

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 242

10 JUNE 2014

PAGES 30442 TO 30618



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1 [PROCEEDINGS ON 10 JUNE 2014]
 2 [09:33] CHAIRPERSON: The Commission resumes. We
 3 were requested this morning by the representatives of the
 4 South African Police Service to grant them extra time
 5 before starting because they only at a late stage received
 6 notice of documents which are going to be relied on in
 7 cross-examination and I understand that since then they
 8 have, after 9 o'clock this morning they received four other
 9 documents which are going to be relied on by the families
 10 in cross-examination. This is not a satisfactory way of
 11 proceeding. It means that they will require extra time at
 12 some stage before cross-examination begins. I hope they
 13 can deal with it during the first break but if not,
 14 obviously I have to give them that time and this is totally
 15 unacceptable and in future if this sort of thing happens I
 16 won't allow cross-examination to take place on documents
 17 that are produced in a late fashion like that. And also,
 18 of course, not only is it necessary for the Police Service
 19 to read the documents, it's necessary for us to read them
 20 as well so that we can perform our duties properly. I
 21 trust that it'll be unnecessary for me ever to have to deal
 22 with a topic of this kind again. Ms Baloyi, are you going
 23 to call the witness?
 24 MS BALOYI: Indeed, Chair, thank you.
 25 Chair, the next witness for the SAPS is Colonel Kaizer Tlou

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1 Modiba.
 2 CHAIRPERSON: Colonel, would you please
 3 stand? Are you prepared to take the oath or do you wish to
 4 affirm?
 5 COLONEL MODIBA: Take the oath.
 6 CHAIRPERSON: You'll take the oath.
 7 COLONEL MODIBA: That's correct.
 8 CHAIRPERSON: Do you swear that the
 9 evidence you will give before this Commission will be the
 10 truth, the whole truth and nothing but the truth. Would
 11 you please raise your right hand and say, I swear, so help
 12 me God.
 13 COLONEL MODIBA: So help me God.
 14 CHAIRPERSON: I swear, so help me God.
 15 COLONEL MODIBA: I swear, so help me God.
 16 KAIZER TLOU MODIBA: (d.s.s.)
 17 CHAIRPERSON: Thank you, you may be
 18 seated. Ms Baloyi?
 19 EXAMINATION BY MS BALOYI: Thank you,
 20 Chair. Chair, perhaps the first thing to start with is the
 21 housekeeping issues. We have a number of new documents
 22 which are –
 23 CHAIRPERSON: Yes, sorry – [microphone
 24 off, inaudible] – something before you carry on. Ms
 25 Pillay, what is the next letter series for -

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1 MS PILLAY: Chair, it's ZZZ.
 2 CHAIRPERSON: ZZZ. Ms Hemraj was right
 3 and I was wrong. You've got – she says somewhat modestly
 4 and inaccurately, she's always right. What exhibits do you
 5 wish to hand in?
 6 MS BALOYI: Chair, the first document is
 7 the CV, it's the CV of Kaizer Modiba.
 8 CHAIRPERSON: Yes.
 9 MS BALOYI: ZZZ1, Chair.
 10 CHAIRPERSON: Yes.
 11 MS BALOYI: And the second document is an
 12 IPID statement which is dated the 23rd August 2012.
 13 CHAIRPERSON: ZZZ2?
 14 MS BALOYI: ZZZ2, Chair. Chair, the
 15 first document is a – it's the same as the IPID statement
 16 but it has a different date and it's not clear why it was
 17 typed again but we thought let's put it before the
 18 Commission.
 19 CHAIRPERSON: Sorry, is the first one
 20 typed, is the second one typed and the first one
 21 manuscript?
 22 MS BALOYI: Chairperson, what you have
 23 with the first IPID statement is you've got it under cover
 24 of an IPID documents with other notes, handwritten notes
 25 and then you've got the typed statement in there so we

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1 present that as a composite document, ZZZ2.
 2 CHAIRPERSON: Sorry, is ZZZ2 then items 2
 3 and 3 on your list or –
 4 MS BALOYI: Yes.
 5 CHAIRPERSON: Alright. Well, alright,
 6 okay. Let's make it ZZZ2.1 being the statement dated 23
 7 August and ZZZ2.2 being the one dated, which you say is
 8 virtually the same -
 9 MS BALOYI: That's in order, Chair.
 10 CHAIRPERSON: - 25th of August. Then you
 11 have a statement of the 12th November 2012.
 12 MS BALOYI: Yes, Chair.
 13 CHAIRPERSON: Is that ZZZ3?
 14 MS BALOYI: That is ZZZ3, Chair.
 15 CHAIRPERSON: Then you've got a further
 16 statement which we already have in –
 17 MS BALOYI: As MMM23.
 18 CHAIRPERSON: As MMM23.
 19 MS BALOYI: Yes, Chair.
 20 CHAIRPERSON: And then we have another
 21 statement –
 22 MS BALOYI: Yes, Chair.
 23 CHAIRPERSON: - of the 19th of December
 24 2013.
 25 MS BALOYI: Yes, Chair.

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1 CHAIRPERSON: Is that ZZZ4?
 2 MS BALOYI: That is ZZZ4, Chair.
 3 CHAIRPERSON: And then the others, other
 4 items in your bundle –
 5 MS BALOYI: Are already exhibits.
 6 CHAIRPERSON: - are previous exhibits.
 7 MS BALOYI: Indeed, Chair.
 8 CHAIRPERSON: Very well, please proceed.
 9 MS BALOYI: Thank you, Chair. Colonel
 10 Modiba, if we could start with ZZZ1 which is your CV, now
 11 you will see in the first page of that document under
 12 competencies and attributes it says you have 27 years'
 13 experience in law enforce, do you see that?
 14 COLONEL MODIBA: That's correct,
 15 Chairperson.
 16 MS BALOYI: Yes. Now if you turn to the
 17 third page, to page 3 of that document and you, the second
 18 heading "Previous employment" which is in bold, it says
 19 under period, the first period there is December 1998 to
 20 January 2002, you see that?
 21 COLONEL MODIBA: That's correct,
 22 Chairperson.
 23 MS BALOYI: And then if you go down still
 24 under that same heading you have another period which is
 25 December 1993 to December 1998, do you see that?

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1 COLONEL MODIBA: Yes, I can see,
 2 Chairperson.
 3 MS BALOYI: Yes. Now according to this
 4 it doesn't add up to the 27 years of experience that you
 5 have in law enforcement. Can we just talk about that?
 6 When did you join the SAPS?
 7 COLONEL MODIBA: Chairperson, I joined
 8 the SAPS in 1987, May 22.
 9 MS BALOYI: And at that time you
 10 underwent training?
 11 COLONEL MODIBA: That's correct, my
 12 training commenced on – in June. That was a six month
 13 training.
 14 MS BALOYI: Yes.
 15 COLONEL MODIBA: Until the end, until the
 16 3rd of December 1987.
 17 MS BALOYI: Okay and then from 1988 what
 18 did you do?
 19 COLONEL MODIBA: 1988, the beginning of
 20 1988 soon after I graduated from the college I went
 21 straight to riot squad unit, then it was riot unit which is
 22 now POP and then I worked there for two years.
 23 MS BALOYI: So that would've been 1988
 24 and '89?
 25 COLONEL MODIBA: That's correct,

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1 Chairperson.
 2 MS BALOYI: And then in 1990 what did you
 3 do?
 4 COLONEL MODIBA: 1990 I went to work in
 5 the crime prevention unit in plainclothes, like undercover,
 6 some sort of that.
 7 MS BALOYI: And for how long were you
 8 there?
 9 COLONEL MODIBA: I worked there until
 10 1993.
 11 MS BALOYI: Yes and on this page here we
 12 see that, on page 3 we see that in December, from December
 13 1993 to December 1998 you say you were in visible policing.
 14 COLONEL MODIBA: That's correct, that's
 15 when I moved to SAPS Soshanguve and there I was attached to
 16 visible policing.
 17 MS BALOYI: Okay. Well, the rest of it
 18 is set out in the CV. When did you join, for completeness,
 19 when did you join the NIU?
 20 COLONEL MODIBA: Chairperson, it was in
 21 2003.
 22 MS BALOYI: And you remain in the NIU
 23 today?
 24 COLONEL MODIBA: That's correct,
 25 Chairperson.

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1 MS BALOYI: Now the statement, you've
 2 deposed to quite a number of statements and perhaps if we
 3 could work from the statement that we have marked exhibit
 4 ZZZ4.
 5 COLONEL MODIBA: Can I get the date?
 6 MS BALOYI: That is the statement of the
 7 19th of December 2013, Chair.
 8 CHAIRPERSON: Item 6 in the bundle, it's
 9 not as legible as it might be but I think if we try hard we
 10 can read it.
 11 MS BALOYI: Now Colonel Modiba, this
 12 document at the top it says "Colonel Modiba, NIU, states
 13 under oath," "further under oath" and then the next line
 14 says, "Sitting in on Mattheus's consultation on 10 July
 15 2013." Can you explain to the Commission what that line
 16 refers to?
 17 COLONEL MODIBA: Which paragraph? Can I
 18 get the paragraph?
 19 MS BALOYI: The first line, the second
 20 line in that statement. In fact let me ask you the
 21 question differently. How did this statement come about?
 22 COLONEL MODIBA: This was the
 23 consultation with the evidence leaders.
 24 MS BALOYI: Yes?
 25 COLONEL MODIBA: Whereby they were

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1 interviewing me about the events that were in relation to
 2 Marikana events.
 3 MS BALOYI: Yes. Chairperson, perhaps I
 4 can put this on record just so that we save time instead of
 5 me taking the witness through this. This document was
 6 prepared by Mr Wesley following an interview and then was
 7 presented to the witness to look at and confirm the
 8 contents, that he's happy, and then it would have been
 9 converted into a statement. It seems within the SAPS there
 10 was misunderstanding and the witness signed this document
 11 prepared by Mr Wesley as if it's a statement and we decided
 12 that we would work on the basis of the document. Now –
 13 CHAIRPERSON: Who is Mattheus? Is that
 14 Mr Wesley's code name?
 15 MR WESLEY: No Chair, that's Mr Mojapelo.
 16 He's actually Mattheus Mojapelo but we call him Mattheus.
 17 CHAIRPERSON: Yes, yes – no, I suspect as
 18 much but you've been given the credit for the statement,
 19 it's actually Mr Mojapelo's credit for the statement, is
 20 that right?
 21 MR WESLEY: The notes which are there are
 22 in fact my notes, if I'm not mistaken, but what happened,
 23 they were notes that were forwarded together with the
 24 statement and instead the statement being signed, the notes
 25 were signed as a statement.

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1 CHAIRPERSON: Okay.
 2 MS BALOYI: Thank you, Chair. Now
 3 Colonel, at paragraph 1 of this document, of the statement,
 4 you tell us that you were, you first arrived or were first
 5 deployed in Marikana on the 14th of August 2012, is that
 6 correct?
 7 COLONEL MODIBA: That's correct,
 8 Chairperson.
 9 MS BALOYI: And then you say Brigadier
 10 Tsiloane gave a briefing about what had transpired a day
 11 before. Who is Brigadier Tsiloane?
 12 COLONEL MODIBA: Chairperson, Brigadier
 13 Tsiloane is the section head of national interventions.
 14 MS BALOYI: And in the second last
 15 sentence you say "Brigadier Tsiloane was one commander,"
 16 was our commander rather, "who represented NIU and spoke at
 17 the JOC for us." Do you see that? The second last
 18 sentence.
 19 COLONEL MODIBA: That's correct, I can
 20 see it, Chairperson.
 21 MS BALOYI: So he was the NIU JOC
 22 representative. Is that what you are conveying there?
 23 COLONEL MODIBA: That's correct,
 24 Chairperson.
 25 MS BALOYI: And then you, in the next

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1 paragraph you tell us that on the 15th you report, in fact
 2 in that first paragraph you tell us about your posting, I
 3 will not go into that. In the next paragraph you tell us
 4 that on the 15th you reported again to the JOC and you had
 5 the same posting as the previous day, is that correct?
 6 COLONEL MODIBA: That's correct,
 7 Chairperson.
 8 MS BALOYI: In paragraph 3 you say, "I
 9 was in charge of one group. Lieutenant-Colonel Nkebe was
 10 in charge of another group in the Karee Mine area and I
 11 think that a Captain Ntoyi from Durban may have been in
 12 charge of the third group with Lieutenant Nzela as his
 13 junior." These people that you refer to as in charge, are
 14 these NIU members?
 15 COLONEL MODIBA: Ja, I'm referring to the
 16 commanders that were working directly with me on the
 17 ground.
 18 MS BALOYI: Yes and these are NIU
 19 commanders? I'm confirming that with you.
 20 COLONEL MODIBA: They are NIU commanders,
 21 correct.
 22 CHAIRPERSON: And the members of the
 23 three groups referred to, the one you were in charge of,
 24 the one Lieutenant-Colonel Nkebe was in charge of and the
 25 one that the officer you think was Captain Ntoyi was in

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1 charge of, were they all NIU groups, groups of NIU members?
 2 COLONEL MODIBA: That's correct,
 3 Chairperson.
 4 CHAIRPERSON: Thank you.
 5 MS BALOYI: And then in paragraph 4 you
 6 tell us that there was a negotiating team that went to the
 7 koppie and then in paragraph, in the second sentence or
 8 second line, second sentence you say "During a briefing
 9 General Annandale gave a feedback that he was told that
 10 miners had agreed to lay down arms and were going to have
 11 some sort of night vigil and that we should not bother
 12 them. He went further to say that such development needs
 13 to be cascaded to the night shift group." You see that?
 14 COLONEL MODIBA: I can see.
 15 MS BALOYI: What does it mean, the
 16 development needs to be cascaded to the night shift group?
 17 COLONEL MODIBA: Here I was referring to
 18 the message which General Annandale conveyed to the
 19 officers that attended the briefing in the evening, that
 20 the striking miners are going to lay down their arms at the
 21 koppie, that they should not be disturbed and that the
 22 development –
 23 CHAIRPERSON: Sorry to interrupt. The
 24 person whose cell phone went off must please turn it off
 25 and if anyone else's cell phone goes off from now on, that

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1 person will have to leave the chamber. Proceed.
 2 COLONEL MODIBA: Thank you, Chairperson.
 3 The developments I'm referring to was soon after General
 4 Annandale briefed us in the JOC about the striking miners
 5 who were going to have a night vigil at koppie 1 whereby
 6 they were, they promised to lay, to leave their arms there
 7 and he further asked to say the group that was coming to
 8 work n the night need to be informed about such
 9 developments so that they don't disturb that process of
 10 night vigil.
 11 MS BALOYI: Now further in that paragraph
 12 you tell us that you had a hand-held radio on this day. Do
 13 you see that, and that you didn't have any serious problems
 14 with it?
 15 COLONEL MODIBA: Which line, Chairperson?
 16 MS BALOYI: Well, perhaps let me ask you
 17 – did you have a radio on that day?
 18 COLONEL MODIBA: Yes, I was issued with a
 19 radio.
 20 MS BALOYI: Okay and was it working
 21 properly?
 22 COLONEL MODIBA: No, the radio was not
 23 working properly. We always had problems with the
 24 communication.
 25 MS BALOYI: Yes. And then you say at the

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1 end of the day you were then told to report the next day at
 2 6H00, you see that right at the end of that paragraph?
 3 COLONEL MODIBA: Yes, I can see it.
 4 MS BALOYI: Now if you turn to the next
 5 page and we deal with the 16th you say in paragraph 5 that
 6 on the 16th you arrived at the JOC and there was a slight
 7 change with the posting. You were no longer, you say "I
 8 was no longer posted to key point but to the northern side
 9 of the koppie where the negotiations were taking place with
 10 the miners, the usual place where the miners gathered." Do
 11 you see that at the top of that paragraph?
 12 COLONEL MODIBA: Yes, I can see it.
 13 MS BALOYI: Now, if I could ask –
 14 COMMISSIONER HEMRAJ: What is key point,
 15 Colonel?
 16 COLONEL MODIBA: The key point I'm
 17 referring to, from day 1 when I arrived in Marikana I was
 18 posted at a certain spot that were named key points, each
 19 one was posted at those points.
 20 COMMISSIONER HEMRAJ: What was the key
 21 point?
 22 COLONEL MODIBA: My key point, I was
 23 focusing at NUM offices, smelters, the hospital and other
 24 areas close to those that I have mentioned.
 25 COMMISSIONER HEMRAJ: Thank you.

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1 MS BALOYI: Now if you would look at
 2 exhibit L slide 148? Now on this slide, where you say that
 3 "I was no longer posted to key point but to the northern
 4 side of the koppie where the negotiations were taking place
 5 with the miners, the usual place where the miners
 6 gathered," can you point out on this slide where it is that
 7 you say you were posted on the 16th?
 8 COLONEL MODIBA: I don't have a pointer
 9 with me, I don't know if I can be offered one. On this
 10 date, the 16th in the morning I was posted at northern side
 11 of koppie 1. However –
 12 CHAIRPERSON: What you indicate on the
 13 screen is the area in a green rectangle marked immediate
 14 response area 2.
 15 COLONEL MODIBA: That's correct,
 16 Chairperson. However, I came here with my team next to
 17 substation, that I realised later that I was not at the
 18 actual spot.
 19 [09:53] CHAIRPERSON: What you indicated was a
 20 spot, as one looks at the photograph, on the left-hand side
 21 of the top portion of the power station which is depicted
 22 on the screen. In other words the, at the bottom left
 23 corner of the photograph we have another green rectangle
 24 marked "Immediate response area 1." Above that are three
 25 essentially rectangular shapes which are, I understand, the

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1 power station, or one of the power stations at the mine,
 2 and the point you've shown us is to the left of the top
 3 rectangle of that power station area. Is that correct?
 4 COLONEL MODIBA: That's correct,
 5 Chairperson.
 6 MS BALOYI: So the left of the top
 7 rectangle, is that where you in fact positioned yourself?
 8 COLONEL MODIBA: Yes, Chairperson.
 9 MS BALOYI: And when was this? What time
 10 did you position yourself in that position?
 11 COLONEL MODIBA: I arrived there with my
 12 team at about 9 o'clock in the morning.
 13 MS BALOYI: And to get to that point, how
 14 did you get there? Were you driving a vehicle? Were you
 15 in a bus?
 16 COLONEL MODIBA: From the base until
 17 forward holding area 1 there were, as I've pointed we
 18 turned left there, that is forward holding area 1. We
 19 turned left throughout until we took off that gravel road,
 20 past those power station until that spot.
 21 CHAIRPERSON: What you indicate is
 22 firstly the area in the bottom right-hand corner of the
 23 photograph marked FHA1, which is the forward holding area
 24 1. You then show us that you went along the yellow road
 25 which is parallel with the bottom of the photograph until

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1 you reached the far end of immediate response area 1. You
 2 then turned right, there's a path or road indicated there,
 3 went up that road and then went around on the left-hand
 4 side of the three rectangles to which I referred earlier,
 5 which is part of the power station. Is that correct?
 6 COLONEL MODIBA: That's correct,
 7 Chairperson.
 8 MS BALOYI: And you remained there until
 9 when?
 10 COLONEL MODIBA: I remained there from 9
 11 o'clock until just before half past 2, 14:30, at just
 12 before that time.
 13 MS BALOYI: Yes.
 14 COLONEL MODIBA: Because we still had to
 15 go to debriefing at 14:30 at forward holding area 1, there.
 16 CHAIRPERSON: Did you leave your unit
 17 there and just go back yourself either alone or with one or
 18 more colleagues to forward holding area 1?
 19 COLONEL MODIBA: I left the team behind
 20 and I went to forward holding area 1 to receive further
 21 briefing, Chairperson.
 22 MS BALOYI: And then you say that "I was
 23 not close to the" – in the same paragraph 5, you say, "I
 24 was not close to negotiations, but could see this
 25 happening." And then you set out your purpose, still in

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1 paragraph 5 in the fifth line, you say, "Our purpose was to
 2 give operational supports to the disciplines that were
 3 involved on that side of the koppie in case they were
 4 attacked." You see that?
 5 COLONEL MODIBA: Yes, I can see it.
 6 MS BALOYI: And then you say you had 26
 7 members armed with R5s, sidearms (pistols). Is that,
 8 perhaps just to clarify, the members that you were with,
 9 what were they armed with?
 10 COLONEL MODIBA: They were armed with
 11 R5s, pistols, as well as the supporting equipments, it
 12 could be smoke grenades, stun grenades, but there I made
 13 specific about R5s and pistols.
 14 MS BALOYI: Yes, and what weapon did you
 15 carry?
 16 COLONEL MODIBA: I carried a pistol,
 17 Chairperson.
 18 MS BALOYI: Now if we move on to
 19 paragraph 6, you say, "There was a lot of movement going on
 20 that I could observe – miners going up and down, some going
 21 into koppie 3, some going to Karee Mine, some coming into
 22 the koppie and we just observed." You see that?
 23 COLONEL MODIBA: Yes, I can see it,
 24 Chairperson.
 25 MS BALOYI: And then you tell us that you

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1 heard on radio that there was a group of women in Nkaneng.
 2 Now if we move to paragraph 7, you say, "Then I received a
 3 call just in the afternoon to say all commanders must go
 4 and meet at forward holding area 1 at 2:30 to get further
 5 briefing." Who gave you this call?
 6 COLONEL MODIBA: It was Colonel Gaffley.
 7 As I mentioned earlier, Chairperson, that there was a huge
 8 communication problem. I could hear that he was trying to
 9 relay a message, but he couldn't get through, then he
 10 resorted to use a cell phone where he informed me about the
 11 planned briefing at 14:30 at forward holding area 1.
 12 MS BALOYI: Yes, and who is Colonel
 13 Gaffley?
 14 COLONEL MODIBA: Colonel Gaffley, then he
 15 was at Special Task Force. Now he's with us at National
 16 Intervention.
 17 COLONEL MODIBA: And then you say in
 18 paragraph 8, "At 14:30 I went to forward holding area as
 19 one of the commanders of the NIU." You see that?
 20 COLONEL MODIBA: Yes, I can see it.
 21 MS BALOYI: Okay, and you mention Captain
 22 Cwinyane. You say you went together with Captain Cwinyane
 23 and Lieutenant Ndlela of NIU. Is Captain Cwinyane also
 24 NIU?
 25 COLONEL MODIBA: That's correct,

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1 Chairperson. He's one of the platoon commanders at
 2 National Intervention Unit.
 3 MS BALOYI: And then you say, "At the
 4 briefing we were briefed by Lieutenant-Colonel Scott from a
 5 vehicle with Google," and all that. You see that?
 6 COLONEL MODIBA: Yes, I can see it.
 7 MS BALOYI: What did Lieutenant-Colonel
 8 Scott say in the briefing?
 9 COLONEL MODIBA: Colonel Scott called us
 10 at forward holding area 1 to brief us about plan of action,
 11 apart from what we have done in the morning. That's where
 12 each discipline was issued with a specific instruction.
 13 The instruction for National Intervention – in fact before
 14 that instruction as to what task we were going to do, he
 15 highlighted the point that we, during the negotiation the
 16 striking miners with the police negotiating team happened
 17 to be at loggerheads, that was that they were no longer
 18 going to lay down their arms. So the next plan of action
 19 was the approach that we're going to deal with that
 20 situation in that we're going to disperse them, disarm –
 21 disperse them from the koppie, encircle and disarm, but
 22 that's where now the roles were highlighted.
 23 MS BALOYI: Yes, what did he say would be
 24 the role of the NIU?
 25 COLONEL MODIBA: During that process of

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1 dispersal NIU was going to give a backup to POP and TRT in
 2 the formation of POP being in front, doing the dispersal,
 3 and TRT backing them and then National Intervention, and
 4 thereafter we were supposed to sweep koppie 1 along with
 5 Special Task Force.
 6 MS BALOYI: Now in fact in that paragraph
 7 8, if you look at the third line from the bottom you say,
 8 the third line from the bottom you say, "Our main role as
 9 NIU was to sweep koppie 1 to retrieve firearms and
 10 dangerous weapons and make sure it was safe for everyone
 11 who was going there, STF also to do this." You see that?
 12 COLONEL MODIBA: Yes, I can see it,
 13 Chairperson.
 14 MS BALOYI: And you also say TRT were
 15 assigned to sweep koppie 2. Is that what the briefing
 16 said?
 17 COLONEL MODIBA: Yes, that is, that was
 18 the role given to TRT after the initial dispersal.
 19 MS BALOYI: Now to get to this briefing,
 20 how did you get there? Did you walk? Did you drive?
 21 COLONEL MODIBA: I drove the state-owned
 22 vehicle that I was entrusted with.
 23 MS BALOYI: And then at paragraph 9 you
 24 say, "At 15:00 I called all 96 NIU members together near
 25 one of the power stations so that I could give them a

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1 briefing." You see that?
 2 COLONEL MODIBA: I can see it,
 3 Chairperson.
 4 MS BALOYI: Yes, now Colonel, if you
 5 would just explain, here you talk about 96 NIU members; in
 6 an earlier paragraph you spoke about 26 NIU members that
 7 were under your command. Won't you please explain where
 8 this 96 comes from?
 9 COLONEL MODIBA: Chairperson, it's the
 10 total number of all NI, all members that were deployed all
 11 over Marikana, although yes, they were, there was about few
 12 that was posted to give air support, but here I'm referring
 13 to those that were on the ground that were redeployed from
 14 the key points, as I earlier mentioned that we had key
 15 points in the beginning, then as we go along, on, then on
 16 the 16th myself and other 26 members were reposted to
 17 immediate reaction, that immediate, IRA2.
 18 MS BALOYI: Yes. Now if you would please
 19 indicate again with reference to L148 where you called the
 20 members to for the briefing, where you gathered?
 21 COLONEL MODIBA: We gathered somewhere
 22 there.
 23 CHAIRPERSON: What you indicate is along
 24 that yellow road, it's yellow on the photograph, which
 25 proceeds from forward holding area 1 to the immediate

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1 response area 1, and on the way there, about I would guess
 2 just under halfway there's a smaller power station
 3 according to the evidence, and just to the right of that
 4 off the road, above the road on the photographs, that's
 5 where you gathered with the members and gave them a
 6 briefing to which you'd referred. Is that correct?
 7 COLONEL MODIBA: That's correct,
 8 Chairperson.
 9 MS BALOYI: In this briefing, what did
 10 you say to members of NIU?
 11 COLONEL MODIBA: I briefed them about
 12 what I got from the briefing we received from Colonel Scott
 13 at forward holding area 1. I explained to them the way
 14 forward in that the striking miners have to be dispersed
 15 from koppie 1 and that our role before we conduct our, we
 16 carry on with our primary role, we're going to give backup
 17 to POP and the TRT.
 18 MS BALOYI: Now if we go back to the
 19 statement, you say in that same paragraph in the second
 20 line, you say, "I gave them briefing accordingly as it was
 21 said and told them from my own always to take into
 22 consideration section 49." You see that?
 23 COLONEL MODIBA: Yes, I can see it,
 24 Chairperson.
 25 MS BALOYI: What were you referring to

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1 there when you say they must take into consideration
 2 section 49?
 3 COLONEL MODIBA: Basically I was talking
 4 about the use of force that section 49 contains, that –
 5 CHAIRPERSON: You're referring to section
 6 49 of the Criminal Procedure Act in the form in which it
 7 then was on that date, the 16th of August 2012. Is that
 8 correct? The section has been amended since, but –
 9 COLONEL MODIBA: Ja –
 10 CHAIRPERSON: - you were talking about
 11 the section as it was then, section 49 of the Criminal
 12 Procedure Act. Is that correct?
 13 COLONEL MODIBA: As amended.
 14 CHAIRPERSON: Yes.
 15 COLONEL MODIBA: That's correct,
 16 Chairperson.
 17 CHAIRPERSON: Well, I think there's a
 18 problem about the amendment and the date it came into
 19 operation. What exactly did you tell – you mean as amended
 20 at that date? Is that what you mean?
 21 COLONEL MODIBA: Ja, I was referring to
 22 that if the, whenever there was force to be used it needs
 23 to be within the conforms of the law as required by section
 24 49.
 25 MS BALOYI: And then you say that they

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1 understood what NIU role was. You see that in that
 2 sentence?
 3 COLONEL MODIBA: Yes, I can see it,
 4 Chairperson.
 5 MS BALOYI: Was that your impression that
 6 the members understood what it is that they were required
 7 to do?
 8 COLONEL MODIBA: Yes, Chairperson, as
 9 usual when you give the briefing you give members
 10 opportunity to pose questions, if any. Any, if there are
 11 any uncertainty they have to should that there are
 12 uncertainty, then you clarify those uncertainties.
 13 MS BALOYI: And you were satisfied that
 14 they understood?
 15 COLONEL MODIBA: I was satisfied because
 16 there was no any other uncertainty that they're showing.
 17 MS BALOYI: Okay, and then in the next
 18 sentence you then say, "We then proceeded to where scene 1
 19 where everything started to check the area," and then you
 20 say image, "IMG P4540 shows the NIU member in line in
 21 middle and my blue bakkie." We want to look at that image,
 22 but if we could go back to L148, when you say "We then
 23 proceeded to where scene 1 where everything started to
 24 check the area," what are you referring to? Where did you
 25 go?

