

RealTime Transcriptions

TRANSCRIPTION OF THE

COMMISSION OF INQUIRY

MARIKANA

BEFORE TRIBUNAL

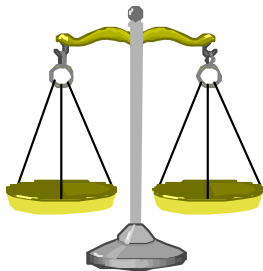
THE HONOURABLE MR JUSTICE FARLAM (RETIRED) - CHAIRPERSON
MR TOKOTA SC
MS HEMRAJ SC

HELD ON

DAY 286

5 SEPTEMBER 2014

PAGES 37027 TO 37183



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1 [PROCEEDINGS ON 5 SEPTEMBER 2014]
 2 [08:28] CHAIRPERSON: The Commission resumes.
 3 You're still bound by your affirmation, Mr De Rover. Ms Le
 4 Roux – you took, of course, I beginning your pardon, you
 5 took the oath. It's the other man from the lowlands who
 6 affirmed. You are still bound by your oath.
 7 CEES DE ROVER: (s.u.o.)
 8 CROSS-EXAMINATION BY MS LE ROUX (CONTD.):
 9 Thank you, Chair, and let me express on the record my
 10 appreciation for the early start. Good morning, Mr De
 11 Rover.
 12 MR DE ROVER: Good morning.
 13 CHAIRPERSON: It was the least we could
 14 do, Ms Le Roux.
 15 MS LE ROUX: Mr De Rover, to start with
 16 some housekeeping, have you been able to locate your terms
 17 of reference overnight?
 18 MR DE ROVER: I have. I have indicated
 19 them to our legal team. I've actually just mailed them
 20 across so there is a letter of the 22nd of February of this
 21 year and, sorry, of last year, that is the letter of my
 22 appointment and it holds a tasking and there are guidelines
 23 that were established March this year for continued work
 24 and that document will be made available to you via the
 25 legal team.

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1 MS LE ROUX: It's the call-up list
 2 provided by Mr De Rover.
 3 CHAIRPERSON: Yes.
 4 MS LE ROUX: For the walk through at
 5 scene 2.
 6 CHAIRPERSON: Mr De Rover's call-up list
 7 is an adequate description, thank you.
 8 MS LE ROUX: Mr De Rover, have you ever
 9 consulted with either officer Myburgh or Swart?
 10 MR DE ROVER: I did consult with Swart.
 11 I did not consult with Myburgh because he was on sick leave
 12 throughout my presence.
 13 MS LE ROUX: And when did you consult
 14 with, I think he's a warrant officer?
 15 MR DE ROVER: Warrant Officer Swart?
 16 MS LE ROUX: Swart, when did you consult
 17 with Warrant Officer Swart?
 18 MR DE ROVER: Either the 26th or the 27th
 19 of March last year.
 20 MS LE ROUX: Of last year.
 21 MR DE ROVER: He is on that He is on that
 22 call-up list that you have and it was in the course of
 23 those gatherings that I spoke to him.
 24 MS LE ROUX: And in your consultations
 25 with Warrant Officer Swart did he describe to you the

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1 MS LE ROUX: Thank you very much, we'll
 2 follow up with the SAPS legal team for those. Mr De Rover,
 3 you testified yesterday that you had consulted with
 4 officers Annandale –
 5 CHAIRPERSON: Who is doing that? There's
 6 something making a noise there. Please turn it off. If it
 7 goes off again I'll ask you to leave the room. I'm sorry,
 8 Ms Le Roux.
 9 MS LE ROUX: Mr De Rover - thank you,
 10 Chair – you testified that you had consulted with officers
 11 Annandale, Merafi, Mpenbe, Scott and Calitz, correct, and
 12 then we've seen the call-up list. Chair, for the record
 13 it's UUUU11, for the members that you did your walk through
 14 at scene 2. Other than those – and you testified that you
 15 had not spoken to Colonel Vermaak – other than those
 16 commanders, have you spoken to any other, and those on the
 17 call-up list, have you engaged with any other members?
 18 CHAIRPERSON: Ms Le Roux, this call-up
 19 list – [microphone off, inaudible.]
 20 MS LE ROUX: It's pre-marked as UUUU11.
 21 CHAIRPERSON: I say what exhibits are
 22 going in, you don't just give me a list of the exhibits
 23 that are before me, I've got to accept each one. I'm not
 24 saying I'll refuse it but I'm just, let's get the rules
 25 right. UUUU11 is Mr De Rover's call list.

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1 evidence that is contained in his statement before the
 2 Commission, that he recognised Officer Myburgh as a SAPS
 3 member who essentially executed a striker at scene 2? Did
 4 you discuss those allegations with him?
 5 MR DE ROVER: The way that that came to
 6 light is different from how you describe it. When we held
 7 that meeting I was first obviously interested in who was
 8 there, then I was interested in their statements and I'd
 9 seen statements of some of them, most of them, and they
 10 left questions to me. The next thing I did was try to plot
 11 their positions on Google maps, to get them to tell me
 12 where they were and then talk about their actions again and
 13 a simple question that followed that was, tell me who was
 14 on your left and who was on your right so that we actually
 15 established exactly when it comes to the TRT line, for
 16 example, I would think it could be of use to the Commission
 17 to actually be able to pinpoint an individual rather than
 18 someone in uniform because then it becomes generic and the
 19 other option would allow you to make it specific. So once
 20 we had plotted who was where around scene 2, I took it unit
 21 by unit and I tried not to pass judgment but just ask
 22 questions for clarification on what they did, how they got
 23 there and what they did. When it was Swart's turn he
 24 simply described his actions at scene 2 that include that
 25 he shot and wounded a person who he claims attacked him and

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1 that in the aftermath while they were standing there
 2 waiting for medical personnel to arrive to render
 3 assistance, he said that a person came walking out from
 4 between the rocks in front of him, that would be a person
 5 coming from the east walking westwards, a police sergeant,
 6 and that he later realised was Myburgh who asked him
 7 whether the person lying at Warrant Officer Swart's feet
 8 was deceased and Swart said no, he is alive and we are
 9 waiting for medical personnel. According to Swart, Myburgh
 10 then said, when the medics come can you send them in there
 11 and he points behind himself to a narrow corridor between
 12 rocks on the southern side, because I believe I may have
 13 just shot someone and I think he's dead. That is the story
 14 that Swart came with on that day. Now obviously that is,
 15 at that stage to me that's upsetting news because there was
 16 a new element there that I had not heard before. Of course
 17 at that time I think in the Commission the evidence of
 18 Myburgh had seen the light of day, his allegation that he
 19 made I think for the first time in October to, coincidence
 20 of coincidences I think, but to Lieutenant-Colonel Vermaak.
 21 I leave that as it stands but my concern now is that here
 22 is someone who makes an equally serious allegation against
 23 another police officer to what at least constitutes then an
 24 admission of potential use of lethal force that I think
 25 needs to be investigated. So I had on that date initiated

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1 steps within SAPS to alert and the legal team were there
 2 during that meeting, so steps were initiated to engage SAPS
 3 on this revelation and to request that in accordance with
 4 the procedures that apply in your national context, this
 5 situation now gets taken over because I'm an expert in your
 6 country, I have no right to question people that
 7 potentially are either witnesses of crime or suspects of
 8 crime. So if you want to know the reason why I did not
 9 speak to Myburgh, that would be another one because I can't
 10 advise him of his rights. I could talk to him if he would
 11 agree to talk to me but I still think that it would pose a
 12 precarious proposition.
 13 MS LE ROUX: Do you know whether any
 14 steps were taken as you had recommended?
 15 MR DE ROVER: Again I've, at a few
 16 corners, stated to you that I am retained as an adviser.
 17 My competence and influence or reach, if you want, does
 18 simply not extend to checking whether they do something
 19 with that information or not.
 20 MS LE ROUX: Do you know if anything has
 21 been done?
 22 MR DE ROVER: I've left this information,
 23 with the help of the legal team at a high level in SAPS and
 24 I was assured that it would be given the follow-up
 25 required. I have never received feedback on it.

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1 MS LE ROUX: When you say a high level,
 2 what are you referring to?
 3 MR DE ROVER: On the day I had a long
 4 telephone conversation with General Masemola and with
 5 General Mbombo.
 6 MS LE ROUX: One further question on
 7 this. Did you, when you had your, when you took notes of
 8 scene 2 - we understand you don't have them with you,
 9 they're in Australia but did you record anything relating
 10 to this Myburgh/Swart chain of events in those notes?
 11 MR DE ROVER: Ja, of course.
 12 MS LE ROUX: Okay.
 13 MR DE ROVER: Because that - but I've
 14 made the information contained therein obviously available
 15 and I know that affidavits were subsequently taken at least
 16 of Warrant Officer Swart that I am aware of, and of another
 17 TRT member who was able to corroborate the story because
 18 Swart's information with regards to Myburgh does not limit
 19 itself to the incidents on the 16th of August. He also made
 20 statements with regard to an encounter that he had with
 21 Myburgh subsequently when people were called to give -
 22 MS LE ROUX: Yes, we've seen that -
 23 MR DE ROVER: Ja, so you are aware of
 24 that.
 25 MS LE ROUX: If I could then, if I could

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1 then ask you to focus on the decision to move to the
 2 tactical phase on the 16th of August. Are you aware of
 3 Lieutenant-Colonel Scott's evidence that he had two pre-
 4 conditions for moving to the tactical phase, the first
 5 being an escalation of the threat of violence and
 6 destruction by mobilising as a group to move to a pre-
 7 determined target or if all other options to resolve the
 8 situation without force were exhausted and there was no
 9 other means to restore order, are you aware that those were
 10 Lieutenant-Colonel Scott's two preconditions to initiate
 11 phase 3? You're aware of that?
 12 MR DE ROVER: Yes.
 13 MS LE ROUX: Yesterday we addressed the
 14 risk assessments that you described in your interrogatory
 15 responses, specifically those to the evidence leaders.
 16 Chair, UUUU2.5 paragraph 1.7, we don't need to go there
 17 though, and you described the risk assessment exercise as
 18 essentially looking at what you intend to do and then
 19 trying to put probabilities to outcomes and you describe in
 20 that interrogatory response how something gets ranked from
 21 likely to not likely and the like. Two questions on that.
 22 First of all, you accept that before the 1:30 JOCCOM there
 23 was no plan for stage 3 that had yet been presented and
 24 agreed.
 25 MR DE ROVER: I would politely disagree

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1 because, for two reasons. One, that effectively if you
 2 look at what happened on the Monday, even for a short
 3 period of time SAPS went to a stage 3. So if not, and
 4 again now we come back to auditable trail but if not in
 5 writing, at least in intention and implementation on Monday
 6 temporarily I would describe what occurred, whatever the
 7 trigger, but what occurred there is, in its confined
 8 reality is a stage 3 situation. They go back –
 9 MS LE ROUX: Mr De Rover, I think you may
 10 have misunderstood my question.
 11 MR DE ROVER: Sorry?
 12 MS LE ROUX: I think you may have
 13 misunderstood my question. I just want to check –
 14 MR DE ROVER: No, I think –
 15 MS LE ROUX: - we're not missing each
 16 other.
 17 MS LE ROUX: I think I did but please go
 18 ahead.
 19 MS LE ROUX: So on the 16th of August
 20 before the 1:30 JOCCOM the evidence before the Commission
 21 has been that there was no written plan that detailed what
 22 stage 3 would look like. In concept there was a tactical
 23 phase but what that would actually entail, there was
 24 nothing in existence before the 1:30 JOCCOM. The only
 25 thing Lieutenant-Colonel Scott had that he presented at the

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1 have to spell it out because the people concerned have been
 2 trained, they know exactly what those procedures involve
 3 but that's not what Ms Le Roux is asking you about. Put
 4 the question again so that the witness can understand the
 5 question.
 6 MS LE ROUX: Mr De Rover, the evidence
 7 before the Commission is that before the 1:30 JOCCOM there
 8 was no written plan. There was no documentation that set
 9 out how all the different units involved in the tactical
 10 phase at Marikana, what they were going to do, how they
 11 were going to do it. We accept that, the evidence has been
 12 there's no need to have definitions of how to arrest
 13 someone. We're talking about how to co-ordinate –
 14 MR DE ROVER: Ja.
 15 MS LE ROUX: - these multiple units in an
 16 unprecedented complex operation. There was no written
 17 plan. At the 1:30 JOCCOM and then at the briefing
 18 thereafter at 3:30 all that there is, is Lieutenant-Colonel
 19 Scott's Google Earth image with the icons that he placed on
 20 that image to indicate how he intended to deploy resources
 21 in his plan. That is all that we understand was the
 22 contemporaneous planning documentation.
 23 MR DE ROVER: Okay.
 24 MS LE ROUX: Does that accord with what
 25 you have been told?

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1 JOCCOM was his Google Earth image that you've seen
 2 with the icons on it showing the deployment of resources
 3 that he intended, but other than that image there was no
 4 written plan. There was no document that spelt out in any
 5 detail how all the different units in the Marikana
 6 operation would co-ordinate themselves, what their roles
 7 would be and the like. Do you accept that that is the
 8 evidence before this Commission?
 9 MR DE ROVER: Chair, respectfully, no.
 10 My understanding is different and I think part of it was
 11 covered by Mr Budlender yesterday when specifically asking
 12 about the detailing of disperse, disarm, arrest with
 13 regards to stage 3 and how much detail you would expect to
 14 see in writing for such a phase.
 15 CHAIRPERSON: No, no, no. I think that,
 16 with respect, is a different point.
 17 MR DE ROVER: Mm.
 18 CHAIRPERSON: What Ms Le Roux is putting
 19 to you is, all that was put before the Commission, before
 20 the committee, the JOCCOM committee, was the concept and
 21 the Google Earth image.
 22 MR DE ROVER: Mm.
 23 CHAIRPERSON: That was all. What you've
 24 said and what other evidence has been to the effect is that
 25 when you talk about disarm, disperse and disarm, you don't

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1 MR DE ROVER: Ja, I think - you must, I
 2 think, remember that my two statements are now one and a
 3 half years old. You've learned a lot in that time. I had
 4 a limited time frame and of course I realise that some of
 5 the documents I was given looked like they were, how do you
 6 say that, created to show what intentions were and not
 7 necessarily reflecting the documents that were there when
 8 things happened. So although for example I've seen
 9 extracts of occurrence books but I've never physically held
 10 the occurrence book concerned. So I would have to rely
 11 that the extracts that I've been given represents the
 12 entirety of what is contained in that book. So if that is
 13 what you put to me, if that is what the evidence is before
 14 the Commission then, ja, I will have to say I –
 15 CHAIRPERSON: That was Colonel Scott's
 16 evidence.
 17 MR DE ROVER: Ja.
 18 CHAIRPERSON: We discussed it yesterday.
 19 Many of the plans and so forth that you saw were
 20 retrospectively created in an attempt to capture in writing
 21 what was alleged to have been present in a non-written
 22 form.
 23 MR DE ROVER: Ja.
 24 CHAIRPERSON: I did tell you that there
 25 was an inaccuracy which we were told about which was

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1 explained on the basis that it was just help us to
2 understand. We don't have to discuss that further, but Ms
3 Le Roux is right, she has correctly summarised Lieutenant-
4 Colonel Scott's evidence on that point.

5 MS BALOYI: Mr De Rover, just one further
6 point of clarification on that, are you aware that the
7 Google Earth image that Lieutenant-Colonel Scott used for
8 the 1:30 JOCCOM and the subsequent briefing, represented
9 what's been called the second stage configuration. So
10 there was an initial encirclement plan of the koppie,
11 secondly there was a plan that had half of an arc dealt
12 with by barbed wire and the remainder of that arc dealt
13 with the deployment of NIU, STF and other units. And then
14 of course we have the actual stage 3 configuration which
15 was only barbed wire, no officers completing the arc. Are
16 you aware that the image that he utilised was the second
17 version, the one that had half an arc of barbed wire, half
18 an arc of personnel. Were you aware of that?

19 MR DE ROVER: I have seen, I think, all
20 those images and asked questions to it when I was shown
21 them.

22 MS LE ROUX: Okay, so if you accept my
23 summarisation of the plan that he had at the time, you will
24 accept that that plan did not set out in any detail what
25 role the different units would perform, how they are to be

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1 with professional police officials. That's why yesterday I
2 did refer to Stockwell for the simple reason that here
3 there seems to be, and I can understand that because of
4 your profession, you want documented evidence because it
5 gives you certainty and objectivity. Stockwell complements
6 this where there are gaps with testimony of officers
7 concerned, assuming that because they are public officers,
8 they swore an oath, they will tell the truth unless you can
9 demonstrate that to not be the fact.
10 [08:48] So whilst I accept that they then did not perform
11 well on the point of entrusting to paper what they were
12 going to do. A briefing was held and you can see in the
13 videos you showed yesterday from the moment Nyala 4 starts
14 moving you can see several vehicles starting to move and
15 move towards to what I would call the jump off point to
16 start the dispersal action proper. So obviously there was
17 communication and people did understand what they were
18 supposed to do and what I'm implying with that is that I
19 would take that at a professional level people did know and
20 people did have a clear mind on what was supposed to happen
21 and did make those assessments. What they failed to do is
22 put that in writing, well put that in writing for you, but
23 put it in writing for themselves so that after the fact
24 they could actually demonstrate to you.

25 CHAIRPERSON: I don't think, with

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1 co-ordinated, there was no contemporaneous document that
2 set that out. If you accept that and assume that, will you
3 agree with me –

4 CHAIRPERSON: I think he said quite
5 fairly that what you've put to him, if it's in accordance
6 with the evidence that's what he accepted –

7 MS LE ROUX: Yes.

8 CHAIRPERSON: And my job, in a way, is to
9 make sure that what you've put is in fact in accordance
10 with the evidence.

11 MS LE ROUX: Yes.

12 CHAIRPERSON: And I've ticked that block
13 so you can carry on from there.

14 MS LE ROUX: Thank you, Chair. So Mr De
15 Rover, accepting that, would you agree with me that there's
16 not much value in doing a risk assessment where there isn't
17 a proper plan that, in detail, sets out what the different
18 units should be doing, how this tactical phase should be
19 implemented because absent that detail, it's very difficult
20 to do a meaningful risk assessment because you don't
21 actually understand what you're assessing the risk of?

22 MR DE ROVER: This is where I think the
23 rubber meets the road because now if you only take
24 contemporaneous documentation as a basis to qualify that, I
25 would be inclined to agree with you but you are dealing

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1 respect, it's quite as simple as that. What Colonel Scott
2 told us was they were presented with this fait accompli by
3 the Provincial Commissioner. She didn't say what do you
4 think about going - I've decided this will happen and we
5 know it had been decided the night before. Then the
6 question is then how are we going to do it and he waited
7 for other people, as I told you yesterday, to put their
8 hands and make suggestions. He then made his suggestion.
9 This was accepted. It's not suggested that there was a
10 pause and people said well let's just discuss the risks and
11 never mind entrusting it to paper, entrusting it to the
12 spoken word is – it didn't happen either. According to the
13 evidence there's no suggestion that anybody said well what
14 are the risks, let's look at the risks of implementing that
15 plan. That's really Ms Le Roux's point. If there had been
16 that evidence then the point you make would obviously be
17 very valid, but there wasn't time, I think, to put things
18 on paper. But the evidence doesn't suggest that there was
19 any discussion of that kind. Then when you go out to the
20 briefing and remember there are no POP people present there
21 at all to say hang on a second, let's look at this
22 possibility. Then when they go out into the field at 2:30
23 he and Brigadier Pretorius the POP commanders were then
24 summoned to his vehicle and he then shows them on his
25 laptop and told them the story. There's also no suggestion

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1 that there was a discussion of risk and Brigadier Calitz
 2 gave a very interesting answer when he was questioned about
 3 that. He was asked well why didn't you hey but you know
 4 this is risk you're doing. We should wait until tomorrow
 5 morning, I'm summarising loosely, but that was the
 6 question. And he said well I couldn't have done that
 7 because if there'd been trouble that night then I would
 8 have been held responsible for stalling the operation and
 9 therefore I said nothing. Now that was very, to use the
 10 word insiggewend in Dutch, maybe you do, a very
 11 insiggewende answer and I think that's really at the root
 12 of the questions you're being asked. Am I right, Ms Le
 13 Roux? Mr Semanya.

14 MR SEMENYA SC: Chair, I think that ought
 15 to be qualified by saying in the JOCCOM, you'd recall when
 16 this cross-examination started Ms Le Roux herself says
 17 there was a – General Mbombo was cautioned that there would
 18 be risk associated with going tactical and if that does not
 19 constitute some form of risk assessment that is why the
 20 witnesses say it is not documented, but you can accept that
 21 that would have ordinarily been a risk assessment
 22 discussion around going tactical.

23 CHAIRPERSON: You are right. I didn't
 24 have to put that to the witness because it was mentioned
 25 yesterday, but that so-called risk assessment took place

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1 ask you the basis of that answer. When you say that the
 2 SAPS gave the scenario a probability of not likely, who at
 3 the SAPS do you say assigned not likely to the scenario of
 4 possible injury or death following the tactical phase?

5 MR DE ROVER: My understanding is that
 6 that was Lieutenant-Colonel Scott and General Annandale.

7 MS LE ROUX: Okay and when is it your
 8 understanding that they did this exercise of assigning not
 9 likely as a risk assessment of the operation?

10 MR DE ROVER: I think on the 16th.

11 MS LE ROUX: Do you if that would have
 12 been at the 1:30 JOCCOM or – on the 16th –

13 MR DE ROVER: I'd almost think that a
 14 pointed interrogatory to them on that point may serve you
 15 better than my speculation. I don't know.

16 MS LE ROUX: Mr De Rover, I'd like to ask
 17 you whether – did you apply your mind independently when
 18 you were answering the evidence leaders' interrogatories
 19 and consider for yourself whether assigning not likely as a
 20 risk assessment to the operation was a reasonable risk
 21 assessment? Do you share the SAPS view that it was not
 22 likely that this operation would cause death or injury?

23 MR DE ROVER: I think I know a little bit
 24 about this operation. I know not much about any other SAPS
 25 operation, so it's a quantitative answer that I got from

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1 about 9 o'clock in the morning. It was a conversation
 2 between General Annandale, General Mpembe and General
 3 Mbombo. General Mbombo was told about the risk and she
 4 said well just do your best to make sure it doesn't happen.
 5 That's as far as it went. There was no discussion at the
 6 JOCCOM at 1:30 and remember at that stage no plan actually
 7 was on the table, so there was nothing to consider in
 8 relation to the risks attached to it. And then at 2:30 –
 9 so nothing happened in the JOCCOM and as far as I can
 10 recall from the evidence there was no suggestion that
 11 anyone said hang on a second, Colonel Scott, I think he was
 12 Lieutenant-Colonel Scott, Lieutenant-Colonel, let's
 13 consider the risk first before we go ahead. That didn't
 14 happen either.

