

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 239

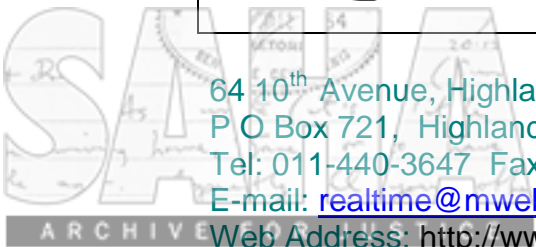
3 JUNE 2014

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1 [PROCEEDINGS ON 3 JUNE 2014]
 2 [09:13] CHAIRPERSON: The Commission resumes. As
 3 has so often been the case during the course of this
 4 Commission there were housekeeping matters that had to be
 5 attended to in chambers before we began this morning and
 6 that's why we're starting late. I apologise to those
 7 who've been waiting since 9 o'clock. You're still under
 8 oath, Lieutenant-Colonel.
 9 LITTLE JOE RONNY CLASSEN: (s.u.o.)
 10 CHAIRPERSON: Mr Ntsebeza, do you have
 11 anymore questions for the witness?
 12 CROSS-EXAMINATION BY MR NTSEBEZA SC (CONTD.):
 13 Yes, Mr Chairman, quite a fair amount. Now Colonel
 14 Classen, I would like us to look again at B16, because I
 15 would like us to have a debate about Mr Gwelani who in B16
 16 is labelled as body P. Well, it has not been put up but
 17 what we are going to be saying is that he was shot 210
 18 metres from where Mtshazi was. Now that's the sketch plan,
 19 there you are. You will not show on this, but it will show
 20 on the sketch plan that we have just gone out of. There.
 21 The point here really is to get your view on what we are
 22 alleging. Yesterday we talked about Mr Mtshazi. Do you
 23 remember where we plotted Mr Mtshazi's body. Mr Mtshazi
 24 was plotted as body N. Do you remember that, yesterday?
 25 COLONEL CLASSEN: I do, Chair.

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1 MR NTSEBEZA SC: Yes, now that sketch
 2 plan shows Mr Gwelani's body, which is body P, to be 210
 3 metres from the body of Mr Mtshazi. Do you see the
 4 indications, 210 metres?
 5 COLONEL CLASSEN: I see the indications.
 6 MR NTSEBEZA SC: Yes. And then the
 7 simple point we want to make about this is that at that
 8 distance Mr Gwelani could not have posed any threat to the
 9 TRT line. I don't know what happened to my pointer. Mr
 10 Wesley is not here, but you have a sense where the TRT line
 11 would be relative to that sketch plan? It will be to the
 12 lower side of the –
 13 CHAIRPERSON: May I interrupt you for a
 14 moment, Mr Ntsebeza. What I suggest that you ask the
 15 witness - well I'll ask the witness: would you look at
 16 exhibit L, slide 209, please? Exhibit L, slide 209.
 17 Before you do that – yes, well there it is. You see that?
 18 That is what's described as the approximate funnel of fire
 19 towards the armed protesters circumnavigating the kraal and
 20 approaching the police members. You see that? Now if you
 21 look at that you'll see that the positions I think of where
 22 M and N as they are described on exhibit B where those
 23 strikers were shot, not covered by the approximate funnel
 24 of fire towards the armed strikers circumnavigating the
 25 kraal. Is that correct?

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1 MR NTSEBEZA SC: Yes, Mr Chairman. I'm
 2 sorry, Mr Chairman, I wasn't concentrating.
 3 CHAIRPERSON: I did ask the question of
 4 the witness, not of you. What I asked him was whether it's
 5 correct that the position where M and N were found – then
 6 their families must forgive me, I can't remember their
 7 names at the moment; if I do remember them I'll mention
 8 them - the place where their bodies were found, not in the
 9 approximate funnel of fire towards the armed strikers
 10 circumnavigating the kraal, as depicted on this slide.
 11 COLONEL CLASSEN: That's correct, Mr
 12 Chair.
 13 CHAIRPERSON: Sorry?
 14 COLONEL CLASSEN: It is how it is, yes,
 15 Sir.
 16 MR NTSEBEZA SC: But if we went back then
 17 to – I think relative to this 209 for instance the position
 18 would be closer to the bottom of this picture as we're
 19 looking at it. You see there's the shack and this is the
 20 area where Mtshazi and Gwelani's bodies were. But the
 21 point here is that where we plotted Mtshazi yesterday and
 22 in relation to that we have 210 metres as shown in exhibit
 23 B, second sketch plan, that has been measured to be 210
 24 metres from scene 1 and from Mtshazi's body. Scene 1 is
 25 here, as you know. That is scene 1 near the kraal –

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1 CHAIRPERSON: You indicate the position
 2 near the kraal and the so-called gap in the corridor.
 3 MR NTSEBEZA SC: Now in the picture to
 4 the right of the sketch plan there is a measurement of 210
 5 metres to the right and we say that is the distance both
 6 from scene 1 and from Mtshazi's body. Do you see that?
 7 COLONEL CLASSEN: I see that, Chair.
 8 MR NTSEBEZA SC: Now we are saying from
 9 that position, because your line would be towards the
 10 bottom of this sketch plan, it would be in fact way below
 11 here, because there's the kraal. You would have lined
 12 somewhere there, which is – because you have got the shack
 13 in this corner here, so it was –
 14 CHAIRPERSON: If you say "somewhere
 15 there" you're indicating a spot in the fenced off area,
 16 bottom left of the sketch plan, about a third of the way in
 17 from the left side.
 18 MR NTSEBEZA SC: You agree with that?
 19 COLONEL CLASSEN: Excuse, Mr Ntsebeza,
 20 because when I look at it, you're pointing at the bottom
 21 and you're saying that's our line, that's where we were.
 22 MR NTSEBEZA SC: That's where your line,
 23 I think your line is not even reflected in this sketch
 24 plan, but if you –
 25 COLONEL CLASSEN: But then what direction

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1 would it be facing, Sir?

2 MR NTSEBEZA SC: You would obviously be

3 facing the kraal. This is the entrance to the kraal.

4 COLONEL CLASSEN: Okay, then maybe I

5 don't understand you so clearly, because I'm actually

6 seeing it from another direction. I'm looking from this

7 side, facing that direction –

8 MR NTSEBEZA SC: Oh yes. Oh ja. From

9 this side –

10 CHAIRPERSON: From the left-hand side and

11 you say "facing in that direction," you're pointing –

12 COLONEL CLASSEN: To the right.

13 CHAIRPERSON: - towards the right.

14 COLONEL CLASSEN: That's correct.

15 CHAIRPERSON: In other words you're

16 pointing in a southerly direction. In fact on the sketch

17 plan, extreme right is north according to the wind

18 indicator, and extreme, towards the left is south.

19 COLONEL CLASSEN: You see, Mr Chair, I'm

20 also looking at the kraal where it's indicating K, where it

21 indicates the body of K. It looks like the entrance of the

22 kraal, if I'm correct. Am I –

23 CHAIRPERSON: Sorry to interrupt you.

24 There is what we call the gap in the corridor, the space

25 between the corner of the fenced area in which the shack is

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1 to be found, and then across the way from there is the

2 kraal and slightly to the right is the entrance to the

3 kraal itself. So you understand? That's not too clear on

4 the sketch, but in fact it is so. Sorry for interrupting

5 you. You were giving an answer. I'm just trying to help

6 you to understand the plan.

7 COLONEL CLASSEN: Yes, I appreciate it,

8 Chair. So when I look at where C is, it's that the gap

9 between the kraal and the fencing?

10 CHAIRPERSON: Yes.

11 COLONEL CLASSEN: Okay, then Mr Ntsebeza,

12 when I look at it I'm actually seeing that then our line

13 will be again facing south, as the Chairperson actually –

14 where this 260 metres, this thing is, it's towards the

15 direction of pointing in that 260 metres. That's how I see

16 the – I just need some clarification then.

17 MR NTSEBEZA SC: Do you have a pointer

18 there?

19 COLONEL CLASSEN: No, I don't.

20 CHAIRPERSON: While you're looking for

21 that, can someone please tell us what are the DR-numbers of

22 the post mortems relating to the two bodies that have been

23 talked about, the two deceased strikers who've been talked

24 about?

25 MR NTSEBEZA SC: Mr Mtshazi – are you

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1 referring to Mr Mtshazi and Mr Nqongophele, Chairman, the

2 ones that we have –

3 CHAIRPERSON: Yes, yes.

4 MR NTSEBEZA SC: - dealt with already?

5 CHAIRPERSON: Yes, we'd like the DR-

6 numbers, please.

7 MR NTSEBEZA SC: Yes, Mr Chairman, we –

8 CHAIRPERSON: I'd make a –

9 MR NTSEBEZA SC: Mtshazi's DR-number,

10 592/2012.

11 CHAIRPERSON: The other one? I think Mr

12 Wesley may – if you can't give it, Mr Wesley can maybe.

13 MR NTSEBEZA SC: Yes. Nqongophele is

14 590/2012.

15 CHAIRPERSON: Thank you.

16 MR NTSEBEZA SC: Do you have a pointer

17 now?

18 COLONEL CLASSEN: Yes, I do. I do, Mr

19 Chair.

20 MR NTSEBEZA SC: Where do you place

21 yourself?

22 COLONEL CLASSEN: Okay, I'm –

23 MR NTSEBEZA SC: Your TRT –

24 COLONEL CLASSEN: Okay, when I look at

25 now it's, if this is the shack –

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1 MR NTSEBEZA SC: Ja?

2 COLONEL CLASSEN: Is that where the shack

3 is? Is that what you –

4 CHAIRPERSON: Somewhere there, yes.

5 COLONEL CLASSEN: Somewhere there, then

6 the TRT line will be in line there.

7 MR NTSEBEZA SC: Ja, yes.

8 CHAIRPERSON: Is that right? You

9 indicate a line which seems to be running from a position

10 fairly close what one can call the left-hand side of that

11 fence that we're talking about, up – will I be correct in

12 saying more or less parallel with the side of the picture?

13 COLONEL CLASSEN: Yes, because what I'm

14 disputing is that sketch plan there, Mr Chair, where you

15 see the fencing there, it could have turned a little bit

16 down, but I think it cannot be that correct because we were

17 in line here, right here. That's where we made our line,

18 and if that's where the bodies were, so we were in line

19 right here.

20 CHAIRPERSON: Yes, the line you draw, you

21 give, is one which is parallel with the side of the page.

22 COLONEL CLASSEN: That's correct.

23 CHAIRPERSON: Up – you know the, ja,

24 upright side of the page, and it in fact, if the wind

25 direction depicted on the sketch plan is correct then it

<p style="text-align: right;">Page 29935</p> <p>1 was effectively from east to west.</p> <p>2 COLONEL CLASSEN: Is that the line now?</p> <p>3 CHAIRPERSON: Well, the line you've</p> <p>4 shown. I mean –</p> <p>5 COLONEL CLASSEN: Yes.</p> <p>6 CHAIRPERSON: You see where north is on</p> <p>7 the sketch plan and what you show us is something at right</p> <p>8 angles to that north direction, as I said parallel with the</p> <p>9 left-hand side of the page. So that therefore will be from</p> <p>10 east to west.</p> <p>11 COLONEL CLASSEN: That's correct, Mr</p> <p>12 Chair.</p> <p>13 CHAIRPERSON: The reason why we asked for</p> <p>14 this post mortem reports is if one looks at the post mortem</p> <p>15 report of Mr Nqongophele, it's 590, one sees on page 3,</p> <p>16 paragraph 4(b), signs of medical intervention. Now we're</p> <p>17 not saying, no-one is making a point, we're seeking</p> <p>18 information, but if there were signs of medical</p> <p>19 intervention that would indicate that one of the paramedics</p> <p>20 at least must have attended to him, and the question that</p> <p>21 then arises is was he moved, in other words was he still</p> <p>22 alive and moved from one point to another for the purposes</p> <p>23 of getting this medical intervention, or did the medical</p> <p>24 intervention take place at the spot where he was shot?</p> <p>25 That's the question we asked. I'm not sure that you can</p>	<p style="text-align: right;">Page 29937</p> <p>1 of course recalls that that was the sort of premise that we</p> <p>2 put the questions to Colonel here –</p> <p>3 CHAIRPERSON: The premise may be correct.</p> <p>4 I'm not saying it's wrong.</p> <p>5 MR NTSEBEZA SC: Yes.</p> <p>6 CHAIRPERSON: I'm just saying it may not</p> <p>7 be right, so you know, one must always be sure –</p> <p>8 MR NTSEBEZA SC: No, we –</p> <p>9 CHAIRPERSON: - a premise is, consists of</p> <p>10 firm ground under one's feet, if you know what I mean.</p> <p>11 MR NTSEBEZA SC: Yes. We are fairly</p> <p>12 confident – well, not confident, but we are fairly aware</p> <p>13 that it is something that will be a subject of debate, but</p> <p>14 as we indicated, we tried to show how objective evidence</p> <p>15 shows that he obviously was shot at where, you know, we</p> <p>16 indicated he was killed at, and he was taken to the area</p> <p>17 next to the shack where he was plotted to have been shot</p> <p>18 and killed at that place. Our theory will be that he was</p> <p>19 shot at where we indicated he was shot at, was taken there</p> <p>20 for medical attention and we will make the points that</p> <p>21 we're seeking to make, that at the place –</p> <p>22 CHAIRPERSON: I must say –</p> <p>23 MR NTSEBEZA SC: - where we say he was</p> <p>24 shot –</p> <p>25 CHAIRPERSON: Ja, I must say in the case</p>
<p style="text-align: right;">Page 29936</p> <p>1 answer it, but it's obviously information that we require.</p> <p>2 If the inference that you, the finding you wish</p> <p>3 us to make is that he was shot at the place where his body</p> <p>4 is depicted on the sketch plan exhibit B, then certain</p> <p>5 things follow. If of course his body was moved for the</p> <p>6 purposes of his receiving medical attention, then of course</p> <p>7 the inference is the finding you seek, that you ask us to</p> <p>8 make cannot be made. So this is an aspect that has to be</p> <p>9 investigated. I don't know what the answer is, but it's a</p> <p>10 question that requires further interrogation, as it were,</p> <p>11 if you can interrogate a question.</p> <p>12 MR NTSEBEZA SC: No, I understand, Mr</p> <p>13 Chairman.</p> <p>14 CHAIRPERSON: On the case of the other</p> <p>15 deceased this point doesn't arise because it appears from</p> <p>16 page 6 of the post mortem report that he sustained a single</p> <p>17 high-velocity gunshot wound to the cervical spine, which</p> <p>18 would have rendered him immediately immobile. Of course I</p> <p>19 suppose he could still technically have been carried from</p> <p>20 one point to another for purposes of medical treatment, but</p> <p>21 the point made in respect of the previous deceased doesn't</p> <p>22 apply as forcibly perhaps as in his case. But again we</p> <p>23 don't know the answers, but it sometimes helps to ask the</p> <p>24 right questions, it helps you to find the right answers.</p> <p>25 MR NTSEBEZA SC: Mr Chairman, Mr Chairman</p>	<p style="text-align: right;">Page 29938</p> <p>1 of the second deceased there's no mention of any signs of</p> <p>2 medical intervention. So the point –</p> <p>3 MR NTSEBEZA SC: Yes.</p> <p>4 CHAIRPERSON: - presumably doesn't apply</p> <p>5 at all. So it's only the one body and that's a matter that</p> <p>6 we can look into.</p> <p>7 MR NTSEBEZA SC: Yes, yes, well –</p> <p>8 CHAIRPERSON: It's not necessary for us</p> <p>9 perhaps to have oral evidence on the point. It may be</p> <p>10 capable of being solved in some other way.</p> <p>11 MR NTSEBEZA SC: Yes, Mr Chairman. Now</p> <p>12 I'm told by my junior that we see from a video by one</p> <p>13 Henderson that Nqongophele is being given medical attention</p> <p>14 near the shack. So there would be that kind of objective</p> <p>15 evidence that –</p> <p>16 CHAIRPERSON: Ja, so he was receiving</p> <p>17 medical attention near the shack, but you say this sketch</p> <p>18 plan indicates that the body must have been at an earlier</p> <p>19 stage at the point depicted on the sketch plan. Is that</p> <p>20 your – that's the firm ground of which your premise</p> <p>21 consists?</p> <p>22 MR NTSEBEZA SC: Well, Mr Chairman, can</p> <p>23 we articulate this at the appropriate time?</p> <p>24 CHAIRPERSON: Yes, yes. No, I'm just</p> <p>25 raising the point while it occurs to us, because otherwise,</p>

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1 you know, one thinks of points and then they disappear from
 2 one's mind before you have a chance to raise them later so
 3 it's best to mention them immediately.
 4 [09:32] Anyway, we've raised the point. You'll give us
 5 the video reference, Warrant Officer Hendrickson's video,
 6 and the matter can be looked into and possibly outside the
 7 chamber –
 8 MR NTSEBEZA SC: Yes.
 9 CHAIRPERSON: - we can get possibly even
 10 some agreed statement as to what the position is but prima
 11 facie it appears if one looks at that, slides from exhibit
 12 L, that if the body, if he was shot at the spot depicted on
 13 the sketch plan he doesn't appear to have been shot by the
 14 TRT as part of the volley and that's the point that seems
 15 clear and I think the witness agrees with that.
 16 MR NTSEBEZA SC: We are still dealing –
 17 well, Colonel, we are trying to deal with Mr Gwelani's
 18 body. Now where you put your TRT line and where we say,
 19 we're saying Mr Gwelani's body is about 210 metres from Mr
 20 Mtshazi's body and Mr Mtshazi's body is this, I think it's
 21 so-called body N.
 22 CHAIRPERSON: You're indicating the
 23 letter N for Nellie on the sketch plan and if one follows
 24 the arrow from the circle in which the letter N appears,
 25 one is presumably able to discover where the body was

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1 found.
 2 MR NTSEBEZA SC: Now we're saying
 3 Gwelani's body is 210 metres from Mtshazi's body so it is
 4 further away from the TRT line and you put the TRT line
 5 somewhere in that area. Do you recall that?
 6 COLONEL CLASSEN: I do, Chair.
 7 MR NTSEBEZA SC: So we are seeking to
 8 make just two quick points. The first is that Mr Gwelani,
 9 assuming he was shot and killed where we say he was, 210
 10 metres from Mr Mtshazi's body and the sketch plan gives the
 11 distances, he is unlikely to have posed, poised – English -
 12 he is unlikely to have been a threat to the TRT line or to
 13 the members of the TRT in your line. You would agree with
 14 that, wouldn't you?
 15 COLONEL CLASSEN: I would, Chair.
 16 MR NTSEBEZA SC: And then the second
 17 point relevant thereto would be that as far as he is
 18 concerned it cannot be claimed that when he was killed he
 19 was killed by the TRT members who were acting in self-
 20 defence, in putative defence or whatever the defence would
 21 be that the TRT members would claim relevant to Mr Gwelani.
 22 Would you agree with that?
 23 COLONEL CLASSEN: I do, Chair.
 24 MR NTSEBEZA SC: Now we also want to put
 25 it on record that exhibit A page 631, paragraph 4.1 and

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1 that's the post-mortem report, will show that he was shot
 2 once with a high velocity firearm, R1 or R5, and he was
 3 shot in the back of the head. If we could show exhibit A
 4 page 631, paragraph 4.1 Now whilst we are trying to get
 5 there, if it is so that he was shot at the back of the
 6 head, that is even more reason for us to submit, as we will
 7 do at the end of the Commission and we would be happy if
 8 you would agree with us on that, that if he was shot at the
 9 back of his head he was clearly not being shot by someone
 10 who was acting in self-defence, private defence or putative
 11 self-defence, in other words someone who was in imminent
 12 danger, the nature of which caused him to shoot at him, if
 13 he was shot at his back because the inference must be that
 14 he was shot whilst he was facing the other direction than
 15 from where the shot came. Would you agree with that?
 16 COLONEL CLASSEN: I would agree with it
 17 and also add that also depending on the situation, what
 18 happened there, sir.
 19 MR NTSEBEZA SC: That's okay.
 20 CHAIRPERSON: This shot that you're now
 21 talking about, putting to the witness, does it appear from
 22 the post-mortem report whether it is what one can call a
 23 direct shot or is it perhaps an indirect shot? An indirect
 24 shot might be some kind of ricochet from the ground or
 25 something of that kind but what does the post-mortem report

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1 indicate? Here we have it in front of us.
 2 MR NTSEBEZA SC: Eventually we have come
 3 to it, Mr Chairman. It doesn't say about it being a
 4 ricochet, it doesn't say –
 5 CHAIRPERSON: It might, we – I'm sorry to
 6 interrupt you –
 7 MR NTSEBEZA SC: Oh yes –
 8 CHAIRPERSON: - this is just a summary of
 9 the chief post-mortem report findings. If we look at the
 10 report itself it may tell us something about the actual
 11 wound. It's described I see as round shaped, it perforates
 12 the cranial fossae of the skull, entering on the right
 13 occipital scalp area, perforating both posterior cranial
 14 fossae and extending keyhole shattering furrow, terminating
 15 in the soft tissues on the left occipital mastoid scalp
 16 area. A bullet fragment was recovered. Now are we able to
 17 see from this whether it was a direct shot or an indirect
 18 one? I don't know, I'm just asking.
 19 MR NTSEBEZA SC: Mr Chairman, I rely on
 20 the report as it stands.
 21 CHAIRPERSON: Well, it obviously may be a
 22 matter for argument later or –
 23 MR NTSEBEZA SC: Yes.
 24 CHAIRPERSON: - possibly further
 25 clarification but I fear Lieutenant-Colonel Classen won't

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1 be able to give us the clarification we require. I say
 2 that without any disrespect to him.
 3 MR NTSEBEZA SC: Well, Mr Chairman, I've
 4 always proceeded on the basis that when we put certain
 5 questions of this nature to lay police officers, them not
 6 being experts, it's always on the basis that if we accept
 7 the post-mortem reports as what they say or indicate, the
 8 back of the head is the back of the head in layman's
 9 language. It may be something else if it is given forensic
 10 analysis by an analyst but this much I want to put to – and
 11 Mr Chairman, I do not see that you are saying I shouldn't,
 12 I am simply saying –
 13 CHAIRPERSON: I am not stopping you.
 14 MR NTSEBEZA SC: No – no, I understand.
 15 CHAIRPERSON: I'm just asking for
 16 information for clarification but you can't give it, you
 17 say it's a matter – the witness can't help us and you
 18 can't. We may get some clarification, not necessarily from
 19 oral testimony but some form of admission or affidavit or
 20 something.
 21 MR NTSEBEZA SC: But what I was seeking
 22 him to say is, all things being equal, if it is so that he
 23 was shot at the back of his head you would agree that it
 24 could not be claimed that this was done in an act of self-
 25 defence.

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1 CHAIRPERSON: What's your answer to that,
 2 Colonel?
 3 COLONEL CLASSEN: I agree, Chair, but as
 4 I said also adding that the situation – I don't want to
 5 like talk for the person that shot, like he ran away, the
 6 situation was tense, everybody was running in directions.
 7 I'm just answering what Mr Ntsebeza is asking me, that's
 8 what I'm doing.
 9 MR NTSEBEZA SC: You see you have got it
 10 just there, Colonel. If he was running away that's all the
 11 more reason why shooting him at the back of his head is
 12 inappropriate but, you know, it's a matter for argument.
 13 You have given a conditional indication that you are not
 14 violently opposed to what I say. Now I would like to take
 15 you to your evidence, I think last week when you were asked
 16 to comment on portions of the video where you can see
 17 police pulling and dragging injured or probably dead
 18 strikers. Do you recall that evidence?
 19 COLONEL CLASSEN: I do, Chair.
 20 MR NTSEBEZA SC: In fact the evidence is
 21 on lines 7 to 10 and it's on page 29463. Are we able to
 22 get to line, 29463, lines 7 to 10? Day 236. It has always
 23 been contested whether the day is of any value. Are we
 24 able to get that? But Colonel, you remember that you
 25 testified on this aspect?

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1 COLONEL CLASSEN: I do recall. What line
 2 was that, Mr Ntsebeza?
 3 MR NTSEBEZA SC: I think lines 7 to 10
 4 where you were saying, "When the members were doing that,
 5 they were searching for weapons from the injured people and
 6 they were moving them around and that is what happened
 7 there."
 8 CHAIRPERSON: What page is this?
 9 MR NTSEBEZA SC: 29463. That's a random
 10 page –
 11 CHAIRPERSON: 29463? We've got 29606 on
 12 the screen at the moment, that's not helping us at all.
 13 MR NTSEBEZA SC: That certainly was not
 14 prompted by me.
 15 CHAIRPERSON: Now we've got 29463. What
 16 line on 29463 do you want? It's enlarged so much we can't
 17 see the whole thing. 7, line reads, the witness says,
 18 "When the members were doing that, they were searching for
 19 weapons from the injured people and they were moving them
 20 around and that is what happened there."
 21 MR NTSEBEZA SC: I think Mr Mathibedi had
 22 been asking what his comment is relevant –
 23 CHAIRPERSON: Perhaps we must go up a bit
 24 further to see what he's asked about.
 25 MR NTSEBEZA SC: Yes.

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1 CHAIRPERSON: Sorry, it will be 29462 we
 2 need, the foot of 29462 Mr Mathibedi says, line 24 "You've
 3 looked at the videos, there is somewhere where you can see
 4 members of the police, you know, pulling and dragging
 5 injured or probably dead people, strikers, did you see
 6 that?" The Colonel says, "Yes, I did see that, Mr Chair."
 7 Mr Mathibedi says, "What is your comment about that?" And
 8 his answer is, "When the members were doing that, they were
 9 searching for vehicles from the injured people" – sorry –
 10 "they were searching for weapons from the injured people
 11 and they were moving them around and that is what happened
 12 there." That's the passage you're putting to the witness,
 13 is it?
 14 MR NTSEBEZA SC: Yes. I don't think we
 15 need to play that but if you want to play it again we
 16 could, but I just want to know whether by giving that kind
 17 of response you are suggesting that it was necessary for
 18 SAPS people to drag the protesters in that manner in order
 19 to search them. I think the issue here is, here are
 20 injured people, there may well be a view by the police that
 21 these people are either dead or injured but may still be a
 22 threat and the attitude is to, safety first, go in there,
 23 search them and remove them from where they may be, you
 24 know, lying on top of their weapons. Now you seem to be
 25 saying it's okay, given what was happening there, if they

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1 can be dragged in the manner in which they were because the
 2 situation demanded that they should be dragged because the
 3 mission was to retrieve weapons. They were searching for
 4 weapons from the injured people. Now do I understand you
 5 to be saying it's justified to – because we are suggesting
 6 that that was not exactly what you would associate with
 7 people who should be caring for injured people after they
 8 have -

9 COLONEL CLASSEN: Just come again there,
 10 Mr Ntsebeza? Is that the end of your question?

11 MR NTSEBEZA SC: In that video you see
 12 one police officer searching the striker for weapons and he
 13 does it by pulling the striker's clothes and patting over
 14 his head to check that he is not hiding any weapons. Now
 15 as I say, you saw that, that was why Mr Mathibedi played
 16 that and I'm simply saying if he needed to search under the
 17 striker's body he could have simply rolled him from one
 18 side to the next without using any force. Now I would like
 19 you to give your comment again as to whether you say it was
 20 justified for the police to have acted in that way simply
 21 because they were searching for weapons?