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1 COLONEL MODIBA: We drove to where most
 2 of the police vehicles and the media vehicles were parked.
 3 They were somewhere here.
 4 CHAIRPERSON: That's not scene 1 as we
 5 know it in the Commission, but never mind, we know what you
 6 mean. If one looks at this photograph, at this slide, one
 7 sees round about the middle of the picture above that
 8 smaller power station that I referred to there's a path
 9 going up there to what would be the bottom left-hand corner
 10 of the area marked "greater squatter camp" and you indicate
 11 just below that, slightly to the left is the place where
 12 you and your members went. Is that correct?
 13 COLONEL MODIBA: Ja, that's where the
 14 vehicles were parked, just in that area there.
 15 CHAIRPERSON: Is that where the media
 16 were? Sorry, I didn't hear that. As one looks at the
 17 slide as one sees this path going up on the left-hand side
 18 of the smaller power station, which meets with what amounts
 19 to the bottom left-hand, just to the right, bottom left-
 20 hand corner of the greater squatter camp. Just below that
 21 to the left there's a darker area on the slide. That's
 22 where the vehicles were, you say.
 23 COLONEL MODIBA: Yes, Chairperson, that's
 24 where most of the police vehicles and the media vehicles
 25 were, just inside there in that area.

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1 CHAIRPERSON: What I would say to you,
 2 that's not scene 1 as we call it, as we know it in the
 3 Commission, but never mind, we understand what you're
 4 meaning.
 5 COMMISSIONER HEMRAJ: Ms Baloyi, is there
 6 a photograph or a slide that shows that area?
 7 MS BALOYI: Yes, Chairperson, L152 will
 8 be helpful. Now Colonel, if you look at that slide –
 9 MR CHASKALSON SC: Sorry, Chairperson,
 10 I'm sorry to interrupt Ms Baloyi, but this is actually
 11 before the Colonel moved in there according to his
 12 testimony, because it's a morning slide. Nyala 6 is still
 13 in its original position. It may be better to look at a
 14 slide from the afternoon, or a photograph from the
 15 afternoon where we'll be able to identify the Colonel's
 16 specific –
 17 CHAIRPERSON: Can we see the photograph
 18 he's referred to? In his statement he says IMG P4540 shows
 19 the NIU member in line in the middle. Now is that the area
 20 that you're talking about, or is it another area before you
 21 got to the area which is shown in that particular
 22 photograph, IMG P4540?
 23 COLONEL MODIBA: That's the vehicle I
 24 drove on the day, Chairperson, that spot where the vehicle
 25 was parked.

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1 MR CHASKALSON SC: And that would be
 2 JJJ10.4540.
 3 CHAIRPERSON: Thank you, Mr Chaskalson.
 4 MS BALOYI: Thank you, Mr Chaskalson.
 5 CHAIRPERSON: Are you able now on this
 6 photograph, which is JJJ10.4540, to show us where your
 7 vehicle was?
 8 COLONEL MODIBA: It could be somewhere
 9 there in that area, here.
 10 [10:13] CHAIRPERSON: Yes, as one looks at the
 11 photograph there is, more or less in line with the kraal
 12 but to the left there's a whole line of vehicles and which,
 13 and about the eighth one from the left-hand side, below it
 14 are two other vehicles. That's more or less where you
 15 indicate, is that correct?
 16 COLONEL MODIBA: That's correct,
 17 Chairperson.
 18 COMMISSIONER HEMRAJ: Do I understand all
 19 your members went to that area?
 20 COLONEL MODIBA: Yes, we all drove there
 21 in different vehicles.
 22 COMMISSIONER HEMRAJ: So are those
 23 vehicles then visible on this photograph because they would
 24 have – how many vehicles were there?
 25 COLONEL MODIBA: Those vehicles, as I

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1 said earlier on, media vehicles was there, TRT vehicles
 2 were there as well, there were a lot of vehicles there
 3 including NIU and other disciplines.
 4 COMMISSIONER HEMRAJ: So you won't be
 5 able to differentiate your vehicle from the others on this
 6 slide?
 7 COLONEL MODIBA: No, I won't be able but
 8 the fact is all the police vehicles, most of the police
 9 vehicles were parked there.
 10 COMMISSIONER HEMRAJ: Yes, thank you.
 11 CHAIRPERSON: And among them were the
 12 vehicles in which the members or your unit had been
 13 conveyed there, is that right? Am I right? Among those
 14 vehicles that you talked about are the vehicles in which
 15 your members were conveyed to that spot?
 16 COLONEL MODIBA: That's correct,
 17 Chairperson.
 18 MS BALOYI: Colonel, on that slide if you
 19 look from the bottom of that, that combination of vehicles,
 20 you have two vehicles right at the bottom, do you see that
 21 in the middle of the slide? Can you see that? There's two
 22 vehicles right at the bottom in the middle.
 23 COLONEL MODIBA: Yes, I can see,
 24 Chairperson.
 25 MS BALOYI: Now if you move in a straight

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1 line from those two vehicles, somewhere in the middle there
 2 are two white vehicles on the extreme and in the middle
 3 there looks like there are people there, can you see where
 4 I'm pointing out a line of people?
 5 COLONEL MODIBA: I cannot, I can't –
 6 MS BALOYI: Yes, it's clearer on this
 7 other screen, Colonel.
 8 CHAIRPERSON: We don't all have the
 9 benefit of the screen you're looking at so I'll indicate it
 10 on the big screen –
 11 MS BALOYI: Chair, you seem to look past
 12 that –
 13 CHAIRPERSON: There is a row of what
 14 looks like, according to other evidence, a line of people.
 15 If you take the middle of the photograph, at the bottom
 16 there are those two vehicles, two bottom vehicles and if
 17 you go straight up and we've now zoomed in a bit, if you go
 18 straight up and slightly to the right one sees actually two
 19 lines of people. Can you see there's that long line of
 20 vehicles stretching across the photograph? Below that
 21 there are a number of other vehicles, a smaller line and
 22 below that there is a smaller line of people, I would guess
 23 about a dozen people. And then if one goes further down to
 24 the right there are two vehicles one behind, one in front
 25 of the other and then to the right of those vehicles

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1 there's a longer line, I would guess it to be 30 – I
 2 haven't counted them – at least 30 people which one can see
 3 there. Do you see what I'm referring to?
 4 COLONEL MODIBA: I can see, Chairperson.
 5 CHAIRPERSON: It's suggested to us that
 6 if you want to look to see things clearly yourself you can
 7 look at the screen on your left-hand side. If you want to
 8 point out, please point out on the middle screen, the one
 9 behind me, so that everyone can see - but you see what I've
 10 referred you to?
 11 COLONEL MODIBA: Ja, I assume Chairperson
 12 is referring me to that line.
 13 CHAIRPERSON: You're correct, yes. Now I
 14 think what Ms Baloyi wants to know is –
 15 COMMISSIONER HEMRAJ: You've got a
 16 pointer –
 17 CHAIRPERSON: You've got a pointer, she's
 18 got a pointer now, alright so now we've got a far more
 19 effective way of presenting the evidence.
 20 MS BALOYI: Thank you, Chair. Colonel,
 21 that line there, you see that?
 22 COLONEL MODIBA: Yes, I can see,
 23 Chairperson.
 24 CHAIRPERSON: That's the longer line, I
 25 suggested at least 30 people in a line.

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1 MS BALOYI: Yes.
 2 CHAIRPERSON: Running parallel to the
 3 bottom of the photograph.
 4 MS BALOYI: It is, Chair, thank you. And
 5 then, Colonel, if you look it is clearer on the TV screens
 6 but where I'm pointing out now, that vehicle on the clearer
 7 screen is a blue vehicle. Do you see that?
 8 COLONEL MODIBA: Ja, that's the one I was
 9 driving, Chairperson.
 10 CHAIRPERSON: There's a blue vehicle, as
 11 one moves along that line that's been referred to, the
 12 longer line of people, round about three-quarters of the
 13 way across if one moves from left to right one sees the
 14 blue vehicle. That's the one you pointed us to.
 15 MS BALOYI: Indeed it is, Chair, thank
 16 you. That blue vehicle, is that what you refer to in your,
 17 in this statement when you say "and my blue bakkie?" Is
 18 that the one you refer to?
 19 COLONEL MODIBA: Yes, Chairperson.
 20 That's the vehicle I used on the day.
 21 MS BALOYI: Yes and that line of people
 22 that we see there, who are those people? What unit are
 23 they?
 24 COLONEL MODIBA: Those are my members,
 25 members that were with me, national intervention members.

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1 MS BALOYI: Yes. And then you say – and
 2 is that where you positioned after you arrived in that
 3 area?
 4 COLONEL MODIBA: Yes, that's where we
 5 stopped and I kept them there so that I could go forward
 6 and check the setup of the initial formations that were
 7 allotted to us.
 8 MS BALOYI: In fact you say, "At scene 1,
 9 I left the group at the back" –
 10 CHAIRPERSON: [Microphone off, inaudible]
 11 - interpose by saying at scene 1 you don't mean what we
 12 refer to as scene 1, you mean the scene as depicted on this
 13 photograph, is that right?
 14 COLONEL MODIBA: That's correct,
 15 Chairperson.
 16 MS BALOYI: And then you say, "I left the
 17 group at the back and went forward to check." You see
 18 that? Won't you indicate with the help of a pointer, when
 19 you say you moved forward, you left the group and you moved
 20 forward, where did you move to?
 21 COLONEL MODIBA: From there I moved to
 22 that direction.
 23 MS BALOYI: From the line of NIU members.
 24 COLONEL MODIBA: That's correct,
 25 Chairperson.

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1 MS BALOYI: Yes when you say in that
 2 direction, won't you please point out?
 3 COLONEL MODIBA: From there I moved to
 4 that direction, the northerly direction.
 5 CHAIRPERSON: You moved to the right on
 6 the photograph towards the kraal more or less in line, I
 7 think, with the line of people we're looking at but in an
 8 area where all one can see is empty veld, is that right?
 9 COLONEL MODIBA: Can you rephrase your
 10 question, Chairperson?
 11 CHAIRPERSON: I pointed to this part
 12 which I thought you'd pointed to us earlier, more or less
 13 in line with the group of people you referred to earlier,
 14 the line of people you referred to earlier and your
 15 vehicle, but to the right in an area – in the direction of
 16 the kraal, in an area where there were no vehicles, where
 17 there was just empty veld, is that correct?
 18 COLONEL MODIBA: That's correct,
 19 Chairperson.
 20 MS BALOYI: Now you say you moved forward
 21 to check, what do you mean by that?
 22 COLONEL MODIBA: What I mean,
 23 Chairperson, since we were told about the formation of
 24 first line being POP, second line being TRT and us third
 25 line to give backup, so I went, I left the group behind

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1 just to go and see if they have already formed up so that
 2 if the other disciplines had formed up I could just go back
 3 and inform my members to come and line up behind those two
 4 lines.
 5 MS BALOYI: And then you say, "As I was
 6 moving around there was barbed wire being deployed which I
 7 watched because I'd never seen this before. We were inside
 8 the barbed wire." Do you see that?
 9 COLONEL MODIBA: Yes, I can see.
 10 CHAIRPERSON: I think it needs a bit of
 11 clarity on that. Can you see in this photograph towards
 12 the top of the photograph, can you see there's a path going
 13 across from left to right and you can see in the far corner
 14 the power station and there are a number of vehicles there
 15 with wire trailers behind them and you see the first one
 16 has moved in from the left. Do you see the first one?
 17 That's quite close to the second one, do you see that?
 18 COLONEL MODIBA: Yes, I can –
 19 CHAIRPERSON: According to the evidence
 20 we've heard this photograph was taken at a time when the
 21 first Nyala, the first trailer-drawing Nyala which had
 22 started out from near the power station had arrived almost
 23 at the point where the second Nyala was waiting and then
 24 you see as you move to the left, to the right, you see the
 25 third Nyala with the trailer and the fourth one and then

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1 later the fifth one. Do you see that?
 2 COLONEL MODIBA: Yes, I can.
 3 CHAIRPERSON: This photograph was taken
 4 at a time when the wire was already being uncoiled and when
 5 the first Nyala pulling a trailer had almost uncoiled all
 6 its wire and it was just approaching the second. Now is
 7 this the time that you're talking about in this part of
 8 your evidence?
 9 COLONEL MODIBA: The deployment of the
 10 barbed wire, in my statement I'm referring to – I don't
 11 know which Nyala in those Nyalas that are lining up there
 12 but at a stage I saw one Nyala pulling the barbed wire.
 13 CHAIRPERSON: There's one other point I
 14 want to clarify. In your statement you talk about "We were
 15 inside the barbed wire." Now that's a big ambiguous. The
 16 barbed wire was of course below the koppie as we see it on
 17 the photograph. When you talk about inside the barbed
 18 wire, do you mean below the barbed wire on the photograph
 19 or above the barbed wire because the word "inside" is a bit
 20 ambiguous?
 21 COLONEL MODIBA: I'm referring to the
 22 inside.
 23 CHAIRPERSON: I want to know what you
 24 mean by inside. Do you mean you were above the barbed wire
 25 on the photograph, in other words between the barbed wire

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1 and the koppie or were you below the barbed wire as we see
2 it on the photograph?
3 COLONEL MODIBA: We're below the barbed
4 wire, Chairperson.
5 MS BALOYI: And then you say that the
6 barbed wire was connected to some kraal, you see that?
7 COLONEL MODIBA: Yes, Chair.
8 MS BALOYI: The very last sentence. Did
9 you see that barbed wire deploying? Did you see that Nyala
10 deploying barbed wire to the kraal?
11 COLONEL MODIBA: Yes, I saw it
12 Chairperson.
13 CHAIRPERSON: The kraal you're referring
14 to, is that the one we see on the right-hand side of the
15 photograph?
16 COLONEL MODIBA: Ja, that's the -
17 MS BALOYI: Point -
18 CHAIRPERSON: It doesn't help to show on
19 the screen to your left, you've got to show on the screen
20 above my, above me, my head in the middle of the chamber so
21 everybody can see it.
22 COLONEL MODIBA: That's the kraal, that's
23 the kraal I am referring to.
24 CHAIRPERSON: You are showing the kraal
25 that we talked about as the small kraal or the kraal which

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1 is the one on the right-hand side of the photograph more or
2 less halfway up the page. Yes, Ms Baloyi?
3 MS BALOYI: Thank you, Chair. And then
4 in paragraph 10 on the next page of the statement you say,
5 "I saw the group running around the barbed wire before it
6 was connected to the" - "running around the barbed wire
7 before it was connected to the kraal." Do you see this?
8 COLONEL MODIBA: Yes, I can see,
9 Chairperson.
10 MS BALOYI: Now if you could again on
11 that slide, with the assistance of your pointer, indicate
12 where was the crowd that you are describing in this line
13 that we've just read now?
14 COLONEL MODIBA: The crowd was running
15 outside the barbed wire, alongside the Nyala that was going
16 to this kraal. So they were running parallel with it.
17 CHAIRPERSON: You indicate a spot
18 diagonally to the left above the kraal on the left-hand
19 side of the road which one can see passing the kraal. You
20 indicate there and you indicate that it was then, the crowd
21 and the Nyala were both moving towards what would be the
22 top left-hand corner of the kraal on the slide, is that
23 correct?
24 COLONEL MODIBA: That's correct,
25 Chairperson.

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1 CHAIRPERSON: They were racing each
2 other, as far as I can make out, to the kraal. Is that so?
3 A race between the Nyala and the crowd.
4 COLONEL MODIBA: Yes.
5 CHAIRPERSON: Who won?
6 COLONEL MODIBA: They were running,
7 walking fast.
8 COMMISSIONER HEMRAJ: Can I just ask you,
9 when you first arrived at the scene did you immediately see
10 that group of persons next to the Nyala or had you seen
11 them prior to that?
12 COLONEL MODIBA: It was a few minutes
13 later after I arrived at that scene because there were a
14 lot of movements there. My impression was, at the time
15 when, before that crowd ran towards the kraal I was under
16 the impression that the negotiating team was still in a
17 process of talking to the striking miners. Then when I saw
18 the group, the Nyala was deploying the barbed wire, it came
19 to my impression that maybe the negotiation did not
20 actually succeed.
21 MS BALOYI: Colonel, before you saw this
22 Nyala that you are describing with the strikers, had you
23 seen any of the Nyalas before it deploying barbed wire?
24 Did you observe that?
25 COLONEL MODIBA: I think there was one

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1 Nyala that moved forward to the last Nyala. That's the one
2 I was referring, that it was the first time to see the
3 barbed wire being deployed.
4 MS BALOYI: When you say it moved forward
5 to the last Nyala, the last Nyala is which one? Is it the
6 one that goes to the kraal?
7 COLONEL MODIBA: That's correct,
8 Chairperson.
9 MS BALOYI: Now when you saw the strikers
10 that you describe running around the -
11 MR NTSEBEZA SC: Mr Chairman, can the
12 witness point out at the photograph where this deployment
13 he observed was carrying on now?
14 MS BALOYI: Chair, I'm not sure which
15 deployment Mr Ntsebeza -
16 MR NTSEBEZA SC: That deployment of the
17 barbed wire. He's talking about him watching -
18 CHAIRPERSON: I understand what you mean.
19 I see, what you - I think I explained to you that the
20 evidence we've had was that the first Nyala was the one we
21 see on the slide just approaching the second one, you see
22 that? I've explained that to you before. And as one moves
23 to the right there's a third Nyala just beyond what looks
24 like a tree there. Can you see that?
25 COLONEL MODIBA: That's correct.

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1 CHAIRPERSON: That's what we call Nyala
 2 number 3 and then as one moves again to the right one sees
 3 another Nyala with a wire trailer behind it, that's what we
 4 call Nyala number 4. And now can you perhaps show us, it
 5 sounds from what you tell us – well, I won't tell you which
 6 Nyala was the one I think you saw, that would put a leading
 7 question to you but can you show us on the slide where you
 8 saw the Nyala you talked about which was approaching, what
 9 you call the last Nyala? Can you show us on the screen
 10 where that is?
 11 COLONEL MODIBA: During that deployment
 12 there was a Nyala running in that direction where it joined
 13 with the last Nyala which deployed the barbed wire towards
 14 the kraal.
 15 CHAIRPERSON: Are you able to describe
 16 that for us, Ms Baloyi?
 17 MS BALOYI: Chairperson, I will try.
 18 Perhaps if I could start by saying, Colonel, if you look,
 19 the top line of vehicles there right at the top, those are
 20 the barbed wire Nyalas and the Chair has pointed you to the
 21 first one which is very close to Nyala number 2, do you see
 22 that?
 23 COLONEL MODIBA: Is it that one?
 24 MS BALOYI: Yes, those are the barbed
 25 wire Nyalas and then after that we've got what we all Nyala

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1 number 3, you see that just next to the tree or bush?
 2 COLONEL MODIBA: Are we – this one there?
 3 MS BALOYI: Yes, yes. Now that – and if
 4 you continue along that line there's another Nyala
 5 immediately afterwards and a further Nyala down. Now if
 6 you could point out with reference to that line of Nyalas
 7 that we see that I've just been discussing with you now,
 8 where, what Mr Ntsebeza has asked you to point out, where
 9 was the Nyala that you say you saw deploying, to the last
 10 Nyala?
 11 COLONEL MODIBA: I'm not so clear with
 12 this –
 13 MS BALOYI: No, go up. Not that line,
 14 yes, that one and if you go to the right with your pointer?
 15 It's this one here. If you look at that, so that's Nyala 3
 16 and then there's that line, there's that line as well.
 17 Where was this Nyala that you say you saw deploying, to the
 18 last Nyala?
 19 COLONEL MODIBA: This Nyala there moved
 20 towards that direction.
 21 MS BALOYI: Yes.
 22 COLONEL MODIBA: And suddenly the one
 23 that was on or in front, moved towards the kraal.
 24 [10:32] CHAIRPERSON: Can you describe that for
 25 us please?

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1 MS BALOYI: Chair, Nyala 4, I think what
 2 the witness is describing is he saw Nyala 4 which is to –
 3 from where I'm looking it's to the left of what I think
 4 we've described as the mast.
 5 CHAIRPERSON: Yes, that's correct.
 6 MS BALOYI: Yes, I think that's Nyala 4.
 7 CHAIRPERSON: He depicts an Nyala moving
 8 in that direction towards the mast, can you see the mast
 9 there or should I show it to you?
 10 COLONEL MODIBA: No, Chairperson.
 11 MS BALOYI: The mast is –
 12 CHAIRPERSON: I'm tall enough to show you
 13 the mast if necessary that Ms Baloyi showed you. Do you
 14 see the mast?
 15 COLONEL MODIBA: Yes I can see it,
 16 Chairperson.
 17 CHAIRPERSON: All right, so what Ms
 18 Baloyi described was that you showed the Nyala to the left
 19 of it, left of the mast going to the mast. Does it go
 20 beyond the mast as far as you could see, in other words to
 21 the right of the mast? Do you see the mast? Now the
 22 question is the Nyala that you saw coming from the left if
 23 one looks at the photograph did that Nyala pass the mast or
 24 get up to the mast? Can you describe the position as you
 25 saw it in relation to the mast?

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1 COLONEL MODIBA: The movement of the
 2 Nyala that was passing it was running somewhere there. It
 3 was going to that direction.
 4 CHAIRPERSON: You've taken it past the
 5 mast, you've taken it past the next Nyala which is what we
 6 call Nyala number 5 and then you indicate it was turned to
 7 the right and moved down towards the kraal, is that –
 8 COLONEL MODIBA: That's correct,
 9 Chairperson.
 10 CHAIRPERSON: Is this perhaps a suitable
 11 stage for us to take the short break?
 12 MS BALOYI: Thank you, Chair.
 13 CHAIRPERSON: We'll take the short break
 14 for 15 minutes. In that time the witness can be shown the
 15 document which arrived late from the families which should
 16 have arrived much earlier than that.
 17 MS BALOYI: Will do, Chair.
 18 CHAIRPERSON: In order to avoid further
 19 delay I suggest you show them to him now.
 20 MS BALOYI: We'll do that, Chair.
 21 [COMMISSION ADJOURNS COMMISSION RESUMES]
 22 [10:58] CHAIRPERSON: The Commission resumes.
 23 Colonel, you're still under oath.
 24 KAIZER NTLOU MOBIDA: s.u.o.
 25 CHAIRPERSON: Ms Baloyi.