15 MS LE ROUX: Now, Mr De Rover, in your
 16 response to the interrogatories to the evidence leaders
 17 which, Chair, is UUUU2.5, paragraph 1.7 of that, this is
 18 where you set out this risk assessment exercise for the
 19 first time. And you conclude that answer by saying based
 20 on its previous experiences in public order management SAPS
 21 gave that scenario, the scenario being that one of the
 22 possible outcomes of forcible disarmament would be injury
 23 or death. So they gave that scenario a probability of not
 24 likely because of its experiences of the outcomes of many
 25 operations to date they'd been different. Now I'd like to

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1 SAPS because obviously my interest is and Mr White has
 2 canvassed that, that you countenance the possibility that
 3 the message you intend to send with a particular action is
 4 not understood the way you intend it because perceptions
 5 build in people's minds. Not just with you unfurling a
 6 wire. That may trigger a reaction that you in fact, maybe
 7 you try to say you can't come here, but people may perceive
 8 it as oh the whole tone of the encounter is changing now.
 9 You expect me to make trouble and people may well decide
 10 then to make trouble. I think Mr White has spoken
 11 extensively on that and Mr Hendrickx, so I do not need to
 12 repeat that. But what I asked SAPS particularly with that
 13 in mind what is your generalised experience when you do
 14 this? And what they say and what they brought, images for
 15 Marikana to show me is that indeed the majority of the
 16 people move away at that stage. It's almost like it's a
 17 conditioned response. People know that this is what the
 18 police will do and that the next thing they risk if they
 19 stay is that in a dispersal action SAPS would use water
 20 canon, teargas or rubber bullets to then convince people to
 21 leave from a particular area.

22 CHAIRPERSON: Sorry, I'd like to ask a
 23 question. Finish your answer, I interrupted you. Forgive
 24 me.

25 MR DE ROVER: No, no please.

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1 CHAIRPERSON: All right, I'm not
 2 interested in whether it could really be said that there
 3 was a probability of not likely, never mind what they now
 4 say or said to you. I don't remember them saying that to
 5 us by the way, but we won't go there now, they may have
 6 done. This is conceded by Colonel Scott in the passage
 7 that I think was put to you yesterday being a first time
 8 situation, a very unusual situation that they never had
 9 before. Now there are a number of factors that are
 10 relevant. They knew that these people had taken muti,
 11 their understanding was, it's disputed actually from the
 12 other side, but the understanding was that gave the
 13 strikers a belief in their invulnerability or
 14 invincibility. They knew how the strikers had reacted on
 15 the Monday. The intelligence that they received was that
 16 they were not going to lay down their arms, they were not
 17 going to abandon their position on the koppie, the were
 18 going to fight to retain their arms and retain their
 19 position. That was all the information, that's the
 20 information they had. They also foresaw as a possibility
 21 that the POP with their non-lethal methods would not be
 22 able to deal with the situation which is why they put in
 23 place the TRT people. The TRT people were there for two
 24 reasons. Firstly to do mopping up if the POP people were
 25 successful, but secondly and more importantly they were

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1 Major-General Annandale went to Brigadier Pretorius who was
 2 keeping the minutes and said please make t his note in the
 3 minutes, this decision was made by the Provincial
 4 Commissioner. And he stood over her while she wrote that
 5 down. That in itself spreek boekdele as we say in
 6 Afrikaans. That indicates things I would imagine, anyway
 7 in the light of those facts I ask you the question. What
 8 do you say on the suggestion, let's not discuss whether
 9 they really thought it was not likely, perhaps let's
 10 consider the reasonableness of such a finding? What do you
 11 say of the assessment that in these circumstances the
 12 probability of it's not likely that there'll be loss of
 13 life and serious injury? What's your answer to that?
 14 MR DE ROVER: Chair, I think on a careful
 15 reading of that response that I gave the not likely does
 16 not apply to, in general, the likelihood of injury or
 17 death. What the not likely label applies to is whether the
 18 group, as a whole, would be turning on the police. And I
 19 know that that is a contested matter, but that there would
 20 be a confrontation with that group, as a whole, if you
 21 will. What I think the presence of TRT and your allusion
 22 to what is before the Commission as evidence the
 23 expectation of TRT involvement, as I understood it, was
 24 that when the dispersal starts and that lead group would
 25 have been broken up into smaller groups or even individuals

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1 there to protect the POP people, to ensure that there was
 2 no loss of life on the police side. And the only way they
 3 could do it, you can't blame the TRT for doing what they
 4 did because that's what they had to do and the only
 5 equipment they had to do it with was TRT rifles. So they
 6 must have foreseen, this is obviously a prima facie issue
 7 I'm putting to you, but they must have foreseen the POP
 8 people mightn't be affected regard been had to these
 9 special circumstances. The muti, the conduct of the 13th,
 10 the information and that was really a first time situation,
 11 they never dealt with this kind of situation before. I can
 12 understand they dispersed and disarmed people in the past,
 13 but this lot who behaved as they had behaved, who had shown
 14 themselves to be the kind of people they were, well not all
 15 of them obviously, but some of them. Based on the
 16 information and so forth, I would have thought that, again
 17 prima facie that to way that it was not likely that the POP
 18 people wouldn't have to do what they had to do. It was not
 19 likely that the TRT people would have to take over, fire
 20 shots which would have a probability of causing death or
 21 serious injury. That's a difficult one to accept and
 22 there's something I must tell you, I don't think you know.
 23 The decision to proceed then was not taken by the JOCCOM,
 24 it was something imposed from above, in fact from the night
 25 before. And the evidence is that at the end of the meeting

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1 they would be approached and arrested and disarmed. Now if
 2 that was not feasible to be done by POP TRT members would
 3 be on hand to assist them with accomplishing that task and
 4 I will frankly say I don't think that SAPS anticipated that
 5 as a not likely event. I think that that was actually what
 6 they thought was going to be the very likely scenario that
 7 would unfold, that they would manage to break up that
 8 group, approach them in smaller numbers or individual,
 9 surround them and disarm them. Starting with POP doing
 10 that and if, for some reason from prima facie appearance of
 11 a suspect that would not be feasible TRT would do it.
 12 CHAIRPERSON: The evidence is partially
 13 that. The evidence is that the TRT people were to assist,
 14 but also the role of defending the POP was also mentioned.
 15 But what one also has to factor in is the intelligence that
 16 the police got that the strikers would not surrender their
 17 position on the koppie, would not surrender their arms,
 18 would fight to protect both. In other words if the POP
 19 approached them and tried to disarm them or the TRT
 20 approached them and tried to disarm them they would fight.
 21 And they believed, so the police thought anyway, they
 22 believed they were invincible, so they weren't scared of
 23 being shot at because they thought the bullets would turn
 24 into water. So the police believed, that's denied by the
 25 strikers, it's something that we'll have to decide at the

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1 end. So you're faced with people who've shown what they're
 2 capable of on the Monday and indeed in certain other
 3 incidents, obviously not all of them, but some of them,
 4 people who believe they're invincible, bullets will turn
 5 into water. People who the police believe or not believe,
 6 police are told people who will fight to protect their
 7 position and their arms. Then you look at the likelihood
 8 and make an assessment.

9 MR DE ROVER: Well I think that if you
 10 take that you would qualify then a confrontation as very
 11 likely to happen the risk that that confrontation then
 12 produces death or serious injury and I just point to the
 13 Monday where whatever the trigger that caused the
 14 confrontation, once the proximity occurred, death and
 15 injury occur on both sides. And that lamentable loss of
 16 mind, of life would obviously also have played on the
 17 Monday when the incident eventually unfolded as it did.
 18 But I think that if – I still believe on what I have been
 19 told that there was never the anticipation that they would
 20 have to deal with the group as one at the time that they
 21 were confronted by that reality. I think their
 22 anticipation was that if that happened it would be in
 23 smaller numbers and in a situation that they could control.
 24 And if I can just share a personal feeling I got talking to
 25 SAPS members. In a strange way there was almost a relief

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1 as they recall, that's the Nyalas would be burnt. There
 2 was a suggestion that one of the senior police officers
 3 who'd come from the homelands, former homelands, would be
 4 killed. There were distinct threats of violence in the
 5 course of the build up from the strikers' side. That also
 6 was a relevant factor in deciding the risks and deciding
 7 the likelihood or non-likelihood of the particular
 8 scenario, you would agree with that I take it.

9 MR DE ROVER: Yes, Chair. I had prepared
 10 for an evidence in chief a power point to set out some of
 11 the characteristics of the protest, I know that it is made
 12 available to the evidence leaders. It would possibly even
 13 be useful to get once slide up on the screen, if that could
 14 be organised.

15 CHAIRPERSON: Is that possible, Mr
 16 Wesley? I think in fairness to the witness and frankly I'd
 17 like to see it.

18 MR WESLEY: I'm sorry, Chair, I was busy
 19 here attending to some correspondence.

20 CHAIRPERSON: The witness says he was
 21 going to - when he thought he was going to give evidence in
 22 chief he had prepared a power point presentation and in the
 23 power point presentation there's a particular slide which
 24 is relevant. Is this now on the screen?

25 MR DE ROVER: It's on the screen.

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1 that now the operation was actually going to something that
 2 they knew and understood and that from experience they know
 3 they can do, they can handle. Whatever you would label it
 4 in terms of quality, but it seemed to be familiar
 5 territory. Disperse, disarm, arrest, now we're talking
 6 issues that we know, recognise that we're comfortable with
 7 and in terms of lessons learnt I don't think that the 14th
 8 and the 15th were sufficiently utilised to critically look
 9 at how was that possible. And to maybe draw something from
 10 that for what you planned to do on the 16th.

11 CHAIRPERSON: Yes there are two other
 12 points that I must put to you and that is on the 13th, of
 13 course, the police and the strikers were in close proximity
 14 to each other. So that's why the police sustained – that's
 15 why the two policemen were killed and injuries were
 16 sustained. On this occasion, of course, the TRT line was
 17 further back and TRT line, members of that were able to
 18 fire without receiving any injuries themselves which is a
 19 distinguishing factor for the 13th. But there's another
 20 factor that I must put to you, I should have mentioned to
 21 you earlier and that was the police evidence is, again it's
 22 disputed by the other side, but we are looking at the
 23 police evidence this time. The police evidence is they
 24 received threats during the day from the strikers, from the
 25 leader of the strikers. There was a threat that the Hippos

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1 CHAIRPERSON: Right, can you tell us –

2 MR DE ROVER: Can you go to slide 7
 3 please?

4 CHAIRPERSON: All right, let's look at
 5 slide 7.

6 MR DE ROVER: And what I'd just like to
 7 put to you is on –

8 [09:08] CHAIRPERSON: I think this will have to
 9 be an exhibit and as much as most of the exhibit numbers
 10 have already been pre-empted by others without my
 11 authority, I will have to have my own one. What's your
 12 last, what is your last –

13 MS PILLAY: Chair, Chair, if I could just
 14 ask, I've worked through the HRC's proposed exhibit numbers
 15 now and we are in a position to finalise it, if in the
 16 meantime we could mark this as UUUU12.

17 CHAIRPERSON: UUUU12 on their list is an
 18 article by Prof Stott called "Crowd Psychology and Public
 19 Order Policing." So we have to take the –

20 MS PILLAY: No, Chair, that will become –

21 CHAIRPERSON: - and use the number 13,
 22 UUUU13 will be, what's the name of your presentation or
 23 slide, PowerPoint? What's it called? How do I describe
 24 this exhibit?

25 MR DE ROVER: The title I put on the

<p style="text-align: right;">Page 37055</p> <p>1 front was "Rules of Engagement." 2 CHAIRPERSON: Okay, "Rules of 3 Engagement." 4 COMMISSIONER HEMRAJ: 12 Rules. 5 CHAIRPERSON: No – oh, you've changed it 6 now. Oh, I see. So it is 12, I beg your pardon. So we 7 can leave 13. It's UUUU12, "Rules of Engagement" and we're 8 looking, I take it we're looking at the whole thing. The 9 whole exhibit is before us now but we must look at slide 7, 10 you say. Alright, thank you. 11 COMMISSIONER HEMRAJ: Is there anything 12 else, Mr De Rover, that you've handed over that we haven't 13 had an opportunity to look at as yet? 14 MR DE ROVER: I gave an entire memory 15 stick and there is a report of the previous special 16 rapporteur on summary executions. There is another article 17 on crowd control of one of the authors of the Stott article 18 but I made that available, I just don't know where these 19 documents are. 20 CHAIRPERSON: May I suggest that during 21 the first short break, comfort break, there can be 22 discussions between the Human Rights Commission counsel and 23 the police counsel and the evidence leaders in regards to 24 what can go in on mere production and in fact seeing you've 25 very kindly taken it upon yourselves to give exhibit</p>	<p style="text-align: right;">Page 37056</p> <p>1 numbers to these things, you can carry on with that 2 function as far as these things are concerned as well. 3 Okay, can we carry on? Now we've got the slide, yes, what 4 do you want to show us about the slide? 5 MR DE ROVER: Now on the left-hand side 6 in the yellow square I've just attributed some qualifiers 7 to the behaviour as I observed it, particularly on the 8 Monday and let me stray away from that, let's separate it 9 from the 16th although that, there are other, there might be 10 that you say that equally applies on that day still to that 11 group – 12 CHAIRPERSON: I suggested a distinction – 13 differences. 14 MR DE ROVER: Okay. So what I saw is the 15 group on the Monday was willing to be confrontational. 16 They appeared to be organised, they were mobile, they were 17 armed, they were violent and they showed themselves 18 volatile and whatever triggered the volatility, I know that 19 that is a point of discussion but they showed that they can 20 be. Now if – I put in the middle there with a question 21 mark and I think it is important to consider that because 22 yesterday I said that SAPS has more than 100 cases open 23 between February and the 1st of August that relate, in my 24 experience at least, to extreme forms of violence that all 25 seem to be strike related or mining problem related in the</p>
<p style="text-align: right;">Page 37057</p> <p>1 Rustenburg area. So I put in red there, "Society 2 acceptance of contemporary forms of protest and violence" 3 because I submitted that in response to an interrogatory, 4 that the incident of the Monday, if that had happened in 5 Holland there would not just be a police response, there 6 would be a huge community outcry and I'm sure that someone 7 from government would appear on TV to express that this is 8 an incident that shocks the conscience of a nation and that 9 we can't and mustn't stand for it and that perpetrators, 10 one, must be brought to justice but two, must be informed 11 and educated on the point that you can't behave like that. 12 So I've put that there as a reminder but if you offset it 13 against current POP capabilities and I'm happy to even 14 elaborate on those, they are mainly reactive, they're 15 mainly static, they're mainly set piece, they're largely 16 aimed at containment and, crucially, POP prefers a distance 17 between themselves and the crowd and it's compounded by the 18 fact that POP in its current configuration has very limited 19 options to deal with the situation. It's just that when 20 you look at those two qualifiers, you wonder whether 21 they're even able in absolute terms to effectively deal – 22 and what you see on the Monday is they can't, some of them 23 even ran away and left their colleagues in the lurch. 24 So I'm simply saying that on the Monday you see 25 an abject failure of public order policing demonstrated on</p>	<p style="text-align: right;">Page 37058</p> <p>1 video, well documented, and you can trace it back to the 2 way POP is organised and I think that this form of protest 3 at Marikana and I don't know about other ones but the 4 characteristics of protests are such that it simply 5 outpaces what police can do and I know that during the 6 London riots, for example, UK police had that same problem. 7 People communicating quickly via social media, arriving in 8 jeans and sneakers, so you can run way faster than a riot 9 policeman in heavy gear and they quickly, it's almost 10 guerrilla tactics, they quickly strike, they loot a shop or 11 they attack a centre and they disappear again into the 12 night and the UK police found themselves tested and 13 challenged to actually come up with the tactical responses 14 that matched, for example, the issue of mobility. And I 15 would venture, although I'm not an expert on the detail but 16 Mr White can answer, that at least when it comes to the 17 mobility aspect, I think that in the UK some serious though 18 ahs been given to how you can counter, prevent, contain and 19 counter particularly when a group is mobile and willing to 20 confront and not shy of closing that gap between themselves 21 and the police. My reading of current POP capabilities, 22 they're totally not qualified, equipped or prepared to deal 23 with that. 24 MS LE ROUX: And Mr De Rover, you'll 25 accept of course that this analysis of yours is limited to</p>

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1 POP. Obviously in the London riots they didn't shoot 34
2 people dead with live ammunition.

3 MR DE ROVER: No.

4 MS LE ROUX: So you're only looking at
5 POP response in this. That's a yes or no question, you're
6 only looking at POP, correct?

7 MR DE ROVER: I am only looking at POP –
8 MS LE ROUX: Right.

9 MR DE ROVER: - if that puts, if that
10 eases the discussion definitely.

11 MS LE ROUX: Now the Chair has helpfully
12 advanced my cross-examination but I'd like to –

13 CHAIRPERSON: I'm sorry, before you carry
14 on I would like to put two things, put one thing actually
15 and maybe two, and Adv Hemraj wants to get clarification on
16 a point before you carry on. Looking at the left-hand side
17 of your slide dealing with the situation as you saw it in
18 respect of the strikers, in comparison with, comparing
19 Monday with Thursday, on Monday they were, they said they
20 weren't aggressive towards the police, there were no
21 threats to attack the police.

22 MR DE ROVER: Mm.

23 CHAIRPERSON: On the contrary, they said,
24 we're not attacking you. They were on their way to the
25 koppie being escorted by the police, they weren't in an

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1 MR DE ROVER: Yes.

2 CHAIRPERSON: Yes. Adv Hemraj wants a
3 clarification, then we'll stop using up Ms Le Roux's time
4 and give her a chance to carry on with the cross-
5 examination.

6 MS LE ROUX: I'd appreciate that, Chair.

7 COMMISSIONER HEMRAJ: Mr De Rover, what
8 does set piece mean?

9 MR DE ROVER: Well, POP works with
10 standard responses, like you deny access by forming a line
11 or you create a cordon or you channel or you block, those
12 type of responses that are essential set piece, that I must
13 add work probably better in an urban environment than in a
14 rural environment because structures can then be used to
15 complement what you are trying to do and people can't
16 simply walk around a line that you put up.

17 COMMISSIONER HEMRAJ: If you think that
18 the POPS in the South African Police are unable to deal
19 with what you've got in the left-hand side block, is there
20 any unit that you know in the South African Police that is
21 well placed to deal with that?

22 MR DE ROVER: Well, this is, I think you
23 face – that's why I know that the emphasis is and the
24 attempt, you're looking at something else in this
25 Commission but my concern is that if you put 300 people

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1 aggressive mood towards the police.

2 MR DE ROVER: Mm.

3 CHAIRPERSON: What I've, the evidence
4 I've put to you indicates that Thursday was different,
5 there were threats of aggression towards the police. On
6 Monday they weren't standing in a position to defend where
7 they were. They weren't defending their position, they
8 were actually on their way to the koppie which they were,
9 according to the information that the police got, the
10 intelligence they got, what they were going to defend on
11 the Thursday and they weren't actually being disarmed or an
12 attempt wasn't being made to disarm them on the Thursday.

13 They may have thought that that was going to happen – I
14 mean on the Monday but on the Thursday, according to the
15 information received, they were going to defend their
16 position and they were going to defend their arms and they
17 were aggressive towards the police and there's evidence
18 that somebody said you can't have two bulls in the same
19 place and there was talk about – there's other evidence as
20 well which indicated it was they or the police who were
21 going to be there, there wasn't room for both of them. So
22 the situation on Thursday was significantly more serious
23 than it had been on Monday and in the light of what you say
24 about Monday then a fortiori the points you make apply to
25 Thursday. You would agree with that, I think.

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1 with those characteristics in Pretoria and they decide they
2 will walk into the Union Building, I don't think that at
3 this stage the South African Police has the ability to stop
4 them doing that.

5 COMMISSIONER HEMRAJ: None of the units
6 in the South African Police?

7 MR DE ROVER: That comes with a price tag
8 because then you will go into your risk assessment and
9 there is plenty recent example of how such confrontations
10 in Greece, in Turkey, in Egypt, how such confrontations end
11 when the state decides that nevertheless it will try and
12 put a stop to that type of protest and, you know, then you
13 get state controlled use of lethal force, sanctions beyond
14 judicial control. And I know in Egypt I think 180 people
15 have been condemned to death –

16 COMMISSIONER HEMRAJ: Thank you.

17 MR DE ROVER: - because of public
18 protests.

19 COMMISSIONER HEMRAJ: Thank you, Mr De
20 Rover.

21 CHAIRPERSON: [Microphone off, inaudible]
22 set piece, do I understand you to be saying, if I'm wrong
23 correct me, the POP approach is almost choreographed moves.
24 It doesn't sound from what you say as if they're very good
25 at improvising. They're choreographed moves, they know, I

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1 mean what they do is certain drills, as it were, a routine
 2 they can follow but if the strikers behave in an
 3 unpredictable fashion, then they're not very good at – it's
 4 not a criticism, it's just, they're not very good at
 5 improvising.

6 MR DE ROVER: That I would hold true
 7 because it would, you'd have to have a high degree of
 8 training to be able to improvise but you'd also need the
 9 commanders to facilitate such improvisation and typical the
 10 structures that SAPS has in place, you create an
 11 organisational contradiction. You have so many different
 12 units in place that there is a need for centralised control
 13 of those units so that they don't run rogue or riot on you,
 14 but the complexity of the situation would require that you
 15 decentralise command decisions and that is where, when I
 16 talked yesterday about unravelling systems, you build it
 17 into your operation almost that it happened this time, it
 18 can happen another time and maybe the next time not all
 19 elements will conspire to thwart you but it will become a
 20 problem. So because of the different elements there is a
 21 desire to exert central command and control on the
 22 operation but an operation of this type also needs
 23 reponsibilising and authorising commanders on the ground to
 24 make decision that are necessary and not obliging them to
 25 first ask permission from a superior because the time that

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1 CHAIRPERSON: Can I just go back? I'm
 2 sorry, Ms Le Roux, I'm breaking my promise to you but I
 3 hope you'll forgive me. I want to go back to this risk
 4 assessment not likely – there was evidence, I don't know if
 5 you're aware of it, that on the Wednesday night, the night
 6 before the action with the National Management Forum was
 7 engaged, was discussing matters elsewhere, there was a
 8 discussion between Mr Zokwana and General Mpembe. Mr
 9 Zokwana said you must disarm them and General Mpembe said
 10 this, he said there's no amount of training which enables
 11 me to, with a rifle, to disarm someone with an axe without
 12 bloodshed. That was his assessment actually of the risks
 13 of dealing with the situation in the way they did it on
 14 Thursday. It will be argued, I would imagine. Were you
 15 aware of that evidence?

16 MR DE ROVER: Yes, Chair, and one of the
 17 problems is that the approach of Marikana had never been
 18 field tested so – and the reality of it actually is that
 19 that's such a dangerous situation, you could not even
 20 countenance the idea that you go and train that because of
 21 the risk that is involved in it. The other thing is, in
 22 part it wasn't imagined, so how can you prepare for the
 23 unimaginable? So it puts up big questions in terms of
 24 preparedness. I know that General Mpembe was and is still
 25 very passionate and emotional about his assessments and

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1 passes can totally change the requirements of the situation
 2 on the ground again and a solution for which you get
 3 permission is no longer appropriate.

4 MS LE ROUX: But Mr De Rover, you'll
 5 accept then that those commanders on the ground also need
 6 to be fully briefed and aware of what their role and what
 7 every other unit's role is in order to ensure that they can
 8 make decision making without endangering or jeopardising or
 9 undermining the roles of the other unit.

10 MR DE ROVER: Ja, but you know that the
 11 problem is that you're now looking at possibilities of
 12 interactions that go well beyond what is planned and that
 13 the situation may dictate. I think one element that you
 14 will find when you look at it is that although commanders
 15 were responsabilised for different parts of the action,
 16 they weren't authorised to make decisions. They would
 17 still be expected to ask permission before going ahead. So
 18 there is an attempt from the JOC to still, with remote
 19 control or central steer, control the operation and direct
 20 the different entities and although commanders were briefed
 21 on their role on the ground, i.e. my assessment is that
 22 they were insufficiently put in a position that they could
 23 also make their own decisions and then report back on hose
 24 rather than reporting on a situation and asking permission
 25 to do something.

