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 90  13 MAY 2013  PAGES 9500 TO 9642

HELD AT

CIVIC CENTRE, RUSTENBURG, NORTH WEST PROVINCE

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13th May 2013 Marikana Commission of Inquiry Rustenburg

[PROCEEDINGS ON 13 MAY 2013]

[10:16] CHAIRPERSON: The Commission resumes. Ms Barnes, I see you’re back here this morning, appearing for AMCU. I understand you have something to tell us.

MS BARNES: Yes, thank you, Chair. I have a statement by Mr Joseph Mathunjwa, the president of AMCU, which I wish to read out. Mr Mathunjwa had hoped to be able to be here today in order to read the statement himself. He’s unable to be here because he is presently meeting with Mr Khulekile’s widow and so in the circumstances I’m going to read the statement out on his behalf.

“It is with great sadness that I inform the Commission of the death of Steve Khulekile, the regional organiser for AMCU at Lonmin. He was due to give evidence in the Commissioner. Mr Khulekile was shot dead on Saturday, the 11th of May 2013, as he sat watching football on television in a tavern at Khomanani Shaft Number 2. Our prayers and thoughts are with Steve’s wife and family. I do not know who is responsible, but I want to take this sad opportunity through the Marikana Commission of Inquiry to plead with all mineworkers to stop these killings. They are destructive of all that we in the mining industry believe in. They leave behind grieving widows, children, mothers, fathers, brothers, and sisters, who are condemned to poverty. I beg of you all, there have been too many who have died. I beg of you all to do your utmost to stop these killings.” Thank you, Chairperson.

CHAIRPERSON: Thank you, Ms Barnes. We on the Commission wish to extend our condolences and sympathy to the family and friends and loved ones of the late Mr Khulekile and please, I ask you please to see to it that they are conveyed, our sympathy and condolences are duly conveyed. We entirely endorse what Mr Mathunjwa has said and we want to add one other factor, and that is that we’ve had other instances, one in particular where a witness was killed and one potential witness was killed. Both cases appear to have been assassinations. It’s important that this Commission gets to the truth of what happened at Marikana, that it’s able to carry out its functions with a minimum of interference and disruption, and deaths of this kind can only impact adversely on the work of the Commission, and it’s a matter of great concern to us that this has happened and we hope profoundly that there will be no repetitions of this kind of event. Thank you. Generaal-Majoor, u is nog steeds onder eed.

CHARL ANNANDALE: s.o.e.

CHAIRPERSON: Mr Mpofu, I understand you’ve distributed now copies of the statement of Mr Botes to which you referred on Thursday -
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1 don’t report directly to the National Commissioner, you report to the Divisional Commissioner ORS who is, I think you said was General Mawela. Is that correct?
2 CHAIRPERSON: Lieutenant-General.
3 MR MPOFU: Lieutenant-General Mawela.
4 GENERAAL-MAJOR ANNANDALE: Dis korrek,
5 Voorsitter.
6 MR MPOFU: And you are not the section head of the NIU or STF. Those are other people. Or rather let me put it this way. Who are those people? Who is the section head of STF and NIU?
7 GENERAAL-MAJOR ANNANDALE: Voorsitter,
8 die Seksiehoof Speciale Taakmag is Brigadier Fritz, en vir NIU is Brigadier Tsiloane, beide seksies wat rapporteer aan my.
9 CHAIRPERSON: While we’re about it, we may as well find out about the Section Head Tactical Operations, that’s the third brown box –
10 MR MPOFU: Yes, that is right.
11 CHAIRPERSON: – brown box under your name.
12 MR MPOFU: Yes, please, General.
13 GENERAAL-MAJOR ANNANDALE: Voorsitter,
14 die betrokke pos is vakant. Dit word op ‘n rotasie basis word dit geval deur Brigadier Fritz, Brigadier Tsiloane, en

1 'n Brigadier Gibson.
2 MR MPOFU: And just for the sake of completion, we established last week that the people who are entitled to deploy the NIU are the Divisional Commissioner, your immediate boss, and the National Commissioner. Is that correct?
3 GENERAAL-MAJOR ANNANDALE: Voorsitter,
4 uiteraard die Nasionale Kommissaris het altyd die gesag, en dan ook myself in terme van my verantwoordelikhede as die komponentshoof.
5 MR MPOFU: Yes, no, I’m just saying in terms of exhibit Q the two people who are empowered to do that are the National Commissioner and the Divisional Commissioner. If you have those powers then hopefully this document will then explain, once we’ve read it, how those powers are devolved to you, but as far as exhibit Q is concerned it’s those two, or that’s the primary powers, let’s call it that.
6 GENERAAL-MAJOR ANNANDALE: Voorsitter,
7 soos ek hier kan onthou in so ver dit NIU aangaan is dit vermelding gemaak van die “Divisional Commissioner Operational Response Services.” Daar is nie pertinente vermelding van die Nasionale Kommissaris nie.
8 MR MPOFU: Okay, that’s fine. We’ll find it when we – just a minute. Unfortunately that exhibit is bulky and unnumbered. Unfortunately, Chairperson, I had actually thought I would do some voluntary service and paginate it, but that document and SS3 in particular I’ll deal with in –
9 CHAIRPERSON: Well, let’s do that quickly.
10 MR MPOFU: Yes, mine is –
11 CHAIRPERSON: The first page we don’t have to number, but the second page “Head, Specialised Operations, Purpose” we’ll call page 2. The chart SS3 –
12 MR MPOFU: Sorry Chair, can we start from the first page, just for that –
13 CHAIRPERSON: The first page is 1.
14 MR MPOFU: Let’s make it 1, yes.
15 CHAIRPERSON: Alright, that’s a good number, it’s for the first page. The second page, “Head, Specialised Operations, Purpose,” etcetera, that’s page 2.
16 The box are page 3. The component, the annexure A is page 4. Weight 20% is page 5.
17 MR MPOFU: Ja, and the next one.
18 CHAIRPERSON: Key performance area 2,
19 it’s also called weight 20%.
20 MR MPOFU: Yes, and so on.
21 CHAIRPERSON: So we’ve numbered the pages, now you can refer to them conveniently.
22
23 CHAIRPERSON: And for the sake of completeness, we established last week that the people who are entitled to deploy the unit to other provinces are the Divisional Commissioner ORS who is, I think you said was General Mawela, “will prioritise and approve the deployment of the unit to other provinces. The National Commissioner can, however, deploy the NIU to any
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1 province should she or he so desire." That's what I'm referring you to. It's just to remind you. Can you see it now?
2 GENERAAL-MAJOR ANNANDALE: Ek sien dit, dis reg, Voorsitter.
3 MR MPOFU: Ja, so all I'm saying is that the primary repositories of that power of deployment are General Mawela and General Phiyega. If you have those powers they will come from GGG20. Correct?
4 [10:36] GENERAAL-MAJOR ANNANDALE: Dit is korrek, Voorsitter.
5 MR MPOFU: And do you know who has the power to deploy or mobilise the STF?
6 GENERAAL-MAJOR ANNANDALE: Voorsitter,
7 Spesiale Taakmag kan selfs op die versoek van 'n stasiebevelvoerder ontplou word, en dan pertinent deur die eenheidsbevelvoerder van enige van die taakmag eenhede ook, dan by implikasie die Seksiehoof, Spesiale Taakmag, myself, die Afdelingskommissaris, en so ook die Nasionale Kommissaris.
8 MR MPOFU: Yes, but I'm talking about situations such as this. Would you describe the Marikana operation as a national operation?
9 GENERAAL-MAJOR ANNANDALE: Voorsitter,
10 née, Marikana bly 'n provinsiale optrede en operasie.

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1 MR MPOFU: Yes, but you would agree that it had a national flavour insofar as the deployment of persons coming from outside the North West province is concerned?
2 GENERAAL-MAJOR ANNANDALE: Voorsitter,
3 ondersteuning deur nasionale eenhede en ook ander provinsies.
4 MR MPOFU: Yes, correct. Thank you. And that although it's correct that a unit commander - I think that's how it's described - may request, as you correctly pointed out, the deployment of the NIU, when as in the situation of Marikana it's an operation that has a national flavour and people from other provinces have to be deployed, obviously that would be outside of the jurisdiction of even a Provincial Commissioner?
5 GENERAAL-MAJOR ANNANDALE: Voorsitter,
6 die prosedure is dat die Provinsiale Kommissaris, of dan enige van haar adjunkte sal nasionale eenhede, hetsy deur die Afdelingskommissaris van Operasionele Reaksie Dienste of dan die Komponentshoof, in die geval myself, versoek.
7 In terme van die versoek vir Openbare Orde Polisiëring hulp sal daar gewoonlik 'n oproep gemaak word vanaf die een provinsie na die ander provinsie net om te verneem of daar beskikbare personeel is, en daarna sal die NATJO OC versoek word, formeel versoek word om sodanige ontplouwing vanaf 'n ander provsinsie te fasiliteer.
8 MR MPOFU: Okay. Well, for instance it should become clear in the next question, I don't accept everything you've said now, but for the purposes of this question let's assume what you've said is correct. Even if that was so, am I correct that the deployment of the NIU would then be done at a national level - let's just limit it to that - at a national level? In other words the local person who's requesting cannot then go and deploy people from another province. It will be done at a national level. By whom, we'll get to it just now. Agreed?
9 GENERAAL-MAJOR ANNANDALE: Dit is korrek, Voorsitter.
10 MR MPOFU: And so that I don't attract the ire of the Chairperson, I will read one sentence from a document which if necessary will be given to you later for later comment. Chairperson, it's in the SAPS documents, page 550. I have a feeling that this pagination, or rather the indexing, I think Mr Pretorius told me that the indexing has been changed, so we'll give it a proper identification.
11 CHAIRPERSON: How is the document described?
12 MR MPOFU: It's called "The National Force."
13 CHAIRPERSON: Thank you. I take it you're familiar with that document, Major-General?
14 MR MPOFU: Yes.
15 GENERAAL-MAJOR ANNANDALE: EK is bewus van die dokument, dis korrek, Voorsitter.
16 MR MPOFU: Thank you. Thank you very much. We'll still give you a copy, but the section I'm reading, if you have the SAPS documents, maybe Mr Pretorius can give us the new pagination, but in any event, it's not a long section. It's section 4 of that document. Are you trying to get hold of it?
17 GENERAAL-MAJOR ANNANDALE: Mmm.
18 MR MPOFU: 4(1) just says, or rather the heading of that section says, "Circumstances in which the Special Task Force may be mobilised," and then section 1 I won't read it – it simply says what we already know, that the STF is for hostage situations, and so on, and so on. Section 2, which is the one I want to read, or subsection 2, 4(2), let's call it that, says, "Notwithstanding paragraph 1, the National Commissioner may at any time and for any reason mobilise the STF and the section head of the STF must coordinate the operation." You accept that as at least what is in the documentation? Once again it may well be that GGG20 will show that you are also in the mix, but
1. as far as this is concerned, the National Commissioner is
2. the only one who can mobilise and the –
3. CHAIRPERSON: I’m not sure that that
4. document says she’s the only one. It empowers her to do
5. that.
6. MR MPOFU: Well, exactly –
7. CHAIRPERSON: I didn’t hear the word
8. “only” there.
9. MR MPOFU: Fine. Well, okay. Like I say
10. the heading says “Circumstances in which the Special Task
11. Force may be mobilised,” and maybe the Chairperson is
12. right. Let me just say, the people who are specified as
13. having that power in this document specifically are the
14. National Commissioner to mobilise and the section head, who
15. must coordinate, and we’ve already established that you are
16. neither the section head nor the National Commissioner.
17. I’m just saying at face value that’s what the situation is.
18. What GGG20 will tell us is another matter.
19. GENERAAL-MAJoor ANNANDALE: Voorsitter,
20. nee, by implikasie is as ‘n eenheidsbevelvoerder of ‘n
21. stasiebevelvoerder, hulle kan mobiliseer. Dan is dit ook
22. die seksiehoof, en dan is dit ook die komponentshoof en dan
23. is dit ook die Afdelingskommissaris “Operational Response
24. Services.”
25. MR MPOFU: Yes, no, no, that may well be,

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1. and most of that will be a matter for argument. All I’m –
2. or something that comes up out of GGG20. All I’m saying to
3. you is simply that as far as the, once again the primary
4. repositories of the power, the specified ones, it’s only
5. the National Commissioner for mobilisation and section head
6. for coordination. What implications one might draw from
7. that and so on is a matter that we will argue, but those
8. are the people specified. Correct?
9. GENERAAL-MAJoor ANNANDALE: Voorsitter,
10. dis nie waar nie.
11. MR MPOFU: Before you answer, General,
12. remember we’ve made the distinction between the ability of
13. a local or unit commander to request within their
14. jurisdiction. We are talking here about a Marikana type
15. operation which has a national flavour, so whatever your
16. answer, you must bear that in mind.
17. GENERAAL-MAJoor ANNANDALE: Voorsitter,
18. subparagraaf 2 kan nie gelees word sonder subparagraaf 1
19. van paragraaf 1 nie, en pertinent 4(1)(c) wat sê, “Any
20. criminal related high-risk operation which the
21. specialised skills and equipment of Special Task Force are
22. required.”
23. MR MPOFU: Yes. No, there we are ad
24. idem, we agree that’s as to the type of activities for
25. which the STF was established. We are now busy with who,

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1. once one of those types can mobilise –
2. GENERAAL-MAJoor ANNANDALE: Voorsitter,
3. ek wil net vir mnr Booi kans gee om te vertaal, dan sal ek
4. my punt maak.
5. MR MPOFU: Sorry.
6. GENERAAL-MAJoor ANNANDALE: Voorsitter,
7. ek –
8. CHAIRPERSON: Sorry. Mr Mpofu, I take it
9. we’ll be given copies of the document to which you’re
10. referring after the tea adjournment? Yes, thank you.
11. MR MPOFU: Yes, Chairperson, I must
12. apologise.
13. GENERAAL-MAJoor ANNANDALE: Voorsitter,
14. so paragraaf 4(2) is dan die Nasionale Kommissaris kan vir
15. enige ander rede nie vermeld onder (a) tot (d) kan sy dit
16. doen, maar (a) tot (d) is dan eenheidsbevelvoerder,
17. stasiebevelvoerder, of dan enigiemand in die rangorde.
18. COMMISSIONER HEMRAJ: Is there a copy of
19. this document available so that we can follow this debate?
20. Because it’s very difficult to just listen to them and be
21. able to understand what –
22. MR MPOFU: Yes, Chairperson, really I am
23. sorry, Chairperson. Can I just go to something else and
24. we’ll deal with this. It’s just one or two more questions
25. anyway –
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1 was busy saying that you and I are of the same mind as to what 4(1), it's what we have already read here about hostage situations and what have you. The issue I'm saying to you is that subsection (2) says, "Notwithstanding paragraph (1) the National Commissioner may at any time," in other words it doesn't mean that she may deploy it for mountain roadblocks, if you know what I mean. It still has to be hostage situation and high-risk operations and all that.

MR SEMENYA SC: Chair -
CHAIRPERSON: I must confess, I don't read it that way. You see the “Notwithstanding” one seems to indicate that never mind what (1) says, that any time or for any reason, the National Commissioner may at any time or for any reason. So mountain roadblocks presumably are covered by any reason. So I don't think prima facie what you're putting is correct. I don't want to be unduly disruptive with your cross-examination, but that's being the -
[10:56] MR MPOFU: No, no, Chairperson, you’re quite right, and I’ll concede that point. Assume that it could be for any reason, mountain roadblock or painting a school, but the point is that it's the National Commissioner who may mobilise the STF and the section head of the STF must coordinate the operation once she has mobilised it for any reason, and the crucial point I’m making is that that section would apply in a national - well, you said it's not a national, an operation which has a national flavour, such as Marikana, which you and I have agreed. Correct?

GENERAIL-MAJ OOR ANNANDALE: Voorsitter, nee, die Nasionale Kommissaris se toestemming is nie nodig vir die vier aspekte vermeld in 4(1)(a) tot (d) nie.
MR MPOFU: Okay, General, I don't want to debate what, as I say what may be a matter for legal argument with you, but surely you're not suggesting that the National Commissioner is excluded from mobilising the STF for a terrorism incident, surely. Surely any reason includes also those things that are in 4(1).

