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 63  13 MARCH 2013  PAGES 6635 TO 6752

HELD AT

CIVIC CENTRE, RUSTENBURG, NORTH WEST PROVINCE

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[PROCEEDINGS ON 13 MARCH 2013]

13th March 2013  Project Frankel v. The Commissionet for the South African Revenue Service  Inquiry


1  [PROCEEDINGS ON 13 MARCH 2013]

2  [09:36]  CHAIRPERSON:  Mr Magidiwana, you’re still under oath.

3  MOZOLO MAGIDIWANA:  Yes.

4  CHAIRPERSON:  Before you re-examine, Mr Mpofu, there are a few questions that members of the Commission would like to put to the witness.

5  COMMISSIONER HEMRAJ:  Mr Magidiwana, when you were referring to the fence that you said prevented entry to the settlement, is it your evidence that there are no gaps in the fence and no pedestrian gates through which you could have entered?

6  MR MAGIDIWANA:  No, there were none.

7  COMMISSIONER HEMRAJ:  And yesterday you said that you could have gone through the fence if you were able to hold the separate strands of wire apart.

8  MR MAGIDIWANA:  Yes.

9  MR MPOFU:  Sorry, Chairperson, I’m sorry, there’s a small interpretation issue.  The question was the question, but the interpretation basically repeated what the witness had said yesterday, which is that someone would hold, you would hold it down and someone else would hold it for you, and so he said yes to that, rather than to the question.  I don’t know if that’s clear.

10  COMMISSIONER HEMRAJ:  Mr Mahlangu, would you like to clarify that perhaps?

11  MR MAHLANGU:  The question was, he said yesterday if he could only go through the fence if it is held down and somebody –

12  COMMISSIONER HEMRAJ:  If the wires are held apart, yes.

13  MR MPOFU:  Yes, which was not part of the question –

14  MR MAHLANGU:  Apart, and that is exactly what I interpreted, that the one picking it up and the one holding it down.

15  MR MPOFU:  You interpreted that because that’s what he said yesterday, but the Commissioner had not mentioned the thing of someone else picking it up.

16  MR MAHLANGU:  I’m sort for that.

17  COMMISSIONER HEMRAJ:  If you would be so kind as to look at slide 194, please, Mr Magidiwana.  Do you recall that your evidence was that initially you tried to go towards the settlement, but that the Nyala was in your way?

18  MR MAGIDIWANA:  Yes.

19  COMMISSIONER HEMRAJ:  And you see on that slide that the movement of the group is described in a bit of an arc there?

20  MR MAGIDIWANA:  I see it, yes.
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25          CHAIRPERSON:          The best way to ensure,
24 is that people were looking for money.
23          MR MAGIDIWANA:          Sir, the knowledge I have
22 koppie and why you decided to join them on the 16th?
20 went, according to your evidence you only went on the 16th,
19 congregating every day on the koppie?  I know you only
18          CHAIRPERSON:          Now why were you all
17          MR MAGIDIWANA:          It is so, yes.
16          CHAIRPERSON:          And the idea of the
15 strikers was that this would force the employer to
14 eventually come to you at the koppie and agree to pay you
13 the amount that you were demanding.  Is that correct?
12          CHAIRPERSON:          And the idea of the
11 he's making.  This also has an effect where it actually
10 hits the whole country and then a decision would be made.
9          CHAIRPERSON:          As long as the strike
8 continued there would be no platinum mined, there'd be no
7 platinum smelted, there'd be no smoke from the stacks, and
6 there'd be no money for the employers.
5          MR MAGIDIWANA:          That is correct.  Sir,
4 16th, didn't you?
3          CHAIRPERSON:          Now what did you think the
2 police were going to do?
1          MR MAGIDIWANA:          I said so yesterday, Mr

25          CHAIRPERSON:          I see, thank you.  Mr
24 the money we wanted.
23 would have remained, not going to work until we received
22 have done that peacefully, Sir, but because of the hurt I
21 dissatisfied?
20 happy to have done that or would you have been
19 what would you have felt about that?  Would you have been
18 but go straight to my house.
17 Would you have happily accepted that?
16 to try to disperse the people on the koppie, chase
15 them away from the koppie, and bring the strike to an end?
14 Would you have happily accepted that?
13          MR MAGIDIWANA:          Yes, Sir, if he did not
12 we are going to shoot here, I would have done nothing else
11 first time, Mr Chairperson, these Nyalas with the trailers,
10 were watching news bulletins on television in the period
9 police there, you got there early in the morning of the
8          CHAIRPERSON:          Yes, what would your
7 them said to me, go away and don't come back.
6 and went through where the police were parked.  Not one of
5 me, because at one time when I was hungry I went home
4                 said no to me.  I was seeing this for the
3 police were going to do?
2                 said so yesterday, Mr
1          CHAIRPERSON:          I see, thank you.  Mr

25          CHAIRPERSON:          I see, thank you.  Mr
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<tr>
<td>1 Mpfou, are you ready now for your re-examination?</td>
<td>1 CHAIRPERSON: Do you want to show the footage now, or do you want to show the footage at some stage in your re-examination?</td>
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<td>2 MR MPOFU: Yes, Chairperson, I am.</td>
<td>2 [09:56] MR MPOFU: At some stage in the re-examination, Chairperson.</td>
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<td>3 Chairperson, with your permission, before I start with my re-examination, there are just a couple of matters that I wanted to mention, to address the Commissioners on. The first one, Chairperson, is that we, since there was that evidence about the journalist and so on, we embarked on some kind of research which has yielded some good results and some others, unanticipated. I can safely say that we have identified at least two journalists who might fit the description, and we’ll give, one of them I’ve got the name, another one I just have the first name, and we’ll give those names over to the evidence leaders –</td>
<td>4 CHAIRPERSON: Alright, so please proceed.</td>
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<td>4 CHAIRPERSON: Just let me know.</td>
<td>5 MR MPOFU: Thank you.</td>
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<td>5 MR MPOFU: Yes, Chairperson.</td>
<td>6 MR MAHLANGU: Excuse me, Mr Mpofu, just before you proceed. I need to interpret too what has been said.</td>
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<td>6 CHAIRPERSON: If it is footage which requires me to give a warning to people in the auditorium, please tell me at the appropriate time, because we’ve seen in the past when people inadvertently see this footage, not expecting it, and they have loved ones or family members who are people lying on the ground, who had been shot, it causes them great distress.</td>
<td>7 MR MPOFU: Oh yes, sorry.</td>
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<td>7 MR MPOFU: Correct.</td>
<td>8 MR MAHLANGU: The person recording is stopping me.</td>
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<td>8 CHAIRPERSON: After the shot to the thigh and where he was lying on the ground?</td>
<td>9 CHAIRPERSON: Yes, there’s one further aspect. I see that we’ve been handed up a copy of the medical report relating to this witness, which it contains three pages. Yesterday there was handed in as exhibit EEE15, the medical report on the witness that only contained two pages. So I take it you want to substitute the one we’ve now got for the one that was handed in yesterday?</td>
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<td>9 MR MPOFU: That’s correct, Chairperson.</td>
<td>10 CHAIRPERSON: They promised us. We had a meeting with them before the Commission sat and maybe, it was either after, before or after the inspection in loco, because we had a meeting with the representatives of media houses and they promised to give us all the material, both material that had been broadcast and material that had not been broadcast. We were assured that that had been, the promise had been implemented. We subsequently discovered</td>
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<td>10 CHAIRPERSON: Yes, thank you, I’ve marked</td>
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<td>11 The one that the Chairperson used the free kick example, which the witness understood very well, yes. Now one of those journalists is some – I’m going to see him on</td>
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<td>13 those names over to the evidence leaders –</td>
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<td>14 CHAIRPERSON: Are you referring to the journalists who according to the witness were present –</td>
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<td>15 MR MPOFU: Yes.</td>
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<td>16 CHAIRPERSON: - when he was being assaulted?</td>
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<td>17 MR MPOFU: Correct.</td>
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<td>19 MR MPOFU: That’s correct, Chairperson.</td>
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<td>20 MR MPOFU: Thank you, Chairperson, yes, and keep the same exhibit number. This is the new EEE15, yes, thank you.</td>
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<td>24 MR MPOFU: Yes, Chairperson. There are two –</td>
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<td>25 CHAIRPERSON: Just let me know.</td>
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<td>26 MR MPOFU: Yes, I will. There are two pieces of footage. One is quite short and collateral, even if I say so myself, but the main footage certainly will require the warning, Chairperson, and I will remind the Chairperson at the appropriate time.</td>
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that the SABC had certain, what they call raw material that
they hadn’t shown us, which they then gave us, but
- a direct express promise

Chairperson: - I’d like to repeat what

MR MPOFU: - Thank you, Chairperson.

Chairperson: - Have you communicated that
to the representatives of the police -

MR MPOFU: - I have. Yes, I have,

Chairperson, and one of the reasons I’m not doing it now is
because I know there are one or two other parties that have
an interest in it. So I would rather do it between the
witnesses. Thank you, Chairperson. Now coming to the
witness, I’m going to start by dealing with a matter that
at face value might look like it doesn’t arise from the
cross-examination, but I give you the assurance that it
does, Chair, and I don’t want too much of latitude but I
would ask for some, and I’ll ask the questions in a mix of
English and Xhosa so that the witness hopefully will be -

Chairperson: - thank you, Chairperson.