22 COLONEL CLASSEN: Yes, from my point of
 23 view it was, Mr Ntsebeza.

24 MR NTSEBEZA SC: Are you saying it is
 25 proper for a police officer, when a person is obviously

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1 injured, standing behind him with a gun pointed at the
 2 injured person, that it is correct to drag him around
 3 because they want to search?

4 COLONEL CLASSEN: No, I'm not saying it's
 5 proper for a police officer to do that but if you think of
 6 your safety you will go to measures that will make sure
 7 that you are safe, sir.

8 MR NTSEBEZA SC: But why is it necessary
 9 then for them to drag the bodies?

10 COLONEL CLASSEN: From what I am looking
 11 at, these guys are lying down and they're just not moving
 12 so you can't trust them, you need to make sure that you are
 13 safe, that you get the weapons underneath them. If we
 14 could have asked them to move, we could have asked them to
 15 move.

16 MR NTSEBEZA SC: Maybe let's play the
 17 video. Exhibit EEE16. Maybe there'll be a need for a
 18 warning, Mr Chairman. We are going to play that video, Mr
 19 Chairman.

20 CHAIRPERSON: I understand we are going
 21 to see again a video clip which shows the people who were
 22 shot at scene 1 lying on the ground and those who are the
 23 loved ones and relations, friends of the people whose
 24 bodies will be seen on the video may well experience
 25 feelings of extreme emotional distress at looking at this

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1 clip, so I ask that it not be shown until 30 seconds have
 2 expired after I have finished speaking to enable those who
 3 wish to leave the chamber to do so. The 30 seconds starts
 4 now. The 30 seconds is up, no-one has left so we can carry
 5 on. Will you indicate where on the clip -

6 MR NTSEBEZA SC: Yes, Mr Chairman.
 7 CHAIRPERSON: - the passage is that
 8 you're going to show the witness so that those who follow
 9 the record later will know what's happening.

10 MR NTSEBEZA SC: It's exhibit EEE16 at
 11 12:36 to 12:38.
 12 [VIDEO IS SHOWN]
 13 [09:52] Maybe if we did it in slow motion it is capable
 14 of -

15 CHAIRPERSON: It is effectively 12:34 to
 16 12:38.

17 MR NTSEBEZA SC: Yes. You have seen
 18 that, Chair? Colonel, you saw that?

19 COLONEL CLASSEN: I did see that, Chair.
 20 MR NTSEBEZA SC: Now you can see that
 21 there are a whole host of police officers there, all armed
 22 with rifles and all other sorts of firearms, do you see
 23 that?

24 COLONEL CLASSEN: I do, Chair.
 25 MR NTSEBEZA SC: Now you see one police

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1 officer, did you see him being dragged, that striker being
 2 dragged?

3 COLONEL CLASSEN: Yes, I see the police
 4 officer dragging the striker.

5 MR NTSEBEZA SC: Now why was it necessary
 6 for him to be dragged like that?

7 COLONEL CLASSEN: As I explained before
 8 that is to retrieve a weapon, also if you look slightly a
 9 bit back you will see the policeman at the back kicking out
 10 a weapon from where the striker was.

11 MR NTSEBEZA SC: Maybe let's play a clip
 12 where the police officers are searching the striker for
 13 weapons, it will be EEE16 at 10:43 to 10:50. He must be
 14 searching for weapons, is it not and he is doing so by
 15 lifting his clothes, getting over his body, to check that
 16 he is not hiding any weapons, do you see that?

17 COLONEL CLASSEN: I do, Chair.
 18 MR NTSEBEZA SC: He could have rolled him
 19 over from one side to the next, he was seeking to search
 20 under his body, would he not?

21 CHAIRPERSON: He is also searching his
 22 clothes, it wasn't just under the body, as far as I could
 23 see he was also searching in his clothing. Do you see
 24 that, Colonel, or did I see it wrongly?
 25 COLONEL CLASSEN: No, I saw that, Chair.

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1 MR NTSEBEZA SC: We see that there is a
2 police officer standing behind him with a gun pointed to
3 offer security to him, can you see that, just like in the
4 one where the striker is being dragged?
5 COLONEL CLASSEN: Yes, Mr Ntsebeza, I was
6 paying attention to the search of the person.
7 MR NTSEBEZA SC: Ja, but in that very
8 same video you see that there are police covering the one
9 who is searching?
10 COLONEL CLASSEN: I do, Mr Chair.
11 MR NTSEBEZA SC: Yes.
12 COMMISSIONER HEMRAJ: In fact the number
13 of policemen on the scene in relation to the number of
14 injured and deceased, the policemen far outnumbered the
15 deceased and the injured, so it could have been handled in
16 a more sensitive manner with some policemen standing guard
17 and others were doing the searching without having to
18 resort to anything insensitive.
19 COLONEL CLASSEN: I agree, Mr Chair, but
20 I also just want to add that the situation was very tense
21 there, it is not a situation where you would just have this
22 thing that I am covered. You are dealing with somebody
23 that is armed right there at the spot, it is not more about
24 being covered, you are squared.
25 CHAIRPERSON: Mr Ntsebeza, I must confess

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1 that the two we've seen so far are not quite as bad as some
2 of the other ones I remember seeing. I see to remember
3 seeing videos of much rougher handling of the people
4 concerned, which I thought and using feet and that kind of
5 thing, I would have thought, expected you frankly to put
6 those to the witness.
7 MR NTSEBEZA SC: Yes.
8 CHAIRPERSON: Because I would thought
9 they make the point –
10 MR NTSEBEZA SC: But perhaps –
11 CHAIRPERSON: - but maybe you're trying
12 to make it more powerfully than the ones we've seen?
13 MR NTSEBEZA SC: Mr Chairman, if we could
14 locate the one clip where the police appear quite clearly –
15 CHAIRPERSON: Mr Ntsebeza, I'm sorry to
16 interrupt you, maybe it would be unnecessary, have you seen
17 all these clips, most the ones of what was recorded by the
18 media houses, the cameramen, at the scene, at scene 1 after
19 the shooting where members of the police force, Police
20 Service, I beg their pardon, were searching for weapons and
21 so forth, have you seen those clips, not just the ones we
22 see now but others as well?
23 COLONEL CLASSEN: I have, Mr Chair.
24 CHAIRPERSON: Yes, and did you see
25 instances where there was fairly rough handling of either

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1 the injured person or the deceased body, did you see such
2 scripts?
3 COLONEL CLASSEN: I have, Mr Chair.
4 CHAIRPERSON: You have?
5 COLONEL CLASSEN: Mm.
6 CHAIRPERSON: And what's your comment on
7 them?
8 COLONEL CLASSEN: Mr Chair, I even tried
9 and justified at some places, but I think the one that Mr
10 Ntsebeza is referring to is the one where they actually
11 stepped on the person and I was trying to figure out, but
12 why would they do that, and in our discussion it is to
13 immobilise the person, to keep him still. You know you try
14 and look for those excuses but I have seen them and –
15 CHAIRPERSON: You say you tried to look
16 for it, so the impression I get is that even, - well, I
17 mustn't say even, cut out the even, the impression I get
18 that you were distressed by some of the things you saw and
19 you feel you are not able to justify them, is that a fair
20 impression?
21 COLONEL CLASSEN: That is fair, thank
22 you, Mr Chair.
23 CHAIRPERSON: Yes.
24 MR NTSEBEZA SC: Yes, but there is one
25 point I would like you to clarify for me and that is where

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1 in your evidence you said under the circumstances all that
2 happened, it wasn't that easy to really just handle them
3 soft handedly. I just want you to explain to me what you
4 may have had in mind when you said, and that is on line 17
5 to 22 and lines 29463 on day 230 –
6 CHAIRPERSON: Okay, Mr Ntsebeza, you've
7 got the concession, well, I got it for you, but you've got
8 the concession that you need and may I suggest that you
9 don't try to talk the witness out of the concession, just
10 quit while you're ahead on this point?
11 MR NTSEBEZA SC: Ja, Mr Chairman, ja
12 well, thank you for the guidance. I don't think I can
13 handle it, to it being suggested that I'm talking him out
14 of a concession, but you know we'll leave to fight another
15 day. Mr Chairman, we would like to make a presentation and
16 I will take just a couple of minutes on that.
17 CHAIRPERSON: Well, time is due to expire
18 now but in fact we started late because of the housekeeping
19 matters we were attending to in Chambers beforehand, so
20 you've got another quarter of an hour.
21 MR NTSEBEZA SC: I don't even think I'll
22 need it, but ja.
23 CHAIRPERSON: Have you seen this slide
24 before, this picture before?
25 COLONEL CLASSEN: Yes, I have, Mr Chair.

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1 CHAIRPERSON: You have.
 2 MR NTSEBEZA SC: Mr Chairman, the colonel
 3 may have seen only the slide that doesn't show the names –
 4 CHAIRPERSON: But we've all seen this
 5 before, I don't know what the exhibit number is but –
 6 MR NTSEBEZA SC: Yes –
 7 CHAIRPERSON: - what you've now done is,
 8 you added in the names –
 9 MR NTSEBEZA SC: The names –
 10 CHAIRPERSON: - of the victims. There is
 11 one anonymous victim, injured victim but the others, you've
 12 actually given the names and there are red arrows running
 13 from the rectangle to their names to blue circles which
 14 indicate the position of the bodies at -
 15 MR NTSEBEZA SC: Ja, so –
 16 CHAIRPERSON: The bodies of injured
 17 persons.
 18 MR NTSEBEZA SC: Quite frankly, Mr
 19 Chairman, and also for the record, there are families here
 20 who have come to find answers and –
 21 CHAIRPERSON: Well, ask the questions and
 22 let's see if the families get the answers.
 23 MR NTSEBEZA SC: Yes, the answer is, do
 24 you see those people in the, and the names of the people
 25 who have been shown there, Bonginkosi Yona, Babe Siliyawa,

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1 Bongani Mdze and Mpangeli Lukusa, do you see the pointers
 2 there?
 3 COLONEL CLASSEN: I do, Chair.
 4 MR NTSEBEZA SC: Now we allege that those
 5 blue dots represent shotgun victims, they were shot in the
 6 left hand side of their bodies, did you know that?
 7 COLONEL CLASSEN: No, I did not know
 8 that.
 9 MR NTSEBEZA SC: And it seems, we will
 10 argue that the spread of the victims indicates that more
 11 than one shotgun was fired. Now what I want to ask from
 12 you, are you aware of anyone who used shotgun pellets and
 13 fired them at the protestors?
 14 COLONEL CLASSEN: No, I'm not aware of
 15 that, Chairperson.
 16 MR NTSEBEZA SC: So you didn't see anyone
 17 using a shotgun at the protestors?
 18 COLONEL CLASSEN: I did see POPS members
 19 using shotguns.
 20 CHAIRPERSON: Firing, were they firing –
 21 MR NTSEBEZA SC: Shotgun pellets –
 22 CHAIRPERSON: - pellets or rubber balls
 23 or can't you say?
 24 COLONEL CLASSEN: I can't say, Mr Chair,
 25 I only saw them using shotguns.

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1 MR NTSEBEZA SC: You don't know whether
 2 they were using shotgun pellets or shotgun pellets were
 3 being fired at the victims? I don't know much about guns,
 4 I'm just told that shotgun pellets is different from just
 5 rubber balls. The question I want to know, because this
 6 much I've been told by those who know more than I do about
 7 guns and bullets, is that shotgun pellets are different
 8 from shotgun balls. Now when you say shotguns were being
 9 used there are you able to say of what kind, were they
 10 shooting, firing shotgun pellets or they were firing
 11 shotgun balls?
 12 COLONEL CLASSEN: No, I can't say, Mr
 13 Chair, -
 14 MR NTSEBEZA SC: Or rubber balls. When
 15 you say you saw POPS members using shotguns were those POPS
 16 members who were just ahead of you or were those the POPS
 17 members who were forming the corridor between, where the
 18 workers eventually emerged from and the side of the kraal?
 19 COLONEL CLASSEN: I saw POPS members
 20 ahead of me, some of them were far left of the picture.
 21 MR NTSEBEZA SC: Do you know if there
 22 were any shotgun pellets or shotguns used by POPS members
 23 who were in Papa19?
 24 COLONEL CLASSEN: No, I don't know.
 25 MR NTSEBEZA SC: So the short of it is

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1 that you wouldn't know, as far as you claim, where, how
 2 those people who died, Yawas, Yona, Mdze and Lukusa, you
 3 wouldn't know from where they would have been shot with
 4 these shotgun pellets?
 5 COLONEL CLASSEN: Yes, I wouldn't know,
 6 Mr Chair.
 7 MR NTSEBEZA SC: You wouldn't however
 8 dispute if it was shown that the probabilities are that
 9 they were shot from or by those members who were in Papa10
 10 whom we now know is also referred to as Papa19 and also
 11 from Papa5, you wouldn't dispute that?
 12 COLONEL CLASSEN: As I said I wouldn't
 13 know, Sir, I wouldn't be able to dispute that, no.
 14 MR NTSEBEZA SC: Mr Chairman, that's the
 15 end of my cross-examination.
 16 CHAIRPERSON: Yes, before Mr Mpofu is
 17 next –
 18 MR NTSEBEZA SC: Oh, can we hand up –
 19 CHAIRPERSON: Yes, sorry, carry on?
 20 MR NTSEBEZA SC: No, Mr Chairman, I just
 21 want to hand up the presentation. The presentation is
 22 called the shotgun presentation and it will need to be
 23 given a new exhibit number.
 24 CHAIRPERSON: That will be VV9, I think,
 25 if Ms Pillay gives me permission to –

<p style="text-align: right;">Page 29959</p> <p>1 MS PILLAY: That's correct, Chair. 2 CHAIRPERSON: VVV9, shotgun presentation, 3 alright. - who will cross-examine to half an hour. Can we 4 have that picture again- 5 MR NTSEBEZA SC: No, Mr Chairman, please. 6 CHAIRPERSON: You've spoken too soon 7 again, but carry on. 8 MR NTSEBEZA SC: This is not our day, Mr 9 Chairman. Mr Chairman, the power presentation is the one 10 that was circulated before we put this one pager because 11 this one pager was put simply because we wanted to label 12 the names but the power presentation that we would like to, 13 and we are not going to be putting any questions relevant 14 thereto other than the ones that we have done. We would 15 like that power presentation, that shotgun presentation 16 which is the presentation which we have circulated, we 17 would like to have that as an exhibit and headed, "Possible 18 evidence of the shotgun and the location of the shooter." 19 CHAIRPERSON: Alright, so VVV9 is in fact 20 that photograph we saw, that's the position of the shotgun 21 victims actually. 22 MR NTSEBEZA SC: Yes. 23 CHAIRPERSON: The position of the shotgun 24 victims and that's VVV9 and VVV10 is possible evidence – 25 MR NTSEBEZA SC: That's the one, Mr</p>	<p style="text-align: right;">Page 29961</p> <p>1 CHAIRPERSON: You've seen this document? 2 COLONEL CLASSEN: That's correct, Mr 3 Chair. 4 CHAIRPERSON: Now you see a passage 5 that's been referred to, it is on the second page. It 6 says, "Note, the dust kicked up circled in yellow, the 7 angle of the shot is indicated by the red arrow, the size 8 of the dust "cloud," appears to be too large for it to 9 being caused by single bullets, compare blue circle. It is 10 consistent with birdshot fired from a shotgun at a range of 11 2 to 3 metres." Are you able to comment on that assertion? 12 COLONEL CLASSEN: No, Mr Chair, I can't 13 comment on that. 14 CHAIRPERSON: You can't say whether it 15 may be right or may be wrong? 16 COLONEL CLASSEN: No, - 17 CHAIRPERSON: It is not a matter within 18 your field of experience or expertise, is that right? 19 COLONEL CLASSEN: No, Mr Chair, we don't, 20 I haven't seen that before. 21 CHAIRPERSON: Oh, I see. 22 MR MATHIBEDI SC: Sorry, Chairperson, if 23 we could be advised as to whose possible evidence is being 24 relied on? 25 [10:12] CHAIRPERSON: If you're seeking advice on</p>
<p style="text-align: right;">Page 29960</p> <p>1 Chairman, there it is. 2 CHAIRPERSON: - of shotgun. 3 MR NTSEBEZA SC: It is even being put on 4 the screen. 5 CHAIRPERSON: And the location – 6 MR NTSEBEZA SC: Of the shooter. 7 CHAIRPERSON: - of the shooter and just 8 for the sake of good order let's just ask this question, 9 did you see this document, was it shown to you beforehand? 10 COLONEL CLASSEN: Yes, I've seen it, Mr 11 Chair. 12 CHAIRPERSON: Alright, have you got any 13 comments on it? Are you able to comment on it? 14 COLONEL CLASSEN: No, no, Mr Chair. 15 CHAIRPERSON: Alright, is that it, Mr - 16 MR NTSEBEZA SC: Maybe, Chairman – 17 COMMISSIONER HEMRAJ: Mr Ntsebeza, on 18 page 2 of this presentation there is an allegation that the 19 size of the dust cloud appears to be too big for, too large 20 for a single bullet and therefore it must be from shotgun 21 pellets. Are we are going to ask the witness to comment on 22 that or – 23 CHAIRPERSON: Perhaps we should ask him. 24 You said you've seen this document – 25 MR NTSEBEZA SC: Well, you can ask –</p>	<p style="text-align: right;">Page 29962</p> <p>1 this point from me, you won't get it, but perhaps Mr 2 Ntsebeza can help us on that. Is this an argument you're 3 putting up, or is this – 4 MR NTSEBEZA SC: Mr Chairman, as always 5 with these things, this particular one is our analysis of 6 the objective evidence. 7 CHAIRPERSON: It's a contention that 8 you're going to advance based upon the series of 9 screenshots from the Reuters camera, upon which you're 10 going to found the argument. 11 MR NTSEBEZA SC: Yes – 12 CHAIRPERSON: And so Mr Mathibedi knows 13 what he must do, if he can, to counteract this contention. 14 MR NTSEBEZA SC: Indeed, Mr Chairman. 15 CHAIRPERSON: It's an inference sought to 16 be drawn from these photographs, and these in – 17 MR NTSEBEZA SC: Yes. 18 CHAIRPERSON: Is that your answer, Mr 19 Mathibedi? Better than that we can't do. Alright. 20 MR NTSEBEZA SC: Now, Mr Chairman, was 21 this made a separate exhibit? Because it's page 17 of the 22 slide. It's slide – okay – 23 CHAIRPERSON: No, we'll make – let's 24 leave it as a separate exhibit, VVV9, that's the position 25 of the shotgun victims with their names and so in. It's a</p>

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1 separate, because that's the way it was handed in, and then
 2 VVV10 is this presentation based on the Reuters camera
 3 screenshots.
 4 MR NTSEBEZA SC: That seems to –
 5 CHAIRPERSON: Alright, okay.
 6 MR NTSEBEZA SC: That seems to –
 7 CHAIRPERSON: Now that's now finally –
 8 MR NTSEBEZA SC: Finally, Mr Chairman.
 9 CHAIRPERSON: Alright.
 10 MR NTSEBEZA SC: Both of us are not
 11 speaking too soon.
 12 CHAIRPERSON: Alright. Now before Mr
 13 Mpfu has a chance, let's have a look again at VVV9. Now
 14 that – you see the line there of TRT people in that
 15 picture? You see that?
 16 COLONEL CLASSEN: I do, Mr Chair.
 17 CHAIRPERSON: Is that where they were at
 18 the time the volley took place?
 19 COLONEL CLASSEN: I cannot say hundred
 20 percent yes, but we were moving forward and backwards. So
 21 I cannot say we were –
 22 CHAIRPERSON: Yes –
 23 COLONEL CLASSEN: - precise position.
 24 CHAIRPERSON: Yes, I was more concerned
 25 about the angle. You see according to this picture it

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1 looks as if the line, if that's the line, whether forward
 2 or backward or where it is, it appears to be parallel to
 3 what one can describe as the road and more or less parallel
 4 to the fence which is on the road side of the plot which
 5 contains the shack. Would you agree with that?
 6 COLONEL CLASSEN: I do, Mr Chair.
 7 CHAIRPERSON: Thank you. Mr Mpfu,
 8 you've got half an hour. We'll take the first comfort
 9 break at the end of your cross-examination, half an hour's
 10 time, unless you're able to cross-examine in a shorter
 11 period than that.
 12 CROSS-EXAMINATION BY MR MPOFU: Well,
 13 Chairperson, let's start with – I actually wanted also to
 14 start at VVV9, just to clarify the bearings. It's true,
 15 isn't it, that the line at the time of the shooting was not
 16 exactly parallel to the road. It actually formed a Y with
 17 the road, as you can see there. In other words some of the
 18 people towards the right of the picture, some of them were
 19 actually on the road, correct?
 20 COLONEL CLASSEN: Can you just – you –
 21 MR MPOFU: No, I'm saying –
 22 CHAIRPERSON: Sorry, I think what counsel
 23 is referring you to is on the right-hand side of the
 24 vehicle, you see near the right end of the line one sees a
 25 vehicle and to the right of that vehicle there's some

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1 further people who extend from the vehicle to the road.
 2 Now they don't seem to me to be a continuation of the line
 3 on the left-hand side of the vehicle, but certainly if you
 4 look at them, they actually meet up with the road. So
 5 they're not parallel with the road, they're – and if you
 6 regard them as a kind of extension of the line on the left
 7 of the road, what you then have is effectively a Y. The
 8 road goes from more or less top right of the photograph
 9 down to bottom left and the line joins up with the road
 10 just to the right of the vehicle. That's Mr Mpfu's point.
 11 Have I got it right, Mr Mpfu?
 12 MR MPOFU: That's correct, Chairperson,
 13 what we can call a converted Y of some sort.
 14 COLONEL CLASSEN: I agree, Mr Chair.
 15 MR MPOFU: Yes, thank you. Now you
 16 testified that you observed the strikers right through,
 17 except when they were obscured by the kraal, correct?
 18 CHAIRPERSON: [Microphone off, inaudible]
 19 His evidence was there was a short period when he couldn't
 20 see the strikers because there was an Nyala or maybe more
 21 than one Nyala in the way –
 22 MR MPOFU: Yes. Ja, okay, subject to
 23 that correction, you observed them throughout the episode
 24 until they came towards near the kraal, correct?
 25 COLONEL CLASSEN: That's correct, Mr

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1 Chair.
 2 MR MPOFU: And in that period you
 3 observed what you saw as an attack. The only attack you
 4 observed was the one during the volley of fire, correct?
 5 COLONEL CLASSEN: Just come again there,
 6 Mr Mpfu.
 7 MR MPOFU: The only attack by the
 8 strikers in your view that you observed was the one that
 9 resulted in the fatal shootings.
 10 COLONEL CLASSEN: That's correct, Mr
 11 Chair.
 12 MR MPOFU: Okay. Right, okay. Look, I'm
 13 going to ask you around, about the events around the kraal.
 14 Unlike Mr Ntsebeza and others who unfortunately their
 15 clients did not live to see the day, so that's why they had
 16 to rely on all the devices that they have used, I'm going
 17 to put to you versions of people who were there because I
 18 represent the people who survived. Do you understand that?
 19 COLONEL CLASSEN: I do, Mr Chair.
 20 MR MPOFU: You observed, according to
 21 your evidence you observed the group which eventually was
 22 shot down there. You observed them walking towards the
 23 kraal, correct?
 24 COLONEL CLASSEN: That's correct.
 25 MR MPOFU: And before that you would have

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1 observed other people ahead of them running in that same
2 direction, correct?
3 COLONEL CLASSEN: Are you saying before
4 that?
5 MR MPOFU: Ja, just slightly before.
6 Remember Mr – okay, you might now know this. Mr Mathunjwa
7 addressed the people and then from there, there was a lot
8 of movement from the crowd and it's common cause that some
9 people started running towards that same direction of the
10 kraal. The only question I'm asking you is whether you
11 observed that or not.
12 COLONEL CLASSEN: No, I did not, Mr
13 Chair.
14 MR MPOFU: You did not see other – if you
15 observed the crowd from the time that they were on the
16 mountain up to their dispersal, then surely you would have
17 seen - go to L191 and 193, you can pick whichever one.
18 Okay, let's take 193, just because it has writing that
19 supports what I'm saying. At that stage, just to orient
20 you, that's the stage before, it's before the shooting
21 happened, maybe five minutes or so before. The thing says
22 "Protesters organised group remain with others on the
23 koppies while a number of protesters are departing," and
24 there are arrows of people. Of particular interest is the
25 long white line, because it actually points to the place

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1 where people were eventually killed, just coincidentally.
2 But you see that shows people moving. If you zoom closer
3 you'll see that you can see people on the road. It's
4 common cause. Did you observe people leaving there and
5 using that road before the Nyala 4 closed that road?
6 COLONEL CLASSEN: No, I have not, Mr
7 Chair.
8 MR MPOFU: Okay. Alright, the reason I'm
9 saying that is because as I say the, your evidence
10 coincides with that of Mr Magidiwana on that point because
11 he says that the people who left earlier sort of ran away,
12 but the group that he was in was told, or had been told by
13 Mr Noki to rather walk than run because they had done
14 nothing wrong, but they effectively had walked into the
15 same direction as those people. You can't dispute that,
16 correct?
17 COLONEL CLASSEN: No, I don't understand
18 that. Just come there again, Mr Mpofo.
19 MR MPOFU: I'm saying insofar as your
20 observation is that the group that was finally mowed, or
21 killed by the police had been walking down there, your
22 evidence coincides with that Mr Magidiwana. You
23 understand?
24 COLONEL CLASSEN: So you're saying that
25 the people that were killed had been walking?

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1 MR MPOFU: Yes, as you say.
2 COLONEL CLASSEN: No, that's not what I'm
3 saying.
4 MR MPOFU: No, I said did you observe the
5 group which eventually got shot walking down towards the
6 kraal area and you said yes, a few questions ago.
7 COLONEL CLASSEN: That's not what I said.
8 MR MPOFU: Okay, well then go to page
9 29611 –
10 CHAIRPERSON: 29611 of the transcript?
11 MR MPOFU: 29611, Chairperson, yes. I'll
12 just check the line now.
13 CHAIRPERSON: So could we have page
14 29611, please? It's a little bit earlier than the passage
15 we just looked at. No, 29611. We've got it now. Which
16 line?
17 MR MPOFU: Yes, Ms Pillay said – it's
18 line, round about line 9. I'm not going to read it
19 verbatim. From round line 9 she said something about that
20 there was a group that walked. According to your testimony
21 it walked along the barbed wire until they reached the
22 kraal, and then you said, "Yes, I could see them. From the
23 third Nyala I could see them clearly that there are guys
24 walking next to the Nyala, and Ms Pillay says, "Alright,
25 the only time you lost sight of the strikers according to

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1 your evidence is when they actually reached the kraal when
2 you lost sight of them?" And then you say, "Yes, behind
3 the kraal," which is what I put to you earlier, but the
4 Chair corrected, but your evidence was actually that the
5 only time you lost sight of them was when they reached the
6 kraal. But that's not the point I'm cross-examining you on
7 now. I'm just saying that you observed them walking down.
8 You understand?
9 COLONEL CLASSEN: Yes, I did not observe
10 them walking down, not even a part way. Walking with the
11 Nyala as it laid out the barbed wire.
12 MR MPOFU: So I don't care whatever else
13 was happening. Did you observe the people walking?
14 MR MATHIBEDI SC: No, Mr Chairperson, I
15 don't think it's correct for Mr Mpofo to tell the witness
16 that he does not care what he's saying, or what he
17 observed.
18 CHAIRPERSON: [Microphone off, inaudible]
19 MR MATHIBEDI SC: He does not care what
20 the witness observed. I mean the witness is providing an
21 answer.
22 CHAIRPERSON: Yes, Mr Mpofo, I didn't
23 actually hear you say that but if I did I suggest that you
24 don't repeat that kind of statement. Just ask questions.
25 Don't say what you care or don't care. But I didn't hear

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1 you say it, so you may not have said it, but if you said
2 such a thing, don't say it again.

