 5 legally, whatever the difficulties that those people face  
 6 and all they want really is a chance to have that voice  
 7 continuing to be heard, for what it's worth.

8 The last point, Chairperson, is that the –  
 9 something again that happened yesterday when one of the  
 10 applicants said to me, well, if they want to continue with  
 11 this without us then they mustn't call it the Marikana  
 12 Commission because we are the people who come from Marikana  
 13 and those people who will remain there are not from  
 14 Marikana. And I took it at first blush as a joke but when  
 15 I reflected later, it really said something to me about  
 16 what the applicants feel should be the character or the  
 17 continuing character of this Commission and this one didn't  
 18 come from them, it came from me when I was thinking later  
 19 that if we, if indeed it continues without them then it  
 20 will only be a Commission of those who have the money to  
 21 continue their participation and that it would then be not  
 22 the Marikana Commission but the Moneykana Commission, M-O-  
 23 N-E-Y, and we don't want that to happen, Chairperson. We  
 24 would like to continue with the Marikana Commission as we  
 25 know it and we appeal to you to ensure that the Marikana

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1 Commission continues after a postponement to allow us to do  
 2 whatever we can to obtain legal representation for the  
 3 victims, failing which if we fail, because there's always  
 4 that possibility, we'll come back and say so, Chairperson,  
 5 but for now we are very optimistic that starting where, or  
 6 rather ending where is started, that either one of the two  
 7 events, either the litigation or the other event will put  
 8 us back to where we should have been. Yes, we might have  
 9 lost a month or so but in the fullness of time, in 100  
 10 years' time when historians look at this I'm sure they will  
 11 not count a couple of weeks here and a couple of weeks  
 12 there. What they will count is whether or not the  
 13 objectives that are on that just behind you, Chairperson,  
 14 truth, restoration and justice and I might add  
 15 reconciliation, whether it was achieved or not and it  
 16 cannot be achieved without the victims' presence. Thank  
 17 you, Chairperson.

18 CHAIRPERSON: Do you wish to say anything  
 19 on behalf of the families who are in a stance of solidarity  
 20 with the injured and arrested persons?

21 MR SHOZI: Indeed, sir.

22 CHAIRPERSON: If you filed an affidavit  
 23 in support of the application, what would you say because  
 24 this is all we're concerned with at the moment, what would  
 25 you say in such an affidavit, if anything?

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1 MR SHOZI: Thank you, Chair. Chair, we  
 2 do support the application. When the first "postponement  
 3 application" was brought we were the so-called co-  
 4 applicants or second applicant, Chair. Chair, I would like  
 5 to send my, Mr Ntsebeza's apologies again for not making it  
 6 this morning. He did try to make alternative arrangements  
 7 but that did not work out. Indeed Chair, as you also  
 8 pointed out earlier on, in particular the families of the  
 9 deceased, they do have funding from the Legal Aid Board to  
 10 participate, to at least continue with participating in the  
 11 Commission. However, our instructions are that they cannot  
 12 continue, at least they see the representation of the  
 13 applicants at the Commission as very critical at least for  
 14 the families' meaningful participation at this Commission.  
 15 They say this because they view the applicants as the only  
 16 people who can give direct evidence as to what happened at  
 17 Marikana between the 9th and the 16th of August. In  
 18 particular they see them as people who really lived to tell  
 19 the tale or to tell the story as to what happened on that  
 20 day.

21 We are instructed again, Chair, to record that  
 22 the families, the way as they view things, they can never  
 23 achieve the peace and reconciliation that is intended  
 24 through the process as the truth about Marikana will remain  
 25 unknown if the applicants do not continue participating at

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1 the Commission. They in effect, Chair, say that their  
 2 involvement, that means the families' involvement without  
 3 the applicants would essentially be meaningless or at least  
 4 redundant without any version by the applicants.

5 Now Chair, I've been asked, at least I'm trying  
 6 to persuade at least to plead with you to postpone the  
 7 Commission at least pending the return of the Commission,  
 8 to read a statement by one of the ladies of the deceased,  
 9 which will be the widow Ms Zaneka Nungu. I would therefore  
 10 beginning the –

11 CHAIRPERSON: If it's something that you  
 12 would have incorporated in an affidavit, a supporting  
 13 affidavit if such an affidavit had been file –

14 MR SHOZI: Indeed, Chair.

15 CHAIRPERSON: If that's the case you can  
 16 read it out.

17 MR SHOZI: Indeed, Chair. I thank you  
 18 for your indulgence, Chair. Chair, just to make sure I  
 19 don't lose the essence of the statement I will read the  
 20 statement as is, in Ms Nungu's words, as the representative  
 21 of the rest of the families, Chair. This is what, it says,  
 22 "The reason we are participating in the Commission and our  
 23 interest in it is to find out the truth about what happened  
 24 to our loved ones. We want and need to know why they were  
 25 taken away from us in such a sudden and violent manner, why

1 our husbands, fathers, brothers, sons and cousins who were  
 2 in most cases our only breadwinners, were shot and killed  
 3 by the police. We seek the truth about what happened at  
 4 Marikana, primarily for three reasons - 1. In the hope  
 5 that this will bring us some measure of healing, closure  
 6 and restoration and thus give effect to our right to human  
 7 dignity. 2. To safeguard our rights in relation to  
 8 possible future civil claims against SAPS for the unlawful  
 9 killing of our loved ones. Our interest in this regard  
 10 will clearly be impacted by the Commission's finding. 3.  
 11 In the hopes of seeing those responsible for our loved  
 12 ones' deaths brought to justice. The Commission is  
 13 empowered to make recommendations that specific persons be  
 14 prosecuted." Mr Mahlangu, maybe you could translate that.  
 15 "As things stand, SAPS is denying that its members acted  
 16 unlawfully when they killed our loved ones. In summary,  
 17 the case that SAPS is advancing before the Commission is  
 18 that our loved ones were charging at the police and that  
 19 the police shot and killed them in self-defence and/or  
 20 private defence. Indeed our loved ones have been painted  
 21 as violent and brutal men who wanted to kill the police and  
 22 were in the process of attempting to do so when they were  
 23 shot and killed. From what we know of our loved ones and  
 24 the evidence that has been presented at the Commission to  
 25 date, including the video footages, we have seen the

1 pictures, we simply don't believe this to be the case. We  
 2 are of the view that they would not" – that means their  
 3 loved ones – "they would have not attempted to attack and  
 4 kill the police. In addition, in our opinion the video  
 5 footage of the shooting does not support the SAPS version.  
 6 The only persons who gave, at least the only persons who  
 7 have given evidence to gainsay the police version are the  
 8 witnesses who have testified to date on behalf of the first  
 9 applicant, in particular Mr Magidiwana and Mr Pasha. They  
 10 have given an explanation for why some of the protesters  
 11 appear from the video footage of the shooting at scene 1 to  
 12 be advancing in the direction of the police. It is only  
 13 due to the evidence of Mr Magidiwana and Mr Pasha that we  
 14 have been provided with the protesters' side of the story  
 15 that contradicts the SAPS version. It was only due to the  
 16 witnesses' participation that we have some understood as to  
 17 why our loved ones acted in a manner in which they did, of  
 18 what they were thinking, feeling on that day in the hours,  
 19 the minutes preceding the killings. These versions relate  
 20 to the central dispute in the Commission, namely whether or  
 21 not there were any legally acceptable justifications for  
 22 the killing of our loved ones. These are two diametrically  
 23 opposed versions before the Commission regarding whether  
 24 SAPS acted lawfully when it shot and killed our loved ones.  
 25 The contrary version has come from the witnesses of the

1 first applicant. This, to us, is not surprising. They are  
 2 the only party to the Commission's proceedings, apart from  
 3 SAPS, who were there and when the relevant events happened,  
 4 who witnessed them. Indeed it is safe to say that aside  
 5 from the journalists who are unlikely to testify, they were  
 6 the only other eye witnesses. It is for this reason that  
 7 the first applicant's full and effective participation is  
 8 crucial to our case and to legitimise the Commission.  
 9 Without their full and effective participation, the other  
 10 side of the story cannot be told, nor can it be said that  
 11 there will be no further need for evidence from the  
 12 applicants, from the first applicant. This is so because  
 13 there are other critical issues in relation to which the  
 14 first applicants would be required to give evidence if the  
 15 other side of the story is to be told. I will refer to two  
 16 examples of these critical issues. The first example is  
 17 the incident of the 13th of August 2012 during which three  
 18 protesters and two police officers were killed. The first  
 19 applicant has not testified in relation to this incident.  
 20 Major-General Mpenbe, the commander who was in charge of  
 21 the relevant police operation on that date, is currently  
 22 giving evidence. He testified that what led to the  
 23 killings on that day was that the protesters suddenly  
 24 changed direction while being escorted by the police and  
 25 started moving in the direction of the informal settlement.

1 This made it necessary for the police to use force in the  
 2 form of teargas, stun grenades and rubber bullets in order  
 3 to deter them from moving in that direction. It is common  
 4 cause from the inspection in loco conducted by the  
 5 Commission that the first applicants dispute this version.  
 6 Their version is that they were simply on their way to the  
 7 koppie when they suddenly came under attack by the police.  
 8 The applicants' version has not been given as evidence  
 9 under oath as yet. Therefore if the applicants are not  
 10 able to participate fully and effectively, their version in  
 11 this regard will not become part of the record. The  
 12 contrary version will simply not be before the Commission.  
 13 The only way of disputing the police version will be by  
 14 means of objective evidence of the incident, including the  
 15 video footage of the day. There will be no-one to speak on  
 16 behalf of our slain loved ones. It is our respectful  
 17 submission this could never be in the interests of justice  
 18 and the outcome of the Commission would not be legitimate  
 19 if it were to continue in this manner.  
 20 The second example is that of Mr X. Mr X, as  
 21 yet, is an unidentified witness who has provided a  
 22 statement and who is allegedly going to give evidence on  
 23 behalf of SAPS. He was allegedly one of the leaders of the  
 24 protesters. He makes a number of allegations against the  
 25 protesters, both the living and the deceased. If, by the

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1 Commission, his evidence could lead – if accepted by the  
 2 Commission, his evidence could lead to adverse inferences  
 3 being drawn against the protesters, for example that the  
 4 protesters were highly organised, they had a clear command  
 5 structure, they were brutal in nature and committed a  
 6 number of violent crimes in an organised and premeditated  
 7 fashion and that they believed themselves to be invisible,  
 8 invincible, due to having used muti and undergone certain  
 9 rituals with a sangoma.

10 [12:09] In our view the only persons who can dispute this  
 11 are the first applicants, particularly those against whom  
 12 he makes specific allegations. In addition, it will be  
 13 extremely unfair to require them to do so without having  
 14 legal representative to advise and protect them. This is  
 15 so because Mr X makes specific allegations of criminal  
 16 conduct against them. In seeking to refute these  
 17 allegations, they do therefore run the risk of  
 18 incriminating themselves.

19 In particular, Mr X also makes allegations of  
 20 criminal conduct against one of the deceased, that being Mr  
 21 Noki. Mr Noki is Ms Veronica Noki's partner. Accordingly,  
 22 the applicants who were the witnesses to the event in  
 23 question are thus the only persons who can possibly speak  
 24 on Mr Noki's behalf and dispute the allegations which Mr X  
 25 makes against him.