GENERAIL-MAJ OOR ANNANDALE: Voorsitter, nee, die Nasionale Kommissaris word nie geken as hulle gemobiliseer word vir die betrokke redes vermeld in 4(1)(a) tot (d) nie. Slegs as dit iets buiten dit sou wees, dan het die Nasionale Kommissaris die reg om hulle ook te gebruik vir iets wat nie dan vermeld is nie.
MR MPOFU: Okay, I'll leave that for argument.
CHAIRPERSON: Let Mr Booi interpret that first, then I want to put -
MR MPOFU: I'm so sorry, Chairperson.
<table>
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<tr>
<th>Page 9520</th>
<th>Page 9521</th>
<th>Page 9522</th>
<th>Page 9523</th>
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<tbody>
<tr>
<td>1</td>
<td>your, what I've called previously your self-deployment, but</td>
<td>1</td>
<td>of water or teargas. Is that correct?</td>
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<td>2</td>
<td>we'll leave that for argument at a later stage.</td>
<td>2</td>
<td>GENERAAL-MAJOR ANNANDALE: Voorsitter,</td>
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<td>CHAIRPERSON: Mr Mpofu, may I ask you a</td>
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<td>ek dink ek het verwys na gebruik van skokgranate,</td>
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<td>question, which of course I take it you're not obliged to</td>
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<td>potensieel CS en rubber, of skokgranaat en haelgeweer</td>
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<td>answer; you can plead the fifth amendment, if you wish. I</td>
<td>5</td>
<td>rubber in terme van uiteendryf aksesies.</td>
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<td>6</td>
<td>understood the Major-General to say that irrespective of</td>
<td>6</td>
<td>MR MPFOFU: Okay, well I'll make a deal</td>
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<td>7</td>
<td>his actual authorities, which he may or may not have</td>
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<td>with you then. If I accept that it could mean those things</td>
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<td>according to your argument, the National Commissioner came</td>
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<td>that you mentioned, are you prepared to accept that it can</td>
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<td>9</td>
<td>there on the 13th and either expressly or by clear</td>
<td>9</td>
<td>also mean the firing of live ammunition?</td>
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<td>10</td>
<td>implication approved of and therefore ratified what he did,</td>
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<td>GENERAAL-MAJOR ANNANDALE: Voorsitter,</td>
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<td>11</td>
<td>if what he did was unauthorised up to that stage. I take</td>
<td>11</td>
<td>ek het getuig dat die gebruik van die woord “engage” in</td>
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<td>12</td>
<td>it when you argue the point you will deal with that point</td>
<td>12</td>
<td>polisietaal beteken versier nie om te skiet nie, en dat</td>
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<td>Brigadier Calitz die enigste persoon sal wees wat die</td>
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<td>14</td>
<td>as well?</td>
<td>13</td>
<td>konteks kan verduidelik. Dit kan 'n legio van potensiële</td>
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<td>MR MPFOFU: I will, and I'll deal with</td>
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<td>woorde beteken.</td>
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<td>that when I cross-examine the National Commissioner and the</td>
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<td>MR MPFOFU: General, you do understand</td>
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<td>17</td>
<td>Provincial Commissioner in particular, and Mawela if he's</td>
<td>16</td>
<td>that you are under oath?</td>
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<td>called.</td>
<td>17</td>
<td>GENERAAL-MAJOR ANNANDALE: Voorsitter,</td>
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<td>19</td>
<td>CHAIRPERSON: Those two points, those two</td>
<td>18</td>
<td>ek is terdeë bewus daarvan.</td>
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<td>20</td>
<td>MR MPFOFU: Yes, and –</td>
<td>19</td>
<td>MR MPFOFU: I put it to you that the word</td>
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<td>21</td>
<td>CHAIRPERSON: – part of cross-examination</td>
<td>20</td>
<td>“engage” does not exclude the shooting of live ammunition,</td>
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<td>22</td>
<td>we can look forward to.</td>
<td>21</td>
<td>even if it includes the things that you've mentioned. In</td>
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<td>MR MPFOFU: That's correct.</td>
<td>22</td>
<td>other words it's not confined to the spraying of water and</td>
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<td>CHAIRPERSON: Carry on with your cross-</td>
<td>23</td>
<td>the other things that you mentioned.</td>
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<td>examination now.</td>
<td>24</td>
<td>GENERAAL-MAJOR ANNANDALE: Voorsitter,</td>
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<td>1</td>
<td>MR MPFOFU: Thank you, Chairperson. Okay,</td>
<td>1</td>
<td>maar ek self het dit nie beperk tot die sproei van water</td>
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<td>2</td>
<td>you don't have to comment. I'm just saying we disagree.</td>
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<td>nie. Ek het gesê dit kan 'n legio van potensiële goed</td>
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<td>Now –</td>
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<td>beteken.</td>
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<td>GENERAAL-MAJOR ANNANDALE: Voorsitter,</td>
<td>4</td>
<td>MR MPFOFU: And those variety of meanings</td>
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<td>5</td>
<td>ek skus, as ek net kan ook sê dat in Generaal Naidoo se</td>
<td>5</td>
<td>among other things would depend on the context in which the</td>
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<td>6</td>
<td>verklaring – en u sal onthou dat hy saam met die</td>
<td>6</td>
<td>word is used, correct?</td>
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<td>7</td>
<td>Provinsiale Kommissaris in die voertuig was toe hulle my</td>
<td>7</td>
<td>GENERAAL-MAJOR ANNANDALE: Konteks is</td>
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<td>8</td>
<td>geskakel het op die betrokke Maandag –</td>
<td>8</td>
<td>versier belangrik.</td>
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<td>MR MPFOFU: Sorry, it's the Provincial</td>
<td>9</td>
<td>COMMISSIONER HEMRAJ: General, in the</td>
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<td>10</td>
<td>Commissioner, not the National Commissioner. I think the</td>
<td>10</td>
<td>event that a command is given to shoot live ammunition,</td>
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<td>11</td>
<td>witness said Provincial.</td>
<td>11</td>
<td>what is some of the possible phrases or words that would be</td>
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<td>MR MAHLANGU: I'm sorry, Sir, the</td>
<td>12</td>
<td>used to issue that command?</td>
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<td>13</td>
<td>Provincial Commissioner.</td>
<td>13</td>
<td>GENERAAL-MAJOR ANNANDALE: Kommissaris,</td>
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<td>14</td>
<td>GENERAAL-MAJOR ANNANDALE: En op bladsy</td>
<td>14</td>
<td>die woord “shoot” sal waarskynlik gebruik word en dit sal</td>
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<td>15</td>
<td>2 van sy verklaring en pertinent paragraaf 2, die laaste</td>
<td>15</td>
<td>dan ook aanduidend wees van in wate rigting, op wie of wat</td>
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<td>16</td>
<td>sin, ek haal aan, “The National Commissioner and Divisional</td>
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<td>ook al dan die omstandighede is. Kommissaris, maar in die</td>
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<td>Commissioner Operational Response Services, Lieutenant-</td>
<td>17</td>
<td>konteks van skarebestuur sal skiet dan verwys na haelgewere</td>
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<td>18</td>
<td>General Mawela, was informed of the situation,” en ek het</td>
<td>18</td>
<td>en buite skarebestuur konteks sal dit wees met skerp-punt</td>
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<td>19</td>
<td>vroeër getuig dat Generaal Mawela bewus was van my</td>
<td>19</td>
<td>ammunisie.</td>
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<td>20</td>
<td>ontplooiing.</td>
<td>20</td>
<td>MR MPFOFU: Okay, so let's leave then the</td>
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<td>21</td>
<td>MR MPFOFU: Right, now let's move back to</td>
<td>21</td>
<td>theoretical meaning and bring it to the context of what we</td>
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<td>22</td>
<td>the issue that we were busy with on Thursday, which is the</td>
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<td>know happened on the 16th at the particular stage. Firstly</td>
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<td>23</td>
<td>meaning of the word “engage.” Your last answer, if I'm</td>
<td>23</td>
<td>before we do that, you remember that on Friday you said the</td>
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<td>24</td>
<td>correct, and if I'm not you'll correct me, suggested that</td>
<td>24</td>
<td>only thing that you overheard was, &quot;Don't engage the target</td>
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<td>25</td>
<td>“engage” in as far as you were concerned meant the spraying</td>
<td>25</td>
<td>unless the target engages you,&quot; or words to that effect.</td>
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1 GENERAAL-MAJOR ANNANDALE: Op Donderdag,

dis korrek, Voorzitter.

2 MR MPOFU: Ja, okay, let's decode then

that sentence. Firstly the target in the sentence that you
remember must surely be referring to the protesters, or the
citizens who were protesting there?

3 MR SEMENYA SC: Chair, would this

conversation not be better spent with Brigadier Calitz when
he testifies?

4 MR MPOFU: No. Chair, this witness,

incidentally these words that he used about “Don't engage
the target until the target engages you,” were solicited by
Mr Semenya in his examination-in-chief and therefore I’m
entitled to cross-examine on that.

5 CHAIRPERSON: That's correct, Mr Semenya,

I think I’ll allow Mr Mpofu to continue. Sorry, did I give
the ruling before you had a chance to address -

6 MR BURGER SC: No, no, may I ask for some

guidance from the Chair, because I have some difficulty
following this debate and I would like to know whether I’m
wasting time. I’ve objected a lot last Thursday and
Friday, and I don’t want to object -

7 CHAIRPERSON: I don’t know where you were

objecting on Friday, but you weren’t objecting here.

8 MR MPOFU: Wednesday and Thursday

then. We’ve been here so long I lose sight of the days.

9 So may I get guidance from you – and I ask it quite

seriously, and I ask it as to the manner in which my
learned friend is probing, and I don’t hold any brief for
the police, but he may probe on to my client and I’m
sensitive to that, and that's why I need the guidance.

10 Chair, in saying what I’m going to say, I’m aware

of the distinction between courts sitting as courts and
commissions sitting as commissions of inquiry. I’m mindful
of the fact that a court of law is bound by rules of
evidence and pleadings and that your Commission is not.

11 You may inform yourself of facts by hearsay evidence, by

reading newspapers, by whatever means is meaningful in
order to come to a decision on the facts. However, the
overriding principle must be that the process must be a
fair one to all the parties involved. This is particularly
so where this Commission proceeds not on an inquisitorial
basis but on what I would have thought is classically an
adversarial basis. In that case I submit the parties are
entitled to expect compliance with the conventional
prescripts of the process and regulate their case
accordingly.

12 There’s a further factor which I want to say by

way of introduction. That principle is particularly
important where the Commission is likely to make adverse
findings to parties. That might have potentially far-
reaching consequences for the parties involved. We
accordingly submit that in the process there should be
adherence to the demands of procedural fairness, and may I
give you three examples of what I submit is an unfair way
of going about. The first example is a statement made by
my learned friend Mr Mpofu to the General, and I quote his
ipsissima verba. He said, “The reason why there was this
frenzy and you drove all the way from Pretoria, uninvited,
was sparked by the killing of the two policemen.” That led
that very same afternoon to a news report in News24 with
the heading “Revenge behind Marikana killings – Mpofu.”

13 Now I have yet to hear the factual basis for that
statement. Fairness would dictate that if a statement like
that is made by an examiner, that he would pose facts and
on the basis of those facts, not with the witness but at
the end of the day argue that to the Commission so that his
protegest can address that argument, either disputing the
facts or adding more facts to show the submission is not
sound. But in my view - and if it happens to my client I’d
like to have your guidance as to whether I should object -
it is unfair to put a proposition to a witness (we know
he’s going he’s going to deny it), he then denies it and
not put the factual basis for that very statement you’ve
put.

14 [11:43] Well, the record on that is at page 2378 and it
went like this; my learned friend Mr Bruinders asked Mr
Mathunjwa, “Why were you so convinced that people were
going to get killed?” and Mr Mathunjwa said, “I mean, (1),
the Provincial Commissioner who said to us this thing must
end today. Subsequently to that the very same Provincial
Commissioner is not available to meet with us to report the
feedback from the mountain. (2), (3), the management
reneged on its commitment and subsequent to that the very
same management is no longer willing to meet with us, and
again I reminded myself of the words that were said on the
meeting of the 15th, where Mr Mokwena’s saying they’ll get the police to go and do their job there on the mountain. So based on those facts it was clear to me, yes, the decision has been taken that these workers are going to be killed.”

Now there was no suggestion of an apartheid mentality or a 1948 state of mind, and I still have to hear the factual basis for what was, I say inelegantly put to this witness and dealt with elegantly by him as to why there was no merit to that.

Let me give you my further example. An example of where these are floated, they get into the newspapers and then we never get the factual basis for them, as they in fact say on this last one, News24 had a headline that afternoon, “Revenge behind Marikana killings – Mpofu.”

That’s a third example. The allegation that the police shot and killed protesters on the 16th of August based on orders, orders to kill. The heading that afternoon in Times Live was, “Mpofu argued that this showed that the officers who shot at the striking Lonmin workers were acting on orders and not in self-defence.” What was the factual basis for that?

By then I objected, and I hope I didn’t waste time, but I objected strongly to that without a factual basis, and my learned friend then took us into his confidence and he gave us three reasons for that statement.

The one reason you had to translate to my learned friend because he didn’t understand the Afrikaans. It came from GGG17, the statement of Vermaak, what’s his rank? Colonel, Lieutenant-Colonel, whatever, the policeman Vermaak, and in paragraph 7 there was the statement which you translated, and it said, “Ek het weer Brigadier Calitz se opdrag herhaal uit die helikopter, waarop ek gesien het dat die lede optree,” and I think it became common cause that the first reason advanced by my learned friend was just not correct for making that statement.

But he gave a second reason. He said the second reason for suggesting that we should find in his October 2012 opening in a paragraph which read, “The claims of self-defence are baseless.” Now with respect again that’s not correct. That does not bear out the statement he made.

He gave a third reason then. He called for a document which he didn’t have at that stage. It was the statement by Botes, one of the Lonmin people, and he’s today now handed up the statement of Mr Botes. Well, we know what Mr Botes says. We filed Mr Botes’ statement last year. Mr Botes –

MR MPFU: Chairperson, I don’t want to interrupt –

CHAIRPERSON: No, no, Mr Mpofu, I must give Mr Burger an opportunity to finish.

MR MPFU: Yes, you must, Chairperson,

but my –

CHAIRPERSON: Then I’ll give you a chance to reply. Don’t worry.

MR MPFU: But can you also give me a chance to say something which is important, which must be said now, Chairperson?

CHAIRPERSON: No, no, no, I think I must let him finish and then I’ll let you deal fully with what he said.

MR MPFU: I want to prevent suggesting answers to the witness, so it will be too late at any other time, but that’s fine.

MR BURGER SC: My learned friend should know me. I will not suggest the answer –

CHAIRPERSON: If that’s a problem, Mr Mpofu, we can always ask the Major-General to leave the auditorium while this matter is being discussed, if it’s suggested that –

MR MPFU: Yes, I’d like that to happen now, Chairperson.

CHAIRPERSON: Alright. Major-General,

Generaal-Majoer, sal u omgee om die ouditorium te verlaat vir ‘n wyle?

MR MPFU: Thank you, Chairperson.

CHAIRPERSON: Mr Burger, would you please proceed?

MR BURGER SC: Chair, the passage I suspect my learned friend relies upon is in GGG19 in paragraph 57. That is a paragraph which does not begin to suggest that people were shot having been ordered to do so. It does not even suggest that the speaker is Brigadier Calitz because you’ll see at paragraph 56 Calitz is named particularly. In paragraph 58 he’s named, but in the important paragraph 57 he’s not named. So the three reasons suggested - my view, with respect – does not bear out that there was an order to shoot, and what my learned friend is now doing through this witness, who’s got nothing to do with this debate, is to ask him a question he should have asked before he made that statement. He should have taken instructions on what the word “engage” means in police parlance, and he would have been told what this General tells us it means. It does not mean you shoot people with sharp-point ammunition. He should also perhaps have looked in the Oxford Dictionary as what the word “engage” means and he wouldn’t have found an answer there either.