3 MR MPOFU: Well, in the context it's
4 called for, Chair, but I'll – all I'm saying is that I'm
5 not asking you about what else was there. I'm asking you
6 whether you observed them walking or not, yes, no?

7 COLONEL CLASSEN: Yes.

8 MR MPOFU: And the point that is tied
9 with that is that you cannot dispute the fact that they
10 were walking because Mr Noki had said to them that they
11 must not run and they must walk, unlike the others who were
12 running?

13 COLONEL CLASSEN: I wouldn't know what Mr
14 Noki said, but –

15 MR MPOFU: Yes. But I've showed you now
16 that the people who were – I showed you the earlier group
17 that had left there. You would agree that the group that
18 you saw walking were also walking in the same direction, in
19 other words towards the kraal, correct?

20 COLONEL CLASSEN: In line with the Nyala,
21 yes.

22 MR MPOFU: Yes, and the crucial issue in
23 this Commission on this point is where those people were
24 going, or basically what their intention was. You
25 understand that?

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1 COLONEL CLASSEN: I do, Chair.

2 MR MPOFU: Yes, and it would be fair,
3 just to assist you on that point, to say you, at some point
4 you said they were walking towards the Nyalas and then at
5 some point you were saying that they were attacking the
6 police. So can we say roughly that they were either going
7 home to Nkaneng, or they were walking towards the Nyalas
8 generally, or they were coming to attack the police? It's
9 one of those.

10 COLONEL CLASSEN: Well, I wouldn't know,
11 Mr Mpofu, but yes, I saw them walking and also attacking.

12 MR MPOFU: Yes, right. Now if they had
13 not been – well, their evidence is that if they had not
14 been blocked by Nyala 4 they would have simply proceeded on
15 that road that was blocked by Nyala 4 towards Nkaneng. You
16 can't dispute that.

17 COLONEL CLASSEN: I can because I saw
18 them walking next to Nyala 3 and then Nyala 4.

19 MR MPOFU: No, I'm sorry, maybe I didn't
20 make the question clear. Their evidence is that but for
21 them being blocked by Nyala 4, whose only purpose there was
22 to block them from proceeding further, they would have
23 proceeded on that very same road in front of the kraal and
24 simply proceeded to Nkaneng. You have no way of disputing
25 that.

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1 COLONEL CLASSEN: I can't comment on
2 that, Sir. That's what they say.

3 MR MPOFU: You can't dispute it.

4 COLONEL CLASSEN: As I said, I can't
5 comment. They said that.

6 MR MPOFU: Right, and the only reason –
7 their version is also that the only reason that they
8 changed track and had to circumnavigate the kraal as it
9 were, was exactly because Nyala 4 had closed their way to
10 Nkaneng. You can't dispute that either.

11 COLONEL CLASSEN: Again that's what they
12 say. I don't know, Sir.

13 MR MPOFU: Yes. But what you do know is
14 that after Nyala 4 blocked them they changed their course
15 and went around the kraal. That you saw.

16 COLONEL CLASSEN: I didn't see them go
17 around the kraal. When they were around the kraal they
18 were obscured from my sight.

19 MR MPOFU: Well, they emerged and
20 attacked you. So you must accept that they must have gone
21 around the kraal, correct?

22 COLONEL CLASSEN: That's correct –

23 MR MPOFU: According to you. Huh?

24 COLONEL CLASSEN: That's correct.

25 MR MPOFU: Ja. Alright, and at that

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1 stage you could see, from where you were you could see the
2 POP members who were shooting them from the gaps between
3 the Nyalas, correct?

4 COLONEL CLASSEN: That's correct.

5 MR MPOFU: And you would agree – well, I
6 don't know if you would agree, but Captain Loest agreed
7 that after they had been shot by those people then they
8 started accelerating forward. You can't dispute that, or
9 you don't disagree with Captain Loest?

10 COLONEL CLASSEN: No, I wouldn't know
11 that. I don't know if that because they were shot they
12 started running. I don't know.

13 MR MPOFU: Yes, but you can't dispute it.

14 COLONEL CLASSEN: I can't comment on it
15 in other words, so I wouldn't know if that's why they ran.

16 MR MPOFU: Okay, and in any event you
17 yourself from where you were you said that you did not
18 observe or even hear the shots that were shot earlier
19 towards the POP members. You saw the later shots during
20 the volley, correct?

21 COLONEL CLASSEN: Just come a bit clear
22 there, Mr Mpofu, sorry.

23 MR MPOFU: Alright, you could not, or you
24 did not observe the shots that were fired by one of the
25 strikers, the shot or shots that were fired by one of the

<p style="text-align: right;">Page 29975</p> <p>1 strikers as they came around the kraal towards the POP 2 members? 3 COLONEL CLASSEN: No, I did not observe 4 that. 5 MR MPOFU: You know nothing about that? 6 COLONEL CLASSEN: As I said, I did not 7 observe that. 8 MR MPOFU: Do you know nothing about it 9 now? I know you didn't observe it. 10 COLONEL CLASSEN: I have seen the video. 11 MR MPOFU: Yes, okay, you only know it 12 after the fact from the video? 13 COLONEL CLASSEN: That's correct. 14 MR MPOFU: Ja. Alright, so while you 15 were there that played no part in your mind because you 16 didn't observe it? 17 COLONEL CLASSEN: That's correct. 18 MR MPOFU: Yes, and would it be fair if I 19 say to you, we're going to argue that if indeed the 20 intention of the strikers as they negotiate the kraal was 21 to attack policemen. 22 [10:32] Then it would have been to attack all policemen, 23 there was nothing magical about the TRT line, correct? 24 COLONEL CLASSEN: Just come again there 25 sir, please?</p>	<p style="text-align: right;">Page 29977</p> <p>1 MR MPOFU: The POP members, yes, in the 2 same way that they attacked the TRT according to you. 3 COLONEL CLASSEN: Mr Mpofu, just put it 4 clearly for me. Maybe I don't understand you, sir, sorry. 5 MR MPOFU: Okay – but I don't have time. 6 CHAIRPERSON: Mr Mpofu's point is, as 7 they came round the kraal and once again into your field of 8 vision, they were passing a line of Nyalas. In between 9 those Nyalas, behind the Nyalas were POP members who were 10 firing at the strikers with teargas, I think it was, rubber 11 bullets, rubber balls and so on and the – but he says the 12 strikers didn't attack them. They didn't worry about the 13 POP people who were firing at them from behind the Nyalas, 14 they moved on in the direction of the TRT. I think that's 15 his point. Is that right, Mr Mpofu? 16 MR MPOFU: Except in the direction of the 17 road is my language. Okay, do you understand it now? 18 COLONEL CLASSEN: I get it, Mr Mpofu. 19 Thank you, Mr Chair. I wouldn't say that they were 20 attacking, I wouldn't know if they were attacking the POPS 21 members when they fired at them so I will agree with you. 22 MR MPOFU: No, look at slide L206. 23 CHAIRPERSON: [Microphone off, inaudible] 24 – what he knows, from what he could see, that's what he 25 tells us, there we see slide 206, we see the gap between</p>
<p style="text-align: right;">Page 29976</p> <p>1 MR MPOFU: If the reason why they 2 navigated the kraal was to attack policemen then they would 3 have attacked any policeman, correct? 4 COLONEL CLASSEN: Correct. 5 MR MPOFU: Ja. Now the first group of 6 policemen that confronted them actually shot at them, was 7 that group of POP members between those Nyalas and they did 8 not, according to your knowledge, attack them. Correct? 9 COLONEL CLASSEN: Who did not attack 10 whom, sir? 11 MR MPOFU: The strikers, when they 12 emerged from the corner of the kraal their first 13 confrontation was with the police or rather they were first 14 confronted by the police who shot them between the gap - 15 the POP members, correct? 16 COLONEL CLASSEN: That is correct. 17 MR MPOFU: And you are not aware of the 18 strikers having, turning around to attack those people. In 19 fact I'm trying to, because I don't have time, not to use 20 the photos but the photos will show that they were actually 21 facing the other way towards the road at that time. You 22 would agree with that, one of the photos you were shown? 23 COLONEL CLASSEN: Okay, are you saying 24 that when they came around the kraal they did not turn 25 around to attack the police –</p>	<p style="text-align: right;">Page 29978</p> <p>1 two Nyalas, we see one POP member at least behind the 2 Nyalas, we see the strikers coming past in the corridor 3 between the Nyalas and the kraal. Could you see that from 4 where you were? 5 COLONEL CLASSEN: I can't quite recall 6 from where I was but I could see them coming around. 7 MR MPOFU: Yes, yes and if you look at 8 207 on the same – all I'm saying is that you can see from 9 those pictures that their movement was parallel to those 10 Nyalas, even though they were being attacked from those 11 gaps and not words those policemen who were attacking them, 12 is that fair? 13 COLONEL CLASSEN: Yes, I see them moving 14 – 15 MR MPOFU: Thank you. 16 COLONEL CLASSEN: - parallel towards the 17 Nyalas. 18 MR MPOFU: Yes and if they are – the 19 point I'm making to you is you would agree that if their 20 intention had been to attack any old policeman then the 21 first victims would have been those policemen there, that 22 bunch of policemen there. Would you agree? 23 COLONEL CLASSEN: I would agree with 24 that. 25 MR MPOFU: Yes. Okay, now moving on I'm</p>

<p style="text-align: right;">Page 29979</p> <p>1 now going to illustrate to you that – or let me put it this 2 way. You would agree with other witnesses that your basic 3 line was effectively formed after Nyala 4 had blocked the 4 road and when the people were negotiating the kraal, in 5 that period. I think it was two minutes or 90 seconds. 6 CHAIRPERSON: Do you mean 7 circumnavigating the kraal? 8 MR MPOFU: Yes. Do you understand the 9 question, Colonel? 10 COLONEL CLASSEN: Just come again, Mr 11 Mpofo, please? 12 MR MPOFU: Yes. I'm saying according to 13 evidence that has already been led and considered, the 14 sequence of events was as follows. Nyala 4 blocked them as 15 you and I have discussed, then they tried or went to 16 circumnavigate the kraal and in that period your guys were 17 running, the TRT people were running to form the basic line 18 and that's when the basic line was formed. You go along 19 with that generally - generally, not general. Colonel? 20 COLONEL CLASSEN: Yes, sir. 21 MR MPOFU: Thanks. So from that it would 22 be self-evident or stating the obvious that as they emerged 23 or when they were obscured by the kraal they did not even 24 have a clue that there was a TRT line there because there 25 was no such line at the time when they last saw that part</p>	<p style="text-align: right;">Page 29981</p> <p>1 MR MPOFU: So we can accept that at least 2 until they emerged from that corner, they had no intention 3 to attack the TRT line whose existence they knew nothing 4 about. 5 COLONEL CLASSEN: Again I can't comment 6 on that. 7 MR MPOFU: No, I'm asking you logically 8 as a human being, if you – 9 CHAIRPERSON: Logic can be argued with 10 the Commission, you don't have to put it to the witness. 11 If your logic is impeccable then your argument will have to 12 be accepted. You don't have to argue with the witness, put 13 points to the witness that really are based on logical 14 deductions – 15 MR MPOFU: Well, I thought all questions 16 were based on logic but I'll consider I am correct – 17 CHAIRPERSON: No, no, you don't have – 18 MR MPOFU: Do you – 19 CHAIRPERSON: Well, you'll be correct – 20 you don't have to put to witnesses points that are merely 21 logical deductions and facts that have already been 22 established. 23 MR MPOFU: Do you accept that - 24 CHAIRPERSON: He declines to comment. 25 MR MPOFU: Yes. Do you accept that if</p>
<p style="text-align: right;">Page 29980</p> <p>1 of the world, correct? 2 COLONEL CLASSEN: Mr Mpofo, I also just 3 need to come in there and say that where Nyala 3 was 4 starting to deploy, that's when we were starting to move to 5 go and form our basic line. 6 MR MPOFU: Yes. No, even if that is 7 correct I'm saying when the basic line was actually formed 8 they did not know that it was there because at that stage 9 it's when they were obscured by the kraal. 10 COLONEL CLASSEN: I wouldn't know, sir. 11 MR MPOFU: You can't dispute that because 12 otherwise I'll show you the videos of you, of the TRT 13 people running just after Nyala 4 has closed. 14 COLONEL CLASSEN: But that's why I said I 15 can't comment on that, I wouldn't know. 16 MR MPOFU: Okay, okay, except if you 17 accept that – that's fair, if you accept that that is so 18 and many other police witnesses have conceded it, then 19 surely when they were going around the kraal the last thing 20 on their minds – well, it's not even the last thing on 21 their minds, it could not have been on their minds that 22 there was a TRT line there because they were not, it was 23 not there actually when they last saw that part of the 24 veld. Do you understand that? 25 COLONEL CLASSEN: I understand that.</p>	<p style="text-align: right;">Page 29982</p> <p>1 they did not know about the existence of the TRT line then 2 they could not have been circumnavigating the kraal to 3 reach or look at or do anything to such a TRT line – 4 CHAIRPERSON: You're now doing the very 5 thing I said you couldn't do. You're putting a question to 6 him based on a hypothesis and the question is based upon a 7 deduction from that. I don't allow the question. 8 MR MPOFU: I've asked this question 9 before, Chairperson, and you have allowed it. 10 CHAIRPERSON: Perhaps I – 11 MR MPOFU: Forgive me if I ask it again. 12 CHAIRPERSON: Perhaps I should have 13 disallowed it before – 14 MR MPOFU: Ja. 15 CHAIRPERSON: I'm disallowing it now. 16 MR MPOFU: I'm just explaining why I'm 17 asking it, Chair. So – 18 CHAIRPERSON: I understand you've got 19 five minutes. 20 MR MPOFU: No – well, I can't have five 21 minutes when I started 10 minutes ago if I had 30 minutes 22 to begin with. 23 CHAIRPERSON: You started at quarter past 24 and it's now nearly quarter to. On my arithmetic Mr Wesley 25 is right, you've got five minutes. Let's not argue about</p>

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1 that.

2 MR MPOFU: No.

3 CHAIRPERSON: Just carry on.

4 MR MPOFU: Okay, ja. Colonel, your –

5 according to you the attack was the two gunshots that you

6 said you heard, the later two gunshots, correct?

7 COLONEL CLASSEN: That's correct, sir.

8 MR MPOFU: So, and as you said because of

9 that being the attack you could not be expected to fire

10 warning shots, correct?

11 COLONEL CLASSEN: That's correct, sir.

12 MR MPOFU: And for that reason and that's

13 understandable, because you know if you are – I mean

14 bullets travel fast and for that reason no, it was for that

15 reason that warning shots were not fired, correct?

16 COLONEL CLASSEN: No, that's not what I'm

17 saying that warning shots were not fired. May –

18 MR MPOFU: I'm sorry, sorry to cut you

19 but I'm sure you understand by now why. I'm saying that

20 you were saying that because the attack that you saw, at

21 least in your estimation the attack constituted the two

22 shots that you testified about yesterday. It was for that

23 reason that there was no, I want to use your own words,

24 there was no need to fire warning shots, correct?

25 COLONEL CLASSEN: I'm trying to figure

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1 out, did I say no need to fire warning shots or –

2 MR MPOFU: Yes, you did.

3 COLONEL CLASSEN: Okay, Mr Mpofo. If you

4 watch the video also you'll see there's dust in front of

5 the members, in front of the miners, so according to me if

6 these guys or the SAPS members who were straight or

7 straight firing at the miners, you wouldn't see the dust

8 there in front of those miners.

9 MR MPOFU: No, but you said to Mr Gotz

10 yesterday there was no need to fire warning shots because

11 these people were firing at you. Did you not say that?

12 Are you denying saying that?

13 COLONEL CLASSEN: No, I'm not denying it

14 but I'm also viewing it from how I see the video and what I

15 do know. From my side there was no need because after

16 those two shots, yes, definitely I wouldn't think of firing

17 warning shots.

18 MR MPOFU: Yes, so there was no need.

19 COLONEL CLASSEN: There was no need –

20 MR MPOFU: Alright.

21 CHAIRPERSON: As far as you're concerned,

22 despite the fact that there was no need to firing warning

23 shots, what is your evidence in regard to the question as

24 to whether warning shots were in fact fired?

25 COLONEL CLASSEN: They were fired.

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1 MR MPOFU: Yes, and those warning shots,

2 how many seconds did that last for, that episode?

3 COLONEL CLASSEN: I wouldn't know, Mr

4 Mpofo, I can't recall.

5 MR MPOFU: Estimate? Three, four

6 seconds?

7 COLONEL CLASSEN: Again it was tense

8 there, I can't say, sir.

9 MR MPOFU: Sorry? But you were able to

10 say that the shots that were part of the attack came two or

11 three seconds before the volley. Was it not tense then?

12 COLONEL CLASSEN: Yes, it was. That's

13 what I estimated.

14 MR MPOFU: Ja, can you also estimate then

15 how long the warning shot episode took?

16 COLONEL CLASSEN: There was a lot of

17 shots there so that is one of the reasons why I can't

18 estimate. There were a lot of policemen firing so I can't

19 say there, sir.

20 MR MPOFU: So you can't say then to the

21 Commission that there was a two stage event there, warning

22 shots followed by shots to heads and bodies? You don't

23 know which came first, you can't say because it was tense.

24 COLONEL CLASSEN: Sir, what I did see

25 first was the dust. So that I can at least say, that I can

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1 refer to as warning shots -

2 MR MPOFU: Yes, how long before that did

3 you see actual shots?

4 COLONEL CLASSEN: I can't say, sir.

5 MR MPOFU: I mean after that. You can't

6 say?

7 COLONEL CLASSEN: Yes, I can't say.

8 MR MPOFU: So therefore you also can't

9 say, if you can't estimate the period between the warning

10 shots and the lethal shots then you also can't say what

11 happened between the two things, correct?

12 COLONEL CLASSEN: Yes, I wouldn't be able

13 to say but Mr Mpofo, I just need to add there that there's

14 a lot of policemen that's firing into the ground. It's the

15 same as me telling you that that was the amount of warning

16 shots fired and I can't say that.

17 MR MPOFU: Yes, no, but listen this is

18 very important. All I'm saying to you is that if you – I'm

19 not disputing that you can't say but I'm saying if you

20 can't say that these were the warning shots and these were

21 the lethal shots, therefore you also cannot say what

22 happened between the two, those two episodes. Is that

23 fair?

24 COLONEL CLASSEN: No, I don't think it's

25 fair because I could see the dust first before I see the

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1 miners falling.

2 CHAIRPERSON: No, but Mr Mpofu's point,

3 there was dust, you couldn't see what was happening behind

4 the dust.

5 MR MPOFU: Mm.

6 CHAIRPERSON: Is that correct?

7 COLONEL CLASSEN: That is correct, Chair.

8 CHAIRPERSON: Therefore it's possible

9 that someone may, during the period that some people were

10 firing into the ground, may have fired straight at the

11 strikers and some of, one or other of the strikers may have

12 fallen at a time when your vision, your view was obscured

13 by the dust. Is that correct?

14 COLONEL CLASSEN: I can't agree with

15 that, Mr Chair, because when I saw the dust I could still

16 see people, you understand. It wasn't that it was so

17 obscured that you couldn't see the people in total.

18 MR MPOFU: Yes, well, if that is true

19 then your earlier evidence can't be correct, you saw the

20 dust, you saw the people and there must be some sequence

21 even assuming you can't estimate, which I'll grant you, the

22 duration but I'm just talking about sequence now, not

23 duration. You saw, in your evidence you saw the dust, you

24 then saw people falling down, correct?

25 COLONEL CLASSEN: That's correct, sir.

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1 CHAIRPERSON: Your time has now expired,

2 Mr Mpofu.

3 MR MPOFU: Chairperson, I have to say

4 that this is –

5 CHAIRPERSON: Mr Mpofu, your time has

6 expired.

7 MR MPOFU: No, I know, Chairperson. I am

8 trying to make an application for an extension of the time.

9 This is a very important witness for my clients.

10 CHAIRPERSON: You've made –

11 MR MPOFU: I know what has gone through –

12 CHAIRPERSON: You've made the point, I

13 take it, on record –

14 MR MPOFU: I'd like to apply for an

15 extension, Chairperson.

16 CHAIRPERSON: How long?

17 MR MPOFU: 15 minutes.

18 CHAIRPERSON: We'll take the comfort

19 break now and I'll think about it and give you my ruling

20 after that.

21 MR MPOFU: Thank you, Chairperson.

22 [COMMISSION ADJOURNS COMMISSION RESUMES]

23 [11:06] CHAIRPERSON: - decided to give you the

24 15 minutes to give you the 15 minutes that you asked for,

25 so please remember you've asked for 15 minutes and that's

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1 what you're getting.

2 MR MPOFU: Chairperson, I'm indebted to

3 the chairperson. Mr Wesley, don't start yet. Thank you,

4 Chairperson, I don't want to belabour the point but I just

5 want to say that the people I represent during the break

6 have said I must once again express their frustration with

7 the time limits, particularly for a witness like this who

8 is crucial to their injuries and the events, but we've had,

9 we've discussed this, Chairperson, I'm simply placing this

10 on record –

11 CHAIRPERSON: Don't go there again, you

12 didn't apply initially to cross-examine him but I gave it

13 to you, so let's just carry on.

14 MR MPOFU: Yes. Well, I've placed the

15 matter on the record as I'm instructed to do, Chairperson,

16 and I explained to you yesterday how the misunderstanding

17 happened, Chair. Alright, Colonel, in a nutshell what you

18 are saying is that, from the questions that I asked you and

19 the chair put to you, would it be fair to say you are

20 unable to separate what happened there in the manner that I

21 wanted to, what you saw effectively is, simultaneously you

22 saw some dust and you saw some people falling, so it would

23 be unfair to you to be asking you about the sequence,

24 correct?

25 COLONEL CLASSEN: Correct.

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1 MR MPOFU: Ja, now if then the dust and

2 the people falling happens simultaneously, then obviously

3 there is no stage at which there was a warning shot and

4 then you wait and see what happens and because of what

5 happens then you shoot the people in their heads. It all

6 happened simultaneously, do you understand that, the

7 difference between the two?

8 COLONEL CLASSEN: I understand that but

9 you're also mentioning that shooting the people in the

10 heads, okay.

11 MR MPOFU: Ja, okay, anywhere on their

12 bodies, whatever, all I'm saying is that if the two things

13 happened simultaneously then there is no gap within which

14 one can say, this is a warning and if you act according to

15 the warning I will do the next thing, because it happened

16 simultaneously, do you understand that?

17 COLONEL CLASSEN: I also just want to

18 say, I understand what you are saying but adding that, if

19 you say simultaneously, in other words the dust and the

20 falling happened at one time, is that what you're saying to

21 me?