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1 The applicants are thus the only party to the  
 2 Commission's proceedings who can counter such version and  
 3 the degradation of their loved one. In our view they speak  
 4 for our dead husbands, sons, fathers, brothers, uncles and  
 5 cousins. If they are not able to participate fully and  
 6 effectively, we will be forced to sit and listen to their  
 7 version with no witness to counter it. Our participation  
 8 in the Commission will thus be rendered meaningless and  
 9 redundant. Rather than enabling the family members to  
 10 achieve some measure of healing and restoration, this will  
 11 only add to our pain, unbearably so. In addition, in our  
 12 respectful view, such one-sided Commission will not have  
 13 any legitimacy. We simply could not take part in it.

14 Thus, in conclusion, if the applicants are not  
 15 enabled to participate fully and effectively in the  
 16 Commission's proceedings, the consequences for the family  
 17 members will be devastating. This will be devastating  
 18 because our rights to restorative justice, which is an  
 19 incident of the right to human dignity, will be infringed.

20 It will be a violation of our loved ones' right to life  
 21 because we will be deprived of the right to participate in  
 22 the State-appointed Commission of Inquiry into our loved  
 23 ones' deaths in order to safeguard our rights and  
 24 legitimate interests. The civil claims which we intend to  
 25 institute against the State may be prejudiced, and finally,

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1 we will be deprived of our best opportunity of ensuring  
 2 that those who killed our loved ones are brought to  
 3 justice. Chair, that's the end of the statement by Ms  
 4 Nungu.

5 Chair, as is also known that SERI also represents  
 6 AMCU, I put on record that AMCU does support the stance, at  
 7 least the postponed application, and obviously based on the  
 8 reasons as submitted by the families, and further AMCU  
 9 regard it as, it will be very difficult for itself to be  
 10 involved in the Commission and not to be seen to support  
 11 its members, of which the majority of the applicants are  
 12 its members. For those reasons they also support the  
 13 postponed application. I thank you, Chair.

14 CHAIRPERSON: Well, what has been said  
 15 will be transcribed. I'm told it will be available at 9  
 16 o'clock tomorrow morning. It will be given to the evidence  
 17 leaders who will then send it electronically to all the  
 18 parties. As I have indicated, the Departments of Justice  
 19 and Constitutional Development wishes to oppose the  
 20 application also and it will be made available to them as  
 21 well and it may be that locus standi points may be raised,  
 22 but clearly we will send the transcript to them. Thank you  
 23 very much. Then we'll take a short – sorry, Mr Budlender?

24 MR BUDLENDER SC: Chair, could I just ask  
 25 for clarity on one aspect of the relief which is being

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1 sought in the application? Mr Mpofu has explained that  
 2 this is an application for a postponement pending the  
 3 attainment of funding from private sources or the outcome  
 4 of the pending application in the High Court, whichever  
 5 comes first. Can I just ask for clarity on what is  
 6 intended by the outcome of the High Court application?  
 7 Does that include the outcome of any appeal which follows  
 8 on the decision of the High Court?

9 CHAIRPERSON: Mr Mpofu?

10 MR MPOFU: Thank you, Chairperson. Yes,  
 11 that's a fair question. No, it does not. As I indicated,  
 12 maybe not clearly, we're talking about the outcome in the  
 13 first instance. In other words we would assume to  
 14 ourselves a duty to come back at that stage of the outcome  
 15 of the first instance. We would not simply hide behind the  
 16 word "outcome" and say well, it's the final-final outcome.  
 17 I'd like to place that on record. Thank you, Mr Budlender.

18 CHAIRPERSON: Thank you. I think that  
 19 makes the point clear, Mr Budlender. Before we bring this  
 20 part of the proceedings to an end, I understand that Mr  
 21 Semenya – am I correct? – Mr Semenya wishes to say  
 22 something, and there may be other who wish to say something  
 23 as well.

24 MR SEMENYA SC: Not anymore, Chair, thank  
 25 you.

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1 CHAIRPERSON: Mr Ntsonkota?  
 2 MR NTSONKOTA: Thank you, Chair. Now  
 3 that we've had the privilege of being apprised of the basis  
 4 and the foundation on which the application and the request  
 5 by Mr Mpofu stands, I beg to record on behalf of NUM that  
 6 we will not be opposing the application. In fact, we will  
 7 abide the ruling of the Commission regarding the request.  
 8 CHAIRPERSON: Yes, thank you. That can  
 9 be – is there anybody else who wishes to say anything  
 10 before we conclude this part of the proceedings? It  
 11 doesn't seem so. So I think we'll take a short adjournment  
 12 now. It's 20 past 12. We'll carry on with our normal work  
 13 for the time being. Mr Mpofu and his party are excused  
 14 and, but we'll adjourn to enable them to make a dignified  
 15 departure, and also of course to enable General Mpembe to  
 16 be requested to come. I don't know if he's in the building  
 17 or wherever he is, but we'll take an adjournment and we'll  
 18 resume when we are told that it's appropriate for us to do  
 19 so.  
 20 MR MPOFU: Chairperson, thank you, I just  
 21 wanted to say thank you for giving us a hearing. We  
 22 appreciate it. Thank you, Chairperson.  
 23 [COMMISSION ADJOURNS COMMISSION RESUMES]  
 24 [12:34] CHAIRPERSON: The Commission resumes.  
 25 Major-General, you're still under oath.

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1 WILLIAM MPEMBE: Correct, Chairperson.  
 2 CHAIRPERSON: Ms Pillay, you're still  
 3 cross-examining?  
 4 CROSS-EXAMINATION BY MS PILLAY (CONTD.):  
 5 Thank you, Chair. General, just in fairness to you, as we  
 6 concluded the proceedings yesterday, you were answering  
 7 around how you understood what you did on the 13th to be the  
 8 best of both worlds. I think that's the point at which we  
 9 concluded yesterday. Would you like to complete the answer  
 10 now?  
 11 MAJOR-GENERAL MPEMBE: Correct,  
 12 Chairperson. What I wanted to achieve, or to end the  
 13 negotiation on that day was on the fact that since the  
 14 protesters were having the dangerous weapons, the win-win  
 15 situation that I spoke about, it was with reference to if  
 16 they can drop their dangerous weapons, because that to me  
 17 was extremely important because that is what they can use  
 18 to maim or kill people. I know that them possessing the  
 19 dangerous weapons was against the law, and I know that they  
 20 were not marched legally, but that to me in, when I compare  
 21 it with the situation, I find only the, for them to lay  
 22 down their weapons and to allow them to march, that could  
 23 have, be in a better position for them, and that could have  
 24 been a win-win in the sense that the laying of, down of  
 25 weapons, it could have been a win to me because that is

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1 what I targeted, and for them to have marched where they  
 2 wanted to go, it could have assisted to de-escalate the  
 3 violence.  
 4 MS PILLAY: General, just to round up  
 5 this point, I just want to put to you what was the evidence  
 6 of the Reverend Seoka who was asked, was being cross-  
 7 examined by Mr Ntsebeza on the basis that he's an expert in  
 8 conflict resolution within a mining context, and he was  
 9 asked to comment on the "negotiation" that you undertook on  
 10 the 13th at the railway line. Now I've asked for copies of  
 11 the relevant portions of the transcript to be made, if I  
 12 can just – it's day 18 of the transcript, 1-8, at page  
 13 2002. Now I'll just read to you, General, what the  
 14 question from Mr Ntsebeza was and what Reverend Seoka's  
 15 answer to the question was. Mr Ntsebeza says, "Not very  
 16 long, Mr Chairman, you know I keep my promises. Now in  
 17 fact as it is just for the record, the witness has said in  
 18 paragraph 3 of his statement he has specialised knowledge  
 19 of and experience in conflict in the mining industry. Now  
 20 I was asking you for your views on, given the volatile  
 21 nature of that situation as you see it on the video, what  
 22 do you think of General Mpembe's reaction to what seems to  
 23 be a proposition in a tense situation?" Now just for  
 24 context, General, the video he's referring to is Z1, and  
 25 the answer by Reverend Seoka is, "I think it was a

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1 desperate, unprofessional way of handling a situation that  
 2 could explode at any time, as he assumed. If I were him, I  
 3 would have handled it differently." Mr Ntsebeza says,  
 4 "Yes, I will not go into how you would have dealt with it.  
 5 If I heard him correctly or clearly, he began to count even  
 6 as Xolani, or the worker as beginning to talk to him. He  
 7 says, 'I am now counting, like listen, you hand over. It's  
 8 my way, or the highway.' Did you observe that when he said  
 9 'I'm counting?'" and the Reverend Seoka's answer is,  
 10 "That's an indication of being impatient and threatening,  
 11 really; if I counted this number and have not done what  
 12 I've asked of you, I will do something. That's my  
 13 assumption." Can I ask you just to comment on Reverend  
 14 Seoka's analysis of what you did on the day?  
 15 MAJOR-GENERAL MPEMBE: Chairperson, it's  
 16 true that the situation was tense and I need to indicate  
 17 that the negotiation that took place at the railway was not  
 18 a normal negotiation where the environment, which is very  
 19 conducive, is prepared, all strategies are being applied.  
 20 I can make an example of all conflict resolutions that they  
 21 have been dealt with where you put the environment in a  
 22 proper manner and the approaches are being determined, but  
 23 these are not hostile to each other.  
 24 Secondly, in that circumstances, taking the  
 25 background of what has happened on the previous day, and I



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1 did say that I did not know who were busy killing and who  
 2 were doing any other when I started speaking to them. The  
 3 protesters were carrying extremely dangerous weapons and  
 4 the manner in which, and the song that they sang that day,  
 5 is not a song that is normally, or the weapons that are  
 6 normally being carried in any conflict resolution process  
 7 that I have ever seen, or understand, which maybe in the  
 8 case of Reverend Seoka that he knows himself, and secondly  
 9 – and what was also very crucial there, inasmuch as myself  
 10 I was realising that by allowing them to march, it's still  
 11 against the law, I had also to look at the compromise of  
 12 the dangerous weapons because the dangerous weapons was  
 13 what was actually being utilised to commit all the crimes  
 14 that were happening. Even though I did not know who in  
 15 particular amongst the protesters was committing crime, but  
 16 it could have been that they were amongst those protesters.  
 17 But what was more crucial for me is if they could  
 18 lay down their weapons and in laying down their weapons  
 19 then we will, we could have avoided a lot of the damages  
 20 that had happened, and what was very crucial for me in that  
 21 instance, in terms of the police crowd management policies  
 22 and conflict resolution we have to show an extreme  
 23 tolerance to the protesters, however vulgar words or any  
 24 other weapons or any other action that they could do,  
 25 because there were so many provocative actions that were

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1 coming from the protesters, but I could, I keep the members  
 2 to be tolerant because I could see the situation could have  
 3 gone either way.  
 4 As I have indicated, I had to get dangerous  
 5 weapons, so at a certain point I had to put them to comply,  
 6 and I need to say in any country where a senior police  
 7 official requested any responsible citizen to hand over a  
 8 dangerous weapon, that is all what I expected on that day,  
 9 and that could not have happened.  
 10 MS PILLAY: Now we see at line 13 on page  
 11 2002, General, that Reverend Seoka describes your way of  
 12 handling the situation as both desperate and  
 13 unprofessional, and he says that he could have handled it  
 14 differently. Did you consider at the time, General, that  
 15 there may have been different ways of handling the  
 16 negotiations so that you could get the miners to hand over  
 17 their weapons?  
 18 MAJOR-GENERAL MPEMBE: Chairperson, on  
 19 that day, as a senior police official I felt that, as I've  
 20 explained already in HHH3, that I could handle the matter  
 21 also in a manner of, for example asking one of their, two  
 22 or what of their representatives to talk to me, to  
 23 negotiate, but in the manner that they were acting  
 24 themselves, you could see that they could not have allowed,  
 25 there was no element of trust. They could not have allowed