RE-EXAMINATION BY MR MPOFU: - Mr

Magidiwana, you know that after you regained your

Chairperson, I do have reason to believe that we can get
more, better than that. But I’ll leave it at that,
Chairperson. Now the last point, Chairperson, that I
wanted to – or well, it is the last point that is not
related to the witness, is that after this witness has
testified we will address the issue that was addressed by
SAPS regarding the Carte Blanche allegations of torture of
some of our clients. There’s just factual issues that we
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related to the witness, is that after this witness has
MR MAGIDIWANA: Your mother died in 1999 when you were about 10 or 11 years old.

MR MPOFU: I do remember that.

MR MAGIDIWANA: And I told you that I had a son who was your age and you should be at school or university, not working in the mine.

MR MPOFU: It is so, Sir.

MR MAGIDIWANA: I understand you, Sir. The Commission already knows that you come from the Eastern Cape, and you’ve been around here since about 2007 in the Gauteng, or rather in the North West area.

MR MAGIDIWANA: Yes, Sir.

MR MPOFU: And you were looking for work, until you found work on the, or rather in 2011, as we know. It is so.

MR MPOFU: Your mother died in 1999 when you were around 11. Is that so?

MR MAGIDIWANA: I did not do what I was told to do.

MR MPOFU: He warned me not to go at all to the place where the strike is taking place. He also told me to put it this way. He is familiar with the goings-on in the mining industry, having worked there for a long time.

MR MAGIDIWANA: It is so.

MR MPOFU: He warned me not to go at all to the place where the strike is taking place. He also warned me not to go at all to the place where the strike is taking place. He also warned me not to go at all to the place where the strike is taking place. He also warned me not to go at all to the place where the strike is taking place. He also warned me not to go at all to the place where the strike is taking place.

MR MAGIDIWANA: He reprimanded me.

MR MPOFU: Okay, now it’s also true that eventually after that bit of a standoff your lawyers sent money for your father to come while you were, or rather to be present while you were testifying. Is that correct?

MR MAGIDIWANA: It is so.

MR MPOFU: And was that then the first time that you saw him since you had been injured?

MR MAGIDIWANA: Yes.

MR MPOFU: And we know that -

CHAIRPERSON: Mr Mpofu, it looks to me as if your client is crying. I wonder whether it wouldn’t be appropriate for us to take a short adjournment –

MR MPOFU: Just a short break –

CHAIRPERSON: - to enable him to regain his composure. I can understand these are emotionally laden matters that you’re dealing with and it’s not fair to expect him to continue with his evidence while he’s in the present state.

MR MPOFU: Thank you.

CHAIRPERSON: So how long do you think we need?

MR MPOFU: Five to 10 minutes,

Chairperson.

CHAIRPERSON: Right, we’ll adjourn for 10
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1  minutes.
2  MR MAHLANGU: Just a minute, Sir.
3  MR MAGIDIWANA: Before the adjournment,
4  Mr Chairperson –
5  MR MPOFU: Let’s have a break.
6  MR MAGIDIWANA: I want to apologise to
7  the State President for appearing in the paper about what I
8  said yesterday. I’m really sorry.
9  [COMMISSION ADJOURNS COMMISSION RESUMES]
10  [10:27]  CHAIRPERSON: The Commission resumes. Mr
11  Mpofu, has your witness now recovered his composure? Can
12  we now proceed?
13  RE-EXAMINATION BY MR MPOFU: Yes, thank
14  you so much, Chairperson. We much appreciate it. I wanted
15  to round off the point. Mr Magidiwana, you remember that
16  the Commission, when you started testifying, I think it was
17  the 27th of August and the Commissioners kindly allowed us
18  when we made a application for your father to be seated
19  there behind you to support you, you remember?
20  CHAIRPERSON: It could have been the 27th
21  of February.
22  MR MPOFU: 27th of February, that’s
23  correct. Sorry, Chairperson.
24  CHAIRPERSON: I know it was a long time,
25  but not that long.

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1  MR MPOFU: Sorry, Chairperson, 27th of
2  February when the Chair and Commissioners allowed for your
3  father to sit behind you. You remember that?
4  MR MAGIDIWANA: I remember that.
5  MR MPOFU: And then on the 28th, which was
6  the following day, you remember that Mr Ngalwana made
7  suggestions about your presence at the koppie and its
8  duration. Let’s call it that.
9  MR MAGIDIWANA: I remember that, yes.
10  MR MPOFU: And he suggested, at least he
11  suggested, as he’s duty bound to do, that you might have
12  even been there on more days than what you had told the
13  Commission.
14  MR MAGIDIWANA: I remember that, yes.
15  MR MPOFU: Okay, I’ll just ask you this.
16  Since that day your father has not been sitting there
17  behind you. Do you know where he is? Until now.
18  MR MAGIDIWANA: I know what happened,
19  yes.
20  MR MPOFU: Yes, what happened?
21  MR MAGIDIWANA: He again seriously
22  reprimanded me. He was angry and he decided to go home.
23  MR MPOFU: And he has not been back
24  since?
25  MR MAGIDIWANA: He hasn’t been back
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PHOTOGRAPHS

Ms Pillay, that we don’t know whether the photographs are of the incidents on the 14th or the 15th? There’s no clarity of this, is it?

Chairperson: Yes, but we don’t know for sure where they emanate from?

MR MPOFU: We don’t know for sure.

That’s a matter for SAPS evidence.

MR MADLANGA SC: Chairman, Commissioners, what Ms Pillay has referred to is slightly better in the sense that at least she is able to refer to where it comes from. Chairman and Commissioners, you will remember that I asked our learned friend Mr Ngalwana to assist us with slide 198. That one we do not even have an idea where it comes from. Can we be advised where it comes from?

MR MPOFU: Is that L198?

MR MADLANGA SC: L, ja slide, in exhibit slide 198. Thank you.

MR MPOFU: I think Mr Mathibedi is in charge today.

Chairperson: Yes, I must confess that I had expected that we would get this information that was promised before you began your re-examination, and I overlooked the fact that we hadn’t – you see “we hadn’t been given,” but I –

MR MPOFU: Ja, I gave up.

Chairperson: I don’t know whether you’d been [inaudible] before you’re starting your re-examination, but it is a matter in respect of which information is owed to us by SAPS. Perhaps you can assist us?

MR MATHIBEDI SC: Thanks, Mr Chairman.

This, all these aspects were being handled by Mr Ngalwana. Can I revert after tea? He’s not available at the moment.

Chairperson: If you can’t provide the information, you can’t. Mr Mpofu, are there other aspects that you can deal with in the meantime?

MR MPOFU: Yes.

Chairperson: Of course if this material in EEE7 was taken on the 14th, it still reflects your client as being on the koppie at a time when he says he wasn’t there. Whether he wasn’t there on the 15th – or he says he wasn’t there at all until the 16th. So if he was there on the 15th, which is the point the police made, a certain inference can be drawn, but if that’s not right, that he was there on the 14th, then similar inferences can be drawn. So of course it may well be also that the confusion is such that these photos may have been taken on the 16th –

MR MPOFU: On the 16th, that’s exactly where I’m going, Chairperson.

Chairperson: That’s where you’re going.

MR MPOFU: Ja. Especially seeing that he’s wearing what he says he was wearing on the 16th.

Chairperson: Yes, perhaps if you could hold that over then until after the tea adjournment when Mr Ngalwana will be here to give us, hopefully, the information that is required.

MR MATHIBEDI SC: Mr Chairman, with regard to slide 198, it was obtained from the Beeld, the newspaper.

Chairperson: You say slide 198 was obtained from the Beeld newspaper?

MR MATHIBEDI SC: Yes, it was downloaded from –

Chairperson: That’s Media 24, I take it.

MR MATHIBEDI SC: That’s correct.

MR MPOFU: Ja. Chairperson, if that is indeed so then can we also after tea be told as to how the SAPS attached a specific time – if you remember, Chairperson, there was an issue about when that slide was taken –

Chairperson: On the bottom right-hand corner it’s reflected –

MR MPOFU: It says 15:47.

Chairperson: 15:47.

MR MPOFU: Yes.

Chairperson: And obviously, I assume that the police would, as they undertook to do, lead evidence in due course proving all the assertions made in exhibit L, and identifying where identification is required, all the slides and photographs. So, but you would obviously like it earlier as far as these particular aspects are concerned, because it’s relevant for your witness.

MR MPOFU: Yes, Chairperson. If you remember, as long as Mr Phatsha’s evidence, the time at which that particular picture was taken was made an issue in the Commission. And what I will propose to do then, Chairperson, is there are other issues that I wanted to raise about the dates, whether it’s the 15th or the 14th. I’ll leave that, all the issue of the dates to until we’ve been given the pathways.

Chairperson: That seems a sensible -

MR MPOFU: Ja, thank you, Chair.

Chairperson: - way of proceeding.