22 MR MPOFU: No, it is what you are saying.

23 I asked you that question and you said, yes.

24 COLONEL CLASSEN: And I also added, I

25 also put it before that, that I said I saw the dust and I

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1 saw people falling.
 2 MR MPOFU: Okay, well, the record will
 3 speak for itself.
 4 COLONEL CLASSEN: Yes.
 5 MR MPOFU: I don't have time to argue
 6 that point with you. The next thing is, if, - okay, you
 7 were under instructions to follow POP about the 100 metres
 8 behind them, correct?
 9 COLONEL CLASSEN: That is correct.
 10 MR MPOFU: And according to your evidence
 11 no person took charge of the fact that that 100 metre gap
 12 was closed effectively to 10 or 20 metres?
 13 COLONEL CLASSEN: That's correct.
 14 MR MPOFU: But you would accept that if
 15 you had been at 100 metres or even half of that, 50 metres
 16 behind POP, then there would have been sufficient time to
 17 determine whether the people were going to cross the road
 18 and attack you or turn left and go to Nkaneng? In other
 19 words if you are not so close to the road then we would
 20 have known whether they would have turned left and gone
 21 home like everyone else, or cross the road to come and
 22 attack you, correct?
 23 COLONEL CLASSEN: That's correct.
 24 MR MPOFU: In any event accepting now
 25 that you did come close to the road as you did, according

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1 to you the danger was posed by the fact that people were
 2 shooting at you. Let me ask that question properly, what I
 3 want to say is that from where you were, if your concern
 4 was just the spears and the pangas you were still a safe
 5 distance but obviously you were not a safe distance if it
 6 came to shots, correct?
 7 COLONEL CLASSEN: That is so, Chair.
 8 MR MPOFU: Now I just want to round off
 9 an earlier point that I made to you. If you accept for the
 10 purposes of this question, that whole analysis that I went
 11 through with you that they did not know about the TRT line
 12 and so on, what we do know is that they knew about the
 13 road, they knew that the road was there to Nkaneng,
 14 correct, because everyone has been using it?
 15 COLONEL CLASSEN: That's correct.
 16 MR MPOFU: Yes, so you therefore would
 17 not be able to dispute their version which is that they
 18 were circum navigating the kraal in order to go to the road
 19 which they knew was there, is more probable than the
 20 version that they were circumnavigating the kraal to go to
 21 the TRT line which they did not know was there, agreed?
 22 COLONEL CLASSEN: I agree.
 23 MR MPOFU: Thank you. Now the next, the
 24 last issue that I want to talk to you about is, you
 25 conceded yesterday when you were being questioned by Mr

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1 Gotz I think, that nobody told the strikers to lay down
 2 their arms, correct?
 3 COLONEL CLASSEN: Yes, in the present
 4 time that I was there nobody told them.
 5 MR MPOFU: Yes, and instead, - well, you
 6 yourself were not aware of this but you can accept that
 7 instead the only warning that was given was to the media,
 8 go away, media, go away. If you didn't see it on the day
 9 you might have heard it on the videos, do you remember
 10 that?
 11 COLONEL CLASSEN: Yes, I do.
 12 MR MPOFU: Now are you, let me just give
 13 you some of the evidence that was given here. Captain Kidd
 14 has testified that when he warned the people or rather when
 15 he asked the strikers, the armed strikers to lay down their
 16 arms before they could proceed, he had a 100% success rate.
 17 So that means that had you, your group asked the strikers
 18 to lay down their arms the probability is that the massacre
 19 would not have happened, would you agree?
 20 COLONEL CLASSEN: No, I would not agree
 21 with it.
 22 MR MPOFU: Well, okay, just postulate
 23 that I know that it is the realm of speculation. If like
 24 Captain Kidd your group had said to the strikers, lay down
 25 their arms, rather, lay down your arms and if like they did

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1 with Captain Kidd, they had complied at a 100% rate, do you
 2 think you would still have shot them?
 3 COLONEL CLASSEN: No, I can't, I don't
 4 get you there, Mr MPOFU, sorry?
 5 MR MPOFU: No, I'm saying and I'm
 6 apologising because I'm saying I know that we are in the
 7 area of speculation, but I'm backing that speculation with
 8 concrete evidence of what happened on the other side of the
 9 mountain. So I'm saying to you, just literally at the same
 10 time as you people were shooting the people down there, on
 11 the other side of the mountain Captain Kidd had asked armed
 12 strikers to lay down their arms and his evidence is that he
 13 had a 100% success rate, do you understand that?
 14 COLONEL CLASSEN: I understand that.
 15 MR MPOFU: In other words everyone that
 16 they asked to lay down their arms did so. Now I'm saying
 17 against that concrete evidence would you agree that if your
 18 group down there had also asked the people to lay down
 19 their arms and if they had complied at a 100% rate like
 20 they did with Captain Kidd, do you think that you still
 21 would have had to kill and injure them?
 22 COLONEL CLASSEN: No, I don't think so.
 23 MR MPOFU: Thank you, Chairperson, I have
 24 nothing further.
 25 CHAIRPERSON: Alright, thank you, Mr

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1 Mpofo. Re-examination?
 2 RE-EXAMINATION BY MR MATHIBEDI SC:
 3 Thanks, Mr Chairman. Lieutenant Colonel, it was put to you
 4 that at the time that the strikers approached or went
 5 around the kraal their intention was to go home, but it was
 6 not put to you that Mr Noki was not staying at Nkaneng.
 7 Now it is the police case that at that stage the strikers
 8 were not going home, in particular Mr Noki because he was
 9 not staying in Nkaneng, you cannot dispute that?
 10 COLONEL CLASSEN: No, I can't dispute
 11 that.
 12 MR MATHIBEDI SC: Now could, -
 13 MR MPOFU: Chairperson, before -
 14 CHAIRPERSON: Yes, Mr Mpofo?
 15 MR MPOFU: No, I'm objecting to that
 16 question, Chairperson, it is a leading question but also I
 17 don't know the basis, even as a leading question it is
 18 shapeless.
 19 CHAIRPERSON: What do you say to the
 20 objection, Mr Mathibedi?
 21 MR MATHIBEDI SC: Well, I submit that the
 22 objection is not founded.
 23 CHAIRPERSON: Why, was it not a leading
 24 question? You put something to the witness, you say, you
 25 can't dispute this and then asked the question, and wasn't

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1 that leading?
 2 MR MATHIBEDI SC: Well, Chairperson, the
 3 answer has already been provided.
 4 CHAIRPERSON: Yes, well, yes, it is a bit
 5 like giving an interdict after the act that's, the
 6 interdict that has happened, I see, an academic objection,
 7 but it is useful to raise the point because like an
 8 interdict it may prevent future things that shouldn't
 9 happen.
 10 MR MATHIBEDI SC: Thanks. Lieutenant
 11 Colonel, could the strikers have gone to Nkaneng without
 12 approaching where the Nyalas were deploying barbed wire?
 13 COLONEL CLASSEN: Yes, it is possible,
 14 they could have taken other directions.
 15 MR MATHIBEDI SC: Could the strikers
 16 further have gone to Nkaneng without trying to go between
 17 the space, in between the space between the Nyala 4 and the
 18 kraal?
 19 COLONEL CLASSEN: From where I was
 20 looking at it, because I could see them through the gaps of
 21 the Nyala, they could have gone the direction that they
 22 were taking or they could have taken gaps if they were
 23 peaceful, walk through the gaps of the Nyala because there
 24 were spaces there.
 25 MR MATHIBEDI SC: It was put to you that

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1 the members should have isolated the striker who had a
 2 firearm from the rest of the strikers, do you remember
 3 that?
 4 COLONEL CLASSEN: I remember that, Chair.
 5 MR MATHIBEDI SC: Was it possible to
 6 isolate that striker?
 7 COLONEL CLASSEN: No, from my side it was
 8 impossible, Mr Chair, because even I couldn't tell who had
 9 the firearm, the guys were wearing blankets and I don't
 10 think, when I look at the bystanders, in terms of the
 11 bystanders, if I knew that somebody has got a firearm next
 12 to me I would not stand with him, but that's just my
 13 opinion.
 14 MR MATHIBEDI SC: Now on the issue of
 15 bystanders, were there any bystanders at the time that the
 16 TRT fired at the strikers?
 17 COLONEL CLASSEN: No, I don't think the
 18 other people were bystanders when they were firing at them.
 19 MR MATHIBEDI SC: Now was the danger to
 20 the police only posed by the striker who had a firearm?
 21 COLONEL CLASSEN: No, totally, I don't
 22 think it was only posed by the member with the firearm, I
 23 heard the shots but also the people that had pangas and
 24 spears with them.
 25 MR MATHIBEDI SC: Was it necessary for

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1 you to give the members an instruction to fire in self and
 2 private defence?
 3 COLONEL CLASSEN: No, I would say it is
 4 not necessary to tell members to fire in self defence, so
 5 they've got to make their own decision, it is according to
 6 their own discretion to do that.
 7 MR MATHIBEDI SC: The briefing by Captain
 8 Kidd and General Naidoo, did it pertain to the whole
 9 operation of the day?
 10 COLONEL CLASSEN: No, Captain Kidd just
 11 gave me a brief briefing about where I should be and so
 12 with Colonel Naidoo, I mean, excuse me, General Naidoo when
 13 he just asked me to stand by and then we will wait for
 14 further instructions.
 15 MR MATHIBEDI SC: If the evidence reveals
 16 that some members continued to fire after you gave an
 17 instruction for, cease fire, can you falter such members?
 18 COLONEL CLASSEN: No, it will be
 19 difficult because even in shooting practices, wherever you
 20 are, you don't just shout it once and then people stop,
 21 especially when there is a lot of people firing, you shout
 22 it a few times until people actually can hear it.
 23 MR MATHIBEDI SC: Did the strikers have
 24 an opportunity to disperse without going to the line of the
 25 TRT after the utilisation of rubber rounds, teargas, stun

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1 grenades and water?

2 COLONEL CLASSEN: I would have expected

3 them to stop when the rubber was start being used or just

4 the barbed wire showing them, don't go that direction. I

5 couldn't see the reason why they had to go around and

6 actually go and meet up with the TRT, even if they didn't

7 know that they were there.

8 MR MATHIBEDI SC: Can you state it as a

9 fact that Mr Xolelwa?, Mtshazi and Gwelani at the times

10 that they were struck by bullets they were not in the

11 approximate final of a line of fire that was done by

12 members of TRT?

13 COLONEL CLASSEN: No, I cannot state that

14 by the fact that they were not in that line. You've taken

15 R5, it is a high velocity rifle and if they were behind the

16 kraal, even in the metres that were put to me, an R5 can

17 shoot up to 500 metres, get a target of 500 metres and so

18 it will be impossible for me to say that they were not shot

19 by TRT or you know I can't actually say, but it is

20 possible.

21 MR MATHIBEDI SC: It was suggested that

22 prior to the TRT members firing there was an opportunity,

23 the strikers should have been told to return back, retreat

24 or disperse. Now taking into account the conduct or the

25 attitude of the strikers, would that have any effect?

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1 COLONEL CLASSEN: Just come again there,

2 Sir, I didn't get you, sorry?

3 MR MATHIBEDI SC: It was suggested to you

4 that the police officer who used a loud hailer to tell the

5 press people to go away, should have used that opportunity

6 to advise or instruct the strikers to retreat, disperse or

7 go back. Now taking into account their conduct and their

8 attitude, would that have worked?

9 COLONEL CLASSEN: I don't think so

10 because I would thought that when barbed wire was thrown

11 for the strikers, that they should have adhered already

12 there or even when the rubber rounds were fired that they

13 should have stopped or just choose another direction, not

14 necessarily for them to actually push and go up to a point

15 where the shooting occurred in the way that it did.

16 MR MATHIBEDI SC: And lastly, what kind

17 of situation were the police dealing with?

18 COLONEL CLASSEN: At first when we looked

19 at the situation it was crowd management, but there was a

20 sudden turn of events where crowd management was thrown out

21 when the shot of, you know where firearms were shot at and

22 bullets were, how could I say, when the miners started or I

23 thought that they were firing at this thing and from there

24 the crowd management situation was already thrown out. It

25 could not have been turned into a crowd management

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1 situation anymore.

2 MR MATHIBEDI SC: Thanks, Chairperson, no

3 further questions for the witness.

4 CHAIRPERSON: I just want to ask you

5 about one matter, you'll remember yesterday you were, when

6 you were looking at the videos of what happened, there was

7 a time when you said you couldn't see the strikers or they

8 had already gone around the kraal and were at, what I call

9 the corridor, you couldn't see them because a Nyala had

10 came past in the way and obscured your vision for a short

11 time, do you remember that?

12 COLONEL CLASSEN: I do, Mr Chair.

13 CHAIRPERSON: Now was there any, - if the

14 Nyalas had stayed where they were instead of proceeding

15 onwards, I think there wasn't only one Nyala, there were

16 more than one, I think. If instead of proceeding to the

17 position where they finally ended up, they had stayed in

18 what one can call the gap at the end of the corridor, would

19 it have been easier to handle the situation and to prevent

20 the strikers from advancing towards the TRT line?

21 COLONEL CLASSEN: Just come again there,

22 Mr Chair, sorry for that?

23 CHAIRPERSON: I think you said it wasn't

24 only one Nyala that came past in that way, there is more

25 than one. Now if the Nyalas instead of continuing as they

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1 did and ending up where they did along the side of the

2 fenced area, more or less where they are depicted on these

3 exhibits that we have this morning, and VVV9 is an example,

4 if instead of any up there they had actually stayed at the

5 gap of the corridor, the position where they were in when

6 your vision or view of the advancing strikers was obscured.

7 [11:25] If they'd stayed there, would it have been

8 necessary for the TRT line to fire the volley it did in

9 order to defend themselves and their colleagues against

10 what was perceived to be an attack?

11 COLONEL CLASSEN: Chair, it's a bit

12 difficult to answer that but I'm going to try. When I look

13 at how you put it, if the Nyalas had to stay there, still

14 the strikers or the miners were going to go around facing

15 towards, towards the TRT line because the TRT line was

16 almost in line with the road.

17 CHAIRPERSON: In other words, what I'm

18 really asking you is would it have been possible for the

19 Nyalas to block the, what I've called the corridor?

20 COLONEL CLASSEN: Block –

21 CHAIRPERSON: You understand what I mean

22 by the corridor?

23 COLONEL CLASSEN: Yes, I do, sir.

24 CHAIRPERSON: Would it have been possible

25 for the corridor to have been blocked by the Nyalas?

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1 COLONEL CLASSEN: There's a possibility,
2 there is a possibility, Mr Chair.
3 CHAIRPERSON: And if that had happened,
4 would it have been easier to have handled the – if the
5 strikers had continued advancing would it have been easier
6 to have handled their advance without the necessity for the
7 TRT members to be involved in a fusillade of eight seconds
8 in an attempt to defend themselves and their colleagues
9 against what was perceived to be an attack?
10 COLONEL CLASSEN: It is, from my side
11 yes, it's possible, Mr Chair, also depending on the
12 attitude of the miners, if they were going to fall back or
13 still continue towards the vehicles.
14 CHAIRPERSON: If they'd continued towards
15 the vehicles would their advance have been easier to handle
16 from the police side?
17 COLONEL CLASSEN: I think it would have
18 been easier, Mr Chair.
19 CHAIRPERSON: Were you surprised that the
20 Nyalas didn't block the gap and rather proceeded along, in
21 the way they did and came to rest where they – came to a
22 stop where they did as depicted I think, inter alia, on
23 VVV8?
24 COLONEL CLASSEN: I wouldn't say
25 surprised but I question myself about it and the fact that

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1 they moved forward, I thought maybe it was part of the plan
2 because they had to go forward and I never ever anticipated
3 that the strikers would actually go to a point where they
4 would do that. I just thought that everything will stop
5 right there with POPS and nothing else, that's how I saw
6 it.
7 CHAIRPERSON: Yes, thank you.
8 MR MATHIBEDI SC: Sorry, Chairperson.
9 CHAIRPERSON: Yes, Mr Mathibedi?
10 MR MATHIBEDI SC: May I ask one question
11 arising from the questions that have been put by the Chair?
12 CHAIRPERSON: Well, it looks as if Mr
13 Mpofo wants to ask as well. May I suggest we let Mr Mpofo
14 ask his questions first so you can then by way of re-re-
15 examination deal with the answers that he obtains, if it's
16 necessary.
17 MR MATHIBEDI SC: Thank you, Chair.
18 CHAIRPERSON: Yes, Mr Mpofo? How many
19 questions do you want?
20 MR MPOFU: Three and a half, Chairperson.
21 CHAIRPERSON: I'll allow you three.
22 MR MPOFU: Thank you. In relation to
23 what the Chair has just asked you, your evidence is that
24 when the people were shot, I think you used the words it
25 was when they were coming around that Nyala, the one at the

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1 back, correct?
2 COLONEL CLASSEN: That's correct, sir.
3 MR MPOFU: Yes. And you would agree, I
4 think Mr Gotz – Chairperson, if you don't mind can we go to
5 RRR17 at 15:53, 4821, or 15, 4821. 15:53:28, 48 –
6 CHAIRPERSON: [Microphone off, inaudible]
7 MR MPOFU: 4821.
8 CHAIRPERSON: Sorry?
9 MR MPOFU: 48:21 Chairperson, it's still
10 right, still –
11 CHAIRPERSON: I see. 15:53, 4821?
12 MR MPOFU: 21 yes. Okay, right there,
13 right there. Actually 49. You remember that, we had a
14 discussion around it?
15 COLONEL CLASSEN: I do, Mr Chair.
16 MR MPOFU: Yes. You would agree that the
17 strikers, having circumnavigated the kraal, actually were
18 now no longer circumnavigating the kraal but they were
19 exiting at a tangent to the kraal, if you know what I mean?
20 You remember we spoke about why, there's another new why
21 now. They're no longer going around the kraal but walked
22 more towards the left than where you're standing, to the
23 right of us. They're tending towards the right, can you
24 see that?
25 COLONEL CLASSEN: I do, Mr Chair.

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1 MR MPOFU: Yes and now there's a bigger
2 gap. Those at the back are against the kraal but Mr Noki
3 in front is furthest from the kraal, can you see that?
4 COLONEL CLASSEN: Mr Noki being the
5 gentleman in front?
6 MR MPOFU: The leader, yes.
7 CHAIRPERSON: The green blanketed
8 gentleman.
9 COLONEL CLASSEN: Okay. Yes, sir.
10 MR MPOFU: You agree. Okay and finally,
11 as they were coming there which is almost, well, it's a few
12 seconds before the shots, you would agree that they are in
13 a row, as it were, with Mr Noki in front?
14 COLONEL CLASSEN: Yes. Again I'm going
15 to reply as in with Mr Gotz's situation where I said they
16 can be in line but also bundled.
17 MR MPOFU: Yes, but what you can see is
18 if you accept that let's say at the back there's more
19 bundling but at the front you can see that Mr Noki is in
20 front on his own as it were.
21 COLONEL CLASSEN: I can see that, sir.
22 MR MPOFU: Thank you. Thank you,
23 Chairperson.
24 CHAIRPERSON: Mr Mathibedi?
25 MR MATHIBEDI SC: Thanks. Lieutenant-

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1 Colonel, was it possible for the Nyala drivers to close the
2 corridor without pre-planning or co-ordination?
3 COLONEL CLASSEN: No, I don't think
4 without – or I will say without pre-planning. That's why I
5 said this could have been part of the plan where they had
6 to keep on driving, they had to keep on moving on to a
7 point where the whole operation still had to proceed.
8 MR MATHIBEDI SC: Thanks, Chairperson.
9 COMMISSIONER HEMRAJ: Can I just ask
10 something?
11 CHAIRPERSON: Yes, of course.
12 COMMISSIONER HEMRAJ: If in fact the
13 Nyalas had closed the corridor and if the group of strikers
14 chose to continue down the corridor then the police that
15 they would come across would be the POPS?
16 COLONEL CLASSEN: That is correct, Chair.
17 COMMISSIONER HEMRAJ: Thank you, Colonel.
18 CHAIRPERSON: Thank you. That's the end
19 of your evidence. We will excuse you on the usual basis
20 that if it's necessary, if some point arises to make it
21 necessary for us to get you back, you will be prepared to
22 come back without our having to issue a subpoena, is that –
23 do you accept that?
24 COLONEL CLASSEN: Yes, Mr Chair.
25 CHAIRPERSON: On that basis you're

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1 excused, thank you.
2 COLONEL CLASSEN: Thank you so much.
3 [NO FURTHER QUESTIONS – WITNESS EXCUSED]
4 CHAIRPERSON: Mr Burger, I understand
5 you're now going to call the next witness.
6 MR BURGER SC: Yes, Chair. We call Mr Da
7 Costa as the next witness.
8 MR TIP SC: Chair, whilst Mr Da Costa is
9 coming in and with the kind agreement of my learned friend
10 Mr Burger, if I might take a few minutes to tender a
11 document that it might be useful to have before the
12 Commission before Mr Da Costa begins. I hope that it has
13 been placed before the Commissioners. Copies of it have
14 been circulated to all the parties. It is, to identify it
15 there is a – it is described as "Note to Lonmin schedules
16 re composition of persons on the koppie on 16 August 2012"
17 and with your leave, Chair, may I just introduce it briefly
18 and describe what it contains and –
19 CHAIRPERSON: Now, before you do that –
20 MR TIP SC: Yes.
21 CHAIRPERSON: Let's get confirmation from
22 Ms Pillay. We are now, Mr Da Costa is part of the WWW
23 series, is that correct?
24 MS PILLAY: Chair, XXX series.
25 CHAIRPERSON: XXX? Oh, alright. Yes, of

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1 course. Yes, I understand. Mr Sebattjane has got WWW,
2 that's right. So this will be XXX1. What did you call it,
3 "Notes to Lonmin schedules," I suppose that's all we need
4 call it, XXX1. Are you going to tell us something about
5 it, Mr Tip?
6 MR TIP SC: Yes, may I?
7 CHAIRPERSON: Yes, you may. Mr Da Costa,
8 you may sit down and I'll swear you in after Mr Tip has
9 explained what he's going to explain to us about XXX1.
10 MR TIP SC: Mr Chair, what it comprises
11 is a short covering note of three pages and thereafter a
12 pre-paginated set of information from pages 1 to 18 and
13 essentially these have been prepared by Lonmin. By way of
14 background, and this is contained in the short description
15 that one finds in the covering note, the Commission will
16 recall that during the re-examination of Mr Mathunjwa a
17 schedule of people who were not at work during that period
18 was put in, in his re-examination. That was given exhibit
19 number OO19. At the time and shortly thereafter we
20 indicated that we had some concerns about the accuracy and
21 the utility of it and we undertook to see if we could not
22 provide the Commission with hopefully more pertinent
23 information and we respectfully submit that this may
24 perform at least part of that function.
25 What Lonmin has done from its records is to

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1 compile two sets of information, the one dealing with
2 persons who unfortunately lost their lives in the course of
3 the events, that is on page 1. It sets out the 34 persons
4 who died on the 16th of August and then also some,
5 immediately before, in the period just before and a couple
6 just thereafter. And then at page 8, I beg your pardon, at
7 page 5 of the bundle a similar exercise has been undertaken
8 in respect of all the arrested persons, in other words
9 those who were arrested on 16 August 2012 and Lonmin has
10 then furnished a number of particulars in respect of all
11 these people including the union affiliation as at 16
12 August 2012, the occupation of the persons, it has analysed
13 whether – it has singled out, rather, those persons who
14 either lost their lives or were arrested who were not on
15 the Lonmin records, from which one can perhaps assume that
16 these were not employees at the time but who nevertheless
17 had joined the strikers. It has also provided a breakdown
18 of the three mining divisions that are relevant, namely
19 Karee, Western and Eastern and usefully also you will see
20 summarised at page 2 of the short covering note, an
21 analysis of the occupations of the persons.
22 Mr Chair, in respect of the arrested there is
23 then revealed and we have extracted just a short table for
24 convenience, that as at 16 August the arrested persons
25 included 144 AMCU members and 60 NUM members, also that

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1 there a number of persons who are listed there as not
 2 identified, totalling 35. Those are the people I've
 3 mentioned who are not on the records of Lonmin.
 4 CHAIRPERSON: Yes. Does that mean that
 5 there was no stop order in place in respect of these people
 6 in terms of which union dues were deducted from the wages
 7 of these employees and paid over to the unions?
 8 MR TIP SC: It goes a step beyond that,
 9 Chair, which is that those persons who are not identified
 10 are in fact not on the Lonmin system at all. In other
 11 words, it's not merely a matter of –
 12 CHAIRPERSON: So – sorry.
 13 MR TIP SC: - a stop order.
 14 CHAIRPERSON: So am I correct in thinking
 15 there would then be four categories of people? There would
 16 be those who, according to Lonmin records, were employed by
 17 them and were NUM members because there was a stop order in
 18 favour of NUM in place, those who were in the employ of
 19 Lonmin who, in respect of whom there was a stop order in
 20 favour of AMCU in place, thirdly, those who were on the
 21 books of Lonmin but there was no stop order in place which
 22 gives rise to an inference that they were non-unionised,
 23 they weren't members of a union at all because there were
 24 no deductions being made in favour of a union. And a
 25 fourth category of those who aren't on the Lonmin system at

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1 all, the inference is that they probably weren't employed
 2 at the relevant time by Lonmin. I see according to the
 3 schedule some people are described as ex-Lonmin.
 4 MR TIP SC: That is correct, Chair, and
 5 if you would be good enough just to look at the first table
 6 on page 1, you will in fact see AMCU, there's a number, NUM
 7 number, no union that is nine. In other words those are
 8 persons who are on the payroll of AMCU but who had elected
 9 not to be affiliated to either of those unions –
 10 CHAIRPERSON: And I see there also
 11 persons described as contractors.
 12 MR NTSEBEZA SC: Payroll of Lonmin, not
 13 payroll of AMCU.
 14 MR TIP SC: Sorry, payroll of Lonmin,
 15 yes.
 16 CHAIRPERSON: I see there are also
 17 persons described as contractors.
 18 MR TIP SC: Yes.
 19 CHAIRPERSON: Were they persons who were
 20 working for Lonmin pursuant to some agreement with a labour
 21 broker?
 22 MR TIP SC: They were there under sub-
 23 contractors but nevertheless they were on the Lonmin
 24 payroll records.
 25 CHAIRPERSON: Yes, yes, I understand

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1 that.
 2 MR TIP SC: Yes.
 3 CHAIRPERSON: But were they employed by a
 4 labour broker and was their labour as it were supplied to
 5 Lonmin by a labour broker or was there some other
 6 arrangement in place?
 7 MR TIP SC: Chair, whether it was a
 8 labour broking or a contracting arrangement, this doesn't
 9 break it down but essentially what is indicated is that
 10 those were persons who were not on the roll as employees
 11 directly of Lonmin.
 12 CHAIRPERSON: Yes. So this figure,
 13 contractors 21 deals with both people who were working for
 14 firms who were contracted to provide certain services to
 15 Lonmin and in the sense that they were themselves direct
 16 contractors to provide work and then people who were
 17 working for Lonmin because there's an agreement between a
 18 labour broker and Lonmin. Is that correct?
 19 MR TIP SC: That is my understanding. If
 20 I'm wrong - my learned friend Mr Van As nods, I appreciate
 21 that. You, Chair, have put the position accurately.
 22 CHAIRPERSON: Well, perhaps that
 23 breakdown can be given to us at some stage.
 24 MR TIP SC: It is, yes, we can ask Lonmin
 25 to assist. I don't know –

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1 CHAIRPERSON: I'm sorry I interrupted
 2 you. You were busy taking us through the document before I
 3 asked the question.
 4 MR TIP SC: Well, that is the essence of
 5 it, Mr Chair. A similar analysis has been carried out in
 6 respect of all the persons who lost their lives over that
 7 period, the most important in respect of 16 August of
 8 course being the number 34 and if one looks at the first
 9 page, at page number 1 of the set of 18, you will see there
 10 helpfully that some colour coding has been provided to
 11 distinguish when it is that people lost their lives and the
 12 large white block comprises the 34 people who died on the
 13 16th of August and the same particulars have been provided
 14 in respect of affiliation, employment, occupation and the
 15 like.
 16 Lonmin also then has helpfully reduced that
 17 information into pie charts, for example at page 2 of that
 18 bundle where at a glance one can get a pictorial
 19 representation and sense of the breakdowns that are
 20 otherwise contained in the schedules and I must say that we
 21 extend our gratitude to Lonmin for the assistance they've
 22 given. We did have, as I have mentioned, a precursor to
 23 this with essentially the same information which was
 24 circulated on 22 May. There were some matters requiring
 25 correction, Lonmin did that and not only did they effect

<p style="text-align: right;">Page 30015</p> <p>1 those corrections but they added the extra analysis that we 2 now have. So Mr Chair, if the Commission is content to 3 accept that then that would be XXX1. 4 CHAIRPERSON: Yes, thank you. Thank you 5 very much, Mr Tip. Mr Burger? 6 MR BURGER SC: Thank you, Mr Chair, I 7 call Mr Da Costa as the first witness. 8 CHAIRPERSON: Mr Da Costa, will you 9 please rise? Are you prepared to take the oath or do you 10 wish to affirm? 11 MR DA COSTA: I'll take the oath, sir. 12 CHAIRPERSON: Would you swear that the 13 evidence you will give before this Commission will be the 14 truth, the whole truth and nothing but the truth. Please 15 raise your right hand and say, I swear, so help me God. 16 MR DA COSTA: I swear, so help me God. 17 CHAIRPERSON: Can we have your full 18 names, please? 19 MICHAEL GOMES DA COSTA: (d.s.s.) 20 CHAIRPERSON: You may now be seated, 21 thank you. 22 EXAMINATION BY MR BURGER SC: [Microphone 23 off, inaudible] – refer to a number of exhibits, limited in 24 number but may I for your convenience identify those to 25 you. Mr Da Costa's statement is already an exhibit before</p>	<p style="text-align: right;">Page 30017</p> <p>1 CHAIRPERSON: Yes, I've done that, and 2 you say it's not dated. Well anyway, which – 3 MR BURGER SC: Mine is not dated. It 4 runs to 31 paragraphs. 5 CHAIRPERSON: Yes, if it's the only 6 supplementary statement then there will be no confusion at 7 all. Supplementary statement – 8 MR BURGER SC: I'm going to ask the 9 witness to confirm it, Sir. 10 CHAIRPERSON: You confirm the 11 supplementary statement as being correct? 12 MR DA COSTA: I do, Chair. 13 CHAIRPERSON: And while you're about it, 14 you confirm the first one as being correct as well? 15 MR DA COSTA: Yes, I do. 16 MR BURGER SC: The next document I'm 17 going to refer to is a little bundle of paper that was made 18 available to the Commission last week. It runs to 46 19 pages, if that may become XXX3. 20 CHAIRPERSON: How does one describe it? 21 MR BURGER SC: It is really a Lonmin 22 bundle of Da Costa documents. 23 CHAIRPERSON: Very well. The Lonmin 24 bundle of Da Costa documents will be accepted as an exhibit 25 as XXX3.</p>
<p style="text-align: right;">Page 30016</p> <p>1 the Commission, OO17. 2 [11:45] And may I propose that that exhibit number is 3 retained. He has also filed a supplementary statement, 4 which is in the Lonmin witness bundle from page 146 onward, 5 and may I propose that that becomes XXX2? 6 CHAIRPERSON: Yes, Mr Burger, the first 7 statement OO17 is the statement dated 29 January 2013. Is 8 that correct? The second statement to which you are now 9 referring, which is the XXX2, is the supplementary 10 statement, and what's – 11 MR BURGER SC: Indeed. 12 CHAIRPERSON: What's the date of that? 13 MR BURGER SC: That is, my one undated, I 14 have an unsigned version of that. 15 CHAIRPERSON: Oh yes, I think it ends on 16 page 70 of the Lonmin bundle, I think. Is that correct? 17 MR BURGER SC: No, my one – 18 CHAIRPERSON: It starts at 63 – 19 MR BURGER SC: My one appears at page 146 20 of the Lonmin witness bundle, supplementary statement by 21 Michael Gomes, starting – 22 CHAIRPERSON: I see, sorry. 23 Supplementary statement – 24 MR BURGER SC: And if I may propose that 25 that be XXX2.</p>	<p style="text-align: right;">Page 30018</p> <p>1 MR BURGER SC: And the only other 2 document I'm going to refer to comes from the NUM bundle 3 which is already before you, Sir, as XX2, and I'm going to 4 refer to a document appearing in that bundle. 5 CHAIRPERSON: What's the description of 6 that? 7 MR BURGER SC: XX2 – 8 CHAIRPERSON: I got that. How was it 9 described? 10 MR BURGER SC: That was a NUM bundle 11 which, it already has a description – 12 CHAIRPERSON: I see. 13 MR BURGER SC: "Index to NUM bundle of 14 documents referred to in the witness statement of Mr 15 Gcilitshana." 16 CHAIRPERSON: Yes, I remember that – 17 MR BURGER SC: That's XX2. It has a 18 number – 19 CHAIRPERSON: I remember the description 20 and it's XX2. So I've just written in my notebook it's NUM 21 bundle. 22 MR BURGER SC: Chair, we've been notified 23 that certain parties will pose questions to this witness. 24 The witness gives evidence this week because of a programme 25 change in the Commission. Somebody else would have given</p>

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1 evidence. We call Mr Da Costa. Next week we believe
 2 there's another witness coming and we've called him on the
 3 basis that he'll be finished this week. Neither my learned
 4 friend Mr Bham nor I am available next week and because of
 5 the time limitations we will limit our evidence-in-chief to
 6 I hope 30 minutes, but it's on that basis Mr Da Costa is
 7 available for the rest of the week.