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1 reading and I think in the end his voice did not prevail in
 2 what SAPS decided to do. His opinion is known and he
 3 shared it, I know that he made it known to people but his
 4 voice did not prevail.

5 MS LE ROUX: Mr De Rover, the Human
 6 Rights –

7 CHAIRPERSON: Sorry, sorry. He had an
 8 acute appreciation for the doctrine of situational
 9 appropriateness.

10 MR DE ROVER: Ja.

11 CHAIRPERSON: Sorry, sorry, Ms Le Roux.

12 MS LE ROUX: Mr De Rover, the Human
 13 Rights Commission intends to submit that with foresight,
 14 knowing what the police knew at the time, they should have
 15 been able to determine that it was in fact likely that
 16 their plan would require the use of force and that it
 17 carried a high risk to both strikers and police. The Chair
 18 has put certain aspects of the evidence to you that are
 19 included in my list of evidence that supports the
 20 contention that we will make but I'd like to give you a
 21 list of 10 pieces of evidence that the Human Rights
 22 Commission will rely on to say that it was entirely
 23 foreseeable that there was a very high risk of injury and
 24 death to both strikers and possibly police with this plan.
 25 The first is the conduct of the operation on the 13th of

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1 August where police members used force against strikers, it
 2 resulted in retaliation, five people died. The second is
 3 Lieutenant-Colonel Scott's view that there was going to be
 4 conflict and that the protesters being armed, emotions
 5 running high, there was likely to be a confrontation. The
 6 third piece of evidence is the use of muti by the strikers
 7 and their belief that it made them somehow invincible
 8 potentially to the use of force by police, which may make
 9 them disregard that risk in their conduct. The fourth is
 10 that this mindset of invincibility was in fact reflected in
 11 some of the planning. The fifth piece of evidence is that
 12 the police had information to suggest that there were
 13 firearms within the possession of the strikers who were
 14 present on the koppie, so there was a firearms threat. The
 15 sixth piece of evidence is that the intelligence available
 16 to the police by the 16th of August noted that many of the
 17 mineworkers were in possession of dangerous weapons which
 18 they were likely to decline to surrender and they would be
 19 prepared to fight if their demands were not met, including
 20 by resisting the police. The seventh piece of evidence is
 21 Lieutenant-Colonel Scott's oral evidence that he was
 22 mindful that the tactical option could elicit a violent
 23 response from the strikers and it was important not to send
 24 the SAPS members into what he called a blatant death trap.
 25 So he proposed a line of TRT to back up the pops. The

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1 delivered to the JOC before the tactical operation started.
 2 He says, I think it was Colonel Merafi, he said that
 3 Brigadier Calitz ordered it. Brigadier Calitz denies it.
 4 This is one of the issues we may have to decide.
 5 MR DE ROVER: Mm.
 6 CHAIRPERSON: But the relevance of it is
 7 this, that somebody high up thought there's going to be a
 8 lot of ammunition fired, we will need an extra 4 000
 9 rounds. They were actually delivered. Brigadier Pretorius
 10 said, don't be silly, we don't need them and sent them back
 11 but while we're talking about what the police actually
 12 foresaw, senior people in the police foresaw, if you put in
 13 the funeral hearses ordered, you put in the extra rounds of
 14 ammunition ordered and sent, later sent back, that's quite
 15 interesting evidence, isn't it, in relation – plus the
 16 other factors that Ms Le Roux has put to you. Perhaps you
 17 could answer the question in the light also of my two extra
 18 factors.
 19 MS LE ROUX: Mr De Rover, let me sum up
 20 then for you. The 12 pieces of evidence that we've placed
 21 before you – Chair, of course some of those are subject to
 22 dispute but what we know is that on the 16th of August all
 23 of those facts were known to the police or they believed
 24 them to be true. In light of those 12 pieces of evidence,
 25 do you agree that in fact it was likely and that they

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1 eighth piece of evidence is that we've had no evidence from
 2 anyone in the JOCOM that they seriously thought that the
 3 so-called militant group would voluntarily just disperse
 4 and disarm when they were asked to do so. The ninth piece
 5 of evidence is Lieutenant-General Mbombo's oral evidence
 6 that she'd been warned of the risk of the TRT using live
 7 ammunition when they went tactical to try to disarm the
 8 strikers.
 9 [09:28] The tenth piece of evidence is the threats that
 10 were made from the strikers towards the police in the days
 11 before the 16th and on that day as well. So in light of
 12 those 10 pieces of evidence –
 13 CHAIRPERSON: May I add two more before
 14 he answers?
 15 MS LE ROUX: Certainly, Chair.
 16 CHAIRPERSON: In relation to what senior
 17 people in the police force saw as possible there is
 18 evidence which was put to you before, I think yesterday,
 19 that somebody ordered four funeral hearses to be, early on
 20 the morning of the Thursday to be there. They didn't come
 21 actually, but that's not the point. There's also evidence
 22 that, and there's a dispute as to who was responsible for
 23 it but the evidence of, I think it was Colonel Merafi – if
 24 I'm wrong with that I'll be corrected – he ordered, he
 25 arranged for 4 000 extra rounds of ammunition to be

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1 should have been able to foresee the risk of injury or
 2 death in the operation when they went tactical on the 16th
 3 of August?
 4 MR DE ROVER: Chair, I think and I felt
 5 and I've written this, that what you underscore is a great
 6 need for this Commission to unearth who, who made the
 7 policy decision on this point and I –
 8 MS LE ROUX: Mr De Rover, I must –
 9 MR DE ROVER: No, no, can I –
 10 MS LE ROUX: - ask you to answer the
 11 question.
 12 MR DE ROVER: Please –
 13 CHAIRPERSON: No, Ms Le Roux, he's
 14 answering the question, don't interrupt him.
 15 MR DE ROVER: I think it's a long
 16 question you asked, you gave me many bits of evidence to
 17 consider and I promise you I will answer your question but
 18 I have to then also be given a chance to contextualise –
 19 CHAIRPERSON: I've given you the time.
 20 Don't argue with her, I've already given you the time.
 21 MR DE ROVER: Sorry, Chair. I know of
 22 the meeting of the National Management Forum, I heard that
 23 as a rumour while I was here, my first week here and again
 24 my testimony is one and a half years old now, a lot has
 25 come to light that I wasn't aware of when I wrote those

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1 statements but one thing I do know is that in no democratic
 2 country an incident that doesn't only have national
 3 security ramifications but definitely serious economical
 4 dimensions, does a police force decide that it is time for
 5 whoever is there to go. That decision comes and originates
 6 from somewhere else and it may well be that that then
 7 becomes the subject for a discussion in a management forum
 8 of the police but it's an order that comes from the
 9 executive and the police must implement that order and then
 10 – because how else, like in the face of what you say, how
 11 can anyone decide that you are going to do that if what, if
 12 I just accept at face value that each of those 12 points is
 13 true, you can't implement an operation on that. Now you
 14 have been given an order, international law says if an
 15 order is manifestly unlawful and if you have a reasonable
 16 opportunity to refuse it, you should do so. That for me
 17 now is a \$64 000 question. Is the order that was given to
 18 the police that I will take came from the executive, from
 19 government, is that order an unlawful order? Can you now,
 20 on the basis of what you know because you're now asking the
 21 police to resolve a situation of which they could have
 22 demonstrated to the executive that it would likely produce
 23 this result, then you have that problem and I recall your
 24 Deputy President in answer to a question of Mr Mpfu,
 25 qualifying Marikana as a collective failure. It's really a

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1 CHAIRPERSON: I'm glad you raised that
 2 point. We're still busy with that. We tried to find out
 3 what exactly happened at the National Management Forum but
 4 the National Management Forum consists only of members of
 5 the police service. It consists of the National
 6 Commissioner, the various deputy commissioners of the rank
 7 of Lieutenant-General, you know, from the national office
 8 and then each of the Provincial Commissioners. Those, that
 9 I think is the people who were there. There's an
 10 allegation which has been made that there was political
 11 influence brought to bear. Now when you say that it was an
 12 order from the executive, are you basing it on something
 13 you were told at the time you heard the rumour or what is
 14 the basis of your saying that?
 15 MR DE ROVER: Chair, two things for that.
 16 One, you are talking about an extraordinary session of the
 17 Management Forum so, and it was held on the 15th in the
 18 evening.
 19 CHAIRPERSON: Well, I'm sorry to
 20 interrupt you. It was extraordinary because the ordinary
 21 meeting had ended –
 22 MR DE ROVER: Of course, ja.
 23 CHAIRPERSON: - and what happened was,
 24 some people had left but all the Provincial Commissioners
 25 had stayed behind, the National Commissioner was there and

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1 pity that he wasn't drawn to qualify that because I think
 2 that part of the answer that you need, one, to unearth the
 3 structures behind what happened and how that happened is to
 4 get clarity why, in the face of such overwhelming evidence
 5 as you now present and that you hold the police were aware
 6 of when they were making that decision and trying to
 7 operationalise it, why didn't they refuse to do it, because
 8 if it originated from within the police itself it would
 9 have been simple to stop that. And I hope that the police
 10 are not an entity on itself, they are agents of the state.
 11 They are accountable to the executive, at first to the
 12 Minister for the Police, Minister for Justice and maybe
 13 even the President and I would hope that an incident like
 14 Marikana in the way it escalated in that week, posed
 15 ramifications for safety and security that well over-
 16 stepped something that you leave your police force to deal
 17 with if you are in government and it had ramifications at
 18 industrial level with the involvement of Lonmin and the
 19 unions that have economic ramifications. I read in
 20 Lonmin's annual report that that week alone cost them \$326
 21 million and that one year on after Marikana, they were
 22 still only at 85% of pre-production capacity, of pre-
 23 Marikana production levels. So it was still costing them
 24 money. So there have been all these references made. I
 25 think it's time to then unearth who gave that order.

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1 I think most of the people from head office were still
 2 there as well.
 3 MR DE ROVER: Ja.
 4 CHAIRPERSON: The Provincial Commissioner
 5 Mbombo was then asked to report, which he did. There was a
 6 discussion for up to an hour and the minutes which you saw
 7 says her proposal that they proceed with the tactical
 8 option was endorsed. One of the questions of course which
 9 I've asked since the beginning of this inquiry and I
 10 haven't yet got the answer, is why Thursday? Because there
 11 was a plan which Mr White says, and I think he's not alone
 12 in saying it, was less risky if they, which they'd
 13 implemented early on the Friday morning. The question is
 14 why it was not decided – by all means act, but why
 15 Thursday? Why Thursday when you can't implement the plan
 16 you've got at the moment because built into the situation
 17 was, they wouldn't know till 9 o'clock whether the weapons
 18 were going to be handed down voluntarily. Obviously if
 19 they're going to do it voluntarily, that's the sensible way
 20 to go. As a result, for reasons that I don't want to
 21 trouble you with, Mr Mathunjwa only arrived on the scene at
 22 the koppie in the afternoon. By that time the idea of
 23 proceeding early in the morning when there weren't many
 24 people there couldn't be implemented because there were a
 25 lot of people there and it was foreseeable that by 9

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1 o'clock already, even though that is the time that they
 2 had, most of the people would be back from the koppie – so
 3 why Thursday? Why Thursday when you know that you can only
 4 do it after 9 o'clock? That's the question I've been
 5 asking. I haven't yet got a definitive answer. If, of
 6 course, it was some order from on high not based on peace
 7 consideration, not based on knowledge of what was happening
 8 on the ground, that's a different matter. That's one of
 9 the things we're trying to investigate. Have you got any
 10 information you can give to us that'll help us?

11 MR DE ROVER: Chair, like I said, one, it
 12 was an extraordinary session and it held people back that,
 13 in the normal structures that exist within SAPS for
 14 managing incidents of this kind in their initial phases,
 15 that that forum doesn't have a place. Now if you call that
 16 meeting, and with what I've said about police forces in a
 17 democratic society, I would be very surprised that SAPS
 18 would have been permitted to make that decision on its own
 19 alone and not guided or would not have actively sought the
 20 guidance of the executive on this prior to doing it,
 21 definitely when faced with the 12 elements that you have
 22 just presented, that's my problem, that I would fine it –
 23 one, if that is held because of the way people talk about
 24 it, that it's held that that was a decision that was made
 25 by SAPS and that forum was used to discuss it and decide it

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1 freedom and independence to the Police Commissioner –
 2 MR DE ROVER: Ja, but under direction of
 3 – government.
 4 CHAIRPERSON: Yes, only on policy though,
 5 actually but anyway let's not debate that point. A number
 6 of the factors that were put to you didn't, certainly
 7 weren't known to the National Management Forum. I mean for
 8 example the order for the 4 000 bullets, that only happened
 9 in the course of the morning of the 16th. The funeral
 10 hearses were only asked for early in the morning, they
 11 didn't know about that but what, there's one piece of
 12 evidence that I think I must give you and that is, the way
 13 it's presented is it's a proposal by the Provincial
 14 Commissioner and she had been talking for some days already
 15 of, we must act immediately, soon. In fact originally on
 16 Tuesday she said we must act on Wednesday but there were
 17 reasons why they couldn't act on Wednesday but what she did
 18 say was this, in answer to a question I asked here, look
 19 here, your background is mainly financial, that was her
 20 speciality and you can understand that in the circumstances
 21 but there are a number of experienced operational people
 22 among the other Provincial Commissioners who were present
 23 and indeed I think the people from the head office, the
 24 Lieutenant-Generals, if any of them had said, no – no, you
 25 can't do this, there are problems, we can't endorse this

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1 as a one-off way of dealing with it, then the least I want
 2 to say about that, that is unacceptable. You cannot have a
 3 police force essentially deciding on issues that have such
 4 ramifications attached to it and consequences as Marikana,
 5 on its own, and place that beyond the political and
 6 judicial control that you would want to exercise before you
 7 go ahead. And what I then inversely, if I take that that
 8 is what is normal in a democratic society and therefore
 9 normal here, I would find it very hard to believe that
 10 there weapons no political or judicial guidance on that
 11 decision and because a higher authority made it and gave it
 12 as an order, then you have your answer to your question as
 13 to why it was implemented and why the haste and why the day
 14 and why those 12 points in the end, although raised, did
 15 not weigh heavily enough to counter the order. And hence
 16 my question is the order, because were the ones that issued
 17 it made sufficiently aware of those 12 points and the risk
 18 that in going ahead – because then it entails a
 19 responsibility and the line of command responsibility in
 20 law enforcement doesn't stop at the National Commissioner,
 21 it goes right through to the top because the police is not
 22 an independent organisation. They are under government
 23 control.

24 CHAIRPERSON: Yes, there are provisions,
 25 though, in the Constitution and the Act which do give

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1 proposal because of this and this and this or we want to
 2 know more information, would you have backed off? And she
 3 said yes. Obviously it was the sensible thing to do. I
 4 mean if three or four experienced Provincial Commissioners
 5 had said look here, this plan of yours isn't going to work
 6 without serious risks, why not hold over till Friday
 7 morning, she would obviously have accepted that and that's
 8 what, effectively what she said.

9 Now in fairness to everyone at the National
 10 Management Forum, a lot of the facts I think that Ms Le
 11 Roux has put to you and the two that I've added obviously
 12 weren't before them but the question of course is whether,
 13 and there's been criticism from some of your colleagues,
 14 colleague experts, that that decision shouldn't have been
 15 taken by that forum the night before, not knowing the
 16 situation on the ground the next day. Would you be
 17 inclined to agree with that?

18 MR DE ROVER: Well, again I can only
 19 stress that I can't see a reason to have an extraordinary
 20 session unless there was an executive decision and that to
 21 an extent the opinions of the Provincial Commissioners
 22 don't matter. Like it's more, we now have to do this, how
 23 are we going to do it and –

24 CHAIRPERSON: Sorry to interrupt you but
 25 to be fair, no, let's not go on a dwaalspoor here.

<p style="text-align: right;">Page 37079</p> <p>1 MR DE ROVER: No, no.</p> <p>2 CHAIRPERSON: Do you use that expression</p> <p>3 in Holland as well?</p> <p>4 MR DE ROVER: Ja.</p> <p>5 CHAIRPERSON: A wrong track. It's called</p> <p>6 an extraordinary session simply because some of the people</p> <p>7 had gone. They were there at the meeting, the meeting</p> <p>8 ended apparently, the people, some people left and then the</p> <p>9 National Commissioner said let's now discuss this</p> <p>10 information, they'd just got the information that it was</p> <p>11 said that the strikers might voluntarily hand down their</p> <p>12 arms the next morning and so she said, let's discuss it.</p> <p>13 And they then discussed it, as I said, for apparently</p> <p>14 something like an hour, it was minuted but it was called an</p> <p>15 extraordinary session because not everybody was there. So</p> <p>16 it isn't as if they specially convened an extraordinary</p> <p>17 session because of some order that they received from</p> <p>18 elsewhere to discuss it. The extraordinary is explained in</p> <p>19 the way I've given you, so let's not go on a dwaalspoor</p> <p>20 there. Sorry, I interrupted you but I think that's</p> <p>21 important information to have.</p> <p>22 MR DE ROVER: Ja, but what I maintain as</p> <p>23 my opinion is that I would expect a political direction to</p> <p>24 a situation of this kind and I, obviously I don't live</p> <p>25 here, I don't know how you deal with that red square,</p>	<p style="text-align: right;">Page 37080</p> <p>1 society's acceptance of contemporary forms of protest and</p> <p>2 violence but if it's an incident that puts at risk the</p> <p>3 interests of a big international enterprise, that obviously</p> <p>4 is of economic importance to South African Police, if it</p> <p>5 puts at risk lives and communities and if it occasions now</p> <p>6 with regularity death and injury, I can't imagine that just</p> <p>7 to be policing questions and that directions and choices</p> <p>8 that are made are not subject to political scrutiny or</p> <p>9 political advice, at least to a National Provincial</p> <p>10 Commissioner, and I remember at least from the early days</p> <p>11 of the Commission that a lot of discussion was held about</p> <p>12 who called whom, what phone calls were made, what e-mails</p> <p>13 were sent, who engaged themselves on this issue. Did, I</p> <p>14 think the problem for me is that it is less than</p> <p>15 transparent who involved and engaged themselves because -</p> <p>16 and it's simply on my expectation of having been in many</p> <p>17 countries around the world, that operations of this kind</p> <p>18 are not left to the police to run there because the policy</p> <p>19 that would underpin the action needs the sanctioning from</p> <p>20 the executive and the judiciary. It can't be the police</p> <p>21 alone.</p> <p>22 CHAIRPERSON: I understand, you've made</p> <p>23 that point. The question, I don't think in South Africa</p> <p>24 the judiciary plays a role but let's not, we don't have</p> <p>25 examining justices and so on as you have but let's not get</p>
<p style="text-align: right;">Page 37081</p> <p>1 involved in that for the moment.</p> <p>2 MR DE ROVER: No, no.</p> <p>3 CHAIRPERSON: I asked you a question</p> <p>4 earlier, you told us how you understood, you heard about</p> <p>5 this National Management Forum decision not as part of the</p> <p>6 official briefing you received. It was, you used the word</p> <p>7 it was divulged to you by somebody.</p> <p>8 MR DE ROVER: Ja.</p> <p>9 CHAIRPERSON: A third party, I think you</p> <p>10 said, over a cup of coffee or tea or whatever the beverage</p> <p>11 was that you were drinking and then you went back to</p> <p>12 Annandale and I think you said Mbombo and put it to them.</p> <p>13 As part of the information you received was there any</p> <p>14 suggestion that there was an executive order which was the</p> <p>15 reason why the National Management Forum made this</p> <p>16 decision?</p> <p>17 MR DE ROVER: No, I think my questions</p> <p>18 have been straightforward on the point, the answers have</p> <p>19 not been. So I've raised that issue, of course I've raised</p> <p>20 that issue because it's an important issue but the answers</p> <p>21 are not helping me.</p> <p>22 CHAIRPERSON: Did you ask why the</p> <p>23 National Management Forum made the decision, to use the</p> <p>24 language of the resolution, made the decision to endorse</p> <p>25 the proposal of the Provincial Commissioner? Did you ask</p>	<p style="text-align: right;">Page 37082</p> <p>1 why that decision was taken, what the motivation of the NMF</p> <p>2 was?</p> <p>3 MR DE ROVER: Ja, no, the way – I think</p> <p>4 it was General Mbombo who, when I asked her how that came</p> <p>5 about, that it was almost like, oh, you know, there</p> <p>6 happened to be that meeting and a few of the members</p> <p>7 remained behind and then we had that discussion. So, but</p> <p>8 I'm already armed with at least my personal experience and</p> <p>9 exposure of 22 years in 70 countries where I see this done</p> <p>10 differently and I hear what she says.</p> <p>11 [09:47] I have a problem accepting it as an utterance of</p> <p>12 how modern democracies work because the ramifications of</p> <p>13 such an action would invariably come back on the</p> <p>14 government, as they did after Marikana. So to imagine a</p> <p>15 reality that that was given a go-ahead or left to go ahead</p> <p>16 without the government having its say on it but still being</p> <p>17 confronted now with the consequences of it, the least of</p> <p>18 which is that they pay for this Commission to now happen, I</p> <p>19 just can't imagine a reality where that is par for the</p> <p>20 course.</p> <p>21 CHAIRPERSON: You put that problem to</p> <p>22 those instructing you?</p> <p>23 MR DE ROVER: We've have discussions on</p> <p>24 it –</p> <p>25 CHAIRPERSON: Did you raise it with them?</p>