MR MPOFU: But just to round off this
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Chairperson, at another stage when 25 we talk about when, if this was indeed taken at 15:47, at
24 the prospect of dismissal, that it would be better to 23 be fired alone, that is the most difficult one.
23 MR MPOFU:  Ja, you also said that if the
22 employer was fed up with you, its recourse should have been
21 relations, for example when you and the Chairman had a
20 discussion about the chimneys.  One of the things you said
19 number of questions yourself and you posed what I would
18 which of those situations would have an adverse effect on
17 number of questions you were asked a number of questions.  You’ve asked a
16 you’ve also given us a crash course, I suppose, in labour
15 long evidence, you have dealt with a number of issues and
14 Right, now I just wanted to – you, in the course of your
13 discussion about the Nyala, for example, because a
12 picture, just above the 181, the number, is that it?
11 MR MAHLANGU:  On the bottom of the
10 picture, just above the 181, the number, is that it?
9 MR MPOFU:  No, in the middle, next to the
8 box that says “stage 3,” and do you see that there’s a
7 graphic depiction of the Nyala which are made to look to
6 others why he left the job he has, he finds it difficult to
5 for him to explain why he left the job.  If one is asked by
4 to leave the job all by himself it even becomes difficult
3 to leave the job; the one of leaving on
2 which of those situations would have an adverse effect on
1 your prospects of losing your job; the one of leaving on
13 MR MAHLANGU:  The question is exactly
12 what prospect –
11 MR MPOFU:  Which one.  Ja, which one
10 where the workers are walking alongside the power station?
9 MR MAGIDIWANA:  Yes, when you’re looking
8 there, you would know that that is humanly impossible in
7 MR MAHLANGU:  On the bottom of the
6 big pole and the power station, then that person could only
5 would you agree that if someone were to capture both the
4 photograph cannot give you the depth.  Remember that kind
3 of discussion?
2 MR MAGIDIWANA:  I remember that.
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1 MR MAGIDIWANA:  I remember that.

MR MAGIDIWANA:  I remember that.
MR MAGIDIWANA:  I remember that.

Can you elaborate on what you meant by that?
MR MAGIDIWANA:  I meant, Sir, if one was
3 to leave the job all by himself it even becomes difficult
4 for him to explain why he left the job.  If one is asked by
5 others why he left the job he has, he finds it difficult to
6 explain why he leaves the job if there is not, say
7 something, a question of being ill.
8 MR MPOFU:  Sorry, but what I really want
9 to know is, is it in your view better to be, or rather
10 which of those situations would have an adverse effect on
11 your prospects of losing your job; the one of leaving on
12 your own, versus the other one of leaving in a large group?
13 MR MAHLANGU:  The question is exactly
12 what prospect –
11 MR MPOFU:  Which one.  Ja, which one
10 where the workers are walking alongside the power station?
9 MR MAGIDIWANA:  Yes, when you’re looking
8 there, you would know that that is humanly impossible in
7 MR MAHLANGU:  On the bottom of the
6 big pole and the power station, then that person could only
5 would you agree that if someone were to capture both the
4 photograph cannot give you the depth.  Remember that kind
3 of discussion?
2 MR MAGIDIWANA:  I remember that.
1 MR MAGIDIWANA:  I remember that.

Can you elaborate on what you meant by that?
MR MAGIDIWANA:  I meant, Sir, if one was
3 to leave the job all by himself it even becomes difficult
4 for him to explain why he left the job.  If one is asked by
5 others why he left the job he has, he finds it difficult to
6 explain why he leaves the job if there is not, say
7 something, a question of being ill.
8 MR MPOFU:  Sorry, but what I really want
9 to know is, is it in your view better to be, or rather
10 which of those situations would have an adverse effect on
11 your prospects of losing your job; the one of leaving on
12 your own, versus the other one of leaving in a large group?
13 MR MAHLANGU:  The question is exactly
12 what prospect –
11 MR MPOFU:  Which one.  Ja, which one
10 where the workers are walking alongside the power station?
9 MR MAGIDIWANA:  Yes, when you’re looking
8 there, you would know that that is humanly impossible in
7 MR MAHLANGU:  On the bottom of the
6 big pole and the power station, then that person could only
5 would you agree that if someone were to capture both the
4 photograph cannot give you the depth.  Remember that kind
3 of discussion?
2 MR MAGIDIWANA:  I remember that.
1 MR MAGIDIWANA:  I remember that.
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25 MR MAGIDIWANA: It is so.
24 police to you.
23 or it should have dismissed you rather than sending the
22 at some stage that if the employer was fed up with you, he
21 MR MPOFU: Thank you. You also testified
20 MR MAHLANGU: Thank you, Chair.
19 interpret it exactly as he's asked it, and then we –
18 Maybe Mr Mpofu can repeat the question. You can then
17 CHAIRPERSON: - part of the problem.
16 MR MPOFU: Ja, you did -
15 being killed?" If I used the –
14 the question has got nothing to do with the employer
13 the police.
12 sending the police, setting the police at your or sending
11 MR MPOFU: Yes, I deliberately left it at
10 the end?
9 stalemate. How would that stalemate have been resolved in
8 talk to you, which is a classical description of a
7 to leave and go back to work before the employer comes to
6 grading system at Lonmin is based on categories of
5 Lonmin on this, but is it your understanding that the
4 will probably seek answers more from my colleagues from
3 MR MOTAU SC: Chairperson, can I just
2 discussion you had with the Chairperson this morning about
1 as the RDOs and so on?

1 no, in whatever formulation, the reality is that if there
2 was such an impasse of whatever description between the
3 workers and the employee, do I take it that the answer you
4 gave would still apply?
5 MR MAGIDIWANA: That is it.
6 MR MPOFU: Then you said something
7 yesterday about if the employer, I think it was interpreted
8 as if the employer had cried or complained regarding the level of
9 meant that if the employer had complained that your demand
10 was too high, that the employer then should have come and
11 put something on the table. Can you explain that to the
12 Commission?
13 MR MAGIDIWANA: That's exactly what I was
14 explaining.
15 MR MPOFU: No sorry, the question was can
16 you explain to the Commission what you meant by if the
17 employer had cried or complained regarding the level of
18 your demand, what you think it should have done?
19 MR MAGIDIWANA: We expected the employer
20 to say, come to us to say, what you people are demanding, I
21 cannot afford, but what I can afford is this.
22 MR MPOFU: Yes, thank you. Then to round
23 off this issue about collective bargaining and labour
24 relations, can you just explain to us, there was a
25 discussion, you remember the discussion about your salaries

1 MR MPOFU: And without spoiling the good
2 discussion you had with the Chairperson this morning about
3 chimneys, it was put to you by Mr Motau that at some stage
4 there was what one can describe as a stalemate in that the
5 employer was saying they're not going to talk to you while
6 you are at the moment, and you were saying you're not going
7 to leave and go back to work before the employer comes to
8 talk to you, which is a classical description of a
9 stalemate. How would that stalemate have been resolved in
10 the end?
11 MR MAGIDIWANA: Sir, if the employer
12 wasn't bending and the employees, the workers were also not
13 bending, it would, what would have determined the end of
14 this thing would have been the one who felt the pain of
15 hunger. If the employer on the other side would have felt
16 he's going down, he's getting finished, he would have then
17 decided workers, please come back to work, we'll talk about
18 the money.
19 MR MOTAU SC: Chairperson, I don't want
20 to interrupt the re-examination unnecessarily. My learned
21 friend will remember the point that I was debating with the
22 witness was the employer was saying, get off the koppie,
23 and the employees were saying, come talk to us at the
24 koppie. It's really in that context, not -
25 MR MPOFU: Okay, so I'm happy to - yes,
promoted from Paterson Grade A4 to B1 with effect from the
1st of October, from which I assume they were Paterson Grade
A4, and all surface and underground general workers were
promoted from Paterson Grade A3 to A4. So I’m interested
to know which grade you fell into, but – that’s page 93 of
exhibit XX2.

MR MPOFU: Thank you, Chair.

MR MAGIDIWANA: I only hear of these
grades.

MR MPOFU: Yes, Chairperson, I’m sure we
can submit that information by way of admission between
1 Lonmin and ourselves. Thank you, Chairperson. Right, Mr
Magidiwana, I’m now going to be moving from topic to topic,
just clarifying some of the issues that you testified on.

You gave evidence – and you’ll forgive me if I move from
the kraal back to the mountain, it’s just to clarify a few
aspects. You testified at some stage under cross-
examination that the person – you remember that there is a
video which showed one, maybe two persons from your group
shooting in the direction of those two policemen?

MR MAGIDIWANA: Yes, I remember that.

MR MPOFU: Yes, and it’s common cause
that at least one of those people had a firearm in his
hand. The other one, there’s a bit of gray area, but
that’s not important for what I’m going to ask you now.

Now you said under cross-examination that that person, or
both of them were shooting back. What did you mean by
that?

MR MAGIDIWANA: Just repeat the question
again, Sir.

MR MPOFU: Yes, I’m saying when you were
giving answers to Mr Ngalwana, you described what those
people were doing as “shooting back at the police,” and the
emphasis is on back, and I wanted to understand from you
what you meant by that. Or maybe I should ask you, in that
exchange of fire, so to speak, who attacked first?

MR MAGIDIWANA: Sir, as I said earlier,
these people that came over shooting, we saw them for the
first time when they shot, when these others, that is the
people who were in my side, started shooting long after the
police had started shooting.

MR MPOFU: Yes, I think the part that was
not translated is where you were saying the very first
person to observe those two policemen shooting was?

MR MAHLANGU: I am sorry, Sir. He said -
MR MAGIDIWANA: I am the first person to
see them. That is the police.