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1 EXAMINATION BY MS BALOYI (CONTD.): Thank
 2 you, Chair. Colonel, when we took the break we were
 3 looking at that slide and you were trying to point out the
 4 Nyala that you saw deploying to what you describe as the
 5 last Nyala. Can I ask you to do that again? Which is the
 6 Nyala that you said you saw deploying?
 7 COLONEL MODIBA: Yes, Chairperson, I
 8 realise that I pointed at the wrong Nyala, which I said it
 9 was heading towards the kraal. The Nyala that I mean was
 10 this one that was pulling the barbed wire –
 11 MS BALOYI: Yes.
 12 COLONEL MODIBA: - towards this one.
 13 CHAIRPERSON: What you now pointed to was
 14 the third Nyala and you indicated with the pointer that it
 15 moved along the line from left to right in the direction of
 16 the next Nyala, which is Nyala 4 on the screen.
 17 MS BALOYI: Thank you, Chair.
 18 COLONEL MODIBA: Ja, that is the Nyala,
 19 Nyala 4 on the screen.
 20 MS BALOYI: And that's the Nyala you
 21 describe as the last Nyala?
 22 COLONEL MODIBA: That's correct,
 23 Chairperson.
 24 MS BALOYI: Now you then go on, and in
 25 the interest of time I will not take you through every line

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1 in the sentence, in the paragraph rather. You then talk
 2 about that, you say the group was chasing the Nyala to the
 3 kraal and then you saw water cannon spraying and heard
 4 sound of grenade. You also go on to say that you saw the
 5 strikers come around the kraal and you say "running to
 6 attack the SAPS and POP responded with rubber and stun
 7 grenade." We are back in the statement, your paragraph 10,
 8 and then you say, "The TRT formed a line and they fired."
 9 You see that? You remember that in your statement?
 10 COLONEL MODIBA: Yes, Chairperson.
 11 MS BALOYI: Now when you saw this
 12 shooting by the TRT, how far were you from that point, from
 13 the point of shooting?
 14 COLONEL MODIBA: I was about 80 to 100
 15 metres behind TRT.
 16 MS BALOYI: Yes.
 17 COLONEL MODIBA: Between the 80, 100.
 18 MS BALOYI: Now if we move then to
 19 paragraph 11 of your statement, you say, "After the
 20 incident it was tense. I went to NIU group and pointed by
 21 using a hand signal to go over to koppie 1 to do a sweep,
 22 as instructed. We went through wire in gap between trailer
 23 and Nyala." If we could look at exhibit L215, now if you
 24 look at that slide and reading it with the rest of
 25 paragraph 11 in the third line, perhaps let me start there,

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1 third line, paragraph 11 you say, "There was a lot of noise
 2 at that moment. I ran to the Nyala and went through. We
 3 formed up a formation basic line facing mountain. IMG
 4 P4543 shows this. Our tactical line is seen by the barbed
 5 wire."
 6 Now if you look at this slide, and I'm going to
 7 point out that you've got a line of barbed wires where I'm
 8 pointing with this pointer, you see that? There's a line
 9 of barbed wire there. There's a barbed wire Nyala rather.
 10 COLONEL MODIBA: Yes.
 11 MS BALOYI: You see that?
 12 COLONEL MODIBA: Yes, I can see it.
 13 MS BALOYI: Just in front of that you
 14 have what looks like what is a long line of, at that line.
 15 Is that what you are describing in what I've just read now?
 16 COLONEL MODIBA: That line is supposed to
 17 be members of National Intervention. That is the basic
 18 line –
 19 MS BALOYI: Yes.
 20 COLONEL MODIBA: - that we formed up
 21 after we went through between the trailer and that Nyala
 22 there.
 23 CHAIRPERSON: Sorry, you say you went
 24 through between the trailer and the line. Now where did
 25 you go? As one looks at this slide you can see three

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1 kraals and the one, the smallest one, the one furthest to
 2 the right of the three, I think that's the kraal we're
 3 talking about, isn't it? And can you show us where you
 4 went through the gap between the trailer and the kraal?
 5 Was it the trailer and the kraal or the trailer and the –
 6 COLONEL MODIBA: The Nyala.
 7 CHAIRPERSON: And the Nyala, yes. Can
 8 you show us –
 9 COLONEL MODIBA: That one there. That
 10 one, Chairperson, between there.
 11 MS BALOYI: Chair –
 12 CHAIRPERSON: Effectively very close to
 13 the mast. Can you see that mast? Perhaps if they could
 14 zoom in you could see it more clearly. Can we zoom in,
 15 please? You see the mast now? And immediately to the
 16 right of the mast we see a Nyala with an empty trailer.
 17 You see that? And in front of the mast one can see to the
 18 left and the right lines of people, who I assume are the
 19 members of the NIU, as you've told us, and in the middle in
 20 line really with the mast there appears to be a gap. Is
 21 that what you're talking about?
 22 COLONEL MODIBA: Ja, but it couldn't then
 23 be that one, should be the one there at the back, but it
 24 was, it's the same. It was also pulling the trailer, so we
 25 went out between.

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1 MR CHASKALSON SC: Chairperson –

2 CHAIRPERSON: What you're showing us is

3 the gap between – sorry, Mr Chaskalson. It looks to me

4 what you've shown us is the gap between that Nyala and the

5 empty trailer behind it to the right of it on the

6 photograph. Is that correct? That's what you're showing

7 us.

8 COLONEL MODIBA: Yes, it was the Nyala

9 with the empty trailer, yes.

10 MS BALOYI: Chair, if we could perhaps

11 use photograph 4543, it might be clearer –

12 CHAIRPERSON: Before you do that, Mr

13 Chaskalson indicated he wanted to say something.

14 MR CHASKALSON SC: I was going to make

15 the same suggestion, Chairperson, JJJ10.

16 MS BALOYI: Craig, if you would zoom on

17 the picture close to the mast. Colonel, there's the mast

18 there. You see that? And then you've got the Nyala.

19 Chairperson, that's Nyala 3, we say, and then you have that

20 line of members there. You see that?

21 CHAIRPERSON: It's a Nyala with an empty

22 wire trailer.

23 MS BALOYI: Indeed with an empty trailer.

24 CHAIRPERSON: Which is just to the right

25 below, diagonally to the right below the mast on the

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1 photograph.

2 MS BALOYI: Yes. Now Colonel, when you

3 say that you jumped, I think you say between the Nyala and

4 the trailer, it is this Nyala that you're talking about,

5 this Nyala 3?

6 COLONEL MODIBA: Ja, it's supposed to be

7 Nyala 3, Chairperson.

8 MS BALOYI: Yes, now did all of your

9 members come through that gap there that you describe?

10 COLONEL MODIBA: Ja, we all used that

11 exit towards the side of the koppie 1.

12 MS BALOYI: And immediately after coming

13 through there, through between the Nyala and the trailer,

14 the empty trailer, you say you then formed up in that line

15 there, in that basic line?

16 COLONEL MODIBA: Yes, we made up a basic

17 line advancing to both koppie 1 and 2, Chairperson.

18 MS BALOYI: Now if we could then go back

19 to L215 where you describe this – Craig, if you could

20 perhaps zoom out, I would like to have both koppies

21 appearing on the screen; yes, like that. Now Colonel, you

22 see again you've got that line, you've got the Nyala back

23 behind the long line, the dark line, that's the Nyala, and

24 then you've got that long line, you say that's the NIU

25 line. You see that?

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1 COLONEL MODIBA: Confirmation.

2 Affirmative, Chairperson.

3 MS BALOYI: Now you then say you

4 approached the mountain, we're still at paragraph 11. You

5 say, "We approached the mountain very cautiously. TRT were

6 meant to sweep koppie 2, but they were busy, so I

7 instructed Colonel Nkebe to concentrate on koppie 2,"

8 koppie 2 being – am I correct that koppie 2 is the small

9 koppie on the left where there's a trail of people, or dark

10 trail behind it? Is that koppie 2?

11 COLONEL MODIBA: That's correct,

12 Chairperson.

13 MS BALOYI: And then you say, "The group

14 moved from koppie 1 to koppie 2, but still some at koppie

15 3, and told Captain Cwinyane to take members, about 19 of

16 them." What did Captain Cwinyane do with the 19 members?

17 COLONEL MODIBA: As our primary task was

18 to sweep the koppie 1, there were still movements in koppie

19 1 and it was still supposed to be swept. So I instructed

20 Captain Cwinyane to take care of koppie 1 with 19 members,

21 and Colonel Nkebe was given koppie 2 because then TRT was

22 not available to do it as planned.

23 MS BALOYI: And then you say, "I went

24 straight between two koppies 1 and 2." Can you indicate

25 with the pointer where you moved to, how you moved?

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1 COLONEL MODIBA: Ja, I'd gone through the

2 two koppies, koppie 1 and koppie 2, with some of the

3 members and Captain Cwinyane went to the left as we were

4 going to west from east, and then Nkebe took care of this

5 one with some of the members.

6 MS BALOYI: So you did –

7 COLONEL MODIBA: And then I went through.

8 MS BALOYI: Yes, you didn't go into any

9 of the koppies?

10 COLONEL MODIBA: Negative. I didn't go

11 through, I mean to any of the koppies. I just walked

12 through with the members between the two –

13 CHAIRPERSON: Do I understand you

14 correctly, when you spoke about one of the officers going

15 to the left you meant his left, the right on the

16 photograph? Is that right?

17 COLONEL MODIBA: Ja, that's the –

18 CHAIRPERSON: The one who went to koppie

19 1 went to his left, the right of the photograph. Is that

20 correct?

21 COLONEL MODIBA: Yes, that's left the

22 koppie 1 and right koppie 2.

23 CHAIRPERSON: Yes, their left, not our

24 left as we look at the photograph. It's the other way

25 around.

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1 COLONEL MODIBA: That's their left and
 2 right. That's their left, our right –
 3 CHAIRPERSON: Their left, our right.
 4 COLONEL MODIBA: Yes.
 5 CHAIRPERSON: As we look at the
 6 photograph, alright.
 7 MS BALOYI: And then you say in paragraph
 8 12, "The miners were running back to koppie 3 and burning
 9 veld. There was a lot of smoke as a result. As going
 10 between koppie - I heard Brigadier Calitz saying everyone
 11 must move forward and do arrests." And then you go on to
 12 say, "We followed in our formation towards koppie 3." When
 13 you say "in our formation," what formation are you talking
 14 about? You say you followed in your formation towards
 15 koppie 3.
 16 COLONEL MODIBA: I'm referring to the
 17 basic line that we formed up –
 18 MS BALOYI: Yes.
 19 COLONEL MODIBA: - when approaching to
 20 koppie 3, Chairperson.
 21 MS BALOYI: And then you say that
 22 "Lieutenant-Colonel Nkebe was always on my right in the
 23 line." This is in the basic line. Am I correct?
 24 COLONEL MODIBA: That's correct, basic
 25 line.

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1 MS BALOYI: Then "We approached the
 2 koppie, alternating kneeling and standing positions." You
 3 see that? "Moving tactically towards koppie 3." You see
 4 that?
 5 COLONEL MODIBA: Yes.
 6 MS BALOYI: And in the next paragraph 13
 7 you say, "Just before we entered koppie 3 three armed
 8 miners emerged from behind rocks and charged at our basic
 9 line."
 10 CHAIRPERSON: May I suggest –
 11 MS BALOYI: Koppie 3 –
 12 CHAIRPERSON: Do we have a slide which
 13 indicates –
 14 MS BALOYI: Yes, Chair.
 15 CHAIRPERSON: - them approaching koppie
 16 3? Because at the moment the slide on the screen is of
 17 purely historic interest.
 18 MS BALOYI: Yes, Chair, I was going to go
 19 to slide 235 and 242. They don't quite show the approach,
 20 but they show us the mouth of the koppie and I was going to
 21 ask him to describe in relation – perhaps if we could call
 22 up MMM2 - thank you, Mr Chaskalson; he thinks it might be
 23 more helpful. MMM2. Now Colonel, on this slide here, are
 24 you able to point out what you're describing in that first
 25 part of paragraph 13 where you were when you approached and

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1 you were charged upon by these strikers?
 2 COLONEL MODIBA: As we were approaching,
 3 Chairperson, we were at that angle when the strikers
 4 emerged behind the rocks and bushes here and they came
 5 charging, having assortments of dangerous weapon in
 6 assegais, axes and knobkieries.
 7 CHAIRPERSON: Let me get this right. Am
 8 I correct in thinking that you've indicated that your line
 9 was approaching, moving from right to left on the slide and
 10 more or less in the block which we can describe as J3? Is
 11 that correct? J3, J2, the two together. Can you see –
 12 MS BALOYI: I3 –
 13 CHAIRPERSON: If you look at the scene on
 14 the screen, you'll see –
 15 MS BALOYI: Chair, it looks more like
 16 I3 –
 17 CHAIRPERSON: - you'll see the letters
 18 are at the top and you'll see the numbers down the side.
 19 COLONEL MODIBA: Yes.
 20 CHAIRPERSON: So you indicated on the
 21 screen that your members, as I understand it, in the line
 22 you described were approaching from right to left on the
 23 slide, and I thought you showed us that they were in blocks
 24 J2 and J3. Is that correct?
 25 COLONEL MODIBA: That's correct,

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1 Chairperson.
 2 CHAIRPERSON: And if you can see the
 3 letters and the numbers, can you indicated by identifying
 4 the block or blocks which are relevant in order for us to
 5 understand where the strikers were coming from?
 6 COLONEL MODIBA: I will talk about these
 7 two blocks here, this one and that one.
 8 CHAIRPERSON: You show I3 and I4 – I3 and
 9 J3.
 10 COLONEL MODIBA: That's correct,
 11 Chairperson.
 12 CHAIRPERSON: And they came, I take it,
 13 from left to right from the bushy area which one sees in
 14 the photograph which is part of koppie 3. Is that correct?
 15 COLONEL MODIBA: Yes, Chairperson.
 16 MS BALOYI: Now you say that "Others went
 17 to the left and others to the right." We're still at
 18 paragraph 13. "In the process I heard the zip of bullets
 19 coming from mountain." You see that within paragraph 13 of
 20 your statement?
 21 COLONEL MODIBA: Yes, I can see it.
 22 MS BALOYI: When you hear these zips of
 23 bullets, are you already at the point where you've
 24 indicated, J2 and J3 I think?
 25 COLONEL MODIBA: Ja, we were still there

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1 in J3, there where the –
 2 MS BALOYI: And were you able to see
 3 where these bullets were coming from, the direction?
 4 COLONEL MODIBA: I assumed they, the
 5 direction was from the, was from koppie 3 to our side.
 6 MS BALOYI: When you say from koppie 3,
 7 which part of koppie 3? Were you able to make out where
 8 they were coming from?
 9 COLONEL MODIBA: It was from this
 10 direction. We could hear the sounds as they were flying.
 11 MS BALOYI: Yes. Chair –
 12 CHAIRPERSON: You indicate with the
 13 pointer a line moving along line 3, the blocks 3, and I
 14 think you started the pointed round about H, possibly even
 15 G, and you moved to the right into I and J. Is that
 16 correct? All in line, in the line of blocks marked 3. Is
 17 that correct?
 18 COLONEL MODIBA: Ja, we'll be talking
 19 between this H block, I and J. That's where we were
 20 approaching.
 21 MS BALOYI: Yes, what I had asked you was
 22 when you heard these zips of bullets, as you described
 23 them, were you able to make out where they were coming
 24 from, and I thought you pointed out from the middle of the
 25 koppie in that direction. Am I correct?

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1 COLONEL MODIBA: That's correct,
 2 Chairperson.
 3 MS BALOYI: Yes, in the middle of the
 4 koppie, Chair, there's a big boulder in the middle between
 5 E and, block E and F2, and then he, the Colonel pointed out
 6 in the right direction towards J, to J.
 7 CHAIRPERSON: Yes, yes, no thank you for
 8 putting that on record for us. When you talk about hearing
 9 zips, would this be the sound of pistol fire?
 10 [11:18] COLONEL MODIBA: I wouldn't say it was
 11 pistol or R5, the fact is the bullets were flying from the
 12 koppie, outside the koppie –
 13 CHAIRPERSON: Yes, yes I understand we
 14 just needed to know whether you could distinguish between
 15 the sound of a pistol shot and a rifle shot but obviously
 16 you can't. Did it sound like automatic fire?
 17 COLONEL MODIBA: No it wasn't automatic.
 18 MS BALOYI: Thank you, Chair. You also
 19 say that, in that third line you say "I also heard sound of
 20 guns from the koppie, from the left." Won't you please
 21 indicate where you describe as the left from where you
 22 heard the sound of gunfire?
 23 COLONEL MODIBA: The left I'm referring
 24 to the southern side of koppie 3. This was my left.
 25 CHAIRPERSON: G4 and 5 and it looks as if

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1 you're moving the pointer up and down but in the line G,
 2 the line of blocks which are headed by the letter G and you
 3 thought it was between 4 and 5. Is that correct?
 4 COLONEL MODIBA: It was between 3 and 4,
 5 the left of –
 6 CHAIRPERSON: 3 and 4 thank you.
 7 COLONEL MODIBA: Ja 3 and 4.
 8 MS BALOYI: Then you go on to describe
 9 the crowd. You say "This aggressive group approached the
 10 line" the group that you had defined as 15 or 20 of them,
 11 you say they approached the line as they were coming 12 to
 12 15 metres away and you say "I shouted stop, stop but they
 13 did not." Do you see that in your statement?
 14 COLONEL MODIBA: Yes, I can see.
 15 MS BALOYI: And you say then you fired
 16 warning shots. Won't you indicate where you were, with
 17 reference to this slide again, where you were when you
 18 fired the warning shot?
 19 COLONEL MODIBA: I fired warning shots
 20 just from that point into I3.
 21 MS BALOYI: So you were at J3 and you
 22 fired into I3, is that what you're saying?
 23 COLONEL MODIBA: That's correct.
 24 CHAIRPERSON: It looks as if you were in
 25 the bottom left-hand corner of J3 is that correct and you

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1 fired into I3?
 2 MS BALOYI: Colonel?
 3 CHAIRPERSON: Is that right? That's what
 4 I thought you showed but I just want to make I got it
 5 correctly. You were at the bottom left-hand corner of J3
 6 and you fired into I3, is that right?
 7 COLONEL MODIBA: That's correct,
 8 Chairperson.
 9 MS BALOYI: And the strikers were where?
 10 Are you able to indicate here where the strikers were when
 11 you fired, when you shot from your position?
 12 COLONEL MODIBA: The strikers emerged
 13 from behind the rocks there. They were charging at us at
 14 that point when I fired warning shots. It was just a
 15 distance between 15 to 20 metres and I started firing here
 16 with my 9 millimetre pistol.
 17 CHAIRPERSON: I think you showed us the
 18 bottom of H2 and then moving into H3, is that right? More
 19 or less on the border between H2 – the bottom of H2, the
 20 top of H3.
 21 COLONEL MODIBA: Ja, the armed miners
 22 came from here, charging straight at our basic line then I
 23 was somewhere here.
 24 CHAIRPERSON: So you're really showing
 25 people moving from H3 to I3.

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1 COLONEL MODIBA: Could you rephrase the
 2 question, Chairperson?
 3 CHAIRPERSON: What you described, I
 4 think, was these armed strikers moving from H3 to I3.
 5 COLONEL MODIBA: Yes, that was the
 6 direction they were heading as they were charging at our
 7 basic line.
 8 MS BALOYI: And then you say other
 9 members also fired. Did the NIU still maintain a basic
 10 line at this point, where you stood in formation?
 11 COLONEL MODIBA: Yes, we still maintained
 12 our basic line that we had been maintaining all the way
 13 from the time when we move out the barbed wire.
 14 MS BALOYI: Yes, and then you say some of
 15 the group went back to koppie 3, I'm still reading from
 16 your statement, "some of the group moved back, went back to
 17 koppie 3, we moved closer. As we were by the big rock I
 18 saw what is body A" and then you give a picture number
 19 there. Do you see that? Chairperson, the person that
 20 we've described as body A his name is Mr Anele Mdizeni.
 21 CHAIRPERSON: Yes if we're going to see
 22 that picture then I think I should give a warning but if
 23 you're not going to show the picture I don't have to.
 24 MS BALOYI: Chair, I wasn't going to show
 25 the picture.

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1 CHAIRPERSON: Can you show us the big
 2 rock while you're about it?
 3 COLONEL MODIBA: That's the big rock,
 4 Chairperson, that's the bottom of it.
 5 CHAIRPERSON: The big rock is in F2 and
 6 F3 and by the bottom that you're referring to, part of the
 7 rock, the extreme right-hand side looks like almost the
 8 right top corner of F3 isn't that right?
 9 COLONEL MODIBA: That's correct,
 10 Chairperson.
 11 MS BALOYI: Now at the point before you
 12 went into the big rock, into the koppie to the big rock did
 13 you become aware that there were other units of the SAPS
 14 around or inside the koppie, before you went in?
 15 COLONEL MODIBA: No at that time I could
 16 only notice the group that came from the southern side
 17 that's General Naidoo and a few members, they met from this
 18 southern side. That's the group that I could identify.
 19 CHAIRPERSON: You're indicating G4, I
 20 think. Is that right, G4? They were coming from your
 21 left.
 22 COLONEL MODIBA: That's correct,
 23 Chairperson.
 24 CHAIRPERSON: And they were moving up
 25 from the direction from the bottom of the photograph to the

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1 top of the photograph.
 2 COLONEL MODIBA: That's correct,
 3 Chairperson.
 4 MS BALOYI: And where were you when you
 5 saw the group of General Naidoo? Won't you please
 6 indicate, where exactly were you?
 7 COLONEL MODIBA: I was somewhere there in
 8 I3.
 9 MS BALOYI: Okay. And then you say you
 10 then saw Mr Mdizeni. At the time when you saw him did you
 11 see whether he was still alive or he had passed on?
 12 COLONEL MODIBA: Chairperson, it was not
 13 only Mr Mdizeni that was at the face of the big rock, there
 14 were also some of the striking miners that were there. And
 15 then I couldn't make out that whether there was any person
 16 who was killed or one or the other.
 17 CHAIRPERSON: These striking miners that
 18 you refer to were they standing or sitting or lying?
 19 COLONEL MODIBA: At that time they were
 20 charging at us from that point. We were in J3 and then
 21 they charged carrying those dangerous weapons and then I
 22 shouted stop, stop. I fired and they still kept coming, I
 23 fired in the ground so the members did as well and then
 24 some of them went back in the bush behind the rocks, left
 25 and right.

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1 CHAIRPERSON: Can you again give us the
 2 block numbers to which you're referring? It's shown on the
 3 screen but you moved the pointer quite quickly. It looks
 4 like G3 and H2 is that correct?
 5 COLONEL MODIBA: In H2 that's where some
 6 of them went back in the bush and others went across to
 7 this direction, yes in this bush.
 8 CHAIRPERSON: That looks like G3
 9 actually, possibly even F as well.
 10 COLONEL MODIBA: No it's G3, some they
 11 went left and others went to H2 in that bush.
 12 CHAIRPERSON: All right, yes thank you,
 13 we now see it thank you. How many people were with General
 14 Naidoo, how many members were with General Naidoo?
 15 COLONEL MODIBA: With my observation he
 16 didn't have a large number of personnel with him.
 17 CHAIRPERSON: He wasn't alone though.
 18 COLONEL MODIBA: No he wasn't alone,
 19 there could have been, although I did not count them, there
 20 was no time to count but I think there were not even 10,
 21 there were less.
 22 CHAIRPERSON: He had less than 10.
 23 COLONEL MODIBA: Ja, it was less.
 24 CHAIRPERSON: I think you had mentioned
 25 there was also firing from that direction, is that right?

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1 COLONEL MODIBA: Ja there was a firing,
 2 as I said earlier on, as we were approaching there was a
 3 firing from the southern side.
 4 CHAIRPERSON: That would be from his
 5 group would it, as far as you could tell?
 6 COLONEL MODIBA: That's a possibility or
 7 even – ja because on the southern side, if the sound was
 8 coming from the southern side then –
 9 CHAIRPERSON: It was his group or people
 10 behind his group further to the south. Is that right?
 11 COLONEL MODIBA: The sound was coming
 12 from G4.
 13 CHAIRPERSON: Yes, I see, thank you.
 14 MS BALOYI: Thank you, Chair. Then you
 15 say – back to your statement, Colonel, in line 8 of your
 16 statement, paragraph 13 it starts "I noticed General Naidoo
 17 to my left" and then you say "General Naidoo climbed over
 18 rocks to the left of the big rock." Can you point out on
 19 that slide where he climbed, what you are describing?
 20 COLONEL MODIBA: Ja, he climbed on the
 21 left. Left is there and then he went to this direction.
 22 MS BALOYI: You're pointing him climbing
 23 at F3 going in the direction of C4.
 24 COLONEL MODIBA: Yes, that direction.
 25 CHAIRPERSON: You saw him at F3 and then

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1 you saw him moving in the direction of E3, is that right?
 2 COLONEL MODIBA: That's correct,
 3 Chairperson.
 4 MS BALOYI: Thank you, Chair. And then
 5 you say "I went to the right in between it and bushes."
 6 Won't you indicate where you went, what you're describing
 7 there when you say you went to the right?
 8 COLONEL MODIBA: Ja, just in front of
 9 that big rock because it's too big, I could not even go up,
 10 I deviated to what's north now between the bushes on the
 11 right, that is G2. And at that time there were striking
 12 miners in this bush that had been retrieved by my members.
 13 I went around, just right around and get back here.
 14 CHAIRPERSON: The bush you refer to is G2
 15 and then you indicated you went around that, almost in the
 16 line which is line 1, went around I think it would be F1,
 17 G1, H1 and then in a clockwise direction you came back to
 18 where you started more or less. Is that right?
 19 COLONEL MODIBA: Ja where we were, where
 20 I first gained entry that is next to just here, I came
 21 around there and back.
 22 CHAIRPERSON: You indicate moving from H3
 23 to G3 and G2. Is that right?
 24 COLONEL MODIBA: My movements started
 25 from this rock, I went up and right around there. But

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1 before – I waited here because there was still shooting
 2 from the western side. I didn't just go smoothly through
 3 right around. I first waited until the shooting has
 4 stopped.
 5 CHAIRPERSON: You indicate you waited in
 6 F2 then you moved into E2, then you moved to the top line,
 7 then you went from left to right on the photograph, on the
 8 slide and it looks as if you came down again either at H1
 9 or even I1. And you came around as I said in a clockwise
 10 direction and ended up more or less where you started. Is
 11 that right?
 12 COLONEL MODIBA: That's correct,
 13 Chairperson.
 14 MS BALOYI: Still in that paragraph, back
 15 to your statement, Colonel, still in that paragraph 13 you
 16 say in the second last line "I could see to the west" this
 17 is after you've described your movements, you say "I could
 18 see to the west how miners were charging and running and
 19 heard gunshots coming from there. Then I lowered down."
 20 Do you see that?
 21 COLONEL MODIBA: Yes I can see,
 22 Chairperson.
 23 MS BALOYI: Yes, now if we could have
 24 L242 so that we you point out what you are describing.
 25 You've just described or shown us your movements. You see

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1 in this picture to the right-hand side where it's written
 2 eastern there's a dotted line that goes from the bottom up,
 3 it's a dotted line in orange and then there's an arrow, in
 4 that is written NIU. It's an orange arrow, do you see
 5 that? It's the bottom right and then there are three
 6 arrows that go to an oval drawing there, there are red
 7 arrows and that is the front of the rock. That is the rock
 8 in the koppie. Do you confirm that?
 9 COLONEL MODIBA: That's correct.
 10 MS BALOYI: Yes, and you've explained to
 11 us how you moved. Now when you say what I've just read now
 12 in that sentence "I could see to the west how miners were
 13 charging and running and heard gunshots coming from there
 14 then I lowered down." Where are you seeing this happening?
 15 Which place are you describing?
 16 COLONEL MODIBA: The miners were coming
 17 out from this point and the police were advancing inside
 18 and the confrontation was from this point and here in this
 19 field.
 20 CHAIRPERSON: If one looks at the slide
 21 and one sees the word northern and you go down from the
 22 word northern to a section in the photograph where one sees
 23 some vehicles, I think they're Nyalas and you go beyond
 24 those and you're further down to the left. Below the word
 25 northern and slightly to the left there are essentially