8 CHAIRPERSON: Can I ask a question?
 9 We've had applications for leave to cross-examine from
 10 various parties and indications of documents that the
 11 cross-examiners intend to refer to. Has the witness had
 12 the opportunity to see those documents and have you had an
 13 opportunity to consult with him in respect of those
 14 documents, insofar as you consider it necessary?

15 MR BURGER SC: Yes. We've been notified
 16 of the four parties wishing to pose questions. We took the
 17 liberty of making copies of all the documents they wish to
 18 refer to. We showed it to the witness. It's in fact in
 19 the witness box. I explained to him this is not a memory
 20 test, he's entitled to look at the documents when he's
 21 asked. We've looked at those documents and yes, we have
 22 done that, Sir.

23 CHAIRPERSON: You're now ready to
 24 commence leading his evidence?

25 MR BURGER SC: Yes, thank you.

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1 MR BIZOS SC: Mr Chairman –
 2 CHAIRPERSON: Yes, Mr Bizos?
 3 MR BIZOS SC: We did not file a notice
 4 that we require time, but having been given the last
 5 statement of the witness we would ask for no more than 15
 6 minutes for certain questions to be put by us to the
 7 witness. No other documents have to be referred to other
 8 than what the witness has before him.

9 CHAIRPERSON: Mr Burger, do you object to
 10 that?

11 MR BURGER SC: I haven't been asked on
 12 any of the others and to my learned friend Mr Bizos I won't
 13 object, so the answer is no, Sir.

14 CHAIRPERSON: No objection?
 15 MR BURGER SC: No objection.
 16 CHAIRPERSON: Your application is
 17 granted.

18 MR BIZOS SC: Thank you, Mr Chair.

19 EXAMINATION BY MR BURGER SC: Mr Da
 20 Costa, your original statement OO17 requires a correction,
 21 you tell me, in paragraph 7.3 of that statement. The
 22 paragraph starts, "Management inside LPD dismissed the
 23 matter."

24 MR DA COSTA: Yes.
 25 MR BURGER SC: What should that be?

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1 MR DA COSTA: Yes, that's correct. It
 2 should read, "Management inside LPD discussed the matter."
 3 CHAIRPERSON: This is 7.3?
 4 MR BURGER SC: 7.3 on typed page 19, Sir.
 5 CHAIRPERSON: Yes, I must say I thought
 6 that is what it should have been, but I'm pleased to hear
 7 that I was correct.

8 MR BURGER SC: But for that correction
 9 you have confirmed the correctness of this statement also?

10 MR DA COSTA: Yes, that's correct.
 11 MR BURGER SC: In this statement in
 12 paragraph 1.1 you told us that you're, at the relevant time
 13 you were the vice president of the Lonmin Karee Mining
 14 Operation.

15 MR DA COSTA: That's correct.
 16 MR BURGER SC: By the time of your
 17 statement you've had 24 years of experience in the mining
 18 industry.

19 MR DA COSTA: Yes, that's correct.
 20 MR BURGER SC: And in paragraph, the rest
 21 of paragraph 2 you explain that experience to us. What is
 22 your present designation?

23 MR DA COSTA: I'm now the vice president
 24 in charge of Group Technical Services and Manager Capital
 25 Project.

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1 MR BURGER SC: I don't intend to deal in
 2 any detail with your statement, but the real chronology
 3 really starts with a meeting you have with some employees
 4 on the 21st of June 2012 at the Karee Mine. Will you
 5 briefly sketch to the Commission how that discussion came
 6 about?

7 MR DA COSTA: Yes, certainly. Well, what
 8 happened was that leading up to that period around the 21st
 9 of June the rock drill operators at the Karee Operation had
 10 started having meetings amongst each other. These meetings
 11 were not really well attended, but eventually on the 21st of
 12 June they had a meeting which was quite well attended, at
 13 the Karee Hostel.

14 Following the meeting, and this was a meeting
 15 that happened after the shift, outside of their working
 16 hours. After the meeting was concluded they decided to
 17 come down to my offices, which were at the central Karee
 18 administration building. They came to my offices – it was
 19 around 5 o'clock in the afternoon, I was still in my office
 20 – and they requested to see me.

21 MR BURGER SC: How many were there? How
 22 many employees?

23 MR DA COSTA: Round about 300, 300 rock
 24 drill operators. They requested to see me. I sent a
 25 message out to them because the security, some security

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1 officials came into my office saying that the group of
2 people had arrived outside my offices. I sent a message
3 out to them saying that it's a large group of people, I
4 wasn't going to go out to speak to them, but they could
5 send somebody in to – they could elect a delegation to come
6 into my offices to speak to me, which they then did.

7 They elected two of the people who were amongst
8 the group who'd come to see me, it's Mr Magqabane and
9 Mofokeng were the two that were designated to speak to me.
10 They came into my office. At that point I asked Mr July
11 Tiro, who was at that stage filling in as acting, as the
12 Human Capital Manager for Karee, he was still around the
13 offices as well so I asked him to join me in the meeting
14 with the two gentlemen.

15 So we sat in my office and I asked, I said to
16 them, "You know, I see there's quite a large group of
17 people who've come down to see me, what would be the
18 issue," and we started the meeting off speaking in English
19 with July then translating, and the gentlemen then said no,
20 they're not that comfortable with the meeting being
21 conducted in English, could we start, could we rather speak
22 Fanagalo, because I can speak Fanagalo, they can speak
23 Fanagalo, so you know, let's rather do it that way. I said
24 no, that's fine, I have no difficulty with that. So we
25 then conducted the rest of the meeting in Fanagalo.

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1 My sort of first reaction to them was, "You know,
2 I understand that you've obviously got a problem if you've
3 come down here to me, but you know, the way that this is
4 being done, for a group of people marching down to my
5 offices is not really the best way to do it, and in fact
6 that's not how we do things around here. Rather if you
7 have a problem, we have procedures. We have ways of
8 escalating this through the organisation, and" –

9 MR BURGER SC: Did you know by then what
10 they wanted to discuss with you?

11 MR DA COSTA: No, no, not at that stage.
12 I assumed at that point that there was a grievance, you
13 know, otherwise they wouldn't have taken the trouble to
14 come down to my offices. But I didn't know exactly what it
15 was. Nonetheless I said to them, "You know, this is not
16 really the right way. There's procedures in place, you
17 should be escalating this through line management in the
18 first place, or you could take it up to, through your union
19 structures or if needs be you could write a note to me with
20 your grievances so that I could see what the grievances are
21 and I can assess it."

22 So their response to me was "But, you know, in
23 terms of writing a note, we're illiterate, we can't write a
24 note of such, so that wouldn't work." They said, and as
25 far as escalating the issues up through line management,

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1 well they felt that their grievance is quite serious, so me
2 being the manager, or the ultimate leader at Karee they
3 felt they'd come directly to me.

4 I then said to them, "Okay well, you are here
5 now, so you know, you want to share with me what your
6 grievance is, what your issue is?" It was at that point
7 that they then went through quite a long lead-up and saying
8 how, do I understand how difficult their work is, do I
9 understand that they work long hours, it's physically
10 demanding work. They tend to get wet in the areas where
11 they're working and so on, and I said to them "I understand
12 that, I'm familiar with the work that you do."

13 They then made the point that well, they feel
14 that they're not adequately remunerated for the amount, for
15 that sort of work that they do and I said, at that point I
16 realised that this was going to be something around
17 remuneration, so I said, "So you know, what is it that
18 you'd like me to do for you?" and the response was, "We
19 feel that our wages should be increased to R12 500 a
20 month." So that stunned me a bit and I then said to them,
21 "Okay, so I mean at the moment you earn round about R9 000
22 a month" and they said, "No, no, at the moment we earn
23 round about R5 000 a month." So when I referred to R9 000
24 a month, what I had in my mind was sort of their, the total
25 package earnings for that category of employee, and when

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1 they mentioned no, no, around R5 000 a month I realised
2 that they were referring to their basic wage. So I said to
3 them, "Well, that's quite a big increase that you're
4 wanting, but you know, this is now a wage issue that you're
5 laying before me." We have certain structures and
6 processes in place where we deal with wages and conditions
7 of employment, and you know, we deal with that through
8 bargaining with union representatives at fixed periods, you
9 know, whether it be on an annual basis or bi-annual basis,
10 depending on what the length of the wage agreement is.

11 So no, their response was that they did not want
12 union involvement in this, they did not feel that they
13 could take this up with their unions. They were
14 approaching me as rock drill operators specifically and
15 specifically rock drill operators from Karee. So they're
16 not even including the rest of the Lonmin operations. They
17 were specific that they were representing the rock drill
18 operators at Karee and they were not in favour of involving
19 unions in this discussion and they wanted me to address
20 this concern of theirs.

21 So my response to them was that I'm not
22 authorised to deal with this myself. I've now heard the
23 issue, I hear what it is, but I'm going to have to escalate
24 this to the executive because it is just not in my position
25 to deal with it, and it's an issue of wages. I can't just

1 deal with it in a forum like this.

2 So I must say at the time I had seen what was
3 happening at Impala. I knew that Impala had given quite
4 significant increased to their rock drill operators and
5 through our sort of networks with the Human Resources
6 people of the other companies, I'd come to the realisation
7 that our rock drill operators, our rock drill operator
8 remuneration had fallen behind our competitors, so at that
9 point I knew that there was a bit of a gap and I thought
10 maybe that was what was prompting this discussion.

11 Nonetheless I did commit to them to, that I would
12 escalate it to the executive and that I would get back to
13 them as to what the response from the executive was. I
14 also pointed out to them though that, you know, the sort of
15 increase they are asking for is extremely high and, you
16 know, unaffordable really. So I said to them that I have
17 little doubt that the EXCO will not approve such an
18 increase, but nonetheless I will escalate the issue of
19 their concerns around remuneration to the EXCO, which I
20 then did –

21 CHAIRPERSON: Did you ask them how they
22 reached the figure of 12,5?

23 MR DA COSTA: I did –

24 CHAIRPERSON: What was their response?

25 MR DA COSTA: I did, Chair. I did, I

1 from the 21st.

2 MR BURGER SC: Mr Da Costa, you explained
3 that story in some detail in your statement, and we've all
4 read the statement. I want to ask you this; there had been
5 criticism in this Commission about the fact that you spoke
6 to the workers, you spoke to these two gentlemen. What is
7 your reaction if I put that criticism to you?

8 MR DA COSTA: Well, on that particular
9 day on the 21st I was faced with a group of mine employees.
10 [12:05] My people standing outside my office with a
11 grievance. It's in my nature as a manager or a leader to,
12 if somebody comes to me with a problem I'll take the time
13 to – to listen to and understand their problem and do what
14 I can to find a solution to it. So that was my immediate
15 reaction is let me hear what the issue is. When I became
16 aware of the fact that this was a wage issue and that they
17 were asking for an increase in their basic wage I
18 nonetheless, you know, having known that there was movement
19 in the industry around rock drill operator wages, knowing
20 that this is a scarce skill, knowing that we're falling
21 behind somewhat, I felt that it was prudent to listen to
22 them and when I heard that they were unhappy about their
23 wages it occurred to me that I should escalate this to the
24 EXCO so that the EXCO was aware of the fact that this was
25 the feeling and so that they could apply their minds to see

1 said that's a very high figure and in fact if you went to
2 that sort of basic wage you'd be earning significantly more
3 than some of the supervisors. Their reply to me was well,
4 that's, you know this is just, it was a good number, they
5 thought that this was the number that would kind of reward
6 them for the work that they were doing. So it was a, they
7 just felt it was a good number. I asked them "How did you
8 calculate it? Did you base it on anything?" They said,
9 "No, we don't do calculations. It's just that's a, it's a
10 good number." So that's –

11 COMMISSIONER HEMRAJ: May I just enquire
12 when in relation to the 21st of June did you become aware
13 that the Impala increases had put Lonmin behind, somewhat
14 behind in the salary scales of the RDOs?

15 MR DA COSTA: Ja, I think it was, it's
16 just a week or two before that, because you know, Impala
17 was in the process of implementing those wage agreements at
18 that time. So I must say during the entire meeting that I
19 had with the two gents it was a very cordial meeting. They
20 were very respectful. They were very humble in fact in the
21 way that they approached me, and the meeting was conducted
22 in a very cordial fashion. So that's basically how the
23 meeting ended where I committed that I would escalate the
24 issue to the EXCO and I committed to give them feedback. I
25 think I'd said I'd give them feedback in about two weeks

1 if there was some, some solution to the issue.

2 The other point was that when the group arrived
3 at my office they were singing but they were not aggressive
4 and they had come to me after hours outside of their
5 working shift. It's not as if they were taking up their
6 working time to come and see me. So you know, their
7 approach to me was quite cordial and as a responsible
8 leader I felt that I must speak to them and at least hear
9 what the issue was. So also at that point, having
10 discussed with them, the issue seemed to be confined to the
11 RDOs at Karee and me being in charge of Karee, they're my
12 people, they're my employees, I was concerned to know what
13 the issue was and therefore I spoke to them. They also
14 seemed to have the support of most of the rock drill
15 operators at Karee, so that's the reason why I engaged with
16 them and spoke to them.

17 MR BURGER SC: What was Lonmin's policy
18 at that stage about speaking directly to the employees,
19 both on a line management level and on a negotiation of
20 substantive conditions of employment level?

21 MR DA COSTA: Well, on a line management
22 level we were actually, we had for some time before that
23 embarked on a programme to encourage supervisors to speak
24 to employees, to get closer to employees, to understand
25 their concerns, whether their concerns were of a nature

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1 that affected the operations and, you know, whether it was
 2 around improving their means to do their job and whether it
 3 was around personal issues, whatever those may be, we were
 4 working with supervisors to become more involved in
 5 understanding and getting closer to their employees. And
 6 we had set in place processes to escalate issues if a
 7 specific supervisor couldn't sort it out but it was, you
 8 know, a bit part of this process was that the supervisors
 9 were required to give feedback to an employee as soon as
 10 possible after a concern was raised. So raise concerns,
 11 listen to people and do something about it to create a
 12 solution. So that's from a line point of view.

13 As far as, you know, from a collective bargaining
 14 point of view, well, we had definite structures in place.
 15 At that time wage negotiations or collective bargaining,
 16 conditions of employment type issues were discussed on a
 17 central bargaining, let me say a company basis, central
 18 bargaining basis and the unions represented there, the
 19 recognised unions at the time were UASA, Solidarity and
 20 NUM. So any of, you know, when it came to negotiating
 21 wages and agreeing on, or should I say signing off a wage
 22 agreement and that sort of thing, it happened in these, in
 23 the central bargaining forum which, as I said earlier,
 24 either happened on an annual basis or depending on the
 25 duration of the wage agreement, this central bargaining

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1 forum was constituted. So that process and structure was
 2 very well established in the company at that time and
 3 that's basically the process that –

4 MR BURGER SC: Were you aware of where
 5 you were in the cycle, the negotiation cycle and that there
 6 was a revision coming up in October of 2012?

7 MR DA COSTA: Yes, I was. In fact at one
 8 of the feedback meetings at a later stage in the process
 9 where I met the rock drill operators I did say to them that
 10 there was an existing wage agreement which expired in, at
 11 the end of September 2013 at that point and you know, that
 12 according to that wage agreement there were agreed wage
 13 increases that were to be implemented on the 1st of October
 14 and, you know, that since that wage agreement was still in
 15 force, we would have to refer any other wage demands or
 16 requests for revision of remuneration and so on to the next
 17 round of bargaining which would have taken place somewhere
 18 around August, September 2013.

19 MR BURGER SC: If I levy a criticism at
 20 you for having negotiated wages with these employees, what
 21 would your reaction be to that criticism?

22 MR DA COSTA: I didn't negotiate wages
 23 with them. They tabled a concern with me which did relate
 24 to their basic wage but at no stage did I engage in
 25 negotiations with them. I escalated the issue to the

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1 executive committee, the executive committee took a
 2 decision to implement an allowance to close the gap that
 3 had opened up in, you know, us relative to the rest of the
 4 industry. I communicated that decision back to them and
 5 that was the end of the process. We never negotiated
 6 around the amount or anything else around that.

7 MR BURGER SC: Can I ask you to have a
 8 look at the NUM bundle? It is exhibit XX2.

9 CHAIRPERSON: While he's looking at that,
 10 Mr Burger, can I ask you how long do you anticipate being
 11 with the rest of the examination in chief?

12 MR BURGER SC: I'm looking at my watch
 13 and I have another 10 minutes, Chair.

14 CHAIRPERSON: Well, I wondered if – would
 15 it be convenient if we took the second break at this stage
 16 for 15 minutes and then you can resume thereafter.

17 MR BURGER SC: Certainly.

18 CHAIRPERSON: That will then enable you
 19 to bring your examination in chief to an end. We'll now
 20 take the 15 minute adjournment.

21 [COMMISSION ADJOURNS COMMISSION RESUMES]
 22 [13:51] CHAIRPERSON: The Commission resumes. Mr
 23 Da Costa, you're still under oath.

24 MICHAEL GOMES DA COSTA: Yes, Chair.

25 CHAIRPERSON: Mr Burger. For those who

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1 weren't here earlier, I did come back into the chamber to
 2 indicate that we were having important discussions with
 3 some of the parties about certain housekeeping matters and
 4 so I indicated that we would not resume after the
 5 adjournment that we had and we would only resume now, which
 6 is what we're doing.

7 EXAMINATION BY MR BURGER SC (CONTD.): Mr
 8 Da Costa, exhibit XX2, page 69 –

9 MR DA COSTA: Yes, I have it.

10 MR BURGER SC: Where does that document
 11 fit into the chronology and the discussions you had with
 12 the employees and your evidence on not negotiating wages
 13 with them?

14 MR DA COSTA: Now this document
 15 originated after the executive had made the decision to
 16 implement the rock drillers allowance and this document was
 17 then a communication script that was issued in order to
 18 brief frontline supervisors on how the allowance would work
 19 to –

20 CHAIRPERSON: Sorry to interrupt you, Mr
 21 Da Costa. Something, part of XXX2 is on the screen, but I
 22 don't think that's the document to which Mr Burger is
 23 referring.

24 MR DA COSTA: No, that's not it –

25 CHAIRPERSON: He's referring, as I

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1 understand it, to XX2.
 2 MR BURGER SC: XX2.
 3 CHAIRPERSON: So could we please have XX2
 4 on the screen.
 5 MR BURGER SC: Page 69 of that document,
 6 XX2.
 7 CHAIRPERSON: Yes, let's wait for that to
 8 come up on the screen and then you can carry on.
 9 MR DA COSTA: Okay.
 10 CHAIRPERSON: And everyone can then
 11 follow what you're saying.
 12 MR BURGER SC: Yes. Is that the
 13 document?
 14 MR DA COSTA: That's the correct
 15 document. Yes, so this document was for the purpose of
 16 educating frontline supervisors and giving them briefing
 17 notes, so this document is used to explain to the frontline
 18 supervisors how the allowance would work and they would
 19 then, they then took this document to the rock drill
 20 operators who worked for them, briefed them on the
 21 allowance, what the conditions of the allowance were, how
 22 the allowance would be implemented, and they had
 23 discussions with the rock drill operators working for them
 24 on a face-to-face basis to help the rock drill operators
 25 understand how this allowance came about and what the

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1 conditions were regarding the allowance.
 2 MR BURGER SC: Did you see this document
 3 at the time?
 4 MR DA COSTA: Yes, I did see it at the
 5 time and this took place sort of in the first week, the
 6 first few days of August 2012.
 7 MR BURGER SC: It says on page 1, "The
 8 company has a two-year wage agreement. According to this
 9 agreement the company will pay wage increases ranging from
 10 8% to 10% in October 2012. Wage negotiations will
 11 therefore only take place in 2013." Was that correct?
 12 MR DA COSTA: That's correct, yes.
 13 MR BURGER SC: And if you just read the
 14 next sentence for us to get the drift of the document?
 15 MR DA COSTA: Okay, "The implementation
 16 of the abovementioned allowances does not constitute a
 17 reopening of the wage negotiations. Any demands from any
 18 parts of the business will therefore not be tolerated."
 19 MR BURGER SC: And then over the page
 20 there is a question and answer document. Was that prepared
 21 for the benefit of the people distributing this pamphlet in
 22 order to answer possible questions which might come their
 23 way?
 24 MR DA COSTA: That's correct. So this
 25 was to assist the frontline supervisors to deal with any

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1 questions that would come their way, yes.
 2 MR BURGER SC: In that same context we've
 3 handed in a little bundle in preparation of your evidence
 4 being heard, XXX3. Will you go to page 20 of that little
 5 bundle, please? It's a document, Lonmin document signed by
 6 Mr Abey Kgotle, Mr Barnard Mokwena, and Mr Mark Munroe.
 7 Have you seen this document at the time, July 2012? Page
 8 20 of exhibit XXX3.
 9 MR DA COSTA: Yes, I had seen that
 10 document at the time.
 11 MR BURGER SC: That just gives one an
 12 indication of the different salaries earned by RDOs at the
 13 time, Lonmin, Impala, and Anglo.
 14 MR DA COSTA: Yes, that's correct. This
 15 was the document that was submitted to the executive
 16 committee with the proposal to introduce the rock drillers
 17 allowance.
 18 MR BURGER SC: And that's the
 19 recommendation in paragraph 3?
 20 MR DA COSTA: That's correct, yes.
 21 MR BURGER SC: If in that same bundle you
 22 go to page 46, you'll see that that's a resolution by the
 23 Lonmin board, by the main board, dated 25th July 2012. Do
 24 you confirm that that recommendation was accepted first by
 25 the EXCO and thereafter by the board?

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1 MR DA COSTA: Yes, I do.
 2 MR BURGER SC: Mr Da Costa, in that
 3 timeframe what was the relationship between AMCU and NUM at
 4 Karee?
 5 MR DA COSTA: Well, the relationship was
 6 quite strained and I'd say adversarial. You know at that
 7 point AMCU was recruiting a lot of members and NUM on the
 8 other hand were trying to regain the members that they had
 9 lost, so there was a lot of competition between the two
 10 unions at that point and even, you know, even after the
 11 point where we had extended certain organisational rights
 12 to AMCU and AMCU then had representatives on our
 13 consultative forums and so on, it was quite difficult to
 14 get a consultative forum together where NUM and AMCU would
 15 sit in the same room around the table. It did happen on
 16 occasions, but it was very difficult to get that together,
 17 and then as the process unfolded the NUM guys actually
 18 started, well they were saying that they had a policy
 19 decision from their head office which then instructed them
 20 not to sit in the same room with AMCU. So it was actually
 21 quite difficult. It was a difficult employee relations
 22 environment from the perspective of a manager, you know, or
 23 a, where I was in my position as vice president of a fairly
 24 large operation. It was quite a challenging environment,
 25 quite a challenging employee relations environment to, you

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1 know, to try to get anything agreed to or, and to get
2 everybody working together. It was very, very difficult
3 because of this strained environment.

4 MR BURGER SC: Mr Da Costa, our time is
5 up. May I conclude with the permission of the Chair with
6 two questions, if you keep your answers short and Lonmin-
7 like. The first question is, did you in this whole process
8 of talking to the employees, going to EXCO, reporting back
9 to you, did you speak to AMCU and/or NUM to keep them
10 informed?

11 MR DA COSTA: I didn't speak directly to
12 them during the initial part of the process, but my HR
13 manager, Tumelo Nkisi did speak to representatives of the
14 two unions to keep them informed of the process. Once the
15 EXCO had approved the allowance I did engage with Mr Moli
16 from the NUM and with Mr Khululekile, Steve Khululekile
17 from AMCU, to share with them that the executive had
18 approved these allowances and that we were going to
19 implement them.

20 MR BURGER SC: And my last question to
21 you, which is a double-barrelled question; when did you
22 first hear of the shooting incidents of the 16th of August
23 and what was your reaction to that as a person?

24 MR DA COSTA: Well, I first heard of it
25 around, it's round about 4 o'clock, or at half past 4 on

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1 the afternoon of the 16th when Tumelo Nkisi came into my
2 office and said to me that there had been this
3 confrontation at the koppie and people had been shot.
4 Well, you know, if I think back when this whole process
5 started, when the unprotected strike action started, I was
6 quite shocked and aghast at what was going on around me.
7 To begin with the level of violence and intimidation that
8 was going on to prevent people from attempting to discharge
9 their responsibilities and to prevent people from coming to
10 work was just unbelievable, you know, to the extent that a
11 number of our colleagues lost their lives, many more of
12 them were assaulted and suffered severe injuries. I mean
13 that in itself was traumatic, but at that point it was
14 inconceivable that the situation could escalate to the
15 point where the events of that afternoon transpired. In my
16 wildest imagination I would not have expected something
17 like that to happen.