So we know now that he has again made a statement, a very contentious statement on a factual basis
<table>
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<tr>
<td>1 which we still wait to hear, and now I need your guidance</td>
<td>1 MR SEMENYA SC: Well Chair, the only</td>
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<td>2 because if this is going to happen with Lonmin, I must know</td>
<td>2 example we can add emanating from the cross-examination</td>
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<td>3 whether I must keep quiet, but just before asking on your</td>
<td>3 this morning is also spending time suggesting that the</td>
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<td>4 guidance, may I quote from a recent decision in the Supreme</td>
<td>4 witness does not have the authority to deploy units that</td>
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<td>5 Court of Appeal which I submit is relevant in this process.</td>
<td>5 fall under him. Now one would have imagined that if that</td>
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<td>6 It’s a case called AllPay Consolidated Investment Holdings</td>
<td>6 proposition is correct, we would have been pointed to</td>
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<td>7 versus The Chief Executive Officer, was reported in 2013 on</td>
<td>7 something. Instead what we are told is that I differ with</td>
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<td>8 the 27th of March this year, and his lordship Mr Justice</td>
<td>8 you there, I will argue differently. It’s just one such</td>
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<td>9 Nugent said the following. He said, “Whatever place mere</td>
<td>9 example where propositions are put to witnesses without any</td>
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<td>10 suspicion of malfeasance or moral turpitude might have in</td>
<td>10 factual foundation for them.</td>
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<td>11 other discourse, it have no place in courts, neither in the</td>
<td>11 CHAIRPERSON: Mr Tip, do you wish to say</td>
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<td>12 evidence, nor in the atmosphere in which cases are conducted.</td>
<td>12 anything?</td>
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<td>13 It is unfair, if not improper, to impute malfeasance or moral turpitude by innuendo and suggestion.</td>
<td>13 MR TIP SC: Chair, yes thank you.</td>
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<td>14 A litigant who alleges such conduct must do so openly and forthrightly so as to allow the person accused a fair opportunity to respond. It is also prejudicial to the judicial process if cases are adjudicated with innuendo and suggestion hovering in the air, without the allegations being clearly articulated. Confidence in the process is built on transparency and that calls for the grounds upon which cases are argued and decided to be openly ventilated,” and it’s on that basis that I ask for guidance. Is it fair to the parties around the table, I ask rhetorically, to put contentious statements to witnesses without first disclosing the factual basis for it and secondly to hold that back for argument, or at the very lowest to the party who is suspected of having uttered the words. In the case of “engage” for example, if it was Brigadier Calitz, ask him what he meant by it before you put a proposition to him which may turn out to be not correct. I’m indebted to you for listening to me, Chair.</td>
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<td>23 CHAIRPERSON: Mr Mpofu. I’ll also ask other counsel because they’re all, I’m asked effectively to give a ruling which isn’t really relevant for these particular questions in cross-examination, but also it looks ahead to other questions that may be asked in future, so I’ll ask the evidence leaders first once Mr Mpofu has replied. Commissioner Hemraj points out to me it will actually be more appropriate to give other counsel who are minded to address me along the same lines as Mr Burger a chance to speak first, so that Mr Mpofu gets a chance to reply to everybody at the same time. I’l ask the evidence leaders if they wish to say anything, and then I’ll ask Mr Semenya and it may be that some of the other counsel also would wish to say something. Mr Madlanga, anything you wish to say in relation to this point?</td>
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<td>23 MR MADLANGA SC: Nothing at all, Mr Chairman, thank you.</td>
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| 25 CHAIRPERSON: Mr Semenya. | 26 and there’s a great deal of merit of course in that submission as well. But what we would with respect just add - and these are not obviously thoughts that we’ve had the opportunity dwell over, they’re spontaneous responses - that the essential nature of a commission is that it is there for the Commission to achieve through all the parties present, whether they are representatives of persons who have been identified in the Terms of Reference or whether they perform the function of the evidence leaders, we are all here to assist the Commission to establish truth and truth in a fashion that is not in any sense defiant or limited through the pleading process, which obviously is not part of the process, and what that impels me to conclude and to submit with respect, is that a balance needs to be struck where the – as has indeed happened in many instances, Chair – where the Commission itself will intervene in respect of any objectionable propositions that are put and we would certainly welcome the Commission playing a more active role in that regard. In other words, that if for whatever reason none of the parties raise a pertinent objection to a particular question, then that does not cloak that question with some sort of immunity, and if the Commission, Chair and the Commissioners feel that this is not a question which is calculated to advance the findings that the Commission must make in due course, Tel: 011 440 3647 Fax: 011 440 9119 RealTime Transcriptions Email: realtime@mweb.co.za
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1 documents. So I think Mr Semenya’s input, or objection, if
2 it is one, is of no basis on what happened here just half
3 an hour ago.
4 As far as Mr Burger is concerned, Chairperson,
5 let me start at the beginning of what we are busy doing
6 now. I am flabbergasted, to say the least, to say that the
7 matter of self-defence, I would have thought even a child
8 in the street who has no training in law, if you say to
9 them there is something called the Farlam Commission, what
do you think it’s about, I’d bet you, Chairperson, any – 80
10 or 90% of all South Africans would say it is going to find
11 out whether the police killed those people in self-defence
12 as they claim, or whether there was another valid reason.
13 You don’t have to be a lawyer to see the relevance of that
14 question. It is but the question that we are here to
15 probe.
16 Now in the light of the centrality of that
17 question you have a witness here who has considered that
18 there are two mutually exclusive means by which the
19 shooting might have happened. One is self-defence, and
20 we’ve all broadened that to include private defence.
21 [12:03] The other one, he says, is on command and the
22 reason the basis was laid about the mutual exclusivity of
23 those things, was exactly to show that the one would negate
24 the other. Now –

I’ll start at the bottom because I think the last two
inputs are much easier to deal with. As far as Mr Tip’s
input is concerned, I would like to say that I think in
defence of the Chairperson and the Commissioners, if
there’s one area, if anyone wants to go through the record
and find how many times the Chairperson has said to all of
us, without any discrimination, how does that advance the
question of the Terms of Reference, I’m quite sure that
you’ll find more than a dozen references of when the
Chairperson has said that to me, to various other people.

So I think to end, and not even using those words when the
Chairperson has meromotu overruled many a question, so I
think that that concern is taken care of by just the
practice of what has happened. Whether it’s sufficient or
not is another matter, but factually the record will show
that it has been happening, at least sometimes too

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well then that will obviously raise it to an objection. So
I think those are the only remarks that we would wish to
add at this stage, Chair, and I appreciate the opportunity.

Chairperson: Do any of the other
parties’ representatives wish to make any submissions on
this point before I call upon Mr Mpofu? I don’t see any
red lights coming on, so Mr Mpofu, would you care to reply
now to Mr Burger, Mr Semenya, and Mr Tip?

Mr Mpofu: Yes, Chairperson, let me –

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inputs are much easier to deal with. As far as Mr Tip’s
input is concerned, I would like to say that I think in
defence of the Chairperson and the Commissioners, if
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Chairperson has meromotu overruled many a question, so I
think that that concern is taken care of by just the
practice of what has happened. Whether it’s sufficient or
not is another matter, but factually the record will show
that it has been happening, at least sometimes too

frequently, particularly I think in the eyes of those who
are on the receiving end, but the point is that it has been
done. So I think Mr Tip’s concern has been taken care of.

As far as Mr Semenya is concerned, I’m perplexed
by what he’s saying. He says that suggestions are made to
the witness that he did not have the powers, without
something – underlined, something - being put to the
witness. Well, there are two somethings that were put to
the witness. The first something was the bullet 2 of that
slide 71 which says what it says. I don’t want to repeat
it. The next something is the new document, which
incidentally I don’t think has been given an exhibit
number, which will be GGG21 I think.

Chairperson: The National Instruction 9
of 2011 which we were handed as we were walking back to the
auditorium I did mark GGG21.

Mr Mpofu: 21, ja. Thank you,

Chairperson. So if that, that might not be something
enough for Mr Semenya, but he can’t say that the questions
that were put to the witness had no basis on something
because those are two pertinent things which say, and I
said to the witness that I’m prepared to accept that his
powers might be implied. That’s a matter for argument.

I’m not going to debate that with the witness, but simply
the fact that there are specified persons in both those
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CHAIRPERSON: As an item of evidential material before the Commission in a sense as part of the police hard drive that’s been made available to everybody, and that’s the point you’re going to enlarge on now?

MR MPOFU: Yes.

CHAIRPERSON: I understand that. I have no problem with that.

MR MPOFU: Fair enough.

CHAIRPERSON: But Mr Burger is effectively arguing for a wider proposition and that is, he says that when allegation of a serious misconduct, what Mr Justice Nugent called malfeasance, are put to witnesses, it should not be done on a basis that it’s just an allegation grabbed from the air or unsubstantiated by anything. He says and he asks me to rule as a matter of fairness, that when allegations of that kind are made, the cross-examiner should refer to the evidential material on which the allegation or malfeasance is being made, to enable to parties who is being attacked as it were, whose conduct is being criticised, to respond in respect of the evidential material that’s being relied on. That, if I’m paraphrasing his argument incorrectly, I invite him to correct me.

MR MPOFU: Yes.

CHAIRPERSON: But that’s what I understand him to be saying. Now what do you say about that now? Because you will also recall, I think, that during the course of these hearings, when that kind of an objection had been raised, Mr Semenya, for example, has raised it on a number of occasions and said, that can’t be put. What’s the factual basis? I’ve always upheld him and always invited the cross-examiner to provide the material and then the attempt has been made, sometimes successful, perhaps sometimes not that successful to provide the basis of the allegation. So what I’m merely asking you is, in relation to Mr Burger’s central request for a ruling, do you quarrel with him or do you accept that the practice that has been followed, not invariably, because I’ve not wished to be super-active in objecting, because I don’t want the impression to be created that I’m biased, in favour of the one party or the other. And as you pointed out, my interventions have been, possibly caused displeasure to various parties, because they haven’t come because of me biased and favouring one party. But do you - when the points have been pertinently raised, I certainly upheld the objection.

MR MPOFU: Yes.

CHAIRPERSON: Do you quarrel with the general proposition by Mr Burger, that as a matter of fairness, and there’s a lot of authority, there’s a practice that he sketches to be followed, as a general ruling, that I thought I had applied, seeks, as a general ruling, that that should be -
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1. **MR MPOFU:** Yes.

2. **CHAIRPERSON:** I just proceed shortly with this ‘engage engage’ point and then move on to the next point.

3. **MR MPOFU:** Yes.

4. **CHAIRPERSON:** Because I think it’s been thoroughly canvassed.

5. **MR MPOFU:** Thank you very much.

6. **CHAIRPERSON:** I hereby give the ruling.

7. **MR MPOFU:** Ja. Okay, fine. Now accepting that, accepting that, let’s then look at Mr Burger’s examples and to show that that objection has no place –

8. **CHAIRPERSON:** Mr Mpofu, do we have to –

9. **MR MPOFU:** No, Chairperson –

10. **CHAIRPERSON:** The ruling he’s asked for, he’s got.

11. **MR MPOFU:** No, Chairperson –

12. **CHAIRPERSON:** Some of the points –

13. **MR MPOFU:** Is critical to the others -

14. **CHAIRPERSON:** This is going to happen time and again, as it happened last week. Please, let’s put it to bed. I’m prepared to waste the next five, 10 minutes so that we don’t have to –

15. **CHAIRPERSON:** I don’t like that word ‘waste’, but you’re prepared to spend the next five minutes on the point?

16. **MR MPOFU:** Invest, because the truth is there is a lot of this kind of thing. Let’s take one example, Chairperson – exactly, let me just tie up the point. The point about whether it was a command or self-defence, must be read in the context of the opening statement of the – of the police, which says at page 18 thereof, first starts on 17, “Officers from the TRT which had been deployed as A support service” and so on and so on, “at virtually less than a heartbeat of charging protestor opened fire on the advancing protestors with live ammunition without instruction from anyone.” Now that’s the case, that’s their case, Chairperson. I am busy with trying to accept evidence, not refuse that very notion that they put, that it was without any command. Link to that, the fact that the – it is projected in the – in their own slides that it’s one or the other, and accepted, Chairperson, that’s a matter for argument, as to whether explicit and so on. We’ll deal with, I’m sure, in good time when we argue the case. But at the very least, I have put that proposition to the witness. It’s linked to what the police’s version is and as if that is not enough, Chairperson, the statements, and this is why I wanted the witness to be – to leave. If you go to Mr Botes’ statement, at paragraph 59, he links this instruction directly to the firing of live ammunition. He says, it’s the same page 17 –

17. **CHAIRPERSON:** I see, “other than for hearing the word engage, which is repeated several – a few times immediately - I did not hear any specific instruction on the use of live ammunition.” Which seems to indicate that he interpreted it in that way.

18. **MR MPOFU:** Absolutely. And that’s all I’m going to put to the witness.

19. **CHAIRPERSON:** Alright.

20. **MR MPOFU:** A person like Botes seems to link this directly to the use of live ammunition and he says it happened immediately before that. That is not a small thing, Chairperson. If you are one of the victims and you have been told that this was done without instruction, and there’s evidence, concrete, coming from somebody who was there who for all intents and purposes was an eye witness, who says the word ‘engage’ was used immediately before the shooting, then honestly, Chairperson, how can –

21. **CHAIRPERSON:** It’s a matter of argument.

22. **MR MPOFU:** No.

23. **CHAIRPERSON:** As far as I understand he’s a –

24. **MR MPOFU:** No, it doesn’t matter. At least all it shows is that –

25. **CHAIRPERSON:** No, I understand that.

26. **MR MPOFU:** Yes. I won’t belabour the point. I think the Chairperson gets the point. So that’s really where I’m going. Secondly, Chairperson, and I do hope the witness is not around –

27. **CHAIRPERSON:** I must tell you, I don’t think your fears that the witness will tailor his evidence because of what he hears in the discussion are well founded, but in view of the fact that you expressed concern, I asked him to go and I’m sure he’s quite happy to go to show his bona fides in the matter. But any way,
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25 would not have been allowed in a purely inquisitorial
24 her statements and so on. That kind of cross-examination
23 adversarially cross-examined the national commissioner on
22 adversarial, that is why Mr Burger fiercely and
21 MR MPOFU: Yes. Now it being quasi
20 CHAIRPERSON: That's right.
19 MR MPOFU: Quasi adversarial.
18 CHAIRPERSON: We are.
17 MR MPOFU: We know that -
16 Now we're not going that way.
15 CHAIRPERSON: I would have to ask them.
14 MR MPOFU: Yes.
13 Now we're not going there now. Let's not spend time on that.
12 Chairperson, it had nothing to do with Mr Bruinders. It
11 was not, and I'll show you why. What I was relying on,
10 relying on an exchange between Bruinders and Mathunjwa when
9 Burger makes example about Mr Mathunjwa's statement.
8 CHAIRPERSON: I think points were put, based, allegedly based upon what Mr Mathunjwa had said.
7 But a study of the record indicated it had not actually
6 reflect what Mr Mathunjwa had said.
5 MR MPOFU: Yes, of course.
4 CHAIRPERSON: I understand you've got –
3 MR MPOFU: I don’t –
2 CHAIRPERSON: I understand you've got –
1 it being quasi 'immediately' meant

1 process. The – I don’t know why this particular witness
2 needs to be protected more than the national commissioner.
3 The point of the matter is that if it's quasi adversarial
4 for the national commissioner, it's quasi adversarial for
5 Annandale. There are no holy cows. Now so that's the
4 preface, but where I'm going, Chairperson, is this. Mr
3 Burger makes example about Mr Mathunjwa's statement.
2 CHAIRPERSON: I think points were put, based, allegedly based upon what Mr Mathunjwa had said.
1 But a study of the record indicated it had not actually
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1 had all to do with, once again, a factual basis that had
2 been placed in this Commission, namely exhibit 009, which
3 states, Mr Mathunjwa placed the following, when he's asking
4 the people, he was trying persuade them. “The fight has
5 been taken, Comrades, that is why we are here amongst you
6 without the police escorting us. We came on our own,
7 because we are coming to the nation of God to try and avoid
8 this blood that they want to see flowing. Comrades, the
9 life of a black person in Africa is so cheap. The life of
10 a black person in Africa is so cheap, they will kill and
11 finish us and get other to put them and pay them salaries,
12 that do not do anything in the Black person's life. That
13 would mean we were defeated, but capitalists will be the
14 ones who win.”