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1 four vehicles. I think it's four vehicles and below those
 2 one sees more rocks and bushes and below those rocks and to
 3 the left there's an open space, is that where the miners
 4 were, the strikers?
 5 COLONEL MODIBA: No at that point,
 6 Chairperson, they came out from there.
 7 CHAIRPERSON: Oh I see. You've got them
 8 – actually you've got them above the rocks or in the bushes
 9 between the bushes and the rocks and would be the second of
 10 the four, counting from the left, the second of those
 11 vehicles I refer to. So below that vehicle and towards the
 12 bushes and rocks that one sees there, diagonally to the
 13 left downwards from that vehicle. Is that correct?
 14 COLONEL MODIBA: If I understood what
 15 Chairperson is saying or what I mention that strikers, the
 16 confrontation was from here towards that direction and the
 17 police were coming from the left into koppie 3.
 18 CHAIRPERSON: Yes, I described the place
 19 you referred to as being diagonally to the left and
 20 downwards from that second vehicle there's an area there
 21 where there are bushes and rocks and so forth. And you
 22 indicate you then went more or less straight to the left
 23 indicating that there's an empty area and on the other side
 24 there are more trees and bushes and rocks. And that's
 25 where the members were, the police were. I think that's

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1 what you showed us, is that right?
 2 COLONEL MODIBA: I just want to make
 3 sure, maybe if someone can show the pointer where the –
 4 CHAIRPERSON: No you've got to –
 5 COLONEL MODIBA: No, I mean someone who
 6 understands that explanation that I –
 7 CHAIRPERSON: Let me have another go at
 8 explaining to you. Do you see those four vehicles I
 9 referred to?
 10 COLONEL MODIBA: Yes.
 11 CHAIRPERSON: You see, counting from the
 12 left, you see the second one and you see, you go downwards
 13 and to the left, in other words diagonally downwards to the
 14 left from the second vehicle. One sees there's an open
 15 space or a more or less open space and then just beyond
 16 that to the left one sees some rocks and some bushes or
 17 trees. And then if one goes further to the left there's
 18 another empty space and as one proceeds to the left there
 19 are further bushes and trees. Do you understand what I'm
 20 referring to?
 21 [11:37] COLONEL MODIBA: That's the direction
 22 where the police came and the confrontation was between –
 23 CHAIRPERSON: Let me have another go. I
 24 showed you on the screen but let's just put it in words.
 25 You see the word "western" on the left-hand side of the

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1 photograph. Below the word, the end of "western" one sees
 2 a vehicle. If one moves to the right and slightly
 3 downwards one sees some trees or bushes and some rocks.
 4 COLONEL MODIBA: Yes.
 5 CHAIRPERSON: That is, as I understand
 6 it, where you're telling us that the police members were,
 7 that vicinity. As one then proceeds further in a straight
 8 line moving across the page parallel with the bottom of the
 9 page, one then sees further bushes and rocks and to the
 10 right of those is the space that I referred to earlier
 11 which is diagonally downwards to the left from that second
 12 vehicle I referred to. Do you understand that? Directly
 13 opposite where I said the police were there's a clearing
 14 and on the right-hand side of that clearing more bushes and
 15 trees and that's where the miners were, is that right?
 16 COLONEL MODIBA: Ja, the miners were
 17 there. Ja, they –
 18 CHAIRPERSON: Do you understand now?
 19 Have I got it right?
 20 COLONEL MODIBA: Yes, Chairperson.
 21 CHAIRPERSON: Alright. Okay, now we can
 22 carry on.
 23 MS BALOYI: Colonel, just to avoid doubt,
 24 won't you indicate where you say the miners were?
 25 COLONEL MODIBA: The miners were

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1 somewhere there and the police came – the confrontation was
 2 between them and the police, the police were from this
 3 direction and they came there from the koppie towards the
 4 police and there was commotion there, movements, running up
 5 and down.
 6 MS BALOYI: Thank you, Chair. And then
 7 you say, we're still looking at your paragraph 13 on the
 8 last page of your statement, you say in the first line, "I
 9 went around to a clockwise direction" and you've described
 10 and shown us how you walked around "and I entered koppie
 11 again from the east to check things around. As I was going
 12 in again I saw body B lying there." Chairperson, the
 13 person that's been identified as body B is Mr Thabiso
 14 Johannes Thelejane and you say you saw him lying there.
 15 Was this the first time that you saw him?
 16 COLONEL MODIBA: Ja, the first time when
 17 I walked past there body A, which was Mr Mdzieni, along
 18 with others that were lying there on the ground, on the
 19 face of the –
 20 CHAIRPERSON: I think it would be helpful
 21 if you showed us on, with your pointer where you saw body A
 22 and the other bodies. I think the other bodies we now know
 23 were people who hadn't been killed but were lying down but
 24 perhaps you could show us where they were, particularly
 25 where body A was and then you can show us where body B was.

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1 COLONEL MODIBA: Ja. Body A was just in
 2 front, just there where those that were lying there had
 3 been cleared and then –
 4 CHAIRPERSON: If one looks at this slide
 5 which is slide 242 of exhibit L, one sees a red circle with
 6 three arrows going into it and I think you've indicated
 7 that body A was in the vicinity of the left-hand arrowhead
 8 in that circle, is that correct?
 9 COLONEL MODIBA: That's correct,
 10 Chairperson.
 11 CHAIRPERSON: And were there other bodies
 12 in that vicinity as well? They were not bodies in the
 13 technical sense, they were people lying down, is that
 14 right, as we now know?
 15 COLONEL MODIBA: They were along with
 16 body A –
 17 CHAIRPERSON: Ja.
 18 COLONEL MODIBA: They were just next to
 19 it.
 20 CHAIRPERSON: Yes and where was body B?
 21 Remind me of the name of –
 22 MS BALOYI: Thelejane, Mr Thelejane.
 23 CHAIRPERSON: Mr Thelejane yes, that's
 24 right, where was Mr Thelejane's body when you saw it?
 25 COLONEL MODIBA: I assume he was among

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1 those that were lying there. I only noticed now that
 2 there's yet another body that was –
 3 CHAIRPERSON: It was in the same area in
 4 that red circle which we see on the slide.
 5 COLONEL MODIBA: Yes, sir.
 6 CHAIRPERSON: That was when you'd
 7 completed your clockwise circuit around the rock, is that
 8 right?
 9 COLONEL MODIBA: That's correct,
 10 Chairperson.
 11 MS BALOYI: Now Colonel, do you know who
 12 shot Mr Mdizeni? Who shot, hit Mr Mdizeni, do you know?
 13 COLONEL MODIBA: No, I wouldn't know who
 14 shot at him, who shot, who shot at him.
 15 MS BALOYI: The same question with Mr
 16 Thelejane, do you know who hit him?
 17 COLONEL MODIBA: No, there was no
 18 information I got to say so and so had shot either Mr
 19 Mdizeni or Mr Thelejane.
 20 COMMISSIONER HEMRAJ: Do you know if
 21 either of them was injured or shot by the shots fired by
 22 the members in your line-up?
 23 COLONEL MODIBA: Just repeat your
 24 question, please.
 25 COMMISSIONER HEMRAJ: Do you know if

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1 either of them was shot by the members who were shooting in
 2 your line-up?
 3 COLONEL MODIBA: It is a possibility that
 4 they might have been caught by the warning shots that were
 5 fired, that as a result of the ricochet it could have hit
 6 them. That is a possibility, I can't rule that one out but
 7 the difficulty is for me to say I know so and so shot
 8 Mdizeni or Thelejane.
 9 CHAIRPERSON: There were also shots, I
 10 think you said, fired by or coming from the direction of
 11 General Naidoo's group and also possibly behind General
 12 Naidoo's group. That's right, isn't it?
 13 COLONEL MODIBA: I can't confirm that.
 14 CHAIRPERSON: No, I say didn't you say
 15 that you heard shots coming from the direction of General
 16 Naidoo's group or even from behind General Naidoo's group?
 17 You did say that?
 18 COLONEL MODIBA: Yes, I said from the
 19 south, southern direction.
 20 CHAIRPERSON: What I'm asking you, is it
 21 possible that one of those shots or two of those shots
 22 could have been responsible for these two deaths?
 23 COLONEL MODIBA: Yes, it could be as a
 24 result of the shots coming from the south, shots coming
 25 from NIU, but I cannot be certain about to say it was the

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1 shot from southern side or a shot from the eastern side.
 2 CHAIRPERSON: Yes, I understand it's
 3 impossible for you to say. All you can deal with is
 4 possibilities.
 5 COLONEL MODIBA: Just a possibility, yes.
 6 MS BALOYI: Now Colonel, when you were in
 7 the basic line – I'm now back to the basic line that you
 8 say formed up here – when you were at that basic line and
 9 you describe the strikers as charging towards the police,
 10 which you say resulted in members firing warning shots, if
 11 members had not fired, if you hadn't fired – first let me
 12 confine it to you – if you hadn't fired warning shots as
 13 you did, what do you think would have happened?
 14 CHAIRPERSON: Would or could?
 15 MS BALOYI: Could have happened, Chair.
 16 COLONEL MODIBA: The reason of firing
 17 warning shots in the ground was trying to prevent the
 18 charging strikers to charge on us, on our basic line. That
 19 was the reason, we were preventing the attack on us.
 20 MS BALOYI: And if you hadn't fired? You
 21 say you fired and they went back into the bushes. If you
 22 hadn't fired, if you had just let them –
 23 COLONEL MODIBA: They would have attacked
 24 us.
 25 COMMISSIONER HEMRAJ: What's the word –

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1 when you use the word "charging," what does that mean?
 2 What were they doing?
 3 COLONEL MODIBA: Charging, they ran in a
 4 hostile, an aggressive manner towards our basic line. That
 5 is the charging, running.
 6 COMMISSIONER HEMRAJ: An aggressive
 7 manner?
 8 COLONEL MODIBA: You could see – in a
 9 violent manner, I could put it like that.
 10 COMMISSIONER HEMRAJ: What were they
 11 doing that gave you that impression?
 12 COLONEL MODIBA: They were brandishing
 13 dangerous weapons.
 14 CHAIRPERSON: Your time is actually up
 15 but I'll give you a few more minutes to round up. I
 16 wouldn't have thought you have to lead the contents of para
 17 14 in the statement but you may wish to just finish what's
 18 in para 13 and ask further roundup questions if you wish.
 19 MS BALOYI: Thank you. Thank you,
 20 Chairperson. Colonel, other than the shooting that you did
 21 when you were in the basic line with members of the NIU,
 22 did you at any point fire again at any point after you had
 23 first fired at the basic line?
 24 COLONEL MODIBA: No, I never fired again.
 25 The only rounds that I fired were five in that basic line

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1 where I indicated earlier. From there, I never fired.
 2 MS BALOYI: Thank you, that is the
 3 evidence of the Colonel.
 4 CHAIRPERSON: Thank you. We'll take the
 5 tea break at this point and thereafter Mr Chaskalson will
 6 cross-examine. Mr Wesley, I omitted to ask you at the
 7 beginning, as I had intended to do, to indicate what amount
 8 of time has been allocated to those parties who have
 9 applied for leave to cross-examine.
 10 MR WESLEY: Yes, thank you, Chair.
 11 Chairperson –
 12 CHAIRPERSON: Sorry, of course what I
 13 should say is that obviously these allocations are done on
 14 the basis that matters that were going to be traversed in
 15 cross-examination that will be covered by Mr Chaskalson in
 16 his cross-examination obviously won't be able to be
 17 repeated, but subject to that can you give us the times at
 18 this stage?
 19 MR WESLEY: Yes, thank you, Chair.
 20 Pursuant to the applications that have been made, the
 21 evidence leaders have three hours, the families have two
 22 hours, the Legal Resources Centre is allotted 45 minutes,
 23 the injured and arrested parties are allotted 180 minutes
 24 and at this stage there is 15 minutes for re-examination .
 25 CHAIRPERSON: Thank you. Well, on that

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1 note we will take the tea adjournment.
 2 [COMMISSION ADJOURNS COMMISSION RESUMES]
 3 [12:08] CHAIRPERSON: The Commission resumes.
 4 Before I remind the Colonel he's still under oath, I think
 5 we have some housekeeping to do, Mr Chaskalson. According
 6 to your list you've got three new exhibits. Is that
 7 correct? The first is number 18 on your list. Is that
 8 correct?
 9 MR CHASKALSON SC: Yes, Chairperson, but
 10 it turns out that that is the, we've been given the wrong
 11 movement report by SAPS, so let's not make that an exhibit.
 12 CHAIRPERSON: So the first one of these
 13 new exhibits will then be the number 19, the expert report
 14 of Dr Naidoo and Mr Steyl?
 15 MR CHASKALSON SC: That's correct,
 16 Chairperson.
 17 CHAIRPERSON: And that will be ZZZ5.
 18 MR CHASKALSON SC: That's correct.
 19 CHAIRPERSON: And then ZZZ6, will that be
 20 number 21 –
 21 MR CHASKALSON SC: Chairperson, we've
 22 already got the primary Plaatjies affidavit or statement as
 23 JJJ60, so why don't we make this JJJ60A or point 1?
 24 CHAIRPERSON: JJJ60, six-oh?
 25 MR CHASKALSON SC: Six-zero.

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1 CHAIRPERSON: Six-zero, A. I think we
 2 used bis at one stage. Let's call it bis. That's an
 3 additional statement by – what is the rank of Mr Plaatjies?
 4 MR CHASKALSON SC: It's Constable
 5 Plaatjies.
 6 CHAIRPERSON: Constable, he's not an
 7 officer. Additional statement of Constable Plaatjies.
 8 Alright, I'll mark those accordingly. That will be JJJ60
 9 bis. Colonel, you're still under oath.
 10 KAIZER NTLOU MOBIDA: s.u.o.
 11 CHAIRPERSON: Mr Chaskalson, you may
 12 proceed with your cross-examination –
 13 MR CHASKALSON SC: Chairperson –
 14 CHAIRPERSON: - commence with your cross-
 15 examination.
 16 MR CHASKALSON SC: Maybe before I
 17 commence, if I can request that SAPS finds the correct
 18 movement report for Colonel Modiba. Colonel, we were given
 19 an AVL record for what was, we were told was your vehicle,
 20 but it bore no relationship to any of the movements that
 21 you were describing in your evidence and then I realised it
 22 had to be wrong because it said you were in Soshanguve at
 23 half past 2 on the 16th, and you clearly weren't. But if we
 24 can get the correct document from SAPS and if anything
 25 flows from it we hopefully will be in a position to address

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1 it, or at least put it on record.
 2 CHAIRPERSON: Ja well, Ms Baloyi and her
 3 attorney have heard what you said and I take it they've
 4 taken notice of what you've said and that we'll get the
 5 relevant report, the movement report for the witness's
 6 vehicle as soon as possible. Is that correct, Ms Baloyi?
 7 MS BALOYI: Chair, we will attend to it,
 8 yes.
 9 CHAIRPERSON: No, I didn't ask you to
 10 attend to it. I said we'll get it as soon as possible. Is
 11 that correct?
 12 MS BALOYI: Chair, I answered that way
 13 because I was told this morning that in fact what Mr
 14 Chaskalson has been given is the correct report. So we'll
 15 go back and make proper –
 16 CHAIRPERSON: Well, then the witness was
 17 at Soshanguve then at 2:30 –
 18 MS BALOYI: Yes, then he was shown –
 19 CHAIRPERSON: - which is a serious inroad
 20 on his credibility if that's correct, isn't it?
 21 MS BALOYI: No, Chairperson, there may
 22 well be an explanation for it, but I'll go back and get a
 23 proper response.
 24 CHAIRPERSON: Thank you very much.
 25 Alright.

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1 MR CHASKALSON SC: The vehicle in
 2 question –
 3 CHAIRPERSON: Sorry, while we're at it,
 4 there were other AVL records that have been asked for. I
 5 don't know what the status is of them. We don't want to
 6 hold up the Commission while we wait for other AVL records
 7 that have been asked for. Is that something that perhaps
 8 you and Mr Chaskalson can discuss during the lunch
 9 adjournment, or unless it's already been –
 10 MR CHASKALSON SC: We can do it. We've
 11 been furnished with copies of all of the AVL records.
 12 We've been focussing at a particular time on those records
 13 and hadn't found obvious anomalies. We found the obvious
 14 anomaly in respect of Colonel Modiba only yesterday in
 15 fact, but in respect of the others they seem on their face
 16 to be correct to us.
 17 CHAIRPERSON: You were checking the
 18 allegations and inasmuch as the allegations appeared to be
 19 supported by the AVL records then we don't have to waste
 20 further time on them because the allegations are correct.
 21 Yes, I understand.
 22 COMMISSIONER HEMRAJ: Actually, Mr
 23 Chaskalson, Ms Le Roux did a cross-examination inferring
 24 certain things with one or other witness's AVL records and
 25 when we asked for them we were told they were incomplete.

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1 I think that was what I reminded the Chair about.
 2 MR CHASKALSON SC: Commissioner, you're
 3 absolutely right. I think this is something that SAPS and
 4 I should sort out because we have been given AVL records,
 5 those were for I think Major-General Naidoo's vehicle, the
 6 ones in question, and Captain Kidd's vehicle, and we've
 7 been given other vehicles that have additional readings
 8 for, other records that have additional readings for those
 9 vehicles –
 10 CHAIRPERSON: Yes, yes, that's right.
 11 The data that Ms Le Roux had was at something like 15-
 12 minute intervals and it seems clear from some of the other
 13 reports we had that data should be available at shorter
 14 intervals than that. I think that's the point. Anyway, if
 15 you and Ms Baloyi can discuss this outside the chamber then
 16 we'll presumably get the reports that are required as soon
 17 as possible.
 18 MS BALOYI: We'll do so, Chair.
 19 CROSS-EXAMINATION BY MR CHASKALSON SC:
 20 Colonel, to begin with, I just want to address a few
 21 matters that flowed from your evidence today that we hadn't
 22 seen in the statement. The first is your starting position
 23 on the 16th. You described your position on what was the
 24 northern, north-western edge of the power station. We
 25 found some photographs and I'd just like to show them to

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1 you to see if we've identified your vehicles correctly in
 2 that regard. So maybe if we could look first of all at
 3 JJJ10.4498 – 4498. Sorry, Colonel, you won't have those
 4 because we weren't aware of this issue from your statement,
 5 but you ought to be able to – if one zooms into the top
 6 left-hand – sorry, in fact let's zoom back so that the
 7 Colonel can be oriented first of all, so we see the whole
 8 photograph, and Colonel, if I can just point out some
 9 landmarks so that you are oriented; that's koppie 1, that's
 10 koppie 2, there's the kraal. I'm sketching out the power
 11 station and we've seen is vehicles in the position that you
 12 described, which I'm marking now. Maybe if we could zoom
 13 up towards those vehicles –
 14 CHAIRPERSON: This is in the top left-
 15 hand corner of the slide.
 16 MR CHASKALSON SC: Colonel, does that
 17 broadly correspond to where you understood your starting
 18 position to be? Or would you be able to confirm that those
 19 are your vehicles at your starting position on the 16th?
 20 For the record, the time of this photograph is eTV time
 21 10:36:11, so it would be 10:36:11 in the morning.
 22 CHAIRPERSON: Can you see your vehicle
 23 there?
 24 COLONEL MODIBA: Chairperson, I can see
 25 the vehicles but I just want to make sure if it's the right

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1 substation which – because we were not far from the
 2 substation, if maybe we can zoom –
 3 CHAIRPERSON: For the purpose you've got
 4 to look at the whole picture again then to get your
 5 bearings there.
 6 MR CHASKALSON SC: Maybe if we can show
 7 another one which might be of better assistance to you,
 8 it's JJJ10.4523, and this is taken from the north, so I'm
 9 marking now koppie 2, koppie 1, and that would be the
 10 substation behind koppie 1 and again those vehicles that we
 11 saw on the earlier photograph are in the top right-hand
 12 corner of this photograph. Koppie 3 would be to the right
 13 of this photograph, off-screen.
 14 COLONEL MODIBA: If I could remember
 15 well, from the morning we were the only vehicles next to
 16 the substation there on the southern side of koppie 1.
 17 MR CHASKALSON SC: This is the substation
 18 on the southern side of koppie 1, the larger substation.
 19 COLONEL MODIBA: That could be our
 20 vehicles because if I recall back there were no any other
 21 vehicles except us next to that substation.
 22 COMMISSIONER HEMRAJ: How many vehicles
 23 were there in your contingent?
 24 COLONEL MODIBA: I can take a guess of
 25 about four with my vehicles.

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1 CHAIRPERSON: One can see about four
 2 there.
 3 MR NTSEBEZA SC: Mr Chair, is it possible
 4 to zoom on those vehicles? I just want to see whether the
 5 colour shows, because the colour was quite an issue.
 6 CHAIRPERSON: Yes, you're right. You see
 7 there are four vehicles. The one on the extreme left-hand
 8 side appears to be dark colour. The other three are white.
 9 In fact I'm not sure, there may even be five vehicles there
 10 because the one on the extreme right looks as if it
 11 actually might be two, if you know what I mean.
 12 MR CHASKALSON SC: I think it has a door
 13 open, Chair.
 14 CHAIRPERSON: That's a door open, I see,
 15 okay. The one has got a door open. Then there are two
 16 other white ones to the left of the picture if you look at
 17 it, and then to the extreme left there's a darker vehicle,
 18 either a dark blue or something. Is that your one?
 19 COLONEL MODIBA: Ja, definitely those
 20 were our vehicles.
 21 MR CHASKALSON SC: Now Colonel, when you
 22 describe what you saw in the morning in your statement
 23 ZZZ4, that's the 19 December 2013 statement, you say in
 24 paragraph 6, "There was a lot of movement going on that I
 25 could observe, miners going up and down, some going into

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1 koppie 3, some going to Karee Mine, some coming into the
 2 koppie and we just observed." So you were aware in the
 3 morning of the 16th that there was movement between koppies
 4 1 and 2 on the one hand, which is where most of the miners
 5 were gathered opposite the SAPS, and koppie 3 on the other
 6 hand, which was behind those koppies. You were aware of
 7 movement between koppies 1 and 2 and koppie 3. Is that
 8 correct?
 9 COLONEL MODIBA: At the distance where I
 10 was standing, where our vehicles were parked, I could
 11 observe koppie 1 and koppie 3 clearly.
 12 MR CHASKALSON SC: Yes, but my question
 13 to you is did you see movement of miners between those
 14 koppies? Which is what is suggested by paragraph 6 of your
 15 statement; "miners going up and down, some going into
 16 koppie 3, some going to Karee Mine."
 17 COLONEL MODIBA: Especially those that,
 18 Chairperson, that were going towards koppie 3, between
 19 koppie 3 and koppie 2 and that also walked past us towards
 20 Karee Mine and in, those yes, that's the movement I'm
 21 referring to in my statement.
 22 COMMISSIONER HEMRAJ: Which direction is
 23 Karee here on this photograph, Mr Chaskalson?
 24 MR CHASKALSON SC: It's a long way to the
 25 right.

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1 COMMISSIONER HEMRAJ: Yes, thank you.
 2 MR CHASKALSON SC: But it's a long way
 3 past koppie 3. How much movement of miners in and through
 4 koppie 3 did you observe?
 5 COLONEL MODIBA: It's uncounted. There
 6 were just movement, just observing, but those were not
 7 movement that actually bothered us, to worry about. It was
 8 just normal movement up and down, Chairperson.
 9 MR CHASKALSON SC: But I suppose my
 10 question was a bit unfair because it's very difficult to
 11 answer how much, but are we talking about one or two people
 12 moving into koppie 3, or a more substantial number of
 13 people moving into koppie 3?
 14 COLONEL MODIBA: If, Chairperson, if I
 15 recall well, in koppie 3 there were not lot of movements in
 16 there, but there were some striking miners in that koppie,
 17 not a lot. A lot of miners were at koppie 1 that you could
 18 see there were a lot there, even in between, but right
 19 inside koppie 3 it was just few movements going up and down
 20 there.
 21 MR CHASKALSON SC: If you were to
 22 estimate how many miners at koppie 3?
 23 COLONEL MODIBA: It's not possible to say
 24 it how many were they there in koppie 3, Chairperson.
 25 MR CHASKALSON SC: But more than 50, less

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1 than 50? More than a hundred, less than a hundred? Are
 2 you able to estimate even in those broad terms?
 3 COLONEL MODIBA: As we are aware that
 4 koppie 3 it's a dense bush and rocky, so it was not easy,
 5 it's no, it wasn't easy for me to make calculation, or if I
 6 can estimate.
 7 MR CHASKALSON SC: Alright, Colonel,
 8 moving to another aspect of your movements, you said in
 9 your testimony with reference to slide 148 of exhibit L –
 10 and maybe we could just have slide 148 of exhibit L so the
 11 Colonel can see it again – that your briefing to NIU
 12 members after the 2:30 briefing to you, you identified what
 13 I'll call the small substation, that your briefing took
 14 place in the area of the small substation, if I understood
 15 your evidence correctly. I just want to clarify that it
 16 was at this substation and not at the substation just south
 17 of koppie 1, which is near where you were earlier in the
 18 morning.
 19 COLONEL MODIBA: It was the first one
 20 that the Chairperson, that was pointed out. It was there.
 21 MR CHASKALSON SC: So the smaller
 22 substation closer to forward holding area 1?
 23 COLONEL MODIBA: That's correct,
 24 Chairperson.
 25 MR CHASKALSON SC: And from that position

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1 you drove to the, well to the position where you and your
 2 members would take up formation in advance of the operation
 3 near where scene 1 happened ultimately. Do you remember
 4 how you drove from where you gave your briefing to the
 5 position where you ultimately parked your vehicle?
 6 COLONEL MODIBA: Yes, Chairperson, from
 7 that point we drove in towards the area where our vehicles
 8 were parked. We go up in there through –
 9 CHAIRPERSON: You indicate you came up,
 10 as one looks at the slide, you came up the right-hand side
 11 of the small power station and when you got beyond the
 12 power station you then veered diagonally to, upwards to
 13 your left and ended up in the spot that you showed us
 14 earlier where you stopped and which we saw on the
 15 photograph where your vehicles were. Is that correct?
 16 COLONEL MODIBA: Affirmative.
 17 MR CHASKALSON SC: Colonel, are you sure
 18 that that's the route that you took? I mean it's not a
 19 major issue one way or another, but according to the
 20 evidence of Major-General Naidoo you can't get through that
 21 way. He tried and it wasn't possible. I mean if you can't
 22 remember the route that you took, please say so.
 23 COLONEL MODIBA: I'm sure that there was
 24 a gravel road that someone could take there. It's not that
 25 it's a good road that any vehicle can travel there, but

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1 with our vehicles that we were using we could go – there
 2 was really a road leading to that where we parked our
 3 vehicles.
 4 MR CHASKALSON SC: There are many roads
 5 leading there. I mean I can mark on the map where there
 6 are roads that are passable. There is one that runs up the
 7 left-hand side. There is another one roughly where I am
 8 indicating now, just before you –
 9 CHAIRPERSON: It's on the left-hand side
 10 of the small power station.
 11 MR CHASKALSON SC: And just –
 12 CHAIRPERSON: It's visible on the slide.
 13 MR CHASKALSON SC: And before one reaches
 14 the slimes dam. There is another road that runs up the
 15 right-hand side of the big power station, and then of
 16 course there's a road going back to forward holding area 1,
 17 which is the main gravel road that cuts across to the left.
 18 It's just that Major-General Naidoo said running up the
 19 right-hand side of the small power station you can't get
 20 through.
 21 COLONEL MODIBA: That possibly with his
 22 vehicle he used on the day, but I, if I remember well,
 23 there was a gravel road that lead into that direction.
 24 CHAIRPERSON: What vehicle did he use, as
 25 far as you can remember? Did you see his vehicle?