<p style="text-align: right;">Page 37083</p> <p>1 MR DE ROVER: Ja, especially with the 2 legal team. 3 CHAIRPERSON: Yes, well never mind the 4 legal team. They wouldn't have more information anyway. 5 MR DE ROVER: Ja. 6 CHAIRPERSON: Did you raise it with those 7 instructing them? 8 MR DE ROVER: Well, I've had lengthy 9 discussions on it with General Mpembe and General 10 Annandale – 11 CHAIRPERSON: And did they give you any 12 answers which you could understand on the point? 13 MR DE ROVER: Ja, that they share my 14 view. They, and, but they are not privy as eyewitnesses or 15 witnesses of fact to any information that helps other than 16 say they share that view. 17 CHAIRPERSON: Did you put the view to 18 General Phiyega? 19 MR DE ROVER: I did – 20 CHAIRPERSON: Sorry, National 21 Commissioner Phiyega. 22 MR DE ROVER: Yes. 23 CHAIRPERSON: And what was her answer? 24 MR DE ROVER: A diplomatic answer and you 25 know in fact I –</p>	<p style="text-align: right;">Page 37084</p> <p>1 CHAIRPERSON: How diplomatic? What were 2 the ipsissima verba of the diplomatic answer? 3 MR DE ROVER: I, it's, that's a long time 4 ago, this discussion, Chair, and – 5 CHAIRPERSON: Is it recorded in your 6 notes? 7 MR DE ROVER: No, there were many 8 informal meetings that I had, or several I should say, with 9 her and I've tried to raise this but you must accept that 10 at the time those took place I'd only been in the country a 11 few weeks – 12 CHAIRPERSON: Yes, yes. No, leave the 13 note point. It was just a – 14 MR DE ROVER: Yes, I don't know, but it's 15 more that my relationship with her was very much still of a 16 stranger, of two strangers meeting and I asked that 17 question that that's a hot one if, you know, to even enter 18 into, to divulge to me what you're working relationships 19 are with the executive. So I got a diplomatic answer – 20 CHAIRPERSON: By diplomatic do you mean 21 evasive? 22 MR DE ROVER: Ja. 23 MS LE ROUX: Mr De Rover, in any of your 24 discussions with the National Commissioner did she express 25 any reluctance to you that you participate in this</p>
<p style="text-align: right;">Page 37085</p> <p>1 Commission process, particularly the expert process? 2 MR DE ROVER: No, I, and I attach value 3 to expressing this here because it took me a while 4 yesterday to realise that I was seen as a SAPS gun for hire 5 and I regret that because I would face unemployment forever 6 if I put my professionalism and integrity on the line here, 7 and I made that clear even before coming, when I received 8 the phone call from SAPS I made that abundantly clear to 9 them that I am not your guy, I have my own professional 10 standards and integrity that come first, I will not lie for 11 you, and I've made that also clear to the National 12 Commissioner and her response to that was that she did not 13 expect me to, that she expected me to look at every bit of 14 information I wanted, or that they could make available to 15 me, and to form my own opinions on that and advise the 16 Commission of them. 17 Where I wrong-footed myself, and I should have 18 educated myself better on the process before this 19 Commission, when I saw two other international experts and 20 saw what they had already done I thought well, there is no 21 point in me giving you more of the same. You already have 22 two peers on which you can judge and you've been informed 23 by recognised experts on how they view this, offset against 24 an international framework. So I went another direction 25 and tried to give you a footing, appreciating that you are</p>	<p style="text-align: right;">Page 37086</p> <p>1 not operational police people, you're trying to understand 2 concepts, so I've used methods and I've used clarifications 3 and I've used comparisons that are not meant to justify 4 anything, but to explain, to give you a possibility to 5 comprehend how certain actions on the ground can happen, 6 and other than that there has been no point that I was told 7 oh, you can't say this or you can't say that. And frankly, 8 I would hear that and that wouldn't wash with me. 9 MS LE ROUX: Because you see, Mr De 10 Rover, I'm trying to understand why you didn't engage with 11 the other experts when that was precisely the process the 12 Commission tried to initiate. There were repeated attempts 13 to have the three experts engage and the SAPS were either 14 unresponsive or did a very, very limited engagement with 15 us, and I'm trying to understand where that came from, if 16 it was your reluctance, if it was an instruction you were 17 give not to participate. That's what I'm trying to 18 understand. 19 MR DE ROVER: I think it was a little bit 20 of both. I still don't completely understand the process 21 here, you know, that of course there is a quest to truth, 22 justice, restoration, but there are to me at times 23 presentations and representations made that I would qualify 24 as preferred narrative, and I have a problem that because 25 it makes a possible engagement with the experts, I wouldn't</p>

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1 have done nothing rather than sit down, have a beer and get
 2 to work on this, but because that, because of the fact that
 3 parties before this Commission also have their particular
 4 interest at heart because of the representations that they
 5 make, those discussions are prejudiced from the word go.
 6 They're not objective expert discussions anymore, and
 7 that's why I was reluctant, because I don't feel a need to
 8 enter into yes, no, and arguing and actually not honestly
 9 arguing but trying to find something that derails a
 10 completely valid proposition. So that's my answer to that.
 11 CHAIRPERSON: Sorry, what we do in the
 12 courts where there's conflict of expert testimony, what we
 13 very often do is – when we, I mean as judges – we say to
 14 the parties look here, we accept the experts are impartial
 15 because they are supposed to be giving their expertise
 16 irrespective of who's called them. We invite the experts,
 17 we say can't you get the experts together to have a
 18 discussion to see whether they can't reach agreement and
 19 what very often happens then, experts go away for a couple
 20 of days, they come back with a report saying we discussed
 21 the matter, we agree on the following, and then set out
 22 what they agree on, we disagree on the following points and
 23 this expert says that and the other expert says something
 24 else. That's what I had hoped could be achieved here. I
 25 thought it would save a lot of time if we did that and I

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1 anything like that?
 2 MR DE ROVER: Look, I don't think it was
 3 discouraged. I obviously did not attend every single
 4 session here, so what I get with regards to expert
 5 witnesses comparing notes, if that is a lucky way, or a
 6 good way to describe it, is obviously a representation and
 7 it, my question at one stage whether we couldn't just hire
 8 a room and sit together was, I think the discussion we had
 9 on that was that that was probably not likely to happen.
 10 I –
 11 MS LE ROUX: And who did you have that
 12 discussion with?
 13 MR DE ROVER: With the legal team.
 14 MS LE ROUX: Okay. Did you discuss it
 15 with any member of SAPS?
 16 MR DE ROVER: Well, at the time and on
 17 instruction of the National Commissioner I've always
 18 affiliated myself with the SAPS legal team and lately
 19 mostly at my square foot of office space at the JOC across
 20 the road, so it's – I would have liked that, but the, my
 21 understanding, my understanding of the atmosphere was never
 22 that it was going to be possible in an objective manner.
 23 Let me just summarise it like that.
 24 CHAIRPERSON: Ms Le Roux, I'm proposing
 25 to take the first adjournment soon, but you will tell me –

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1 made the suggestion on a number, a couple of occasions at
 2 least, and I understood it was taken further, the
 3 suggestion I made was communicated to the parties and
 4 nothing happened. So that really what Ms Le Roux is about.
 5 MS LE ROUX: Mr De Rover –
 6 CHAIRPERSON: We don't expect people,
 7 experts to come like some international arbitrators do –
 8 MR DE ROVER: No.
 9 CHAIRPERSON: - and argue for the side
 10 that's appointed them. We expect the experts to get
 11 together and say we genuinely can agree on the following
 12 points; we genuinely disagree on these points. It narrows
 13 the debate, you see. That's what I had hoped would happen.
 14 I'm sorry it didn't, but what Ms Le Roux is probing is why
 15 it didn't happen.
 16 MS LE ROUX: Mr De Rover, your answer was
 17 that it was a bit of both and I've understood your last
 18 answer to be describing in a sense your feeling that since
 19 you largely were in agreement with Mr White and Mr
 20 Hendrickx, that it would somehow be redundant for you to
 21 add to that. Is that a correct summary of in part your
 22 explanation as to your attitude to it? But I'm interested
 23 in the other part of the both, which was, were you ever
 24 instructed not to engage, or if not instructed, were you
 25 ever, was it made clear to you that it was discouraged, or

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1 MS LE ROUX: Chair, I just have one
 2 question and then if we –
 3 CHAIRPERSON: You will tell me –
 4 MS LE ROUX: Because it will round out
 5 what we've done this morning.
 6 CHAIRPERSON: You don't have to confine
 7 yourself to one question. You will tell me when it's
 8 appropriate.
 9 MS LE ROUX: Okay. Mr De Rover, taking
 10 you back to the decision to move to the tactical phase and
 11 the debate we had this morning, the 12 pieces of evidence,
 12 the likelihood, the risk assessment, a further question on
 13 that for the Human Rights Commission is do you consider the
 14 decision to move to the tactical phase on the 16th of August
 15 to be consistent with the requirement in Standing Order 262
 16 to avoid the use of force at all costs?
 17 MR DE ROVER: You know, I've given much
 18 thought to this, how could you avoid Marikana from
 19 happening, and I know, I'm aware of a number of people who
 20 have endeavoured to try and do so. I think the last in
 21 that line was Bishop Seoka who actually found that he
 22 couldn't get the access that he wanted, but I read his
 23 statement on that account. Now I, what I look at as a
 24 chance are actually the 14th and the 15th and what I look
 25 at, and I do that with sincerity, I look at all of you here

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1 and I think you all were here, you, some of you even have a
2 mandate that empowers you to act and I'm thinking that
3 there were people that engaged themselves with that
4 situation because they were aware of it, and the Bishop is
5 one utterance of someone who obviously took it to heart and
6 decided to physically go there, and I think that more of
7 that might, could have created other opportunities that
8 simply then don't eventuate, and I'm particularly looking
9 at the 14th and the 15th because it seemed to be days of
10 relative calm there, where attempts at getting some form of
11 constructive dialogue going maybe from different
12 perspectives and different actors and stakeholders who
13 again in democratic societies are expected and entitled to
14 engage themselves on those issues, that's a missed chance
15 too.

16 If you are, in answer to that question on 262 I
17 would consider that part of trying your damndest, is that
18 word is permitted in this setting, to avoid that you need
19 to deploy and put a stop to it because inevitably when you
20 stop talking, things become confrontational, and I've
21 worked long with the United Nations; the core principle in
22 any relationship is that we try and maintain constructive
23 dialogue, however futile, because for as long as we're
24 talking, we're not fighting, and even if we agree to
25 disagree, and rather than focussing on the essence of a

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1 to protecting human rights. Is there no platform then for
2 you to engage in this situation and say we can project on
3 the basis of past experience that this may well lead to
4 catastrophe? So if we talk missed opportunities, I see
5 that as a big missed opportunity and as to 262, the text of
6 262 is clear.

7 MS LE ROUX: So you'll agree with me that
8 the move to a tactical option was not trying to avoid the
9 use of force at all costs?

10 MR DE ROVER: I think the inherent risk
11 when you move to a tactical option is that you may end up
12 in a situation where you will have to use force, so that
13 you'd stick a percentage on it, I'm happy with anything
14 that you want to say. 100% I wouldn't go to because then
15 obviously we need to have another discussion, but once you
16 decide that, that is a possibility. You must factor in the
17 possible consequences of that.

18 MS LE ROUX: Now Chair, just to round
19 this out, you mentioned two possible alternatives to going
20 tactical and therefore avoiding the use of force. That was
21 maintaining what we'd call the stage 2 presence because it
22 seemed to be working. There hadn't been significant
23 violence after the Monday. The second one you mentioned
24 was having Bishop Seoka continue to try to negotiate and
25 speak to the strikers. If I put three other potential

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1 problem my tactic has always been to make it bigger because
2 if you make it bigger there is a bigger chance that you'll
3 actually find some common ground, something that you can
4 agree on, and not that you whittle it down to that
5 essential key point that you forever will differ of opinion
6 on. I look at, that's again society acceptance of forms of
7 violence.

8 I've been in your country now one and a half
9 years and the last time I went home after four months it
10 takes me a week to get back to normality, that I don't have
11 to lock my doors, that it's alright to leave the keys in my
12 car, and I don't have an electrified fence around my house
13 and armed response on standby. You have 1.2 million
14 registered private security providers in this country.
15 That's to me a demonstration of how safe your country is
16 and an indication of how well you law enforcement is doing
17 because they charge you for a service that the police
18 should give you for free, and that is, there are just some
19 factors there that I put in alignment and I think well,
20 people were watching the news and definitely on the 11th and
21 the 12th and then on the 13th you get that flashpoint that
22 would have made headlines. People would have seen that,
23 people in government, individuals in the street. Aren't
24 people outraged? And South African Human Rights
25 Commission, you have a constitutional mandate when it comes

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1 alternatives to you would you comment on them and tell me
2 if you'll accept them; the first would be to have waited
3 until at least the following morning and implemented the
4 encirclement plan which had a lower risk and therefore less
5 likelihood of the use of force; fourthly, trying to gather
6 further intelligence to support the cordon and search part
7 of the operation; or fifthly, trying to bring pressure to
8 bear on Lonmin to send a representative to speak to the
9 strikers? Would you accept that those other three
10 scenarios are also alternative to going tactical on the
11 afternoon of the 16th of August?

12 MR DE ROVER: You know, if I'm just
13 fatalistic about it anything that can delay the decision is
14 an option that you should consider and I can probably, if I
15 sit down for a second and write a list can probably come up
16 with 20 more. But that doesn't explain the pressure on the
17 timing that we discussed previously. So I hear what you
18 are saying and I recognise that. If I take the problem,
19 you have to acknowledge that we are talking about
20 symptomatic relief. We're not doing anything about the
21 cause. So I can think of a reality where I continue to try
22 and maintain a dialogue with the strikers on the kopple,
23 but I – and this is part of the police's problem; you can
24 negotiate if you have something to bargain with, but when
25 that – and the bargaining chips the police had or managed

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1 to put in line was to bring representatives from NUM and
 2 AMCU and actually act as facilitators, as a conduit. I
 3 think that in the process the police lost their neutrality
 4 by doing that, that from a mediator, especially when they
 5 were the bearers of the bad news that there would be no one
 6 else coming, that Lonmin would not be coming and that now
 7 it was time to go home, that there may have been a
 8 confusion on the part of the strikers because now the
 9 police act as the speaking tube for corporate enterprise
 10 and for that other group that obviously were not friends
 11 with the people on the hill, and that some of the
 12 aggression that then develops in fact gets directed at the
 13 police and that, I actually think that the police failed to
 14 recognise that as a risk, that by putting yourself as a
 15 neutral intermediary and doing something on behalf of one
 16 of the parties, that you may be perceived you're then doing
 17 something against another party, and that might not be your
 18 intention but that may well be the reading. That's why I
 19 refer to Operation Restore Hope in Somalia where with the
 20 best of intentions the UN distributed food to 300 000
 21 people starving, but that was a weapon of war in the hands
 22 of General Aidid and he did take offence. He didn't care
 23 that these people were dying because that's exactly what he
 24 wanted them to do, and when the UN gave them food he turned
 25 on them and he killed UN peacekeepers. He killed 24

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1 Pakistani and two weeks later eight Americans and we pulled
 2 out, the UN pulled out of Somalia and we never went back.
 3 So the proposition of being misunderstood in your role is a
 4 risk there.
 5 [10:07] So you want the police to maintain a presence and
 6 to try and maintain dialogue. I would at least venture you
 7 need a bargaining chip, you can't just try and talk because
 8 I think the talks that were there were strained enough
 9 whilst the police had a bargaining chip those talks were
 10 not easy. And those talks were not safe, they were
 11 conducted from within a Nyala. So the conditions of the
 12 talks were already not very happy. So that is why I'm
 13 saying that if the bishop had arrived on the 14th or the
 14 15th I'm sure he would have been welcomed with open arms as
 15 you would have been as anybody else who would have wanted
 16 to engage probably would have been welcome by the police as
 17 a means of relieving pressure. If I was there on the
 18 ground I'd be desperately looking for ways to relieve the
 19 pressure even if I have to bring a portable TV and a radio
 20 to play music or to distribute food to people to try and
 21 get a sense or an atmosphere that would make it possible to
 22 have a conversation rather than adversarial stand off.
 23 MS LE ROUX: Chair, if you'd like to take
 24 the adjournment now.
 25 CHAIRPERSON: I would, 15 minutes.

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1 [COMMISSION ADJOURNS COMMISSION RESUMES]
 2 [10:37] CHAIRPERSON: I'm sorry, Ms Le Roux, we
 3 had a bit of housekeeping to deal with in relation to the
 4 inspection on Monday. It ate up some of your time, for
 5 which I apologise but I'm sure you'll have fine-tuned your
 6 cross-examination and won't be prejudiced.
 7 MR SEMENYA SC: Chair, can I for the
 8 record state that Mr De Rover is unable to be here beyond 1
 9 o'clock.
 10 CHAIRPERSON: Yes. No, you told me.
 11 CEES DE ROVER: (s.u.o.)
 12 CROSS-EXAMINATION BY MS LE ROUX (CONTD.):
 13 Mr De Rover, the National Commissioner, when she came and
 14 gave evidence, testified that the plan had been what she
 15 called disrupted. Have you been told by the SAPS when they
 16 believe the plan was disrupted?
 17 MR DE ROVER: I'd like to say I'm
 18 grateful for the videos that I saw yesterday because I
 19 think they show a comprehensive, if very long, summary but
 20 at least they allow that multi-camera view and the
 21 animations I think are particularly helpful. From what
 22 I've understood all along right from the beginning and
 23 what's illustrated in that video is that at the moment that
 24 Nyala 4 arcs and cuts to that corner of the kraal, that I
 25 would, that I take as it has been told to me, is the moment

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1 that the plan starts to diverge from what was anticipated
 2 because that Nyala was supposed to go straight and 5 was
 3 supposed to make the curve.
 4 MS LE ROUX: Now in the –
 5 CHAIRPERSON: I must say I thought the
 6 disruption point was slightly different. They intended to
 7 keep the people on the koppie side of the barrier, on the
 8 sort of plain by the koppie and after a suitable, when
 9 everyone was in position Brigadier Calitz was going to give
 10 the warning that we're going to do the dispersing and
 11 disarming and arresting, he was going to wait for a while
 12 and then repeat it, have it translated into the vernacular
 13 languages and then they were going to do that. And of
 14 course what happened was that he never got that far because
 15 the strikers either decided to go to Nkaneng or decided to
 16 attack the police, whichever version one accepts, and that
 17 I thought was the so-called disruption, was that there was
 18 then an argument which we don't have to worry you about,
 19 that the plan was then back on track when they got to scene
 20 2, but we won't debate that with you but the disruption, as
 21 I understood the police case to be and Mr Semanya will tell
 22 me if I'm wrong, the disruption was instead of being able
 23 to proceed with what we call the DDA as it was planned,
 24 they had to deal with what they perceived, so they say, to
 25 be an attack by the strikers and they were trying to defend

<p style="text-align: right;">Page 37099</p> <p>1 themselves. That, I think in a nutshell, is their case. 2 Am I right, Mr Semenya? 3 MR SEMENYA SC: It is so, Chair. 4 CHAIRPERSON: [Microphone off, inaudible] 5 MR DE ROVER: Chair, looking at that 6 because that has come to light after the fact but I'd put 7 that in fact the first disruption already happens when the 8 deployment of the barbed wire is done consecutively and not 9 simultaneously as Lieutenant-Colonel Scott foresaw at the 10 time. So if you want an earliest indication of when the 11 plan already did not, the action on the ground did not 12 reflect what the plan said, that that would for me be the 13 earliest manifestation. When I asked specifically with the 14 exhibits available at the time where they figured that 15 tangibly things went different, that is at the moment Nyala 16 4 starts to arc. Is it permitted, Chair, to ask a question 17 about this exhibit because that would be a useful addition 18 – 19 CHAIRPERSON: I'm sure you can ask a 20 question. I must say I would have thought the first 21 disruption was actually when they moved Nyala 6. I seem to 22 remember the evidence was that Colonel Scott wasn't aware 23 of it, I may be wrong on that but the original plan has 24 Nyala 6 in a position where it was and it was then moved at 25 about 11 o'clock or 11:20 or thereabouts, so that was</p>	<p style="text-align: right;">Page 37100</p> <p>1 really the first disruption and it's said in quotation 2 marks. The second one is the one you've mentioned and the 3 third one is the one which I think the National 4 Commissioner meant, but you want to ask a question. Do you 5 want to ask me or – you've got more chance of getting an 6 answer out of Ms Le Roux. 7 MR DE ROVER: No, no. Well, Chair, I 8 know I need to address you but I know that the owners of 9 the exhibit are the Human Rights Commission. Now I think 10 that that exhibit would benefit from an effort and I've 11 checked, I'm sure SAPS is willing to come to party, if I 12 can call it that, on that because I know that it will cost 13 money to do it but you can identify the command vehicles in 14 those presentations and specially the animations. Now what 15 we saw yesterday shows camera views but those camera views 16 do not equate lines of sight commanders had. If you would 17 use that same principle of the yellow line arcs, it would 18 at least permit in the animation to show what commanders at 19 that time were looking at because you get a camera on 20 someone's right there, I remember one sequence where 21 there's a camera here and a Nyala drives through the screen 22 left to right and we see things behind that Nyala that the 23 camera keeps focusing on, that could have been Brigadier 24 Calitz's Nyala but obviously his line of sight is different 25 from the line of sight that we are being presented with and</p>
<p style="text-align: right;">Page 37101</p> <p>1 I think the exhibit would benefit, for your understanding 2 but for everybody's, if for the command vehicles, those 3 lines could be included and secondly I think that the 4 exhibit would probably give rise to a number of pointed 5 interrogatories for those operational commanders pursuant 6 to it. And I know that you are under, time bound, but 7 you've used that tool for the experts, I don't know if it 8 can be used but I see that the exhibit as such could give 9 rise to a number of questions but I'd be answering second- 10 hand. I'd think that there would be reason with what you 11 have, to ask them to comment on that, taking into account 12 the direction of their movement and the arc of sight that 13 they would have at the time that those movements occur. 14 CHAIRPERSON: May I say that that point 15 has actually been raised with me by Adv Hemraj who 16 suggested that that exercise be done and I'm afraid the 17 suggestion stayed with me for the moment but certainly it's 18 something I take it that the SAPS and the Human Rights 19 Commission can talk about and I hope something can be done 20 along those lines. It shouldn't take too long if the 21 necessary willingness is there but anyway, that's a matter 22 which we don't have to debate further. Mr Chaskalson, 23 you're leaning forward to your microphone. 24 MR CHASKALSON SC: I was going to say 25 that if there's difficulty in that respect because there</p>	<p style="text-align: right;">Page 37102</p> <p>1 may be budgetary difficulties, it's something that the 2 parties should come to the evidence leaders to discuss 3 because we might be able to assist. 4 CHAIRPERSON: It sounds as if something 5 may happen along those lines but certainly I'm sure – do 6 you use the expression "daadwerklike pogings" in Dutch – 7 I'm sure those can be done. 8 MR DE ROVER: Daadwerklike poging in 9 Dutch is a punishable offence. 10 CHAIRPERSON: Not in South Africa. 11 COMMISSIONER HEMRAJ: Certainly the 12 perspectives and the visibility factor will make a huge 13 difference to us as to how we understand it, doesn't it? 14 MR DE ROVER: Well, look, I think the 15 exhibit is extremely useful for giving an understanding and 16 if you offset it against the fact that the commanders 17 didn't have multiple camera views, they did not have 18 replays, freeze frames, multiple frames, so they got one 19 chance of looking at it and trying to get it right. So in 20 that context it is important that you factor in what could 21 they actually see and which facts could they have 22 appreciated and then decide whether they were in a position 23 to act on those and I think that that would be very 24 beneficial. And if I take that point of Nyala 4 bending as 25 an indication of SAPS diverting now from what it was</p>

1 planning to do, it is also important to note that from that
 2 moment till the shooting starts there is two minutes in
 3 real time available to them. Now at that time you see
 4 vehicles moving. They're obviously on their way to their
 5 jump off point where that dispersal action needs to start
 6 so their attention and direction are to get towards that
 7 end of the line where they will then come around and start
 8 the dispersal proper. Are they actually able to observe
 9 what the camera is showing us? And I don't want to qualify
 10 that unless we can actually draw in on the exhibit the
 11 lines of sight so that you can say, not only say look, this
 12 happens because the camera caught it, but that you can
 13 superimpose on it a line of sight and say look, just on the
 14 basis of the line of sight that commander was in a position
 15 to observe that same fact and then you'd have a point to
 16 question them and get them to speak to that because all,
 17 you've managed to identify every single vehicle there and
 18 the occupants of every single vehicle are known. So I
 19 would think that to be a very useful and worthwhile
 20 exercise to conduct.

21 COMMISSIONER HEMRAJ: Bearing in mind
 22 that some of those commanders would have been inside the
 23 Nyalas at the time.

24 MR DE ROVER: Ja, but that's – like I
 25 know and that's why I don't, my opinion is second-hand on

1 this point but I know that Brigadier Calitz was in the
 2 centre of his Nyala, sitting sideways, focused on radio
 3 communication and occasionally looking out of the windows.
 4 Now, I know you are going to Marikana on Monday. I've
 5 already contacted General Annandale and recommended that a
 6 Nyala is there. I know you have been inside Nyalas before,
 7 that you had a chance but it might be good to refresh that
 8 opportunity, but to play that role then and be told where
 9 he was sitting and for you to have a chance, even plot some
 10 of these routes and see what can you actually see when you
 11 are there because I think they are factors that, in the end
 12 when judging decisions, can be critical. And we are
 13 talking about a serious matter so if you want to invoke a
 14 commander's responsibility you must get to a point that you
 15 can prove that that commander saw, or if you want I can use
 16 the word "knowledge," that that commander had knowledge and
 17 failed to act on it. And the exhibit I think supremely
 18 enables that possibility, so I would think that with that
 19 in mind the exercise of Monday might even gain some
 20 significance on that point as well.