18 You know when you think back, to think that so
19 many of my people lost their lives in that way, it was
20 really, it stunned me, and you know, when the – first it
21 was just too difficult to believe, bit when the reality set
22 in I was really saddened that these events had overtaken
23 all of us and ended up in such a terrible tragedy, and
24 having said that I can only imagine, or I can't imagine the
25 pain that those people must have felt who actually lost a

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1 husband or a father or a brother in this incident, and all
2 I can say is that we have done and we will continue to do
3 as much as within our power to lessen that pain, to soften
4 that pain, and we will do whatever we can to prevent
5 anything like this happening again, and that's how we feel
6 from a company perspective. We lost a number of our
7 colleagues on that day.

8 MR BURGER SC: Thank you, Chair.

9 CHAIRPERSON: Yes, thank you. Mr
10 Budlender, I think you're going to be the first cross-
11 examiner. Is that correct?

12 CROSS-EXAMINATION BY MR BUDLENDER SC:
13 [Microphone off, inaudible]. Good afternoon, Mr Da Costa.

14 MR DA COSTA: Good afternoon.

15 MR BUDLENDER SC: I'd like you to –
16 you've got the bundle of documents which we're going to
17 rely on and I'd like you to go first to exhibit FFF9, if
18 you wouldn't mind, and in particular to the foot of page 8
19 of FFF9.

20 COMMISSIONER HEMRAJ: I'm sorry, what
21 page, Mr Budlender?

22 MR BUDLENDER SC: The foot of page 8,
23 Commissioner.

24 COMMISSIONER HEMRAJ: Thank you.

25 MR BUDLENDER SC: Mr Da Costa, just to

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1 identify the document, this is the opening statement which
2 was made on behalf of the South African Police Service at
3 the commencement of this Commission, and you'll see at the
4 foot of page 8 in paragraph 22, the very last – well,
5 paragraph 22, I'll read it, the statement says as follows,
6 "Specifically the police service" – or let me start at the
7 beginning of paragraph 22. "You will hear evidence that at
8 various stages the police service tried to encourage mine
9 management and labour representatives to engage in peaceful
10 negotiations without involving itself in labour disputes.
11 Specifically the police service tried to persuade AMCU and
12 NUM to address differences and tensions between the two
13 unions." And then this sentence in particular, "Senior
14 police officers also made efforts to get Lonmin management
15 to address workers but management's constant refrain was
16 that it was not prepared to negotiate outside collective
17 bargaining structures." You see that?

18 MR DA COSTA: Yes, I see that.

19 MR BUDLENDER SC: Now what I wanted to
20 ask you is this; did anyone from the South African Police
21 Service ever ask you to engage in discussion with the
22 strikers?

23 MR DA COSTA: No. No, they didn't. I
24 wasn't that close to – I wasn't really involved in
25 discussions with the police services.

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1 MR BUDLENDER SC: Do you know whether the
2 South African Police Service asked anyone else in Lonmin
3 management to engage in negotiations or discussions with
4 the strikers?
5 MR DA COSTA: I'm not sure about that,
6 no.
7 MR BUDLENDER SC: Well, if such a request
8 had been made by the SAPS, do you think it's likely that it
9 would have come to your attention either at that stage or
10 subsequently?
11 MR DA COSTA: Ja look, as I say at the
12 time I wasn't aware that those discussions were taking
13 place. Afterwards I have heard that those discussions, or
14 that those requests were made from some, from some South
15 African Police Services members to our management.
16 MR BUDLENDER SC: And to whom in your
17 management were those requests made by the South African
18 Police Service? What have you heard?
19 MR DA COSTA: I believe it was to Mr
20 Barnard Mokwena.
21 MR BUDLENDER SC: And is what you – we'll
22 have to check with Mr Mokwena, but is it your understanding
23 that police officers made efforts to get Lonmin management
24 to address the workers? Which I think refers to the
25 strikers on the koppie.

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1 MR DA COSTA: I know there were various
2 discussions taking place between the South African Police
3 and union leaders and our management.
4 MR BUDLENDER SC: Alright, I won't pursue
5 that with you. You have no personal knowledge of it?
6 MR DA COSTA: No, I have no personal
7 knowledge of it.
8 MR BUDLENDER SC: Alright.
9 COMMISSIONER HEMRAJ: Are you saying –
10 I'm sorry to interrupt you. Are you saying that you were
11 not even familiar with responses given by the various
12 persons from Lonmin that interacted with the police?
13 MR DA COSTA: Ja, I wasn't involved in
14 that process, so I wouldn't know, I wouldn't know for sure
15 what was said.
16 COMMISSIONER HEMRAJ: And you never
17 became aware of that at any stage prior to the 16th of
18 August?
19 MR DA COSTA: No, not that I can recall.
20 CHAIRPERSON: Were you based at Karee at
21 the time?
22 MR DA COSTA: Yes, I was.
23 CHAIRPERSON: And management who would
24 have been dealing with the police, and I presume the
25 strikers to some extent, were based at the Lonmin Platinum

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1 Division. Is that correct?
2 MR DA COSTA: That's correct.
3 CHAIRPERSON: And the police JOC was
4 later established fairly close to that.
5 MR DA COSTA: It was fairly close to
6 that, the facility at Western Platinum, yes.
7 CHAIRPERSON: And that's where the
8 miners, or the strikers went on the 10th to, in an endeavour
9 to persuade management to give them the increase they asked
10 for. Is that correct?
11 MR DA COSTA: Yes, they went to Lonmin
12 Platinum Division offices. On that particular day I was in
13 the offices, so I did go to those offices from time to time
14 during the strike period, but most of the time I was based
15 out at the Karee Operations.
16 CHAIRPERSON: Were you present at the, I
17 think it's called the LPD, the Lonmin Platinum Division
18 offices, were you present there on the 10th of August when
19 this group of strikers came and demanded to, or requested
20 an opportunity to speak to management about their demand
21 for 12 500?
22 MR DA COSTA: Yes, I was there.
23 MR BUDLENDER SC: Alright, can I then
24 move to a further document with which I hope you've been
25 briefed, and that is the transcript of day 36 of the

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1 proceedings of this Commission. You've been given an
2 extract from the transcript of day 36. You have that? I'm
3 sorry, you won't have been given that. You're looking
4 puzzled and you're puzzled for good reason. My error.
5 Could we have that on the screen, please, day 36, page
6 3875.
7 [14:10] Is there a difficulty with the transcript?
8 What's the problem? I understand, Chair, there's a
9 difficulty with the transcript which the technical people
10 are using. We're giving them another copy so that they can
11 use that.
12 CHAIRPERSON: Alright. Well, I take it
13 that it will be on the screen quite soon.
14 MR BUDLENDER SC: I hope so, Chair.
15 CHAIRPERSON: While we're waiting, to go
16 back to your evidence about unwillingness or questions were
17 asked to you about the unwillingness of Lonmin to negotiate
18 otherwise than through the ordinary structures. I see that
19 the attitude of Lonmin in relation to the demand for 12 500
20 is set out in paragraph 7.3 of your statement, that you
21 were there on the Friday the 10th, management discussed the
22 matter as you say, decided you wouldn't engage with the
23 group because they were engaged in an illegal strike and
24 also you viewed the matter as finalised because the EXCO
25 had determined this amount for the allowance and that, as

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1 far as Lonmin was concerned, appears to have been the end
2 of the matter, is that correct?

3 MR DA COSTA: That is correct, Chair.

4 MR BUDLENDER SC: Chair, I wonder whether
5 in the interests of expedition I could just read the
6 passage to the witness.

7 CHAIRPERSON: I would suggest, I was
8 trying to fill in and I hoped that by the time I'd asked
9 the question and got the answer we would have it on the
10 screen but I have failed in that so you'd better read the
11 passage.

12 MR BUDLENDER SC: This is, Chair, from
13 record day 36, it's page 3875 from line 21 and what's
14 happening there, Mr Da Costa, is that Mr Gcilitshana is
15 giving evidence and I'm asking him some questions and the
16 question is put as follows at line 21, "What would have
17 happened if on the 15th of August SAPS had got together with
18 Lonmin and the NUM and the police had said the following –
19 there's a dispute around the RDO wages and it seems that it
20 can't be resolved through the normal collective bargaining
21 processes, 10 people have now lost their lives. There's a
22 limit to the extent to which we can prevent this violence
23 through normal policing activities. The rock drill
24 operators have said they will leave the koppie if the
25 management comes and talks to them. We think that you,

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1 Lonmin and NUM should agree that this dispute should be
2 negotiated outside the normal collective bargaining
3 processes. Now if the police had said that to NUM and
4 Lonmin on let's say the 15th of August, what would NUM's
5 attitude have been?" And Mr Gcilitshana's answer is, "As
6 NUM, as we indicated that even beyond the shootings we
7 agreed to sit down. I believe that we would have agreed to
8 sit down with the company and see how can we resolve the
9 problem as we were trying." Then the question is, "Would
10 you have agreed to an attempt being made to resolve the
11 dispute outside the normal bargaining processes in mid-
12 August 2012?" And the answer is, "That's correct, as a
13 process of trying to resolve the problem." And the
14 question is then put, "In other words just as you agreed
15 after the shootings, you would have agreed before the
16 shootings?" And the answer which is given is "Yes." It's
17 now up on the screen belatedly. Now what I wanted to ask
18 you is this, if the SAPS had said the same to Lonmin, had
19 said look, the situation is volatile, 10 people are dead,
20 we think you need to – the strikers repeatedly say they
21 want to speak directly to you and we think you should speak
22 directly to them or their representatives, what would you
23 have advised Lonmin to do?

24 MR DA COSTA: I think if the proposal had
25 been made in that way, as Lonmin we would certainly have

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1 considered that. I guess we would have wanted to know how
2 the, you know, how that sort of negotiating forum would be
3 constituted and who would be part of that negotiating forum
4 and so on but I think the sort of position of the company
5 at that time was that the employees were engaged in an
6 unprotected strike and it was our wish that everybody got
7 back to work, come off the koppie, lay down the weapons,
8 return to work and then you know had that happened I think
9 we would have been amenable to consider an approach like
10 that.

11 MR BUDLENDER SC: Are you saying that
12 your advice to Lonmin would have been don't speak to the
13 strikers at all unless they lay down their weapons, come
14 off the koppie and go back to work or would your advice
15 have been, if SAPS had made that proposal, I think we'd
16 better speak to some representatives of the strikers?

17 MR DA COSTA: I think even that, if the
18 strikers were prepared to designate a delegation to speak
19 to management I believe we would have spoken to them in a
20 controlled environment, not out at the koppie.

21 MR BUDLENDER SC: No, that I understand.
22 Now the question is this, as we know the demand of the
23 strikers was addressed to Lonmin. They kept on saying, we
24 want to speak to management. Why did Lonmin not take the
25 initiative and say, we will, we are willing to speak to

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1 representatives of the strikers in a controlled
2 environment?

3 MR DA COSTA: I'm actually not sure that
4 that didn't happen but I wasn't, you know I wasn't really
5 party to a lot of the discussions that had taken place
6 around those issues at the time. So I'm not 100% sure that
7 that proposal was never made.

8 MR BUDLENDER SC: No, it wasn't made.
9 What I am – as far as I know – what I'm asking is can you
10 think of any reason why Lonmin – 10 people were dead, eight
11 of them employees of Lonmin, surely the sensible thing for
12 Lonmin to say was, look, this is a bad situation, we hear
13 that the strikers want to talk to us, we will talk to a
14 group selected by them in a controlled environment. Surely
15 that would have been the sensible thing to do, 10 deaths
16 had already taken place.

17 MR DA COSTA: Yes, what I'm saying is
18 where I'm sitting here right now I'm not sure that – it is
19 quite possible that that proposal was made.

20 MR BUDLENDER SC: Well, there's been no
21 suggestion in any statement by any of the Lonmin witnesses
22 or any of the evidence given before this Commission that
23 Lonmin ever made that proposal.

24 MR DA COSTA: I wasn't in those
25 discussions so I, I'm not exactly sure what was –

<p style="text-align: right;">Page 30051</p> <p>1 MR BUDLENDER SC: Well, you're – I'm 2 sorry, I didn't want to interrupt. You're an experienced 3 mine manager at a very senior level. Do you not think that 4 would have been a sensible thing to do? 5 MR DA COSTA: It most likely would have 6 been. 7 MR BUDLENDER SC: Thank you. Now I want 8 to turn to your discussions with the RDOs from Karee which 9 you gave evidence about. 10 COMMISSIONER HEMRAJ: Just before you get 11 to that point if you don't mind my interrupting you. Mr Da 12 Costa, apart from those who were interacting with the 13 police, with who would the ultimate decision rest in the 14 company as to what the approach would be, what the 15 responses would be to any request from the miners or the 16 South African Police? 17 MR DA COSTA: It would have been the 18 executive committee, you know, so generally those sorts of 19 decisions are taken in committee. It wouldn't just be one, 20 one particular person. 21 CHAIRPERSON: Who is on the executive 22 committee? Who was at that time? Was it a sub-committee? 23 MR DA COSTA: As it in names or 24 positions? 25 CHAIRPERSON: Well, both. Give us</p>	<p style="text-align: right;">Page 30053</p> <p>1 taking place. So let's talk, look first at the contents of 2 the discussions. Now the content of the discussions was 3 this, the RDOs made a request or a demand, that's correct 4 is it? 5 MR DA COSTA: That's correct. 6 MR BUDLENDER SC: You debated the merits 7 of the demand with them to some extent, saying you think 8 it's very unlikely EXCO will agree to this, what's more in 9 the middle of a wage cycle. 10 MR DA COSTA: That's right. 11 MR BUDLENDER SC: They made it clear that 12 strike action might take place. Well, that at least was 13 the inference you drew from the discussions you had with 14 them. 15 MR DA COSTA: Initially not. In fact 16 initially they said to me that they don't want to disrupt 17 operations. 18 MR BUDLENDER SC: But subsequently it 19 became a concern that there might be strike action. 20 MR DA COSTA: Yes. 21 MR BUDLENDER SC: And you said that you 22 would report the matter to your principals and revert to 23 them. 24 MR DA COSTA: That's correct. 25 MR BUDLENDER SC: You did report to your</p>
<p style="text-align: right;">Page 30052</p> <p>1 positions first. Was the EXCO, did it consist primarily of 2 members of the board? Was it, in other words, a sub- 3 committee of the board of directors of the company? 4 MR DA COSTA: There are two board - there 5 are two directors who sit on the EXCO, that's the chief 6 executive officer and the chief financial officer. 7 Together with them there is the executive vice-president 8 for mining, the executive vice-president for processing, an 9 executive vice-president for human resources and at that 10 point there was a chief commercial officer as well. 11 MR BUDLENDER SC: Perhaps I can help you, 12 Mr Da Costa. Lonmin have provided us with the minutes of 13 the EXCO meetings held on 28 June and 19 July and the 14 people who are reflected as being EXCO members in 15 attendance, Mr Ian Farmer, Mr Mark Munro, Albert Jameson, 16 Natasha Viljoen, Barnard Mokwena, Simon Scott and Thandeka 17 Ncube. Does that sound correct? 18 MR DA COSTA: Yes, it's correct. 19 MR BUDLENDER SC: Now I want to say, 20 dealing with the question of your discussions with the RDOs 21 from Karee, as my learned friend Mr Burger said, there are 22 people who criticise you for engaging in those discussions. 23 I want to make it clear that to the extent that my opinion 24 is relevant, I don't criticise you for doing that. I want 25 to really try to unpick what happened there and what was</p>	<p style="text-align: right;">Page 30054</p> <p>1 principals and in fact you made a recommendation to your 2 principals. 3 MR DA COSTA: Yes, I did. 4 MR BUDLENDER SC: And then you reported 5 back to the rock drill operators on the outcome of that, of 6 the discussion with your principals. 7 MR DA COSTA: Yes. 8 MR BUDLENDER SC: And we can see what 9 happened in one of the documents which is part of the 10 Lonmin discovery before this, produced for your evidence. 11 It's the notes on the rock drill operators' meeting, it's 12 XXX3 page 24. Do you see that? That records, that's a 13 note of your meeting with representatives of the rock drill 14 operators. I'm not going to take you through all of the 15 detail but if we just go halfway down the page, this is the 16 meeting of the 30th of July 2012 and what you say is, 17 management, "It was explained that the executive has 18 approved the payment of the rock drill operators' allowance 19 backdated from 1st of July 2012. The allowance will be a 20 monthly amount of R750. This is a management decision due 21 to RDO market movement. The intention is to retain the 22 RDOs and make Lonmin competitive. The representative must 23 communicate this allowance to the RDO in general and make 24 sure that any illegal activity is averted." That's a 25 reference to a strike, isn't it?</p>

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1 MR DA COSTA: Yes.

2 MR BUDLENDER SC: And then the RDO

3 response is, "The RDO" – it should be "wants" – "R12 500

4 but the reps will take the news of the allowance to the

5 employees who will decide." Does that correctly reflect

6 what happened?

7 MR DA COSTA: That's correct. This was

8 the meeting where I – I conveyed the executive's decision

9 to implement the allowance –

10 MR BUDLENDER SC: Yes.

11 MR DA COSTA: - to the rock drill

12 operators and that was the last meeting that we had.

13 MR BUDLENDER SC: Yes. Now your initial

14 recommendation to Lonmin EXCO had in fact been that the

15 single rock drill operators should be paid an allowance of

16 R1 000 per month, do you remember that?

17 MR DA COSTA: Yes, that's correct.

18 MR BUDLENDER SC: Now what would you have

19 done at that meeting if, when you said you're going to get

20 R750, the rock drill operators had said we're not satisfied

21 with that, we are going to strike but if you give us R1 000

22 we'll reconsider? Would you have told them you'll take

23 that back to your principals?

24 MR DA COSTA: No. No, I wouldn't have

25 because this decision has been made, it was the executive's

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1 final position on this. I was not engaging in a process of

2 negotiation with the rock drill operators so I was simply

3 giving them the feedback that had come from the executive

4 decision. So no, I would not have agreed to take it back

5 any further. I would have said to them this is the

6 decision, this is what the executive has decided to

7 implement, please go ahead –

8 MR BUDLENDER SC: Mr Da Costa, if the

9 rock drill operators go on strike the mining operation

10 virtually comes to a halt, doesn't it?

11 MR DA COSTA: Yes, it does.

12 MR BUDLENDER SC: It costs the company –

13 CHAIRPERSON: Mr Burger's light is on.

14 Mr Burger? Oh, mistake, sorry.

15 MR BUDLENDER SC: I'm sure he'll object

16 to something in due course, Mr Chair.

17 CHAIRPERSON: No, I'm sure he won't

18 unless he has a good reason to do so, which you won't give

19 him. Mr Budlender, before you ask this question can I ask

20 a question dealing with a previous point? On the screen we

21 have the minutes of the meeting you had on the 30th of July

22 and I see the RDO section that was read, what the RDOs said

23 in response to what you said was that they wanted 12 500,

24 that they'd take the news of the allowance to the employees

25 and then follow the words, quote, "who will decide." What

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1 did you understand that to mean and what was to be the

2 subject of the decision which it was said the employees

3 would take once they got the news that they weren't getting

4 12 500 but merely an allowance of 750?

5 MR DA COSTA: My understanding of what

6 they were telling me is that they would take this back to

7 the employees, to the other rock drill operators, they

8 would communicate it and then the employees would decide

9 whether they're happy with that or not.

10 CHAIRPERSON: If they weren't happy with

11 it, what did you think they would decide?

12 MR DA COSTA: I honestly wasn't quite

13 sure at that point in time because these representatives

14 said to me they, they actually want 12 500 so this doesn't

15 bring them to 12 500. However, they will take it through

16 to the other rock drill operators and then they'll decide

17 if they're happy with that or not.

18 CHAIRPERSON: The decision would scarcely

19 be a take it or leave it decision, you know, the decision

20 would scarcely be, well, thank you we'll take the 750 or no

21 thank you, we won't want the 750. If they decided not to

22 take, not to accept the 750 as the final amount that they

23 were happy with then other things would follow, wouldn't

24 they?

25 MR DA COSTA: Possibly, yes.

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1 CHAIRPERSON: What was the most likely

2 thing that would follow?

3 MR DA COSTA: It was possible that there

4 would then be a work stoppage.

5 COMMISSIONER HEMRAJ: And what is the

6 illegal activity that you asked them to ensure would be

7 averted?

8 MR DA COSTA: It was that there wouldn't

9 be any illegal work stoppages or anything else like that,

10 ja.

11 COMMISSIONER HEMRAJ: Thank you.

12 MR BUDLENDER SC: One of the – yes, if

13 the rock drill operators go on strike the company loses a

14 great deal of money, is that correct?

15 MR DA COSTA: Yes, that's correct.

16 MR BUDLENDER SC: I looked at your

17 initial proposal of R1 000 a month and the ultimate

18 decision of R750 a month and the cost difference between

19 the two, between your proposal and what was ultimately

20 adopted was about R3 million per year. Can you remember

21 that? You said it would cost about, you estimated what you

22 proposed would cost about 32 million and ultimately what

23 was proposed, what was adopted was going to cost 29.6

24 million.

25 MR DA COSTA: Ja, it was something in

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1 that –

2 MR BUDLENDER SC: It was of the order of

3 2 or 3 million rand per year.

4 MR DA COSTA: Yes.

5 MR BUDLENDER SC: Now if the option was a

6 strike or possibly avoiding it by paying another 2 or 3

7 million rand a year, surely that's something you would have

8 wanted your principals to consider.

9 MR DA COSTA: You know, I think that at

10 this point in the process it was clear that the company's

11 position was that we were not prepared to reopen the wage –

12 we were not prepared to reopen the wage agreement. We did

13 not want to get into a wage negotiation process and we were

14 not going to negotiate this position to the backwards and

15 forwards.

16 [14:30] MR BUDLENDER SC: Do you seriously, are

17 you seriously telling the Commission that if the executive

18 had known that, and this is a hypothetical situation, if

19 the executive had been told there is a risk of a strike for

20 another 2 or R3 million a year we can avert it, they

21 wouldn't have been willing even to consider it.

22 MR DA COSTA: Well, maybe they would have

23 but you know I also got the sense from the group of people

24 that I was talking to at this stage, you know at the end of

25 July, that, I mean they never said to me that, can you make

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1 the allowance more.

2 MR BUDLENDER SC: No, I'm not suggesting

3 that they did, I'm trying to understand what the nature was

4 of your discussion with them and what I'm saying to you is,

5 what, a hypothetical situation, if you had known, if you

6 had been told another R250 a month will avert a possible

7 strike, you say you wouldn't even have reported that to

8 your executive for decision?

9 MR DA COSTA: No, you see at that point I

10 had no mandate to entertain any other approaches from the

11 rock drill operators.

12 MR BUDLENDER SC: Would you have told the

13 executive the workers of, the RDOs have said another R250

14 will keep us happy, or would you have just kept that from

15 the executive?

16 MR DA COSTA: No, I would most likely

17 have told them but –

18 MR BUDLENDER SC: Yes –

19 MR DA COSTA: But I wouldn't be

20 presenting it as, you know as a position of, please

21 consider this so that you can continue this negotiation

22 process because it was not intended to be a negotiation

23 process.

24 MR BUDLENDER SC: One of the purposes of

25 the allowance was to reduce any risk of strike action,

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1 correct?

2 MR DA COSTA: One of my concerns is that

3 there was a risk of strike action and if offering an

4 allowance could avert strike action, then that would be

5 sort of first prize position to be in, but the position of

6 the company was that we were not going to get into a

7 negotiation process, so you know if this allowance didn't

8 address the issue, well, then we would have to see where

9 that progresses to and then continue.

10 MR BUDLENDER SC: Mr Da Costa, one of the

11 purposes of the allowance was to reduce any risk of strike

12 action, is that correct?

13 MR DA COSTA: It was certainly an attempt

14 to avert strike action, yes.

15 MR BUDLENDER SC: Yes, and the would-be

16 strikers had told you what they wanted and you had told

17 them what management was prepared to give them, is that

18 correct?

19 MR DA COSTA: That is correct.

20 MR BUDLENDER SC: And if they had said it

21 is not quite enough but it is nearly enough surely you

22 would have gone back to your executive and said, we can

23 avert the strike action, we can achieve our goal if we just

24 pay them for example another R250 a month, surely you would

25 have told them that. I want to put it to you that if you

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1 hadn't, - if that situation has arisen and you hadn't told

2 your executive that for another 250 a month we can avert

3 strike action and as a result strike action took place, you

4 would have been in big trouble with the company. The

5 executive would have said, why didn't you tell us that?

6 MR DA COSTA: You know as I said to you

7 previously, no doubt I would tell them that but –

8 MR BUDLENDER SC: Yes –

9 MR DA COSTA: - I had no mandate to give

10 any indication or make any commitment to the rock drill

11 operators, that that is what I would do.

12 MR BUDLENDER SC: No, I understand that,

13 all I'm trying to, what I'm coming to is that what you were

14 doing is, you were in effect communicating between the rock

15 drill operators and management and vice versa. That was

16 the function you were performing.

17 MR DA COSTA: Yes, I was.

18 MR BUDLENDER SC: Yes, now I want you to

19 have a look at the –

20 COMMISSIONER HEMRAJ: Sorry, before that,

21 there is just another point. When you made the

22 recommendation for an increase of R1,000, that was to

23 redress the imbalance because of what Impala had granted to

24 their RDOs.

25 MR DA COSTA: That's right, in my mind

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1 that extra thousand Rand would put our rock drill operators
2 just ahead of Impala's.

3 COMMISSIONER HEMRAJ: So when it came at
4 7:50 it hadn't quite redressed that imbalance?

5 MR DA COSTA: I can't remember 100% and
6 the tables are in here, but it brought our rock drill
7 operators very close to parity with Impala, I think. I
8 can't remember.

9 CHAIRPERSON: But it wasn't quite up to
10 parity or was it? Am I right, it wasn't quite up to
11 parity?

12 MR DA COSTA: Yes, it wasn't quite up to
13 parity, yes.

14 CHAIRPERSON: And the whole purpose
15 surely of paying the allowance is because it was
16 appreciated that the mineworkers would have known what had
17 happened at Impala and Amplats.

18 MR DA COSTA: Yes, so –

19 CHAIRPERSON: Am I correct?

20 MR DA COSTA: It was certainly intended
21 to close the gap.

22 CHAIRPERSON: Ja, - no, no, no, no, the
23 mineworkers would have known that their colleagues at
24 Impala and their colleagues at Anglo Platinum had got more
25 than what they were being offered, they would have known

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1 that, wouldn't they, and the whole purpose was to make it,
2 as you say to make it competitive because otherwise if
3 people are getting more money elsewhere they will go
4 elsewhere and I take it just as you people knew what was
5 happening on the management side of Impala and Amplats
6 because you had, what you called the network, presumably
7 not in the same sophisticated way but the mineworkers also
8 would have known what was happening with their colleagues
9 at the other two major Platinum Mines in the area, is that
10 not right?