15 That is the factual basis. It's not anything to
16 do with Bruinders or whatever has been wrongly ascribed to
17 me. The - in other words, what I - all I’m putting to the
18 witness is that from this and Mr Mathunjwa says - at least
19 there is evidence from Magidiwana that he repeated this in
20 the other address. That this at least was given as a
21 reason or one of the reasons why these people are going to
22 be killed. Now all we know is that the prophecy of
23 Mathunjwa that they would be killed, was well - fulfilled,
24 they were killed. And all I’m probing is as whether the
25 reason that he gave, at least or one of them, had any

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1 basis. Assuming - well, accepting that Mr Bruinders is
2 wrong -
3 CHAIRPERSON: - allow you to proceed with
4 that cross-examination.
5 MR MPOFU: Thank you.
6 CHAIRPERSON: So what is your complaint?
7 MR MPOFU: Indeed, thank you. No, I just
8 want to debunk this myth, Chairperson. The next thing is,
9 yes, that addresses the apartheid issue. Bruinders is
10 dealt with. There was nothing - there was another example
11 of a headline - ja, I think I’ve dealt with it, it is the
12 revenge. Once again, this issue of revenge, Chairperson,
13 firstly is contained in our opening -
14 CHAIRPERSON: The fact that it is in your
15 opening statement, of course, doesn’t constitute evidence.
16 MR MPOFU: No.
17 CHAIRPERSON: I was surprised Mr Burger
18 didn't take that point, but there were -
19 MR MPOFU: But that's -
20 CHAIRPERSON: Sorry, evidential basis was
21 suggesting that some at least of the police, rushed forward
22 to koppie 2 and might have been prompted by considerations
23 other than those of self or private defence.
24 MR MPOFU: Yes. And statements were read
25 out which suggested that the witnesses - the statement of

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1 Naidoo, I think the statement of Scott and the statement of
2 Allandale were read out, which suggested that they - let's
3 put it this way, prioritised the death of the police as the
4 reason of going there, over and above. I won't they
5 negated -
6 CHAIRPERSON: That afforded the basis for
7 suggesting any question of revenge?
8 MR MPOFU: Well -
9 CHAIRPERSON: But it might be that, I
10 think that Captain Ryland's, for example, might have
11 afforded some evidential basis for suggesting that some of
12 the shooting was at least done for reasons other than self
13 of private defence.
14 MR MPOFU: Yes.
15 CHAIRPERSON: Ja. And but in any event -
16 MR MPOFU: Ja, that's all, Chairperson,
17 all I’m saying is that if you have a situation where - you
18 have a suggestion before this Commission where some police,
19 some policemen shot after a command to cease fire. Others
20 were kicking the corpses that are lying down. Others were
21 laughing around the dead bodies and all sort of things,
22 which have already been produced here. And you – other
23 were at least on our version, planting weapons on the dead
24 bodies. If all those things are not sufficient at the very
25 least – it may be disproved at the end, as a basis for

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1 suggesting a level of malice and vengefulness, than nothing
2 ever will. That's all I want to say. And at 9.8 of our
3 opening statement, we say the following. “The demeanour,
4 underline, the demeanour and behaviour of the police showed
5 that they were inter alia motivated by revenge and malice.”
6 That's what we said in our opening statement.
7 How else, and the Chairperson is right, but it's exactly
8 because of that circular argument, the fact that it’s in
9 the opening statement, doesn’t mean it has been proved, but
10 that's exactly why we are doing this.
11 [12:23] So that when, at the end of the case I say, now
12 Chairperson, I said I was going to establish the same
13 things, you said to me, well, Mr Mpfou, what do you say
14 about 9.8? Should I scratch it out, or did you establish
15 it? I should be able to then say, through the evidence of
16 A, B, C witnesses this was either established, or at least
17 an attempt was made, whether it was established
18 successfully or not is a matter that the Chairperson and
19 the Commissioners will determine. But I cannot be stopped
20 -
21 CHAIRPERSON: I just want to -
22 MR MPOFU: Yes, I accept that,
23 Chairperson. The - but I cannot for the life of me, be
24 stopped from canvassing the exact issue which I’ve put -
25 put to this – to these parties in October last year, as an
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I didn't understand Mr Burger to say I must stop you from probing what this Commission is all about, then we might as well fold and go home.

If it was on command –

I forgot the third one, Chairperson, but all those issues have been established.

Let me just finalise by saying this, Chairperson, the – this wouldn't have offered some, it's just so that we bring it back to the current, what supposedly sparked the so-called objection. This witness have just said to me there is a wide array of what the word 'engage' means. And I say to him, in that wide array it depends on the context and he agrees. And I was busy now going to go to the context and inter alia to show him two things. One, that the Botes other paragraph which I have already gone through. Two, the fact that in Vermaak's statement the water and tear gas incident had already occurred and therefore this would mean that it's dealt with the third issue around the kraal, which is live ammunition. Once again, that may or may not be established at the end, but I can't be stopped, Chairperson, with the greatest of respect, from probing the central issues in this case, which is whether those people were shot in self defence or in – on command –

Chairperson: - orders, pursuant to orders?

MR MPOFU: Or pursuant to orders or even with the Chairperson's combo, whether it was this one or the other one for the combo. That I must be entitled to probe, Chairperson. If it was the combo, then of course that negates the opening statement. If it was on command, then it is either not self-defence or it was the combo. I mean those are matters that will be dealt with in argument, but at this stage all I'm saying, Chairperson, is that if I can be stopped from probing what this case is all about, what this Commission is all about, then we might as well fold and go home.

Chairperson: I didn't understand Mr Burger to say I must stop you from probing what the Commission is all about. I understand he was more concerned with the procedural matter. But I'll give him an opportunity to reply.

Mr Burger to suggest you should be stopped from probing the matters that are before the Commission. His concern, as I understood was more on the procedure, the way the procedure followed, so I understood him. But I'll give him a chance to reply in a moment. But I understood his complaint to be more that where a serious allegation is made in cross-examination, it's not enough just to rely on material which may or may not be in the background somewhere. The witness being cross-examined and the party's witness who is being cross-examined, should have the opportunity of knowing at that very time what evidential material is to be used in support of the allegation, so it can be dealt with. I think that's his complaint –

MR MPOFU: No, Chairperson –

Chairperson: When you're finished, I call upon him to reply. Is there any more you wish to say?

MR MPOFU: Yes, just one thing, Chairperson, which is that the - my understanding of the art of cross-examination is that the style of the cross-
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probing. And of course the General has explained it and put it into context and I moved on. So please, let's - firstly let's not ascribe to me things I did not say. Two, let's not say that there's no factual basis, when it is there starting at us in the documentation. Thank you, Chairperson.

CHAIRPERSON: Mr Burger, your reply?

Before you reply, I want to say this. That you asked me for a ruling effectively for the future. I'm just disinclined to say anything about the points that have been made in relation to the past, because they have - it's water under the bridge. You've asked me for a ruling for the future, which I've given you, the ruling you sought.

Mr Mpofu had been here effectively defending himself in respect of points that you made in the course of your address. I'll give you a chance to reply, but I don't see any advantage at this stage when dealing with things that happened in past. But please proceed as you considerate it appropriate.

MR BURGER SC: In another forum I might have well forgone the right to reply. I'm really not used to debate on the level that has been raised. But – and I promise my learned friend, the out of cross-examination I won't debate with him. But may I make three points, because he still does not understand my argument. He says that the police's case is that the shooting happened without command. That's in fact their case. It does not mean that he can then put that they shot as a result of a command. What he is entitled to do, is to probe the veracity of that point, to probe the police to see whether they in fact did give a command or whether they did not give a demand. But he cannot start off a debate by putting the proposition without the factual substructure for that submission. That's my only question and I thought you ruled on that?

CHAIRPERSON: Yes, I ruled on it and he in fact conceded that the requirement of the factual substructure should be there.

MR BURGER SC: Yes.

CHAIRPERSON: And he conceded that even though this is a Commission and not a Court, the principles of basic fairness apply, be held in many of the cases, and the styles of cross-examination may differ. If a style of cross-examination of a particular aspect happens to be unfair, it can't be allowed and he doesn't fight with that. He was really defending himself against some of the criticisms that you addressed against him. But any way, please proceed.

MR BURGER SC: But that's just where the debate goes array then. He accepts that principle and on the first application, he belies the principle. It does not follow that it is the police's case that they did not shoot on a command, that he can put a proposition that they did shoot on a demand. That's the only point I make.

CHAIRPERSON: I put the combination, what he calls, he's got another express that I don't like, but I put the combination to you. You could have a situation –

MR BURGER SC: Yes.

CHAIRPERSON: - where members of the service is commanded –

MR BURGER SC: Yes.

CHAIRPERSON: - in order to defend a colleague. The – I'm not sure that the command could necessarily be relied on as a defence standing by itself.

MR BURGER SC: Yes.

CHAIRPERSON: But if in fact the command was to shoot in private defence and there was a shot in private defence, then the plea of private defence would be upheld. So the combination certainly may well apply here.

MR BURGER SC: I understand that.

CHAIRPERSON: Ja.

MR BURGER SC: My learned friend is entitled to probe a combo. He is not entitled to put a proposition that a combo was in place until such time as he has established the facts for that. He can probe, as he's shown us, all over the place. He can probe whatever is to be probed, but he cannot put a proposition without the factual basis. That's the only point that – I thought I had a ruling on that.

CHAIRPERSON: I understand him to concede that. Whether that was done entirely correct in the past, is a matter which has no fruits to be derived from – or advantage to be derived from going into that now. It's past. One of the points, as I understand it, is that there is evidential material, for example, the police hard drive. There is evidential material in videos. He can't just put a proposition, a general proposition and when challenged say, well, if you look at page 500 of the hard drive, or if you look at video, this particular video, you'll see something in support of that, the witness to whom the allegation is being put doesn't know what's being relied on. He's entitled to be told what is being relied on, so that he or she can say, it doesn't support the proposition that you're making against me. So I would have thought that you and he and I are at this point ad idem on that?

MR BURGER SC: No, I'm very happy that you and I are at ad idem. I'm not sure at all that he's ad idem.

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25 at this stage.
24 wrongly done in the past, because I don't see any purpose
23 what was said was wrongly done in the past, were in fact
22 giving a ruling on whether the instances advanced as to
21 basic principles that are applicable. And I don't propose
20 and Mr Mpofu, and Mr Mpofu and me for that matter, on the
19 understand there to be any difference now between Mr Burger
18 some of the questions that were asked in the past, I don't
17           CHAIRPERSON:          Apart from criticisms about
16 good today to say, revenge was referred to in my opening
15 what you wrote in your opening. You must put a factual
14 based on. The witness doesn't know what it's based on and
13 the combination or whatever. So it's no use – you can say
12 I'm going to say that this thing was done on command or in
11 the combo or whatever. So it's no use – you can say
10 whatever you want to say. If the factual basis is
9    disingenuous. No, no, no, I was accused of that. You
8     disallowed it, but I heard it loudly and clearly. I have
7  never had that before. I hope I'll never hear it again,
6     but let me say that it is in the context of apartheid
5  mentality, I put two and two together and I thought the
4  apartheid mentality was based on the exchange between Mr
3  Mathunjwa and Mr Bruinders. My learned friend now says it
2    was based on the phrase to the effect that the life of a
1    black person in Africa is cheap. Now I would never have

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But having said that, Mr Mpofu, do you wish to
say anything more?
MR MPOFU:          Just one thing, Chairperson, I
promise, one. Once again the – Mr Burger must not ascribe
to me things that I have not done. I have not as yet said
6 to this witness that because of this and that and what have
you, this thing was done on command or on the combo or
whatever. So he's accusing me of I have done the exact –
what he says should be done is exactly what I'm doing,
which is take through the witness and then maybe at the
end, once I've shown him the statements I will say, well,
I'm going to say that this thing was done on command or in
the combo or whatever. So it's no use – you can say
whatever you want to say. If the factual basis is
incorrect, if he says now he thought that I based it on
Bruinders and the discussion, well, that's not what he said
in his earlier address. He said, my learned friend based –
said and I did not say it. So let's – if the factual basis
of this debate is incorrect, as evidenced by the record,
then surely what follows thereafter cannot be correct.

CHAIRPERSON:           I don't propose spending
any more time on that aspect of the matter. But one thing
I will say and that is, I think there is substance in the
point that the factual basis should be put first before the
conclusion and the question is put, not the other way
around and I think that's the problem to some extent. So
we can get the General – the Major-General back for the
next 20 minutes?

Obviously the witness has gone out of his way to
make sure he was not within earshot, but here he comes
back. Generaal-majoor, u is nog steeds onder eed. Mr
Mpofu.

GENERAL-MAJOR ANNANDALE:          s.o.e.
MR MPOFU:          Thank you, Chairperson.
Sorry, General. I just want to assure you that I was not
casting any aspersions on your integrity. I just didn't
want us – this debate to affect the next few questions. If
you go to – let's start with GGG17, which is the Vermaak
statement.

CHAIRPERSON:           Which paragraph you're
referring to?
MR MPOFU:          At the bottom of paragraph 6.
You remember that we read –

CHAIRPERSON:           Sorry, sorry, you say the
bottom of paragraph 6. Paragraph 6 starts on one page and
continues on the next. By the bottom, you mean the bottom
of the first page or –
MR MPOFU:          Actually Chairperson, I don't
know whether it's just my copy. It looks like there's no
paragraph 6, it flows from paragraph 5.
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1 CHAIRPERSON: 6 begins with “Donderdag 16 Augustus 2012 was ek aan diens gewees vanaf sewe-uur die oggend. Sewe-uur die oggend was ek bemanning op helikopter R44 RKE.” That’s para 6. If I may say that I understand that the –

2 MR MPOFU: Chairperson, the shortcut is this. Let’s forget about the previous part. If you go to seven, paragraph 7.

3 CHAIRPERSON: Hm.

4 MR MPOFU: Which starts, “Die groep het terug beweeg.” Are we on the same page?

5 CHAIRPERSON: Yes, that’s the paragraph –

6 MR MPOFU: That you read –

7 CHAIRPERSON: That I translated on Thursday.

8 MR MPOFU: Yes. Now I’m reading to him the last two sentences of the previous paragraph.

9 [12:42] CHAIRPERSON: The last two sentences being, “Die lede het getalm.” Or “Die groep was in daardie stadium ongeveer 3 000.”

10 MR MPOFU: The groep, that one.

11 MS JELE: If I might be of assistance, Chair. There are two statements by Vermaak. I understand that this one is the one that’s marked 13A in the –

12 CHAIRPERSON: Well, this is the one that was referred to on Thursday, which was handed as an exhibit marked GGG17.

13 MR MPOFU: Ja.

14 CHAIRPERSON: But I didn’t know about the second one, thank you for telling me.

15 MR MPOFU: Okay. Now Chairperson, I just want the General, just to make it easy, to read out from “Die groep” up to the end and then I’ll ask the question, because in so doing the translation will already have been done.

16 CHAIRPERSON: No, I didn’t translate the last few sentences of six and I’m not quite sure what the word ‘talm’ means. Mr Burger will help me.

17 MR BURGER SC: [Inaudible].

18 CHAIRPERSON: Yes, thank you. Maybe we should ask Mr Burger to translate for us.

19 MR MAHLANGU: It reads, Mr Chairperson.

20 CHAIRPERSON: Perhaps I can start from the previous sentence, “Brigadier Calitz het lede van die Nyala opdrag gegee en –

21 MR MPOFU: Oh yes.

22 CHAIRPERSON: Brigadier Calitz gave the members of the Nyala an order, or the order, to close the doors, because the group was aggressive. The group, at 15:46, moved to the kraal where the last Nyalas to – it’s barbwire trailer, I think, was deployed. The group was at that stage about 3000 people [attackers]. Brigadier Calitz gave the order that the members should mount an operation, that’s what I translated last time, I think, to protect themselves against the attacks of the mass. Ja, it must be mass or group. Photo 1515. The group hesitated. Sorry, the members hesitated and until the group or what’s called the mass, were practically at them at the Nyala and the barbwire trailer. Out of the helicopter it could be seen that the water cannon were being deployed and that stun grenades and tear gas, the tear gas - granate, sorry, grenades, thank you, grenades were also being used against the attack of the group.

23 MR MPOFU: Thank you. Thank you,

24 Chairperson. And at least I read on the very good and reliable authority of Mr Burger, whom I asked last week, that the expression which has been translated, which means, “om te loods” –

25 CHAIRPERSON: I think that’s to mount an operation, isn’t it?

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11 CHAIRPERSON: Brigadier Calitz gave the members of the Nyala an order, or the order, to close the doors, because the group was aggressive. The group, at 15:46, moved to the kraal where the last Nyalas to – it’s barbwire trailer, I think, was deployed. The group was at that stage about 3000 people [attackers]. Brigadier Calitz gave the order that the members should mount an operation, that’s what I translated last time, I think, to protect themselves against the attacks of the mass. Ja, it must be mass or group. Photo 1515. The group hesitated. Sorry, the members hesitated and until the group or what’s called the mass, were practically at them at the Nyala and the barbwire trailer. Out of the helicopter it could be seen that the water cannon were being deployed and that stun grenades and tear gas, the tear gas - granate, sorry, grenades, thank you, grenades were also being used against the attack of the group.

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2 MR MPOFU: Oh yes.

3 CHAIRPERSON: Brigadier Calitz gave the members of the Nyala an order, or the order, to close the doors, because the group was aggressive. The group, at 15:46, moved to the kraal where the last Nyalas to – it’s barbwire trailer, I think, was deployed. The group was at that stage about 3000 people [attackers]. Brigadier Calitz gave the order that the members should mount an operation, that’s what I translated last time, I think, to protect themselves against the attacks of the mass. Ja, it must be mass or group. Photo 1515. The group hesitated. Sorry, the members hesitated and until the group or what’s called the mass, were practically at them at the Nyala and the barbwire trailer. Out of the helicopter it could be seen that the water cannon were being deployed and that stun grenades and tear gas, the tear gas - granate, sorry, grenades, thank you, grenades were also being used against the attack of the group.

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CHAIRPERSON: A platform for your questions.

MR MPOFU: Thank you, Chairperson.

CHAIRPERSON: The group moves back and regrouped again on the other side of the kraal. Photo 1516. And again attacked the police at about 15:55. It was clearly seen from the air that the group was not going to retreat or give way. Brigadier Calitz again gave the members the order to mount an operation. It almost seemed as if the members did not hear. Because of the incident on Monday, the 13th of August, where the two police members were chopped to death or hacked to death under the helicopter, I was – I realised that the members would have to act to defend themselves. I again repeated Brigadier Calitz’s order out of the helicopter, upon which I saw that the members were acting. Groups [attackers] photographed 1517, ran away in the direction of the shacks or the squatter’s houses adjacent to the scene at 15:56."