MR MPOFU: And we’ve already gone
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<tr>
<td>1 me as soon as possible.</td>
<td>1 there.</td>
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<td>2 CHAIRPERSON: - you've said has been confirmed.</td>
<td>2 MR MPOFU: You've also said that at some stage during the pulling of the barbed wire, you realised that what Mathunjwa had warned about, might be about to happen, do you remember that?</td>
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<tr>
<td>4 MR MPOFU: Thank you, Chairperson. Mr Magidiwana, you were asked questions about what Mr Mathunjwa said and what the police did not say, and so on, in the following context, in the context of the leaving your weapons, or putting your weapons down. Now, I just want to ask you to clarify that issue with a direct question that, on the 16th, did anyone whether it was Mr Mathunjwa, whether it was whoever, did anyone ever address the group of workers on the 16th and ask them to put down their weapons?</td>
<td>6 MR MAGIDIWANA: Yes.</td>
</tr>
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<td>24 MR MAGIDIWANA: I heard it when it was being said.</td>
<td>7 MR MPOFU: And at that point, once you made that realisation, what was the decision that was taken?</td>
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<td>15 MR MPOFU: Yes. I am quite aware that a person.</td>
<td>10 MR MAGIDIWANA: It was to leave.</td>
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<td>19 MAGIDIWANA said and what the police did not say, and so on, is actually in accordance with the police regulations which say that the first thing you do, is to tell the people explicitly what it is that they should or should not do.</td>
<td>11 MR MPOFU: And is it correct that Mr Mathunjwa in saying that he was going to be killed, or warning that you were going to be killed, his advice was that you should leave the koppie.</td>
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<td>20 it's true that the witness said that it was not said.</td>
<td>13 MR MAGIDIWANA: It is so.</td>
</tr>
<tr>
<td>31 MR MAGIDIWANA: No, there was never such a person.</td>
<td>15 MR MPOFU: Now, you've now told us that you -</td>
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<td>33 MR MAGIDIWANA: No, it was not happen. But about the issue of the weapons and so on,</td>
<td>18 MR MOTAU SC: Chairperson, can I just get clarity on this part? My learned friend is asking on this side, and I thought the witness's answer was, he did not hear.</td>
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<td>35 MR MAGIDIWANA: Yes, thank you, Mr Magidiwana, that issue has been cleared up.</td>
<td>22 MR HANABE: He said [African language].</td>
</tr>
<tr>
<td>1 It you – I am raising a different issue, I thought the witness had said he did not hear Mr Mathunjwa's address because you</td>
<td>23 MR MOTAU SC: No, I am asking a different issue, I thought the witness had said he did not hear Mr Mathunjwa's address because you</td>
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<tr>
<td>2 MR MPOFU: Okay. No, Sir; it is addressed to me. Chairperson, I think my learned friend is mixing up two issues. The issue I am addressing is simply that Mathunjwa said to them that you are going to be killed, and so on and so on, and knelt down to ask them to leave the koppie. There was no such a thing that did not happen. But about the issue of the weapons and so on, it's true that the witness said that it was not said.</td>
<td>24 I think my learned friend is nodding, understandingly.</td>
</tr>
<tr>
<td>3 MR MPOFU: And at that point, once you made that realisation, what was the decision that was taken?</td>
<td>25 Yes, thank you, Mr Magidiwana, that issue has been cleared up. Yes, the issue has now been cleared up. All I was asserting to you, was that Mathunjwa said you must leave, otherwise you are going to be killed. Obviously you said you did no believe him. When you started to believe him, you took a decision to leave, as he had advised, and whatever else happened, is what I am now going to ask you about. When you then decided to leave, as once you realised that Mathunjwa's warning had been true, how did you decide to – or rather what route did you decide to take to leave the koppie?</td>
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<td>4 MR MPOFU: The next question which I was going to ask you, you've already answered. I think Commissioner Hemraj or somebody else asked you, as to what you would have done had the police given such a warning or made such an order. Do you remember that? Yes, now because you were not informed, you gave evidence that when the barbed was pulled, you did not know what was going to happen, and what did you think might happen?</td>
<td>5 MR MAGIDIWANA: With the one that is from Marikana and leading to Nkaneng.</td>
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<tr>
<td>16 MR MPOFU: And the next question which I was going to ask you, you've already answered. I think Commissioner Hemraj or somebody else asked you, as to what you would have done had the police given such a warning or made such an order. Do you remember that? Yes, now because you were not informed, you gave evidence that when the barbed was pulled, you did not know what was going to happen, and what did you think might happen?</td>
<td>25 MR MAGIDIWANA: I thought perhaps we were going to be arrested or that the employer will arrive</td>
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MR MPOFU: Yes, and there's already evidence which has been led, I won't refer you to the slide, but a number of the people, I don't know how many, indeed also made that, or seemed to have made that decision, because they left the koppie, and all I want to ask you is what route did they take, those who had successfully executed Mathunjwa's advice?

MR MAGIDIWANA: They walked on the one on which we also had intended to walk.

MR MPOFU: Yes, and in a way you followed them, but what happened when it was your turn to take that road near the kraal?

MR MAGIDIWANA: It was then being blocked by barbed wire, and also being sprayed with water, and where we ran away. When we made a turn on the road, around the kraal, with the intention of engaging or appearing on that very same road, the police left a place where they were, and they had already closed that gap or the place where we had intended to walk or pass, and they shot at us.

MR MPOFU: Thank you. This is quite a crucial piece of evidence, can you please tell the Commission whether when you say you were blocked near the kraal, which we've heard a lot about, when that road was blocked, and before you turned around the kraal, did you see that line of policemen, the ones who eventually shot at you, that you've seen in the videos, were they in that position or were they not in that position?

MR MAGIDIWANA: We never saw the police officers. We only saw the police after we had in fact emerged, and we said, there, because they had already left the place where they were, and then all of a sudden they were there. And they were on the path or the road where we had intended to pass, and they had already blocked in fact that road.

MR MPOFU: Yes, and I really would like you to explain this so the Commission, we see you, you've answered that question, we see you now in picture L206, looking at the two policemen who were shooting, and then I think in the video, we then see you sort of being obscured from them by one of the Nylas, can you please take the Commission then, exactly what - step by step, what happened to you from the time you were looking at these policemen, two policemen who were shooting, and crying out as you are in 206, to the point at which you were shot down?

MR MAGIDIWANA: Oh, Sir, many things happened there.

MR MPOFU: Yes - sorry, just for clarity, I am just asking, I know many things were happening. I was asking in relation to you, what happened to you from what we see there, to the time when we see you on the ground?

Mr Magidiwana: It's common cause now that you were holding, well, maybe that's too much because there's the issue of the gun and so on.
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1. the video, I also, I'd like you to ask the, you to explain
2. another supposedly rhetorical question which you asked to
3. the commission. You said something like if you ran away
4. from water why would you not run away from guns. Can you
5. explain what you meant by that?

MR MAGIDIWANA: The reason why I asked
that rhetorical question, when this whole thing started,
where we were eventually shot at, we in fact were running
away from the water. But in fact we were looking for this
path with which we were going to go through. Now what was
being said was that we were attacking the police, how can
we do that, how can that as we were running away from
the water, how can then run to the firearm.

MR MPOFU: Yes okay. I'm also not going
to answer that question. Maybe one day in argument it will
be answered. Right there was also evidence about the exact
route and path that you did or did not follow between the
place where your group was sitting and the kraal, you
remember that?

MR MAGIDIWANA: Yes.

MR MPOFU: And I think this issue was
also touched on this morning. In relation to slide number
194. Commissioner, I am right 194. First I want to inform
you that this exhibit is not yet evidence and therefore the
question of where those arrows should be or should not be

is a matter that hopefully the police will educate us on at
a later stage. But be that as it may I really would like
you to explain something which I thought became one of the
most confusing pieces of evidence and I did suggest in your
presence to the commission where at least I thought the
confusion came from. But I'd like to take you through it.
When, Mr Ngalwana, was and unfortunately he's not here, was
questioning you about what he terms as the first approach
you made to through, to put it neutrally. He was referring
to that yellow arrow, do you understand that? That one,
the straight one and you, when you are talking about the
first approach or whatever you call it, the first time what
were you referring to?

MR MAGIDIWANA: I said as he was pointing
there on that path I, we did not walk on that path in fact
that he had mentioned.

MR MPOFU: On the yellow line?

MR MAGIDIWANA: Yes.

MR MPOFU: Where was your first time?

MR MAGIDIWANA: It was in the koppie, but
we were walking on the path in fact which is leading
directly to the veld.

MR MPOFU: Yes you traced that, I think
it's triple.

MS HEMRAJ SC: Mr Mpofu don't you have

this in the witness's own hand on expert EEE8.3?

MR MPOFU: That's exactly what I'm
saying.

MS HEMRAJ SC: Yes.

MR MPOFU: Ja. You have that on EEE8, or
rather you've traced your version of the route on EEE8.3.

MR MAGIDIWANA: Yes.

MR MPOFU: And in terms of that route

MR MAGIDIWANA: We started on that small
path, when we were about to reach the one that leads to
Nkaneng.

MR MPOFU: Yes and when you were giving
evidence referring to the small path was there any other
small path that you were referring except for the one that
you've just told us about now?