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1 anybody to go and, allow them to go and negotiate with me  
 2 because they were feeling that they wanted to go with  
 3 weapons.  
 4 Secondly, I could not have changed the  
 5 environment in any way to be conducive because what was  
 6 more important, it was to disarm them, and that is what  
 7 they could not have allowed me to have done, as they did on  
 8 that day. Comparatively speaking, on the following day, on  
 9 the 14th when we were now going to negotiate with them, that  
 10 was the negotiation that was done, initiated by the police,  
 11 the five brave "madoda" were asked to negotiate. They were  
 12 put at ease. They asked, they requested that we should  
 13 bring "umlungu." I need just to indicate, they asked that  
 14 we should bring "umlungu" on the 13th. I did that. It's  
 15 the South African Police Service that initiated the  
 16 negotiation between the unions and the mine. That could  
 17 not have happened if the police did not take the  
 18 initiative.  
 19 Thirdly, on the following day, because those were  
 20 the alternatives after what had happened on the 13th when we  
 21 said we have to continue, because to us negotiation, it was  
 22 the extremely better position of ending up the conflict on  
 23 that day. That's why then we continued with the  
 24 negotiation. Five brave "madoda" were called. On that day  
 25 they requested to see "umlungu" through Colonel McIntosh.

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1 Myself, Colonel McIntosh, and now Colonel Moolman, we went  
 2 to the Lonmin management; we said the protesters, they  
 3 still want to see you. That message is conveyed to the  
 4 Lonmin management, and my witnesses in this case is Colonel  
 5 McIntosh, as well as Moolman can confirm that. Colonel  
 6 McIntosh, and I think in his statement does state it.  
 7 I need just to demonstrate the alternatives that  
 8 one could have done, depending on different circumstances,  
 9 and the situations that were changing from time to time.  
 10 Chairperson, I need to add that we were extremely  
 11 considerate in terms of whatever they were requesting.  
 12 There was a time where they wanted my telephone numbers and  
 13 I said they need to come to the JOC, and that the Adv  
 14 Shapiro of Pretoria wants to talk to me. The information  
 15 was conveyed to them many times to say the General is now  
 16 at the JOC, he wants to talk to you. So any person could  
 17 have come there, and secondly, Colonel McIntosh did check  
 18 who's this Adv Shapiro, and we could not find and establish  
 19 who is this Adv Shapiro.  
 20 In ending my answer, it will be that in what  
 21 Reverend Seoka is referring in terms of the police on that  
 22 day, I do not know whether he was referring to a normal  
 23 process of negotiation, like if I may give an example, you  
 24 could do that if the environment is conducive, like the  
 25 negotiation that was done between what was happening at

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1 Gallagher Estate, but, or in any place where negotiation  
 2 has to take place, but there it has, I am a law enforcer; I  
 3 need to enforce the law of the country. I need also to  
 4 ensure that the people whenever they march, they march  
 5 peacefully, unarmed, but I do believe that we did what we  
 6 could to persuade and to negotiate with the protesters on  
 7 that day.  
 8 CHAIRPERSON: I'm sorry to interrupt.  
 9 Could I ask a question? Do you know whether Adv Shapiro's  
 10 telephone number was ever furnished to you or to any other  
 11 member of the SAPS?  
 12 MAJOR-GENERAL MPEMBE: Chairperson, they  
 13 were not given, but I tasked Colonel McIntosh to follow  
 14 this Adv Shapiro. He had one Adv Shapiro that he knew, and  
 15 he followed it up with him and then he said it's not him.  
 16 The one that he phoned, he was dealing with actually the  
 17 divorces. He was not actually – and he said that he's not  
 18 of his lawyer. He didn't know which Adv Shapiro that they  
 19 were referring to.  
 20 CHAIRPERSON: Ms Pillay, are you going to  
 21 ask any questions about Lonmin's response to this request,  
 22 or – because if you are, I won't ask any questions about  
 23 it.  
 24 MS PILLAY: No, you could ask them.  
 25 CHAIRPERSON: Thank you. You said you

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1 and Colonel McIntosh and Captain Moolman, as she then was,  
 2 went to see Lonmin to convey what you mentioned to us, the  
 3 request of the strikers. Did you speak to people at Lonmin  
 4 about that?  
 5 MAJOR-GENERAL MPEMBE: Chairperson, we  
 6 did go and talk with Lonmin people, and I think Colonel  
 7 McIntosh will confirm and Colonel Moolman, Adv Moolman.  
 8 CHAIRPERSON: To whom did you speak at  
 9 Lonmin?  
 10 MAJOR-GENERAL MPEMBE: I did,  
 11 Chairperson –  
 12 CHAIRPERSON: To whom?  
 13 [12:54] MAJOR-GENERAL MPEMBE: We did speak to,  
 14 at that time it's, one member was Mr Sinclair, he was also  
 15 having, the gentleman is Abey Kgotle, but - I think it's  
 16 Abey Kgotle and then it was on the early morning, if I  
 17 remember very well, of the 15th, that was before that  
 18 meeting which I was supposed to hold with the unions later,  
 19 and then they said we will get the answer. Now, and it was  
 20 also at that time that I emphasised to them to say then I  
 21 need also to get the unions, so Chairperson, then the  
 22 answer which I got, then I got the answer which was  
 23 recorded at the exhibit OO4.  
 24 MS PILLAY: General, there's a further  
 25 dimension to what I've been putting to you, and it's a

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1 contention that was advanced both on behalf of the miners  
 2 and on behalf of the families, and that is this; that the  
 3 police had at their disposal a seasoned and experienced  
 4 negotiator who had experience with conflict resolution in a  
 5 mining context, who was a man of God, trusted by the  
 6 miners, and on two occasions, or specifically on the 16th,  
 7 but also in relation to the 13th, he could have been used as  
 8 a resource to negotiate with the miners. Now what's your  
 9 response to that?  
 10 MAJOR-GENERAL MPEMBE: Chairperson,  
 11 according to the statement of Colonel McIntosh, the people  
 12 are the ones that actually couldn't want to continue with  
 13 the negotiations any further. Maybe I, we should actually  
 14 check the statement of Colonel McIntosh because he does put  
 15 it clearly what happened on the 16th.  
 16 COMMISSIONER HEMRAJ: But perhaps Ms  
 17 Pillay wants to know why the police did not use someone who  
 18 comes with the reputation that the Reverend Seoka has of  
 19 dealing with these situations. Why did the police not  
 20 elect to use him in any of the negotiations?  
 21 MAJOR-GENERAL MPEMBE: As far as my  
 22 recollection is concerned, we did utilise Colonel McIntosh  
 23 and he has good experience.  
 24 CHAIRPERSON: No, no, that's not the  
 25 question. The question is Colonel McIntosh did his best,

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1 but then the Right Reverend Bishop Seoka arrives on the  
 2 scene; he's an experienced person facilitating and  
 3 negotiating and so on, and as we know, he subsequently  
 4 assisted materially in bringing about the peace accord,  
 5 facilitating the arrangement that took place subsequently  
 6 after the 16th, made a very important contribution, as I  
 7 understand. Now the question you're being asked is why  
 8 didn't you use, take advantage of his willingness to be  
 9 involved – I think that's the question, is that right, Ms  
 10 Pillay?  
 11 MS PILLAY: That's correct, Chair.  
 12 MAJOR-GENERAL MPEMBE: Thanks,  
 13 Chairperson. I didn't understand the question.  
 14 CHAIRPERSON: That's why I clarified it.  
 15 MAJOR-GENERAL MPEMBE: Yes. Chairperson,  
 16 and I think Reverend Seoka can confirm, I did not know  
 17 about Reverend Seoka at all. The second part that I need  
 18 also to mention is, Chairperson, and the Commission, you'll  
 19 recall in terms of my pleading with all the leaders of the  
 20 unions in as far as GGG4 is concerned, because if Reverend  
 21 Seoka was known by one of those leaders and he was  
 22 introduced, because I even told them that we need somebody  
 23 that will have to bring change, so if for example I could  
 24 see now with the benefit of hindsight that he's actually  
 25 very close to Mr Mathunjwa, if by then he was there, then

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1 we could have utilised him. But myself as an overall  
 2 commander, I did not know about his services at that time.  
 3 CHAIRPERSON: Yes, no I understand that,  
 4 and to be fair, I don't think he was close to Mr Mathunjwa  
 5 at that stage. It was only subsequently when he came and  
 6 facilitated what amounted to a settlement, but that was all  
 7 after the 16th. So I understand your answer. Is this an  
 8 appropriate stage for us to take the lunch adjournment?  
 9 MS PILLAY: It is, Chair.  
 10 CHAIRPERSON: Can you give us an  
 11 indication, Ms Pillay – I know it's difficult – of how long  
 12 you're likely to be, when we resume, with the witness?  
 13 MS PILLAY: Chair, a maximum of an hour.  
 14 CHAIRPERSON: I see. Alright, we'll bear  
 15 that in mind. We'll now take the lunch adjournment. We'll  
 16 resume at quarter to 2.  
 17 [COMMISSION ADJOURNS COMMISSION RESUMES]  
 18 [14:01] CHAIRPERSON: The Commission resumes.  
 19 Major-General, you're still under oath.  
 20 MAJOR-GENERAL MPEMBE: Correct,  
 21 Chairperson.  
 22 CHAIRPERSON: The reason we are late is  
 23 that we had a visit in chambers from counsel for the police  
 24 services who wishes to say something which doesn't amount  
 25 to an objection. Yes, Mr Ngalwana.