21 MS LE ROUX: And Mr De Rover, if we're
 22 engaged in an exercise of suggestions for Monday, we should
 23 then probably also have 328 rounds fired next to that Nyala
 24 and see if it's possible to hear them.

25 MR DE ROVER: Ja, but the same applies to

1 calls of cease fire, you know, that is true. I think in
 2 all fairness, rounds going off, you can, you don't have to
 3 test 300 rounds but multiple rounds going off at the same
 4 time, there is a limit to the amount of decibels they
 5 generate. So you generate that amount of noise and you can
 6 substitute. Once you've measured the decibels you can
 7 substitute it with white noise and you can sit in that
 8 Nyala and you can test at least, and it's a sterile
 9 environment because you don't factor in engine noise,
 10 people noise and urban noises around it but you could make
 11 that comparison, is it audible at all?

12 The other thing you could do is have white noise
 13 at the decibel level of gunfire played and you go and stand
 14 away from that source, 20 metres, and yell "cease fire" and
 15 get someone who is next to that source to confirm whether
 16 he can actually hear you.

17 CHAIRPERSON: Forgive my ignorance, I'm
 18 probably the only person in the room who doesn't know what
 19 you mean. What is white noise?

20 MR DE ROVER: White noise is the polite
 21 term for methods of interrogation the US has used to put
 22 prisoners under stress and it's noise that generates in
 23 excess of 120 decibels.

24 CHAIRPERSON: So you damage the eardrums
 25 and hope they'll confess.

1 MR DE ROVER: Well, it's not quite at a
 2 damaging level but I can tell you that it's annoying if you
 3 are forced to listen to it for a lengthy period of time.

4 CHAIRPERSON: [Microphone off, inaudible]
 5 the US Embassy to help us but I'm sure our South African
 6 Police don't know how to do that, do they, we can make a
 7 plan.

8 MR DE ROVER: Chair, it's important and I
 9 know that SAPS is in the process of exploring the
 10 possibility to purchase a long range acoustical device.
 11 You go into YouTube, Google long range acoustical device
 12 and you will see one used in action by the American Police
 13 during a G20 protest and just put – I warn you in advance,
 14 put the volume of your computer to half and see if you can
 15 listen to the sound it produces and know then the actual
 16 sound is at 140 decibels. It does cause injury and you
 17 will want to get away from that area, the area denial
 18 systems.

19 The second one that exists is a mobile area
 20 denial system that effectively has a large microwave on the
 21 top and it sends out a radio wave at a particular frequency
 22 that only penetrates the skin for half a millimetre. It
 23 will give you that sensation all of a sudden that you feel
 24 incredibly hot and you don't know why, a hot flush times
 25 100 and you just want to move away. That can be projected

<p style="text-align: right;">Page 37107</p> <p>1 at 500 metres distance plus. These systems exist. Now my 2 contention, I said that yesterday, it's not in arming up, 3 it's in smarting up but you can expect your police to 4 differentiate the approaches but the means that are 5 available on the market are generally marketed under 6 euphemisms of less lethal technologies. All of them, every 7 single one of them has multiple attested cases that they do 8 produce injury and death. So there is – 9 MS LE ROUX: Mr De Rover – 10 CHAIRPERSON: What you're suggesting – 11 MS LE ROUX: Mr De Rover – 12 CHAIRPERSON: Sorry, what you're 13 suggesting, we get a decibel counter and then we do 14 something to simulate sound at – 15 MR DE ROVER: Well, if – 16 CHAIRPERSON: - at the relevant decibel 17 reading. 18 MR DE ROVER: I know that the contentions 19 about the cease fire shouts, I think they are important 20 because you'd expect that one command of cease fire would 21 be enough for that fire to cease. Now – 22 MS LE ROUX: Mr De Rover, you accept that 23 there are several cease fire calls which are indicated by 24 gesture, though, so – 25 MR DE ROVER: Ja, but are people looking</p>	<p style="text-align: right;">Page 37108</p> <p>1 at those? 2 MS LE ROUX: If we could now return to my 3 cross-examination, you've observed annexure V2 which is 4 around the movement of strikers and you've seen the 5 animation that is V2A. In your statement – Chair, just for 6 the record it's FFF11A page 18, paragraph 33, there you 7 refer to the strikers repeatedly approaching the barbed 8 wire line and trying to breach or skirt it. Having seen 9 annexure V2, the video, and V2A the animation which 10 indicates the position of the lead group at all times, do 11 those presentations accord with what you were told by the 12 SAPS about the movement of strikers? 13 MR DE ROVER: Again what I was told by 14 SAPS and at the time I wrote that, that's before the 8th of 15 March 2013, I had been shown exhibit L, that does contain 16 SAPS version of photographs that purport to show that they 17 were approaching the line. If we can hold, and I've heard 18 the reservations yesterday to the videos, I have no beef 19 with that. What I see does not support that. So if it can 20 be held that your presentation is correct, then my 21 statement on that point is incorrect. 22 MS LE ROUX: Mr De Rover, turning then to 23 the question of water cannons, you'll accept of course that 24 water cannons are an important part of the less than lethal 25 equipment that's available to police in crowd situations.</p>
<p style="text-align: right;">Page 37109</p> <p>1 You will agree with that. 2 MR DE ROVER: Given that they are one of 3 two means that I would qualify as mostly non-lethal, yes. 4 MS LE ROUX: And now you've seen the 5 video presentation V3 which deals with the use of water 6 canon on the 16th of August, does that presentation change 7 the statement you've made about the use of water canon at 8 Marikana? Do you wish to revise what you said about water 9 canon in light of what you've seen in that video? 10 MR DE ROVER: I think it needs to reflect 11 what is seen in that presentation but like I said, you 12 know, this is two years on. You know so much more. Are 13 you referring to a statement that was one and a half years 14 ago, made in the absence of that particular knowledge? It 15 was made to the best of the information available at that 16 time. 17 MS LE ROUX: But in your response to the 18 evidence leaders which was only a few weeks ago, you still 19 recorded that the water canon had been used to spray the 20 strikers attempting to enter the police line, which we 21 interpret to mean the lead group of strikers. If the 22 presentation is correct and is accepted by the Commission 23 you will agree with me that that is incorrect and water 24 canon was never used against the lead group of strikers. 25 MR DE ROVER: But you have another</p>	<p style="text-align: right;">Page 37110</p> <p>1 problem then because I referred in that response to a 2 number of statements. Again, I don't make these things up. 3 I base myself on at least an auditable information that 4 people make statements, the crew of that water cannon, so I 5 base myself on that. Clearly from what you have compiled, 6 if we can trust that, what they say did not happen or if it 7 happened they may actually be referring to another time 8 than they thought they were referring and they're confused 9 on the timing as to when. 10 MS LE ROUX: Well – 11 MR DE ROVER: But that leaves four 12 statements, I think, that at least then warrant an 13 interrogatory on that point, whether people want to revise 14 their opinion and that I need to revise mine I would take 15 as a given. If you trust the veracity of what is said 16 there, then of course. 17 MR DE ROVER: And you'll accept that it 18 could be that those statements in fact are referring to the 19 use of the water canon against other strikers, not the lead 20 group that come around the kraal. Do you accept that 21 possibility? 22 MR DE ROVER: Well, again now I'm 23 speculating that people may have been mistaken about the 24 fact and the time line, so I would suggest that the ones 25 that claimed what I quoted and I have put the names of the</p>

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1 people that made that claim in that reply, that you get
 2 them to verify now.
 3 [10:57] MS LE ROUX: Mr De Rover, we'll obviously
 4 contend that those statements are false in light of the
 5 objective evidence that shows how the water cannon was not
 6 used on the lead group of strikers. You also in your
 7 interrogatory response to CALS indicated that you had been
 8 informed that the water cannon operators were properly
 9 trained. Have you been aware of the statement of Warrant
 10 Officer Fourie – Chair, it's HHH37 – where he sets out what
 11 he calls a two-hour crash course that Officers –
 12 CHAIRPERSON: Perhaps we could have it on
 13 the screen.
 14 MS LE ROUX: We can, Chair. I'm just
 15 conscious of time. The phrase they used was "two-hour
 16 crash course that Warrant Officers Kruger and Dicks went
 17 through. It was not an official course and they would need
 18 to get proper training but that never took place." If you
 19 accept that that evidence is true, all that Kruger and
 20 Dicks have had is a two-hour crash course, not an official
 21 programme, would you revise your opinion that the water
 22 cannon operators were properly trained?
 23 MR DE ROVER: The statements I saw from
 24 Kruger and Dicks do not contain that qualification, so I've
 25 obviously seen earlier versions of that. You –

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1 evidence to the contrary as to their preparedness to
 2 participate in the operation?
 3 MR DE ROVER: No.
 4 MS LE ROUX: So if the evidence is
 5 accepted by the Commission that the Johannesburg water
 6 cannon operators were not properly trained, first, second
 7 that they were not briefed before the operation other than
 8 in a very limited way by the other water cannon crew, and
 9 thirdly that they did not expect to be operating the water
 10 cannon in the operation until the very commencement of that
 11 operation, if you knew those three things would you have
 12 been concerned about the ability of the water cannon to
 13 contribute effectively to the use of less than lethal
 14 measures on the 16th of August?
 15 MR DE ROVER: Ja, of course.
 16 MS LE ROUX: If we can then turn to the
 17 utilisation of teargas and stun grenades at scene 1; you
 18 obviously watched the video V4 yesterday and again I'm
 19 going to ask you to assume that the analysis in that
 20 presentation is correct. Assume that what is shown in that
 21 presentation, namely that the stun grenades and teargas
 22 were only ever discharged behind the front of the lead
 23 group of strikers and that that group consistently moved
 24 away from the stun grenades and moved away from the
 25 teargas. So if you accept that as it's shown in the video,

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1 MS LE ROUX: It's a statement by Warrant
 2 Officer Fourie –
 3 MR DE ROVER: No, I haven't seen that –
 4 MS LE ROUX: - who describes the two-hour
 5 crash course he gave Kruger and Dicks and that's all the
 6 training they've had.
 7 MR DE ROVER: Well, they in their
 8 statements only refer to the fact that their training was a
 9 year ago and I think in another statement someone qualifies
 10 that they did receive the operator training but not the
 11 training on how to operate the video system.
 12 MS LE ROUX: Warrant Officer Kruger and
 13 Dicks also acknowledge their training was what they call
 14 "very limited."
 15 MR DE ROVER: Ja.
 16 MS LE ROUX: Ja. Are you aware of the
 17 evidence that Warrant Officers Kruger and Dicks were not
 18 expecting to have to operate the water cannon and they did
 19 not receive any briefing in advance of the commencement of
 20 the operation? Are you aware of that evidence?
 21 MR DE ROVER: It's part of their
 22 statements, I think, where they say that it was actually
 23 the crew of the other cannon that told them what would be
 24 expected of them.
 25 MS LE ROUX: Yes, and you have no

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1 then surely you can't say that teargas and stun grenades
 2 were ineffective against that group of strikers because
 3 they had the intended effect, the strikers moved away from
 4 the teargas and the stun grenades that were used against
 5 them. Would you accept that?
 6 MR DE ROVER: I think it's important to
 7 stress that obviously the events as they started to develop
 8 there, there was a two-minute window until the first
 9 gunshots occur. I don't know what at that time the
 10 instructions of the operational commanders on the ground
 11 are, but they become critical because the fact that Nyala 4
 12 closes at the corner of that kraal causes that group
 13 movement to go around.
 14 Now part of the vehicles that I see and
 15 understand from what I was told are actually on their way
 16 to their jump-off point where they would start the
 17 dispersal, I see on that evidence, but I've never – how do
 18 you say? – have the detail of who fired, from what
 19 direction, the teargas and the stun grenades. That was
 20 first shown, or at least apparent yesterday in the detail
 21 that it was presented.
 22 I see that they move away from the police, that –
 23 I don't know, like I think that that is open for debate. I
 24 do see an acceleration in their movement once they come
 25 around that bend and then see the line in front of them.

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1 If, there was one brief aerial shot where that group is
2 still I think seconds before they made the second turn that
3 puts them on an inverse course on the one that they
4 actually were walking on, so in that shot you see many
5 people actually walking away to the north and that's the
6 part that looking at it I see the two differences and I
7 don't understand it. So, and I just have to leave that for
8 what it is.

9 But I do see that the exercise of trying to
10 isolate the commanders, because I'd like to know, because
11 the use of the teargas and the stun grenades is still
12 supposed to be subject to someone giving that order. So
13 someone gave that order. It would be important now with
14 this material to try and isolate who did, especially if you
15 put, your contention is that it causes them to move towards
16 the police line in fact, or it forces them in that
17 direction. I would still ask why they didn't simply turn
18 around and do what the rest of the crowd did and walk in
19 the opposite direction. So there is a manifest difference
20 in the intended direction of that group and what a lot of
21 other people are doing. But that's what I'm seeing
22 yesterday, and what I'm saying now I'm saying off the cuff
23 on just watching that.

24 MS LE ROUX: But let me break this down
25 then. The expected response to the deployment of teargas

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1 or stun grenade is for a protester to move away from the
2 teargas and the stun grenade, correct? That's the expected
3 response of someone when they have teargas or stun grenades
4 used near them, it's to move away from those.

5 MR DE ROVER: Well, it depends on two
6 factors. It depends on a possibility to move away and it
7 depends on the intention of the use. Specifically with
8 teargas you're obviously dependent on wind direction
9 because if on that day a stiff breeze had been blowing
10 towards the north it would have been quite difficult to
11 effectively use teargas unless you deploy it on the other
12 side.

13 Now I think, and that's why I put that slide up
14 before; I think that SAPS' use of teargas and stun grenades
15 is more aimed at maintaining that separation between police
16 and protesters, and I see much more, like knowing that and
17 knowing that preference from speaking to them, that I see
18 the use of that teargas and those stun grenades there as
19 POP members trying to have that safety barrier between them
20 and the demonstrators. I don't think, because physically
21 it would have been impossible for the strikers to move
22 further away because that would have only been possible if
23 the kraal hadn't been there, they could have moved towards
24 a westerly direction.

25 So I think that I read the action, and again I'm

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1 saying this with respect that I've only seen that footage
2 yesterday, I'm looking and considering that now. I haven't
3 spoken to anyone about it. I can only read it as an intent
4 to keep a barrier, to avoid physical contact between the
5 units that are there actually trying to get to the point
6 where they will move around and start their dispersal and
7 are then confronted by a number of people that unlike many
8 others are coming now around and actually coming towards
9 them.

10 MS LE ROUX: Mr De Rover, have you seen
11 any evidence of any barrier being placed between the
12 strikers and the TRT?

13 MR DE ROVER: No.

14 MS LE ROUX: If we can then move on to
15 the use of firearms. In your statement FFF11, Chair, for
16 the record it's page 18, paragraph 80, you say there that
17 the police were "confronted with a heavily armed group with
18 guns," plural, "being fired from within that group." In V5
19 which we watched yesterday there's only video footage of
20 one handgun being discharged by a striker. Do you have any
21 evidence of more than one gun being fired within the group
22 of strikers that come around the kraal?

23 MR DE ROVER: Chair, this is where
24 registered video footage has a serious limitation because
25 it can only capture what it sees and -

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1 MS LE ROUX: Hence my question. Are you
2 aware of any other handguns, any other guns being used by
3 that group?

4 MR DE ROVER: What I was shown was that
5 in the items that were seized by police after there were
6 multiple firearms. So then, and they obviously also refer
7 to the fact that the group was alleged to have taken
8 firearms on the Monday that belonged to the police, an R5
9 and a 9 millimetre pistol. So when I compiled - and again
10 you've had two years now, I had one week. When I compiled
11 that I relied on that information to write that particular
12 paragraph. So talking to the people, asking them about
13 what was seized on the scene, seeing that snippet of
14 footage where, okay there was video registration of one
15 shot, but confronted by police officers who say to me that
16 there were multiple, whether that was a mistake of fact
17 appreciation where, you know where your videographer points
18 out that one shot coincides with a stun grenade going off
19 and it, the sound overlaps, that I don't know. I can't
20 judge that. You have to either isolate officers concerned
21 and ask the question, or ride on the strength of what you
22 know and what you can prove.

23 When I wrote that paragraph I went as far as I
24 could in auditable evidence in terms of seeing what they
25 seized at that scene, and in talking to the people that

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1 were there and asking them, and those two combined, and
 2 again like I know your preference is with the first one,
 3 that what can be proven, and that you want to accept
 4 someone's testimony if it can be underpinned by such
 5 auditable evidence, but not necessarily on and of its own.
 6 So that is problematic.
 7 So my contention would still remain that the
 8 possibility that there were other firearms there I think is
 9 demonstrated by the fact that multiple firearms were seized
 10 at that scene and the police's contention, the way they
 11 presented it to me is that none of those firearms had a
 12 full magazine, they had rounds missing. The thing is, and
 13 I've said that to them, that the fact that rounds are
 14 missing doesn't necessarily say anything about when they
 15 were used, or whether they were used or whether someone
 16 simply didn't have more than five rounds for a eight-round
 17 magazine. So these other options also stay open. So on
 18 what I've seen and heard I can't agree 100% with you that
 19 there was only one shot fired and there was only one
 20 firearm.
 21 MS LE ROUX: Mr De Rover, have you been
 22 instructed that three firearms were seized at scene 1 and
 23 the only cartridge that was found is a 9 millimetre, which
 24 would match the gun that we see fired on the footage? Were
 25 you told those two facts; three firearms seized, only one

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1 MR DE ROVER: And there is of course the
 2 exhibit of the ballistics –
 3 MS LE ROUX: And then the exhibit that Mr
 4 Semenya has just mentioned.
 5 MR DE ROVER: Ja.
 6 MS LE ROUX: Apologies, Chair, I'm just
 7 trying to accommodate your conversation with the
 8 Commissioner.
 9 CHAIRPERSON: I didn't intend you to
 10 accommodate it. I just said to my colleague – I may as
 11 well tell you that – that the police knew that the strikers
 12 had firearms and were entitled to factor that in, in their
 13 response. But anyway, but firearms obtained in amongst
 14 those on the 13th, but I didn't intend to interrupt the flow
 15 of your cross-examination by that.
 16 MS LE ROUX: Thank you, Chair.
 17 CHAIRPERSON: But seeing it's happened,
 18 I've told you what I'd said.
 19 MS LE ROUX: Mr De Rover, in any of your
 20 interviews with SAPS members did anyone describe in any
 21 detail shots being fired from the group? Did anyone
 22 explain they saw a striker wearing this at this point,
 23 discharging a weapon in this way? Any detail to the –
 24 MR DE ROVER: No, and you know –
 25 MS LE ROUX: - the contention that shots

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1 cartridge?
 2 MR DE ROVER: Yes, but the problem with
 3 the cartridges is that even when I went there on the 26th of
 4 March I kicked up a cartridge in the sand. So I know that
 5 the evidence collection at the scene because of the size
 6 has been problematic. So I know that for example of, I
 7 think of General Naidoo's use of the firearm at scene 2,
 8 only one of his cartridges of the two shots he claims to
 9 have fired has been recovered.
 10 CHAIRPERSON: I think it's correct to say
 11 that if one has regard to the number of shots fired by the
 12 police at scene 1, I don't think all the cartridge cases
 13 were found, were they? And the same applies of course to
 14 scene 2. So the fact that only one cartridge case is found
 15 is evidence which has some value, but it's rather limited
 16 in regard to what I've put to you, isn't it?
 17 MR SEMENYA SC: And Chair, if I may for
 18 the record point to statement KKK23, the description of the
 19 shot fired there is dissimilar to the one we see on the
 20 video.
 21 MS LE ROUX: So Mr De Rover, you said
 22 that there were two sources of information for you from the
 23 SAPS about the usage of firearms by the strikers. The one
 24 was what was seized; we've covered that. You also said you
 25 spoke to members that were there.

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1 were fired?
 2 MR DE ROVER: I have a professional
 3 problem with the situation that very early on SAPS members
 4 have been given warning statements by IPID. So there was a
 5 general reticence to be specific with me on detail. I've,
 6 there are a few statements that I read of people that said
 7 they fired and they thought their life was in danger and I
 8 ventured that if you try to present and convince a third
 9 person of imminent threat to life or serious injury, you
 10 try to put into words what must be an incredible emotional
 11 experience, and having had my life put in danger a few
 12 times in law enforcement I can tell you that I might
 13 struggle at times to find the right words but it's quite a
 14 narrative to try and convey that. The expectation was
 15 always put upon us by the court to be as elaborate in
 16 describing that as you possible could and to try and convey
 17 as much of that emotion or fear, because that is in the end
 18 what you need to judge, whether such fear existed and
 19 whether there was a factor of imminence that warranted and
 20 necessitated the response given.
 21 Now I've seen many statements that fall far short
 22 from that and the explanation I was given for that is
 23 IPID's involvement, where people are no longer witnesses of
 24 truth that because of their public office can help you and
 25 assist you and should assist you to piece together in

1 detail what happened, but now they are suspects, because
 2 these warning statements basically accuse them, you know,
 3 tell them you're a suspect of murder now and you are
 4 advised to avail yourself of legal support. You are
 5 advised of the fact that you do not have to say anything if
 6 you do not wish to do so. Now personally I think well, if
 7 I can't really oversee the consequences of speaking with
 8 that warning being given, I'd rather say nothing for the
 9 time being, and I think many SAPS members elected that
 10 path, even when I tried to engage them.

11 You know the, let me just tell you that the first
 12 session I held with the people for scene 2 necessitated a
 13 general to come in and give them an order to speak to me
 14 because nobody was prepared to answer, not even a question
 15 as to where were you. So I think the problem is that there
 16 seem to be competing needs and authorities that exist as a
 17 matter of law. There is the international principles that
 18 say as a law enforcement official you're an agent of the
 19 State. You swore an oath. You swore to uphold that.
 20 There is a situation to which you can speak, you must speak
 21 the truth. You're a witness of truth and we will treat you
 22 as such and hold you to that truth unless we can prove that
 23 your actions constitute a criminal offence, then we'll
 24 change tack and tune and we'll call you a suspect and
 25 advise you of your rights that come with that status.