MR MAGIDIWANA: The small paths that I
talked about are two, there are two of them.

MR MPOFU: Yes.

MR MAGIDIWANA: Then the other one in

MR MAGIDIWANA: The Kraal.

Chairperson, the witness did indicate at tea time that he
was not feeling well, but he could continue. So I'm just
inquiring as to whether he's still fine.

MR MAGIDIWANA: You can continue, Sir.

MR MPOFU: Alright, thank you. Before we
go to the footage. I just want to refer, you know that you
were referred many times to, are you okay, sorry,

Chairperson, the witness did indicate at tea time that he
was not feeling well, but he could continue. So I'm just
inquiring as to whether he's still fine.

MR MAGIDIWANA: You can continue, Sir.

J Just a little bit, I will tell you then I maybe there is
something.

MR MPOFU: Thank you. You know that you
were asked extensively about a certain Mr X.

MR MAGIDIWANA: I remember, Sir.

MR MPOFU: Yes and his version was put to
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<td>1 you in some great detail.</td>
<td>1 person died, and that's the third person. Now these were</td>
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<td>2 MR MAGIDIWANA: It is so, Sir.</td>
<td>2 the parts that were not put to you about Mr X's version.</td>
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<td>3 MR MPOFU: Well I'd like to, there were</td>
<td>3 When the parts that were put, were put to you, said Mr</td>
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<td>4 certain important parts which were skipped, so to speak</td>
<td>4 X was a liar. Do you have any comment on what I've just</td>
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<td>5 from his version, which I'd like to bring to your attention</td>
<td>5 said to you now?</td>
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<td>6 and it was explained to you that the police would rely a</td>
<td>6 [12:24] MR MAGIDIWANA: Yes, Sir.</td>
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<td>7 lot on what Mr X's, on Mr X's evidence regarding what</td>
<td>7 MR MPOFU: Yes.</td>
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<td>8 happened in the period in question, do you remember that?</td>
<td>8 MR MAGIDIWANA: Do you see this X? He is</td>
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<td>9 MR MAGIDIWANA: Yes.</td>
<td>9 the real murderer. It's obvious that he's the one who</td>
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<td>10 MR MPOFU: Okay well this is one of the</td>
<td>10 murdered people.</td>
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<td>11 things that Mr X says. This is about the 12th. You</td>
<td>11 MR MPOFU: And, well it might be</td>
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<td>12 remember, you were told about -</td>
<td>12 argument. Do you have any comment about the fact that the</td>
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<td>13 CHAIRPERSON: J ust, paragraph?</td>
<td>13 police will rely on such a person -</td>
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<td>14 MR MPOFU: As it happens, yes, Chair, but</td>
<td>14 CHAIRPERSON: That's point of argument -</td>
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<td>15 it's also about the 12th, you remember the, Chairperson,</td>
<td>15 MR MPOFU: It is, Chair, thank you.</td>
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<td>16 asked you a few questions and even, Mr Ngaiwana, about</td>
<td>16 CHAIRPERSON: You can say it from the bar</td>
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<td>17 relating to the killing of security officials on the 12th.</td>
<td>17 later if you like, but -</td>
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<td>18 MR MAGIDIWANA: I remember.</td>
<td>18 MR MPOFU: Yes. No, I accept that -</td>
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<td>19 MR MPOFU: Now Mr X says this about that</td>
<td>19 CHAIRPERSON: - the submission won't be</td>
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<td>20 incident, &quot;I saw two security officials try to get into</td>
<td>20 strengthened by the fact that you relied on his evidence</td>
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<td>21 their vehicle and we blocked them and assaulted with our</td>
<td>21 being -</td>
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<td>22 weapons. I personally stabbed one of the security</td>
<td>22 MR MPOFU: From the witness, yes.</td>
</tr>
<tr>
<td>23 officials, somewhere on the mouth or face. I stabbed him</td>
<td>23 Chairperson, yes, thank you very much. Thank you, yes,</td>
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<td>24 with a butcher knife I had with me&quot;. Yes and we know from</td>
<td>24 we'll leave that for argument. Thank you, Mr Magidiwana.</td>
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<td>25 what you were told that this, that person possibly died and</td>
<td>25 I think, ja, this stage might be appropriate for, to do</td>
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<td>1 then you remember being asked about whether or not you had</td>
<td>1 that footage, Chairperson.</td>
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<td>2 gone with a group that went to K4.</td>
<td>2 CHAIRPERSON: Which – the warning?</td>
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<td>3 MR MAGIDIWANA: I remember, Sir.</td>
<td>3 MR MPOFU: Yes, and the warning, thank</td>
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<td>4 MR MPOFU: Well this is what Mr X says</td>
<td>4 you, Chairperson.</td>
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<td>5 about that incident, at paragraph 16, Chairperson. “I</td>
<td>5 CHAIRPERSON: Yes, what I’m saying now is</td>
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<td>6 remember while attacking the people who were reporting for</td>
<td>6 addressed to people in the auditorium. I’m told that we're</td>
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<td>7 duty, I saw one lying on the ground whom we assaulted and I</td>
<td>7 going to be shown video clips which show, which depict some</td>
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<td>8 personally stabbed him on the lower part of his stomach or</td>
<td>8 of the people who died on the 16th of August, and the sight</td>
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<td>9 hip. I stabbed him with a bush knife I had in my</td>
<td>9 of them on the clips, particularly after they've been shot,</td>
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<td>10 possession, I do not know whether that person was still</td>
<td>10 is likely to cause distress and hurt to their loved ones</td>
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<td>11 alive or not when I stabbed him”’. So that's the second</td>
<td>11 and relations. So if anyone in the auditorium falls in</td>
</tr>
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<td>12 person that was possibly killed by Mr X and then do you</td>
<td>12 that category, is either a loved one or a relation of any</td>
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<td>13 remember, you were asked by Mr Ngaiwana regarding a group</td>
<td>13 of the people who were killed on the 16th of August, I will</td>
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<td>14 that went to Eastern Platinum in the early hours of the</td>
<td>14 ask that the clip not be shown for two minutes after what</td>
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<td>15 morning, I think.</td>
<td>15 I’ve just said has been translated, to enable them to leave</td>
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<td>16 MR MAGIDIWANA: I remember.</td>
<td>16 the auditorium if they wish.</td>
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<td>17 MR MPOFU: About that one Mr X says, on</td>
<td>17 MR MPOFU: Thank you, Chairperson. While</td>
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<td>18 that incident, Mr X at paragraph 17 says this, he's</td>
<td>18 that is happening, if I may just give some instructions.</td>
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<tr>
<td>19 describing the incident at which somebody was killed there,</td>
<td>19 We're going to be doing item 2 and 3 on the list, and if</td>
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<td>20 yes in the, during that episode. He says, okay “before the</td>
<td>20 you can - item 1 is the longer eNews clip. Item 3 is the</td>
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<td>21 man can finish someone and someone assaulted him on the</td>
<td>21 SABC clip which is marked “shorter,” and if you can, on the</td>
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<td>22 back of his head with a bush knife and someone else also</td>
<td>22 eNews clip there are intervals where you see words written,</td>
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<td>23 stabbed him with a spear on his left front chest”.</td>
<td>23 which you can pause in those intervals and I’ll ask</td>
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<td>24 Then it says, “The man fell down on his back and</td>
<td>24 questions for each segment. Thank you.</td>
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<tr>
<td>25 I also stabbed him on the abdomen.” We also know that that</td>
<td>25 CHAIRPERSON: Have these clips been shown</td>
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1 already? Do they have exhibit numbers or do we have to give them new exhibit numbers?
2 MR MPOFU: It's definitely new footage,
3 Chairperson, so it would – although it does contain some of the footage we've seen, but it's new itself.
4 CHAIRPERSON: Ms Pillay, can you please help us, tell us how we must describe this exhibit, or these exhibits?
5 MR MPOFU: That would be eNews, I think.
6 MS PILLAY: Chair, the eNews clip would be EEE16. I believe that Mr Mpofu's team has caused copies of DVDs with these clips to be distributed.
7 CHAIRPERSON: And the second clip is the SABC clip. Is that also new material as far as the Commission is concerned, Mr Mpofu?
8 MR MPOFU: Yes. And I believe there are DVDs of this clip also available.
9 MS PILLAY: Chair, as far as I'm aware, it is new material.
10 CHAIRPERSON: So that will be EEE17?
11 MS PILLAY: EEE17 would be the SABC clip, and I believe there are DVDs of this clip also available.
12 MR MPOFU: Yes.
13 MS PILLAY: If parties don't have it, we can distribute it lunchtime.
14 MR MPOFU: Yes, Chairperson, if I may just clarify, it would seem that with regard to the eNews clip there was some understanding that it would be distributed to the evidence leaders and they would distribute it, but if that has not been done, we'll take the responsibility. As far as the SABC clip is concerned, we've got copies which we can hand out quickly. Thanks, Chair.
15 CHAIRPERSON: They don't have to be distributed now; they can be distributed later, I'm sure.
16 MR MPOFU: Yes, it can, actually.
17 CHAIRPERSON: No-one is going to ask us whether he feels able to continue? There's no indication –
18 MR MPOFU: When he's upset, yes, and this one is relatively short. Thank you. Okay –
19 CHAIRPERSON: I don't know if what I've said has been heard by the relevant person. You don't have to give them out just yet, you can give them out at lunchtime.
20 MR MPOFU: At lunchtime, thank you, Chairperson. Okay, then can we start with the eNews? Mr Magidiwana, can you have a look –
21 [VIDEO RECORDING PLAYED]
22 CHAIRPERSON: I missed the – sorry, could we go back to the front? I missed the wording. Before that, the very first –
23 MR MPOFU: Yes, stop right at the beginning.
24 CHAIRPERSON: - image had something that I didn't read. Is that the beginning?
25 MR MPOFU: Yes, it is.
26 CHAIRPERSON: That's it. That's it.
27 MR MPOFU: Thank you.
28 [VIDEO RECORDING PLAYED]
29 MR MPOFU: Okay, thank you. Now, Mzoxolo, I know it’s not easy for you to watch some of these things, but I’m going to ask you a few questions. In the same way, if there’s an objection, to try and save time, I’ll lead you on the issues that are patently from the video, but I’m sure if I overstep then my learned colleagues will object.
30 CHAIRPERSON: I was just looking at him as you spoke –
31 MR MPOFU: Yes.
32 CHAIRPERSON: And we’re having the same reaction we had before, and again one can understand, as I said this was the, brings back the most cataclysmic event in his life. Imagine the emotional turmoil that he’s undergoing while he watches it. Perhaps we can ask, has someone got some sugar water perhaps to take to him, and ask him whether he feels able to continue? There’s no point in torturing him by asking him questions about, particularly about this matter, at a time when he’s really upset.
33 MR MPOFU: When he’s upset, yes, Chairperson.
34 CHAIRPERSON: I don’t think –
35 MR MPOFU: Chairperson, can I just get an indication –
36 CHAIRPERSON: Yes, it might be sensible to take the lunch adjournment and continue at say half past one –
37 MR MPOFU: In any event, yes.
38 CHAIRPERSON: Maybe the missing Adv Ngalwana will have been found by the search party by then.
39 MR MPOFU: Thank you, Chairperson.
40 Mzoxolo, can we continue with this after lunch? The Chairperson thinks you should take a, use the lunch break maybe to recover.
41 CHAIRPERSON: I can see from here that there are tears on his face actually.
42 MR MPOFU: Yes, Chairperson.
43 CHAIRPERSON: Yes, we do accept –
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<tr>
<td>1  CHAIRPERSON:  Even if he's prepared to carry on, I don't know if we should subject him to it, even if he's willing to be subjected. We'll adjourn till half past 1.</td>
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<td>2  MR MPOFU:  Yes, Chairperson, thank you.</td>
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<td>3  [COMMISSION ADJOURNS COMMISSION RESUMES]</td>
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<td>4  [13:34]  CHAIRPERSON:  The Commission resumes. Mr Magidiwana, you're still under oath. I take it you have further questions in re-examination. Are there further video clips that you want to show?</td>
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<td>5  MR MPOFU SC:  Yes, Chairperson.</td>
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<td>6  CHAIRPERSON:  I take it that those in the auditorium are aware that the warning I gave still stands.</td>
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<td>7  MR MPOFU:  Chairperson, before I continue, I just wanted to place on record that my learned colleague for SAPS and I had a another discussion about the pathway. It seems like there are still two of them which are outstanding, but we have sort of reached an arrangement in terms of which I will defer, for lack of a better word, my cross-examination on the issue of dates. And possibly - should we still have grants to dispute the date and so on when SAPS leads that evidence on Exhibit L, we would then deal with it that way, otherwise we'll find ways of having admissions between ourselves.</td>
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<td>8  CHAIRPERSON:  The witness has committed to a version.</td>
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<td>9  MR MPOFU:  Yes.</td>
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<td>10  CHAIRPERSON:  That he wasn't there on the 14th or the 15th.</td>
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<td>11  MR MPOFU:  Hm.</td>
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<td>12  CHAIRPERSON:  So if it's established that those photographs were indeed taken on the 14th or the 15th, then he may have problems. If on the other hand it's not, and it's - it seems clear that they were taken on the 16th, then obviously the situation will be different. There will be no need for him to explain further, because his version is already on record.</td>
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<td>13  MR MPOFU:  Thanks.</td>
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<td>14  CHAIRPERSON:  As you say it's a matter to be dealt with primarily with the police when they set out to prove the evidential material contained in Exhibit L.</td>
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<td>15  MR MPOFU:  Thanks, Chairperson.</td>
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<td>16  CHAIRPERSON:  Thank you.</td>
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<td>17  MR MATHIBIDE SC:  Thanks, Mr Chairman, I confirm the arrangement.</td>
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<td>18  MR MPOFU:  Mr Mpofu, you did indicate to me in chambers that, as to how long you thought you would be with the witness. Perhaps you could put that on record as well, because as a consequence of it, which I think in fairness we should tell everybody in the auditorium about, because they might want to make other arrangements once they've heard what you're going to say.</td>
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<td>19  CHAIRPERSON:  I think finish his evidence might be more correct.</td>
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<td>21  CHAIRPERSON:  It would be longer if we have to, but the main point is that the National Commissioner who was going to give evidence today, the first witness called by the police, will not be giving evidence this afternoon. She'll be giving evidence tomorrow.</td>
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words appear, which is what we have done now. Then I'll just ask a few questions in the manner that I have suggested, unless there is an objection, just for the section that we have seen, thank you. Mr Magidiwana, on the part of this Exhibit EEE16 that we have already seen, let me start with the original issue that we were looking for and then we found other things. Did you observe a person who looks like a journalist, a white person who was – who have shown at the first early stages of that clip?