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1 MR NGALWANA: Thank you, Chair, let me  
 2 emphasise again that this is not an objection. It's just  
 3 an observation of concern that the police team has conceded  
 4 over the lunch break, the concern is that and I'm dealing  
 5 only with the witness. This issue relates to the witness  
 6 who's currently in cross-examination. The concern that the  
 7 police team has discussed is where the evidence leaders  
 8 place the version of the miners or the injured workers who  
 9 are not currently represented here without having consulted  
 10 with them. And, of course, in light of what Mr Mpofo has  
 11 said this morning that has also brought this to a head. It  
 12 made us think a bit and so we consider that if this were to  
 13 happen and Mr Mpofo comes back it seems to us that very  
 14 little can stop him from saying well look I am now here,  
 15 I've consulted with my witnesses. I want to cross-examine  
 16 General Mpeembe on my witness's version as they've conveyed  
 17 it to me, the evidence leaders could not possibly have  
 18 articulated fairly the version of my witnesses. We've  
 19 considered that there may be a way around this problem and  
 20 it's one of two ways, there may be more, either the  
 21 evidence leaders, before they put a version of  
 22 unrepresented people to the Major-General they could have a  
 23 consultation with the miners who are not here represented  
 24 either voluntarily, in other words of their free volition  
 25 of the miners or by way of subpoena. And let me make it

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1 clear, Chair, that I am not talking about versions that are  
 2 contained in statements being put to the General, I am  
 3 talking about general versions attributed to people who are  
 4 not represented here and that being said to be their  
 5 version. So we fear that it may very well be argued at the  
 6 end by Mr Mpofo and his team and perhaps Mr Ntsebeza that  
 7 the process has been irregular and that may very well be a  
 8 ground for review. We just thought we should place that on  
 9 record without any objection at all so that we are all  
 10 alive to this possibility.  
 11 CHAIRPERSON: Thank you, Mr Ngalwana. Mr  
 12 Budlender, as the Chief evidence leader, do you wish to  
 13 comment at all on what's been said.  
 14 MR BUDLENDER SC: Chair, we understand  
 15 the problem that is raised by our colleagues. It seems to  
 16 us that the way to resolve it is as follows; that where a  
 17 witness gives evidence and we have on record a version by  
 18 the injured and arrested persons put by them themselves  
 19 either in the form of a statement which they have submitted  
 20 or in the form of a proposition or a case which is being  
 21 put by their counsel then we will say, according to the  
 22 statement of Mr So and So, he says this. And say to the  
 23 witness what do you say to that or alternatively according  
 24 to what was said by counsel for the injured or arrested  
 25 persons their case is this, what do you say to that. That

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1 putting of a version will carry no evidential weight  
 2 whatsoever, it will give the witness some opportunity to  
 3 deal with it so that the witness doesn't have to be called  
 4 back subsequently. And if the injured and arrested persons  
 5 subsequently come back and say well that's not really what  
 6 we meant, when we said this that's not what we meant, we  
 7 meant something else. Well they can deal with that and  
 8 that can be dealt with in due course but it seems to us  
 9 that it's both fair to the witnesses and important for the  
 10 work of the Commission that where we have a version on  
 11 record from the injured and arrested person, a version  
 12 created by them themselves is important that should be put  
 13 to the witnesses.  
 14 CHAIRPERSON: Thank you. That seems to  
 15 be prima facie correct - Mr Ngalwana do you want to  
 16 comment?  
 17 MR NGALWANA: I just want to say  
 18 something briefly by way of reply. The difficulty, of  
 19 course, there may not be a difficulty with the injured  
 20 miners but the difficulty will be that Major-General Mpeembe  
 21 may very well have to be recalled in the event of the  
 22 injured miners amending the version that was put to Major-  
 23 General Mpeembe and that we think will be an unfair approach  
 24 to take.  
 25 CHAIRPERSON: Shouldn't we cross that

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1 bridge if and when we get there? It may not happen. It  
 2 would affect weight, I understand the point you make that  
 3 it might be contended it's an irregularity. Whether that's  
 4 ever likely to be upheld by a court applies its mind  
 5 properly to the question is another matter if you don't  
 6 have to go into it at the moment. But thank you for making  
 7 the point, for giving us cause to think about it. I think  
 8 I've already reminded you you're under oath, Major-General.  
 9 Ms Pillay.

10 MAJOR-GENERAL MPEMBE: Correct,  
 11 Chairperson.

12 MS PILLAY: Thank you, Chair. Chair  
 13 during the cross-examination of General Phiyega Mr Mpofu -  
 14 COMMISSIONER HEMRAJ: Sorry, Ms Pillay,  
 15 are you moving away from the extract?  
 16 MS PILLAY: Yes, I am.  
 17 COMMISSIONER HEMRAJ: I can't remember,  
 18 did you put lines 24 and 25 to him? I can't remember if  
 19 you did read it out or not.  
 20 MS PILLAY: Yes, I did -  
 21 COMMISSIONER HEMRAJ: Okay, thank you.  
 22 Sorry to interrupt.  
 23 MS PILLAY: General, during the cross-  
 24 examination of General Phiyega Mr Mpofu dealt with what he  
 25 described as ten prescripts, legal prescripts which were

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1 extracted from the legal framework of the various legal  
 2 documents that bind SAPS and regulates their conduct. Now  
 3 General Phiyega agreed with all ten of them and so I think  
 4 they're largely uncontentious. The one that I want to deal  
 5 with you today specifically is what was described by Mr  
 6 Mpofu legal and moral duty on the part of SAPS to act in an  
 7 impartial and unbiased manner. Now General Phiyega  
 8 accepted that such a duty exists, do you similarly that  
 9 SAPS has to act, when they do act they have to act in an  
 10 impartial and unbiased manner?  
 11 MAJOR-GENERAL MPEMBE: Correct, Chair.  
 12 MS PILLAY: Now General, Mr Mpofu argued  
 13 before the Commission that in relation to the Marikana  
 14 operation that SAPS did not act in an unbiased and  
 15 impartial manner, in fact he alleged that there was what he  
 16 called a toxic collusion between SAPS and Lonmin. And he  
 17 put to both General Annandale and General Phiyega 13  
 18 indications of what - factual indications of what he  
 19 submitted amounted to a toxic collusive relationship  
 20 between SAPS and Lonmin. Chair, what I've done just to go  
 21 quite quickly through these points is I've just tabulated  
 22 them in a table and cross-referenced to where they where  
 23 they appear in the record and I just seek to go quite  
 24 quickly through them, General, and get your response.  
 25 CHAIRPERSON: I suggest you read all 13

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1 without interruption, you know just to get them on record  
 2 as it were and then the witness can deal with them either  
 3 one by one or globally as he considers it appropriate or  
 4 you consider it appropriate. Shall we give it an exhibit  
 5 number?  
 6 MR NGALWANA: Chair, before we give it an  
 7 exhibit number, it's not an objection, I'm just alerting us  
 8 to the fact, I am wondering if this is necessary because I  
 9 remember distinctly Mr Burger dealing with each and every  
 10 one of these and quite ably with respect and it seems the  
 11 effect of that was really to torpedo each and every one of  
 12 these out of the water. So I wonder if it's necessary for  
 13 this witness to deal with it.  
 14 CHAIRPERSON: Lonmin don't agree there  
 15 was collusion, perhaps it's appropriate to get a police  
 16 comment as well but let's not just spend too much time on  
 17 it, let's rather get it - the next exhibit as far as I can  
 18 see will HHH49. You'll bear in mind the point that was  
 19 made by Mr Ngalwana, not by way of objection. Carry on  
 20 please, Ms Pillay.  
 21 MS PILLAY: The 13 points, General, are  
 22 firstly the appointment of Mr Sinclair as the liaison  
 23 person to manage the relationship between SAPS and Lonmin.  
 24 The second point is the partnership between SAPS and Lonmin  
 25 identifying individuals who were suspects. The third is

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1 the establishment and use of the Lonmin JOC, essentially  
 2 that relates to the fact that the JOC was based on Lonmin's  
 3 premises. The fourth was the joint use of the CC TV  
 4 material by Lonmin and SAPS. The fifth was the joint  
 5 deployment of medical personnel ad forward holding area 1.  
 6 The sixth was Mr Botes', the fact that Mr Botes was  
 7 permanently based at the SAPS JOC. The seventh was the use  
 8 of the Coin Security helicopter which is referred to in  
 9 certain documents as the Lonmin Chopper. The eighth was  
 10 the use of the Lonmin employee George as the Fanagalo  
 11 interpreter. The ninth was the fact that Mr Kwadi was with  
 12 the Union representative, sorry the Union President when  
 13 they were taken to the koppie on the 14th. The tenth was  
 14 the miners who were arrested on the 16th were processed at  
 15 the Lonmin Number 1 shaft. The eleventh is the fact that  
 16 Mr Botes attended the 6am JOC on 16th of August. The  
 17 twelfth is that there were daily briefing meetings between  
 18 Lonmin and NUM and that SAPS would occasionally attend the  
 19 daily briefings and the thirteenth is that when the people  
 20 were shot the overall commander, that is yourself, was in  
 21 the Lonmin chopper and not in the JOC at the time.  
 22 MAJOR-GENERAL MPEMBE: No, Chairperson.  
 23 MS PILLAY: General, if I could ask you  
 24 to respond first to the general allegations that was some  
 25 sort of improper relationship between SAPS and Lonmin

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1 during the operation. If I could have your comment to  
 2 that.

3 MAJOR-GENERAL MPEMBE: No, Chairperson,  
 4 there was no toxic relationship between SAPS and Lonmin. I  
 5 can deal with each item if the Commission does allow me to  
 6 do that.

7 MS PILLAY: You can go ahead, General,  
 8 and deal with whichever points you feel it's necessary to  
 9 deal with.

10 MAJOR-GENERAL MPEMBE: The appointment of  
 11 Mr Sinclair as liaison officer - was liaison person to  
 12 manage relationship between SAPS and Lonmin, Mr Sinclair in  
 13 terms of his work, he is a most senior officer of the  
 14 security in Lonmin and he's not appointed by us. So it is  
 15 by virtue of his work that he worked with South African  
 16 Police Service. Chairperson, number 2 recalls me of what I  
 17 said in terms of on the 13th where people were identified.  
 18 Lonmin was the employer and for us to know who were the  
 19 people, we had no any other place to go except to go to  
 20 Lonmin. And secondly the Commission will recall that I  
 21 said when the Provincial Commissioner was briefed on Monday  
 22 the senior officers of Lonmin said we don't know who are  
 23 these people, they are faceless. So that's why then we had  
 24 to go there. It was not a partnership. To us to establish  
 25 that there is a partnership, there should have been a

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1 memorandum of understanding whereby we do share resources  
 2 or any other issue but this is any other department where  
 3 we can help. But in this case Lonmin were the employer  
 4 where we could get more information in order to enable us  
 5 to do our work.

6 Chairperson, with regard to number 3 there is no  
 7 policy that says you cannot establish a JOC to any other  
 8 place. Secondly, is that we normally, in any operation, we  
 9 normally establish a JOC where we will be nearer to the  
 10 problem than any other. The issue that we look at is  
 11 efficiency, effectiveness. The EEE, economical, efficiency  
 12 and effectiveness rather than to be away from the place to  
 13 travel from all over the place where we were not because we  
 14 were supposed to deploy throughout the day and the night  
 15 and you have to work to know all the places within a short  
 16 space of time. We were getting different police officials  
 17 from different provinces but they had to be on a continuous  
 18 basis be orientated.

19 Chairperson, with regard to number 4 the CC TV it  
 20 was an asset to enable us to do the work. We did not  
 21 utilise it because there was any other agreement between us  
 22 and Lonmin. There was no even a prior arrangement or prior  
 23 - it was an asset that is there that we could utilise it to  
 24 do our work properly. With regard to number 5, the medical  
 25 personnel of Lonmin, we couldn't see any reason why we

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1 could not utilise it because in most cases it was in the  
 2 case of emergency. What happened on the 13th and then with  
 3 regard to - on the 16th there was no any other prior  
 4 arrangements in terms of saying we have to plan together so  
 5 that we should get you to go there. So that to me it  
 6 didn't show any other toxic relationship. Chairperson,  
 7 with regard to number 6, Mr Botes is the second in command  
 8 of Mr Sinclair, he knew the environment very well and in  
 9 this case for us to have operated in a better way one of  
 10 the areas that we need to muster well it is the - that  
 11 environment in which we have to work. So in regard to that  
 12 that's why Mr Botes was in the JOC.