MR MPOFU: Thank you. And the question firstly is, we now all accept that in terms of the sequence this happened on the other side of the kraal, General, as the statement clearly says. And the issue is this. When the instruction was given by Brigadier Calitz to mount another offensive, which was repeated by Brigadier Vermaak, because he thought the members might not have heard, do you accept that according to Vermaak that was an instruction to act to defend themselves. Om hulle self te beskerm.

GENERAL-MAJOOR ANNANDALE: Soos dit hier vermeld is, ja, om hulleself te beskerm, dis korrek.

MR MPOFU: And that involved the use of live ammunition, correct? Or rather let’s put it, not involved the use of water. They were not going to protect themselves or defend themselves with water?

GENERAL-MAJOOR ANNANDALE: Voorsitter, soos ek dit lees, sal dit nie as dit individuele lede is waarna verwys word, sal dit nie water wees nie, maar dit kan goed wees skok granate en haelgewere ook, ek weet nie, dit kan potenseel ook -

MR MPOFU: And that would include defending themselves with the 9 millimetres and the R5 semi-automatic rifles?

GENERAL-MAJOOR ANNANDALE: Voorsitter, nee, ek kan nie sê wat was die bedoeling gewees van Brigadier Calitz nie. So ek kan nie sê dat dit 9 millimetres en R5 of skerppunt-ammunisie was nie.

MR MPOFU: Yes. I accept that, but you cannot exclude the possibility that they would defend themselves with, not just with the stun grenades or whatever else you mentioned, but also with the rifles and

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MR MPOFU: Sharp, yes, I think let’s say sharp ammunition which you must attempt to include the R5s and the 9 millimetres.

CHAIRPERSON: It’s sharp ammunitions what you’re talking of.

MR MPOFU: Yes, I think let’s say sharp ammunition which you must attempt to include the R5s and the 9 millimetres.

CHAIRPERSON: Mr Semenya wants to say something. Mr Semenya?

MR SEMENYA SC: Chair, perhaps this illustrates the point. If Colonel Vermaak is going to testify and we are now being told that what he’s saying here, doesn’t exclude certain things, and I’m sure Mr Mpofu hasn’t consulted this witness, to make that proposition to the witness again. And this is the nature of the complaint which we were debating earlier.

CHAIRPERSON: Mr Mpofu, isn’t there something in what Mr Semenya says? Clearly the Colonel is going to give evidence. Brigadier Calitz is going to give evidence. You’re really asking this witness to interpret the statements of these two witnesses. Now it would be our function at the end of the day to decide on the evidence of these two witnesses. What they say, may well be entirely dismissed.

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MR MPOFU: Whatever else you mentioned, but also with the rifles and the shotguns that they were carrying or rather –

CHAIRPERSON: The shotguns, the shotguns were for the tear gas and the rubber.

MR MPOFU: Yes.

CHAIRPERSON: It’s sharp ammunitions what you’re talking of.

MR MPOFU: Sharp, yes, I think let’s say sharp ammunition which you must attempt to include the R5s and the 9 millimetres.

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1 MR MPOFU: Okay, Chairperson. If - well,
2 if I can make a deal with you then, Chairperson?
3 CHAIRPERSON: No, no, I don't make deals
4 with counsel.
5 MR MPOFU: If - I will try and truncate
6 it in those terms, but I would like to put what I referred
7 to earlier, when the witness was not here, which is
8 paragraph 59 of Botes, at least.
9 CHAIRPERSON: Let's do that after lunch.
10 One of my colleagues has to make an urgent telephone call.
11 MR MPOFU: Thank you, Chairperson.
12 CHAIRPERSON: We'll resume at half past
13 one, alright, half past one.
14 [COMMISSION ADJOURNS  COMMISSION RESUMES]
15 [13:39] CHAIRPERSON: Mr Mpfou, is there a
16 problem with your clients. I see that everybody got up at
17 about - well, a lot of people got up at about 20 to 1 and
18 went off, and they haven't come back. Are they, is there
19 something - is there any reason why we shouldn't proceed?
20 I mean -
21 MR MPOFU: No, Chairperson, I'm aware of
22 the issues that are detaining them, so to speak. But -
23 CHAIRPERSON: You mustn't use that word
24 “detain.” It's got unhappy connotations.
25 MR MPOFU: I know, Chairperson,

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1 especially to them.
2 CHAIRPERSON: I'm sure. Generaal-Majoor,
3 u is nog steeds onder eed.
4 CHARL ANNANDALE: s.o.e.
5 CHAIRPERSON: Mr Mpfou, you did tell me
6 you're not available tomorrow. I hope that means that
7 you'll finish today. I understand it depends on injury
8 time, over which you have no control, but I would
9 appreciate it if you try very hard to finish today because
10 we'll need a witness tomorrow and -
11 MR MPOFU: Yes, Chairperson, I'm -
12 CHAIRPERSON: There are other cross-
13 examiners; I don't know how long they're going to be
14 though, when you're finished.
15 MR MPOFU: Well, if I may, I don't know
16 if I have permission to do this but at least one of the
17 cross-examiners indicated that they were going to be about
18 a day, so -
19 CHAIRPERSON: Really?
20 MR MPOFU: But Chair -
21 CHAIRPERSON: Oh dear.
22 MR MPOFU: I don't want that to attract
23 the ire to me, and I know that Mr Burger and Mr Tip are
24 going to be shortish, and then of course there's re-
25 examination.

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1 CHAIRPERSON: Yes.
2 MR MPOFU: But -
3 CHAIRPERSON: Re-examination is only
4 necessary to repeat damage done in cross-examination.
5 MR MPOFU: I know, Chairperson, it's
6 going to be a lot of re-examination. No Chair, the issue -
7 yes, I'm going to try and finish, but I must warn that I've
8 already moved my check-up for the afternoon, but I'm going
9 to try and finish -
10 CHAIRPERSON: No well, that's fine. If
11 you can't finish today then hopefully you'll finish
12 tomorrow -
13 MR MPOFU: Early, early tomorrow, yes,
14 but Chairperson, the other relevant issue, a proper word
15 we're talking about is that Mr Semenya and Mr Madlanga and
16 I had of course at your request discussed the matter of
17 General Phiyega and I had at that stage optimistically
18 thought I would finish by lunchtime today and we had then
19 projected that she would have to come back on Wednesday. I
20 just want to indicate that obviously we'll play it by ear
21 if by tomorrow - because we don't want her to waste her
22 time, but that's the arrangement as it stands now. If we
23 shift it, if it looks like that threat of the cross-
24 examination is carried out, then we might shift it by a
25 day, but -

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1 CHAIRPERSON: I wouldn't want her to be
2 inserted in the middle of the next witness.
3 MR MPOFU: Yes.
4 CHAIRPERSON: She must come in a gap
5 between witnesses, if you know what I mean.
6 MR MPOFU: Yes.
7 CHAIRPERSON: Alright, anyway -
8 MR MPOFU: Thank you, Chairperson.
9 CHAIRPERSON: Okay, carry on with your
10 cross-examination.
11 MS JELE: Chairperson, just if I might
12 for the sake of organisation and at the risk of incurring
13 the ire of the Commissioners, I would be the cross-examiner
14 that unfortunately believes that I will need at least a day
15 with the Major-General. I assure the Commissioners that we
16 are doing everything in our power to limit our cross-
17 examination as much as necessary -
18 CHAIRPERSON: Yes.
19 MS JELE: But as things currently stand
20 it still looks as though I would need that time.
21 CHAIRPERSON: No, I understand, and I've
22 been shown a number of statements that you're going to be
23 relying on, which I promise to read tonight, but - so
24 anyway, I understand what you say and I don't know whether
25 anyone has yet experienced the ire of the Commissioners,
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but perhaps it will be something that they will always
remember when they finally do experience it. Mr Mpofu,
would you like to carry on?

CROSS-EXAMINATION BY MR MPOFU (CONTD.):

Thank you, Chairperson. General, you’ve heard that we’re
trying to save time, so in the interest of time and also to
try and make up the time that was, I’m sure the Commission
will allow me to say wasted, or spent –

Chairperson: That was spent with quite a
constructive result in the end, I submit.

Mr Mpofu: Ja, okay, the time that was
spent. I’m going to try and, I’m going to actually give
you a longish statement because I expect you to deny it,
which will round off this topic. But if you want me to
break it down you’ll tell me.

Chairperson: A short question is the
ones which you expect to get affirmative answers to.

Mr Mpofu: I know, yes. I’m going to
base, what I’m going to argue at the end in relation to
this issue of whether there was a command or not is going
to be based on various things that you and I have
canvassed, but mainly on the statement of Brigadier
Vermaak, or Lieutenant-Colonel Vermaak who according to the
issue that we read now, at least makes it clear,
fortunately his statement is sequenced in terms of time and

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what I will argue is that the occasion that he refers to
when he gave an order, or repeated Brigadier Calitz’s
order, was after the issues of water and stun grenades –

Chairperson: Teargas and stun grenades.

Mr Mpofu: And teargas, yes, and I will
then argue that it was when people had gone to the other
side of the kraal according to him, which relates to the
shooting of the live ammunition. I’m just saying that’s
what I will argue. Do you understand it? You don’t have
to agree with me, but if you want to comment.

Generaal-Majoor Annandale: Ek hoor dit
so, Vorsitter.

Mr Mpofu: The other basis of my argument
in that respect will be your evidence as it appears from
pages 8334 to 8335 where you describe - actually it also
goes up to 8339, so let say 8334 to 8339, specifically
where you deal with scene 1. Among other things you say
that Brigadier Calitz indicated that the water cannon
should move and he also remarked that where is the TRT
line, the TRT line must move, and from the hopper that
Colonel Vermaak indicated the direction that the people
must move. You then say there was a stage where Brigadier
Calitz indicated that the people must not engage unless you
are being engaged, or words to that effect, and as I hinted
in the morning, I’m going to argue that the word “engage”
in that context cannot, does not refer to water cannons but
it refers to live ammunition. That’s what I will argue.
Once again you don’t have to agree. I’m just telling you
the basis of what I will argue.

Generaal-Majoor Annandale: U is reg, ek
stem nie saam nie maar ek hoor u argument.

Mr Mpofu: And in respect of that second
ground the words that you used immediately after this use
of the word “engage,” you then said “There was a stage
where he mentioned that people must get out of the Nyalas
and they must perform arrests. I can also remember that he
said ‘Take the panga, take the panga.’ I can remember
Colonel Vermaak mentioned that there are bodies lying down
and he indicated that the water cannons must split and one
must go to the other side,” and so on. You’ve already
answered. I just wanted for the sake of completion to
inform you on what basis I’m going to argue that this
referred to the shooting of live ammunition.

Then the third broad ground, all these other
grounds obviously I’ll canvass with other witnesses, except
for the one where I’m quoting you. The third other ground
is on the statement of Mr Botes that we have dealt with.
If you jump, we dealt with paragraph 57. If you jump
paragraph 58 and go to paragraph 59, he says, quote, “Other
than for hearing the word ‘engage’ which was repeated a few

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times (underline a few times) immediately (underline
immediately) before the shooting start I did not hear any
specific instruction for the use of live ammunition.” In
other words he says other than that word he did not hear
any other specific, or rather any specific instructions
which – well, it’s a matter of interpretation, but I’m
going to argue means that he, well, firstly that it
happened immediately before, but he took it to be an
instruction for the shooting of live ammunition. Do you
understand where I’m coming from at least?

Generaal-Majoor Annandale: Vorsitter,
ja, ek hoor dit is ‘n saak vir interpretasie. As ek net
mag meld op dit wat mnr Botes gesê het, ek het nie die
woorde “engage, engage, engage” gehoor soos wat hy dit
vermeld in paragraaf 57 presies so nie. Die eerste keer
wat ek onthou dat ek die woord “engage” gehoor het was
sekerlik omtrent so 20 minute nadat die draad uitgerol is.
Dit moes dan gewees het na die toneel van toneel 1 en ek
weet ook dat dit herhaal is op ‘n gedeelte van ‘n Protea
Coin helikopter wat mens dit kan hoor en dit was verseker
na 4 want ek weet hulle helikopter het min of meer eers 4
uur het hy opgestyg met Generaal Mpembe. Dankie,
Vorsitter, ek wou dit net meld.