MR MAGIDIWANA: I saw.

MR MPOFU SC: And does that person seem like the journalist that you referred to when you gave the evidence a day or two ago?

MR MAGIDIWANA: It is so.

MR MPOFU SC: Yes. And as I have indicated to the, Chairperson, we have traced the person and he still has to see the footage and confirm if it is him, but after that we'll hand over his name to the evidence leaders. Right. And then, were you able to hear the sound of the choppers or helicopters?

MR MAGIDIWANA: Yes, on the day.

MR MAGIDIWANA: I also saw them.

MR MPOFU SC: Okay. And then coming to the positions that you had already testified about, where you were lying on your side, taking off the towel and then the one that we all know where you are facing the ground. We have to add this position where you are facing upwards the part of this Exhibit EEE16 that we have already seen, thank you. Mr Magidiwana, second segment, thank you very much.

[VIDEO SHOWN]

MR MAGIDIWANA: I could hear them.

MR MAGIDIWANA: Yes, they were – so they could be heard, I could hear them.

MR MPOFU SC: And then if you remember the part of this Exhibit EEE16 that we have already seen, thank you. Mr Magidiwana, second segment, thank you very much.

[VIDEO SHOWN]

MR MAGIDIWANA: Yes, I saw him.

MR MPOFU SC: And when I was examining you in chief, we dealt with the other material of cease fire and the shots that followed thereafter. But on this clip, were you able to detect more shots and I'm not asking you, we now know where you were lying among those people. Did you observe the place where we see you for the first time, lying on your back with your left knee up?

MR MAGIDIWANA: Yes.

MR MPOFU SC: There was also another place where the camera almost zoomed onto your face and we could see your eyes open, you were looking towards the side of the road as it were?

MR MAGIDIWANA: It is so.

MR MPOFU SC: And so now in addition to the positions that you had already testified about, where you were lying on your side, taking off the towel and then the one that we all know where you are facing the ground. We have to add this position where you are facing upwards with your knee up. Would that be correct?

MR MAGIDIWANA: Yes, it is so.

MR MPOFU SC: And finally, did you see another journalist, a Black journalist who doesn't seem to be the Rastafarian you're referring to, who was also running basically almost out of the footage, out of the picture?

MR MAGIDIWANA: Yes, I saw that journalist.

MR MPOFU SC: Sorry, I said finally, but I was wrong. The – one of the points of showing this particular footage, was when Ms Pillay had played UU3 and AAA7 our joint intention as it were was to explain, because the one I think it's UUU7 shows the police in one position and then the next one shows them among the people and we would have asked the Commission as it were, to extrapolate that they must have moved in. But in this video, did you observe that we actually see the moving in between those two positions?

MR MAGIDIWANA: Yes, I saw them.

MR MPOFU SC: Finally now this time, on this part, the – did you see the one policeman holding a small gun, moving in, almost at a faster pace towards where the people were lying.

MR MAGIDIWANA: Yes.

MR MPOFU SC: Thank you. Can you see the second segment, thank you very much.

[VIDEO SHOWN]

MR MAGIDIWANA: Mr Magidiwana,

MR MPOFU SC: Thank you. Mr Magidiwana, in this segment just a few issues. You saw the journalist again, did you?

MR MAGIDIWANA: I saw him.

MR MPOFU SC: And when I was examining you in chief, we dealt with the other material of cease fire and the shots that followed thereafter. But on this clip, were you able to detect more shots and I'm not asking where they were coming from, after the shout of 'cease fire'?

MR MAGIDIWANA: Yes, they were – so they could be heard, I could hear them.

MR MPOFU SC: And then if you remember there was a debate between you and Mr Ngalwana about the reasons why the police may or may not have been retreating. On this video were you able to observe the fact that the police, members of the police seemed to be overcome by the tear gas and some of them were even coughing?