13 [14:20] But I need to indicate, Chairperson, with regard  
 14 to the JOC and that can also be confirmed. And I did state  
 15 that our JOC was established on Saturday. It worked on  
 16 Saturday and at that time Mr Botes was there and the police  
 17 were there and when I arrive on Monday the JOC was  
 18 separated. So Lonmin JOC was at another place and SAPS JOC  
 19 was on another place, so it was on the issue of - it's not  
 20 that he was always there when we were doing the briefing.  
 21 When we were doing the briefing it was only the police and  
 22 then Mr Botes will come at a later stage and he will be -  
 23 the briefing could be done for the operation to continue on  
 24 a highly classified manner. Chairperson, with regard to  
 25 number 7, the use of Coin Security helicopter, I need also

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1 to state that there was no prior arrangements with SAPS  
 2 that the Coin Security should be used by SAPS. Coin is  
 3 contracted by Lonmin so we saw it as a tool that you can  
 4 utilise it in that regard. It was not because Lonmin -  
 5 there was any other prior arrangement between us and Lonmin  
 6 and in all of my testimony exactly what was said by Lonmin,  
 7 exactly what was said - I said it without any fear to show  
 8 that there was no any other relationship. We have just to  
 9 talk what has happened on that day.

10 Chairperson, with regard to number 8, the  
 11 situation at that time needed any resource to use and as  
 12 I've indicated earlier on that if we knew of the skills of  
 13 Reverend Walker we could have used him. And in this case  
 14 the only people that could assist us with the Fanagalo  
 15 because we didn't have any expert in the police to talk  
 16 Fanagalo, it was to use one of the Lonmin people. As I  
 17 indicated that we didn't get those services on Monday but  
 18 on the following day we did get those services from Lonmin.

19 CHAIRPERSON: Wasn't there some evidence  
 20 that Lieutenant-Colonel McIntosh also can speak Fanagalo?  
 21 Or am I confusing that with something else? I seem to  
 22 remember some evidence to that effect, am I right?

23 MAJOR-GENERAL MPEMBE: Chairperson, what  
 24 I know is he did do a conflict resolution in the mines but  
 25 that he is very good in Fanagalo I do not know.

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1 Chairperson, with regard to number 9, Mr Kwadi it is his  
 2 work in Lonmin to be a labour relations officer. As I have  
 3 indicated that what happened in Lonmin was labour related  
 4 and the police intervened when people started to be killed,  
 5 vehicles starting to be torched. We did request Lonmin and  
 6 Lonmin tasked Mr Kwadi because he had a good relationship  
 7 with the President already, he's the one that facilitated  
 8 the meeting that took place on the 15th. So we did not see  
 9 any toxic relationship. He was there to assist and the  
 10 meeting that was organised and it was organised by him but  
 11 called by us and also to go to the mine it was to assist  
 12 but not to have any other toxic relationship.

13 Chairperson, with regard to number 10, I did  
 14 testify that the police station at that time did not have  
 15 electricity and there were problems that we could have  
 16 experienced. And with the number and the volume of the  
 17 people that we could have processed and then what we had to  
 18 do is to get another place in terms of to process this. It  
 19 was arranged prior, it was when we said it was - it was  
 20 arranged prior, yes in the sense that when we realised that  
 21 the police station there's no electricity because it was  
 22 under construction. Then we had to get a place where we  
 23 could process.

24 CHAIRPERSON: When exactly - what time  
 25 was that that you made that arrangement with Lonmin that

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1 they would make that place available for the processing of  
 2 the arrested persons? Can you remember?

3 MAJOR-GENERAL MPEMBE: Chairperson, if my  
 4 recollection serves me well it was on the 16th by the time  
 5 when we were doing the taskings in the morning.

6 CHAIRPERSON: In the morning.

7 MAJOR-GENERAL MPEMBE: And I do remember  
 8 that Brigadier Van Zyl, Seboloke and myself we were  
 9 responsible for that one.

10 CHAIRPERSON: We're just going to take a  
 11 short adjournment of five minutes. There's something that  
 12 one of my commissioners has to attend to.

13 [COMMISSION ADJOURNS COMMISSION RESUMES]  
 14 [14:30] CHAIRPERSON: The Commission resumes.  
 15 You're still under oath, Major-General.

16 WILLIAM MPEMBE: Correct, Chairperson.

17 CHAIRPERSON: Yes, Ms Pillay? I think  
 18 the Major-General was going through the list and you just  
 19 finished dealing, I think with number 10, when we took that  
 20 short adjournment.

21 MAJOR-GENERAL MPEMBE: Correct,  
 22 Chairperson. Chairperson, for Mr Botes to attend the 6  
 23 o'clock JOC meeting at the, on the 16th, it was when he was  
 24 just to inform the JOC how they have posted their  
 25 securities, so it didn't show any other relationship in

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1 terms of planning together to do any other thing. The  
 2 daily briefings, I do not have any knowledge of any Lonmin  
 3 and NUM meeting that were attended by SAPS members. That  
 4 is number 12.

5 Chairperson, with regard to number 13, my answer  
 6 is still the same, that as I have said, the chopper was a  
 7 resource that was there that could be used, but there is no  
 8 policy that says I must have been at the JOC as an overall  
 9 commander.

10 CROSS-EXAMINATION BY MS PILLAY (CONTD.):  
 11 But General, whether or not these factors indicate a toxic  
 12 collusion or not, what I've put to you is at the very least  
 13 from the perception of the miners involved, it may have  
 14 created a perception that there was an improper working  
 15 relationship between Lonmin and SAPS, from the perception  
 16 of the miners involved.

17 MAJOR-GENERAL MPEMBE: Chairperson, I  
 18 understand the perception, but what was more important is  
 19 that all what the miners asked the police during all the  
 20 activities that happened here, we did convey it to the  
 21 Lonmin management, and secondly, we have been transparent  
 22 even in this Commission to say what did we convey to Lonmin  
 23 and coming from the miners themselves. Our communication  
 24 with the miners, between the miners and Lonmin was conveyed  
 25 on both parties.

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1 Secondly, for us to do our work in, as the  
 2 Constitution says and in terms of the Police Act, Lonmin  
 3 was the employer and we did feel that Lonmin has the duty  
 4 to ensure that the situation has to be brought under  
 5 control. But not only Lonmin; we also felt that the labour  
 6 unions should also have a duty, and in terms of that, if  
 7 there was any toxic relationship, with all the meetings and  
 8 the relationship that I had with the presidents of the  
 9 unions, in relation - we can check both OOO4 and GGG4, I  
 10 said to them I'm always 24 hours here; if is there any  
 11 other thing, just talk to us. So if there was any other  
 12 issues, we also brought in element of the presidents  
 13 talking to the miners and also to Lonmin. So it could have  
 14 been addressed at that time.

15 MS PILLAY: Within that theme, General,  
 16 there are just two further points that I need to draw to  
 17 your attention. The first is that I put it to you that on  
 18 the morning of the 16th that Lonmin had made available to  
 19 SAPS additional barbed wire, that was eventually not used.

20 MR NGALWANA: Chair, whose version is  
 21 this? Which witness has said it? I'm not aware of this  
 22 evidence.

23 MS PILLAY: Chair, we have photographic  
 24 evidence to that effect, but if needs be we can get a  
 25 statement from Lonmin which confirms that.

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1 COMMISSIONER HEMRAJ: Was this apropos  
2 the police saying there was insufficient barbed wire to go  
3 around the copy?  
4 MS PILLAY: To encircle the koppie, yes.  
5 CHAIRPERSON: You know, the rule we've  
6 got is that if statements and things are going to be put,  
7 the person to be cross-examined should get notice of it  
8 beforehand. If this wasn't part of the material that the  
9 witness was given, then I don't think you can ask him the  
10 question. It may well be that the question can be asked of  
11 other people – I think in relation to the barbed wire maybe  
12 Brigadier Calitz or somebody can deal with the question,  
13 and presumably by the time he gives evidence, the relevant  
14 statement to which you refer and the photograph to which  
15 you refer can be put to him. But I think Mr Ngalwana was  
16 on the point of raising something which would have been an  
17 objection and which I would have upheld, but don't concur –  
18 MR NGALWANA: [Inaudible] objection.  
19 CHAIRPERSON: You don't have to, Mr  
20 Ngalwana.  
21 MS PILLAY: General, the second point  
22 which I wish to put to you, is the following. You were  
23 aware that the miners on the 13th had reported to you that  
24 there were incidents of violence on the part of Lonmin  
25 against the miners. Is that correct?

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1 MR SHOZI: Chair, again might we enquire  
2 as to whose version is being put to General Mpmembe?  
3 MS PILLAY: Chair, it appears from  
4 General Mpmembe's statement, GGG15, that on the day, on the  
5 13th the miners informed him that they wished to be armed  
6 because they were shot at by Lonmin.  
7 CHAIRPERSON: - Lonmin, NUM. Do they say  
8 Lonmin as well? What is that statement? Just give me the  
9 reference again. I remember them saying they wanted to  
10 retain their arms to protect themselves against NUM, but if  
11 they said Lonmin as well, then I don't remember that, but  
12 can you give me the reference, please?  
13 MS PILLAY: I'll give you the reference  
14 in two seconds, Chair. GGG12 at paragraph 14.  
15 CHAIRPERSON: GGG12, paragraph?  
16 MS PILLAY: Paragraph 14.  
17 CHAIRPERSON: 14. Yes, I see that is  
18 correct. It is correct. What they stated was, "They  
19 refused to hand over the weapons. One of them stated that  
20 the mine security fought with them and it was the mine  
21 security that were shooting at them, and that was why they  
22 don't want to give their weapons to the police." That's  
23 what you yourself said [microphone off, inaudible] told  
24 you.  
25 MAJOR-GENERAL MPEMBE: Chairperson, in

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1 this case they were referring to, I was referring to the  
2 incident. That's what I thought that they were referring  
3 to the incident that happened when the securities were  
4 attacked and killed, and I knew that there was a docket  
5 that was opened.  
6 CHAIRPERSON: But the point in question  
7 is that what the miners said was that the mine security,  
8 which are obviously Lonmin employees, had shot at them.  
9 That was their allegation. I understand there may be other  
10 allegations from other parties, but that was the miners'  
11 allegation. That's the basis of the question which Ms  
12 Pillay is asking you.  
13 MS PILLAY: The question, General, is if  
14 you look at exhibit L, and if you look at slide 43 onwards  
15 of exhibit L –  
16 CHAIRPERSON: Which particular bullet are  
17 you referring to in slide 43 of exhibit L?  
18 MS PILLAY: It's no particular bullet,  
19 Chair. I'll just wait for the witness to open the slide  
20 and I'll pose my question.  
21 CHAIRPERSON: I see. Alright, okay.  
22 MS PILLAY: The question, General, is if  
23 you look at slide 43 to 48 of exhibit L, it's a summary of  
24 the sequence of events that took place on the 13th. Now you  
25 will see that there is absolutely no mention in those