Mr Mpofu: Sorry, I think the
interpretation, or rather the witness referred to the Coin
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<td>1  helicopter, not the Oryx. Coin Security, which is</td>
<td>1  and actions that will be taken.” I think that's the</td>
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<td>2  otherwise known as the Lonmin chopper in the documentation.</td>
<td>2  passage you have in mind.</td>
</tr>
<tr>
<td>3  CHAIRPERSON: He referred to the</td>
<td>3  MR MPOFU: Yes, as the Chairperson has</td>
</tr>
<tr>
<td>4  helicopter that Major-General Mpembe was in, which was the</td>
<td>4  read it, she indicated that she will inform the Minister of</td>
</tr>
<tr>
<td>5  Coin one. There seems to be some connection between Coin</td>
<td>5  Police on the current situation and the actions that will</td>
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<tr>
<td>6  Security and Lonmin, so it's also called the Lonmin</td>
<td>6  be taken. The point really I want to make is since you</td>
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<td>7  helicopter, whereas I think Lieutenant-Colonel Vermaak was</td>
<td>7  were chairing the meeting, that these remarks were made in</td>
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<td>8  in the Oryx one, I think. Which one</td>
<td>8  your presence and you can confirm that part of the minute.</td>
</tr>
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<td>9  was he?</td>
<td>9  GENERAL-MAJOR ANNANDALE: Voorsitter,</td>
</tr>
<tr>
<td>10 GENERAAL-MAJOR ANNANDALE: Voorsitter,</td>
<td>10 dit was in my teenwoordigheid gemAAK.</td>
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<td>11 nee, die Oryx was die Suid-Afrikaanse Lugmag helikopter.</td>
<td>11 MR MPOFU: And well, I'm sure the purpose</td>
</tr>
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<td>12 Kolonel Vermaak was in die klein Robinson R44 -</td>
<td>12 of making the remarks I will ask General Mbombo, but from</td>
</tr>
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<td>13 CHAIRPERSON: The Squirrel. The</td>
<td>13 your point of view did these remarks assure you that at</td>
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<tr>
<td>14 Squirrel.</td>
<td>14 least the operation had the blessings of the National</td>
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<tr>
<td>15 GENERAAL-MAJOR ANNANDALE: Nee, hy was</td>
<td>15 Commissioner and would probably, or rather would also be</td>
</tr>
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<td>16 nie die Squirrel nie, hy was in die Robinson.</td>
<td>16 communicated to the Minister?</td>
</tr>
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<td>17 CHAIRPERSON: Well, he says, &quot;Ons het met</td>
<td>17 GENERAL-MAJOR ANNANDALE: Voorsitter,</td>
</tr>
<tr>
<td>18 die helikopter RPB Squirrel onttrek.&quot; Unless that was</td>
<td>18 nie noodwendig &quot;blessings&quot; of goedkeuring nie, net dat die</td>
</tr>
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<td>19 earlier. I don't know whether he was in that one on the</td>
<td>19 Nasionale Kommissaris aldus ingelig is.</td>
</tr>
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<td>20 16th. Oh, no, on the 16th he says &quot;was ek bemanning op</td>
<td>20 MR MPOFU: Yes, I thought your evidence</td>
</tr>
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<td>21 helicopter R44 RKE.&quot; That's the Robinson.</td>
<td>21 either in chief - no, probably during cross-examination of</td>
</tr>
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<td>22 GENERAL-MAJOR ANNANDALE: Dis die</td>
<td>22 Mr Budlender, was that if ever a junior person says</td>
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<td>23 Robinson, dis reg, Voorsitter.</td>
<td>23 something to the senior and the senior agrees, then that</td>
</tr>
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<td>24 MR MPOFU: In any event, it's one of the</td>
<td>24 for all intents and purposes amounts to an order.</td>
</tr>
<tr>
<td>25 SAPS helicopters, not the air force one or the Coin one.</td>
<td>25 [13:59] CHAIRPERSON: What I do remember him</td>
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<td>1  MR MAHLANGU: That's correct, yes.</td>
<td>1  saying was that if those people on the JOCOM hadn't agreed</td>
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<td>2  MR MPOFU: Okay, that's fine. I understand that, as I said I'm not</td>
<td>2  with the Provincial Commissioner who had instructed that</td>
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<td>3  going to debate those issues with you; I will debate it with the</td>
<td>3  stage 3 should be implemented, they would have said so. I</td>
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<td>4  other witnesses.</td>
<td>4  understood him to say that.</td>
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<td>5  Now moving on, there is just, I'm just going to deal with</td>
<td>5  MR MPOFU: Ja.</td>
</tr>
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<td>6  small issues that I want to get out of the way before we go</td>
<td>6  CHAIRPERSON: But I don't remember - if</td>
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<td>7  to the next big topic. I'm sure I don't have to give you the</td>
<td>7  I'm wrong someone can show me the passage, but I don't</td>
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<td>8  exhibit by now. We've dealt with it before. In exhibit EE there is the</td>
<td>8  remember what you've now put as having been said.</td>
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<td>9  reference that Lieutenant-General Mbombo reported that she had spoken</td>
<td>9  MR MPOFU: Okay.</td>
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<td>10  to the National Commissioner who indicated that she, this is now the</td>
<td>10  CHAIRPERSON: But again it's a point on</td>
</tr>
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<td>11  National Commissioner, or rather General Mbombo told her that the</td>
<td>11  the peripheral, isn't it? You can get home without it or</td>
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<td>12  stage 3 of the plan would be implemented and that the</td>
<td>12  not, as the case may be.</td>
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<tr>
<td>13  National Commissioner had indicated that that information had been</td>
<td>13  MR MPOFU: Yes. Okay.</td>
</tr>
<tr>
<td>14  relayed to the Minister.</td>
<td>14  not in possession of the exact passage, so I won't belabour</td>
</tr>
<tr>
<td>15  CHAIRPERSON: If you're referring to the third page of exhibit EE,</td>
<td>15  the point. I just want to ask you one thing. Did you say</td>
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<td>16  which is described as police hard drive 1613, the passage is the</td>
<td>16  in relation to the discussion between General Mpembe and</td>
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<td>17  second paragraph under the heading “Closing remarks.” “The Provincial</td>
<td>17  the Provincial Commissioner before the 13:30 meeting, did</td>
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<td>18  Commissioner indicated that she'd already communicated with the</td>
<td>18  you say that because General Mpembe gave the report and the</td>
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<td>19  National Commissioner, informing her of the current situation, that</td>
<td>19  Provincial Commissioner seems to agree, that that would</td>
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<td>20  a deadlock is reached with negotiations and also that phase 3 of the</td>
<td>20  indicate that the Provincial Commissioner was in agreement?</td>
</tr>
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<td>21  operational plan would be executed. She also indicated that the</td>
<td>21  I won't put it higher than that.</td>
</tr>
<tr>
<td>22  National Commissioner indicated that she will inform the Minister of</td>
<td>22  GENERAL-MAJOR ANNANDALE: Voorsitter,</td>
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<td>23  the current situation</td>
<td>23 dis reg. Die Provisiale Kommissaris het saamgestem.</td>
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<td>24  MR MPOFU: Thank you. Now the intelligence that you received, I'm now</td>
<td>24  MR MPOFU: Thank you. Now the intelligence that you received, I'm now</td>
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<td>1 specifically about the intelligence that was revealed in the morning of the 16th, or even in the days before that, indicated among other things two things. One was that the people had said that they were armed to defend themselves because of “an attack,” as they’ve put it, upon them by the NUM. That’s one of the issues that they revealed.</td>
<td>1 teargas, stun grenades, water cannons and those kinds of measures should only be employed after a warning has been given?</td>
</tr>
<tr>
<td>2 4 GENERAAL-MAJOR ANNANDALE: Voorsitter, in terme van Staande Order 262 as mens sou ‘n normale protesaksie hê en jou sou dan die geleentheid kry na die ontپ 3</td>
<td>5 ja, in terme van Staande Order 262 as mens sou ‘n normale protesaksie hê en jou sou dan die geleentheid kry na die ontپ 4</td>
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<td>3</td>
<td>6 ontplooiing van defensiewe maatreëls om dan die waarskuwing te gee voor die offensiewe maatreëls.</td>
</tr>
<tr>
<td>4 MR MPOFU: And since it would seem that you knew as much as early in the morning that there would be resistance and people might even be prepared to die, in the contingency plan, or the contingency, whatever you call it, was there provision made for the issuing of such a warning? If so, at what stage was it going to be done?</td>
<td>7 GENERAAL-MAJOR ANNANDALE: Voorsitter, dis ‘n standaard vereiste voordat daar offensiewe maatreëls gaan plaasvind, so in die geval sou dit gewees het nadat die draad - die defensiewe maatreël - uitgerol was, dan sou die waarskuwing geskied.</td>
</tr>
<tr>
<td>5</td>
<td>8 MR MPOFU: Now do you – okay, let me put it this way. You are aware that the police had the means to issue such a warning, and in fact we know that there was a loudhailer which in one of the videos we heard an announcement being made, “Media, go away. Media, go away.” So the means were there. Should we accept that?</td>
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<td>1 indicated that they were prepared to die.</td>
<td>1 GENERAAL-MAJOR ANNANDALE: Ja, publieke adresseringsisteme was beskikbaar gewees in ten minste van die Nyalas, indien nie almal nie.</td>
</tr>
<tr>
<td>2 GENERAAL-MAJOR ANNANDALE: Ek weet nie wat is die woorde in daardie verslag nie, maar die strekking is wel so.</td>
<td>2 MR MPOFU: Yes, and I’m sure everyone will accept that it’s no use just having the means; you must also have the opportunity.</td>
</tr>
<tr>
<td>3 MR MPOFU: Okay, that’s fine. That’s good enough for where I’m going. The issue is this. As a result of that intelligence there was, or rather the police devised a contingency plan. Is that correct? GENERAAL-MAJOR ANNANDALE: Voorsitter, nie ‘n gebeurlikheidsplan nie, ‘n gebeurlikheid.</td>
<td>3 MR MPOFU: The evidence of the police will suggest that there was at least, at least 90 seconds between the approach at Nyla 4 and the crowd re-emerging on the other side of the krai.</td>
</tr>
<tr>
<td>4 MR MPOFU: Okay, please just assist me then, what’s the difference? GENERAAL-MAJOR ANNANDALE: Voorsitter, miskien die beste wat ek kan verduidelik, ‘n gebeurlikheidsplan sal wees as daar ontruiming moet plaasvind uit ‘n gebou uit en daar is ‘n fisiële plan geskryf in terme van as daar vuur is en die ontruiming plaasvind, en die gebeurlikheid sal net ‘n pünentie akties stap wees, soos byvoorbeeld ontruiming sal plaasvind. So om dit na Marikana toe te bring, Voorsitter, was dit die, die gebeurlikheid was gewees om die draad sleepwaens te preposieer.</td>
<td>4 MR MPOFU: Dit is reg, Voorsitter, hulle moet die geleentheid ook hê.</td>
</tr>
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<td>5</td>
<td>5 MR MPOFU: And subject to an objection by Mr Semenya, if you look at the picture where the 90 seconds is depicted, one could say that there were at least another half a minute before the actual shooting. So we’re talking “min of meer” two minutes.</td>
</tr>
<tr>
<td>6 MR MPOFU: And since it would seem that you knew as much as early in the morning that there would be resistance and people might even be prepared to die, in the contingency plan, or the contingency, whatever you call it, was there provision made for the issuing of such a warning? If so, at what stage was it going to be done?</td>
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Chairperson: Ja.

Mr Mpofu: Well firstly, Chairperson, no, referring to?

Chairperson: So what warning are you to some other warning.

Mr Mpofu: That's right, Chairperson.

Chairperson: But if we're now at the stage just before the shooting started, then obviously the wire has already been deployed. So you must be referring to some other warning.

Mr Mpofu: Yes.

Chairperson: But if we're now at the stage just before the shooting started, then obviously the wire has already been deployed. So you must be referring to some other warning.

Mr Mpofu: Ja.

Chairperson: So what warning are you referring to?

Mr Mpofu: Well firstly, Chairperson, no, that's not correct. I was certainly not talking about any warning before the barbed wire was deployed.

Chairperson: But if we're now at the stage just before the shooting started, then obviously the wire has already been deployed. So you must be referring to some other warning.

Mr Mpofu: Ja.

Chairperson: But if we're now at the stage just before the shooting started, then obviously the wire has already been deployed. So you must be referring to some other warning.

Mr Mpofu: Yes.

Chairperson: Now let's get another -

Mr Mpofu: So that's, let's get another -

Chairperson: So what warning were you talking about?

Mr Mpofu: Well, I'm now talking about - and Mr Semenya is correct, because I didn't make the distinction. What I'm talking about now is a warning that should have been given, albeit belatedly, before the use of live ammunition, and I didn't make it clear.

Chairperson: In other words if you don't stop your nonsense, if you don't move backwards -

Mr Mpofu: We now -

Chairperson: - or stay where you are, we will shoot you?

Mr Mpofu: Yes, we'll use that one, and Mr Semenya is correct, I didn't make it clear that I was now talking about that, ja.

Chairperson: I take it he's now -

Mr Semenya SC: Well, again I have never known in police action that there is a requirement to give a warning before you act in self-defence.

Chairperson: I don't know that Mr Mpofu is suggesting that it's a requirement. He's simply trying to establish if there was time to do it. Is that right?

Mr Mpofu: That's right, Chairperson.

Yes.

Chairperson: Now let's get another -

Mr Mpofu: So that's, let's get another -

Chairperson: So what warning were you talking about?

Mr Mpofu: Well, I'm now talking about - and Mr Semenya is correct, because I didn't make the distinction. What I'm talking about now is a warning that should have been given, albeit belatedly, before the use of live ammunition, and I didn't make it clear.

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Chairperson: I don't know that Mr Mpofu is suggesting that it's a requirement. He's simply trying to establish if there was time to do it. Is that right?

Mr Mpofu: That's right, Chairperson.

Yes.

Chairperson: Now let's get another -

Mr Mpofu: So that's, let's get another -

Chairperson: So what warning were you talking about?

Mr Mpofu: Well, I'm now talking about - and Mr Semenya is correct, because I didn't make the distinction. What I'm talking about now is a warning that should have been given, albeit belatedly, before the use of live ammunition, and I didn't make it clear.

Chairperson: In other words if you don't stop your nonsense, if you don't move backwards -

Mr Mpofu: We now -

Chairperson: - or stay where you are, we will shoot you?

Mr Mpofu: Yes, we'll use that one, and Mr Semenya is correct, I didn't make it clear that I was now talking about that, ja.

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Mr Mpofu: That's right, Chairperson.

Yes.
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1 must mean that the threat must have been imminent to life
2 and limb. Is there a requirement somewhere there between
3 the imminent threat and the action?
4 CHAIRPERSON: Mr Mpofu, as I understand
5 the objection - it's not an objection, I think it's more of
6 query, what Mr Semenya wants to know, what is the source of
7 the obligation which you're going to contend there was
8 resting on the police to give a warning during that time
9 that you answered in response to the question asked by my
10 colleague Commission Hemraj? Just what's the source of the
11 obligation? Is it part of the law of self-defence, is it a
12 police regulation, is it a statute, is it common sense?
13 What is it? I just want to understand correctly.
14 MR MPOFU: Chairperson, the source of the
15 obligation comes from inter alia regulation 262 where it
16 says they must warn the participants according to the act
17 that, of the action that will be taken against them should
18 defensive measures fail, and I've already conceded that
19 point earlier. Then step 2 it says, “We bring forward the
20 reserve or reaction section, platoon, that will be
21 responsible for offensive measures,” and I'm assuming let's
22 read that as TRT for the purposes of this case, “as a
23 deterrent to further violence should the abovementioned
24 measures not achieve the desired result.”
25 CHAIRPERSON: In other words what you say

1 at the moment, but that's the police contention. The point
2 that Mr Semenya is making is that that paragraph doesn't
3 apply on the factual premise, or on the factual
4 circumstances with which the witness is dealing at the
5 moment.
6 MR MPOFU: Okay, Chairperson, I think
7 I'll answer that by asking a question. Does the term
8 “offensive measures” include the – or rather, does it
9 include both the firing of teargas, water, stun grenades,
10 as well as live ammunition?
11 GENERAAL-MAJOR ANNANDALE: Voorsitter,
12 offensiewe maatreëls is genoem, soos genoem deur Adv Mpofu,
13 dit kan wees gesamentlik of enkele van die. Dit hoef nie
14 noodwendig almal te wees nie, maar dit staak by die gebruik
15 van 'n haelgeweer. Voorsitter, die beginsels van die
16 betrokke Staande Order is van toepassing op skarebestuur
17 uitsluitlik, en wat belangrik is, is die paragraaf wat iets
18 lees soos hierdie gemeenregtelike beginsels van
19 selfverdediging, noodweer, of die beskerming van eiendom
20 wat nie geraak deur hierdie order nie. So daardie
21 waarskuwing is nie van toepassing in terme van
22 selfverdediging en beskerming van eiendom en noodweer nie.
23 COMMISSIONER HEMRAJ: Mr Mpofu, doesn't
24 11(4) specifically exclude live ammunition being used in
25 the execution of the plan, because that's the context in

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2 the answer is I don’t know for now, but it doesn’t matter.
3 The only issue is that offensive measures includes the use
4 of live ammunition, which the witness has confirmed.
5 CHAIRPERSON: From what I understand he
6 said that offensive measures stop with the use of shotgun.
7 So in other words stun grenades and teargas. That’s the
8 terminus, as it were, of offensive measures for the
9 purposes of the Standing Orders.
10 MR MPOFU: Well, can we then go to –
11 okay, this time you will have to forgive me because I
12 didn’t anticipate, I thought this was common cause, but I’m
13 just going to read you a definition that is contained in –
14 and we will make copies available – National Instruction of
15 2012, Public Order Policing, crowd regulation and
16 management during public gatherings and demonstrations, and
17 before Mr Semenya objects, I do understand that, I think he
18 had raised the question at some stage about whether this
19 particular regulation was already operational or not, but
20 nevertheless, this is what I want to read to you. It
21 defines offensive measures in section 2(n) thereof. I’ll
22 just read it out, Chairperson, I’ll make it available. It
23 might be an exhibit, I don’t know, Ms Pillay.

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1 MS PILLAY: Is it also confirmed that Mr
2 Semenya said it was a draft?
3 MR MPOFU: Possibly. That’s why I’m
4 acknowledging that, ja. But it says that “Offensive
5 measures refers to reactive tactical measures required to
6 normalise a situation which ranges” –
7 CHAIRPERSON: Sorry, what page are you
8 referring to?
9 MR MPOFU: Of that document it’s page 3
10 of 21, (n), small letter n for Nellie, National Instruction
11 of 2012, Public Order Policing, crowd regulation and
12 management during public gatherings and demonstrations, and
13 which may or may not be a draft?
14 MS PILLAY: Chair, this document is a
15 draft document. It hasn’t been entered as an exhibit as
16 yet.
17 MR MPOFU: Yes. I accept that.
18 CHAIRPERSON: I thought it might be
19 exhibit R, but I see it isn’t exhibit R.
20 MR MPOFU: No, it’s not.
21 CHAIRPERSON: It’s a document that hasn’t
22 been before us.
23 MR MPOFU: Yes, but it’s part of that –
24 CHAIRPERSON: It’s just a draft though.
25 Alright, anyway, what does it say?

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1 MR MPOFU: It says, and it was submitted
2 by SAPS, “Offensive measures refers to reactive tactical
3 measures required to normalise a situation which ranges
4 from making arrests, using of pyrotechnics, to responding
5 with firearms and includes search and seizure, push-back,
6 evacuation, encircling, and dispersal.”
7 CHAIRPERSON: That’s what it means in
8 that document. The question is –
9 MR MPOFU: Well –
10 CHAIRPERSON: No, no, no, listen to me,
11 Mr Mpofu, before I attract your ire. That’s what it means
12 in that document. What the witness is concerned with is
13 what it means in the Standing Order and he said what he
14 understands it to mean in the Standing Order. The fact
15 that it means one thing in one document doesn’t mean it
16 necessarily means the same in another document.
17 MR MPOFU: Right, okay. In the document
18 that is not a draft, which is Order 262, there is a
19 definition of offensive measures. In the other one there’s
20 a definition of offensive measures, which includes the use
21 of firearms, but in 262, paragraph 2(f), it says,
22 “Defensive measures refer to proactive tactical measures
23 such as a static barrier which are used to protect and
24 safeguard people or property by cordoning off, blocking,
25 isolating, patrolling, escorting, and channelling people.”