11 MR DA COSTA: They would have had a fair
12 idea, yes.

13 CHAIRPERSON: So would it have been such
14 a smart idea that you had to offer less than their
15 colleagues were getting at the other two?

16 MR DA COSTA: Chair, -

17 MR BURGER SC: I don't want to interrupt
18 and I don't want to lead the witness but in fairness both
19 the tables at page 20 and 21 should be put to him in this
20 context, and I don't want to take it any further but in
21 XXX3 there are two tables and what you are debating with
22 him is the table on the left hand side.

23 CHAIRPERSON: No, that's a fair comment,
24 I don't want to put anything to the witness which is unfair
25 and I want information anyway, this is not seeking one

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1 answer as opposed to another.

2 MR BURGER SC: No, I don't want to put
3 anything to lead to him and that's why I'm ambivalent in
4 what I put, but –

5 CHAIRPERSON: Well, I've indicated I
6 haven't got a problem with what you've done.

7 MR BUDLENDER SC: Now I understand –

8 MR DA COSTA: I'm sorry, I'm sorry.
9 Okay, when you look at the –

10 CHAIRPERSON: - you looked at both
11 tables, well, my machine wasn't on, now we've got them.

12 MR DA COSTA: Yes, so at that current
13 time, if we compared our rock drill operator's total
14 package to Impala's before the Impala increase, so that
15 would have been, (a), the R750 rock drill operator
16 allowance would have put us ahead of Impala, but just at
17 that time Impala also then increased their rock drill
18 operator allowances quite significantly or their rock drill
19 operator remuneration quite significantly, so we would
20 still, you know the R750 would still have set us a little
21 behind Impala, but I must take it that the Executive
22 Committee was comfortable with the fact that they were
23 closing the gap, even if they didn't close the gap
24 completely.

25 CHAIRPERSON: I want to ask you another

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1 question, the minute it was up of the meeting you had on
2 the 30th of July which contained this expression that the
3 mineworkers would decide after they were told that they
4 weren't getting the R12,500 but only getting 750, was that
5 minute just for your own purposes or would that have gone
6 to the management and being available to Exco to see what
7 the result of your discussions with the RDO representatives
8 was?

9 MR DA COSTA: Ja, I wouldn't have send
10 that minute through to Exco but I certainly communicate it
11 through to the Executive Vice President of Mines what the
12 outcome of the meeting was.

13 CHAIRPERSON: As we've heard it was a
14 member of Exco?

15 MR DA COSTA: That's correct, yes.

16 MR BUDLENDER SC: Now, Mr Da Costa, I
17 understand that you and your principals formulate this and
18 you take your stand on the principle that this was not an
19 amendment of the wage agreement and it was not the process
20 of negotiation, because you wanted to stick to those
21 principles that you would not negotiate outside the
22 recognised channels and you would not renegotiate wages
23 anyway at this time, is that correct?

24 MR DA COSTA: That's correct.

25 MR BUDLENDER SC: I understand that but I

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1 want to put it to you that as far as your employees were
 2 concerned that must have been an absolutely artificial
 3 distinction, because what they saw was that they were
 4 getting more money as a result of a process of demand,
 5 discussion, communication and decision, and while you may
 6 have thought this was a very important question of
 7 principle on which you were taking your stand, to them this
 8 must have been materially no different from a negotiation.
 9 They made a request or a demand, you discussed the merits,
 10 you communicated with your principals, your principals
 11 communicated with you and on behalf of them, you
 12 communicated with the rock drill operators and you gave
 13 them a decision. Now from their point of view what's the
 14 difference? Do you think, did you think the rock drill
 15 operators draw a critical distinction between cash which
 16 comes and is called an allowance and cash which comes and
 17 is called a wage, do you think that matters to them?

18 MR DA COSTA: I think they did understand
 19 the difference in that, you know whether it comes as an
 20 increase to the basic wages it brings some other increases
 21 along, whether in terms of some of the other allowances and
 22 so on, this is just an allowance on top of the basic wage.

23 MR BUDLENDER SC: Are you suggesting that
 24 if Lonmin had given an allowance which made up the
 25 difference between the basic wage and R12,500 the rock

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1 it into my book.

2 MR BUDLENDER SC: Thank you, could we
 3 blow up the first four or five lines? Can we go to the
 4 left, please? Alright, you'll see there, this is now the
 5 Career RDO occurrence book, it is a Lonmin document,
 6 correct?

7 MR DA COSTA: Yes, it is a document from
 8 our security.

9 MR BUDLENDER SC: Yes, let's see what
 10 they say on the first entry, 21 July at 10 o'clock, "The
 11 RDO's first illegal march to the general office, Karee.
 12 The first demand made for an increase from R5,400 to
 13 R12,500. Negotiations between VP Mike da Costa and Semelo
 14 Mkhise and two reps from the RDOs, demand rejected at Exco
 15 level, threat, strike action." Now what that tells me is
 16 the following, the person who made that entry thought that
 17 these were negotiations?

18 MR DA COSTA: Yes.

19 MR BUDLENDER SC: And that person didn't
 20 draw the distinction between wages, allowances,
 21 negotiations, unilateral action, that's what, colloquially
 22 what it means, isn't it?

23 MR DA COSTA: The person who made this
 24 entry clearly didn't draw that distinction.

25 MR BUDLENDER SC: Yes.

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1 drill operators would have said, hang on, no, we don't want
 2 an allowance, we want a wage, we want a wage increase, or
 3 do you think they would have said, we're very pleased,
 4 thank you very much, we've achieved our purpose?

5 MR DA COSTA: No, most likely the latter.

6 MR BUDLENDER SC: Yes.

7 CHAIRPERSON: In fact when they walked
 8 out of the meeting someone had come out and said, tell me,
 9 have you been engaged in wage negotiations, you know
 10 someone from the unions, have you been engaged in wage
 11 negotiations with management or what, surely they would
 12 have said, yes, or no, no, no, these aren't negotiations,
 13 these are something else, these are just talks about an
 14 allowance, I mean surely that kind of distinction wouldn't
 15 have appealed to their minds, would it?

16 MR DA COSTA: No, I'm really not sure.

17 MR BUDLENDER SC: Well, let me take you
 18 to a document, have a look at, one of the documents in your
 19 bundle is the Career RDO occurrence book, 933, it is a new
 20 exhibit. It will be XXX4, Chair.

21 CHAIRPERSON: [Indistinct]?

22 MR BUDLENDER SC: It is called "Career
 23 RDO OB 933" and it is page 216 of the Lonmin phase 1
 24 discovery.

25 CHAIRPERSON: Thank you, I've so entered

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1 CHAIRPERSON: NUM don't appear to have
 2 drawn that distinction either, because if you look at the
 3 entry for the 23rd of July, what do we see in the fourth
 4 line? We need more to the right than is on the screen.
 5 NUM, - your answer, AMCU informed and NUM not happy that
 6 they were not involved in the negotiations."

7 MR DA COSTA: Yes, I see that.

8 CHAIRPERSON: So the only person who
 9 compiled the security occurrence book was also NUM
 10 apparently who saw it that way too.

11 MR BUDLENDER SC: I want to put it to
 12 you, Mr Da Costa, that the distinction between negotiations
 13 and unilateral decisions and the distinction between wages
 14 and allowances may be important as a matter of theoretical
 15 principle or a practical principle to Lonmin but it is
 16 actually entirely artificial from the point of view of the
 17 employees.

18 MR DA COSTA: No, I'm not sure if I'm in
 19 a position to comment on that.

20 MR BUDLENDER SC: Well, the relevance of
 21 the question is this, that Lonmin takes a stand on the
 22 basis that it says, oh, no, we never entered into
 23 negotiations, we just made a unilateral decision. Oh, no,
 24 we never discussed wages, we just discussed an allowance,
 25 and I'm suggesting to you that that's an artificial, a nice

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1 artificial distinction which has no meaning in the real
2 world. Would you like to comment on that?
3 CHAIRPERSON: What is your answer, Mr Da
4 Costa?
5 MR DA COSTA: That may well be, but you
6 know I'm not seeing it from the perspective of the general
7 employees out there.
8 MR BUDLENDER SC: Let me move on. I want
9 to look at some of the reasons why you then chose to engage
10 directly with the representative of the RDO from Karee and
11 again I say this was not to criticise your decision to do
12 so, but just to understand the reasons. These are all
13 reasons drawn from the transcripts in cross-examination.
14 Firstly, the workers concerned did not want to work through
15 the NUM, that was one of the reasons, wasn't it?
16 MR DA COSTA: Well, they weren't
17 specifically about the NUM, they said that they did not
18 want union involvement in the process.
19 MR BUDLENDER SC: Yes, they didn't want
20 to work through the established channels for negotiation,
21 is that correct?
22 MR DA COSTA: Yes, I mean said that they
23 weren't going to involve unions in this.
24 MR BUDLENDER SC: In other words they
25 weren't willing to work through the established channels

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1 for negotiation wages, is that not correct, that's why they
2 came to you?
3 MR DA COSTA: Well, I think they came to
4 me because they felt that they weren't going to have any
5 success if they took the issue to the unions.
6 MR BUDLENDER SC: Yes, indeed. Secondly,
7 a second reason which is given is that if you had not
8 spoken to these people there would have been unprotected
9 strike that was the reason why you spoke to them.
10 MR DA COSTA: The risk of a strike
11 ensuing had I not spoken to them was pretty high.
12 MR BUDLENDER SC: Yes, a third reason why
13 you spoke with them is that the strike would probably have
14 been accompanied by violence and intimidation.
15 MR DA COSTA: Very likely if it was an
16 unprotected strike.
17 MR BUDLENDER SC: And a fourth, - and so
18 therefore under the circumstances you really had no option,
19 you had to talk to the workers.
20 MR DA COSTA: Well, yes, I had to but as
21 I said in my evidence in chief that when they first arrived
22 at my office I actually did not know what they wanted to
23 speak to me about.
24 MR BUDLENDER SC: Yes.
25 MR DA COSTA: I mean the rock drill

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1 operators have issues related to their bonuses, they have
2 issues related to, particularly the one, the rock drill
3 operators at Karee often had issues related to wanting a
4 systems, that sort of thing. So I wasn't quite sure what
5 they wanted to speak to me about when they first arrived.
6 MR BUDLENDER SC: And, sorry?
7 MR DA COSTA: I mean that was one of the
8 reasons why I asked for the representatives to come into my
9 office in the first place, was to establish what the issue
10 was.
11 MR BUDLENDER SC: Yes, and when you found
12 out what the issue was you had no, you really had no
13 option, you had to talk to them.
14 MR DA COSTA: Yes, I had to talk to them.
15 MR BUDLENDER SC: You had no option,
16 correct?
17 MR DA COSTA: Correct.
18 MR BUDLENDER SC: Now let's look at those
19 reasons again now through the lens of mid August 2012.
20 [14:50] There are strikers on the koppie, they're
21 demanding a substantial wage increase and they say we want
22 to talk to management. Now the first reason we looked at
23 was that the workers concerned didn't want to work through
24 the NUM or through the established negotiating channels.
25 That was also the case in mid-August 2012, wasn't it?

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1 MR DA COSTA: Yes, it was.
2 MR BUDLENDER SC: Secondly that, a second
3 reason we looked at was if you hadn't spoken to these
4 people there was a risk of an unprotected strike. Well, in
5 mid-August 2012 there was already an unprotected strike.
6 MR DA COSTA: Yes.
7 MR BUDLENDER SC: Thirdly the strike
8 would probably have been accompanied by violence and
9 intimidation. In mid-August 2012 there was ongoing
10 violence and intimidation. Is that correct?
11 MR DA COSTA: That's correct.
12 MR BUDLENDER SC: So how can one not
13 reach the conclusion that in mid-August, as in June/July,
14 you really had no option, you had to talk to the workers?
15 The same reasons applied.
16 MR DA COSTA: Ja, the same reasons
17 applied, but the environment was somewhat different in the
18 middle of August to what it was when I was talking to the -
19 MR BUDLENDER SC: Yes.
20 MR DA COSTA: - to the rock drill
21 operators -
22 MR BUDLENDER SC: In middle of August -
23 I'm sorry. In middle of August it was much more
24 threatening.
25 MR DA COSTA: Well, I would say when I

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1 was talking to the rock drill operators the environment was
 2 a lot more normal than it was during the time at the middle
 3 of August.
 4 MR BUDLENDER SC: Yes.
 5 MR DA COSTA: And when the rock drill
 6 operators came down to my offices in the middle of June
 7 they were not armed. They were not aggressive.
 8 MR BUDLENDER SC: Yes, that's my point.
 9 MR DA COSTA: They had not, there had,
 10 nobody – at that point nobody had been assaulted. So the
 11 whole environment was a lot more conducive to having a
 12 discussion with the people.
 13 MR BUDLENDER SC: Mr Da Costa, the time
 14 to – if you need to talk to people when a situation is
 15 peaceful, you certainly need to talk to the people when the
 16 situation is not peaceful, when there's violence and when
 17 there's been death. You're not suggesting to me that
 18 negotiations, or the discussions are only appropriate when
 19 it's peaceful? It's precisely when it's violent that you
 20 need to avoid further violence, you need to talk.
 21 MR DA COSTA: Yes, I have no argument
 22 with that, so –
 23 MR BUDLENDER SC: That's the point I'm
 24 trying to make –
 25 MR DA COSTA: It's just that under, when

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1 things are volatile and violent and so on you need to at
 2 least be able to establish some sort of controlled
 3 environment where that is conducive to having such
 4 discussion.
 5 MR BUDLENDER SC: I don't disagree with
 6 that. What I'm suggesting to you is that if it was, if you
 7 had no option but to talk in June/July 2012, you certainly
 8 had no option but to talk in mid-August 2012 when 10 people
 9 were dead and when the situation was very threatening and
 10 likely to get worse.
 11 MR DA COSTA: That may be so.
 12 MR BUDLENDER SC: Yes, and in fact Lonmin
 13 finally recognised that after the shootings of the 16th of
 14 August when it did engage in discussions directly with
 15 representatives of the strikers.
 16 MR DA COSTA: That's correct. I mean
 17 those discussions were directly with representatives of the
 18 strikers.
 19 MR BUDLENDER SC: Yes.
 20 MR DA COSTA: But also involved the other
 21 role players in the impasse.
 22 CHAIRPERSON: Yes, but the non-unionised
 23 people, or the people who weren't going through the unions,
 24 they were actually listed, set out in the agreement that
 25 was finally concluded as a separate party, weren't they?

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1 MR DA COSTA: Yes, they were as a
 2 separate party, represented by some delegates, yes.
 3 COMMISSIONER HEMRAJ: There had also –
 4 MR BUDLENDER SC: So I want to ask you –
 5 COMMISSIONER HEMRAJ: Sorry.
 6 MR BUDLENDER SC: I'm sorry.
 7 COMMISSIONER HEMRAJ: There had also to
 8 be a willingness to want to talk in mid-August.
 9 MR DA COSTA: Ja, certainly. Like I say,
 10 a willingness from all parties at that point in time, yes.
 11 MR BUDLENDER SC: The strikers also
 12 wanted to talk before the shootings, didn't they?
 13 MR DA COSTA: Well –
 14 MR BUDLENDER SC: That's what they said
 15 their demand was.
 16 MR DA COSTA: My understanding of the
 17 demand from the strikers at the time before the shooting
 18 was that the management, management or management
 19 representatives must come to them at, on the koppie to hear
 20 their demand. It wasn't, from what I understand and my
 21 interpretation of the situation, it wasn't a request of can
 22 we get some delegates together and engage in negotiations
 23 or discussions or whatever. It was management must come
 24 out to the koppie and stand in front of us at the koppie
 25 and hear our demand.

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1 MR BUDLENDER SC: I've got two responses
 2 to that, or two questions to that, Mr Da Costa. Firstly,
 3 did Lonmin ever say to the strikers we will talk to you,
 4 but we will talk to your representatives in a controlled
 5 environment, not here where we're under threat at the
 6 koppie? Was that offer ever made by Lonmin?
 7 MR DA COSTA: The position of the company
 8 at that point was that we were prepared to engage in
 9 discussions with the recognised representatives of the –
 10 MR BUDLENDER SC: Of the whole workforce?
 11 MR DA COSTA: Of the workforce.
 12 CHAIRPERSON: Which meant NUM?
 13 MR DA COSTA: It would have been NUM at
 14 that stage, yes.
 15 CHAIRPERSON: It was about remuneration,
 16 so it would have been through NUM.
 17 MR DA COSTA: Sorry, Chair?
 18 CHAIRPERSON: I say the negotiations or
 19 discussions, whatever you call them, would have been about
 20 remuneration, the quantum of remuneration. So the
 21 established structure would have been negotiation with NUM.
 22 MR DA COSTA: Yes, it would have been.
 23 CHAIRPERSON: Ja, and you said earlier
 24 when you discussed the reasons why you were prepared to
 25 talk to the people in July was they didn't want to go

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1 through the union, didn't want to go, which meant they
 2 didn't want to go through NUM. Is that right?
 3 MR DA COSTA: Yes, that's correct.
 4 CHAIRPERSON: Did you know why they
 5 didn't want to go through NUM?
 6 MR DA COSTA: They weren't specific about
 7 that, no. I, and I did ask them. In fact I'm wrong. When
 8 I asked them why they didn't want the unions involved, what
 9 they said to me at that stage was, "This is a rock drill
 10 operator issue and in fact it's a Karee rock drill operator
 11 issue, it's not an entire Lonmin issue, so therefore the
 12 unions have no place in this discussion, it's our
 13 discussion with you as rock drill operators."
 14 MR BUDLENDER SC: Chair, I'll come back
 15 to that a bit later, if I may, just to finish of this point
 16 first. The reason Lonmin gave for not talking to
 17 representatives of the strikers was not that it was unsafe
 18 at the koppie, it was that as a matter of principle they
 19 would speak to the strikers only through the recognised
 20 representatives, i.e. NUM. Is that correct?
 21 MR DA COSTA: No, it wasn't just that.
 22 The position of Lonmin management was that they could not
 23 go out to the koppie because you know, having assessed the
 24 risks of sending a management person or executive out to
 25 the koppie at that point, that the risks of something going

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1 bad were extremely high –
 2 MR BUDLENDER SC: I understand that –
 3 MR DA COSTA: So they weren't prepared to
 4 take that risk.
 5 MR BUDLENDER SC: I asked you, and let me
 6 ask you again; did Lonmin ever say to the strikers we are
 7 willing to talk to your representatives chosen by you, as
 8 long as it is in a safe and controlled environment? Was
 9 that offer ever made to the strikers?
 10 MR DA COSTA: As far as I know the only
 11 offer that was made to the strikers was please lay down
 12 your weapons, come off the koppie, get people back to work,
 13 and then we can discuss these issues in organised
 14 structures.
 15 MR BUDLENDER SC: Through NUM.
 16 MR DA COSTA: It would have been through
 17 NUM, yes.
 18 MR BUDLENDER SC: Yes.
 19 CHAIRPERSON: Now Mr Budlender, I was
 20 proposing to take the tea adjournment at some stage now,
 21 but when it's convenient for you please let me know.
 22 MR BUDLENDER SC: Thank you, Chair.
 23 Well, I want to put it to you for comment because
 24 submissions will no doubt be made to the Commission at the
 25 end of the hearing that the refusal to talk directly to the

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1 strikers was the consequence of a rigid adherence to the
 2 principle of speaking to them only through NUM and this
 3 refusal was a mistake which had tragic consequences. Would
 4 you like to comment on that?
 5 MR DA COSTA: Ja, I don't think the
 6 refusal was only because of rigid, was because of a rigid
 7 stance.
 8 CHAIRPERSON: It may not only have been
 9 because of it, but was it one of the reasons?
 10 MR DA COSTA: Well, as I – I think the
 11 company wanted to stay within the organised structure that
 12 was in place, but the other issue was certainly that we
 13 wouldn't send somebody out to the koppie in that
 14 uncontrolled volatile situation where the people there were
 15 quite aggressive and confrontational. It would have been
 16 irresponsible to send an executive out there when the risks
 17 were so high.
 18 MR BUDLENDER SC: You used the word
 19 "irresponsible." I'm afraid I'm driven to use it myself.
 20 Was it not irresponsible to refuse to talk to the
 21 representatives of the strikers at all even in a controlled
 22 environment?
 23 MR DA COSTA: But at no point was – well,
 24 again I wasn't close enough to the situation but my
 25 understanding is that at no point was there a delegation

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1 put forward that, you know, that there are these
 2 representatives of the strikers who have been elected to
 3 meet with management, let's have a meeting. I'm not aware
 4 that that ever happened before the 16th.
 5 MR BUDLENDER SC: And Lonmin never
 6 suggested it. All they said repeatedly was lay down your
 7 weapons, come down off the koppie, go back to work and then
 8 we will talk to you through NUM. That was consistently
 9 Lonmin's position.
 10 MR DA COSTA: That's my understanding.
 11 MR BUDLENDER SC: Yes. Chair, perhaps
 12 this might be a convenient time.
 13 CHAIRPERSON: We adjourn for 15 minutes.
 14 [COMMISSION ADJOURNS COMMISSION RESUMES]
 15 [15:18] CHAIRPERSON: The Commission resumes. Mr
 16 Da Costa, you're still under oath.
 17 MICHAEL GOMES DA COSTA: Yes, Chair.
 18 CHAIRPERSON: Mr Budlender.
 19 CROSS-EXAMINATION BY MR BUDLENDER SC (CONTD.):
 20 Mr Da Costa, by the 16th of August 2012 four of Lonmin's
 21 employees had been killed, each for either doing his job or
 22 just for going to work – Mr Fundi, Mr Mabelane, Mr Madibe
 23 and Mr Langa. All of them had been killed and each of
 24 them, as far as one can established, was killed because he
 25 was doing his job or because he was going to work. That's

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1 right, isn't it?

2 MR DA COSTA: Yes, that's right.

3 MR BUDLENDER SC: And as far as you were

4 concerned, or as far as – I don't mean, when I say "you" I

5 don't mean you personally. As far as Lonmin knew the

6 killings had probably been by some of the strikers.

7 MR DA COSTA: Yes, it certainly seemed

8 that way, yes.

9 MR BUDLENDER SC: Yes. A further

10 employee, Mr Twala, had been killed at the koppie.

11 MR DA COSTA: Yes, that's right.

12 MR BUDLENDER SC: Three more employees

13 had been killed in a clash with the SAPS on the 13th.

14 MR DA COSTA: That's correct.

15 MR BUDLENDER SC: Two members of the SAPS

16 had been killed in the same clash.

17 MR DA COSTA: Yes, that's correct.

18 MR BUDLENDER SC: So 10 people were dead,

19 right?

20 MR DA COSTA: Yes.

21 MR BUDLENDER SC: And Lonmin's position

22 was that it would talk to the strikers only through the

23 recognised channels, in other words through NUM. Is that

24 correct?

25 MR DA COSTA: That was the position at

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1 the time, yes. That –

2 MR BUDLENDER SC: Yes.

3 MR DA COSTA: - we would only talk

4 through the recognised structures that was in place, yes.

5 MR BUDLENDER SC: Yes, and then after the

6 16th of August another 34 people had been killed and Lonmin

7 then changed its position and was willing to talk directly

8 to the strikers, or their representatives. Is that

9 correct?

10 MR DA COSTA: That's correct. We then

11 went into a mediated negotiation process, yes.

12 MR BUDLENDER SC: Yes. I'd like you to

13 go – well, you don't have it. Could we have the transcript

14 of day 25, page 2582.

15 CHAIRPERSON: Line, Mr Budlender?

16 MR BUDLENDER SC: 2582, starting from

17 line 9. Now there Mr Mathunjwa of NUM is being cross-

18 examined by my learned friend Mr Burger on behalf of – or I

19 beg your pardon, of AMCU; somebody's going to be angry with

20 me for saying that. Mr Mathunjwa of AMCU is being cross-

21 examined by my learned friend Mr Burger on behalf of Lonmin

22 and Mr Mathunjwa in line 9 says, "The concluded agreements

23 after the shootings were the very same central forum that

24 was confirmed by Jomo Kwadi took place, which I wanted a

25 seat on. It's where then the strikers themselves had its

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1 own delegation which is that delegation of the strikers,

2 not a recognised entity, it's just workers forming

3 delegations. So it's where we then, then we said, and then

4 to come closer to your question, AMCU never influenced

5 anything. They signed on their behalf. They got the

6 mandate on their own from the mountain. So we just had a

7 seat there."

8 CHAIRPERSON: I take it that "they"

9 refers to the workers who were the delegation, not AMCU.

10 MR BUDLENDER SC: Yes.

11 CHAIRPERSON: Is that right?

12 MR BUDLENDER SC: It seems to be. And

13 then Mr Burger explains what Lonmin's position was, or is.

14 He says, "Mr Mathunjwa, that was a different situation. 34

15 people had been killed and NUM had by then agreed that

16 there would be a negotiation in order to obtain peace at

17 Lonmin. That was after the tragedy. This was before the

18 tragedy, you're trying to avoid it here." So just to clear

19 one piece of undergrowth; we've agreed I think that Lonmin

20 never said to NUM we think we should go and speak directly

21 to the strikers. That was never proposed by Lonmin.

22 MR DA COSTA: Not that I'm aware, no.

23 MR BUDLENDER SC: Right, so what had

24 happened was that this was now a different situation

25 because 34 people had been killed. What it amounts to is

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1 this; the death of 10 people - eight employees and two

2 members of the SAPS - before the 16th of August did not

3 cause Lonmin to speak directly to the strikers. Is that

4 correct?

5 MR DA COSTA: Well, we didn't speak

6 directly to the strikers at that point, no.

7 MR BUDLENDER SC: The deaths didn't bring

8 about that Lonmin thought we must now talk directly to the

9 strikers, those 10 deaths.

10 CHAIRPERSON: According to Mr Burger's

11 question the death of the 34 people was something that

12 happened and then there were negotiations after the

13 tragedy. He then goes on to say, "This was before the

14 tragedy." He's talking about what happened before the 16th.

15 Were the deaths of the 10 people not a tragedy?

16 MR DA COSTA: I'm sorry, Chair? I didn't

17 catch the last part.

18 CHAIRPERSON: Let's look at Mr Burger's

19 question. "Mr Mathunjwa, that was a different situation."

20 He's talking about what happened before the 16th. "That was

21 a different situation. 34 people had been killed and NUM

22 had by then agreed that there would be negotiations in

23 order to obtain peace at Lonmin. That was after the

24 tragedy. This was before the tragedy, you're trying to

25 avoid it here." Now what I'm asking you is was the deaths

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1 of the 10 people before the 16th not a tragedy?
 2 MR DA COSTA: No, I think the death of
 3 the 10 people before the strike, as I said – I mean before
 4 the events of the 16th, as I said just now was quite a, it
 5 was clearly traumatic, Chair, to be living through all of
 6 that. So it was a serious situation.
 7 MR BUDLENDER SC: And that's really, the
 8 point I'm seeking to ask you is this, Mr Da Costa; those
 9 deaths of 10 people before the 16th of August didn't have
 10 the result that Lonmin felt it should talk directly to the
 11 strikers. Is that correct?
 12 MR DA COSTA: Well, I think in my view
 13 what happened was after the events on the 16th where the 34
 14 people lost their lives the external world, or the rest of
 15 the country also woke up to the grey situation that was
 16 developing at Marikana, and there were a lot of other
 17 parties who became involved and started facilitation and,
 18 you know, offering to mediate and so on, and I think it's
 19 probably through a lot of those processes that these
 20 discussions then started happening, that we then had
 21 delegates elected from the striking workers, that the
 22 people in the NUM changed their attitudes, people in AMCU
 23 changed their attitude to some extent, and I guess the
 24 company then also changed its view on the situation and
 25 that's how these talks then got going.