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1 slides of reports or allegations even by the miners that  
2 they were shot at by Lonmin.  
3 MAJOR-GENERAL MPEMBE: Chairperson, as I  
4 indicated earlier on, the inputs that were made in exhibit  
5 L were coming from different people and it depends from the  
6 compiler how did he compile it. So, but what I do believe  
7 is that the versions were put, but how it was compiled is  
8 something that I did not have any control of.  
9 MS PILLAY: General, as overall commander  
10 of the operation, did you see exhibit L before it was  
11 presented to this Commission?  
12 MAJOR-GENERAL MPEMBE: Chairperson, I  
13 would say that exhibit L, it was presented to all of us,  
14 including myself, but thereafter there were some, many  
15 changes that were made, whom I cannot know when were they  
16 being made.  
17 MS PILLAY: And it goes further than  
18 that, General. Are you aware that there was a docket  
19 opened on the 10th of August, recording allegations by two  
20 residents of Marikana that they had been shot at by mine  
21 security?  
22 MAJOR-GENERAL MPEMBE: No, Chairperson,  
23 as on the 10th I was still on leave. I started reporting on  
24 the 13th.  
25 MS PILLAY: Chair, if I may hand up two

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1 statements. These are both statements taken from the SAPS  
 2 hard drive. The first is by Mr Thando Elias Mutengwane,  
 3 and the second by Mr Bulelani Kluset Dlomo. Now I've drawn  
 4 these statements to the attention of both representatives  
 5 for SAPS and Lonmin, Chair.  
 6 CHAIRPERSON: I take it you want me to  
 7 mark Mr Mutengwane's statement as HHH50?  
 8 MS PILLAY: That's correct, Chair.  
 9 CHAIRPERSON: And Mr Dlomo's statement as  
 10 HHH51. I have so marked them.  
 11 MS PILLAY: Now General, you will see  
 12 from the statements of both Mr Mutengwane and Mr Dlomo that  
 13 they allege that they were shot at from a Lonmin Security  
 14 twin-cab on the 10th of August.  
 15 MAJOR-GENERAL MPEMBE: Chairperson, as  
 16 I'm saying, on the 10th I was not, on leave, not running  
 17 away from my responsibilities; on the 13th, I might have  
 18 made some enquiries, but I did receive now this document  
 19 here, I could have checked what was done to process of the  
 20 investigations, is there any other arrests were made or not  
 21 on this.  
 22 MS PILLAY: The proposition that I've put  
 23 to you, General, as overall commander of the operation, is  
 24 that we've had a look at slides 11, 12, 13 to 16 to exhibit  
 25 L, which records a summary of the sequence of events on the

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1 10th of August and nowhere in those slides does it mention  
 2 allegations by residents of having been shot at by Lonmin.  
 3 MAJOR-GENERAL MPEMBE: Yes, Chairperson,  
 4 my answer is still the same, that this is being brought to  
 5 me. This was never being brought to my attention on the  
 6 13th, as it happened on the 10th.  
 7 CHAIRPERSON: I think the question goes a  
 8 bit further than that. I understand you just came back  
 9 from leave.  
 10 MAJOR-GENERAL MPEMBE: Correct,  
 11 Chairperson.  
 12 CHAIRPERSON: But the –  
 13 MR NGALWANA: Not on the 10th, Chair.  
 14 CHAIRPERSON: No, no, no, I'm sorry, I  
 15 didn't make myself clear. You came back from leave after  
 16 the 10th. This happened on the 10th apparently, and you  
 17 didn't know about it because you were on leave.  
 18 MAJOR-GENERAL MPEMBE: Correct,  
 19 Chairperson.  
 20 CHAIRPERSON: And I think you're saying  
 21 it wasn't drawn to your attention before the 13th. Is that  
 22 right?  
 23 MAJOR-GENERAL MPEMBE: Correct,  
 24 Chairperson.  
 25 CHAIRPERSON: But the question of Ms

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1 Pillay goes a bit further than that, because she asked you  
 2 whether you were aware of the contents of exhibit L before  
 3 it was finalised, and you told us that it was presented  
 4 just before it was finalised, because you said some changes  
 5 were made after that, after it was presented to a group,  
 6 including you. So I think what Ms Pillay wants to know is  
 7 were you aware at that stage when the draft, as it were, of  
 8 exhibit L was presented, that these complaints had been  
 9 made by these two people of their being attacked, or  
 10 assaulted by Lonmin people.  
 11 [14:50] So what's the answer? Did you know of these two  
 12 dockets, these two cases, allegations at the time when the  
 13 draft of exhibit L was presented to a group, including you?  
 14 MAJOR-GENERAL MPEMBE: At that time,  
 15 Chairperson, I was not aware in terms of – I do not  
 16 remember that this was mentioned in the exhibit L, but as I  
 17 have indicated, there were so many times that exhibit L was  
 18 updated.  
 19 CHAIRPERSON: Yes, yes, I know, but you  
 20 see, the point is this; we've got the final version of  
 21 exhibit L. Exhibit L doesn't mention that at this time  
 22 some of the workers were complaining, miners were  
 23 complaining that they were being attacked by Lonmin people  
 24 in the circumstances set out in these statements, and I  
 25 think the point being made – if I'm wrong, Ms Pillay will

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1 correct me – was that in order to present a fair picture of  
 2 the situation, this should have been mentioned in L. If  
 3 you knew about these statements at the time and you were  
 4 present when presumably a draft of L was presented, you  
 5 should have put your hand up and say hey, this isn't fair,  
 6 this isn't completely fair and complete version; there  
 7 should also be mention of these two incidents that are  
 8 referred to in HHH50 and 51. I think that's your point, Ms  
 9 Pillay. Is that right?  
 10 MS PILLAY: That's correct, Chair.  
 11 MAJOR-GENERAL MPEMBE: Chairperson, as  
 12 I've indicated that I was not aware of this since I was on  
 13 leave, but also that as my memory serves me well, I didn't  
 14 see it when exhibit L was presented to me at that time.  
 15 MS PILLAY: General, if I may refer you  
 16 to a further statement –  
 17 MR NGALWANA: Chair, can I just make one,  
 18 or two corrections? As I understand Ms Pillay, she said  
 19 that there were two dockets that record people being shot.  
 20 She can correct me if I'm wrong. It seems to me if you  
 21 look at the top of the page it's in fact one docket.  
 22 MS PILLAY: Chair, I'm about to introduce  
 23 the second docket.  
 24 CHAIRPERSON: What we've got at the  
 25 moment, exhibits HHH50 and 51, those are from one docket,



<p style="text-align: right;">Page 13170</p> <p>1 but we're now coming to the second docket. Is that right?</p> <p>2 MS PILLAY: The second docket, that's</p> <p>3 correct, Chair.</p> <p>4 MR NGALWANA: The second point of</p> <p>5 correction; it was mentioned that these two mentioned that</p> <p>6 people were shot from a bakkie, twin-cab that opened fire</p> <p>7 at them. I haven't seen that allegation in HHH51, Chair.</p> <p>8 Perhaps our learned friend can help the witness. It seems</p> <p>9 paragraph 4 is the one that talks about a shooting.</p> <p>10 MS PILLAY: Chair, in paragraph 4 it's</p> <p>11 mentioned of people who were there or from the Lonmin</p> <p>12 Security.</p> <p>13 CHAIRPERSON: So the statement as put to</p> <p>14 you may not have been precise in the sense that it should</p> <p>15 have said that the one case that the shots were fired from</p> <p>16 a Lonmin Security twin-cab. The second case it was said</p> <p>17 fired from a Lonmin Security, and not stating whether or</p> <p>18 not it was a twin-cab. That's the difference, but either</p> <p>19 way the allegation was that Lonmin Security had been</p> <p>20 involved in shooting at these people, and these two</p> <p>21 complainants' statements were filed together in one file,</p> <p>22 one docket, which apparently is CAS69/08/2012, and that's</p> <p>23 not referred to in exhibit L, and now we're coming to the</p> <p>24 second docket. How many statements are there? Just one?</p> <p>25 MS PILLAY: It's just one document.</p>	<p style="text-align: right;">Page 13172</p> <p>1 in paragraph 2 that on Monday, the 13th of August, he was on</p> <p>2 duty at Lonmin Marikana Operations. They encountered a</p> <p>3 group, a crowd marching towards the K3 Shaft. The crowd</p> <p>4 was stopped next to the railway line. They were dispersed</p> <p>5 by members of Lonmin Security. As they were marching back</p> <p>6 towards the gathering they were stopped by SAPS in order to</p> <p>7 negotiate. Mr Kellerman says in paragraph 3, General, that</p> <p>8 they stayed behind on the bridge to keep observation on the</p> <p>9 movement of the crowd, and when SAPS dispersed the crowd</p> <p>10 they tried to follow the movements of the people, and he</p> <p>11 says that they then saw a group of five people moving</p> <p>12 towards the K4 concentrator. He says in paragraph 4 that</p> <p>13 they rushed towards the K4 concentrator and shouted at the</p> <p>14 people to move away from the concentrator area. He says</p> <p>15 the Lonmin Security team shot a warning round with rubber</p> <p>16 ammunition towards the suspects.</p> <p>17 MR NGALWANA: Chair, I must apologise. I</p> <p>18 notice my learned friend is paraphrasing. There's some</p> <p>19 excerpts that she doesn't read. I'm not sure if that</p> <p>20 creates an accurate picture for the witness.</p> <p>21 CHAIRPERSON: Has the witness got the</p> <p>22 document in front of him?</p> <p>23 MS PILLAY: Chair, the witness was also</p> <p>24 given notice a few days ago that we intend relying on this</p> <p>25 document.</p>
<p style="text-align: right;">Page 13171</p> <p>1 CHAIRPERSON: So that will be HHH52, I</p> <p>2 take it.</p> <p>3 MS PILLAY: This will be HHH52. General,</p> <p>4 do you have the statement of Mr Kellerman in front of you?</p> <p>5 MAJOR-GENERAL MPEMBE: Correct,</p> <p>6 Chairperson.</p> <p>7 MS PILLAY: You will see from paragraph 1</p> <p>8 of the statement, General – firstly this statement belongs</p> <p>9 to Marikana CAS118, and you will confirm, General, that</p> <p>10 that's one of the dockets opened as a result of the</p> <p>11 shooting of the 13th of August?</p> <p>12 MR NGALWANA: Chair, we're a bit</p> <p>13 handicapped because we don't have the statement to which</p> <p>14 our learned friend is referring.</p> <p>15 MS PILLAY: Chair, the team was furnished</p> <p>16 with a copy of the Kellerman statement, but I can get them</p> <p>17 another copy, if I'm just given 30 seconds.</p> <p>18 COMMISSIONER HEMRAJ: You can have my</p> <p>19 copy, Mr Ngalwana.</p> <p>20 MR NGALWANA: Thank you, Commissioner</p> <p>21 Hemraj.</p> <p>22 MS PILLAY: Now you will see, General,</p> <p>23 that Mr Kellerman is employed as a senior – or was at the</p> <p>24 time employed as a senior security officer for mining</p> <p>25 security at Lonmin Platinum Marikana Operations. He says</p>	<p style="text-align: right;">Page 13173</p> <p>1 MR NGALWANA: All I'm asking is that</p> <p>2 perhaps she should read the document, Chair, inasmuch as</p> <p>3 this seems to be misleading.</p> <p>4 MS PILLAY: Chair, I'm very conscious of</p> <p>5 the commitment I made as to time. I did give notice to the</p> <p>6 SAPS team of my intention to rely on this document. I</p> <p>7 think in the circumstances it's unreasonable to expect me</p> <p>8 to read every word on the page. I think the witness will</p> <p>9 correct me if I'm not accurately portraying what's on</p> <p>10 the statement.</p> <p>11 CHAIRPERSON: I think go on as you are</p> <p>12 for the moment, but I'll keep an eye on it and if I think</p> <p>13 that you're skipping over things that are relevant I'll</p> <p>14 raise the alarm, and Mr Ngalwana will do the same if he</p> <p>15 thinks so. We were busy with para 4. "We rushed towards</p> <p>16 the concentrator and shouted at the people to move away</p> <p>17 from the concentrator area." That's where you were, was</p> <p>18 it?</p> <p>19 MS PILLAY: That's correct, Chair. They</p> <p>20 kept on coming and members of the security team shot a</p> <p>21 warning round with rubber ammunition towards the suspects</p> <p>22 to deter them from entering the concentrator area. In</p> <p>23 paragraph 5 Mr Kellerman states that the suspect ran into</p> <p>24 the veld behind the concentrator and disappeared behind the</p> <p>25 small mounds of earth which are situated behind the</p>

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1 concentrator. He says then that the concentrator security  
2 superintendent had a high vantage point and directed him to  
3 where the suspect disappeared behind the mound. In  
4 paragraph 6, General, Mr Kellerman then says, and the sharp  
5 point of what he says in paragraph 6 is that Superintendent  
6 Botha, who was covering him, shot the suspect with rubber  
7 12-gauge rounds to deter him from coming towards Mr  
8 Kellerman.