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1 COLONEL MODIBA: No, I haven't seen his
 2 vehicle. I didn't even know –
 3 CHAIRPERSON: You don't know –
 4 COLONEL MODIBA: I didn't even see him
 5 there.
 6 CHAIRPERSON: So you don't know what the
 7 width of his vehicle is.
 8 COLONEL MODIBA: No.
 9 CHAIRPERSON: You're just being
 10 charitable perhaps and suggesting that maybe the reason, if
 11 it's true that he couldn't go that way. Is that right?
 12 You can't give evidence that that is so. All you can say
 13 is it may be.
 14 COLONEL MODIBA: I don't know what
 15 vehicle he used and even that I can still say I haven't
 16 seen him there where we parked our vehicles, if he wanted
 17 to come there, but he wasn't there either.
 18 MR CHASKALSON SC: Colonel, moving to a
 19 different question in relation to movements.
 20 [12:27] If I can then go - and I'm jumping around in time
 21 here, I'm really just clarifying aspects before I get to
 22 the issues that concern me - in your statement of 3
 23 November 2012 which is MMM23, paragraph 6, you talk about
 24 what you saw after the shootings at scene 1 and you say,
 25 "Soon after the shooting at scene 1 I directed my members

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1 to sweep koppie 1 for dangerous weapons that may be there
 2 and for armed protestors that may still be in that koppie.
 3 There were 96 of my members including myself at that time.
 4 As the protestors moved to koppie 3 I directed 19 of my
 5 members to remain sweeping koppie 1 and took 77 of my
 6 members to sweep koppie 2 and koppie 3 where the protestors
 7 had proceeded." Now I just want to clarify that at the
 8 time, during the operation, you were aware that after the
 9 scene 1 shootings a substantial number of strikers had
 10 retreated to koppie 3. Were you aware of that?
 11 COLONEL MODIBA: Yes, just after the
 12 shooting they first regrouped in koppie 2, then we went out
 13 between the trailer and the Nyala and form up with a basic
 14 line. That's when now they moved further to koppie 3. I
 15 could see them.
 16 MR CHASKALSON SC: So you could see them
 17 moving in to koppie 3.
 18 COLONEL MODIBA: Yes I see them. From
 19 koppie 1 to 2, from 2 to 3. That I could see, Chairperson.
 20 MR CHASKALSON SC: Then to clarify
 21 something which I suspect may just be an error, but if it's
 22 not please tell me. ZZZ2.2 which was your statement of 25
 23 August 2012, and if we can go to paragraph 3 where you're
 24 describing the briefing that you received from Lieutenant-
 25 Colonel Scott. "At about 14:30 I was called to attend a

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1 briefing about a plan of action at forward holding area 1,
 2 next to smelter's plants. The briefing was given by
 3 Lieutenant-Colonel Scott of Special Task Force. During the
 4 briefing it was mentioned that striking miners should be
 5 disarmed and dispersed from the mountain hill. It was also
 6 mentioned that Public Order Police would be first on the
 7 line, followed by Tactical Response Team and the National
 8 Intervention Unit. It's also mentioned that NIU and SDF
 9 should sweep the mountain situated at scene 2." Now did you
 10 mean to refer to scene 2 or koppie 2 in that statement?
 11 COLONEL MODIBA: I was actually referring
 12 to koppie 1 and 2.
 13 MR CHASKALSON SC: Ja, that makes sense.
 14 One last aspect of the briefing. You said in your
 15 testimony today when you're describing what you saw when
 16 you were in the field after the operation had begun and you
 17 saw striking miners running around the Nyala that was
 18 trying to get to the kraal with the barbed wire. I think
 19 if I got your words correctly you said at that point you
 20 realised that the negotiations had not succeeded.
 21 Something along those lines, but I just want to clarify
 22 this. Did you think when you went into the field for the
 23 operation that there were still going to be negotiations
 24 with the strikers?
 25 COLONEL MODIBA: That's correct,

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1 Chairperson, as I alluded earlier that during the briefing
 2 at 14:30 the negotiations were still to happen and then if
 3 that did not materialise, the plan was we're going to form
 4 up in those lines to give back-up for the dispersal by POP.
 5 Yes the negotiations were still going to continue,
 6 Chairperson.
 7 MR CHASKALSON SC: And how did you
 8 understand those negotiations were going to take place?
 9 Who was going to conduct them, where were they going to
 10 take place?
 11 COLONEL MODIBA: With my knowledge I know
 12 Colonel McIntosh was one of the negotiation team for the
 13 SAPS, so it could be where they normally did their
 14 negotiations.
 15 MR CHASKALSON SC: And until you saw the
 16 strikers running around, you thought that the negotiations
 17 were still going to happen, is that correct?
 18 COLONEL MODIBA: At the time I saw the
 19 striking miners running around, Chairperson, that's when I
 20 was under the impression that seemingly negotiations didn't
 21 succeed, so that means we were to form up accordingly. So
 22 that was my impression because obviously if the
 23 negotiations were still on, the striking miners wouldn't
 24 have looked the way they were when they ran around that
 25 Nyala which was pulling the barbed wire towards the kraal.

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1 MR CHASKALSON SC: So until you saw them
 2 running around, or running, try to get in front of that
 3 barbed wire, you didn't realise that your men had to form
 4 up and the operation was proceeding?
 5 COLONEL MODIBA: You know, Chairperson,
 6 things happened so quick at that time, I was just
 7 observing, standing behind TRT which was already forming up
 8 and other members were still going towards the rest when
 9 the said aggressive group came around the kraal.
 10 MR CHASKALSON SC: When you say around
 11 the kraal, around which side of the kraal? The west side
 12 or the east side? The east side is where the shootings
 13 ultimately took place.
 14 COLONEL MODIBA: You see as I mentioned
 15 earlier that at the distance that I was, I could observe
 16 the east and seemingly there were those that managed to
 17 bridge before the Nyala, but I cannot be definite, but the
 18 large group came around the kraal from the eastern side,
 19 Chairperson.
 20 MR CHASKALSON SC: Maybe if we can just
 21 look at a photograph for some of these questions. At JJJ10
 22 4540 which you have seen already. Now this is a photograph
 23 before the strikers tried to get round the barbed wire
 24 Nyala. You've identified your men in the position I'm
 25 marking now, which is the line of men just to the left of

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1 the four vehicles that one sees broadly parallel with the
 2 shack opposite the kraal. Where were your men going to
 3 form up in terms of the operation. Where would you have
 4 wanted your men to form up if you had called them to form
 5 up in terms of the operation?
 6 COLONEL MODIBA: They would form up next
 7 to the kraal, just before the entry into that kraal.
 8 MR CHASKALSON SC: I don't know if you've
 9 got a pointer, but if you can identify the position as to
 10 where you -
 11 COLONEL MODIBA: That's where the
 12 formation was going to take place. Just in front. Next to
 13 the kraal there.
 14 MR CHASKALSON SC: So just to the left of
 15 the path underneath the kraal. On this photograph, and
 16 parallel with that path.
 17 COLONEL MODIBA: Ja, somewhere there,
 18 Chairperson.
 19 MR CHASKALSON SC: And at what point
 20 would you have moved them into that position in terms of
 21 your understanding of the operation?
 22 COLONEL MODIBA: That would be determined
 23 by the results of the negotiations. If the negotiations
 24 were to succeed, we would still be hanging there in the
 25 area, then the POP would then go on retrieving the

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1 dangerous weapons. So fortunately at that time we didn't
 2 have opportunity to move forward to form up there, but we
 3 still had to form up behind the lines of POP and TRT.
 4 MR CHASKALSON SC: So it was never made
 5 clear to you at the briefings that the negotiations had
 6 failed completely and it was now a foregone conclusion that
 7 SAPS were moving to the tactical phase.
 8 COLONEL MODIBA: Could you please
 9 rephrase your question please?
 10 MR CHASKALSON SC: At the briefing at
 11 2:30 that you received from Lieutenant-Colonel Scott, did
 12 he not make clear to you that the negotiations had failed
 13 completely and SAPS had now taken a decision they were
 14 moving to the tactical phase?
 15 COLONEL MODIBA: Yes, he made it clear
 16 that during those formation, that would be when there was -
 17 of laying down the arms, then we would carry on with the
 18 dispersal, encircle and disarm but we were there as NIU to
 19 give a back-up.
 20 CHAIRPERSON: Mr Chaskalson, I wonder
 21 whether the two of you aren't talking past each other.
 22 You'll remember the main negotiations were conducted
 23 largely by Lieutenant-Colonel McIntosh. Those were
 24 negotiations, I think which we would say it failed. What
 25 was then envisaged was the tactical option. The tactical

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1 option was going to take the form of putting the wire
 2 barrier up. Calitz was then going to go and address the -
 3 we're going to move forward, I think in that we've called
 4 the corridor. They thought that the miners would be
 5 somewhere above the kraal to the left of the koppie side of
 6 the barrier. Calitz was going to give them the two
 7 warnings in vernacular languages to disperse - lay down
 8 their arms and disperse and if, of course, something else
 9 happened, then they had to be ready for it and I suspect
 10 that the negotiations he's talking about now is not what
 11 one can call McIntosh negotiations but the warnings and so
 12 forth that were to be given by Brigadier Calitz. If I'm
 13 correct in thinking that, then the two of you are talking
 14 past each other. That's something you can investigate
 15 because otherwise we may get stuck in what amounts to a
 16 point that isn't going to help us.
 17 MR CHASKALSON SC: Colonel, I don't know
 18 if you followed what the chairperson was putting to me.
 19 Did it make sense to you? Are the negotiations that you
 20 thought were going to take place essentially an
 21 announcement from Brigadier Calitz that people must leave
 22 their weapons and put down their weapons and leave the
 23 koppie.
 24 COLONEL MODIBA: That will be correct,
 25 taking into account that Brigadier Calitz was the

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1 operational commander. He was the one to execute that
 2 instruction.
 3 CHAIRPERSON: If that is so, that would
 4 effectively have been the first part of the tactical
 5 option, the non-violent alternative which was hoped to be
 6 achieved. In other words, the negotiations you're talking
 7 about is not the negotiations which Lieutenant-Colonel
 8 McIntosh had been conducting earlier. That's something
 9 different. Is that the way you understand it.
 10 COLONEL MODIBA: Maybe I might be
 11 confusing it but the fact here is - or to my knowledge I
 12 know that Colonel McIntosh was always alongside Brigadier
 13 Calitz. They were always together when doing this process.
 14 CHAIRPERSON: I asked you the question
 15 because I notice in your statement which is ZZZ4 when you
 16 summarise what Lieutenant-Colonel Scott said, you say in
 17 paragraph 8, line 3 and 4 the following. This is now what
 18 Lieutenant-Colonel Scott said according to you. "He said
 19 there's instruction that miners must be dispersed and
 20 disarmed because they had reached loggerheads about laying
 21 down arms." You outlined the formation and then you go on
 22 with that. That seems to make it clear to me anyway that
 23 what was going to happen according to Lieutenant-Colonel
 24 Scott was that there was going to be a dispersal and
 25 disarmament because, as you put it, "they had reached

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1 loggerheads about laying down arms." In other words the
 2 earlier negotiations that had been conducted in regard to
 3 the laying down of arms had not produced the desired
 4 results. Am I interpreting what you say correctly?
 5 COLONEL MODIBA: That's correct,
 6 Chairperson.
 7 MR CHASKALSON SC: Well if we go back to
 8 the photograph, you've explained where you would have lined
 9 up your men if you thought that the operation was now going
 10 to commence. Can you mark the position on the map where
 11 you were when you saw the miners running parallel to the
 12 barbed wire Nyala? Sorry, on the photo, not on the map.
 13 COLONEL MODIBA: I was still at that
 14 spot, Chairperson. Not far from my group. I was moving
 15 towards that direction. To north direction. Somewhere
 16 there.
 17 CHAIRPERSON: That's where the pointer
 18 is. Starting with the point in the middle of that line,
 19 that longish line of vehicles which I referred to earlier,
 20 then he indicates that he moved diagonally upwards to the
 21 right, midway between the negotiation Nyala and the Nyala's
 22 on either side of it and the line below of TRT vehicles.
 23 MR CHASKALSON SC: And did you stay in
 24 that position essentially until after the shootings or did
 25 you, as you saw the strikers move, did you move anywhere

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1 else?
 2 COLONEL MODIBA: If I got it well you
 3 mean after the shooting?
 4 MR CHASKALSON SC: No, you've marked the
 5 position where you were when you saw the strikers trying to
 6 get around the barbed wire Nyala. Did you stay in that
 7 position until after the shootings or did you move as you
 8 saw other developments?
 9 COLONEL MODIBA: I moved a little bit
 10 forward, not - just towards the kraal but a little bit
 11 forward. That's where now the eruption occurred. When
 12 these miners that came here and the shooting started.
 13 CHAIRPERSON: Well indicate again the
 14 spot that I've referred to earlier halfway between the line
 15 of TRT vehicles and the negotiating vehicle line of Nyalas.
 16 He indicates that's where he was and then he pointed to a
 17 spot close to - as one looks at this slide, the bottom
 18 left-hand corner of the kraal. Is that right, Colonel? Is
 19 that correct? That's what you did point out.
 20 COLONEL MODIBA: Can I get the question?
 21 It's not clear to me.
 22 CHAIRPERSON: Sorry, I've indicated the
 23 two spots physically on the screen. The one is the spot
 24 that I thought you pointed out, the bottom left-hand corner
 25 of the kraal where you said that the crowd were -

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1 MR NTSEBEZA SC: Mr Chair, just for my
 2 own orientation, can we have an idea where the negotiating
 3 vehicle is? Negotiating Nyala. Sorry to interrupt.
 4 CHAIRPERSON: Where have you been Mr
 5 Ntsebeza. If you look at the slide, there is the mast
 6 which we've used as a fixed point, and immediately below
 7 the mast as one looks at the photograph, there are - well
 8 it's effectively four Nyala's close to each other in a line
 9 parallel with the bottom of the photograph, with another
 10 one further to the left. The negotiating Nyala, as I
 11 understand it, is the one more in line with the mast.
 12 MR NTSEBEZA SC: Thank you, Mr Chairman,
 13 Mr Chaskalson has kindly pointed it out with his own
 14 pointer. That's more or less around the area of the mast.
 15 CHAIRPERSON: The one in the middle. I
 16 was wrong, it's not the one below the mast as I thought,
 17 but the one to the left to the one below the mast. I think
 18 that's the evidence.
 19 [12:47] Now that we've got Mr Ntsebeza onboard as well,
 20 we can carry on.
 21 MR CHASKALSON SC: Alright, Colonel, so
 22 you've marked the position where you were at the shootings.
 23 What did you do when the shootings took place?
 24 COLONEL MODIBA: I started shooting
 25 because it didn't take long. It was a very quick, if I can

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1 say exercise, it was very quick. The -
 2 CHAIRPERSON: According to the evidence
 3 it was about eight seconds or less.
 4 COLONEL MODIBA: Ja, as I say, it was
 5 quick, then immediately I moved back. As I was, moved back
 6 towards my members and then at the same time I gave hand
 7 signal for them to go towards koppie 1 so that we could
 8 conduct our primary task.
 9 MR CHASKALSON SC: Okay, Colonel, I'm
 10 going to show you again a sequence of photographs where you
 11 can just identify your members. The starting photograph is
 12 a photograph about two and a half minutes after the
 13 shootings. It's KKK16.5108 - KKK16.5108, and if we can
 14 zoom into the left-hand side of the - or before we zoom in,
 15 again Colonel, if I can orient you; here is the kraal. The
 16 shootings had taken place just to the left of the kraal as
 17 we look at it. Koppie I'm marking now with the pointer.
 18 Koppie 2 I'm marking with the pointer there. There is a
 19 line of Nyalas that have already formed up opposite koppie
 20 2. I want us to zoom in on what I think are the line of
 21 your members, which I'm marking now, which is towards the
 22 left-hand side of the photograph, and we can now see that,
 23 we zoomed in, we can see the kraal, we can see the TRT line
 24 behind the kraal, and will you confirm that these are your
 25 members who you have now called and who you are going to

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1 take in the direction of koppie 1?

2 COLONEL MODIBA: Affirmative,

3 Chairperson.

4 MR CHASKALSON SC: Colonel, we did some

5 rough measurements on Google Maps. One can measure the

6 intersection of these two, not really, the sort of paths

7 which cross the group of your men. We can measure that

8 point and the point from that intersection to the mouth of

9 the kraal is approximately 65 metres. Would that square

10 with your recollection?

11 COLONEL MODIBA: As I made an estimate,

12 Chairperson, I said between 80 to 100. It's just a layman

13 estimation, the distance.

14 MR CHASKALSON SC: Well, I just want to

15 put it to you, we've done that exercise. Maybe the SAPS

16 team can look at it as well. If they've got a query on it

17 we can sort it out among ourselves. The next photograph

18 that I want us to look at is KKK16.5110, which is 20

19 seconds later, and one can see what has happened here is

20 that your group is starting to form into a basic line. If

21 we can zoom into the top left-hand corner of the screen,

22 and so the group is starting to move from the sort of bunch

23 that we saw in the previous photograph into what will look

24 like a line. Can you confirm again that that is your

25 group, your members?

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1 COLONEL MODIBA: Ja, that's the time when

2 they were preparing to move towards koppie 1 through that

3 Nyala at the bottom.

4 MR CHASKALSON SC: We'll get to that on

5 the next shot. I want to give another distance that we

6 measured, which is from the northernmost tip of your group

7 to the bodies that I'm marking now around the kraal, around

8 the path in front of the kraal. That distance we estimated

9 on Google Earth was 45 metres. Does that – again SAPS, I

10 just want to put it to you. If SAPS have a difficulty with

11 it they will come back to us; 45 metres.

12 If we can go about two minutes on to KKK16.5113,

13 and now if we can zoom in on your members crossing at the

14 Nyala, the time of this shot is 15:58:37, which is almost

15 five minutes after the shootings, and will you confirm that

16 this is your group of NIU members attempting to cross the

17 barbed wire at what is in fact Nyala 3?

18 COLONEL MODIBA: I can confirm that,

19 Chairperson.

20 MR CHASKALSON SC: Then the next shot

21 that I'd like us to look at is JJJ10.4543, which we've seen

22 already, and if we can now zoom in on the line of your

23 members who are on the other side, on the koppie side of

24 the barbed wire to the bottom right of the photo, and will

25 you confirm again that this is your line of members?

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1 COLONEL MODIBA: Yes, I can confirm that

2 as well.

3 MR CHASKALSON SC: And the time of that

4 photo is 16:01:43 eTV time. Now on the FLIR camera, which

5 is the long-range CCTV camera, we can see that your line is

6 first seated and then it stands up at 16:08:11 on the FLIR

7 camera, which is 16:02:49, and it moves off, it starts

8 actually moving forward towards koppie 2 and ultimately

9 koppie 3 at 16:08:49 on the FLIR camera, which is 16:03:27

10 – 16:03:27 eTV time. Again I don't want to take you to

11 those shots because it will waste a lot of, or we'll spend

12 a lot of time –

13 CHAIRPERSON: Mr Chaskalson, you say

14 seated. According to his evidence they were kneeling and

15 standing, so –

16 MR CHASKALSON SC: Kneeling.

17 CHAIRPERSON: So the kneeling is probably

18 what you mean by that.

19 MR CHASKALSON SC: Kneeling, or sort of,

20 it looks in fact that they are on one knee, sort of one

21 foot up, one knee and then stand up. If I can give the

22 references, again I would ask SAPS to query them if they

23 have difficulties, but just to get the timeline, it's CC38,

24 which is the FLIR camera, 16:08:11 on that camera, which is

25 16:02:49, one can see the line seated, or kneeling, and

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1 16:08:49, which is eTV 16:03:27, one can see them standing

2 up and starting to move forward, and what one also sees on

3 the FLIR camera, at 16:03:33 eTV time, which is 16:08:55,

4 is that the second water cannon, the North West water

5 cannon comes through the line of Nyalas at koppie 2. So my

6 question to you is, do you recall that your line started

7 moving forward round about the same time that the second

8 water cannon reached the Nyalas that were gathered at

9 koppie 2? Does that square with your memory?

10 COLONEL MODIBA: Yes, we moved just after

11 the water cannon moved in first.

12 MR CHASKALSON SC: Now that point,

13 16:03:33, is – 16:03:27 is roughly nine and a half minutes

14 after the shootings. So you started moving forward roughly

15 nine and a half minutes - moving forward towards koppie 2

16 and koppie 3 roughly nine and a half minutes after the

17 shootings. Does that square with your recollection?

18 COLONEL MODIBA: We didn't rush into

19 those koppies, I cannot dispute that, because we were

20 cautious. That's part of our techniques when approaching

21 the dangerous area, we still had to consider the safety

22 there first.

23 COMMISSIONER HEMRAJ: Mr Chaskalson, we

24 don't have the exhibit number for the FLIR camera.

25 MR CHASKALSON SC: Sorry, CC38. CC38.

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1 CHAIRPERSON: Mr Chaskalson, when you've
 2 reached a suitable stage let me know, we can take the lunch
 3 adjournment. If you're busy with a point I think you're
 4 busy with, you've nearly made the point, but when it's
 5 convenient for you let me know.
 6 MR CHASKALSON SC: I have reached the end
 7 of this section of the cross-examination, so it would be a
 8 convenient time.
 9 CHAIRPERSON: We'll take the lunch
 10 adjournment. It's quarter to 2.
 11 [COMMISSION ADJOURNS COMMISSION RESUMES]
 12 [13:49] CHAIRPERSON: The Commission resumes.
 13 Colonel, you're still under oath.
 14 MR CHASKALSON SC: All right, Colonel,
 15 I'm afraid we've moved, we're finished with the
 16 clarificatory questions. Now for the questions where I
 17 have some concerns and if we can go back to the scene 1
 18 shootings. Did you yourself see the shootings?
 19 COLONEL MODIBA: Yes I did see the
 20 shooting, Chairperson.
 21 MR CHASKALSON SC: And you heard that
 22 eight second volley of five gunshots?
 23 COLONEL MODIBA: I heard a gunshot, I
 24 can't say it was eight seconds.
 25 MR CHASKALSON SC: We've measured it on

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1 the television footage and there is a sustained burst of
 2 gunfire for eight seconds. There are some debates as to
 3 whether one can identify individual shots later but the
 4 volley lasts eight seconds. Have you ever heard a volley
 5 of gunfire like that before in an operation?
 6 COLONEL MODIBA: It was the first time
 7 that I get involved in such a situation where the shooting
 8 erupted.
 9 MR CHASKALSON SC: Were you aware that
 10 several people had been killed and many more others had
 11 been injured in that volley of gunfire?
 12 COLONEL MODIBA: I cannot say,
 13 Chairperson, that people were killed at that time. I know
 14 that there was a shooting which probably yes it could be
 15 those that were killed or injured but to say yes I was
 16 aware at that time is not possible.
 17 MR CHASKALSON SC: Did you infer at the
 18 time that there was a strong likelihood that there were
 19 deaths and injuries, serious injury?
 20 COLONEL MODIBA: Rephrase your question.
 21 MR CHASKALSON SC: Did you infer, did you
 22 assume that there were deaths and serious injuries as a
 23 result of that gunfire?
 24 COLONEL MODIBA: I could truly assume
 25 that there could be injuries but that I was not sure of if

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1 there were fatalities.
 2 MR CHASKALSON SC: Could you see bodies?
 3 COLONEL MODIBA: Yes, I saw bodies.
 4 MR CHASKALSON SC: I want to take you to
 5 something that you said in your statement of the 25th of
 6 August which is ZZZ2.2. Can we go to paragraph 6?
 7 "Thereafter the armed warriors ran around the barbed wire
 8 in mob formation, wielding pangas, spears, assegais, axes
 9 and knobkerries while charging at the outlines of
 10 formation. In the process there was a sound of gunshot
 11 from the charging mob and both first and second rows
 12 responded by firing at the aggressive, hostile mob with an
 13 effort to cut them down." What did you mean by an effort
 14 to cut them down?
 15 COLONEL MODIBA: In that paragraph my
 16 take is that as these armed strikers were charging at the
 17 police then the police responded by firing towards their
 18 direction which I could think it was stopping them not to
 19 come closer to them or hurt them.
 20 MR CHASKALSON SC: Did you see what had
 21 taken place there as a deliberate attempt to kill strikers?
 22 COLONEL MODIBA: No, that I cannot say
 23 that it was a deliberate attack on the strikers.
 24 MR CHASKALSON SC: But the words that you
 25 used were "an effort to cut them down." What do you mean

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1 by cutting someone down?
 2 COLONEL MODIBA: What I basically mean is
 3 stopping that the person who was charging to stopping him.
 4 I can stop you by firing in front of you. That can make a
 5 person who is charging to retreat, that is what I meant.
 6 MR CHASKALSON SC: But that's not what
 7 cut them down means is it?
 8 COLONEL MODIBA: No that's according to
 9 how I put it there, my explanation.
 10 MR CHASKALSON SC: So when you say you
 11 used the words "cut them down" what you meant was make them
 12 retreat.
 13 COLONEL MODIBA: That's correct. By
 14 firing what I could say a warning shot at them, firing in
 15 front of the charging, striking miners they would
 16 eventually retreat if you're firing in front of them as
 17 they are charging. That was what I meant in cutting them
 18 down. That's to prevent them from coming.
 19 MR CHASKALSON SC: Why did you use the
 20 words "cut them down" because they don't convey to me, they
 21 don't convey the meaning that you say you had.
 22 COLONEL MODIBA: No well that's how
 23 perhaps you could understand it and you need also to take
 24 into account that English is not my native language but
 25 that was precisely what I meant, Chairperson.