1 a starting point for your quest to establish what now
 2 happened that's most unfortuitous. And one thing I think
 3 is that it would probably have assisted the Commission if
 4 IPID and I don't know if that's within your might, to tell
 5 them to speed up that investigation, to give it priority
 6 and to assist the Commission with its findings. Because at
 7 least then if that's now the channel that we are using that
 8 would have produced the information you need, the dockets
 9 you need, the information you need to base yourself on
 10 rather than trying to piece it together here because you're
 11 in fact a third line of inquiry now. And that to me is
 12 part of the problem that this process is facing that as an
 13 outsider I'm confused because I hear you when you say it's
 14 puzzling that SAPS is not conducting its own internal
 15 investigation. But if I understand the rules of IPID
 16 correctly, they can't. They're not allowed to. It would
 17 be considered interference and IPID has taken this case on
 18 board but hasn't assigned it any priority. Its amidst the
 19 tasks that they are performing and I'm not clued in as to
 20 when they actually consider providing their findings to
 21 this Commission or more particularly to the officials
 22 concerned. And then there is your effort of trying to
 23 piece together what now happened and obviously this
 24 Commission is formally established and the evidence that
 25 you produce has a formal place. But I think it's also

1 Now what IPID involvement does is actually not
 2 consider that aspect of public account and the need for
 3 public accountability and a right for the public to know.
 4 They step in, they give you that warning statement and the
 5 ballgame changes from there and I think you constables that
 6 have limited knowledge and education and understanding of
 7 the consequences and ramifications, they clam up, they
 8 don't say anything.
 9 [11:17] and that I think is, a lot of the evidence you
 10 have is not very helpful or useful to either tell you what
 11 happened, when did it happen, who was there, why did it
 12 happen in that way, what are the justifications and under
 13 normal circumstances there would be a delay in involving
 14 IPID because if you put sufficient guarantees in place for
 15 the public official role that in my book would come first.
 16 And that you put integrity and professionalism of an
 17 organisation first line. You'd first walk that path and if
 18 you're not satisfied that you are getting what you need you
 19 can still change tact. But now with bringing IPID on there
 20 which is a formal requirement and IPID not bringing the
 21 resources needed to effectively take control you get a
 22 hybrid. You get SAPS securing a scene and doing forensics
 23 and you're getting IPID getting very busy with issuing
 24 warning statements to people that were there on the ground.
 25 And I think the net effect of it is that it leaves you with

1 important to recognise that you now at least have three
 2 competing processes at stake that at some stage someone
 3 will have to say what is going to take precedence because I
 4 think there is a distinct possibility that your findings
 5 contradict IPID or that you make findings on issues that
 6 IPID hasn't considered. And I think that would of great
 7 interest to at least try and align the processes.
 8 MS LE ROUX: Mr De Rover, I understand
 9 you won't be able to do it now, but if you could refer us
 10 to the rule that you just referenced, that prevents IPID
 11 from doing something. I understand you may not have it to
 12 hand now, but you said there was a rule that was going to
 13 prevent IPID, sorry the SAPS.
 14 CHAIRPERSON: SAPS.
 15 MS LE ROUX: Sorry, preventing – if you
 16 could find that reference in due course.
 17 MR DE ROVER: I will do my best, but as
 18 I've said I've taken that on face value and that is just
 19 talking to SAPS senior officers. They referred to a rule
 20 that prohibits them. I've never asked them to qualify that
 21 rule, but –
 22 MS LE ROUX: Well then we'll take it up
 23 with the SAPS legal team. Mr De Rover, given your
 24 international legal qualifications as well you'll agree
 25 with me though that when an officer waives their right to

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1 silence and provides some statement and if you accept my
2 description of a lot of the warning statements that we have
3 before the Commission where they admit to killing, they
4 admit to shooting. But they don't give any of the details
5 of the circumstances that would justify that shooting.
6 That officer is then in a very difficult position because
7 prima facie they've admitted to potentially killing
8 somebody yet have not taken the opportunity to set out all
9 of the detail and the circumstances that justify each and
10 every one of the shots that they fire. You'll agree with
11 that proposition.

12 MR DE ROVER: Well I think it underscores
13 the problem that we face because to – it would be up to
14 IPID then to solicit that detailed statement and I would
15 expect that to be part of what IPID does. So they've taken
16 it on record, so they've got a start now, they've got a
17 basic admission of yes I fired my weapon and an answer to
18 the question did that occasion injury and or death. And
19 that's a start. Initially you would not require more. In
20 Holland I know that you get that stage then you have 48
21 hours because there's obviously let's say your moment
22 induced confusion and stress and trauma of the incident as
23 such, so you get your initial encounter with central
24 detectives and your warning statement and then you have
25 your 48 hours to compile your statement. But actually you

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1 follows, but you're a police officer, you've sworn an oath
2 and I take that seriously. So I come with everything I can
3 say about that incident and the circumstances and that is
4 normal. And I think that path could have yielded different
5 results, but the prompt bringing of IPID to that scene,
6 which is a requirement and IPID not having the resources to
7 adequately manage that incident, ah really. That makes it
8 really difficult because now you create a reality where
9 you've done what you're supposed to do and you've given it
10 to an organisation that sends two people there to initially
11 administer the incident on site. That is inadequate and it
12 is unacceptable because then it would have been much better
13 to actually realise that that would likely produce and I
14 don't know if SAPS was in a position to judge what the
15 resources were that IPID could make available. But you'd
16 almost prefer a reality where SAPS indeed would have been
17 left with its organisational responsibility to provide the
18 information because then there wouldn't have been warning
19 statements. But there would have been witnesses of truth
20 that are obliged to speak the truth. And you would have at
21 least, I think, in terms of information have had a far
22 larger bulk than you have now.

23 MS LE ROUX: Mr De Rover, when you
24 answered the interrogatories that are UUUU2.6 from CALS,
25 you answered those on the 26th of August of this year, you

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1 are then subjected to an interview by our equivalent of
2 IPID who quiz you on what happened. And what I'm actually
3 trying to stress is and I've seen that in many other
4 countries, there's a close time correlation and requirement
5 between being confronted with the fact that they will treat
6 you as a suspect and the requirement to then follow up.
7 And here I understand that IPID's backlog runs into years.
8 Now as a matter of international principles I think that is
9 unacceptable because if it's about a theft I can sort of
10 understand that your priorities are elsewhere. But if it
11 is about the intentional or accidental taking of life or
12 occasioning grievous bodily harm those are not cases that
13 you can put on the back burner because you have a big
14 workload. And I would think that given that this incident
15 triggered a commission of inquiry a logical consequence of
16 that would be that an instruction would be given to IPID to
17 give those investigations priority so that it assists the
18 Commission in its findings.

19 COMMISSIONER HEMRAJ: Doesn't your
20 warning, before taking a warning statement include a
21 warning to disclose everything that might be pertinent?

22 MR DE ROVER: Well the thing is that and
23 this is where it differs in Holland. If I've been involved
24 in a shooting incident I don't get treated like a suspect
25 off the bat. Of course there's a judicial process that

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1 recorded that you had not read all of the statements of the
2 shottists of the 16th of August. Is that still the case?

3 MR DE ROVER: Well it's still the case
4 because they all sing much of a tune and they don't offer
5 you much clue. And where they do offer a clue I'd actually
6 want detail, the same detail that you want. So they're a
7 frustrating bunch of statements in that sense and that is a
8 given.

9 MS LE ROUX: That's putting it mildly.
10 Mr De Rover, in your first statement FFF11, page 18 of that
11 statement, paragraph 77 there you set out what we could
12 call a statistical analysis of shooting at Marikana. And
13 we understand because we've engaged with you this, we
14 understand the limited purpose for which you cited all of
15 the statistical evidence that appears in your statements
16 around US shootings and the like. But I would just like to
17 clarify here that you'll accept that the analysis you've
18 presented to the Commission works on averages and it
19 doesn't present the actual data of shots fired by
20 individuals. It's averaging out.

21 MR DE ROVER: You know this morning I
22 said what I – I took a different tact to the other experts
23 because I sought to act in complementarity. No I can only
24 reiterate your concern that I wasn't seeking to justify the
25 shootings and I'm still not. What this methodology does is

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1 give you a footing for a quick scan of any shooting
 2 incident and the reason why this morning I said I have the
 3 special repertoire's report where Professor Philip Alston
 4 was special repertoire and he did a country study on
 5 Brazil. I've worked for him in the sense that I advised
 6 him, but roles without acknowledgement or glory, but you
 7 try and assist a special repertoire if you can. Had he's
 8 used those approaches to make quick analysis, am I looking
 9 at something dirty or not. And the second thing that I
 10 think is an important lesson to take is there is, I think,
 11 an overestimation of what you think the police can do. And
 12 especially when it comes to use of firearms there is, I
 13 think, the biggest lesson to draw from those figures and
 14 from the narrative that runs around it is that if an
 15 officer is on his own and he's supposed to fire shots under
 16 threat on average it's about 50% of those rounds that will
 17 find their target. Now that's not meant to explain
 18 shootings, what it's actually meant for is to improve
 19 training. And SAPS trains police officials on a range with
 20 a static target, at a set distance where your breathing is
 21 normal and where you get, in your own time, the chance to
 22 fire at that target. And surely if you can hit it at 15
 23 metres you can hit it at three. That is the base
 24 contention and it's erroneous because if you put officers
 25 under stress even just by simply asking them to sprint,

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1 number at the onset. Let that not cloud your focus on you
 2 actually need to focus on which is the justification.
 3 MS LE ROUX: But, Mr De Rover we would
 4 contend that using averages and for example you say on
 5 average it was 6.18 rounds per officer, that in fact clouds
 6 the inquiry that this Commission needs to make because it
 7 needs to inquire for each and every officer if they can
 8 justify each and every round. And of course, we know for
 9 example we have Constable Kumar who fired 17 rounds.
 10 Constable Hlongwane fired 15, Constable Molotlogai fired
 11 24. So your exercise will not assist the Commission in
 12 trying to establish if it has sufficient evidence before it
 13 for each officer to justify each round, will it?
 14 MR DE ROVER: Look, with humbleness, as
 15 an expert I would never be able to detail that information
 16 for you. The only ones that can are the officers concerned
 17 and I acknowledge that averages hide the peaks, but they
 18 give you a base idea of the problem. And I think one of
 19 the problems is that there is a problem with the accuracy
 20 of shooting and there might be recommendation required
 21 that, how do you say, SAPS could usefully provide
 22 information on how officers are taught to shoot, how
 23 frequently are they subjected to training, how often are
 24 they actually given the chance to practise those skill.
 25 And not under clinical circumstances, but under more

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1 jump, lift, carry and you make them tired and you give them
 2 then, still it's a static target and now they're tired and
 3 they have to shoot. Their results drop dramatically. If
 4 you take 100% of the first score then in the second similar
 5 test they only score about 30%. Now make it more
 6 difficult, now it's a moving target and the target is
 7 shooting back at you or at least you think the target is
 8 moving back at you the chances that you actually hit it
 9 diminish dramatically because those scenarios are currently
 10 in SAPS not trained. Or actually not many police forces
 11 train it. When I worked in Holland we did train it because
 12 we realised and were aware of the figures that when police
 13 officers get confronted by an armed criminal most of them
 14 die, 75% in the US die at a distance from zero to seven
 15 yards. And that's where they score the worst results when
 16 they are forced to shoot. And that doesn't make sense
 17 because that offers you a problem that you could solve
 18 through training. So all I've tried to do with offsetting
 19 the results is to say I know that the number of shots fired
 20 is horribly high, but I can show you and there's more
 21 recent examples, that have come out of US from Philadelphia
 22 where four police officers fired 138 rounds into a car.
 23 The mind boggles how that happens and why that happens and
 24 how that can ever be justifiable, but I just tried to offer
 25 it as a base to say please don't be distracted by the

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1 realistic circumstances that would match possible threats
 2 they face. And I totally – look I know the rules that you
 3 quote and I fully agree with that that you fire one shot
 4 that doesn't automatically justify numbers 15 and 16. You
 5 would still at every pull of the trigger need to prove the
 6 existence of an imminent threat to life or serious injury.
 7 But only the person pulling that trigger can tell you that.
 8 CHAIRPERSON: Unless his firearm was on
 9 automatic.
 10 MS LE ROUX: Yes, Chair, I'll get there.
 11 MR DE ROVER: There is proof of that and
 12 –
 13 CHAIRPERSON: I take it you don't approve
 14 of that.
 15 MR DE ROVER: No because you know what it
 16 shows is what in jargon is called a thumbing mistake, the
 17 catch on the R5 pushes from safe, past full automatic to
 18 single shot. Now you make a mistake, you're stressed or
 19 whatever. Or you don't check – you don't push that far
 20 enough, it's on automatic. And people have admitted to me
 21 that they fired inadvertently on automatic and that a burst
 22 went off that might well account for five, six rounds on
 23 one pull of the trigger. So that is an utter reality that
 24 you must contend with whether that is ineptitude or stress
 25 I can't answer. But I know that individuals have admitted

<p style="text-align: right;">Page 37135</p> <p>1 to it.</p> <p>2 MS LE ROUX: But whatever the</p> <p>3 explanation, whether it was inadvertent or not you would</p> <p>4 accept that that is reckless.</p> <p>5 MR DE ROVER: I've said yesterday that I</p> <p>6 think that R5 rifles do not belong in public order</p> <p>7 management and if you take away the possibility for them to</p> <p>8 be used you can't have the reality that you need to deal</p> <p>9 with the consequences. And in a blanket answer automatic</p> <p>10 rifle fire doesn't have a place in law enforcement, I'm</p> <p>11 sorry.</p> <p>12 MS LE ROUX: Mr De Rover, you described a</p> <p>13 moment ago the SAPS firearm training as static target at a</p> <p>14 distance, standing still and stressed. Are you aware of</p> <p>15 whether the SAPS firearm training, in addition to testing</p> <p>16 accuracy, ability to hit the target whether it also tests</p> <p>17 judgment, distinguishing between a threat and a non-threat?</p> <p>18 Does it have any judgment component to it that you're aware</p> <p>19 of?</p> <p>20 MR DE ROVER: I think that there is</p> <p>21 theory component that police officers go through where</p> <p>22 obviously that aspect of judgment is taught to them or told</p> <p>23 them you know acting in proportionality means nothing if</p> <p>24 you can't act proportionately when the situation occasions.</p> <p>25 So the problem is with operationalisation. What I see</p>	<p style="text-align: right;">Page 37136</p> <p>1 concerns because I don't think that SAPS training in</p> <p>2 elements is an adequate reflection of the threats and the</p> <p>3 real circumstances policing every day here puts on police</p> <p>4 officials. So I think they're poorly prepared. I think</p> <p>5 that my preference would be that judgment is part of active</p> <p>6 shooting training so that you create shoot, don't shoot</p> <p>7 scenarios and there's very sophisticated ones that have a</p> <p>8 video wall that even interacts with your voice command.</p> <p>9 [11:37] So you have a suspect with a knife and yo draw</p> <p>10 your weapon and you shout at the suspect will drop the</p> <p>11 knife and those moments allow an instructor to judge</p> <p>12 student response to more realistic scenarios, and I think</p> <p>13 if you separate shooting from class room that connection</p> <p>14 isn't necessarily made. Like I can put 20 people in a room</p> <p>15 here that will recite for you the definition on</p> <p>16 proportionality in the use of force, but if I put them in a</p> <p>17 scenario where they have to use it I'm not so sure that I</p> <p>18 could say with as much confidence that they all will behave</p> <p>19 in proportion to what confronts them because that is a</p> <p>20 function of what they are capable of physically and how</p> <p>21 strong they are mentally and how they judge the requirement</p> <p>22 of that particular situation and it becomes very much</p> <p>23 individual.</p> <p>24 COMMISSIONER HEMRAJ: Mr De Rover, the</p> <p>25 removing of one finger from the trigger when you're firing,</p>
<p style="text-align: right;">Page 37137</p> <p>1 especially an automatic, is a conscious decision. There's</p> <p>2 some writing about that, isn't there?</p> <p>3 MR DE ROVER: That's why I was saying in</p> <p>4 answer to your question yesterday why don't people go for</p> <p>5 their 9 millimetre weapon, once they hold that it becomes</p> <p>6 fixation. The basic training in firearms use is finger is</p> <p>7 off the trigger. That's a safety thing. The other thing</p> <p>8 is if you have a pistol in one hand you go to grab</p> <p>9 something with your other, there's double-handed reflex.</p> <p>10 So if you have your finger on the trigger – and there's</p> <p>11 recorded incidents of this that I have my pistol, I have my</p> <p>12 finger on the trigger and I grab this bottle, I might</p> <p>13 actually inadvertently pull the trigger with my other hand</p> <p>14 and that obviously gets worse if I'm at that time grabbing</p> <p>15 a suspect that I want to control and I'm having my pistol</p> <p>16 and a finger on the trigger. So base doctrine in training</p> <p>17 is finger off; it's along the trigger guard. Base doctrine</p> <p>18 is that your weapon is on safe and that when you need to</p> <p>19 fire you bring it to single-shot mode. A pistol doesn't</p> <p>20 know automatic, so it's either safe or it is on single</p> <p>21 shot. An automatic rifle will have the choice to select</p> <p>22 from either full auto or single shot.</p> <p>23 Now if you take the German-made Heckler & Koch</p> <p>24 which fires 9 millimetre rounds and which is designed for</p> <p>25 use in law enforcement, there the selector switch goes from</p>	<p style="text-align: right;">Page 37138</p> <p>1 safe, single shot, three-round burst, to full automatic.</p> <p>2 So it's virtually impossible, unless you do it</p> <p>3 deliberately, to select full automatic. But there are</p> <p>4 five. It's inverse and it shows that it's designed for</p> <p>5 warfare. So it's safe or it's initially on full auto and</p> <p>6 if you go one further it's on single shot.</p> <p>7 So you have to pay attention to what mode you</p> <p>8 select, but if you are under stress or you fear that your</p> <p>9 life is at risk, mistakes are being made and it's, the</p> <p>10 possibility for it is there, then it's only a matter of</p> <p>11 time before it occurs and the only thing standing between</p> <p>12 you and that is frequent training and exposure to scenarios</p> <p>13 that try to simulate that stress and force people to</p> <p>14 confront it. But if you never do and then it happens, that</p> <p>15 mistake gets made because in potential it was always there.</p> <p>16 MS LE ROUX: Mr De Rover, in paragraph 77</p> <p>17 of your first statement FFF11, the final sentence there</p> <p>18 you're dealing with scene 1. It says, "I do see evidence</p> <p>19 in the scene for what is called associative threat</p> <p>20 perception, i.e. officers firing because others were,</p> <p>21 without necessarily having perceived that threat</p> <p>22 themselves."</p> <p>23 My first question on associative threat</p> <p>24 perception is do you limit it to what you see for scene 1,</p> <p>25 or do you also think there was some evidence of what you</p>

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1 call associative threat perception in scene 2 based on the
 2 interactions you've had with members of scene 2? Do you
 3 limit it to scene 1?
 4 MR DE ROVER: I see it particularly at
 5 scene 1 and I think if you take some of the stills, or if
 6 you would freeze frame on some of the images of yesterday,
 7 it's worth to have a look at that and you can see that,
 8 that some people are responding because others are, but I
 9 don't necessarily think because they saw a threat
 10 themselves, and it's probably also why you get that cascade
 11 that mounds like a bell curve and then comes back down.
 12 It's a serious worry because it also, this has to do with
 13 experience and exposure to this type of incident and
 14 scenario and the problem is that now we're talking very
 15 dangerous scenarios, how can you train them, and actually
 16 I'd like a reality where you don't need to train those.
 17 MS LE ROUX: Mr De Rover, my question was
 18 do you see, do you have a view that there is associative
 19 threat perception operating at scene 2 as well?
 20 MR DE ROVER: There is, I think there is,
 21 especially –
 22 MS LE ROUX: And why do you say that?
 23 MR DE ROVER: Well, speaking to people on
 24 the southern side that were brought there by General
 25 Naidoo, some of the K9 members, I asked them what were you

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1 within the koppie because for where they are placed they
 2 can't have been placed by shots from the police.
 3 CHAIRPERSON: Ms Le Roux, I'm proposing
 4 to take the tea adjournment in a minute when it's
 5 convenient for you to do so, but can I ask you in relation
 6 to associative threat perception, is there literature on
 7 it? I don't expect you to tell us now, but can you perhaps
 8 give us a list of books or articles that deal with that,
 9 those that you find particularly helpful?
 10 MS LE ROUX: Chair, in response to our
 11 interrogatories Mr De Rover provided the HRC with an
 12 article that describes the phenomenon in US shooting. We
 13 can provide that –
 14 CHAIRPERSON: That will be good.
 15 MR DE ROVER: That was just to
 16 illustrate, because you have had for one and a half years
 17 at the evidence leaders there are three binders that
 18 actually contain far more. I just used it to say look,
 19 here's just one example of what's contained in those
 20 folders. It's not the only one. There's a raft of
 21 articles that I put in there. The problem is that I had to
 22 select.
 23 CHAIRPERSON: If the articles are with
 24 the evidence leaders and we can look at them after, we'll
 25 get them from them.

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1 shooting at and why, and two of them talk about an
 2 individual darting in and out with a handgun, and we found
 3 on the day, but it's useless because on the day where one
 4 of those officers was lying and there was no cover where he
 5 had to go down because he said shots were fired at me, I
 6 had to fall down in the grass, and there's a rock in front
 7 of him and it has a strike mark on it that was confirmed is
 8 a bullet strike mark, but that's in March 2013. I can't
 9 say when that strike mark happened, but it sort of then, on
 10 face value it supports his contention and the ballistic
 11 experts that were there admitted they missed that one.
 12 They didn't see it because they, their efforts were very
 13 much focussed on recording the shots that had gone in, but
 14 not necessarily on identifying the shots that had gone out,
 15 and the same happened on the western side where Captain
 16 Kidd is. There's a rock that shows at least six strike
 17 marks of bullets that were never recorded. Problem is now
 18 I can't say they happened, they were made on the 16th of
 19 August. So it's, but –
 20 CHAIRPERSON: Can you say which direction
 21 they came from?
 22 MR DE ROVER: Sorry?
 23 CHAIRPERSON: Can you say which direction
 24 those strike marks came from?
 25 MR DE ROVER: They would have come from

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1 MR DE ROVER: Yes.
 2 CHAIRPERSON: Can we take the adjournment
 3 now, or do you want to round off the point –
 4 MS LE ROUX: Chair, if I could just round
 5 off associative threat perception. Mr De Rover, so given
 6 your definition of it that it's essentially firing because
 7 others are firing, even if you don't perceive a particular
 8 threat, you would agree with me that that doesn't provide a
 9 lawful basis or any justification –
 10 MR DE ROVER: No.
 11 MS LE ROUX: - for that use of live
 12 force, correct?
 13 MR DE ROVER: But that – ja, that is
 14 essentially the problem, that it exists and I think there
 15 is, you know the hard thing is if you ask a scientist he'll
 16 so no, it doesn't exist, because you can't prove it. You'd
 17 have to think of a way that you can establish a simulation
 18 where you could prove that element to be true, but it is a
 19 recurring theme in a lot of articles that talk about
 20 multiple officers using their firearms and the reasons for
 21 which they used it, and just taking that example of the K9
 22 on that side, there is that claim of a person darting in
 23 and out and shouts being made to others, and the problem is
 24 that the rules of international law simply talk about a
 25 requirement of an imminent threat to life or serious

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1 injury. It doesn't say that if you feel that your
2 colleague is firing at something that poses a threat you
3 just take fire in that same general direction and you take
4 by proxy the threat to life to also –

5 CHAIRPERSON: Is it a voluntary act?
6 MR DE ROVER: Sorry?
7 CHAIRPERSON: Is it a voluntary act? I
8 can understand if my colleague is firing and if the fact
9 he's firing makes me involuntarily fire then you wouldn't
10 have a conscious act.

11 MR DE ROVER: Well, it's, ja it's more
12 like panic spreads in a crowd. If someone starts to yell
13 fire here now others might, you know, when we see smoke
14 might take that up and all of us start to scramble for the
15 door, and it's been compared to that, you know, that there
16 is a panic reaction, if you will, that all of a sudden now
17 a police officer is firing, there must be a reason for
18 that, a rationale, and others, without having properly
19 appreciated what that is, do the same thing.

20 I think it's much more readily visible in armed
21 combat. There is much more footage available of it too
22 where you can see a patrol, one soldier perceives a threat,
23 he's not going to say guys, there's a threat on that side,
24 he opens up fire and the immediate response of the others
25 is to do in the general direction the same thing until they

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1 think we were told that, weren't we? There will be a Nyala
2 available at the inspection on Monday and, if so, I don't
3 know whether someone's going to be there with a video
4 camera but there probably will be, the media houses may be,
5 so we could even fix it up then, provided it doesn't take
6 too long.