9 MR NGALWANA: Well, it also says that the  
10 superintendent was covering him, Chair. That's been left  
11 out. Surely that gives a –

12 CHAIRPERSON: I don't know if that's a  
13 material omission, though. The point is that these rounds  
14 were fired. Please carry on, Ms Pillay.

15 MS PILLAY: He states then that the  
16 suspect changed direction and tried to run away in the  
17 direction of Superintendent – I'm not sure what that word  
18 is, it looks like Segwai to me. He then decided to shoot  
19 the suspect on the legs in order to stop him from escaping.  
20 He indicates that he shot the suspect with rubber rounds  
21 and that when he fell, he apprehended the suspect. I think  
22 in the remainder of the statement, General, Mr Kellerman  
23 indicates that he then apprehended the suspect and took him  
24 to SAPS, where he was then arrested and where he received  
25 medical treatment. Now the point is, General, that this

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1 Thank you.

2 COMMISSIONER HEMRAJ: The statements are  
3 not the only place where there's reference being made to  
4 shooting by Lonmin security guards; there are other  
5 statements as well which refer to it.

6 CHAIRPERSON: In answer to your first  
7 question, you will remember the ruling said that if a party  
8 to whom a version is put, or I suppose who's affected by a  
9 version wishes to do so, they can apply for the person  
10 whose version was put to be subpoenaed. So it's not  
11 incumbent upon Ms Pillay to say that she will definitely  
12 call this person. If the version is relevant, you may –  
13 and you want the person concerned to come – you can apply  
14 for the person to be subpoenaed, and if it's a relevant  
15 issue, the person will be subpoenaed. So that's the answer  
16 to the first question. She doesn't have to say whether  
17 she's going to call the person.

18 The second point is as to why it's put, that I  
19 think is something you're entitled to ask. Is it put to  
20 check this witness's knowledge and the fact that he appears  
21 to have refrained from asking that this point be included  
22 in exhibit L? If that's the purpose, then that's really  
23 the end of the matter. If on the other hand it's put  
24 forward as evidence from which a toxic collusion or  
25 something approximating thereto can be inferred, then I

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1 incident occurred on the 13th of August and yet in the  
2 summary of events of the 13th of August that's set out in  
3 exhibit L, there is no mention that any of the strikers  
4 were shot with rubber bullets by Lonmin Security.

5 CHAIRPERSON: The same point applies, you  
6 see. If you were present when the draft of L was  
7 presented, and if you knew about this – or let me put the  
8 question, then you can make your point – and you knew about  
9 this, why didn't you raise your hand and say hey, but this  
10 isn't complete, we should include this? That's the  
11 question, Ms Pillay?

12 MS PILLAY: That's correct, Chair.

13 CHAIRPERSON: Now I think there may be an  
14 objection from the Lonmin side to that. You put your light  
15 on, did you?

16 MR SHOZI: Chair, it's not an objection  
17 as such. We seek clarity from Ms Pillay in two respects  
18 because it's important for us to follow the debate since  
19 they concern Lonmin. The first aspect in respect of, we  
20 seek clarity in regard to the statements of Mutengwane and  
21 Bulelani Dlomo. We would like to know whether Ms Pillay  
22 intends to call them as witnesses. Secondly, we would like  
23 to know whether the statements are being relied upon to  
24 prove this alleged toxic collusion between Lonmin and SAPS,  
25 or is she now dealing with a separate subject matter?

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1 suppose you're entitled to know the answer to that. So  
2 what's the answer to the second question, Ms Pillay, put by  
3 counsel for Lonmin?

4 MS PILLAY: Sorry, just repeat the second  
5 question.

6 MR SHOZI: The question really is whether  
7 the statements are being relied upon as part of proving  
8 this so-called toxic collusion between Lonmin and SAPS, or  
9 whether you're now dealing with a separate subject matter  
10 altogether.

11 MS PILLAY: The statements are put within  
12 a broader theme of an improper relationship between SAPS  
13 and Lonmin, as further indicia of an improper relationship  
14 between SAPS and Lonmin.

15 CHAIRPERSON: It can't be as simple as  
16 that. The mere fact that a Lonmin official allegedly fired  
17 – he admitted he did, actually, or so he appears to in the  
18 statement – fired rubber rounds at a person who was  
19 injured, that in itself doesn't prove a toxic collusion  
20 between the police and Lonmin. But the fact that in the  
21 official police presentation this incident, which would  
22 have a bearing on that aspect, was not disclosed, and if  
23 this witness knew about this incident and didn't raise up  
24 his hand at the exhibit L preparatory discussion, then  
25 inferences can be drawn, I take it. So in itself it

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1 doesn't prove the collusion, but the fact that this  
 2 incident was, as it were, not disclosed in L when there was  
 3 knowledge of it, might lead to some kind of inference. So  
 4 I think - Ms Pillay, I don't want to put words in your  
 5 mouth - that seems to be the way the point presents itself  
 6 to me -

7 MR NGALWANA: No -  
 8 CHAIRPERSON: Am I reading it correctly?  
 9 MS PILLAY: That's correct, Chair.  
 10 CHAIRPERSON: Now you know the answer to  
 11 your question.  
 12 MR NGALWANA: Chair -  
 13 CHAIRPERSON: [Microphone off, inaudible]  
 14 points put is that there are really a number of preliminary  
 15 points that should be established before the inference can  
 16 be drawn.  
 17 MS PILLAY: Chair, we are well aware of  
 18 that. The witness indicated that there were limitations to  
 19 how far he could take this, and we will certainly put it to  
 20 further witnesses who come and testify before the  
 21 Commission.  
 22 CHAIRPERSON: Alright, so we just need to  
 23 get the short answer to the question then. Were you aware  
 24 of this incident?  
 25 MAJOR-GENERAL MPEMBE: No, Chairperson.

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1 Chairperson, maybe to say that [microphone off, inaudible]  
 2 -  
 3 CHAIRPERSON: Ms Pillay, isn't that the  
 4 end of it as far as this witness is concerned? He says he  
 5 didn't know. If he didn't know about it, he couldn't be  
 6 expected to have stood up at the exhibit L discussion  
 7 meeting and said this incident should be included for the  
 8 interest of completeness, because if he didn't know about  
 9 it, obviously he couldn't be expected to do that. That's  
 10 his answer.  
 11 MS PILLAY: We agree with that, Chair.  
 12 We simply felt it necessary to put it to this witness,  
 13 given that he is the overall commander, give him an  
 14 opportunity to answer -  
 15 CHAIRPERSON: You've got his answer.  
 16 [15:10] MAJOR-GENERAL MPEMBE: Chairperson, I  
 17 need also to add that in that is a CAS number where, I  
 18 think it's one of the - where the police officer was  
 19 killed, so the statement was taken and placed in the  
 20 docket, but however, I need also to state that Brigadier  
 21 Van Zyl, who's heading the Detective, he didn't also bring  
 22 this to my attention at that time.  
 23 MS PILLAY: General, just the final point  
 24 that I intend to deal with in my cross-examination is to  
 25 draw to your attention that when Mr Mpofu was cross-

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1 examining General Annandale, he described seven indications  
 2 of the fact that the operation was hijacked - in his terms  
 3 - by Hawks, who are more militant members of SAPS from what  
 4 he called the Doves, and in this analysis you were cast as  
 5 a Dove.  
 6 Now the proposition put was that the Hawks, the  
 7 more militant members of SAPS, were really General  
 8 Annandale, Lieutenant-Colonel Scott. On the other hand,  
 9 you represented the Doves, and the proposition put by Mr  
 10 Mpofu was that you were sidelined, deliberately sidelined  
 11 during the operation by the Hawks, and he referred to a  
 12 number of factors which he submitted demonstrated the fact  
 13 that you were sidelined.  
 14 Now there are five such factors, General, and I'd  
 15 just like to briefly put them to you and just to record  
 16 your response. The first factor is the statement by Mr  
 17 Mathunjwa that you informed him that you were not in charge  
 18 of the operation. General, can I have your response to  
 19 that?  
 20 MAJOR-GENERAL MPEMBE: Chairperson, in  
 21 terms of my statement HHH3 I did deny that I, I did not  
 22 tell Mr Mathunjwa that I'm no more in charge of the  
 23 operation, and when I introduced him to the Provincial  
 24 Commissioner I said it's the Provincial Commissioner of the  
 25 province, and I don't see any reason why I could have lied

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1 to Mr Mathunjwa. Chairperson, maybe I may be explaining  
 2 this proposition, what is meant by the Dove and the Hawk.  
 3 MS PILLAY: General, the Hawks are the  
 4 more militant members who adopted a more militant approach,  
 5 and the Doves are the peacemakers, those that adopted a  
 6 more passive approach. The second factor, General, which  
 7 was advanced as an indication of the fact that you were  
 8 sidelined is your statement in GGG12, paragraph 51, that  
 9 you could only give guidance if it was sought, and that on  
 10 the day guidance was not sought.  
 11 MAJOR-GENERAL MPEMBE: Chairperson, the,  
 12 I did respond in terms of my HHH3. If I heard the question  
 13 correctly in terms of paragraph 28, page 11, to say that I  
 14 should add to say on my original statement that as an  
 15 overall commander, I understand the importance of the  
 16 operational commander in the JOC when problems arise and  
 17 they inform me through the radio or cell phone of those  
 18 problems and seek my guidance. This did not happen. It is  
 19 not the function of the overall commander to usurp the  
 20 functions of the operational commander, particularly when  
 21 the operational commander is better positioned as being on  
 22 the ground and experienced action, best action, but that it  
 23 doesn't mean that I was sidelined.  
 24 MS PILLAY: General, the third factor was  
 25 the fact that death threats were made against you on the

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1 13th of August and that Colonel Vermaak proposed to remove  
2 you from the scene on the 13th.