MR MAGIDIWANA: I could hear they were coughing there that day.

MR MPOFU SC: And in the course of that particular debate there was a suggestion of that the police – that your evidence could not be correct, because they could use masks. Did you see any policeman wearing a gas mask?

MR MAGIDIWANA: No, they didn't put them on.

MR MPOFU SC: Thank you, Chairperson. If the – I’m trying to make this as quick as possible. Thank you, Chair.

[VIDEO SHOWN]

MR MAGIDIWANA: Okay, can you stop, please and rewind, just to save time, so that we can repeat just
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1 this part. And please when you redo this, if you can give
2 us a little bit more volume. The question I wanted to put,
3 Mr Magidiwana, is whether you can hear the - what seems to
4 be a loudhailer saying "media go away, media go away."
5 MR MAGIDIWANE: Yes, I heard.
6 MR MPOFU SC: Thank you. Okay. If you
can play it from the beginning, just so that everybody's
attention can be drawn to that. I said the beginning, I
don't mean the very beginning, the beginning of this
10 segment.
11 [VIDEO SHOWN]
12 [13:54] MR MPOFU: Thank you, just I think three
13 questions on this one. Were you able to see the police
14 approaching or running - not really running, but let's say
15 rushing towards the area of the - towards the road, the
16 road side of the picture?
17 MR MAGIDIWANE: Yes, I saw them.
18 MR MPOFU: And when the volume was put up
19 were you able to hear the cocking of the guns before the
20 actual shooting?
21 MR MAGIDIWANE: No, Sir, I just heard the
22 clicking sound, but I don't know exactly what they were
doing.
24 MR MPOFU: Okay, fine, we'll establish
25 that through the police themselves. And then, once again,

Page 6704
1 you saw the people who were running - or rather some of the
2 policemen holding to their mouths, seeming to be affected
3 by the teargas?
4 MR MAGIDIWANE: It is obvious that indeed
5 they are affected by the teargas there.
6 MR SEMENYA SC: No, Chairperson, if this
7 is re-examination, then the witness must testify. It is
8 not proper for Mr Mpofu to be doing what he's doing now.
9 MR MPOFU: Okay, Chairperson, Mr Semenya
10 has obviously not been here. The arrangement that we had
11 reached was that I would lead the witness for the sake of
12 not going through this over a long time, but if it's on a
13 contentious issue, then obviously then I'll - either I,
14 voluntarily, will change the mode of questioning or
15 there'll be an objection.
16 CHAIRPERSON: Yes, well there is an
17 objection, but I don't know we need waste time on it. The
18 video is before us now as an exhibit. We are in as good a
19 position as the witness is to decide whether people are
20 putting their hands over their mouths, whether they're
21 dealing with teargas. He's put on record what he sees, we
22 can, at later stage, if there's argument about it, study
23 the clip carefully, and there can then be argument. We
don't have to have further evidence on it at this stage.
24 You've established what you want to establish, whether it

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1 is in fact indicative of the fact that they were suffering
2 from the teargas is a matter on which we're in as good a
3 position as the witness is to decide that.
4 MR MPOFU: Yes. Chair, on the subject of
5 this, the only reason I'm doing this is really because it
6 might look like that now, but six months later, when we
7 have to argue, at least these will be pointers. Of course
8 it may be argued that that would be -
9 CHAIRPERSON: No, but the clip will be
10 there, so if there's an issue during argument, the clip can
11 be shown in argument. I don't like to hear in six month's
time, but it would be - during examination, I would trust,
12 but never mind, carry on.
13 MR MPOFU: Thank you, Chairperson. Okay,
14 I'll take care, Chair, to really just deal with the non-
15 contentious stuff. Thank you, Chair. Okay, thank you.
16 [VIDEO SHOWN]
17 MR MPOFU: Okay, you can continue, we've
18 already seen that footage.
19 [VIDEO SHOWN]
20 MR MPOFU: Okay, I think that one does
21 speak for itself.
22 [VIDEO SHOWN]
23 COMMISSIONER HEMRAJ: I'm sorry,
24 Chairperson, I'm sorry to interrupt. Has the warning been
25 repeated, just before these images continue?
26 MR MPOFU: Yes, it was.
27 COMMISSIONER HEMRAJ: It was. Thank you.
28 [VIDEO SHOWN]
29 MR MPOFU: Mr Magidiwana, I'll ask you
30 just two or three issues which I wish to place on the
31 record. Were you able to see that during the movement of
32 the police towards the bodies, and at other different
33 places, that some of the people on the ground, some of the
34 protestors, were still moving and, in particular, did you
35 observe Mr Ntenetya in the reddish top, who seemed to be
36 trying to struggle off the ground.
37 MR SEMENYA SC: Chair, no, Dali Mpofu
38 can't be testifying.
39 MR MPOFU: Okay, Chairperson, I think -
40 CHAIRPERSON: Mr Mpofu, at suitable stage
41 in the argument this video can be shown, you can say what
42 you see there, Mr Semenya can then get up and say he
43 doesn't see it and -
44 MR MPOFU: Yes, Chairperson, that's fine.
45 I'll do it the long way. Mr Magidiwana, you previously
46 identified a gentleman that you said as Bai, which we
47 established at that time in chief that it was Mr Ntenetya,
48 do you remember that?
49 MR MAGIDIWANE: I know him.
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1 MR BURGER SC: In that video did you
2 observe him, and if you did, what was he doing?
3 MR MAGIDIWANE: I saw Bai, and when he
4 got shot, I also thought that he was shot below – his
5 pointing below, yes, because in the lower body. As he was
6 directly behind me, he was talking.
7 MR MPOFU: Yes?
8 MR MAGIDIWANE: Even when they helped
9 him, as he was behind me, I could hear that in fact there
10 was this gun where a shot was being fired. As I was also
11 lying there at sometimes, I would also shake, move a little
12 bit, and look in the direction of the Mambush. And I saw
13 that in fact he was dead, but Bai, I am sure that they
14 finished him off.
15 MR MPOFU: Thank you. Yes, can we see
16 the next segment?
17 [VIDEO SHOWN]
18 Thank you. Can you tell us this time what you
19 observed about Mr Ntenetya?
20 MR MAGIDIWANE: I could see that he moved
21 and then sat. Even though he was busy, because at some
22 stage he fell again.
23 MR MPOFU: Yes, and were you able to
24 identify the other person who was dragged and dropped on
25 the floor?

1 MR SEMENYA SC: I won’t allow Mr Mpofu to
2 do this at all. He must accept that we are going to object
3 if he testifies.
4 MR MPOFU: Fine. Did you observe anybody
5 else being handled by the police?
6 MR MAGIDIWANE: I, in fact, never looked
7 at his direction on his side, but I have just seen this one
8 on the video.
9 MR MPOFU: Yes, thank you. Sorry, it is
10 completely my fault. When I’m asking the questions now,
11 I’m referring to what you’ve observed on the video more
12 than what you observed on that day, and I think from that
13 answer I did not make it clear.
14 Chairperson, if that clip can be played again,
15 there is a particular portion which I’m not sure that it –
16 okay, I’m told it was on this clip, and I’ll indicate when
17 to pause please. Thank you.
18 [VIDEO SHOWN]
19 Okay, can you do it almost like bit by bit,
20 because the part I’m looking for is close, and I’ll tell
21 you when to stop? I’m sorry, can you play it back slowly,
22 like you did?
23 [VIDEO SHOWN]
24 [14:14] If we can go back slowly and just play this part,
25 and Mr Magidiwana, can you just observe the feet of the

1 policemen and their boots.
2 [VIDEO SHOWN]
3 Okay. Yes, can you just play that part for the
4 last time? Mr Magidiwana, can you then tell the Commission
5 what you’ve observed in relation to pointers I gave you.
6 Alright, what you observed on that question of the clip, Mr
7 Magidiwana.
8 MR MAGIDIWANE: He’s kicking someone, a
9 person who’s lying down. I should think that his foot is
10 just on this party’s – pointing at his cheek, right cheek,
11 Commissioner.
12 MR MPOFU: Okay, what is he kicking the
13 person with? What did you see exactly?
14 MR MAGIDIWANE: With the boots.
15 MR MPOFU: And is the person who is being
16 kicked with the boot, does it look like he is attacking
17 that policeman?
18 MR MAGIDIWANE: No, Sir.
19 MR MPOFU: Thank you, can we move on?
20 [VIDEO SHOWN]
21 Thank you very much. Can you move to the next
22 clip, thank you – the next segment?
23 [VIDEO SHOWN]
24 Thank you. Mr Magidiwana, just one question on
25 that section. What did you observe in relation to the

1 protesters and the Nylas?
2 MR MAGIDIWANE: What I saw, it was the
3 Nylas that were in fact pursuing the people.
4 MR MPOFU: Yes, thank you. Next segment.
5 [VIDEO SHOWN]
6 Thank you. Just one or two questions here.
7 Until now the evidence seems to suggest that all the
8 arrests were made at scene 2, when the people have been put
9 on the ground. What did you observe on this clip in
10 relation to the arrest of protestors?
11 MR SEMENYA SC: Chair, this witness
12 cannot be an eyewitness to that, and he cannot testify on
13 it.
14 CHAIRPERSON: - Mr Mpofu. You know I
don’t think that it takes the case very much further by
15 getting one witness to say what he sees on the video. The
16 videos are before us. There may well be argument later as
17 to what one can see, and as I say, your argument as to what
18 is on the video won’t be strengthened or corroborated by
19 the witness has to say. So I think there’s something
20 to be said for what Mr Semenya said.
21 MR MPOFU: Yes, Chairperson, I’ll
22 withdraw the question, more so on this one, the loaded
23 words, like arrest, which might have legal meanings. So
24 can we move on to the next segment?
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[VIDEO SHOWN]

MR MPOFU: Okay, thank you, Chairperson, everyone will be relieved to hear that is the last segment of that video. There's still -

CHAIRPERSON: - see on that segment.