7 MR DE ROVER: But without preference for
8 any narrative I'd actually say that it would give you an
9 opportunity, if you did it, to see whether an incident
10 that's captured by a camera is actually within the field of
11 view of a commander and you'd have a point for an
12 interrogatory –

13 MS LE ROUX: And then we could make
14 submissions based on, well, this commander wouldn't have
15 been able to see –

16 MR DE ROVER: Ja, because –
17 CHAIRPERSON: Or alternatively -
18 MS LE ROUX: - or that they did see it.
19 MR DE ROVER: Ja.
20 CHAIRPERSON: When I said we'll do it, I
21 was not expressing myself with my customary precision or
22 perhaps some would say I was expressing myself with my
23 customary lack of precision, but it can be done. There
24 will be a Nyala there on Monday and provided someone is
25 there with a video camera, presumably what is suggested can

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1 actually ascertain what it is they are shooting at, and I
2 see that replicated in law enforcement in instances.

3 CHAIRPERSON: Yes, I see. Ms Le Roux, is
4 it convenient –

5 MS LE ROUX: Yes, Chair.
6 CHAIRPERSON: - for us to take the tea
7 adjournment – 15 minutes.

8 [COMMISSION ADJOURNS COMMISSION RESUMES]
9 [12:07] CHAIRPERSON: The Commission resumes.
10 You're still bound by your oath, Mr De Rover. Ms Le Roux?
11 CEES DE ROVER: (s.u.o.)
12 CROSS-EXAMINATION BY MS LE ROUX (CONTD.):
13 Thank you, Chair. Mr De Rover, I do want to just take us
14 back to your suggestion that the V2 video be further
15 annotated with what we call sort of the commander fields of
16 view so that we can see what the commanders could have
17 seen. I just want to confirm that the reason you think
18 that will assist us is that it could potentially explain
19 why those commanders were mistaken in terms of what they
20 perceived to be the intentions of the strikers or the
21 movement of the strikers. Is that what you're trying to
22 explain?
23 CHAIRPERSON: Sorry to interrupt you. It
24 could work the other way too, of course. It could indicate
25 the opposite. I understand a Nyala will be available, I

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1 be done. You and I don't have to supervise it, Ms Le Roux.
2 MS LE ROUX: Except, Chair, we may have
3 difficulty with establishing precise commander positions
4 but we can sort that out. Chair, we also must of course
5 somehow manage on Monday the community's perception that
6 we're not sort of re-enacting anything with Nyalas rocking
7 up and water cannons and the like.

8 CHAIRPERSON: That's correct.
9 MS LE ROUX: We really must manage –
10 CHAIRPERSON: That's correct.
11 MS LE ROUX: I'm sure the evidence
12 leaders have anticipated that.

13 CHAIRPERSON: Before you carry on,
14 there's a question I meant to ask the witness earlier. It
15 doesn't relate to what you're dealing with now, it deals
16 with a matter you dealt with earlier. I'd just like to ask
17 it now quickly and get it over with. When you spoke to the
18 Provincial Commissioner about the decision to act on
19 Thursday, remember we discussed that before, did she
20 mention to you that it was a factor which weighed either
21 with her alone or with the National Management Forum that
22 it was important to get in before Mr Malema arrived on the
23 scene because on a previous occasion with one of the other
24 platinum mines, Mr Malema had come and in fact spoken to
25 the strikers and brought the strike to an end and that she

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1 perceived that that was something that shouldn't be allowed
 2 to happen at Marikana. Did she mention that to you at all?
 3 MR DE ROVER: Not at all.
 4 CHAIRPERSON: Not at all?
 5 MR DE ROVER: Not at all.
 6 CHAIRPERSON: Didn't mention Mr Malema's
 7 name at all?
 8 MR DE ROVER: No, not at all, Chair.
 9 This is the first time that I hear that.
 10 MS LE ROUX: Mr De Rover, I'm not sure if
 11 you're familiar with the cross-examination by my learned
 12 friend Mr Semenya of Mr White where they dealt with this
 13 question of the dust cloud obscuring the strikers at the
 14 kraal.
 15 MR DE ROVER: Mm.
 16 MS LE ROUX: Are you familiar with that?
 17 MR DE ROVER: Not in detail but I –
 18 MS LE ROUX: But broadly that that –
 19 MR DE ROVER: I can see where your
 20 question would go, so -
 21 MS LE ROUX: Right. So I'd like you to
 22 assume that there are approximately 30 people coming around
 23 the kraal. I'd like you to assume that according to the
 24 evidence of Mr X but just assume, regardless of its source,
 25 that at the time these 30 come around the kraal they intend

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1 and if I put international legal requirements – there would
 2 obviously be an issue with a difficulty to be able to
 3 identify that threat. So I hear what you are saying and
 4 that I think is a part that I would hold would be taken
 5 into account when you rule whether, first of all whether a
 6 threat existed and then, second, whether at a time that an
 7 individual shoots, as you contend, into a cloud that's
 8 effectively obscuring that shooter's view as to what he is
 9 shooting at, whether that is then still justified because
 10 three, you know, like a second before or two seconds before
 11 the threat was visible and the fact that sand obscures it,
 12 it's still there. So I – ja, I'm not a lawyer and
 13 fortunately not a judge, so I don't have to judge on that
 14 but I see the problem you refer to and international law
 15 doesn't deal with dust clouds, it simply states there needs
 16 to be an imminent threat to life or serious injury.
 17 CHAIRPERSON: That's the common law too
 18 but I'd like to ask you another question based upon what
 19 Adv Le Roux said. I had the impression, I must look at the
 20 videos again but my impression is that before the dust
 21 cloud comes up you could actually see some of the people
 22 falling.
 23 MR DE ROVER: Ja.
 24 CHAIRPERSON: The question I want to ask
 25 you is this, assuming you, a mob are coming at you to

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1 to attack the police. I want you to assume that the
 2 intention of the individuals within that crowd changed
 3 after they saw the first few of their colleagues begin to
 4 fall. Mr X says that's because they realised the muti
 5 wasn't working and they started to turn to run away but
 6 just assume the fact that the intention of some of the
 7 individuals in the crowd changes and they turn to run away.
 8 Would you agree with me that if that change of intention
 9 and the effort to run away is happening where there is a
 10 dust cloud and therefore the police are obscured in being
 11 able to see that crowd or what they're doing then it would
 12 not be justified to shoot at that moment in time into the
 13 dust cloud.
 14 MR DE ROVER: I think you need to make
 15 that part of the investigation because again I can only, I
 16 know that you have your national law applying first so
 17 section 49, I think, of the Criminal Procedure Act –
 18 CHAIRPERSON: [Microphone off, inaudible]
 19 – applies to arrests, they weren't arrested –
 20 MR DE ROVER: But –
 21 CHAIRPERSON: Common law applies here.
 22 MR DE ROVER: Okay. So, but –
 23 CHAIRPERSON: Which is essentially the
 24 same as international law.
 25 MR DE ROVER: Okay, but if I take that

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1 attack you and you fire a couple of shots and the first few
 2 people fall, are you now – I mustn't ask you a legal
 3 question but would it not be appropriate for a reasonable
 4 policeman in those circumstances to wait to see whether the
 5 fact that the front line have been already shot and have
 6 fallen, does have some effect on those behind because I –
 7 anyway, let me not say - I've asked you the question, you
 8 give me the answer.
 9 MR DE ROVER: Well, Chair, I gather now
 10 with what we saw yesterday the contention now is whether
 11 that lasted eight seconds or 12 and I'll leave that and
 12 take it for what it is. I think at a technical level, I
 13 think your proposition is reasonable in that force should
 14 cease when you achieve our objective but if you never
 15 allow for a moment to see whether what you do sought the
 16 effect you are after, then that in itself can't be the
 17 basis on which you justify continuing it.
 18 CHAIRPERSON: It obviously depends on the
 19 distance of the front group from the shottist.
 20 MR DE ROVER: Ja.
 21 CHAIRPERSON: But if there's – and I can
 22 understand there's a possibility even of the fact that the
 23 first lot, the first line have fallen, that the others can
 24 come on, some sort of kamikaze kind of attack and if they
 25 are so close to you that you'd better act immediately, you

<p style="text-align: right;">Page 37151</p> <p>1 won't have another chance, that would be one thing but if 2 they're sufficiently far away for you to stop to see 3 whether the first, the falling of the first lot has had any 4 influence on the rest, then I take it you'd be obliged to 5 hold fire for a moment at least to see what impact that has 6 had on those following. Would that be right?</p> <p>7 MR DE ROVER: The problem is, Chair, that 8 if I take the worst possible to be true, that it in fact 9 lasted for 12 seconds, then there was only those 12 10 seconds. The contention I, at least until yesterday 11 afternoon, is that it was actually only eight and that 12 whilst I agree with that principle it is again, can you 13 make it practicable? Can you actually then apply it in 14 that time frame that was available because it was done and 15 finished then essentially, barring that additional shot 16 that we see fired and that I had no knowledge of until 17 yesterday.</p> <p>18 CHAIRPERSON: We might have to see from 19 the video, the timing of it and so on –</p> <p>20 MR DE ROVER: Ja.</p> <p>21 CHAIRPERSON: - what the time lag is 22 between the falling, the visible falling of the first 23 group. I understand the dust cloud came later actually, 24 that was my impression.</p> <p>25 MR DE ROVER: Ja.</p>	<p style="text-align: right;">Page 37152</p> <p>1 CHAIRPERSON: The visible falling of the 2 front line or some of the people in the front line and the 3 end of the firing.</p> <p>4 MR DE ROVER: Ja.</p> <p>5 CHAIRPERSON: And it obviously –</p> <p>6 MS LE ROUX: Chair, my recollection is 7 that the dust cloud is obscuring strikers about four 8 seconds into the volley. That's my recollection.</p> <p>9 CHAIRPERSON: Anyway, we can look at it 10 but the point is, my recollection, which may be faulty, was 11 you can see people in the front line falling and –</p> <p>12 MS LE ROUX: That's in the first four 13 seconds, because it's by four seconds -</p> <p>14 CHAIRPERSON: That's right, then comes 15 the dust cloud. The dust cloud wouldn't be an excuse if 16 the falling of the first line was already visible and not 17 obscured by the dust cloud. It's then a question of, 18 you've got to take things like reaction time and so on into 19 account and you can then measure with a stopwatch the time 20 lag between the visible falling of the first line, the 21 front line, and the end of the firing. That's the point.</p> <p>22 Mr Semenya?</p> <p>23 MR SEMENYA SC: Chair, one of the 24 difficulties we had with this video tape and the narrative 25 is that there are things in the video which are not</p>
<p style="text-align: right;">Page 37153</p> <p>1 consistent with a theme the narrator wants and it's not 2 mentioned as part of the narrative. Now I'm making this 3 statement to allude to the next one. Even in the outline 4 you give, Chair, after the first person falls there are 5 still others who are coming and –</p> <p>6 CHAIRPERSON: No – no, I understand that. 7 In fact I wasn't even thinking of looking at this video 8 because I know there's a caveat which you entered 9 yesterday, you may remember, but even on the videos you've 10 got already, it's something that one can look at. I 11 understand there may be arguments about it and one of the 12 factors would be whether there's enough reaction time for 13 the police to assess whether the falling of the front line 14 has any effect on those behind, one factor. And the other 15 factor you make is that even if they did that and they saw 16 the people still advancing, that would neutralise the 17 point. I think these are all matters that can be argued, 18 can't they, at the appropriate time. Am I right?</p> <p>19 MR SEMENYA SC: It can, Chair. The 20 trouble I had was if the entire narrative is not given to a 21 question, as the Chair says, posterity will had that 22 excerpt as though it was an answer to a complete picture 23 when it was not.</p> <p>24 CHAIRPERSON: Of course Adv Le Roux was 25 dealing with the dust cloud, her question is, should you</p>	<p style="text-align: right;">Page 37154</p> <p>1 shoot if it's a dust cloud? My question is a different 2 one, should you shoot if before the dust cloud you see the 3 front line falling, but anyway I think the witness has 4 given an answer. If he wishes to amplify or expand on his 5 answer he can do so, then we can move on.</p> <p>6 MR DE ROVER: Judge, maybe just one 7 addition if –</p> <p>8 COMMISSIONER HEMRAJ: Sorry, can I just 9 add something to that? If you're taking a moment to see 10 who has fallen and who has not, don't you run the risk of a 11 potential attacker being closer to you then, if you're at 12 close quarters –</p> <p>13 CHAIRPERSON: From a distance.</p> <p>14 MR DE ROVER: Chair, the –</p> <p>15 COMMISSIONER HEMRAJ: That's why I said 16 at close quarters.</p> <p>17 MR DE ROVER: The issue is that it's 18 either eight or 12 seconds that that confrontation from 19 first shot fired to people observing the cease fire, so 20 there's a very limited time frame. I would just contend 21 that as a basis the international principles say, and I 22 think it's embodied in the principle of necessity, you 23 don't inflict more harm than you have to, than is 24 absolutely required and justified by the circumstances. I 25 understand Ms Le Roux's question to go to that nature and</p>

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1 that is the question, so the standard is there. I think
 2 the standard of necessity is embodied in that. Now the
 3 question is, can you make it operational in the context
 4 there? Was it, like are they aware of that standard? I'd
 5 hope so. And are they able to act on that standard? Is
 6 there time to act and is it reasonable to hold them to that
 7 standard in those circumstances?
 8 CHAIRPERSON: The close quarters problem
 9 we can work out the answer to on Monday, we can measure the
 10 distance actually between the TRT line and the place where
 11 –
 12 COMMISSIONER HEMRAJ: Mr Chaskalson's
 13 measured it -
 14 MR CHASKALSON SC: Chair –
 15 CHAIRPERSON: He can measure it on his
 16 Google Earth, I'd like to measure it on the ground.
 17 MR CHASKALSON SC: No, no, no.
 18 Chairperson, we will have grave difficulty, that landscape
 19 has changed dramatically. So there are no markers that one
 20 can see from the original time period that are still in
 21 existence other than the kraal itself and I can foresee a
 22 great deal of debate between parties if we try to pin down
 23 the exact position. We will do our, we'll make our best
 24 attempt.
 25 CHAIRPERSON: Ja.

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1 at scene 2 and he said that he agreed with the approach
 2 that, "the whole operation should have been slowed down,
 3 police officials should have backed away to a safe distance
 4 and negotiations should have been reignited or reinitiated,
 5 trying to speak to them and giving the opportunity and,
 6 simultaneously with that negotiation happening, there would
 7 have been a full reorganisation of what would have had to
 8 be a sweep through in that case should it have been
 9 necessary." Are you aware that Lieutenant-Colonel Scott
 10 expressed his preference for perhaps not a retreat but an
 11 attempt to contain the situation at scene 2 without using
 12 lethal force? Are you aware of that evidence?
 13 MR DE ROVER: I'm aware of a plan that
 14 never envisaged scene 2 the way it unfolded. What was
 15 meant to happen that TRT and POP were to approach from the
 16 east and north side and leave the south and western sides
 17 open so that people actually have a pathway out of koppie
 18 3. So the base design was there and I've said from the
 19 beginning, and you'll find the reference in my first
 20 statement, the operation should have been halted after
 21 scene 1.
 22 MS LE ROUX: And given that you've
 23 accepted as a point of principle that a law enforcement
 24 official should consider retreat before using lethal force,
 25 putting the two together, do you agree with Lieutenant-

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1 MR CHASKALSON SC: But I do foresee
 2 difficulties.
 3 CHAIRPERSON: We'll cross that bridge
 4 when we have to.
 5 COMMISSIONER HEMRAJ: Didn't you give us
 6 a measurement of 12 metres? I think it was for –
 7 MR CHASKALSON SC: It was 12 to Warrant
 8 Officer Kuhn and –
 9 COMMISSIONER HEMRAJ: That's right.
 10 MR CHASKALSON SC: 18 to the –
 11 COMMISSIONER HEMRAJ: To the TRT line.
 12 MR CHASKALSON SC: To the TRT line.
 13 COMMISSIONER HEMRAJ: Yes.
 14 MS LE ROUX: Mr De Rover, if I can then
 15 move on to scene 2 and I don't intend to spend any
 16 significant amount of time on it but on e aspect of scene
 17 that I wanted to canvass with you is, do you accept that as
 18 a point of principle that a law enforcement officials
 19 should consider retreat before using lethal force?
 20 MR DE ROVER: If that is practicable,
 21 yes.
 22 MS LE ROUX: And are you aware of the
 23 evidence of Lieutenant-Colonel Scott – Chair, the reference
 24 is say 141, page 15293 lines 17 to 25 – there Lieutenant-
 25 Colonel Scott was asked to comment about what had happened

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1 Colonel Scott's view that one it was clear the strikers had
 2 holed themselves up in koppie 3, that the police had legal
 3 obligation or had a –
 4 CHAIRPERSON: No, no, no, he can't say
 5 what the legal obligations were.
 6 MS LE ROUX: Chair, let me rephrase. Do
 7 you agree with Lieutenant-Colonel Scott's view that once it
 8 was clear that the strikers had holed themselves up in
 9 koppie 3, it would have been preferable to retreat rather
 10 than firing 295 live rounds into the koppie?
 11 MR DE ROVER: Absolutely.
 12 MS LE ROUX: If we can then move on to,
 13 in your second statement FFF11A and Chair, it's page 29
 14 paragraph 62 of that statement, you're setting out your
 15 conclusion on the koppie 3 deaths and the second sentence –
 16 sorry, the first sentence concludes by saying, "I believe
 17 that the deaths of nine protesters at koppie 3 referred to
 18 above," that's where you've set out your account of the
 19 events, "were incidental and not intentional." Am I
 20 correct that by incidental and not intentional you mean
 21 that they were the result of shots that were not aimed or
 22 intended to hit the person that it hit? Is that what you
 23 mean?
 24 MR DE ROVER: Chair, I think when I went
 25 there that was a – the emotional experience I had on the

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1 spot was not just to have the police there but to actually
 2 realise and I think that factor has not been emphasised
 3 here a lot but there were, when that police action happened
 4 there were 300 people there. Now you go there on Monday,
 5 you just walk around there and tell me where those 300
 6 people are going to be and where they can find cover. So
 7 whilst listening and just listening and hearing policemen
 8 say that there was something of a threat and they shot at
 9 that threat and missed, I now picture these rounds
 10 travelling through that area and you, on Monday, the
 11 foliage there is distinctly different although the
 12 ballistics report will give you an idea but the ballistics
 13 report also shows you the evidence of how far and
 14 penetrating those rounds were. Now, there is a very
 15 unfortunate term in humanitarian law that calls situations
 16 like that collateral damage and I'm loathe to employ that,
 17 but from the stories and the reality and the geography on
 18 the ground, the fact is that shots were fired allegedly in
 19 self-defence. That remains to be seen and tested, whether
 20 that is true. Those shots missed and then continue on
 21 their path.
 22 [12:27] And the worst part of it is that in that centre
 23 area of koppie eventually you have shots from four
 24 directions travelling through, and I can't remember the
 25 exact number I said, but that might have been in excess of

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1 150. Now put 300 people there, because that would have
 2 been the most likely spot where they would have thought
 3 themselves safe; you have sight cover and fire cover, but
 4 you do not have fire cover for fire from all directions.
 5 You'd have it at best for two, but not for four, and that's
 6 why I'm saying that tragic as that is, I'm mindful of the
 7 fact that the number because then of what you have there,
 8 at least 150 rounds flying through and there are nine
 9 deaths there that can't be linked to an individual shooter,
 10 that could have been much higher, and I think that the
 11 position in which people were found and the injuries they
 12 suffered, my reading is that that – and I'm not an expert
 13 on that, so please discount if you disagree, but there
 14 would have been normal interactions going on. So we are
 15 facing each other. I'm bending to pick something up and at
 16 that moment a round strikes the top of my head, and I
 17 realised that standing there and that took my breath away.
 18 It's terrible.
 19 MS LE ROUX: Mr De Rover, in your
 20 statement where you determine that nine of the deaths were
 21 incidental and not intentional, we haven't seen which nine
 22 individuals you ascribe that judgment to. Would you be
 23 able to provide us with that information?
 24 CHAIRPERSON: Forgive me for a moment. I
 25 know you're running out of time. Mr De Rover, would you

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1 like an adjournment for five minutes? I can see you're
 2 very moved by what you've just said. Five-minute
 3 adjournment? Can we sit till 5 past 1, Mr Semenya?
 4 [COMMISSION ADJOURNS COMMISSION RESUMES]
 5 [12:34] CHAIRPERSON: The Commission resumes.
 6 Are you able to continue now, Mr De Rover?
 7 MR DE ROVER: Sure.
 8 CHAIRPERSON: I understand your response
 9 to the previous evidence. Yes, Ms Le Roux.
 10 MS LE ROUX: Thank you, Chair. Mr De
 11 Rover, two housekeeping points occurred to me before we
 12 finish. Well not that I'm finished, Chair. Advocate
 13 Budlender yesterday was asking you about the contingency
 14 plan that you identified or mentioned in that testimony.
 15 Have you been able to locate the specific document you were
 16 referring to?
 17 MR DE ROVER: Not yet. To be honest I
 18 had other things I looked at last night including the
 19 exhibit that you showed yesterday afternoon, I looked at it
 20 again. I haven't given it any –
 21 MS LE ROUX: Well we'll follow up through
 22 the SAPS legal team.
 23 MR DE ROVER: Okay.
 24 MS LE ROUX: And then if I could ask you
 25 just again, JJJ178.10 which was the response we got from

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1 SAPS on points of disagreement in June. I just wanted to
 2 clarify from yesterday's evidence, did you have input into
 3 that document?
 4 MR DE ROVER: Can you give me the
 5 reference again?
 6 MS LE ROUX: It's JJJ178.10. It's
 7 attached to Mr White's statement. It's up on the screen,
 8 Mr De Rover. I don't know if we can scroll it for you so
 9 you can familiarise yourself with it, if you recognise it.
 10 Do you recognise this document?
 11 MR DE ROVER: No.
 12 MS LE ROUX: Not. Okay what we'll do
 13 then is follow up through the SAPS legal team to establish
 14 whether you had input into this document. So when it
 15 refers to we response, we repeat, we do this, we do that
 16 whether that includes yourself or whether that was the SAPS
 17 legal team alone.
 18 MR DE ROVER: I definitely did not write
 19 this.
 20 MS LE ROUX: Okay, we'll then establish
 21 how it was prepared with the SAPS legal team.
 22 MR DE ROVER: You asked for the
 23 identification of the nine on scene 2, do you still want an
 24 answer to that?
 25 MS LE ROUX: Yes, but again we can

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1 facilitate it through the SAPS legal team. Mr De Rover, in
 2 your second statement FFF11A and specifically page 12 of
 3 that statement, paragraph 21 here you're dealing with a
 4 section entitled The SAPS Doctrine of Maximum Force. And
 5 paragraph 21 at page 12 states "I'm aware of incidents in
 6 recent SAPS history that have given rise to the belief that
 7 a doctrine of maximum force does exist within the
 8 organisation. My own review of these incidents leaves me
 9 to contend that they were indeed isolated incidents and do
 10 not provide evidence or even strong indication of an
 11 organisational breakdown within SAPS with regard to the use
 12 of force and firearms culminating in the systemic and
 13 deliberate use of lethal force against civilians."