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1 Do you accept that definition which is in an official
2 document, of defensive measures?
3 GENERAAL-MAJOR ANNANDALE: Ek aanvaar
dit so.
4 MR MPOFU: And would you accept that the
5 measures which are not included in the definition of
6 defensive measures, such as those that are included in the
7 other definition, including the use of live ammunition,
8 aggregately constitute offensive measures?
9 MR SEMENYA SC: No –
10 CHAIRPERSON: Before the question is
11 interpreted, I have a problem with that. We’re busy
12 interpreting what the expression “offensive measures” means
13 in 262 and 262, die einste 262, says in paragraph 11(4),
14 “The following are prohibited or restricted during crowd
15 management operations. (b), the use of firearms and sharp
16 ammunition, including birdshot and buckshot, prohibited.”
17 So the drafter of the Standing Order could never have
18 intended the expression “offensive measures” in 11(2)(4) to
19 include the use of firearms because he or she was going to
20 go on to say in subparagraph (4) that the use of firearms
21 and sharp ammunition were prohibited. So therefore clearly
22 offensive measures didn’t come – the use of sharp
23 ammunition wasn’t covered by, wasn’t really in the
24 contemplation of the expression “defensive measures.” That
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1 must be so.
2 
3 MR MPOFU: No, Chairperson -
4 
5 CHAIRPERSON: It's a matter of elementary
6 interpretation.
7 
8 MR MPOFU: With respect, Chairperson,
9 that can definitely not be correct. If you go to 11(3) it
10 says, "If the use of force is unavoidable," which I
11 understand is applicable here, at least according to the
12 police, "it must meet the following requirements. The
13 purpose of offensive actions are to de-escalate conflict
14 with the minimum force to accomplish the goal and therefore
15 the success of the actions will be measured by the results
16 of the operation in terms of cost, damage to property,
17 injuries to people, and loss of life." Surely, surely the
18 offensive measures that are contemplated in 262 11(3),
19 which may lead to loss of life, cannot be said to exclude
20 when use of force is unavoidable, the use of live
21 ammunition. I mean it -
22 
23 CHAIRPERSON: Well, even if you're right,
24 Mr Mpofu, it's a matter for interpretation which I don't
25 think can sensibly be debated with this witness. It's a
26 matter you can argue at the appropriate time, but General
27 Annandale isn't the interpreter of the Standing Orders and
28 whatever he says about it would not really be relevant when
29 one interprets the wording used.

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1 MR MPOFU: That's fine. Forget offensive
2 measures, whatever it is. Shooting people, whatever it's
3 called, would you accept that a police force that is
4 committed to no loss of life, no injuries to people, which
5 has the means and the opportunity to warn people, should do
6 so before live ammunition is used against them, whatever
7 the definition thereof is?
8 [14:38] CHAIRPERSON: Then you haven't answered
9 Mr Semenya's query. Mr Semenya wanted to know from you
10 when you put the proposition to the witness, what was the
11 source of the obligation upon which you rely, and you said
12 262. We've had a debate about that and I understand you to
13 say you don't persist in that. So then Mr Semenya then is
14 entitled to say well would you please answer my question
15 before the witness is expected to answer it.
16 MR MPOFU: No, Chairperson, with the
17 greatest respect, I've read from 262. We know that even
18 under the common law there's requirement for
19 proportionality and the duty to flee doesn't apply to the
20 police, but at the very least there must be a duty to avoid
21 the calamity. That I'm sure is not a matter for debate.
22 All I'm saying is that - because I don't want to be
23 involved in a semantic debate about offensive or defensive
24 measures - is that when you are contemplating loss of life,
25 which is prohibited by the regulations, about that there's

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1 no debate, and you have the means and the opportunity to
2 warn the people that we are now going to get to this stage,
3 call it what you want, isn't there an obligation emanating
4 - I'm prepared to concede - partly from the regulations
5 which says there should be no loss of life and it must be
6 avoided at all costs, but also just from, to answer Mr
7 Semenya's questions more directly, from common sense, but
8 that common sense is not separate from the no loss of life,
9 no injuries, and so on, which is in the regulations.
10 CHAIRPERSON: Mr Mpofu, you'll forgive
11 me, but it sounds to me as if what you're really saying is
12 that you say the source of the obligation would be the
13 common law, and if that's so, then it's not necessary to
14 ask the witness what he thinks the common law is and nor
15 would the witness's answer be receivable.
16 MR MPOFU: Yes.
17 CHAIRPERSON: So perhaps we can move on
18 then.
19 MR MPOFU: Okay. Alright, you said for
20 example that a lot of things were happening in that two
21 minutes, and I agree with you, some of the lots of things
22 that were happening, at least according to the videos, is
23 that the TRT people were being instructed to form a basic
24 line, whatever that is, and that there was a warning for
25 the media to move away. That happened in that period. You

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1 may not be aware of it because you were not there, but are
2 you prepared to accept that those are things that happened
3 in that period?
4 MR SEMENYA SC: - Mr Mpofu may just
5 assist us by explaining which period, just for our
6 edification.
7 MR MPOFU: Okay. Chairperson, let me
8 take a step back. You'll remember that I put a question to
9 Mr Magidiwana who said very clearly that between the time
10 that they were trying to access the road when Nyala 4
11 closed, and the time that they re-emerged on the other side
12 of the kraal, the TRT line – I'm using shorthand – must
13 have been formed at that time, and he said that because I
14 asked him, and I think Mr Ngalwana might even have asked
15 him, but at least I'll account for my side, that, "When you
16 were stopped at Nyala 4 you obviously had a view of where
17 the police line was. Was it there?" and he said, "No, it
18 was not there." "And when you re-emerged, was it there?"
19 "Yes." So obviously it must have been formed at that time.
20 Secondly, we have videos that show very clearly the TRT
21 line rushing to its formation and we have videos that show
22 people saying that basic line, basic line, that they must
23 form a basic line, and I'm sure we'll explore that with
24 other people as to what that means. Then we have the
25 evidence of "Media, move away. Media, move away." All
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10       MR MPOFU:       No, I’m afraid – I’ll find it,
11       but I’m a thousand percent sure, because I asked the
12       question myself, either in chief or in re-examination, but
13       I’ll find it, Commissioner.
14       CHAIRPERSON:       I must confess I haven’t
15       got a recollection one way or the other, so you may well be
16       right, but how does this point help us in relation to the
17       evidence of this witness, or more accurately, how does the
18       evidence of this witness help us in relation to this point?
19       MR MPOFU:       Well, Chairperson, the
20       evidence of this witness, as I’ve said earlier, is that the
21       shooting was “onvermydelik.” I’m busy putting propositions
22       to him which show that it could have been avoided, one of
23       which –
24       CHAIRPERSON:       Okay, carry on.
25       MR MPOFU:       Thank you.
26       MR SEMENYA SC:       Chair, just for the

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1       record –
2       MR MPOFU:       I’m sorry, “onvermydelik” by
3       the way means unavoidable.
4       MR SEMENYA SC:       Chair, for the record,
5       even in evidence-in-chief the witness is not saying that
6       the police action was in self-defence. The witness’s
7       evidence is he was informed by various stages of commanders
8       that their action was, the action of the police was
9       actuated by self-defence. So you cannot test the
10      correctness of that assertion, if it is that, through this
11      witness. It would have to be those who took the action
12      themselves who must answer to it.
13      CHAIRPERSON:       But isn’t that right, his
14      evidence on that point is hearsay, so I understand you
15      don’t want to be accused of having not challenged his
16      evidence on the point so that it could be argued later that
17      you accepted it. You’ve made it clear you don’t accept it.
18      But inasmuch as his evidence on the point is based on, is
19      hearsay based on what other people told him, it’s enough
20      for you to say I’m going to put to the witnesses who gave
21      you your information that they were wrong, it wasn’t
22      unavoidable, but I don’t propose dealing with it with you.
23      MR MPOFU:       Okay –
24      CHAIRPERSON:       If you do it that way then
25      it’s fine. Then none of those points can be taken against

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1       those things clearly happened in that space between Nyala
2       4, the Nyala 4 incident and the shooting, which is why I
3       locate them in the two minutes.
4       COMMISSIONER HEMRAJ:       - there a reference
5       for Mr Magidiwana’s evidence where he says that the line
6       was not there initially and then he saw it there? Because
7       my recollection is something else. Do you have a reference
8       or not?
9       MR MPOFU:       No, I’m afraid – I’ll find it,
10      but I’m a thousand percent sure, because I asked the
11      question myself, either in chief or in re-examination, but
12      I’ll find it, Commissioner.
13      CHAIRPERSON:       I must confess I haven’t
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20      shooting was “onvermydelik.” I’m busy putting propositions
21      to him which show that it could have been avoided, one of
22      which –
23      CHAIRPERSON:       Okay, carry on.
24      MR MPOFU:       Thank you.
25      MR SEMENYA SC:       Chair, just for the

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1       that. Let’s talk about Marikana. You said “Die draad was
2       dan juis ontplooi om enige benadering tot die polisielyn te
3       ontmoedig.” Among other things, but the point of the
4       matter is that in the Marikana situation the method by
5       which the police had decided the people will be dissuaded
6       or prevented from entering the police line was barbed wire,
7       hence the drawing of the first four Nyalas, correct?
8       GENERAAL-MAJOR ANNANDALE:      Voorsitter,
9       dit was die draad, maar dit was ook die magsvertowner, die
10      ontplooiing van die ekstra getalle om dan enige so’n
11      benadering te ontmoedig.
12      MR MPOFU:       Yes, but in terms of the so-called
13      force continuum you would agree that barbed wire is
14      a more preferable way of blocking people then semi-
15      automatic rifles?
16      GENERAAL-MAJOR ANNANDALE:      Voorsitter,
17      ons gebruik nie wapens om mense te blok nie. Ons het die
18      draad ontplooi om hulle te ontmoedig om in daardie rigtig
19      te beweeg.
20      MR MPOFU:       Alright, again to save time,
21      let me cut to the chase. The Nyalas 5 and 6 still had
22      their barbed wire undeployed. Correct?
23      GENERAAL-MAJOR ANNANDALE:      Ek het dit so
24      oor, Voorsitter.
25      MR MPOFU:       We are back to our discussion
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1 of the means and the opportunity. So the means were there;
2 the barbed wire was available. We've established that, and
3 the two minutes was there, and we've already established
4 that, plus-minus. Now I want to say to you that - and I
5 want your comment - the gap where 16 or so people were
6 killed is about, we've already established that this is not
7 scientific, about 20, at most 25 metres - I measured it
8 myself - and it is between the kraal and the corner of the
9 fence. You know where the people died, where they were
10 lying down. That gap is about plus-minus 20, 25 metres.
11 Would you accept that?
12 GENERAAL-MAJOR ANNANDALE: As ek u nou
13 reg verstaan, die, daar is drie kraal, so die klein kraal
14 waar die stertes plaasgevind het, vanaf die kraal tot by
15 'n draad wat u na verwys, 'n hoek draad, of 'n "corner of a
16 fence?"
17 MR MPOFU: Okay, well in your evidence
18 you referred to it as unprotected, but I'll assist you. If
19 you go to 208, look at 208 and 209 - sorry, exhibit L, 208
20 and 209 - you see the shack in 208?
21 GENERAAL-MAJOR ANNANDALE: Ek doen, dis
22 reg, Voorsitter.
23 MR MPOFU: Okay, you can also see it in
24 209 in a different profile, from an aerial point of view.
25 GENERAAL-MAJOR ANNANDALE: Ek sien ook

A page from the Marikana Commission of Inquiry transcript.
GENERAL-MAJ OOR ANNANDALE: Voorstetter,
1 soos ek dit het, die polisie het nie voorsien dat daar 'n
gaping gaan wees en dat 'n groep van die stakers na daardie
gapings toe sou gaan nie. Voorstetter, as ons kyk na
dan sal u merk die ses Nylas met die draadkarre wat
ontplooi is, en dan agter hulle is daarsoor vyn Nylas wat
net so 'n paar meter agter hulle in 'n ry staan, en dan sal
u merk daar is 'n sy flank wat ook, dit is vyn voertuie wat
waarskynlik vier Nylas en een Casspir voertuig is wat ook
geposisioneer is, wat so half in 'n noordelike rigting sal
ek sê wys. Voorstetter, en al hierdie voertuie wat ek nou
na verwys is voertuie wat beman is deur Openbare Orde
Polisiering, en dan sal u merk agter die vyf Nylas wat
geposisioneer is net 'n paar meter agter die ses Nylas met
die draad, is daar groot spasie en dan is daar wat ek weet
is sagte-dop voertuie, Voorstetter, en dis waar die TRT lede
ontplooi was, en ek is seker as ons hierdie foto opblaas
sal ons sien daar is nie 'n lyn van die TRT wat gevorm is
by die kraal en dat eers later, die laaste foto wat dit lyk
vir my na 15:51, dan is daar 'n lyn. So sowsat wat dit aan
my oorgedra is, en ek kan suier net sê wat aan my oorgedra
is met die eerste beweging van die stakers na die
polisielyn toe, die eerste aanval, toe het die lede begin

CHAIRPERSON: Major-General, if we look
at slide 209 you'll see a number of blue squares from which
the firing took place. You see the firing being indicated
by the red arrows, the direction of the bullets, and the
blue line being the position of the shottists, so am I
correct in thinking that the strikers were coming around,
as one looks at this photograph, on the left-hand side of
the kraal one can see that shed which appears to have bits
of wood or something on the roof, just to the left of that
opening, and then if it's correct that the strikers were
coming around on the left-hand side of the kraal, moving
towards the line of blue squares, and the shottists are
represented by the blue squares, that it seems to indicate
that at the time the shooting took place that there was a
line of policemen in front of the strikers. Am I
interpreting 209 correctly, or am I misunderstanding it?

MR MPOFU: I will indicate –

CHAIRPERSON: - we'll take the tea

MR MPOFU: Thank you, Chairperson, one or
two questions then. I just to round off this point, General,
and bear in mind what the Chairperson has put to you, would
you accept that if you look at the - you've referred us to
that picture already - the 15:51 picture of slide 210, you
see the police line which has formed there, which is
probably already in basic line. I don't profess to know
what that means. Can you see that?

GENERAL-MAJ OOR ANNANDALE: Ek sien die
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MR MPOFU: Yes, there’s no 15:41 there.

COMMISSIONER HEMRAJ: Yes.  Mr Magidiwana is that the approach, if you notice, Commissioner, of the place where Nyala 4 closed.

MR MPOFU: Yes.

COMMISSIONER HEMRAJ: Closed off, and Magidiwana’s evidence is exactly that that line was not there, otherwise he would have seen it. So which is why I’m saying that line was formed during the 90 seconds to two minutes when they were moving around. That’s exactly the point, that it was not there at 15:49 and it was there at 15:51. So one doesn’t have to be a mathematician to say if it wasn’t there at 15:49 but it was there at 15:51, it must have been formed in that period, in that two-minute period between 49 and 51. In other words, Commissioner, what I am saying is that, and as I’ve said, and I’ll respond to Mr Semenya’s request by maybe playing the video in the morning. In a static picture you can, you just deduce 49, 51, but in the mobile pictures you can clearly see that the people rushing in and then somebody saying to them “Basic line, basic line,” and then they form the line and so on, and so on, but by the time the strikers emerge, they’ve already formed the line. So clearly that must have happened between 15:49 and 15:51.

COMMISSIONER HEMRAJ: The videos you refer to, do they show the policemen running from another line-up to this particular line-up?

MR MPOFU: Well, I don’t know where they’re running from. It doesn’t matter where they were running from. The issue is that they ran to that place and then formed the line. Where they came from I don’t think is –

CHAIRPERSON: Yes, the witness can’t really help us because he wasn’t there.

MR MPOFU: No. All I’m asking the witness, Chairperson, is that those people formed that line in front of that specific gap before the people, or while the –

CHAIRPERSON: Yes, I understand what’s your question you’re asking him.

MR MPOFU: Yes.

CHAIRPERSON: My problem is I’m not sure he can answer your question because he’ll say “andazi,” you know, if he was giving evidence in isiXhosa; he would say I suppose “ek weet nie,” he’ll say in his own language. He doesn’t know, he can’t know. The eyewitnesses you can ask and you can confront them with the video and so on, but is it not with respect a waste of time to ask this witness? I’m not intending any disrespect either to you or to him, but trying to be practical. Shall we take the tea while you can think about it? We’ll take the tea adjournment.

[COMMISSION ADJOURNS  COMMISSION RESUMES]

CHAIRPERSON: The Commission resumes. Those responsible for the sign can change it. General-Major, u is nog steeds onder eed.

CHARL ANNANDALE: s.o.e.

CHAIRPERSON: Mr Mpofu, you have some more questions in cross-examination, I believe.

CROSS-EXAMINATION BY MR MPOFU (CONTD.):

Thank you, Chairperson. General, in response to what the Chairperson put to me before tea, I want to try and short-circuit this discussion as follows. The Chairperson is of course correct that the people who were on the spot who formed the line, or who might have asked others to form it and so on, and the shooters, as we call them, will at some stage be here. Not all of them. So the question as to why they formed that line before the people emerged and so on and all that will be put to those people. You yourself were not there. So the proposition I’m going to put to you is going to be based on the, assume that when those people come they will either concede or accept that what we see in the pictures, that the line was formed before the people came. Assume that to be the case. The issue I really want to raise with you is that if that is so, then the barbed wire could and should have been extended to cover that 25 metres. You understand where I’m going? Once again you don’t have to agree with me, just so that you and I don’t debate were they standing there or not, because you were not there. Do you accept that?