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1 MR CHASKALSON SC: Have you used this
 2 phrase "cut them down" before or again? Is this the first
 3 you've used this phrase to the best of your recollection?
 4 COLONEL MODIBA: Those were the words I
 5 used, I cannot say I used them before but those words that
 6 are contained in the paragraph that's the meaning behind
 7 that not to cut as to cut a thing but prevent that movement
 8 of the miners that were coming, that were charging at the
 9 police.
 10 MR CHASKALSON SC: You saw bodies at
 11 scene 1, how many bodies did you see? Just an estimate.
 12 COLONEL MODIBA: As I alluded earlier
 13 that the action was very quick, I can just estimate five,
 14 six up, not more than ten. That's when I turned back.
 15 MR CHASKALSON SC: Was it not clear to
 16 you that there were going to be a large number of injuries
 17 at scene 1 and probably some fatalities as well?
 18 COLONEL MODIBA: Come again with your
 19 question.
 20 MR CHASKALSON SC: Was it not clear to
 21 you that there was going to be a large number of very
 22 serious injuries at scene 1 and probably some fatalities as
 23 well from that shooting?
 24 COLONEL MODIBA: Yes, there was a
 25 possibility that there could be fatalities as I saw bodies

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1 falling, then immediately I turned around and I directed
 2 NIU members to proceed to koppie 1. So I didn't went
 3 further to establish as to how many bodies were there.
 4 MR CHASKALSON SC: Why did you direct the
 5 NIU members to proceed to koppie 1 without establishing how
 6 many bodies there were?
 7 COLONEL MODIBA: Chairperson, the
 8 shooting involved TRT which I believed they had their
 9 commanders in front that they could take care of that. So
 10 I was just complying with the task that was initially given
 11 to National Intervention.
 12 MR CHASKALSON SC: So you were carrying
 13 out what you understood to be your function in terms of the
 14 operation or in terms of the plan and the briefing.
 15 COLONEL MODIBA: Yes, I was following the
 16 initial tasking that was given to National Intervention.
 17 MR CHASKALSON SC: But did it not strike
 18 you as odd that there were possibly many dead people at the
 19 kraal, many more injured and the operation was just going
 20 to continue? Did it not occur to you that the operation
 21 should maybe stop?
 22 COLONEL MODIBA: That I couldn't
 23 determine that the operation needs to stop. Maybe that was
 24 the responsibility of the operational commander to stop the
 25 operation but I didn't have that mandate.

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1 MR CHASKALSON SC: Well you couldn't have
 2 stopped it yourself but as one of the commanders in the
 3 field did it not occur to you that you should really
 4 contact the JOC or the operational commander to suggest
 5 that this operation should not proceed? A tragedy had just
 6 taken place?
 7 COLONEL MODIBA: Chairperson, that did
 8 not come to my mind.
 9 MR CHASKALSON SC: So you thought that
 10 you were just going to carry on with your task in terms of
 11 the briefing irrespective of what had happened at the
 12 kraal?
 13 COLONEL MODIBA: According to me,
 14 Chairperson, there was nothing wrong of us or National
 15 Intervention to still continue shipping koppie 1 as
 16 directed because there could still be firearms or dangerous
 17 weapons that we could seize from that point, koppie 1.
 18 MR CHASKALSON SC: You had 96 members
 19 under your command at scene 1, is that correct?
 20 COLONEL MODIBA: That's correct,
 21 Chairperson.
 22 MR CHASKALSON SC: Now we've been told
 23 that all NIU members receive first aid training to level 3.
 24 Is that correct?
 25 COLONEL MODIBA: Some of them yes,

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1 Chairperson, but not all of us.
 2 MR CHASKALSON SC: We were given a
 3 training manual which had the NIU training in it and maybe
 4 if we can just look at slide 79 of exhibit Q, 79 of exhibit
 5 Q. Now maybe if we go back to 69 which makes clear that
 6 this is the chapter of training for NIU. And just scroll
 7 quickly down to 79 so that we can see that nothing else
 8 comes in between. Sorry if we can just go back to that,
 9 one further back. So 18 weeks training, 48 trainees
 10 attending the first phase from the initial 1000 applicants
 11 broken up into three six week phases. The first phase is
 12 the weapons phase, the second phase is the rural phase, the
 13 third phase is the urban phase. Is this all familiar to
 14 you, do you recognise that training?
 15 COLONEL MODIBA: That's correct,
 16 Chairperson.
 17 MR CHASKALSON SC: So if we can then go
 18 down to 79 which is the rural phase, phase two, rural phase
 19 following modules. Para technical aid, do you get that
 20 training, Para technical aids? Do you recall that
 21 training?
 22 COLONEL MODIBA: That's correct,
 23 Chairperson.
 24 MR CHASKALSON SC: Tactical movements, is
 25 that training that you get?

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1 COLONEL MODIBA: That's correct.
 2 MR CHASKALSON SC: Map reading.
 3 COLONEL MODIBA: Correct.
 4 MR CHASKALSON SC: Global positioning
 5 system, GPS.
 6 COLONEL MODIBA: That's correct.
 7 MR CHASKALSON SC: First aid level 3.
 8 COLONEL MODIBA: There if I'm allowed to
 9 elaborate on that I would be pleased to do that.
 10 MR CHASKALSON SC: Please do.
 11 COLONEL MODIBA: There it's just a basic
 12 that you get but if during the operation you're a team
 13 member what is it that you can do. That's just a basic.
 14 CHAIRPERSON: What does level 3 mean?
 15 COLONEL MODIBA: I guess the level of
 16 that first aid.
 17 CHAIRPERSON: It's not level 1 or level
 18 2, it's level 3.
 19 COLONEL MODIBA: Chairperson, I'm not a
 20 medic, that is my understanding but then my indication here
 21 is that is part of the lesson we get, however, I want to
 22 point out that that's just a basic knowing whether that if
 23 your body get hurt this is what you can do. It's not
 24 something that I can use to save life like a medic.
 25 MR CHASKALSON SC: Is it – I'm just

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1 curious about what level of training it involves. Do you
 2 get training on for instance – say your buddy gets shot and
 3 he's bleeding heavily from the arm or from the leg would
 4 you know what to do?
 5 COLONEL MODIBA: Yes, Chairperson, in
 6 that regard my understanding I have to arrest the blood, in
 7 other words to stop the bleeding to be excessive.
 8 MR CHASKALSON SC: And the training gives
 9 you a basic skill to do that? I'm not suggesting it turns
 10 you into an emergency surgeon but it gives you certain
 11 basic skills to know how to stop bleeding.
 12 COLONEL MODIBA: That is just a basic.
 13 CHAIRPERSON: But you haven't answered
 14 the question. If one of your colleagues is bleeding badly,
 15 arm, leg and there is a danger unless something is done he
 16 could bleed to death are you able to deal with it? You
 17 remember this is rural phase so this presupposes you could
 18 be somewhere out in a rural area, far away from the nearest
 19 doctor and hospital and so on and would you be able to save
 20 the life of a colleague who was shot in the leg or in the
 21 arm and was bleeding badly? Would you know what to do?
 22 COLONEL MODIBA: Not exactly but -
 23 CHAIRPERSON: What would you do in that
 24 [inaudible], assuming you were in that situation how would
 25 you handle it?

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1 COLONEL MODIBA: If I have to talk about
 2 the bleeding it's a known thing that the bleeding needs to
 3 be stopped by bandaging the area that is bleeding. So that
 4 is my understanding by to go into details to say I would
 5 further do this and that to save the life I'd be lying
 6 because I'm not a medic.
 7 COMMISSIONER HEMRAJ: Does level 3
 8 include learning to diagnose what the problem is?
 9 COLONEL MODIBA: I'm not familiar with
 10 that type of course, the level 3, I'm not familiar with
 11 that one if I have to put it clear. That what it entails,
 12 what I know, the lessons that we receive during that period
 13 of rural phase is just a basic first aid that we can help
 14 ourself in case there are casualties.
 15 COMMISSIONER HEMRAJ: And in the case of
 16 excessive bleeding have you been taught how to apply a
 17 tourniquet to stop the bleeding?
 18 COLONEL MODIBA: Yes, that I can recall
 19 that to stop the excessive bleeding you tie the area that
 20 is bleeding. That they call you arrest the blood.
 21 COMMISSIONER HEMRAJ: Thank you.
 22 CHAIRPERSON: Did you pass the test, did
 23 you pass the course?
 24 COLONEL MODIBA: Yes, Chairperson.
 25 CHAIRPERSON: You did pass the test, you

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1 said yes and if necessary we can get the syllabus, level 3
 2 first aid, the syllabus of levels 1 and 2 as well if we
 3 want.
 4 COLONEL MODIBA: Chairperson, let me get
 5 it, you're talking about the overall course.
 6 CHAIRPERSON: No I'm only interested in
 7 the first aid you see. Level 1, level 2, level 3 but what
 8 you've told us is you learnt in the course of taking first
 9 aid how to stop excessive bleeding by applying a
 10 tourniquet, you told us that. So that we know already.
 11 All right, anyway, sorry, Mr Chaskalson, forgive us for
 12 interrupting you.
 13 MR CHASKALSON SC: Colonel, are you
 14 familiar with the crime scene policy at SAPS?
 15 [14:09] COLONEL MODIBA: If I can answer that if
 16 you get to a scene, the scene needs to be secured for
 17 further handling, for other aid to come and take it
 18 further. That is basically that.
 19 MR CHASKALSON SC: Maybe if I can call up
 20 a document which we've been told is the crime scene, the
 21 official crime scene policy of SAPS, it's exhibit MMM49.1,
 22 so it's a policy on crime scene management, policy 2 of
 23 2005. Do you recognise this document?
 24 COLONEL MODIBA: Yes, this document, it's
 25 filed in here with the file I'm having.

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1 MR CHASKALSON SC: Before I asked them to
 2 put it in your file, had you seen it before?
 3 COLONEL MODIBA: No, I cannot say I saw
 4 it before.
 5 MR CHASKALSON SC: As a commander of a
 6 unit, what are your responsibilities in terms of being
 7 aware of official SAPS policies?
 8 COLONEL MODIBA: As far as possible I
 9 need to understand the policies of the SAPS, and plus this
 10 policy 2 of 2007, when I look at that purpose, it's
 11 something that I need to know what to do when I get to a
 12 scene, what steps, procedures that I need to follow, how to
 13 handle the scene.
 14 MR CHASKALSON SC: No, that is what the
 15 policy instructs you on, but I'm curious about the internal
 16 systems at SAPS. You're a colonel, you're a commander of a
 17 specialist unit. Do these policies not get sent to you as
 18 a matter of course for you to read up and implement?
 19 COLONEL MODIBA: The way it stands is not
 20 something that I would say is new when coming to the
 21 management of the scene.
 22 MR CHASKALSON SC: Colonel, we'll get to
 23 the details of what's inside there in a minute, but I'm
 24 interested now in really in internal systems of SAPS. You
 25 say you're not sure you saw this document before it got put

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1 in the file in front of you. Are you clear on that?
 2 COLONEL MODIBA: Ja, as we are having a
 3 lot of policy documents in SAPS, this cannot surprise me
 4 even with its contents what to do when I get to a
 5 situation, managing the scene –
 6 MR CHASKALSON SC: Sure. I want to
 7 separate the contents from understanding how these policy
 8 documents get distributed in SAPS so that they are
 9 effectively implemented. So do you as a commander not
 10 receive copies of these sorts of policy documents so that
 11 you as commander can make sure that they are implemented?
 12 COLONEL MODIBA: Ja, these get circulated
 13 from time to time.
 14 MR CHASKALSON SC: And to whom? Who in
 15 your line of command would get a copy of this document, the
 16 policy on crime scene management, if you don't get it?
 17 COLONEL MODIBA: That could be myself as
 18 the in charge of the unit, it would be directed to me for
 19 me to cascade it down to the, to my members.
 20 MR CHASKALSON SC: But then how is it
 21 possible that you say you may not have seen this document
 22 before it was in the file that was arranged for you earlier
 23 this week?
 24 COLONEL MODIBA: Chairperson, surely
 25 there are a lot of policy documents that we have in the

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1 SAPS. This could be one of those policy document. I'm not
 2 disputing that one, but I cannot now at this stage point
 3 out to say SAPS did not make this document available for
 4 me, but it's put, it's a possibility that they could be in
 5 the documents that are filed at my unit.
 6 MR CHASKALSON SC: But as a matter of
 7 course ordinarily if policy documents are to be distributed
 8 through SAPS in your unit you would expect to receive a
 9 policy document so that you can implement it to the people
 10 underneath you. Is that how you would expect the practice
 11 to work?
 12 COLONEL MODIBA: That's correct,
 13 Chairperson.
 14 MR CHASKALSON SC: Can we –
 15 COMMISSIONER HEMRAJ: Sorry, so it's not
 16 as though a document like this would only go to the
 17 detectives who might attend crime scenes and know how to
 18 manage them; they would come to all the other units
 19 regardless of their functions?
 20 COLONEL MODIBA: That's correct. It gets
 21 circulated to all the components, regardless whether it's
 22 in line with that particular component.
 23 MR CHASKALSON SC: But in the nature of
 24 your work you are frequently present on crime scenes, are
 25 you not? Your unit.

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1 COLONEL MODIBA: Can you rephrase the
 2 question?
 3 MR CHASKALSON SC: Well, it flows from
 4 Commissioner Hemraj's question. I mean she was asking do
 5 these documents not get targeted to the units that are most
 6 likely to need them, as it were. I'm paraphrasing her
 7 question. But if your unit, the NIU is frequently present
 8 at crime scenes, is that not correct?
 9 COLONEL MODIBA: That's correct,
 10 Chairperson.
 11 MR CHASKALSON SC: Can we look at page 8
 12 of this document? And if we go down to the bottom, it
 13 starts with "Controlling phase," and it talks about the
 14 first member, who is the first member at a crime scene,
 15 "must executive all the duties of a crime scene manager
 16 until the handover to the official crime scene manager has
 17 been completed." "Taking control and evaluation of a crime
 18 scene" is paragraph 2, and if we go over the page we see
 19 under A6, "With due consideration of the integrity of
 20 physical evidence, the first member must assist the injured
 21 within the limitations of his or her training as a matter
 22 of priority." So that's SAPS policy that the first member
 23 on the scene must with due consideration to the integrity
 24 of physical evidence, must assist the injured within the
 25 limitations of his or her training as a matter of priority.

<p style="text-align: right;">Page 30566</p> <p>1 Were you aware of this aspect of the SAPS policy?</p> <p>2 COLONEL MODIBA: This cannot,</p> <p>3 Chairperson, surprise me when a police member get to the</p> <p>4 scene where there are injured people, you still need to do</p> <p>5 the necessary arrangements to get the necessary aids to</p> <p>6 come and assist.</p> <p>7 MR CHASKALSON SC: Well, I'll follow up</p> <p>8 that answer in a minute, but I do want you to answer the</p> <p>9 question that I initially asked, which is were you aware of</p> <p>10 this aspect of SAPS policy, or were you aware that it was</p> <p>11 SAPS policy that the first member at a crime scene must</p> <p>12 assist the injured within the limitations of his or her</p> <p>13 training as a matter of priority?</p> <p>14 COLONEL MODIBA: This to me, Chairperson,</p> <p>15 is the same as you get to the collision scene where there</p> <p>16 are injuries that you still need to assist and get the</p> <p>17 necessary aids to take over to assist further the injured.</p> <p>18 It's not a surprise. It's just a normal thing that as a</p> <p>19 member of the SAPS you need to establish, ascertain the</p> <p>20 nature of the injuries and to render some assistance.</p> <p>21 MR CHASKALSON SC: They are two separate</p> <p>22 issues, really. I mean you and I can agree that it makes a</p> <p>23 lot of sense, but were you aware that this was SAPS policy</p> <p>24 as well, as well as making sense? Were you aware that SAPS</p> <p>25 said that as a matter of priority this is what the first</p>	<p style="text-align: right;">Page 30568</p> <p>1 there was this, the appropriate equipments.</p> <p>2 MR CHASKALSON SC: Did you make any</p> <p>3 enquiries as to whether any of the SAPS vehicles at the</p> <p>4 scene had first-aid kits in them?</p> <p>5 COLONEL MODIBA: No, I did not make</p> <p>6 enquiries, Chairperson.</p> <p>7 MR CHASKALSON SC: Can I ask you,</p> <p>8 Colonel, if events at scene 1 had turned out differently</p> <p>9 and if it hadn't just been strikers who were shot at scene</p> <p>10 1 but actually some SAPS members had been shot at scene 1</p> <p>11 and were lying wounded and bleeding at the scene, would you</p> <p>12 not have yourself or with some of your trained personnel</p> <p>13 sought to assist those wounded SAPS personnel as a matter</p> <p>14 of priority?</p> <p>15 COLONEL MODIBA: Yes, at that stage the</p> <p>16 assistance, whether it's SAPS or member of the public, they</p> <p>17 still need, efforts still need to be made to summon the</p> <p>18 medical team to attend to the injured.</p> <p>19 MR CHASKALSON SC: Absolutely, and that I</p> <p>20 don't hold you responsible for at all, suggest that you</p> <p>21 carry any responsibility for that omission. There are</p> <p>22 other people who need to answer that, but there is a period</p> <p>23 before the medics arrive and in that period did you not</p> <p>24 recognise that it was your duty to try to assist the</p> <p>25 injured within the limitations of your training as a matter</p>
<p style="text-align: right;">Page 30567</p> <p>1 member at a crime scene must do?</p> <p>2 COLONEL MODIBA: Chairperson, as I said</p> <p>3 earlier that we're having a lot of policy documents. I'm</p> <p>4 not in a position to say I knew specific about this policy.</p> <p>5 However, I cannot point a finger at the SAPS to say the</p> <p>6 policy, this type of policy document was not made available</p> <p>7 for me to take note of the contents.</p> <p>8 MR CHASKALSON SC: You see, Colonel, I</p> <p>9 have to ask you some questions about your response to scene</p> <p>10 1 because you were in command of 96 people who had some</p> <p>11 first-aid training up to level 3, and there was a massive</p> <p>12 trauma scene at scene 1; some people who'd been killed,</p> <p>13 many people who'd been wounded. Why did you not deploy</p> <p>14 some of these 96 medically trained personnel under your</p> <p>15 command to assist at the scene, to assist the injured</p> <p>16 within the limitations of their training as a matter of</p> <p>17 priority? Why didn't you do that?</p> <p>18 COLONEL MODIBA: I don't remember having</p> <p>19 the first-aid equipments with us when getting to that</p> <p>20 scene, that maybe I was aware to say in case there are</p> <p>21 injuries, these are the injury sustained, these are the</p> <p>22 first-aid kit that we can assist. I didn't have knowledge</p> <p>23 of if we had those equipments. If I knew that we had those</p> <p>24 equipments I would most probably tell those that could</p> <p>25 volunteer to say this I can offer assistance, as long as</p>	<p style="text-align: right;">Page 30569</p> <p>1 of priority?</p> <p>2 COLONEL MODIBA: As I said, I was not in</p> <p>3 front with the line of the TRT that I made, that I could</p> <p>4 make efforts to establish, or ascertain the injuries that</p> <p>5 were sustained after the shooting.</p> <p>6 MR CHASKALSON SC: But you were in</p> <p>7 command of 96 people who have medical training, first-aid</p> <p>8 training up to a certain level. The TRT don't have that</p> <p>9 training. Did it not occur to you that you should go up to</p> <p>10 the scene to ascertain whether there was a need for any of</p> <p>11 the assistance that your trained members could possibly</p> <p>12 provide?</p> <p>13 COLONEL MODIBA: That I cannot dispute</p> <p>14 that I should have done that. It could be that I failed to</p> <p>15 do it, if I had to.</p> <p>16 MR CHASKALSON SC: Colonel, did you</p> <p>17 realise that this instruction applies even to suspects</p> <p>18 who'd been wounded by the police? Did you realise you have</p> <p>19 duties even to suspects who've been wounded by the police?</p> <p>20 COLONEL MODIBA: It is correct, as I</p> <p>21 said, it could be anything, whether injuries, as far as</p> <p>22 possible assistance need to be rendered and we as the</p> <p>23 police, we, it is our duty to assist whoever, regardless</p> <p>24 whether it's a suspect or what, but at the end of the day</p> <p>25 we still need to see, assist him by all means. I don't</p>

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1 deny that, Chairperson.
 2 MR CHASKALSON SC: Colonel, I have to put
 3 this to you and it's that the medical evidence suggests
 4 strongly that if basic first-aid had been applied promptly
 5 at scene 1, at least one victim – I don't want to put it
 6 higher than that – at least one victim, Mr Mdze, would
 7 probably have survived. Now is there anything that you
 8 want to say to the Commission in relation to your failure
 9 either to investigate whether there was a need for first-
 10 aid at scene 1 or to deploy some of your members to do that
 11 investigation and to make that first-aid available in the
 12 context of the fact that one person it seems bled to death
 13 on the scene in circumstances where his death could have
 14 been prevented by, or would probably have been prevented by
 15 basic first-aid?
 16 COLONEL MODIBA: I believe that beside
 17 the fact that I did not attend to the injured, JOC should
 18 have known to say there were people, or miners that
 19 sustained injuries at that time. I believe so, that that
 20 message could have been relayed to them, even though I
 21 didn't do it myself.
 22 MR CHASKALSON SC: Did you hear any
 23 reports of that nature on the radio that the JOC would have
 24 heard?
 25 COLONEL MODIBA: There was always some

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1 distortion in the radio, but I still believe that in those
 2 distortion could be that among other message that could not
 3 transmit it clearly, could be one of those that the report,
 4 the feedback on the scene that was communicated to JOC.
 5 MR CHASKALSON SC: Colonel, I'm going to
 6 move to a different topic now, which is the circumstances
 7 of the killings of Mr Mdizeni and Mr Thelejane, but before
 8 I do that I just want to clarify what I understood your
 9 evidence to be, and maybe if we can call up exhibit MMM3,
 10 which has got the gridded photograph of – MMM3. Sorry,
 11 MMM2. MMM2. You described in your evidence your approach
 12 to koppie 3, and we see koppie 3 in this photograph, and
 13 you said that as you were approaching you heard gunshots
 14 and you indicated two different directions from which you
 15 heard gunshots, and if I understood your evidence
 16 correctly, the one set of gunshots.
 17 [14:28] My note says from three, along the row of three,
 18 gunshots coming in this direction.
 19 CHAIRPERSON: This direction being
 20 towards, left to right towards J3.
 21 MR CHASKALSON SC: And you described also
 22 hearing gunshots to your – from G4 and 5 to your left. Do
 23 you recall that evidence?
 24 CHAIRPERSON: From a southerly direction.
 25 You indicated that but you didn't say.

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1 MR CHASKALSON SC: Indeed, gunshots from
 2 a southerly direction from 4 and 5, from G4 or 5.
 3 COLONEL MODIBA: Chairperson, I said
 4 there were, there were gunshots from the southern side and
 5 also there were zipping of bullets that were flying all
 6 over from inside the koppie towards our direction.
 7 MR CHASKALSON SC: Now Colonel, can I ask
 8 you, did you hear these gunshots before any of your members
 9 opened fire? Let's take them separately because the answer
 10 may not be the same in respect of both. Did you hear the
 11 gunshots that you say were zipping from the koppie, from
 12 the direction of the koppie and by that I understand, I'm
 13 sort of indicating row 3 with my pointer, gunshots coming
 14 from somewhere along row 3 in your direction from left to
 15 right on this photograph, did you hear those gunshots
 16 before any of your members opened fire?
 17 COLONEL MODIBA: It was first the
 18 gunshots that were heard on the southern side and direct
 19 from the koppie, gunshots that we heard was at the time
 20 when the striking miners were charging so you could hear
 21 the zip of the rounds that were flying over from the
 22 koppie.
 23 MR CHASKALSON SC: So you say the first
 24 shots that you heard were from the southern side and was
 25 that before your confrontation with the charging striking

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1 miners?
 2 COLONEL MODIBA: That's correct,
 3 Chairperson.
 4 MR CHASKALSON SC: And none of your
 5 members had opened fire before that confrontation?
 6 COLONEL MODIBA: No – not what I know of.
 7 MR CHASKALSON SC: Now when there was
 8 that confrontation with the striking miners who came
 9 charging out at you, do you recall any members who were
 10 with you when that happened, members, NIU members who were
 11 with you in that confrontation? Well, let me ask the
 12 question the other way around. Let me give you some names
 13 and ask if you recall whether they were there at that
 14 confrontation. Lieutenant-Colonel Nkebe, was he there with
 15 you when the miners charged you?
 16 COLONEL MODIBA: You know, Chairperson,
 17 we had a long basic line of members of NIU which Nkebe was
 18 more to my right, to the northern side with a certain group
 19 of members of NIU. So the charging happened to all the
 20 sections of the basic line and those that were close to me,
 21 I cannot recall who were they but Nkebe was more to my
 22 right towards north.
 23 MR CHASKALSON SC: So there was one NIU
 24 line that came in together to the koppie.
 25 COLONEL MODIBA: One long line that

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1 advanced to the koppie, which Nkebe was more to the right.
 2 As I say, there were sections of – we maintained the line
 3 but the charging occurred to various directions.
 4 MR CHASKALSON SC: I understand what
 5 you're saying. Can you maybe indicate on this map, you
 6 indicated your own position which, if I understood it, was
 7 in block J3 when the charging was taking place – can you
 8 indicate for us how long the NIU line stretched that was
 9 advancing in the direction of the koppie?
 10 COLONEL MODIBA: It stretched
 11 horizontally towards koppie 3.
 12 MR CHASKALSON SC: But where would it
 13 have started? Would it have started as high as J1 or even
 14 higher or lower and how far down would it have gone?
 15 COLONEL MODIBA: Just below the red
 16 letters.
 17 MR CHASKALSON SC: The red letter J?
 18 COLONEL MODIBA: Just below, it was not
 19 higher than those letters, it was in.
 20 MR CHASKALSON SC: Okay and how long did
 21 the line stretch past you to your left?
 22 COLONEL MODIBA: It stretched up to J4.
 23 CHAIRPERSON: When you said horizontally,
 24 I take it you were referring to the positioning which you
 25 stood and faced, in that sense it was horizontal to you but

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1 if, as we look on the slide here it was presumably
 2 vertical?
 3 COLONEL MODIBA: To me it will be
 4 vertical.
 5 CHAIRPERSON: No, to you it would be
 6 horizontal surely –
 7 COLONEL MODIBA: Ja, but when you look –
 8 CHAIRPERSON: Listen to me, you're going
 9 along and you've got people on your right and your left,
 10 right?
 11 COLONEL MODIBA: That's horizontal.
 12 CHAIRPERSON: That's horizontal,
 13 horizontal to you but if you look at the picture it's
 14 vertical to the picture, vertical from the bottom of the
 15 slide, isn't that right? You were going like this, you
 16 were going from right to left across the scene we have here
 17 on the slide, That's correct
 18 COLONEL MODIBA: That's correct, in a
 19 horizontal formal but vertical direction.
 20 CHAIRPERSON: Yes, horizontal from your
 21 point of view –
 22 COLONEL MODIBA: Yes.
 23 CHAIRPERSON: - vertical from the point
 24 of view of someone looking at the photograph? It must be,
 25 from the bottom of the photograph to the top.