14 So we were interested, given that you said my own
 15 review of the incidents, we were interested in the review
 16 that we thought you had conducted. So in GW4A, the
 17 annexure to Mr White's statement we asked you to please
 18 identify which incidents you had reviewed and then in GW4B
 19 we got the response that "Mr De Rover did not examine – the
 20 incidents referred to are those raised in cross-examination
 21 by various parties to claim a doctrine of maximum force
 22 within SAPS. Mr De Rover did not further examine those.
 23 He rather went down the path to explain basic law
 24 enforcement structures and practises with regards to use of
 25 force and firearms." So I just want to be clear, in your

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1 actively using it. And again it's not a – it doesn't give
 2 you a certainty that there wasn't a case of abuse or a
 3 criminal offence. But at least when you look over a period
 4 of a year or five years you get a fair indication of
 5 whether force is systematically abused. So if, for
 6 example, you get an indicated that as happened in Jamaica,
 7 that the number of civilians killed as compared to police
 8 killed is 75 times higher and that the percentage of police
 9 killings, of civilians is virtually 25% of the homicide
 10 statistic for that country. I would say on prima facie
 11 indication I'd want to have a serious talk with and I've
 12 actually been to Jamaica and tried to have a serious talk
 13 with them about they employ force. And those methods help.
 14 Now if you look at the realities for South Africa then
 15 you're actually doing on that count marginally better than
 16 the USA. So I would then at least content you don't appear
 17 to have an issue with systemic abuse of force and firearms.
 18 And I'm told to be acknowledging that you do have incidents
 19 of abuse of force and firearms here that obviously need
 20 follow up and investigation. But not the extent that I
 21 would say there is also a need to look at the system that
 22 is SAPS. The way it's governed, the way it's structured
 23 and managed. It appears to be at a level of application
 24 and that triggers a control question, but it doesn't
 25 trigger a systemic one. That was the push of those

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1 statement you say my own review of these incidents, you
 2 didn't actually review any incident.

3 MR DE ROVER: Well I did look into a few
 4 of them. The Tatane case comes back to mind from that time
 5 and without qualifying that further I did not see a reason
 6 to equate that to an organisational or a systemic breakdown
 7 within SAPS.

8 MS LE ROUX: But beyond that research you
 9 didn't – those are the incidents in recent SAPS history
 10 that you're referring to and only those.

11 MR DE ROVER: Yes but I think what you
 12 read out there in my statement should probably be preceded
 13 by the study that I did that seeks to establish how often
 14 does the police use lethal force. How many police
 15 officials get killed in the line of duty every year and
 16 what percentage does that represent of the total number of
 17 homicides in the country. And because I'd be loathe to use
 18 one or two incidents to elevate that to a norm or a
 19 standard which seemed to have happened before the
 20 Commission. Now again that particular methodology is used
 21 or was used by a previous special repertoire on arbitrary
 22 and summary execution, Mr Philip Olson and I can refer you
 23 to the exact document and paragraph where it's set out that
 24 he's using that. So it's not just something that I
 25 developed and kept to myself but others are actually

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1 paragraphs.

2 CHAIRPERSON: Perhaps you could put it in
 3 terms that I can understand. Are you saying then that
 4 these statistics are - at least circumstantial evidence
 5 indicates that the unfortunate remarks made by the Deputy
 6 Minister, a former deputy minister I think around about
 7 2008 do not appear to have led to what you call an
 8 institutional breakdown within the SAPS culminating in the
 9 deliberate use of lethal force against civilians in
 10 circumstances where it wasn't justified. Would that be a
 11 fair summary of what you're saying?

12 MR DE ROVER: I think that that is true
 13 and I'd be disappointed if it was different because again I
 14 say police officials are public officials that swore an
 15 oath and I would say that many of them want to be in the
 16 police and want to be police officials. And then there are
 17 people who do not deserve to be there because in your
 18 selection process you do happen to turn away people that
 19 you should have accepted but worse is that you end up
 20 accepting people that you should have turned away. And I
 21 think SAPS is struggling with that reality to remedy that,
 22 that you've got your rotten apples in the basket and that
 23 you need to try and get rid of them. But I know that
 24 quote, I've even heard it because I found a video where it
 25 is being said. I know of others, previous police

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1 commissioners who made statements to similar effect, I'm
 2 just glad to see that my conclusion still is that obviously
 3 the individual officer is aware of his duties and
 4 responsibilities that have to be in accordance with the law
 5 and that there hasn't been an organisational following of
 6 what was indicated almost as a blank cheque to run wild.
 7 And it is important to note that South Africa loses, you
 8 know, I think it's between 2008 and 2013 close to 800
 9 police officials in the line of duty and that is a serious
 10 count because I think Holland maybe loses one every 10
 11 years.
 12 MS LE ROUX: Mr De Rover, I'm sure you'll
 13 pleased to know I'm onto my final topic which is to ask you
 14 whether you agree with me that reasonable expert witnesses
 15 can disagree on substantial matters, but that disagreement
 16 doesn't indicate that one or other of the experts is
 17 lacking objectivity or impartiality. Do you agree with
 18 that?
 19 MR DE ROVER: The term expert is not a
 20 protected one, nor is it linked to a training that you can
 21 do. So you know I think show me an argument and I'll show
 22 you 20 that go the other way. I think that that's a given.
 23 I've tried to offer this Commission not more of the same,
 24 but something different and I hope it assists the
 25 Commission. I'm fully conscious that at times it may not

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1 task is to get you to agree with me that you can disagree
 2 without becoming partial.
 3 MR DE ROVER: Sure.
 4 MS LE ROUX: Okay. You'd also agree with
 5 me that it's very serious to allege that an opposing expert
 6 lacks impartiality or objectivity without a sound factual
 7 basis for making that allegation. That if you're going to
 8 allege that an expert lacks objectivity and impartiality
 9 you need a basis to do so.
 10 MR DE ROVER: Yes.
 11 MS LE ROUX: Now in your June response to
 12 our interrogatories, Chair, it's UUUU1.3. In the first
 13 paragraph of that response you are recorded to state "The
 14 pejorative and highly emotional language of Mr White's
 15 statement call into question for me his status of an
 16 impartial and objective expert witness. Examples include
 17 reference to anticipation of an attack by police which in
 18 my view is unusual language to refer to a possible police
 19 operation coming from an experienced police official and
 20 regular use of words such as reckless, excessive and
 21 shambolic." I'd like to start with the first where you say
 22 that Mr White used the phrase "anticipation of an attack by
 23 police." Now we've been unable to find that phrase in any
 24 of Mr White's statements or submissions to the Commission.
 25 Can you explain why you've attributed that phrase to Mr

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1 help your argument and that obviously you're keen on
 2 getting specifics that assist you. And then I just have to
 3 admit that's not why I'm here. I'm not here to help you,
 4 I'm here to help the Commission.
 5 MS LE ROUX: Mr De Rover, my question was
 6 whether despite disagreements between experts, as a matter
 7 of principle, that disagreement doesn't mean either one
 8 lacks objectivity or impartiality does it?
 9 MR DE ROVER: No.
 10 MS LE ROUX: Reasonable experts can
 11 disagree without becoming in any way partial.
 12 MR DE ROVER: I had a business teacher
 13 who once pointed out to class in one of the first sessions
 14 that the moon in Turkey looks different from the moon in
 15 Holland because in Turkey you see a lying banana and in
 16 Holland a standing one. He said you better not forget that
 17 you're both looking at the moon. So at times I think it's
 18 perspectives that differ. If you come from a certain angle
 19 you look at an issue, you come with findings and you base
 20 them on your honest, expert opinion. An expert comes from
 21 another angle and picks up something different. That
 22 doesn't have to bite each other, totally not, there can be
 23 expert disagreement. The unenviable tasks rests with this
 24 Commission to say where their preference lies.
 25 MS LE ROUX: And my assumingly unenviable

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1 White, an attack by police?
 2 MR DE ROVER: I think it was in response,
 3 it was a question put to me whether –
 4 MS LE ROUX: It was a question put to you
 5 by the legal team.
 6 MR DE ROVER: Sorry.
 7 MS LE ROUX: It was a question put to you
 8 by the legal team that that phrase does not appear in
 9 anything authored by Mr White.
 10 MR DE ROVER: The question put to me was
 11 and I took that that question was a question from Mr White
 12 and so if I'm now erring on the path that in fact he did
 13 not write that question because the way it was presented to
 14 me was these are the questions of Mr White directed at you.
 15 And I took it that he would have drafted those. So in one
 16 of those questions it was asked and I can't exactly
 17 remember whether I said that something was to the left
 18 whether it couldn't have been as much an indication of an
 19 intended or anticipated attack by the police. Attack is a
 20 military term, it comes from situations of conflict, an
 21 attack is well defined in international law. So of course,
 22 I took exception because attack is not an acceptable term
 23 in law enforcement.
 24 MS LE ROUX: And if you accept that –
 25 CHAIRPERSON: I understand that, but

<p style="text-align: right;">Page 37171</p> <p>1 apparently we now know, we're now told and we must accept 2 it.</p> <p>3 MR DE ROVER: I accept that, so that 4 obviously I was mistaken in the identity of the author so 5 then humbly I apologise and I think there is then sense no 6 need to continue because I was reading something that was 7 written by Mr White.</p> <p>8 MS LE ROUX: Okay so if you accept that 9 it was an error made by the legal team that that should not 10 in any way be a basis to accuse Mr White of being un- 11 objective or impartial or partial.</p> <p>12 MR DE ROVER: No absolutely. So I 13 totally –</p> <p>14 MS LE ROUX: Now the second example that 15 you put up as a basis for attacking Mr White's impartiality 16 and objectivity in what you call his regular use of the 17 words and first one is reckless and then excessive and 18 shambolic. Now with respect to excessive we have managed 19 to find that he used it twice as a qualifier for the use of 20 force. I did a similar exercise in the second edition of 21 your book To Serve And Protect and excessive appears there 22 17 times and excessive use of force appears five times. So 23 if Mr White can be accused of highly emotional and 24 pejorative language because he uses the word excessive 25 twice would you accept that To Serve And Protect similarly</p>	<p style="text-align: right;">Page 37172</p> <p>1 suffers from pejorative and highly emotional language? 2 MR DE ROVER: If the base contention is 3 that you can compare apples and oranges then I would have 4 to agree with you, but To Serve and To Protect seeks to 5 explain concepts in an international setting and then it 6 is, of course, necessary and required that you explain what 7 excessive force is without a quality judgment. Now my base 8 attitude is that it may hamper the Commission that you 9 attach that qualification to it although I can see why he 10 made it. And it was more along those lines that to me and 11 I'll say that on a personal level, that those few 12 qualifiers, shambolic is the other one, just took away from 13 the quality of his analysis. And I found it a shame, 14 that's just what I thought, that I thought if those had not 15 been there I'd regard that I held for his analysis and I 16 tried to make amends here, publicly, by acknowledging that 17 I agree with that analysis. And that my not addressing 18 them didn't meant that I didn't see a need to, I just 19 didn't want to do more of the same. So his work is solid, 20 I just think that those few moments that have that what 21 can't be anything else but a subjective qualifier to it 22 make it, ja difficult. At least I thought that was worth 23 mentioning.</p> <p>24 CHAIRPERSON: Mr De Rover, is the point 25 that you're making now a valid one? Let me put my problem</p>
<p style="text-align: right;">Page 37173</p> <p>1 to you about that. I understand that's the way you thought 2 and I'm not criticising you for that, but I just need to 3 know whether the point you make is a sound one. If you 4 want to say someone used too much force, excessive is a 5 perfectly permissible adjective. It expresses precisely 6 what you want to say isn't that so?</p> <p>7 MR DE ROVER: But it is at a point that 8 you haven't yet made that decision.</p> <p>9 CHAIRPERSON: No, his opinion, I haven't 10 looked at the cases where he used it, but I take it as 11 where he said too much force is being used in his opinion 12 based on the evidence. Now if he says too much force do 13 you quarrel with that and if he's saying too much then as a 14 matter of English isn't excessive a perfectly permissible 15 synonym? Is that right, do you agree?</p> <p>16 MR DE ROVER: I'm only expressing my 17 personal opinion on it and –</p> <p>18 CHAIRPERSON: That doesn't make him 19 impartial and lacking in objectivity.</p> <p>20 MR DE ROVER: I've already said in 21 regards to that that was to the previous question and that 22 obviously I was mistaken as to who was the author.</p> <p>23 CHAIRPERSON: Now let's go to reckless. 24 Reckless, I don't know whether you use the word in Holland, 25 it's a Latin expression. We use the word dolus eventualis</p>	<p style="text-align: right;">Page 37174</p> <p>1 in South Africa. It means foresight of possibility and not 2 caring as to whether that possibility will eventuate. 3 That's our legal term for recklessness. Now if he thought 4 the conduct of the police, again I don't know the specific 5 context, the context of the police indicate that – he 6 thought there were consequences which they foresaw as being 7 possible. And he thought they proceeded nevertheless, 8 regardless as we would say. Again the word reckless would 9 be the appropriate expression to convey that, would it not? 10 Now let's go to shambolic. Shambolic is more of a 11 [12:54] Shambolic is more of a slang work, I am not sure 12 it is anything other than that. But the word shambles is a 13 word one uses to indicate there's a lack of organisation, 14 there's a lack of method, regularity about a situation. 15 Shambolic is the – and he thought that at certain points 16 particularly at scene 2, I think, things weren't proceeding 17 according to plan at all.</p> <p>18 MS LE ROUX: No, Chair, Mr White uses the 19 word "shambolic" once –</p> <p>20 CHAIRPERSON: In what context? 21 MS LE ROUX: And it's with respect to the 22 rollout of the barbed wire –</p> <p>23 CHAIRPERSON: Oh, I see. 24 MS LE ROUX: - in that it was not 25 simultaneous, it –</p>

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1 CHAIRPERSON: Alright, okay.
 2 MS LE ROUX: - that we had evidence of
 3 the members involved who didn't understand what it needed
 4 to be used for and that Brigadier Calitz was unaware of all
 5 of these issues relating to barbed wire. He uses it in
 6 that context once.
 7 CHAIRPERSON: Shambolic is the adjective
 8 for shambles. A shambles is, things go awry rather badly.
 9 Would that be not an appropriate word to use? Possibly one
 10 you wouldn't use but can one criticise somebody who uses
 11 that English word, the adjective of shambles, to describe a
 12 shambles in the sense I've endeavoured to define?
 13 MR DE ROVER: Chair, with the
 14 qualifications you give I'm happy to accept that and to
 15 apologise if that causes distress because I think it
 16 distracts from what we are trying to do. The other thing
 17 is, I do need to point out I'm not a native English
 18 speaker, I'm still learning.
 19 CHAIRPERSON: But you do very well, if I
 20 may say so. No, the reason I raise this with you is it
 21 seems to me that Mr White who is also in the field now as a
 22 retired police officer giving professional advice all over
 23 the world and a suggestion that he's not an impartial and
 24 objective expert witness is something which, if it stands
 25 un-withdrawn, could cause him some harm I would have

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1 appeared to have had inadequate equipment to deal with the
 2 situation. Now can you tell us precisely what that, in a
 3 sentence or two what that document shows and I'm going to
 4 read it, I've tried reading bits of it already and
 5 fortunately written Dutch is not very different from
 6 written Afrikaans. If it's read aloud then we have
 7 difficulty. It's easier in some ways than Afrikaans to
 8 English speakers because the Dutch use more English words
 9 than the Afrikaners do, but what exactly in that document
 10 that you gave us to read must we look out for and what does
 11 it teach us that can help us here?
 12 MR DE ROVER: It is, in short, an
 13 incident of a concert that was held on the beach in Holland
 14 at [indistinct] 30 000 people come just to enjoy that and
 15 at the same time 80 soccer hooligans decide that that is a
 16 nice opportunity to simply cause problems, so they enter
 17 that sphere, they identify people that they reckon belong
 18 to a rival soccer club and then fights erupt and it's a
 19 group of 80 that cause tremendous problems there. And as
 20 happened here, there's problems with police communications,
 21 there's problems with deployment but the thing is that in
 22 that incident the police fire more than 200 rounds nine
 23 millimetre. One protester dies, five are seriously
 24 injured, several police sustain injuries and what happens
 25 subsequent, and this is why I use that it shocks public

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1 thought. So I take it you - are happy to withdraw that?
 2 MR DE ROVER: Chair, I'm more than happy
 3 to withdraw that and to add to it that we've actually
 4 exchanged business cards and are fully intending to be in
 5 touch, so I do not see that problem occurring.
 6 CHAIRPERSON: You wouldn't have done that
 7 if you'd not regarded him as someone who is, now regard him
 8 as someone who is impartial and objective, is that fair?
 9 MR DE ROVER: Sure.
 10 MS LE ROUX: And Chair, you just stole my
 11 last question, so I have no more questions for Mr De Rover.
 12 CHAIRPERSON: I'm sorry to have done that
 13 but I'm pleased - one question I want to ask. It won't
 14 require a very long answer but you gave us a document in
 15 Dutch, a report prepared in respect of some action by some
 16 people who were described by "hooligans" which I take it
 17 means the same in Dutch as it does in English. I think
 18 it's actually an Irish word but we haven't got Mr White to
 19 tell us whether that's correct. An incident at the Hoek
 20 van Holland.
 21 MR DE ROVER: Ja.
 22 CHAIRPERSON: Where some hooligans
 23 behaved very badly.
 24 MR DE ROVER: Yes.
 25 CHAIRPERSON: And where the police

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1 conscience, the next day this triggered a response from the
 2 Queen in Holland on TV and it triggered a response from
 3 politics where the actions of that group, whatever their
 4 motive, were condemned and where the police were given by
 5 government, because of the fact that it was an incident
 6 that shocked the conscience of the nation and that had
 7 serious implications for safety and security in the
 8 country, the police were given the order to pursue this as
 9 a matter of the highest priority and part of that pursuit
 10 was the subsequent investigation because obviously the
 11 policing operation had serious flaws in it and I think that
 12 report will line those out and give you an insight in
 13 those.
 14 CHAIRPERSON: Thank you very much.
 15 Sorry, Mr Bizos? We've run out of time.
 16 MR BIZOS SC: Mr Chairman, we wish to
 17 place on record that we consider this an important witness
 18 and we have what we believe to be vital questions to put to
 19 him.
 20 CHAIRPERSON: You didn't apply for leave
 21 to cross-examine him, did you?
 22 MR BIZOS SC: I beg your pardon?
 23 CHAIRPERSON: You didn't apply for leave
 24 to cross-examine him, did you?
 25 MR BIZOS SC: This is correct -

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1 CHAIRPERSON: I have a suggestion to
 2 solve your problem.
 3 MR BIZOS SC: Yes.
 4 CHAIRPERSON: I take it that Mr De Rover
 5 will be happy to provide written answers to any
 6 interrogatories that you may wish to address to him in
 7 relation to matters which you regard as of great importance
 8 where you think his answers may well be of assistance to
 9 the Commission. I take it I'm correctly expressing what
 10 your attitude would be -
 11 MR BIZOS SC: Well -
 12 CHAIRPERSON: - Mr Bizos?
 13 MR BIZOS SC: I am glad but I did want to
 14 indicate that I do not wish to lay blame on anyone but I
 15 would ask you, Mr Chairman, to indicate to the witness that
 16 the interrogatories are to be answered by him and not after
 17 consultation with our colleagues or members of the police.
 18 We are entitled to the right -
 19 CHAIRPERSON: If you'd asked him the
 20 questions here when he's sitting at the witness table he
 21 would have given his answers without that. Now you're
 22 asking for the same thing, in effect, and I'm quite sure -
 23 I'm not going to tell him to do that because I think I'd be
 24 insulting him if I told him to do that because I'm sure he
 25 is going to do that anyway.

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1 it necessary and we communicated that to you and it's on
 2 the strength of that that you adopted a particular attitude
 3 to the leading of evidence here, that we didn't consider it
 4 necessary for every single shottist to come and explain why
 5 he shot. The view we took and it's the view we hold is
 6 that it was sufficient to have representative people from
 7 different groups, different situations, explaining the
 8 situation as they saw it and explaining why in particular
 9 cases they fired. After all, the test would be on e of
 10 reasonableness and if it was reasonable for witness A to
 11 shoot then it would be reasonable for someone in the same
 12 group as he was, witness C, to do the same. If it was
 13 unreasonable for witness A, the same would apply to witness
 14 C and that was the ruling that I indicated to you in
 15 chambers. It was on the strength of that that you made the
 16 decision not to call every shottist.
 17 MS LE ROUX: Chair -
 18 MR SEMENYA SC: I am indebted to you,
 19 Chair.
 20 CHAIRPERSON: Alright. Yes, Ms Le Roux?
 21 MS LE ROUX: And Chair, of course that
 22 approach will still be the subject of submissions by other
 23 parties in connection with as to whether that -
 24 CHAIRPERSON: Well, you can make - ja,
 25 that's the ruling I gave. If you want to attack it then

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1 MR BIZOS SC: I just thought that
 2 although he seems to be quite versed with legal principles,
 3 that he may not have known of the rules of our profession
 4 and what is expected of a witness.
 5 CHAIRPERSON: Yes, no, as I've said I am
 6 not going to ask him to do that. I think I'd be insulting
 7 him if I did, I don't think it is necessary. I am sure he
 8 will behave in the way you have suggested he should, okay.
 9 MR BIZOS SC: Thank you, Mr Chairman.
 10 CHAIRPERSON: Thank you, Mr De Rover,
 11 you're excused. Oh sorry, Mr Semenya, I beg your pardon,
 12 your light is on.
 13 MR SEMENYA SC: Chair, directly arising
 14 out of the cross-examination by my learned colleague Ms Le
 15 Roux in relation to justification of each and every bullet
 16 fired, I think my request for a ruling is now imminent and
 17 I must place it on record because we will fail to discharge
 18 that legal hurdle in the time available.
 19 CHAIRPERSON: [Microphone off, inaudible]
 20 the ruling you want me to give?
 21 MR SEMENYA SC: The ruling couched as we
 22 possibly agreed with -
 23 CHAIRPERSON: Oh, I remember what it is
 24 now. I did indicate to you in chambers, as I indicated to
 25 some of the other parties, I think, that we do not consider

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1 obviously you're free to do so. If you have 50 people who
 2 fire and you've got, representative come and say why they
 3 fired, the likelihood that any one of the others would have
 4 some particular factor operating in his mind is something
 5 that one will have to consider as and when it arises as a
 6 possibility or as a non-possibility but anyway -
 7 MS LE ROUX: Chair, we would certainly -
 8 CHAIRPERSON: If you want to address
 9 submissions to us at the end on the matter, obviously you
 10 can do so.
 11 MS LE ROUX: When was the ruling given?
 12 CHAIRPERSON: [Microphone off, inaudible]
 13 the ruling now. I communicated to Mr Semenya that was my
 14 attitude. If I hadn't said that, we would be here until
 15 the - well, if we had enough time - till sometime towards
 16 the end of next year with every single shottist coming to
 17 give evidence, which would have been, in my view shared by
 18 my colleagues, would have been unnecessary in the
 19 circumstances. You have obviously never had experience of
 20 faction fighting cases. If you call every member of each
 21 faction, those cases would go on forever. The procedure
 22 followed is the one that I've indicated. Anyway, if you
 23 want to make submissions to us on the point you may do so.
 24 MS LE ROUX: We will, Chair.
 25 CHAIRPERSON: Thank you, Mr De Rover. I

1 take it you're leaving our country soon. Thank you for the
2 evidence you've given us and we wish you bon voyage on your
3 return home. We will now adjourn. We resume at 10 o'clock
4 on Monday morning at forward holding area A –

5 COMMISSIONER HEMRAJ: One.

6 CHAIRPERSON: I'm sorry.

7 COMMISSIONER HEMRAJ: Forward holding
8 area 1.

9 CHAIRPERSON: Ja, Adv Pingla says it's
10 because we started at half past eight. We will resume at
11 forward holding area 1 at 10 o'clock on Monday at Marikana.

12 [COMMISSION ADJOURNED]

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