GENERaal-Majoor ANNANDALE: Voorsitter, ek kan slegs getuig in terme van wat die beplanning was met die draad. Dit sou gewees het –

MR MPOFU: Yes. No, no, I accept that, and we have video that I was going to play to illustrate this, but I won’t even do that. As I say, assume that those videos will be played to those witnesses who were on the ground, and maybe the best way to illustrate the point I want to make to you is to go slide 203, L203, and look at the third bullet. It says, “Nyala 6, barbed wire group, went around the kraal (underline) without releasing the barbed wire, to block protesters that were approaching from the northern side of the kraal in the direction of the
Ek dink dit is nodig om na die politie te vra of hulle dit as stap begin te neem vir die politie vanavond,” voorsitter, maar -

MR MPOFU: Yes, and the sum total of my criticism is that Nyala, instead of driving around and all that to block the protesters, all that they should have done is just to close that gap, because that Nyala 6 had 100 metres of barbed wire, should have closed the gap and the massacre would, the tragedy would have been averted.

That’s really where I’m going, but I won’t debate it with you any further. In other words, instead of not releasing the barbed wire, that the barbed wire should have been released and the people would have been prevented from doing anything beyond the barbed wire. Okay, sorry, I know it’s a long question. More particularly because we know that when Nyala 4, when Nyala 4 closed them off, that was sufficient deterrent for them to take another route.

CHAIRPERSON: The phrase they use in exhibit L is “circumnavigate,” I think.

MR MPOFU: Yes. Okay, General, just stay with me. Do you accept that on the version that you were given, when Nyala 4 closed against the kraal, the people turned back? They could not go any further.

GENERaal-MAJoOR ANNANDALE: Voorsitter, ek wil net eers klaarmaak wat ek nou-nou mee begin het in terme van die beplanning vir die uitrol van die draad. Voorsitter, die beplanning sou gewees het dat Nyala 6 sou nie daar na daardie klein hutjie toe beweeg het nie. Nyala 6 sou parallel terugbeweeg het in ‘n oostelike rigting. So my punt is daardie betrokke spasie wat mnr Mpofu na verwys het van 25 meter sou in elke geval oopgebly het, en dan die laaste vraag wat u gestel het in terme van dat hulle teruggedraai het, Voorsitter, ons doen almal interpreetasies nou van die foto’s. Dis maar soos dit aan my oorgedra is. Hulle het teruggedraai om te hergroep en hulle het toe weer vorentoe beweeg, net na ‘n ander posisie op die polisielyn.

MR MPOFU: Okay. Okay, General. You see, I don’t want us to be drawn into another debate. The version of the protesters is that they were accessing the road to go to the settlement. I know that the version of the police is that they were not going to the settlement, they were attacking, but I just want you to stay with me on one thing. All I’m asking you now is do you dispute the evidence that the closing of the gap with the barbed wire by Nyala 4 had been sufficient to dissuade them to take another route to attack, if they were attacking, but not to proceed on the route that they had planned?

GENERaal-MAJoOR ANNANDALE: Ek dink dit was waarskynlik ‘n kombinasie van ‘n fisiese versperring,
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<td>CHAIRPERSON:</td>
<td>addressed. Thank you, Chairperson.</td>
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<td>[15:50] CHAIRPERSON:</td>
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<td>MR MPOFU:</td>
<td>Mr Madlanga, do you wish to say anything in – sorry, before Mr Madlanga gets a chance –</td>
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<td>MS MOTLOENYA:</td>
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<td>Yes, Chairperson. Chair,</td>
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<td>5</td>
<td>just to put it on record that this perception is a</td>
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<td>perception that is shared by the families. However, it</td>
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<td>hasn’t been raised in the Commission because we are</td>
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<td>currently dealing with that issue with the families</td>
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<td>privately.</td>
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<td>CHAIRPERSON:</td>
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<td>What exactly is the</td>
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<td>perception? That they have been treated unfairly or their</td>
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<td>counsel had been treated unfairly, or both?</td>
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<td>MS MOTLOENYA:</td>
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<td>15</td>
<td>Well Chair, a bit of both.</td>
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<td>To the families it seems that this bears a bit of bias on</td>
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<td>the side of SAPS in terms of certain objections being</td>
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<td>upheld and things of the like. However, we are trying to</td>
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<td>explain to them under what basis those objections had been</td>
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<td>upheld and things like that, but just to put it on record</td>
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<td>that they do share a similar perception.</td>
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<td>CHAIRPERSON:</td>
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<td>23</td>
<td>Yes, thank you. Mr</td>
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<td>Madlanga.</td>
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<td>MR MADLANGA SC:</td>
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<td>Mr Chairman, as evidence</td>
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<td>leaders I want to believe that we are the last people to be</td>
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<td>considered to be partisan in the matter. I have been in</td>
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<td>these proceedings from the beginning and perhaps I’ve not</td>
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<td>important. The reason the Chairperson reminds us about</td>
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<td>time and so on is not so much just to save the time; it’s</td>
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<td>also because we know that the nation is waiting for the</td>
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<td>outcome, but with due respect, the people who are directly</td>
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<td>affected, we must do everything in our power to make them</td>
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<td>feel that this is a process which will benefit them in the</td>
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<td>7</td>
<td>sense that that was intended in getting down to the truth</td>
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<td>8</td>
<td>and that there’s no party that is “assisted” unduly, nor</td>
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<td>any other party that is prejudiced or negatively viewed in</td>
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<td>the sense that it might predetermine the outcome, and I’m</td>
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<td>just appealing to the Chair and all of the other parties</td>
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<td>that we make sure that the integrity of the process is</td>
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<td>maintained in that regard, and I suppose that’s also a</td>
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<td>statement about our own collegiality and things like what</td>
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<td>the ruling that the Chairperson had said earlier, which has</td>
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<td>nothing to do with cross-examination, about when there are</td>
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<td>issues to be raised counsel should as much as possible try</td>
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<td>and raise them. It’s those kinds of, and that Chair will</td>
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<td>remember was a matter that I had raised specifically with</td>
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<td>the Commissioners in chambers, and the outcome was that</td>
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<td>there was a general understanding, and it has eased that</td>
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<td>kind of thing which is also likely to contribute to the</td>
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<td>perceptions. So maybe we should think of other ways -</td>
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<td>without pointing fingers, all of us – of making sure that</td>
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<td>those feelings insofar as they may legitimately exist are</td>
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| 26 | been here only for one or two days at the most, and in my |
| 27 | observation of what has been happening here I want the |
| 28 | families and the victims to be assured that the process |
| 29 | that has been going on here has gone on in a very fair |
| 30 | manner. I am happy to hear from both my colleagues, Mr |
| 31 | Mpfou and Ms Motloenya that they have explained to the |
| 32 | families and the victims that what has been happening has |
| 33 | been in accordance with what should happen in a process of |
| 34 | this nature. Ms Motloenya does go so far as to say that |
| 35 | even at this very moment they are in the process of |
| 36 | addressing the perceptions that the families and victims |
| 37 | have. |
| 38 | That said, I want to move on and touch on the |
| 39 | matter that relates to Mr Burger specifically. Mr Burger |
| 40 | may be more forceful perhaps – |
| 41 | CHAIRPERSON: |
| 42 | I’m sorry, Mr Madlanga, is |
| 43 | it a good idea for the interpreter to interpret what you |
| 44 | said so far and then he can interpret what you have to say |
| 45 | about Mr Burger once you’ve said it? |
| 46 | MR MADLANGA SC: |
| 47 | Although of course I’m |
| 48 | sure Mr Burger will speak for himself, I cannot resist |
| 49 | saying this. Perhaps he has been more alert than most of |
| 50 | us regarding the need to intervene and object. I recall |
| 51 | for example that when I was cross-examining, I think it was |
| 52 | one of the NUM witnesses, he objected no less than three |
MR TIP SC: Chair, we don’t really have a contribution to make. We are not the, we have not been identified as being an entity that is complained about, but perhaps I may just say that objections form a very important part of the process and that in our view by and large the objections are made in order to seek to advance a very large the objections are made in order to seek to advance a huge burden in relation to the proceedings of this nature should be conducted. If it is of any comfort to anybody, we’re feeling as a team that we are carrying a huge burden in relation to the issues before the Commission. We have been overruled more often than we would have find comfort necessarily, but it’s in the nature of the process. We take those on the chin and we go to the next point, but as to whether there is any collusion toxic in the fiery language of the opening statement doesn’t help us. It just reasserts something that has no factual foundation to it. I certainly don’t feel assisted by Mr Burger, not one inch. I have seen him protest against what he said, we have never objected to any questions that did not merit an objection, and we take the rulings as we are supposed to do as professionals, in good stead. If there is no malice intended in them they must be a consequence of the proceedings that we are having.

MR SEMENYA SC: Chair, on behalf of SAPS, if it is of any comfort to anybody, we’re feeling as a team that we are carrying a huge burden in relation to the issues before the Commission. We have been overruled more often than we would have find comfort necessarily, but it’s in the nature of the process. We take those on the chin and we go to the next point, but as to whether there is any collusion toxic in the fiery language of the opening statement doesn’t help us. It just reasserts something that has no factual foundation to it. I certainly don’t feel assisted by Mr Burger, not one inch. I have seen him protest against what he said, we have never objected to any questions that did not merit an objection, and we take the rulings as we are supposed to do as professionals, in good stead. If there is no malice intended in them they must be a consequence of the proceedings that we are having.

MR BURGER SC: I stand corrected on that. The point I make is I act for victims and my client is hugely concerned about that fact and that’s why I do this case with some emotion. Lives were lost here. We’re concerned about the lives that were lost.

MR SEMENYA SC: Chair, on behalf of SAPS, if it is of any comfort to anybody, we’re feeling as a team that we are carrying a huge burden in relation to the issues before the Commission. We have been overruled more often than we would have find comfort necessarily, but it’s in the nature of the process. We take those on the chin and we go to the next point, but as to whether there is any collusion toxic in the fiery language of the opening statement doesn’t help us. It just reasserts something that has no factual foundation to it. I certainly don’t feel assisted by Mr Burger, not one inch. I have seen him protest against what he said, we have never objected to any questions that did not merit an objection, and we take the rulings as we are supposed to do as professionals, in good stead. If there is no malice intended in them they must be a consequence of the proceedings that we are having.

MR TIP SC: Chair, we don’t really have a contribution to make. We are not the, we have not been identified as being an entity that is complained about, but perhaps I may just say that objections form a very important part of the process and that in our view by and large the objections are made in order to seek to advance the process and to bring about a more expeditious traversing of the relevant evidence, and we believe that that is important.

I may just add, and if I may perhaps say that as
someone who has been in practice for rather a good number of years and have been in courts over thousands of days and have been involved in the assembly of records that traversed tens of thousands of pages, I have seen a great many objections being raised by parties; I have seen various fora in action, and although it's certainly not for me to be precocious enough to advance any sort of judgmental comment from the vantage point that I have temporarily in the second row as it may be, we have certainly not seen signs of bias on the part of the Commission in respect of its attitude to any parties, and I might say as well that Mr Mpofu should not feel that his cross-examination has been unduly curtailed. To the contrary, he has been given a great deal of latitude and the occasional or frequent objections, as they may be, from time to time have not affected that.

So we would with great respect urge the families and the victims not to feel that these proceedings are not well balanced and I’d like just to echo that NUM also represents, my legal team also represents victims, and I might put on record that we now act for Mrs Fundi, and of course her husband was one of the people who died in very unfortunate circumstances on the morning of the 12th of August. So we speak not as an entity on the outside; we also have victims amongst our ranks, both present and past.

MR MPOFU: Chair -

CHAIRPERSON: Yes.

MR MPOFU: If I, I just would like rather to have you having the last word, so can I just address one or two of the issues -

CHAIRPERSON: Yes, you may.

MR MPOFU: Thank you, Chairperson.

Chairperson, I just want to clarify a few things. Firstly apropos what Mr Tip is saying, that I - and Mr Tip more than anyone else would know, that you know, I’ve been in this profession for almost 30 years and worked with Mr Tip, Mr Bizos, and other people. So I have no problems with taking it on the chin. Anyone who knows me will know that I take it on the chin more than, or at least I take as much as I give. This has nothing to do with me, really. And to answer Mr Burger’s question of what advice I gave, I will answer to that.

[16:10] I said the first thing that I said to the clients was what I’ve said earlier, that this is normal. As I said earlier, this process is quasi adversarial and insofar as it is adversarial to whatever extent, then of course there are stances that get taken, and I think that’s understood by everybody.

The second thing that I advised was that this was not a matter that should be raised in the open forum but it should be raised in chambers with the Commissioners, and they specifically said no, they wanted it – they had discussed and they wanted it to be raised here, and I indicated that to the Chairperson before we came here. So those are the issues.

Apart from that I accept what all my colleagues have said. The only thing really that I wanted to say is where I would draw the line, and that’s what I was saying, trying diplomatically to say we must also caution ourselves, is a situation such as what happened this morning where the objections do not have a factual basis, or are as a result of somebody not having read the particular document in the record, and so on. I think let’s try and avoid those because they just add to the perception. So that’s the only place where I would draw the line, but of course the Chairperson has in fairness more than once even admonished us for the nature of the objection that we make if he was of the view that the basis of the objection itself was unfounded. So these are the kinds of examples that I’ve given to the clients, but nevertheless all of us here would know that I’m duty-bound to raise the issue once it has been raised. This is akin to the situation where you are instructed to ask the judge to recuse himself or herself. You might think that this is the best judge who’s ever graced the bench, but if the client has a perception which they reasonably hold, based on their vantage point, then you have a duty to raise it, even if the judge was your best friend.

So I just wanted to clarify just those points, and of course it’s not a competition of who’s more of a victim than any other one. I accept that the victims, properly defined, are all over. The police for that matter have lost people. So to that extent I mean everybody to some extent or another represents the victims. I’d go as far as to say even the evidence leaders represent all the victims that we represent, so I didn’t mean it in the sense of starting a competition. Yes, that’s all, Chair, that I just wanted to clarify, apart from what I’ve added.

CHAIRPERSON: Thank you all for what you’ve said. I’m pleased that the point has been raised in the open auditorium so that the parties’ families and anyone here can be aware of the feelings and perceptions, and they can be discussed. It’s only right that that should happen in the spirit of openness, and so forth.

Those who are sitting in the auditorium, many of them I’m sure haven’t had the opportunity of sitting in court cases for a long time, at least I hope they haven’t had that opportunity. Those who have had the opportunity to sit in court cases for a long time will see that it’s what happens all the time. Questions are asked, parties
1 object. If the objections are well-founded they're upheld.
2 If they're not well-founded they're dismissed, and that's
3 what happened. A number of the objections raised against
4 some of the questions Mr Mpofu had asked were disallowed,
5 the question, he was allowed to proceed. In other cases
6 the objections were upheld. Other parties who have,
7 counsel who have raised objections against other parties,
8 sometimes I upheld the objections when I thought they were
9 correct; other times I dismissed them when I thought they
10 were wrong, they were bad.

If I ever perceive a situation where there's a
whole series of objections being asked without foundation
in order to harass or intimidate or disrupt cross-
examination, I won't hesitate to take strong action. But I
would appeal to those who are sitting here in the
auditorium who haven't, as I've said, had the misfortune
before to sit in legal proceedings for a long time, to
accept that that's the way the system works and not to
think because their side has a ruling given against them
that the ruling is unfair because I can assure you that the
other side, when an objection is upheld against them, also
are inclined to think the same. I have tried from the very
beginning of this Commission, and will do so to the end, to
be fair to all parties, to give all of them a fair
opportunity to put their case, mindful however of the point
that I've stressed over and over again that we, apart from
the need to get an answer sooner rather than later for the
country's sake, apart from the parties, that we have a
limited amount of time and we must try to use it as
gainfully as we can. So some of the objections, some of
the rulings I've given have been designed to speed the
proceedings on.

Insofar as to suggest that I have assisted
certain witnesses, what I've done sometimes if I thought
the witness was trying to say something but wasn't
articulating it as briefly as he or she should, I have
suggested what I thought the answer was, something that has
to be done very carefully because obviously one mustn't put
answers in witnesses' mouths and must merely say what one
thinks the witness is trying to say but he's stumbling over
saying.

But if people think I'm biased I'm sure there's
nothing I can do about it except to say this, that I
genuinely and honestly believe that my colleagues and I are
not biased; we're doing our best to be fair to everybody.
We are determined to get as far as is possible to do so, to
the truth of what happened, and if in the result we end up
criticising the police, so be it. If we end up criticising
some of the other participants, so be it. We may end with
all of them to some extent dissatisfied, but that may be a
result of the process. But as I've said, I'm pleased
however that the matter has been brought up here before us
to be openly discussed, and I'm also pleased to hear that
the representatives of those who have this perception are
endeavouring, and as we were told, are still endeavouring
to explain to them how the system works and why it is that
these perceptions have arisen, but why it is that the
perceptions we believe are unfounded. But on that note we
will adjourn until half past 9 tomorrow morning. On that
basis we will take the adjournment now until half past 9
tomorrow morning. I understand we're going to be given
some statements from the side of the Human Rights
Commission, which we will study overnight, and we will
continue again, as I've said, at half past 9 tomorrow.

[COMMISSION ADJOURNED]
13th May 2013
Marikana Commission of Inquiry
Rustenburg

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