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1 COLONEL MODIBA: That's correct.
 2 CHAIRPERSON: Okay.
 3 MR CHASKALSON SC: Now when there was
 4 this confrontation between your line and the charging
 5 strikers, some of your members fired shots, whether they
 6 were warning shots or direct shots we don't need to concern
 7 ourselves with at this stage but there was some shooting.
 8 My question now is, when that shooting took place was that
 9 the furthest point away from the koppie where there was
 10 shooting by the NIU? It's quite a complicated question so
 11 let me just put it to you again.
 12 CHAIRPERSON: - the first shots, is that
 13 right? –
 14 MR CHASKALSON SC: They would be the
 15 first shots.
 16 CHAIRPERSON: The first shots that were
 17 fired by what one can call your members, they were fired
 18 from the furthest position from the koppie of any of the
 19 shots that your people fired, would that be correct?
 20 COLONEL MODIBA: Ja, the furthest could
 21 be J3, from the koppie.
 22 CHAIRPERSON: No, no, I don't think Mr
 23 Chaskalson is concerned with that. I take it your members
 24 fired at various distances from the koppie. There were the
 25 final – I take it some shots were the nearest that they

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1 were to the koppie and others were further away and
 2 eventually there were some that were the furthest away.
 3 Now if they were proceeding as you've explained to us,
 4 vertically as it were, they were vertical on this slide as
 5 we see it and they were proceeding in what amounts to a
 6 direction from right to left, it must follow that the ones
 7 that were fired from furthest away would be the ones
 8 closest to the right-hand edge of the slide. Would that be
 9 correct?
 10 COLONEL MODIBA: Yes, Chairperson, as I
 11 mentioned earlier I said with that long basic line the
 12 charging was not only coming from the front where I was
 13 heading to. It also occurred, that experience was also on
 14 the other line. That line was too long so that is why I
 15 know that members mentioned that they fired warning shots
 16 as they got charged at.
 17 MR NTSEBEZA SC: Chair, this is quite
 18 critical also to the families – that the –
 19 CHAIRPERSON: Perhaps you can ask
 20 questions critical to the families when you get your chance
 21 to cross-examine. I think you would be a bit grumpy if Mr
 22 Chaskalson interfered in your cross-examination. May I
 23 suggest you wait until it gets to your turn?
 24 MR NTSEBEZA SC: Sorry Chair, can I just
 25 make the request that I need to follow what Mr Chaskalson

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1 is proceeding with so that when it comes to us asking
 2 questions we don't repeat questions that he has asked. All
 3 I wanted the witness to indicate here, Chair, is on this
 4 slide, Mr Chaskalson –

5 CHAIRPERSON: What did you want to
 6 indicate? I'm happy to hear what you want to indicate –

7 MR NTSEBEZA SC: No, Chair, I'll recall
 8 what – I'm sorry that I may have interrupted Mr Chaskalson.

9 CHAIRPERSON: Alright, Adv Hemraj wanted
 10 to ask a question which may solve your problem.

11 COMMISSIONER HEMRAJ: Colonel, as your
 12 line approached the koppie and the miners, right, in the
 13 way that you were positioned, some of you in that line-up
 14 were closer to the miners than the others, is that right?
 15 Some of you would have been closer to the koppie and the
 16 bushes and others further up to the right on the line.

17 COLONEL MODIBA: Yes, Chairperson, I just
 18 want to elaborate on what I experienced when I was there.
 19 That's where I started to –

20 CHAIRPERSON: There you point at J3.

21 COLONEL MODIBA: That is where I myself,
 22 I started to fire shots into the ground when the striking
 23 miners were charging at and then in that section there some
 24 members also fired warning shots.

25 CHAIRPERSON: Then you showed members in

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1 J3 and in J4 and you said other members, people who were
 2 with you also fired warning shots as you had done in the
 3 direction of the koppie. Is that what you showed us?

4 COLONEL MODIBA: Chairperson, the firing
 5 was as a result of the charging that the striking miners –
 6 it was an effort to stop them from charging, attacking us.
 7 That is why –

8 CHAIRPERSON: To cut them down or just to
 9 dis – to suggest that they, encourage them to turn back?

10 COLONEL MODIBA: No, we fired the warning
 11 shots into the ground. Obviously with the dust, but a
 12 person who is charging and you're firing in the ground,
 13 there will be dust. Of course a person could see, that
 14 could make a person to retreat because that can show that
 15 there is danger where I'm going so that also was an effort
 16 to stop them from charging, from coming at us and stab us,
 17 cause injuries either way.

18 MR CHASKALSON SC: Colonel, I'm still
 19 curious to try to – let me tell you where I'm going so that
 20 you understand the logic of my question. There are a whole
 21 range of cartridges that were found on the scene, some of
 22 them were linked to particular weapons and we have the
 23 positions of those cartridges and which weapons they were
 24 linked to. Now I'm trying to understand where exactly this
 25 confrontation took place with reference to the cartridges

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1 that we found. So what I would like and why I'm asking –
 2 and let me tell you what I think, I think that this
 3 confrontation that you're describing now was a shooting
 4 incident that took place furthest away from the koppie
 5 relative to all of the places where the NIU may have shot
 6 on the day. I don't think that any NIU shooting that took
 7 place on the day took place further from the koppie than
 8 this first confrontation with the miners that you describe.
 9 If I'm right on that thought or that hypothesis, then when
 10 we find the furthest cartridges away from the koppie we
 11 will know that you were at least that far away from the
 12 koppie when this confrontation took place. So that's
 13 really what I want to establish. So I suppose the first
 14 question is, is my hypothesis right? Was there any
 15 shooting from the NIU on the day that you're aware of that
 16 was further away from the koppie than that first
 17 confrontation with the strikers?

18 COLONEL MODIBA: No, Chairperson.

19 MR CHASKALSON SC: So that first
 20 confrontation was furthest from the koppie of all of the
 21 shooting incidents that involved the NIU on the day.

22 COLONEL MODIBA: Chairperson, I must
 23 point out that as I was walking there in J3, Nkebe's line
 24 was more to my right, it could be that they were charging
 25 also from that side but which I cannot say yes, I saw, I

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1 concentrated there. My focus was –

2 CHAIRPERSON: That side you indicate I
 3 and J2. I2 and J2. They may have been charging from
 4 there, you said. You said from there but you didn't say
 5 what it was and when we read the record we won't have the
 6 benefit of seeing you with your pointer, you see. So it
 7 was, what you said was it may have been that you were in
 8 line with J3 and that's where the charging took place as
 9 far as you were concerned but you say there was also
 10 charging, or may have been charging, from I2 and J2, is
 11 that right?

12 COLONEL MODIBA: That's correct,
 13 Chairperson.

14 MR CHASKALSON SC: If there was, we
 15 didn't find any cartridges there – or not we, the crime
 16 scene people didn't find any cartridges there. Okay, can I
 17 ask you to go to ZZZ5 which is the report of Dr Naidoo and
 18 Mr Steyl and annexure C of that document. It's quite a
 19 complicated diagram but it's a very useful diagram. What
 20 Mr Steyl in this case has done is he has taken a sketch
 21 plan of koppie 3 that was prepared by Captain Mohlaki and
 22 if I can just orient you on the sketch plan, here's the big
 23 rock that I'm circling now. I'm pointing just above, the
 24 rocks above body A and body B, that's the position, I'm
 25 indicating now the position of where body A was found. You

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1 would have been approaching from the direction at the
 2 bottom of the page with your basic line and the basic line
 3 according to your description a few moments ago would have
 4 stretched a little bit, but essentially it stretched from
 5 roughly where the writing on the left-hand side identifying
 6 members starts, to where the writing on the right-hand side
 7 identifying members ends –

8 CHAIRPERSON: Well, to put it more
 9 simply, Mr Chaskalson, it ends at the beginning of the
 10 rectangle containing the words “annexure C” and it begins –
 11 it ends there and it begins at the right-hand side of the
 12 legend which is preceded by the expression “14:15”
 13 referring to various cartridges and so on, that’s where it
 14 runs from. You indicated, I think, that the witness was
 15 somewhere below the area which is beneath BB21-BB41.

16 COLONEL MODIBA: That’s where I would
 17 place you according to your, where you placed yourself.
 18 What –

19 CHAIRPERSON: No, let’s just check, do
 20 you agree with that? Do you understand how the thing
 21 works? It’s different from what we saw earlier in MMM2
 22 because that had north at the top.

23 COLONEL MODIBA: Okay.

24 CHAIRPERSON: This has got north on the
 25 right-hand side and the top would be west and the bottom is

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1 east and the south of course, it follows, is on the left
 2 but once you’ve adjusted for that, do you agree with what
 3 is here depicted?

4 COLONEL MODIBA: Yes, Chairperson.

5 MS BALOYI: Chairperson, without meaning
 6 to interrupt Mr Chaskalson’s cross-examination, we see this
 7 document, it refers to Mr L Steyl and Dr Naidoo. We don’t
 8 have any recollection of this statement or anything from
 9 them and this is the first time we see their names and
 10 anything prepared by them. Is it intended that they will,
 11 there’s some of kind of statement to give some, to be
 12 presented properly before the commission as evidence.

13 [14:48] CHAIRPERSON: Well Mr Chaskalson will
 14 answer that, I can’t.

15 MR CHASKALSON SC: Yes. I mean there is
 16 a report to which this is an annexure which is their
 17 report. We can - it’s signed by both of them. I mean if
 18 needs be we can have a covering affidavit drawn up.

19 CHAIRPERSON: If I understand this - this
 20 is an annexure as you can see - annexure C to the report.
 21 The report has already been given to you because it was one
 22 of the documents which were covered by the list of
 23 documents to be used by Mr Chaskalson in the cross-
 24 examination of the witness and it’s the expert report.
 25 It’s item 19. Most of the previous documents referred to

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1 are already exhibits and you’ll remember that item 18 fell
 2 away because they had the wrong ABL report. So effectively
 3 the first document which counts - the second page of this
 4 bundle - from the third page onwards we have exhibit ZZZ5.
 5 The cover sheet is headed “Final Report Marikana Mining
 6 Incident” and so on, and the next page you get the index.
 7 That’s page 1 as it’s so marked, of the documents, and then
 8 the report itself begins on page 2. It continues for some
 9 distance down the bundle. It ends page 27 and thereafter
 10 will be the annexures and we’re busy with annexure C. Now
 11 one of the questions we have to consider at some stage is
 12 the status of the document. As Mr Chaskalson has
 13 indicated, if necessary, they can get Mr Steyl and Dr
 14 Naidoo to make affidavits confirming the accuracy of what’s
 15 in their report.

16 COMMISSIONER HEMRAJ: Yes, Chair.

17 CHAIRPERSON: It may well be that the
 18 parties, when they’ve got a chance to go through it, will
 19 accept that it’s correct, or they may have points - detail
 20 they wish to raise. I think one must assume that the
 21 cross-examination has been put on a provisional basis and
 22 that is the evidence the evidence leaders are going to lead
 23 if they have to, but in the hope that it won’t be necessary
 24 for that. I think that answers your question.

25 COMMISSIONER HEMRAJ: It does, Chair,

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1 thank you.

2 CHAIRPERSON: Right. Mr Chaskalson
 3 please proceed. It was one of the documents which was part
 4 of the bundle which the witness saw before he gave
 5 evidence. That’s correct, isn’t it?

6 COMMISSIONER HEMRAJ: Yes, this the
 7 witness has seen. I wasn’t querying this document.

8 CHAIRPERSON: No, no. Okay. So that’s
 9 alright. So Mr Chaskalson please proceed.

10 MR CHASKALSON SC: Colonel, if I can just
 11 explain how this document works. Captain Mohlaki of the
 12 LCRC plotted the position where certain cartridges were
 13 found, so I’m marking now where cartridges - I think it is
 14 in fact BB2 to 8 because B1 wasn’t a spent cartridge, it
 15 was an unspent cartridge. BB2 to BB8 were found roughly in
 16 this direction where they’re marked on this plan. BB21 to
 17 BB41 were found roughly in this area where they’re marked
 18 on this plan, and BB9 to BB20 were found where they’re
 19 marked on the plan there. The precise GPS co-ordinates for
 20 where these cartridges were found and distances have been
 21 calculated on the basis of those co-ordinates, but what
 22 this plan shows is which NIU members were shooting which
 23 cartridges on that were found there, because cartridges
 24 were then linked to rifles. So the gun marked 14.2 which
 25 has 15 cartridges linked to it in this position was a gun

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1 fired by Constable Ngwaleni. Do you recall him being part
 2 of your team? Well he was part of your team, that much we
 3 can tell you, but do you recall his position relative to
 4 where you were?
 5 COLONEL MODIBA: Chairperson I don't
 6 recall his position, however I can confirm that he was part
 7 of my team.
 8 MR CHASKALSON SC: If I can then just run
 9 through these. 14.3 Constable Ngonyama. Two of the
 10 cartridges found between BB21 and BB128. Do you recall
 11 Constable Ngonyama.
 12 COLONEL MODIBA: I know him as a member
 13 of National Intervention.
 14 MR CHASKALSON SC: Constable Mabasa,
 15 14.5?
 16 COLONEL MODIBA: Yes, Chairperson, it's
 17 the first time to hear about Mabasa.
 18 MR CHASKALSON SC: He was recorded as an
 19 NIU member on the day.
 20 CHAIRPERSON: He may have come from
 21 Durban or Umtata, so -
 22 COLONEL MODIBA: It could be that he
 23 might be from Umtata or Durban but for Pretoria I don't
 24 know the person.
 25 CHAIRPERSON: You don't recognise the

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1 name as being one of the members who fell directly under
 2 you, but of course you had other NIU people with you from
 3 Durban and Umtata didn't you?
 4 COLONEL MODIBA: That's correct,
 5 Chairperson.
 6 CHAIRPERSON: Alright, so anyway, we can
 7 follow that up at our leisure later.
 8 MR CHASKALSON SC: 14.7 is Constable
 9 Mandla. Do you recall Constable Mandla?
 10 COLONEL MODIBA: Yes I recall that name,
 11 Chairperson.
 12 MR CHASKALSON SC: 14.8 Constable Mogele?
 13 COLONEL MODIBA: I also recall that one,
 14 Chairperson.
 15 MR CHASKALSON SC: Lieutenant Ntebe we've
 16 already dealt with, 14.10. 14.15 Constable Spanyetso.
 17 COLONEL MODIBA: Yes, that one also I can
 18 recall.
 19 MR CHASKALSON SC: And 14.19 is Constable
 20 Nyatela.
 21 COLONEL MODIBA: He's also from National
 22 Intervention at Umtata.
 23 MR CHASKALSON SC: If we then go to
 24 annexure D of the same report, we then look at distances
 25 and here I'm marking the big rock which starts just above

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1 where body A is marked on annexure D. The three clusters
 2 of cartridges, BB1 to 8, BB21 to 41 and BB9 to 20 are these
 3 three circles that I'm identifying now, and using the GPS
 4 co-ordinates that Captain Mohlaki fixed for those
 5 cartridges, we can see that the closest distance from the
 6 cartridges to body A was 41.9 metres. The exercise hasn't
 7 been done in relation to body B, we've done that exercise
 8 with GPS co-ordinates and we get just over 35 metres from
 9 the cluster BB9 to 20 through to body B. Now -
 10 CHAIRPERSON: Sorry, before you carry on
 11 Mr Chaskalson, can you tell us looking at exhibit D,
 12 perhaps show us on the screen where you were. I take it
 13 you follow this. It may not be easy for you to follow but
 14 if you can't follow please say so, but you see where the
 15 rock is and you see where body A was and body B was which
 16 you would have seen at the time. Can you tell us more or
 17 less where you were here?
 18 COLONEL MODIBA: Does the chairperson
 19 refer to the position when I discharged my firearm?
 20 CHAIRPERSON: Yes, yes I would think so
 21 yes. Perhaps you can tell us where you were - you know,
 22 when the people started charging at you. When the first
 23 shots were fired, I take it. When the charge began. Now
 24 can you - I'm not sure whether you fired shots at that
 25 stage or slightly later, but can you show us more or less

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1 where you were when the first shots were fired and as these
 2 people were charging at you.
 3 COLONEL MODIBA: I'll talk about myself
 4 when I first opened fire with my pistol. I was somewhere
 5 there.
 6 CHAIRPERSON: You were somewhere to the
 7 right as one looks at the photograph of BB21 to 41 is that
 8 correct?
 9 COLONEL MODIBA: That's correct,
 10 Chairperson.
 11 MR CHASKALSON SC: And according to your
 12 statement -
 13 CHAIRPERSON: Mr Chaskalson I'm sorry to
 14 interrupt you. It's now 3 o'clock. I was proposing to
 15 take the tea break round about now but obviously it - the
 16 time for tea break depends upon your convenience as the
 17 cross-examiner. So when you're ready to take the tea
 18 adjournment would you be kind enough to tell me because I
 19 won't be able to announce the tea adjournment unless you do
 20 so.
 21 MR CHASKALSON SC: Just one question and
 22 then it would make a sensible point to break. Colonel,
 23 your statement - I've got your first statement of 23, 25
 24 August. ZZZ2.2. You put the strikers 12 to 15 metres away
 25 from you when you fired your warning shots. In fact, 12

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1 metres in that first statement, paragraph 7, ZZZ2.2. I
 2 think in your 2013 statement, ZZZ4 you said 12 to 15 but
 3 we're talking somewhere between 12 and 15 metres is your
 4 estimate of how far away the strikers were from you when
 5 you fired your warning shot is that correct?
 6 COLONEL MODIBA: That's correct,
 7 Chairperson.
 8 CHAIRPERSON: May I ask you this. 12
 9 metres is an interesting estimate to make. May I enquire
 10 whether - before you made the statement you went back to
 11 the scene and paced out some of the distances? Refreshed
 12 your memory as it were by what you saw there. You made
 13 your statement on the 25th of August I think, and that was
 14 some nine days after the events that you were describing.
 15 Did you perhaps go back to the scene just to refresh your
 16 memory and perhaps pace out distances and try to be as
 17 accurate as you could.
 18 COLONEL MODIBA: The only time I went to
 19 the scene for inspection-in-loco it was way after I
 20 submitted my statement, Chairperson.
 21 CHAIRPERSON: 12 was a genuine or just an
 22 estimate. Almost a guesstimate one can say. It wasn't
 23 based upon actual pacing out on the scene.
 24 COLONEL MODIBA: No, this was the
 25 estimate between myself and the charging strikers.

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1 MR CHASKALSON SC: Do you play football?
 2 COLONEL MODIBA: I played football, yes.
 3 I play football.
 4 MR CHASKALSON SC: Do you have the
 5 capacity to estimate the distance from the penalty spot to
 6 the goal line?
 7 COLONEL MODIBA: Ja, I can.
 8 MR CHASKALSON SC: What is it, 12 metres.
 9 COLONEL MODIBA: It could be your
 10 distance between the two of us. That could be 12 metres.
 11 MR CHASKALSON SC: You're probably right.
 12 CHAIRPERSON: I'd like to take the tea
 13 adjournment at this stage if you want to ask him about the
 14 length of a cricket pitch and what he knows about that as
 15 well. Commissioner Hemraj suggests I give you one penalty
 16 question and he will have to do his best to keep it out of
 17 the net.
 18 MR CHASKALSON SC: No, no I'm going on to
 19 a slightly different -
 20 CHAIRPERSON: We'll take the tea
 21 adjournment. You decline the opportunity. We'll take the
 22 tea adjournment, 15 minutes.
 23 [COMMISSION ADJOURNS COMMISSION RESUMES]
 24 [15:15] CHAIRPERSON: The Commission resumes.
 25 Colonel, you're still under oath.

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1 KAIZER NTLOU MOBIDA: s.u.o.
 2 CHAIRPERSON: Mr Chaskalson.
 3 CROSS-EXAMINATION BY MR CHASKALSON SC (CONTD.):
 4 Colonel, you were you say approximately 12, maybe 12 to 15
 5 metres away from the people charging at you when you fired
 6 your warning shots. Was the roughly the same point at
 7 which others of your members opened fire as well?
 8 COLONEL MODIBA: I cannot confirm that,
 9 Chairperson, if it was the same distance as compared to the
 10 other members. I'm only alighting my distance between
 11 myself and the charging strikers.
 12 MR CHASKALSON SC: Had anyone started
 13 firing before you fired your warning shots?
 14 COLONEL MODIBA: Chairperson, I cannot
 15 confirm that one as to that there was any firing before I
 16 fired because there were shooting all over, so there were
 17 gunshots from the south as well, so I cannot say yes, there
 18 was a shooting before I fired my warning shot.
 19 MR CHASKALSON SC: You see, Colonel, my
 20 concern is in relation to the deaths of Mr Mdizeni and Mr
 21 Thelejane because it appears to me from the expert evidence
 22 that neither Mr Mdizeni nor Mr Thelejane could have been
 23 part of the group that charged at your line in the incident
 24 that you are describing, and let me take you slowly through
 25 the evidence in that regard.

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1 If we can start with Mr Mdizeni, and Chairperson,
 2 at this point we may need warnings for this section of the
 3 argument.
 4 CHAIRPERSON: I'm informed that we are
 5 shortly going to be shown on the screen pictures of
 6 deceased persons who were killed at scene 2 and I'm sure
 7 that seeing those pictures will cause a great deal of
 8 emotional distress and pain and suffering to the loved
 9 ones, relatives and even the friends of those two persons.
 10 So I ask that the pictures that we're going to be shown are
 11 not shown until 30 seconds have expired from the time I
 12 stop speaking, starting now.
 13 30 seconds are over. The pictures may now be
 14 screened.
 15 MR CHASKALSON SC: If we can look at
 16 JJJ29.205, that will show us the position of the body of Mr
 17 Mdizeni. JJJ29.205, and we see Mr Mdizeni lying face down
 18 at the base of what you've described as the big rock.
 19 That's the big rock behind him and his head is pointing
 20 roughly in a northerly direction. So if we go back to say
 21 MMM3, if I can just indicate to you what we are looking at,
 22 Mr Mdizeni is lying face down in block F3 with his head
 23 pointing up towards F or G2.
 24 If we then look at the post mortem evidence in
 25 relation to Mr Mdizeni, what we see is that he was killed

1 by a single R5 shot, if we can go to exhibit A, page 66, or
 2 I don't know, this is just the – if we can go down to the
 3 bottom of this first page of the post – keep scrolling.
 4 This is not the – there, yes, first page of the post
 5 mortem. If we look at paragraph 4, "A single penetrating
 6 bullet wound of pelvis perforated the pelvic cavity and
 7 lacerated the right internal iliac artery and rectum,
 8 fractured the L5 lumbar vertebrae" – that's part of the
 9 spine – "sacrum, and both pelvic bones and terminated in
 10 the muscles of the lateral aspect of the left hip." So the
 11 bullet went in on his right hip and ended on the left hip,
 12 doing a lot of damage in the process. "The bullet wound
 13 and spent wound were consistent with high-velocity
 14 firearm," and if we go down to page 69, paragraph 27, which
 15 talks about the spinal column, "There is a large furrowed
 16 bullet perforation of L5 lumbar vertebrae and upper part of
 17 sacrum with extensive bone shattering and extensive bone
 18 fragmentation associated with extensive surrounding soft-
 19 tissue haemorrhages. See also paragraphs," then there's a
 20 reference above, and the spinal cord refers above at 28 to
 21 27.

22 What this means is translated for us by Dr Naidoo
 23 in ZZZ5, and if we can go to the main report in ZZZ5, pages
 24 13 to 14, and if we can go to page 13 of ZZZ5 – I'm looking
 25 at paginated page rather than PDF page. I'm not sure what

1 – ja, next page, bottom of the next page. There we go,
 2 body A, that's Mr Mdizeni. "This deceased was found
 3 against the base of a large central boulder on its eastern
 4 side and had sustained a single high-velocity R5 bullet
 5 injury to his spine/pelvis/hip from right to left, having
 6 been most likely fired from the eastern side of the koppie,
 7 positions 1 or 2. See map annexures E to G. Thus it would
 8 appear that the deceased was facing towards the north when
 9 he was shot. The wound was severely incapacitating and
 10 caused rapid, although not immediate, death and therefore
 11 the deceased would unlikely have been able to move his body
 12 location after the injury."

13 Sorry, we've got to scroll over the page for the
 14 last passage that I read out. There are two points about
 15 this that I would emphasise, Colonel. The first is that
 16 the expert evidence suggests strongly that Mr Mdizeni was
 17 not facing the person who shot him because he was shot
 18 through the right hip into the left hip. So he was shot
 19 facing this way, being shot from that side.

20 The second is that the expert evidence says he
 21 would have been unlikely to have been able to move to
 22 escape the position of his fall, which meant that he would
 23 have died where he fell. Where we found his body would
 24 have been where he was shot, or where he fell after being
 25 shot.