3 MAJOR-GENERAL MPEMBE: Chairperson, as I  
4 said, I don't, I didn't see anyone who threatened me, maybe  
5 is he coming from the Hawk or from the Dove. So it will  
6 very difficult for me maybe – maybe I may say this, whereas  
7 it was actually coming from the Dove where I was falling.  
8 So I, if I knew who were the one that threatened me, I  
9 might be in a position, because as I said, I was also told  
10 when I was in Potch that the people who actually threatened  
11 me, it was Captain Tupe and Merafe. So I don't know  
12 whether they're classified as Doves or as Hawks, but that I  
13 was also told and I did not see them doing that.

14 MS PILLAY: The fourth factor, General,  
15 is the fact that at the JOCCOM which took place at 1:30 on  
16 the 16th, General Mbombo gave the instruction to General  
17 Annandale, and not to you, to execute stage 3 of the  
18 operational plan. Do you agree, General, that this is  
19 evidence of you being sidelined during the operation?

20 MAJOR-GENERAL MPEMBE: No, Chairperson,  
21 what I would – in my response I did respond in terms of my  
22 original statement, paragraph 12, GGG12, I'm sorry, and  
23 also on my HHH3. Major-General Annandale, since from his  
24 arrival on the 13th he has been always in the JOC and he was  
25 a JOC commander. He was chairing most of the meetings and

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1 I explained why I did choose him to be a JOC commander, and  
2 in my absence he will also assume my responsibilities. So  
3 in the South African Police we don't see ourselves as Hawks  
4 or as Doves. We work as a team and as officers, but if  
5 there was any other thing that I would not have agreed, I  
6 would have stated it.

7 CHAIRPERSON: I'm not sure it's as simple  
8 as that. If you look at slide 67 of exhibit L, you'll see  
9 we get the designated command position. Have you got that?  
10 Slide 67, exhibit L. Now your role, you were the commander  
11 of the JOC and your role was overall commander of the  
12 operation. General Annandale was your chief of staff and  
13 his role was to coordinate the running of the operation by  
14 managing the JOC with the designated role players  
15 representing each field, and he explained also - and you've  
16 said that it's so too - that he was to chair the meetings  
17 of the JOCCOM. But inasmuch as you are described as the  
18 person in overall command, and his role was simply to  
19 coordinate the running of the operation by managing the JOC  
20 and carrying the JOC, I would have not expected him to have  
21 been instructed to implement stage 3. Surely the person to  
22 implement stage 3 would have been the person in overall  
23 command, namely yourself, or possibly the operational  
24 commander, Brigadier Calitz, who was going to coordinate  
25 the operation on the ground. But somehow we find Major-

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1 General Annandale being instructed by the Provincial  
2 Commissioner to implement stage 3. That doesn't quite make  
3 sense to me, I must tell you, but I'd be interested to hear  
4 your comment on it.

5 MAJOR-GENERAL MPEMBE: Chairperson,  
6 notwithstanding what the Provincial Commissioner might also  
7 say, because the instruction came from her, but my  
8 understanding at the time, it was that because Major  
9 Annandale was often the, he was the one that was normally  
10 chairing the meetings of the JOC.

11 CHAIRPERSON: Anyway, I just wonder if  
12 this would not be a question we should ask her, why she did  
13 what she did. You can merely speculate, really, as to what  
14 she had in mind. Sorry, Ms Pillay, I interrupted you.  
15 Please forgive me.

16 MS PILLAY: Chair, just a final factor,  
17 General, which was advanced as a further indication that  
18 you were sidelined during the operation is the absence of  
19 specific mention in the minute of the crucial meeting,  
20 that's the 1:30 JOCCOM on the 16th, there was an absence of  
21 specific mention of input from you in the minute.

22 MAJOR-GENERAL MPEMBE: Chairperson, when  
23 the, there were some inputs that I did make on the 16th and  
24 inputs like the resources that there has to be utilised,  
25 for example, if I have to give an example, the taskings

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1 that were given to Brigadier Seboloke, Brigadier Van Zyl,  
2 and as a result that Major-General Annandale was coming  
3 from head office, then some of the issues in terms of how  
4 they should be done and which police stations, they were  
5 done by me. But they did not appear in the minutes. My  
6 understanding was that for the fact that they did not  
7 appear in the minutes, they seem not to be the decisions  
8 because I do understand that in the minutes in most of the  
9 times the decisions are what's being recorded, but not  
10 everything that was said in the meeting. But as I'm  
11 saying, Major-General Annandale came from head office;  
12 surely he could not have known anything that could have  
13 been happening in the province. So I was there to, also to  
14 play that role.

15 MS PILLAY: Chair, I have no further  
16 questions.

17 CHAIRPERSON: Thank you. [Microphone  
18 off, inaudible] who wishes to cross-examine the witness?  
19 No. Mr Ngalwana, you did indicate to me, I think –

20 MS PILLAY: Chair, if I may just –

21 CHAIRPERSON: Sorry, I beg your pardon.

22 MS PILLAY: If I may just ask for a 30-  
23 second indulgence; one of my colleagues just wants to draw  
24 something to my attention. General, there's just one  
25 further proposition that I need to put to you, and the

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1 proposition is the following, and I preface the proposition  
 2 with the following, that we as yet do not have a statement  
 3 from the witness, who is Brigadier Seboloke, but if he  
 4 testifies the following, and I'd just like to hear your  
 5 comment if the Brigadier does come to this Commission and  
 6 testifies –  
 7 MR NGALWANA: If the question is going to  
 8 start like that I'm already objecting, Chair. She must  
 9 rephrase it.  
 10 MS PILLAY: All we want to do, Chair, is  
 11 give the witness the benefit of commenting on this  
 12 evidence, which we believe will be placed before the  
 13 Commission in due course.  
 14 CHAIRPERSON: From the Brigadier?  
 15 MS PILLAY: From the Brigadier, that's  
 16 correct.  
 17 CHAIRPERSON: Well Mr Ngalwana, you know,  
 18 I understand where you are coming from, that there should  
 19 have been a statement filed and he should have had notice  
 20 of it so he could deal with it. I understand that. On the  
 21 other hand, if we are going to say the question can't be  
 22 put because there wasn't a statement, and they then get the  
 23 statement and it's immaterial, I don't know what the answer  
 24 is going to be – the question is going to be, then we'll  
 25 have to get, and if it's important to get the witness's

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1 response to it then we have to get him back. So isn't it  
 2 practical and convenient for the question to be put and he  
 3 can say well I, he can either say I can't answer it or I  
 4 don't know, or answer it, or not, as the case may be?  
 5 Maybe he'll give an answer that's so decisive on the matter  
 6 that the point will be dead from now on. Isn't it  
 7 practical to do it that way? Or would you want to be  
 8 impractical? You must tell me.  
 9 MR NGALWANA: Chair, my objection is not  
 10 about the absence of a statement. It's the uncertainty  
 11 about whether or not he is going to come and testify. If  
 12 so and so is going to come and testify, I mean –  
 13 CHAIRPERSON: I get the impression, and I  
 14 may be wrong, that the evidence leaders have interviewed  
 15 him and he's told them something and they are fairly  
 16 confident that he's going to come and say that –  
 17 MR NGALWANA: Then why don't they put the  
 18 question when he's done so, Chair?  
 19 CHAIRPERSON: Then we have to get the  
 20 witness back. That's the point.  
 21 MR CHASKALSON SC: Mr Chairperson, I  
 22 wonder if I could add something to this debate? We sit  
 23 with a real difficulty as evidence leaders in this respect.  
 24 In order to cooperate with SAPS we have hitherto  
 25 interviewed their witnesses in their presence and haven't

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1 insisted that the witnesses sign statements immediately.  
 2 We have sent notes back to SAPS with draft statements. In  
 3 some cases those draft statements have waited for months on  
 4 end and still haven't come back. If the ruling is going to  
 5 be that we cannot put what SAPS witnesses say to us in  
 6 consultations unless we have a statement, then we'll have  
 7 to reconsider our relationship with SAPS in this regard and  
 8 insist that witnesses who consult with us sign statements  
 9 immediately.  
 10 MR NGALWANA: Well, Chair, with respect,  
 11 maybe they should because we've had witness statements  
 12 prepared by the evidence leaders which the witness  
 13 themselves are not prepared to sign. So I mean, this  
 14 suggestion that we should agree to an arrangement where the  
 15 evidence leaders interview or consult with witnesses whom  
 16 they are going to cross-examine and then present a witness  
 17 statement to that witness to sign, is ridiculous, with  
 18 respect.  
 19 [15:29] But that doesn't deal with the issue that we are  
 20 concerned with here. Here there is no clarity about  
 21 whether or not the evidence, or the version, the witness  
 22 whose version is sought to be put here is going to come and  
 23 testify. Now –  
 24 CHAIRPERSON: Well, I'm reluctant to deal  
 25 with the matter now by way of a ruling one way or the other

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1 because it seems to me that it may well have important  
 2 implications for our way forward. What is suggested by Mr  
 3 Chaskalson is that if necessary the evidence leaders when  
 4 they interview members of the police, in the present of  
 5 legal representatives of the police - that's the important  
 6 point – may well then insist that the statement be signed.  
 7 Obviously if the witness isn't happy to sign the statement  
 8 that's proffered to him, he can change it, but that will  
 9 alter the whole way of working. I prefer to leave it open  
 10 for the moment for discussions perhaps with the legal  
 11 representatives of the police, Mr Semanya and Mr Budlender  
 12 and others, and then so at the moment if we have to have  
 13 this witness coming back if the Brigadier gives the  
 14 evidence that the evidence leaders thinks he'll give on  
 15 this particular issue, then so be it. We'll have wasted a  
 16 bit of time, but there's nothing we can do about it. So  
 17 the matter can stand over and if need be, the witness can  
 18 be recalled on this point. That's the end of your  
 19 questioning, Ms Pillay?  
 20 MS PILLAY: That is it.  
 21 CHAIRPERSON: Mr Ngalwana, I understand  
 22 that you need time to prepare for re-examination. So I  
 23 suggest we take the adjournment now and start again at 9  
 24 tomorrow.  
 25 MR NGALWANA: Not so much to prepare for

1 it, Chair, just to streamline my questions [inaudible] –  
2 CHAIRPERSON: You see, I meant that.  
3 Obviously you've got a lot of material to work through.  
4 You'd like to coordinate it and put some pieces in the  
5 wastepaper basket and others at the top of the pile, but  
6 that can be quite a lengthy process. It will streamline  
7 the resultant re-examination. That's what you want to do.  
8 MR NGALWANA: Yes, thank you, Chair,  
9 that's it.  
10 CHAIRPERSON: 9 tomorrow be good enough?  
11 MR NGALWANA: That's perfect, Chair.  
12 Just one housekeeping matter which has been brought to my  
13 attention; it appears the statement of Mr Kellerman, I  
14 don't recall it having been entered as an exhibit. Perhaps  
15 I'm wrong.  
16 MS PILLAY: Chair, I think it's HHH52.  
17 CHAIRPERSON: My recollection, you may be  
18 [microphone off, inaudible]. I think it was referred to as  
19 exhibit HHH52, but I didn't mark it and I hasten to remedy  
20 that omission and I've now done [microphone off,  
21 inaudible].  
22 MR NGALWANA: No, Chair, thank you.  
23 CHAIRPERSON: Sorry, we will adjourn now  
24 until 9 o'clock tomorrow morning.  
25 [COMMISSION ADJOURNED]



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