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1 MR BUDLENDER SC: Mr Da Costa, let me ask
 2 you the question again, perhaps slightly differently. Is
 3 it correct that the deaths of 10 people before 16 August
 4 2012 did not bring about the result that Lonmin decided
 5 that it had to speak directly to the strikers? Is that
 6 correct?
 7 MR DA COSTA: Ja well at that point we
 8 had not taken the decision to –
 9 MR BUDLENDER SC: Yes.
 10 MR DA COSTA: - to talk directly to the
 11 strikers.
 12 MR BUDLENDER SC: The deaths of a further
 13 34 employees of Lonmin on the 16th of August did cause
 14 Lonmin to speak directly to the strikers. Is that correct?
 15 MR DA COSTA: That's – again I'm not sure
 16 that it was the death of the employees that caused Lonmin
 17 to speak to the strikers. We did speak to the strikers
 18 after that, but as I said, I mean it was, those 34 deaths
 19 brought a lot more attention onto what was going on in that
 20 area.
 21 MR BUDLENDER SC: Yes, but I take it
 22 Lonmin's attention was already – Lonmin didn't need its
 23 attention brought to what was going on; it was there, it
 24 was its company, its land and its employees. It didn't
 25 need international outcry to make it realise that there was

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1 a problem.
 2 MR DA COSTA: No, it didn't, but that
 3 outcry brought other people into the process who then were
 4 able to facilitate these discussions and were able to get
 5 the parties to shift from their positions and start talking
 6 to each other.
 7 MR BUDLENDER SC: Are you saying that if
 8 outside parties had not become involved, after the 16th of
 9 August Lonmin still wouldn't have talked directly to the
 10 strikers?
 11 MR DA COSTA: No, I'm not saying that,
 12 for sure. I'm just saying –
 13 MR BUDLENDER SC: Well, what do you say?
 14 MR DA COSTA: I'm just saying that I
 15 think that deaths assisted in getting the parties together.
 16 MR BUDLENDER SC: Well, Mr Burger, what
 17 he put seems to me consistent, with respect, with common
 18 sense. He says, "Mr Mathunjwa, that was a different
 19 situation. 34 people had been killed and NUM had by then
 20 agreed that there would be a negotiation in order to obtain
 21 peace at Lonmin. That was after the tragedy." It was the
 22 tragedy of the death of 34 people which triggered Lonmin's
 23 willingness to talk directly to the strikers, whether
 24 through mediators or not through mediators.
 25 MR DA COSTA: That may well have been.

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1 MR BUDLENDER SC: Now what I want to ask
 2 you is this, and I ask it to you not cynically or to score
 3 points, but it seems to me it's an important question which
 4 Lonmin has to answer. 10 deaths was not enough to cause
 5 that. Another 34 deaths was enough to cause that. What
 6 was the tipping point? How many people had to die before
 7 Lonmin was willing to talk directly to the strikers?
 8 MR DA COSTA: No, I don't think there was
 9 a tipping point.
 10 MR BUDLENDER SC: Well, it tipped, didn't
 11 it? It tipped from we won't talk to we will talk. Isn't
 12 that true?
 13 MR DA COSTA: Well, it did change from
 14 that we weren't talking and then we did engage with the
 15 striking workers after the 16th, yes.
 16 MR BUDLENDER SC: Well, can you explain
 17 to me the logic of what I understand to have been Lonmin's
 18 position – three positions: position 1, we will talk to the
 19 RDOs at Karee during June when there have been no deaths,
 20 but there's a threat of an unprotected strike. Second
 21 position, we will talk to the strikers in September when
 22 there have been 44 deaths. Third position in the middle,
 23 but we will not talk to the strikers in August when there
 24 have been 10 deaths. Now what's the logic of that?
 25 MR DA COSTA: Well, it is a difficult

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1 position, so –

2 MR BUDLENDER SC: It's a difficult

3 position to justify after the event, isn't it?

4 MR DA COSTA: I think at the time,

5 certainly when the RDOs came to me to talk to me I engaged

6 with them and, you know, under those circumstances I think

7 that was the right thing to do. As I explained earlier,

8 the situation was somewhat different then, it was more

9 normal. During the time when everybody was sitting on the

10 koppie it was a lot more volatile. It was an abnormal

11 situation. I think at that point in time all the parties

12 had fairly fixed positions, be it the company, the people

13 sitting on the koppie, the recognised unions, everybody had

14 a fixed position –

15 MR BUDLENDER SC: But there was no

16 position –

17 MR DA COSTA: - at that point in time –

18 MR BUDLENDER SC: I'm sorry to interrupt.

19 There was position which was more fixed than Lonmin's

20 position, which was we will only talk to you if you lay

21 down your weapons, you come down off the koppie and you go

22 back to work and then we will talk to you through NUM.

23 That was a fixed position if there were ever a fixed

24 position.

25 MR DA COSTA: Ja well, I think, you know,

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1 on the counter side though the position of the employees on

2 the koppie, it was also give us R12 500, we'll go back to

3 work and you come here to the koppie and come and talk to

4 us, and the NUM's position was this is not our situation,

5 we're not getting involved in this, it's for the company

6 to –

7 MR BUDLENDER SC: So NUM weren't an

8 obstacle?

9 MR DA COSTA: I'm sorry?

10 MR BUDLENDER SC: NUM weren't an

11 obstacle. They said, it's not our business.

12 MR DA COSTA: Ja, they weren't really

13 prepared to get involved in it. So now in my view all the

14 parties were holding fairly fixed positions –

15 MR BUDLENDER SC: Well, the one party

16 which we won't speak to you at all was NUM. The strikers

17 were never offered the opportunity of talking to

18 representatives. Lonmin took up an absolutist position

19 which said we will not talk to you other than through NUM

20 when you've left the koppie, put down your weapons and gone

21 back to work. Is that not the most absolutist position of

22 all?

23 MR DA COSTA: No, as I said I think the

24 other side had a fairly fixed position too. So it probably

25 wasn't the best situation, wasn't conducive to entering

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1 into discussions and finding an amicable solution to –

2 MR BUDLENDER SC: No, I think you're

3 wrong –

4 MR DA COSTA: - to the problem –

5 MR BUDLENDER SC: Sorry. I'm sorry to

6 interrupt. I think you're wrong, Mr Da Costa. What the

7 strikers kept on saying was we want to talk to management.

8 It's true they said we want 12 and a half thousand rand a

9 month, but they didn't say we won't talk to you unless you

10 give us 12 and a half thousand rand a month. They said we

11 want to talk to management. We want to talk to them about

12 our wage demands.

13 MR DA COSTA: My understanding of the

14 situation is we want management to come to us, to the

15 koppie, to come and – so that we can talk to them about our

16 12 and a half thousand rand demand.

17 MR BUDLENDER SC: Yes. They wanted to

18 talk.

19 MR DA COSTA: In my view they wanted us

20 to come there to tell them they could have the R12 500 so

21 that they could go back to work.

22 MR BUDLENDER SC: Well, of course they

23 did. I mean that's, obviously they did, but they didn't

24 say we will only talk to you if you agree to give us

25 R12 500. They said we want to talk.

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1 MR DA COSTA: Again –

2 MR BURGER SC: That's in fact not the

3 evidence, Sir. The evidence is that the strikers at the

4 koppie wanted to talk about 12 and a half thousand and when

5 they would be paid that, not whether they would be paid

6 that.

7 MR BUDLENDER SC: We'll leave that for

8 argument, Chair.

9 COMMISSIONER HEMRAJ: Are you saying that

10 one of the reasons that contributed to the attitude of not

11 wanting to go to the koppie to speak to the miners was that

12 you would not be able to comply with what they wanted,

13 which was R12 500?

14 MR DA COSTA: I think the principal

15 reason of not wanting to go to the koppie was the risk to

16 the safety of whoever would be going to the koppie. So the

17 only point is –

18 CHAIRPERSON: How – sorry, carry on first

19 and then I'll ask the question.

20 MR DA COSTA: Ja, so the only point I was

21 making now is that, you know, if Lonmin had a fixed

22 position in this, the other parties also had a pretty fixed

23 position and my understanding of the position of the people

24 sitting on the koppie was give us R12 500 and then we'll go

25 back to work, and they weren't asking, you know, can, we

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1 want to talk to management about this, can we elect a
2 delegation to go and speak to management. It was a demand
3 that management should come to the koppie and speak to them
4 at the koppie and come and tell them about the R12 500. So
5 you know, it was also a pretty fixed position. It wasn't,
6 my understanding it's not, it wasn't an invitation to have
7 a negotiation or a discussion around this amount, it was
8 come here to us where we are and come and talk about, come
9 and tell us about how we're going to get this R12 500.
10 That's my understanding of the situation.

11 CHAIRPERSON: I just want to ask you
12 about something else. You said you were also concerned
13 about the security aspects; irresponsible, I think you
14 said, to expect Lonmin to go to the koppie because of the
15 danger and so forth.

16 MR DA COSTA: Yes, Chair.

17 CHAIRPERSON: Now we know that eventually
18 on the Wednesday the two trade union presidents went to the
19 koppie to speak to the miners, mineworkers. Mr Zokwana
20 spoke to them briefly and didn't find much support from
21 them, so he left. Mr Mathunjwa spoke to them and then
22 agreed to come back the next day. But both of them spoke
23 from a Nyala. The police in fact wouldn't allow either of
24 them to leave the Nyala because the police were concerned
25 about safety considerations. So what would have prevented

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1 speak to them. I mean that, you know, it certainly wasn't
2 conducive to that, and as I said if you're inside a Nyala
3 where people can't even see you and you're just talking
4 there, it's really not a, it's not the sort of environment
5 that's conducive to reaching any kind of agreement.

6 MR BUDLENDER SC: Mr Da Costa, just to
7 round off on the question of fixed or inflexible positions;
8 did the strikers ever set any precondition for talking to
9 management?

10 MR DA COSTA: You know, as I said I don't
11 think there was any invitation from – you're talking before
12 the 16th?

13 MR BUDLENDER SC: While they were on the
14 koppie.

15 MR DA COSTA: The only demand from the
16 strikers was that management come to the koppie to talk
17 about the R12 500.

18 MR BUDLENDER SC: Yes.

19 MR DA COSTA: There was no, I mean the
20 only condition was that you come to the koppie and come and
21 talk about the R12 500.

22 MR BUDLENDER SC: Management set three
23 preconditions; you've got to lay down your weapons – four
24 preconditions; you've got to lay down your weapons, you've
25 got to leave the koppie, you've got to go back to work and

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1 Lonmin from saying we'll go to the koppie, we're concerned
2 about safety, but if we can do what the trade union people
3 did and speak through a loudhailer and so forth from a
4 Nyala, that there would have been no safety problems at
5 all, or would there have been? I don't understand that
6 point that you're making.

7 [15:38] MR DA COSTA: I guess management could
8 have gone in a Nyala, but you know, again if you're going
9 to approach people and go there with the aim of having a
10 discussion or a negotiation, having an aim of finding some
11 sort of resolution to the impasse, I mean standing in a
12 Nyala with a loudhailer in front of 3 000 aggressive people
13 is not really a conducive environment to be able to get to
14 some sort of solution to the problem.

15 CHAIRPERSON: I can understand that. The
16 argument then would be we don't want to go to the mountain
17 and speak because even though safety concerns can be
18 addressed, the circumstances of the discussion would not be
19 conducive to getting a settlement. I can understand that
20 argument, but not the safety point. That's the one I have
21 difficulty with.

22 MR DA COSTA: Ja, you know, I know, I
23 guess you know, in my, when I'm saying, when I'm thinking
24 of a risky situation I'm thinking of going to stand in
25 front of a group of employees as we normally would and

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1 you've got to speak to us through NUM, otherwise management
2 wasn't prepared to speak. That's right?

3 MR DA COSTA: Those were the conditions
4 that were laid down, yes.

5 MR BUDLENDER SC: Now let's be practical.
6 That was an inflexible position which is in no way to be
7 compared with any rigidity or inflexibility of the
8 strikers.

9 MR DA COSTA: No, I maintain my point
10 that the strikers on the koppie were, they had a very
11 definite fixed position that the only time they would come
12 off the koppie is once management had been there and given
13 them the R12 500 that they were looking for, and that was
14 their position, which was extremely inflexible in my view.

15 MR BUDLENDER SC: I'm not talking about
16 preconditions for coming off the koppie. I'm talking about
17 preconditions for talking. Management had four
18 preconditions for talking. The strikers had perhaps one
19 precondition, you must come to the koppie to talk to us.

20 MR DA COSTA: Well, their position in my
21 view was that they're not even really prepared to talk
22 about anything else except give us the R12 500, then we
23 will come down from the koppie and then we will return to
24 work. That's –

25 MR BUDLENDER SC: And Lonmin never –

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1 MR DA COSTA: That's the way I understood
2 their position.

3 MR BUDLENDER SC: Lonmin never tested
4 whether the strikers were inflexible, whether they were
5 willing to send representatives to a safe place or whether
6 they were willing to talk about a lesser amount. Lonmin
7 wasn't even prepared to go there, wasn't prepared to enter
8 into the discussions at all. So it never tested whether
9 there were in fact rigid preconditions.

10 MR DA COSTA: I'm not aware of whether it
11 was tested or not.

12 MR BUDLENDER SC: Yes, alright. Let me
13 move on then. I want to ask you some questions about the
14 relationship between the strikers and the NUM and AMCU.
15 Now we know that at the time of the events of August 2012
16 Lonmin's understanding was that the root cause of the
17 conflict was inter-union rivalry between NUM and AMCU.

18 MR DA COSTA: Yes, that's right.

19 MR BUDLENDER SC: And that conflict went
20 beyond the normal competition one sees when unions compete
21 for membership. It involved physical conflict between the
22 two groups.

23 MR DA COSTA: There had been some – well,
24 you know, I guess before the 9th of August those conflicts
25 weren't obvious and weren't, you know, I guess weren't

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1 really violent. It was more competing for space at that
2 time, but from the events that took place on the morning of
3 the 11th of August, from there on forward it started
4 becoming more of a physical conflict, yes.

5 MR BUDLENDER SC: Yes, and there was a
6 bad relationships between the strikers and the NUM. Would
7 you agree with that?

8 MR DA COSTA: Ja, I guess that would be
9 correct, although there were quite a number of strikers who
10 were still NUM members at the time they went on strike, but
11 ja, probably the majority of the strikers had some
12 animosity towards the NUM.

13 MR BUDLENDER SC: Yes, that's fair
14 enough. Could we go to day 36? It's the transcript of day
15 36, page 3874, lines 4 to 12. This is again Mr Gcilitshana
16 of NUM giving evidence. At line 4 he's asked, "It wouldn't
17 assist in September 2012 for NUM and Lonmin to reach an
18 agreement through the normal processes about how the
19 dispute could be resolved because the striking workers were
20 not adequately represented by NUM at that time; they didn't
21 have confidence in NUM." And Mr Gcilitshana very fairly
22 says, "It will be difficult for me to say yes or no on that
23 one, but what I agree with you that there was loss of
24 confidence to the NUM." You see that?

25 MR DA COSTA: Yes, I see that.

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1 MR BUDLENDER SC: So the striking workers
2 didn't have confidence in the NUM. The NUM itself says
3 that.

4 MR DA COSTA: Yes, I see they say so.

5 MR BUDLENDER SC: The RDOs felt that they
6 had been let down by the NUM in its negotiations with
7 management. Are you aware of that?

8 MR DA COSTA: They never said that as
9 such to me, but it could be so.

10 MR BUDLENDER SC: There was a physical
11 confrontation on Saturday, the 11th of August, when strikers
12 marched to the NUM offices, correct?

13 MR DA COSTA: Yes, that's correct.

14 MR BUDLENDER SC: Some of the strikers
15 who marched on the NUM offices were armed with dangerous
16 weapons.

17 MR DA COSTA: That's correct.

18 MR BUDLENDER SC: NUM officials fired
19 shots at the strikers. They injured two of the strikers
20 and at the time the strikers thought that those two of
21 their members had been killed by the NUM officials.

22 MR DA COSTA: Yes, that's right.

23 MR BUDLENDER SC: It was a source of
24 great anger on their part because they thought their
25 members had been killed by union officials.

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1 MR DA COSTA: That's how I understand it,
2 yes.

3 MR BUDLENDER SC: Various people wrote
4 very florid things about that, but it turned out not to be
5 true.

6 MR DA COSTA: Correct.

7 MR BUDLENDER SC: The strikers repeatedly
8 said that the reason they were carrying dangerous weapons
9 was that they feared that NUM members would attack them and
10 that they wanted to defend themselves, correct?

11 MR DA COSTA: That's –

12 MR BUDLENDER SC: That's what they said.

13 MR DA COSTA: That was their assertion,
14 yes.

15 MR BUDLENDER SC: Yes, I'm not saying
16 that's necessarily true. They must answer for that, but
17 that was what they said.

18 MR DA COSTA: That is what they said,
19 yes.

20 MR BUDLENDER SC: The NUM was trying to
21 persuade workers to go back to work.

22 MR DA COSTA: Yes, they were at the time.

23 MR BUDLENDER SC: To break the strike.

24 MR DA COSTA: That's correct. I think it
25 was an unprotected strike. They wanted their members to

Page 30103

1 get back to work.

2 MR BUDLENDER SC: And the strikers were

3 very angry about this.

4 MR DA COSTA: Yes.

5 MR BUDLENDER SC: Some of the strikers

6 attempted to prevent workers, including NUM members, from

7 going to work.

8 MR DA COSTA: They did.

9 MR BUDLENDER SC: The strikers killed

10 some of the Lonmin employees.

11 MR DA COSTA: Yes, they did.

12 MR BUDLENDER SC: Mr Julius Langa was

13 killed early on the morning of Monday the 13th of August

14 when he was on his way to work.

15 MR DA COSTA: Yes, that's right.

16 MR BUDLENDER SC: It seems that he was

17 killed for going to work.

18 MR DA COSTA: I believe so.

19 MR BUDLENDER SC: When Mr Zokwana of NUM

20 attempted to speak to the strikers at the koppie they were

21 hostile to him. They wouldn't listen to him and they told

22 him to go away.

23 MR DA COSTA: That's what I heard, yes.

24 CHAIRPERSON: And they also sing an anti-

25 Zokwana or anti-NUM song when –

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1 MR BUDLENDER SC: Sang a rather rude song

2 in the process, yes.

3 CHAIRPERSON: Yes.

4 MR DA COSTA: Ja, I heard that that did

5 take place, yes.

6 MR BUDLENDER SC: In short the strikers'

7 grievance wasn't only against Lonmin, it was also partly

8 against NUM.

9 MR DA COSTA: It would appear so.

10 MR BUDLENDER SC: Some of them saw NUM as

11 the enemy.

12 MR DA COSTA: Some of them.

13 MR BUDLENDER SC: And what Lonmin said

14 was if you want to talk to us, talk to us through the NUM.

15 MR DA COSTA: I think what Lonmin said is

16 if you want to talk to us, talk to us through the

17 recognised structures, through the recognised union. At no

18 point did we say that you are not allowed to change your

19 union affiliation. At no point did we say that you cannot

20 become a member of another union and you know, should,

21 obviously if people had decided to exercise that right and

22 become members of a different union, AMCU for example, then

23 the membership of that alternate union would have grown –

24 CHAIRPERSON: How long would that have

25 taken? How long would the process have taken for NUM to

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1 lose its position as the recognised union and for AMCU to

2 take its place? Wouldn't there have had to be

3 verification? Apart from the fact that people had to leave

4 the one union to join the other, wouldn't there have had to

5 be verification process and things of that kind?

6 MR DA COSTA: Well, we'd have to check to

7 see if, you know, that people have signed stop orders to

8 change unions –

9 CHAIRPERSON: Yes, yes, I understand.

10 How long did it –

11 MR DA COSTA: But the –

12 CHAIRPERSON: Sorry to interrupt you.

13 How long did it in fact take for NUM to lose its recognised

14 status and for AMCU to gain it?

15 MR DA COSTA: I believe NUM lost their

16 recognised status towards the end of 2013 and AMCU then

17 was, we ascertained that AMCU was representing the majority

18 of the employees and then began negotiating a recognition

19 agreement with AMCU, which is round about, if my memory

20 serves me correct, round about February this year.

21 CHAIRPERSON: Yes, now you see, we had a

22 serious problem with people on the koppie and people being

23 killed and disputes about an unprotected strike and so

24 forth, and this was going to be solved by, it was hoped by

25 negotiation. It was said it's got to be through the

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1 recognised union because that's the structure. So what was

2 going to happen to this dispute while the lengthy process

3 of changing the identity of the recognised union was going

4 to take place?

5 MR DA COSTA: Ja, Chair, I understand

6 that, but my – the point I'm making is that it was not, if

7 people were, had lost confidence in the NUM and if they did

8 not want to negotiate or work through the NUM, this is now

9 even before the unprotected strike action began, AMCU had a

10 presence at Karee. In fact I know that AMCU was trying to

11 recruit across the entire Lonmin. So if it was that the

12 employees had, really had lost that much confidence in NUM

13 and they no longer wanted NUM to represent them, it wasn't

14 as if they did not have another alternative. They had

15 another alternative. They could have joined –

16 CHAIRPERSON: What I was –

17 MR DA COSTA: They could have joined

18 AMCU, which was an alternative union.

19 CHAIRPERSON: They had another

20 alternative, but it was a long-term alternative, wasn't it?

21 There would have been a verification process to make sure

22 that the majority had indeed left NUM and was now behind

23 AMCU. That couldn't have happened overnight, could it? It

24 would probably have taken at the very least several months,

25 wouldn't it?

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1 MR DA COSTA: It would have taken several
2 months –
3 CHAIRPERSON: Ja, so our –
4 MR DA COSTA: That's what the law
5 requires of –
6 CHAIRPERSON: I know, but how practical
7 therefore would it have been to have said to the
8 mineworkers on the koppie come down, negotiate through the
9 established structures, of course you realise that will
10 take several months before the union you want will be the
11 union vested with negotiating powers. Would that have been
12 a practical suggestion to make to them to solving the
13 problem?
14 MR DA COSTA: Well, I mean once they were
15 on the koppie it was a difficult situation. However, you
16 know, I make the point again that we, to remain within the
17 bounds of the law and to maintain the collective bargaining
18 structure and the fabric of that, you would want to conduct
19 your engagements through recognised structures that you
20 want in place, that you have in place, and you know, if
21 those structures are going to change you would want them to
22 change in an orderly fashion. So we were, what we were
23 being faced with was a very disorderly change of that
24 organised bargaining structure that was in place, and it
25 was a difficult situation to be faced with. So the company

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1 took the stance that we did not want to undermine the
2 collective bargaining structures and therefore we wanted to
3 address this and speak, sort it out through the structures
4 that we had established.
5 MR BUDLENDER SC: Mr Da Costa, as at
6 August 2012 the strikers had no alternative if they wanted
7 to speak to Lonmin. Their only option was to lay down
8 their weapons, leave the koppie, go back to work and speak
9 to Lonmin through NUM, as of August 2012.
10 MR DA COSTA: Speak to Lonmin through
11 NUM, or go back to work. Again lay down the weapons, go
12 back to work, change your union membership –
13 MR BUDLENDER SC: But if they –
14 MR DA COSTA: Change it to something else
15 and then we establish a new structure and we talk.
16 MR BUDLENDER SC: But if they wanted to
17 talk to Lonmin in August or September or October or
18 November or December of 2012, the only organisation through
19 which they could talk to Lonmin was the NUM.
20 MR DA COSTA: At that point.
21 MR BUDLENDER SC: Yes.
22 MR DA COSTA: But if the employees had
23 been at work and there was a mass resignation from NUM and
24 they joined an alternative union, I'm sure we would have
25 been prepared to go into negotiations to recognise that

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1 union and then conduct the discussion through that union.
2 MR BUDLENDER SC: Isn't that what
3 happened? And it took more than a year.
4 MR DA COSTA: Yes, but –
5 MR BUDLENDER SC: It was only at the end
6 of 2013 that NUM lost its status and only in 2014 that AMCU
7 gained that status.
8 MR DA COSTA: Yes, that's correct,
9 because of certain clauses in the recognition agreement
10 that are negotiated with the unions.
11 MR BUDLENDER SC: But NUM was not an
12 obstacle to your talking directly to the strikers. We've
13 had this two or three times now. NUM did not object.
14 MR DA COSTA: Well, NUM said to us that
15 they are not getting involved in this because it is not
16 their issue.
17 MR BUDLENDER SC: Yes.
18 MR DA COSTA: However, they did not say
19 it's okay to go and conclude some sort of agreement, or
20 reach some solution and agreement with the strikers sitting
21 on the koppie –
22 MR BUDLENDER SC: NUM never said to you
23 or suggested to you or implied to you that they would
24 object to Lonmin talking directly to the strikers or their
25 representatives.

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1 MR DA COSTA: Ja, not as far as I know.
2 MR BUDLENDER SC: No.
3 COMMISSIONER HEMRAJ: But if you, if
4 Lonmin thought that the correct thing for the strikers to
5 do would be to go back to work, lay down their weapons, go
6 back to work and then change their union, what in effect
7 would have happened is that would have been the end of the
8 strike and you would have them back at work for a good many
9 months before another union would be in a position to
10 negotiate their salaries on their behalf.
11 MR DA COSTA: Well, that would probably
12 be the case, yes.
13 MR BUDLENDER SC: So to sum up, if we can
14 perhaps close for today on this; as at August 2012 Lonmin
15 was faced with 3 000, approximately, strikers on the koppie
16 who were angry. There had been violence. They said that
17 they wanted to talk to Lonmin and Lonmin's position was we
18 will talk to you but for the foreseeable future, until such
19 time as other processes have taken place, we will talk to
20 you only through NUM, and NUM was the organisation in which
21 they didn't have confidence, the organisation which they
22 felt had let them down, the organisation with which they
23 were in a physical conflict and confrontation, the
24 organisation which they thought had killed two of their
25 members, the organisation which they said they thought were

1 under threat from, the organisation which had attempted to
2 break the strike by persuading workers to go back to work,
3 and the organisation which some of them saw as the enemy.
4 [15:58] Lonmin's position was those are the people you
5 should speak to. Those are the people through whom you
6 should speak to us. As of August, September, October,
7 November, December. Is that correct?

8 MR DA COSTA: That's correct. That was
9 the, they were the recognised union at that point in time.

10 MR BUDLENDER SC: Chair, I wonder if this
11 is a convenient time.

12 CHAIRPERSON: We'll adjourn now until
13 Thursday morning – unfortunately we can't sit tomorrow here
14 because the chamber is not available and it's not possible
15 for us to transport all the equipment to some other
16 alternative venue for tomorrow and then bring it back again
17 on Thursday. So we're adjourning now until 9 o'clock on
18 Thursday morning.

19 [COMMISSION ADJOURNED]

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