1 If that's the case, Colonel, it seems to me there
 2 are one of two possibilities; either he was shot at the
 3 base of the rocks, the base of the big rock where his body
 4 was found, back on JJJ29.205, or possibly he was shot and
 5 killed on top of the rock and fell down to that position,
 6 because if we see his position, if we go back to JJJ209 we
 7 can see that it is possible that this is the position into
 8 which he, where he ended up, having rolled down the rocks
 9 at that point. Either way, Colonel, he would have been at
 10 least 40 metres away from the people who shot him, if he
 11 was shot in the encounter that you describe, and he
 12 wouldn't have been charging at them because he would have
 13 been looking not in their direction, which would have been
 14 40 metres out the front of this photograph, but rather
 15 looking off to the right of this photograph so that the
 16 bullet entered his right hip and stuck in his left hip. He
 17 would have been facing the right-hand side of this
 18 photograph. Are you able to cast any light on this? Did
 19 you see victim A being shot, Mr Mdizeni?

20 COLONEL MODIBA: Chairperson, I first
 21 want to mention that at the time we were in the face of the
 22 rock, there was, Mr Mdizeni was not there when some
 23 charging strikers were charging towards us, so I don't know
 24 as to whether it was later after the charging strikers went
 25 back into the bush behind the rocks, but in the beginning

1 when I was facing that direction where his body is lying,
 2 there was no body there.

3 MR CHASKALSON SC: Are you talking about
 4 before the confrontation with the charging strikers when
 5 his body wasn't there?

6 COLONEL MODIBA: That's correct,
 7 Chairperson.

8 MR CHASKALSON SC: Were you able to see
 9 the rocks immediately after the confrontation with the
 10 charging strikers?

11 COLONEL MODIBA: That's correct,
 12 Chairperson.

13 MR CHASKALSON SC: And his body still
 14 wasn't there?

15 COLONEL MODIBA: I only saw the striking
 16 miners that were ordered behind the rocks by the police,
 17 that were ordered to lie in that area where that, the
 18 deceased body is, which I made sense to say the deceased,
 19 that was the first time when I saw a deceased, it was among
 20 the group that was ordered, the police, that was retrieved
 21 behind the rocks by the police.

22 MR CHASKALSON SC: So when there was this
 23 confrontation between the charging strikers and your NIU
 24 line, you are saying that you don't think that that is what
 25 caused Mr Mdizeni's death, that Mr Mdizeni's body was not

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1 there after that confrontation?
 2 COLONEL MODIBA: Before the
 3 confrontation, Chairperson, there was no body on the face
 4 of the big rock. The only time when there were bodies
 5 there, it was the time when the police removed those
 6 strikers that went back in, behind the rocks, then they
 7 were ordered to lie there in the same area where the
 8 deceased is lying.
 9 CHAIRPERSON: Are you saying that there
 10 wasn't a body lying where he was subsequently found when
 11 the other strikers were ordered to lie down there? Or
 12 can't you say that?
 13 COLONEL MODIBA: What I'm trying to
 14 explain, Chairperson, is at the time the charging occurred
 15 there was no body in front of the face of the rock that I
 16 could see. That's what I remember. I only saw the
 17 charging strikers that came towards our line and at the
 18 time when we opened fire as to let them not come closer to
 19 us, they then ran back into the bush and the rocks around
 20 there, and then immediately those that were hiding behind
 21 the rocks were ordered to get out and lie there so that
 22 they could be cleared.
 23 CHAIRPERSON: Yes, I understand, but you
 24 haven't answered my question. I don't know if you can, but
 25 I'm just asking the question. You say that a number of the

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1 strikers were told to lie down there. That's correct, is
 2 it? That area we see on the photograph. Is that correct?
 3 COLONEL MODIBA: That's correct,
 4 Chairperson.
 5 CHAIRPERSON: Alright, now are you able
 6 to say whether this deceased striker was not already lying
 7 there, in other words must the body have got there later,
 8 or is it possible that he was already lying there at that
 9 point where we see him at the time the other strikers were
 10 told to lie down on the rock near him?
 11 COLONEL MODIBA: He could have been
 12 amongst them, those that were ordered to lie next to that
 13 big rock, but that he was there before the shooting
 14 started, that I haven't seen.
 15 CHAIRPERSON: Would you necessarily have
 16 seen it? You see the reason I ask you the question is I
 17 understood you to say that there were shots fired from what
 18 amounts to the south, from your left, before you and your
 19 members fired the warning shots you did. Now is it
 20 possible that this deceased was perhaps killed in one of
 21 the early shots that you heard coming from the southerly
 22 direction, from your left? In other words he may not even
 23 have been one of the people who charged out and then went
 24 back into the bush. He may have been killed by an early
 25 shot from the south. I'm not saying it is so; I'm asking

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1 you whether it's possible. Can you help us on that?
 2 COLONEL MODIBA: It is possible that it
 3 could be any fired shot from either direction, or even the
 4 shot that were fired from the line of NIU, due to the
 5 ricochet it could have caught him. That is the
 6 possibility. It could be anywhere else, and my point here
 7 that I'm trying to make is at the time the charging
 8 strikers occurred, he was not there on the face of the big
 9 rock.
 10 MR CHASKALSON SC: Let's look at Mr
 11 Thelejane's case. Again if we can start by looking at his
 12 position – Chairperson, I'm not sure if there's another –
 13 or the photograph is still up, so presumably the warning
 14 that was –
 15 CHAIRPERSON: The warning I'm sure still
 16 stands. I didn't see anybody leave actually, but of course
 17 some people did come in after I gave the warning, but I'm
 18 afraid there's nothing I can do about that. But anyway the
 19 fact is nobody left after I spoke and the picture has been
 20 up ever since, so I don't think another warning is
 21 required.
 22 COMMISSIONER HEMRAJ: Could I just ask,
 23 before you move away from this slide, when you saw this
 24 deceased lying in that – is that the position in which you
 25 saw him lying with the other persons who were on the

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1 ground?
 2 COLONEL MODIBA: Chairperson, it is
 3 difficult to confirm that position because at that time the
 4 area was very volatile and the threat was too high, so I
 5 cannot precisely say he was in that position, who was in
 6 that position. So it's just difficult for me now to
 7 confirm that.
 8 COMMISSIONER HEMRAJ: And the other
 9 persons that were lying there, had they been arrested?
 10 Were their hands behind their backs with cable ties? Do
 11 you remember that?
 12 COLONEL MODIBA: Yes, I remember that as
 13 they were ordered to gather behind the rocks, I mean to
 14 come and lie there, it was at the time when my team was
 15 clearing them by way of searching for dangerous weapons
 16 that could be in their bodies, and at the same time there
 17 were those that were cable tied, or handcuffed.
 18 COMMISSIONER HEMRAJ: Does that include
 19 all the four persons that were there, including the
 20 deceased, who had their hands cable tied behind them?
 21 COLONEL MODIBA: Those that were brought
 22 there where the deceased is in that, on the ground in front
 23 of that big rock, those were the ones that I know they were
 24 cable tied.
 25 COMMISSIONER HEMRAJ: Was the deceased's

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1 hands also cable tied behind him at the time that you
 2 passed by there?
 3 [15:35] COLONEL MODIBA: I cannot recall that,
 4 Chairperson.
 5 COMMISSIONER HEMRAJ: Thank you.
 6 MR CHASKALSON SC: Maybe there are cable
 7 ties on Mr Mdzizeni's body. If we just zoom in we will see
 8 them. Can - there's a cable tie in front of him there and
 9 another one, I think, on his back - on the back of his left
 10 leg and his hand - certainly his right hand is behind his
 11 back in a position where it would have been if it had been
 12 cable tied.
 13 CHAIRPERSON: Did you see that at the
 14 time? You presumably spent some time there in that
 15 vicinity when you saw the other people lying down having
 16 been cable tied. Did you notice whether this particular -
 17 it was already a body by that time. I assume he was
 18 already dead. Had - there was a cable tie in there? You
 19 said you didn't see it I think. Did you see - you see
 20 there are these bits of cable ja, and there's this position
 21 of the right hand behind the back. Did you notice that?
 22 COLONEL MODIBA: Chairperson, I cannot
 23 confirm that I saw him being cable tied but I know for a
 24 fact that there were bodies that were lying next to him,
 25 around him, that were cable tied. It could be possible

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1 that he was cable tied just to remember, Chairperson, that
 2 the cable tying was the process of controlling those
 3 striking miners that were deemed to be dangerous. So that
 4 was not something wrong that maybe you find a person was
 5 cable tied while he was no more but then at that time no-
 6 one could really know, so there's a possibility that he
 7 might have been cable tied too.
 8 MR CHASKALSON SC: Colonel, the medical
 9 evidence in relation to Mr Mdzizeni is that a bullet went
 10 through his spine. He would have been unable to move
 11 himself. When you say people were brought out of the rocks
 12 and made to lie down, did everybody who came out of the
 13 rocks and laid down, did they walk themselves to the
 14 position where they laid down and were then arrested?
 15 COLONEL MODIBA: Those that were hiding
 16 behind the rocks were under the physical control of the
 17 members.
 18 CHAIRPERSON: - physical control, did
 19 they have them by the scruff of the neck or did they have
 20 their arms and pushed them down, or dragged them down, or
 21 what do you mean by under physical control?
 22 COLONEL MODIBA: It could be that there
 23 was a hand on either striking miner. It could be on the
 24 belt, on the shoulder, either way, just to show that you
 25 are under my control. That's what I mean when I say

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1 physical control.
 2 MR CHASKALSON SC: No, I asked you also
 3 whether you saw anyone being dragged down. Can I accept
 4 from what you tell us that you didn't see that?
 5 COLONEL MODIBA: Yes, they were dragged
 6 behind the rocks.
 7 COMMISSIONER HEMRAJ: They would have
 8 been searched in the process of putting them under control
 9 and arresting them, right? They would have been searched
 10 by the police.
 11 COLONEL MODIBA: What I see there is at
 12 the time they were taken behind the rocks they were brought
 13 there so that they could be searched.
 14 COMMISSIONER HEMRAJ: So they would have
 15 been searched after they were put onto the ground with
 16 their hands cable tied behind them.
 17 COLONEL MODIBA: Before - what could have
 18 happened is at the time when they were removed from behind
 19 the rocks, they could have brought their under control with
 20 the instruction from either member saying lie down, at the
 21 same time being cable tied and then searched.
 22 COMMISSIONER HEMRAJ: And then searched
 23 after that?
 24 COLONEL MODIBA: That's correct.
 25 COMMISSIONER HEMRAJ: So their positions

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1 would have been moved by the police in the searching
 2 process.
 3 COLONEL MODIBA: That's correct,
 4 Chairperson.
 5 COMMISSIONER HEMRAJ: Thank you.
 6 MR CHASKALSON SC: But, Colonel, I want
 7 to go back to something I asked you a few minutes ago.
 8 There's a difference between dragging a person who can walk
 9 himself, and dragging someone who is effectively paralysed
 10 from the waist down where you have to carry his whole body
 11 weight, and according to the medical evidence there would
 12 have been rapid death as well. So what the medical
 13 evidence suggests is that if Mr Mdzizeni didn't die in that
 14 position he would physically have to have been carried into
 15 that position probably dead at the time. Are you aware of
 16 any of your men who carried someone who was paralysed or
 17 dead into that position?
 18 COLONEL MODIBA: Chairperson, I'm not
 19 aware if there was anyone - I never saw anyone carrying the
 20 body or either a striking miner who was hiding behind the
 21 rock. All what I am saying is that they were under
 22 control, taken behind the rocks to that open field in front
 23 of the rock to be searched and cleared then taken to the
 24 Cantor where they would be in the police custody.
 25 MR CHASKALSON SC: Maybe we're talking at

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1 cross purposes here, because Mr Mdizeni is not in the open
2 field. If we can just look at MMM2 again. Can we look at
3 MMM2? You see there are photographs which show mine
4 workers - it may not be this one - but we have photographs
5 which show NIU members subduing mine workers inside the
6 blocks, sort of G2 - an area I'm marking now which is G2,
7 G3, that area, but in the open field.

8 CHAIRPERSON: - H3 I think.

9 MR CHASKALSON SC: I'm not sure if it
10 goes as far as H3. Maybe if I can ask for one of those
11 photographs to be called up. If we can go to KKK16, 5137
12 and if we can zoom into the area that I'm marking now. You
13 see, Colonel, here we have images of what seem to be NIU
14 people subduing miners in the open field.

15 CHAIRPERSON: Can you perhaps describe
16 with more particularity for the bench and those who's going
17 to read the record and look at this exhibit where precisely
18 you're pointing to.

19 MR CHASKALSON SC: If we can then zoom
20 back out.

21 CHAIRPERSON: What I see in the centre of
22 the photograph is what looks like a line of - I take it
23 members of the police service, and who were parallel with
24 the bottom of the page about halfway - just over halfway up
25 and then immediately below the right-hand end of that line

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1 of members is a, well I suppose it's a clearing or a field.
2 Is that what you're referring to? And then below that
3 there are some bushes and rocks and then there's a further
4 cleared space below that. So I don't know exactly it is
5 that you are focussing on.

6 MR CHASKALSON SC: If we zoom into the
7 cleared space on the other side of the bushes from the line
8 of SAPS members that the chairperson described, we'll see
9 what seems to be an NIU man standing with his foot on the
10 lying body of a striker, and there are two more NIU members
11 - we'll see from the next photographs, subduing another
12 striker who is lying on the ground, but that's not in the
13 same position as Mr Mdizeni. Mr Mdizeni is probably about
14 30 metres to the right of what we see there. Now when you
15 talked about strikers being taken out of the rocks into an
16 area where they were placed under control and arrested,
17 were you talking about what happened in this open area that
18 we see in this photograph here, or something close up
19 against the big rock which is where we find the body of Mr
20 Mdizeni.

21 COLONEL MODIBA: I was - Chairperson, I
22 was referring to the area where Mr Mdizeni was lying.

23 CHAIRPERSON: Let me get my bearings
24 correct. Am I correct in thinking that the big rock as
25 it's being described, is the rock one sees at the bottom

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1 right-hand corner of the photograph? There appears to be a
2 big rock there, and then on the other side of it, right at
3 the bottom of the picture on the right-hand side, there's a
4 police vehicle but that rock above the police vehicle, is
5 that the big rock seen from the other side? Do you
6 understand what I mean? Let me show you. Is that the big
7 rock seen from the other side? Would the deceased be
8 obscured from our view, looking at this photograph, by the
9 rock or am I not following at all?

10 COLONEL MODIBA: I'm not sure if that is
11 the rock where -

12 MR CHASKALSON SC: Maybe to help the
13 colonel we should just zoom back out so he can get a full
14 perspective of where the koppie is.

15 CHAIRPERSON: You don't zoom back out,
16 you un-zoom back out I think. You see, you now see the
17 rock to which I was referring against the background of
18 some of the surrounding features. Are you now able to
19 answer my question? That rock we see there in the middle
20 of the photograph is that the rock that has been talked
21 about, seen from the other side?

22 COLONEL MODIBA: That's correct. It
23 looks to be part of the rock as you come to the eastern
24 side.

25 MR CHASKALSON SC: What is that line of

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1 policemen doing I referred to earlier? Is this the NIU or
2 - first, is it the NIU? Can you confirm that?

3 COLONEL MODIBA: Which one, Chairperson?

4 MR CHASKALSON SC: There's a line of
5 policemen there, can you see? You can see a police vehicle
6 about three-quarters of the way more or less in the centre
7 of the picture and if you go down towards the middle of the
8 picture, from that police vehicle, I think it is a Cantor,
9 and you go left, you'll see there's a line of - quite a
10 longish line of people who I assume must be members of the
11 police force.

12 COLONEL MODIBA: Yes that was NIU members
13 with Colonel Nkebe.

14 MR CHASKALSON SC: Alright. What were
15 they doing?

16 COLONEL MODIBA: They were still
17 approaching the other side of the bush to assist clearing
18 the strikers that ran into the - into koppie 3.

19 MR CHASKALSON SC: If we can just move to
20 Mr Thelejane and again go back JJJ29, 208, this is a
21 picture of the position of Mr Thelejane's body and if I can
22 orient you, Mr Mdizeni's body would be roughly where I'm
23 pointing now around the rock towards the top left-hand
24 corner of this photograph. Mr Thelejane is lying face
25 down, facing north, north-west. If we look at the medical

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1 evidence in relation to him - go to exhibit A page 41 of
 2 the PDF I think it is. Sorry, you've got the paginated PDF
 3 for Mr Thelejane. On page 1 down to paragraph 4, "the
 4 chief post mortem findings made by me on this body were two
 5 bullet wounds of the head and pelvis. The bullet wound of
 6 the head perforates the head on the right side and back of
 7 head, entering on the right temple just above the ear and
 8 exiting on the left back of the head. The pelvic bullet
 9 wound penetrates the anterior bones of the pelvis entering
 10 on the lateral aspect of right buttock terminating with
 11 bullet fragmentation within soft tissues around the urinary
 12 blood and bones of pelvic rami." If we go to Dr Naidoo's
 13 report here, ZZZ5 at page 15, he gives his assessment.
 14 "This deceased was found adjacent to the edge of the large
 15 central boulder on its eastern side, about 20 to 30 metres
 16 away from body A with a high velocity R5 bullet wound of
 17 the head from right to left side, and another from the
 18 pelvis from right to left side. He was also thus facing
 19 north when shot. The injuries were together both severely
 20 incapacitating and rapid fatal, though not immediate, and
 21 likely immediately incapable of any movement. Four images
 22 captured in the attached photo album do not suggest body
 23 movement after death for body B." Again, two very similar
 24 points I'd emphasised. He wasn't facing the person or
 25 persons who shot him, he was facing at right angles because

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1 the bullet entered the right side of his body, or pelvis in
 2 one case, head in the other, and went out through the back
 3 of the left side of his head, the left of his pelvis. So
 4 he was at right angles to the person or persons who shot
 5 him, and he was likely to be immediately incapable of
 6 movement according to the medical expert. So he wouldn't
 7 have been able to move after he was shot, he died very
 8 quickly and was not able to move before he died. He would
 9 have been, according to our GPS calculations, more than 35
 10 metres away from the shooters, or from the cartridges that
 11 were found - was it B - the closest cartridges that were
 12 found to him, B9 to 20 and it seems clear from this
 13 evidence that he couldn't have been part of a group that
 14 was charging your line in the circumstances that you
 15 describe, he must have been killed in other circumstances
 16 and I want to raise something that I understood from your
 17 evidence in this regard because - correct me if I'm wrong,
 18 because I may have misunderstood you, but I understood your
 19 evidence to be that - and can we have MMM2 up? MMM2. You
 20 spoke about your movement... How you moved. After the
 21 charge you moved into the koppie, you turned right, General
 22 Naidoo went over to the left, you went right. You say you
 23 waited at F2 for some shooting to stop and then you went
 24 out and around through E1 all the way back to J1 and then
 25 came back to the koppie, you recall that evidence?

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1 [15:54] COLONEL MODIBA: I do, Chairperson.
 2 MR CHASKALSON SC: Now if I understood
 3 you correctly you said that you only saw body B for the
 4 first time when you came back after having gone round this
 5 route. Did I understand you correctly? You only saw the
 6 body of Mr Thelejane when you came back, not when you first
 7 approached the koppie and turned right round, right along
 8 the face of the big rock?
 9 COLONEL MODIBA: Chairperson, it's true
 10 that I noticed body B after I made a second turn to that
 11 big rock.
 12 MR CHASKALSON SC: You see it seems to me
 13 that Mr Thelejane, if Mr Thelejane's body was there the
 14 first time you came round, it would be very difficult for
 15 you not to see it because you would have literally walked
 16 right past it. If you go, Mr Thelejane's body is roughly,
 17 probably on a line between F and G just into road, just
 18 above the bottom of road 2. Now that would have been the
 19 route that you walked when you first came into the koppie
 20 and went right along the face of the big rock, along the
 21 bottom of the big rock. So if it was there it would be
 22 very difficult for you not to see it, not to have seen it.
 23 COLONEL MODIBA: If I remember well,
 24 Chairperson, as I walked there, there were also a group of
 25 miners that were taken behind the rocks that were lying

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1 there, maybe which could be that he was amongst those, I'm
 2 not sure but that could be a probability. Then I proceeded
 3 right around until I went in through the first entry into
 4 that koppie 3.
 5 CHAIRPERSON: As you did this clockwise
 6 circuit, as you described it, did you hear any gunshots?
 7 COLONEL MODIBA: There was no gunshot at
 8 the time I was in the koppie.
 9 CHAIRPERSON: No gunshot, in other words
 10 while you were doing the circuit or whatever.
 11 COLONEL MODIBA: I didn't hear any
 12 gunshot.
 13 CHAIRPERSON: So that means that Mr
 14 Thelejane must have been shot before you did your circuit -
 15 COLONEL MODIBA: It did -
 16 CHAIRPERSON: - because I mean if you
 17 walked past there and you came round again and there were
 18 no gunshots during the course of that circuit, then he must
 19 have been shot before that. So it sounds from what you
 20 say, as if he must have been shot before you passed where
 21 the body was ultimately found. Would you agree with that?
 22 COLONEL MODIBA: It is possible, Chair.
 23 CHAIRPERSON: No, never mind possible. I
 24 mean that sounds, that's the ineluctable conclusion to
 25 which one comes, isn't that so?

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1 COLONEL MODIBA: Yes, Chairperson.
 2 CHAIRPERSON: Alright. Now, so the only
 3 question is why didn't you see it? Now, is your answer – I
 4 just want to make sure I understand you – is your answer
 5 there were a number of bodies lying there, you
 6 understanding them to be living people who had been ordered
 7 to lie down and you didn't see a dead body among them? Is
 8 that effectively what you're saying?
 9 COLONEL MODIBA: Yes, that's correct,
 10 Chairperson.
 11 MR CHASKALSON SC: But whenever Mr
 12 Thelejane was killed, if he died where he fell, which is
 13 essentially what the expert medical evidence says, he
 14 couldn't have been part of the group that charged your
 15 members because they would have been in H3 or in the region
 16 of H3 or I3 when people either shot at them or fired
 17 warning shots close to them. Someone who was not able to
 18 move could not end up in F or G2 if they were shot while
 19 charging in H3.
 20 COLONEL MODIBA: Chairperson, it is
 21 possible that at the time of the charging Mr Thelejane
 22 could have been amongst the group and he could have turned,
 23 not turning the whole body but the upper body. He could
 24 have – it's possible that when, with the ricochet of the
 25 bullets those bullets could have caught him also.

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1 MR CHASKALSON SC: But Colonel, there are
 2 two aspects to the medical evidence. The first is the
 3 direction in which Mr Thelejane was facing when he was shot
 4 which is north, facing up this photograph, but the second
 5 which is more conclusive in relation to whether he was part
 6 of the charging group when he was shot is that he wouldn't
 7 have been likely capable of movement after he was shot. He
 8 was shot through the head. He would not have been able to
 9 move after he was shot so he couldn't have got from H3 to
 10 FG2 after he was shot. He would have to have been shot in
 11 F2, FG2.
 12 COLONEL MODIBA: Chairperson, I think we
 13 should also take into account the move, the direction in
 14 which the firing on the left of that big rock where body A
 15 was lying, we also have to look at that one, that it could
 16 have been those fired bullets from that direction that
 17 perhaps ricocheted and caught him.
 18 CHAIRPERSON: Sorry, do I understand you
 19 to say he could have been shot by one of the bullets fired
 20 from the south? Is that what you're saying? I understood
 21 you to say that body A, as he's called, could have been
 22 killed by a shot fired from the south. Does the same apply
 23 to Mr Thelejane as well, is it also a possibility?
 24 COLONEL MODIBA: That's correct,
 25 Chairperson.

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1 COMMISSIONER HEMRAJ: You and the other
 2 members in the basic line continued to shoot as some of
 3 those who were charging towards you turned around and ran
 4 back?
 5 COLONEL MODIBA: Chairperson, at – the
 6 shooting stopped immediately when they surrendered back
 7 into the bush. There was no further shooting there.
 8 COMMISSIONER HEMRAJ: Yes, but all of
 9 them couldn't have turned around at the same time.
 10 COLONEL MODIBA: Yes.
 11 COMMISSIONER HEMRAJ: The question is,
 12 while some of them turned around, did shooting continue?
 13 COLONEL MODIBA: No, there was no
 14 continuation of shooting there.
 15 CHAIRPERSON: Let me put it this way, how
 16 long did the shooting last, for how long? It wasn't just
 17 one second, was it? It must have been longer than that.
 18 How long did it last?
 19 COLONEL MODIBA: It didn't take long –
 20 CHAIRPERSON: Approximately just –
 21 obviously you can't tell us with mathematical precision but
 22 can you give us an idea of just how long it lasted
 23 approximately?
 24 COLONEL MODIBA: Chairperson, I want to
 25 point out to say the shooting had not occurred the same

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1 time while we were being charged towards the koppie 3. It
 2 was at a different distance as we were moving in, so it
 3 wasn't at a go that the shooting occurred, so that maybe
 4 we, the firing was simultaneous shots from the members.
 5 CHAIRPERSON: Yes, yes, I see. Of course
 6 the other point that occurs to me is that it doesn't follow
 7 that Mr Thelejane was one of the people who charged. I
 8 mean if there were quite a lot of people on the koppie and
 9 some of them charged and some of them stayed inside the
 10 koppie, they'd taken perhaps shelter there to get away from
 11 all the bullets that were flying around, he might not have
 12 been one of the charging group at all. I take it that's a
 13 possibility too, is it, or am I wrong in that?
 14 COLONEL MODIBA: It is possible,
 15 Chairperson.
 16 CHAIRPERSON: Because how many people
 17 approximately would you say came charging, the ones that
 18 you were talking about?
 19 COLONEL MODIBA: I referred to a group of
 20 between 15 to 20 that charged –
 21 CHAIRPERSON: Yes.
 22 COLONEL MODIBA: - in front where I was
 23 heading to.
 24 CHAIRPERSON: Do we know how many of the
 25 strikers were in that vicinity, perhaps taking refuge,

1 hiding behind rocks, behind bushes and so on? It may have
2 been more than just the 15 or 20 who you saw charging.
3 That must be right, surely?
4 COLONEL MODIBA: That's correct. There
5 were a lot of them that were retrieved behind the rocks.
6 CHAIRPERSON: Yes, I see, thank you.
7 MR CHASKALSON SC: Chairperson, I see
8 we've run past four. I am about to move on to my other
9 topic.
10 CHAIRPERSON: May I suggest that you do
11 so tomorrow? We'll adjourn till nine tomorrow.
12 [COMMISSION ADJOURNED]

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