MR MPOFU: Well, I'm going to deal with it now, Chair.

CHAIRPERSON: Do you remember what I said, that -

MR MPOFU: Yes, no, no, I'm bearing that in mind, Chair, I'm not going to go to town at this stage.

Mr Magidiwana, with particular reference to the people who were lying on the ground, if you observed them, and then there are the policemen who are standing, are you able to say if the people who are lying on the ground are all dead, or some are still alive, with indication to the movements, if any, that you might have observed?

MR MAGIDIWANE: Chair, I don't know Mr Magidiwana's talents, but if he's able to say somebody lying down is dead or alive -

MR MPOFU: Okay, were they moving? I'm sure he has talents to see movement.

CHAIRPERSON: The only problem is that we can see it as much as the witness can. I mean, what's the point in calling a witness to say, "I'm looking at a video and I could see something moving," and we all look at a video -

MR MPOFU: I'm just leading up to the question, I just need to - thank you. Did you see people moving?

MR MAGIDIWANE: Yes, there are people who were moving.

MR MPOFU: And did you observe whether or not the policemen who were standing there were attending to the people who were moving and possibly still alive?

MR MAGIDIWANE: I said on the other day that they were laughing and taking out their phones and shooting photos of us.

MR MPOFU: Thank you, yes, no, that's fine. We do have evidence - objective evidence of the laughing, but it is only at scene 2. Thank you,

Chairperson. If you can – on this one, I just want you to try and observe the journalist that you testified about. It's quite a fleeting appearance, so it's a very short one.

Can you play the last one, the SABC news? Chairperson, if I may indicate, this footage was on the 7 o'clock news two days ago, and I just spotted it fortuitously, and it seems to deal with this issue.

[VIDEO SHOWN]

MR MPOFU: Thank you. Apart from the journalist, Mr Magidiwana, in that clip, what did you observe in relation to the policemen who were handling guns?

[14:34] MR MAGIDIWANE: I saw that they were standing on the line.

MR MPOFU: Yes and when they got closer to the bodies to where you were lying down?

MR MAGIDIWANE: They were coming closer.

The gunshots in fact as they were shooting at the time we were lying they could be heard.

MR MPOFU: Thank you Chairperson, some of the material as the Chairperson has repeatedly indicated will be dealt with in argument. Thank you Chair.

CHAIRPERSON: In something else, re-examination proper?

MR MPOFU: Yes Chairperson.

CHAIRPERSON: I think I should indicate at this stage that inasmuch as some of the matter that you introduced was new matter. I understand you did it because you only found the footage later. I will obviously give any party wishing to cross-examine on new matter the opportunity to do so.

MR MPOFU: Yes Chairperson, in the event that there is new matter I was careful to deal with issues that were dealt with in the re-examination such as the teargas and so on but if -

CHAIRPERSON: If you're referring to the videos which -

MR MPOFU: Yes no I'm saying -

CHAIRPERSON: - the things were on the videos which people may not agree are visible and I give them the opportunity to cross-examine if they wish to do so. They may take the line but they'll argue it later and the video can be seen during argument but it would only be fair in accordance with procedural fairness for me to permit them to cross-examine if they wish to do so.

MR MPOFU: Yes. The police version is that when or rather just before the volley of shots were fired the protestors were approaching the police in an attacking formation. And we've already dealt with exhibit L206. If you can turn to L207, exhibit L207 I'm sure it would be common cause that these were people who were coming behind you, behind your group and according to the caption it says “they are moving past the kraal and it seems to be near the same tree” that you testified about earlier in the -

CHAIRPERSON: I doubt that it would be common cause that they were in a separate group, it may well be contended that they were part of one group but anyway let's not spend time on it.

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1 MR MPOFU:  Fair enough, thank you
2 Chairperson.  Yes we can eliminate the group thing but we
3 know from the video and I don't want to play the video
4 again, you know from the video that there were only three
5 people in front of you.  One of them was Mr Noki.  It is on
6 that basis that I was suggesting that they were behind you
7 and also the caption put by the police to that photo.  And
8 the question which you may or may not be able to answer is
9 whether from that picture one can observe what is called an
10 attacking formation whatever that is.
11 MR MAGIDIWANA:  It is not so, Sir.
12 MR MPOFU:  Thank you.  Now we can just
13 deal with - there seems to be another confusion which needs
14 to be cleared up if you may assist the Commission.  The
15 impression that was given at least by the cross-examiner
16 was that the numbers allocated to the protestors that
17 appear in exhibit L206 and in L208 are supposed to
18 correspond.  I just want us to deal with that and clear it
19 out.  Firstly let's start with you, your number there is
20 number one.  On L206 you are number one.
21 MR MAGIDIWANA:  Yes I can see it.
22 MR MPOFU:  And on L208 you are still
23 number one.
24 MR MAGIDIWANA:  Yes I can see it.
25 MR MPOFU:  Yes the only confusion there

1 seems to be the fact that Mr Semenya put it to a previous
2 witness that that was Mr Noki.  We now know that it is you.
3 CHAIRPERSON:  The point was made by Mr
4 Ntsebeza in his cross-examination.
5 MR MPOFU:  Yes anyway -
6 CHAIRPERSON:  You might undo it in the
7 process I don't think Mr Ntsebeza would like you to do
8 that.
9 MR MPOFU:  No it is in consultation with
10 him, Chairperson, or in collaboration.  And although as Mr
11 Semenya pointed out that I'm not a witness I think it can
12 be observed that number two is also number two on L206, on
13 both 206 and 208 and I'm sure you won't quarrel with that.
14 MR HANABE:  He's nodding the head.
15 CHAIRPERSON:  You know, Mr Mpofu, I don't
16 want to stop you unduly but when the police come and give
17 evidence and they try to establish that the factual
18 material, the evidential material in exhibit L is correct
19 you will then obviously have an opportunity to deal with it
20 and you'll be cross-examining on the basis of what one can
21 see on the photographs.  So as I've said to you before your
22 cross-examination then and the argument you'll advance
23 later in this regard, isn't going to be rendered any
24 stronger by the fact that this witness has already in
25 response to questions, some leading and some not, already

1 made the point that you want to make.  So, I don't want to
2 be unduly technical because I understand you have a
3 difficult job to do but you know we must have regard to the
4 expense that is incurred every day in this hearing.
5 MR MPOFU:  Well, Chairperson, you know my
6 answer to that.  It is only those who get paid who might
7 know the expense but just one more question, Chairperson.
8 The only question really that I wanted to ask is the person
9 identified as number three in L208 is Mr Noki isn't it?
10 MR MAGIDIWANA:  Yes, this person here who
11 is referred to as number three is Mambush and I'm facing
12 him but what really also confuses me is that I'm facing
13 him, there is just this small gap between myself and him in
14 the picture.
15 MR MPOFU:  Yes despite that the only
16 issue really is whether, if you go to L206 the person
17 pointed as number three is that Mr Noki?
18 MR MAGIDIWANA:  It's not him.
19 MR MPOFU:  Okay thank you.  Another
20 aspect that I'd like you to clarify - okay alright,
21 Chairperson, this is something that I can achieve by other
22 means.  The issue which was conversed with you in cross-
23 examination about there being two groups at the koppie, do
24 you remember that?
25 MR MAGIDIWANA:  I remember when that was

1 said.
2 MR MPOFU:  And it was suggested because
3 there was a gap between the so called front group and the
4 rest.
5 MR MAGIDIWANA:  Yes, I remember when that
6 was said.
7 MR MPOFU:  Can you just go to slide 190?
8 And maybe in your own words in relation to whatever gaps
9 you might see there identify how many groups you can see
10 there.
11 MR MAGIDIWANA:  There are many of them.
12 MR MPOFU:  And in relation to the gap,
13 you'll see that there are people in that picture who are on
14 the big mountain, on koppie one.
15 MR MAGIDIWANA:  Yes.
16 MR MPOFU:  And between them and the other
17 people that are grouped in front of them there's a gap -
18 the question is when you look at that picture the gap
19 between that front group and what I will call the middle
20 group and the gap between the people on the koppie and that
21 middle group, which gap is bigger?
22 MR MAGIDIWANA:  It is this gap that is
23 between the people in fact who are in the big koppie.
24 MR MPOFU:  Yes but the big koppie and
25 what I've termed the middle group.
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<td>1 MR MAGIDIWANA: Yes.</td>
<td>1 of it is that if they had waited, he said something like if</td>
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<td>2 MR MPOFU: And in relation to the other</td>
<td>2 they had waited until they crossed the road or do something</td>
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<td>3 gap which I suppose is the smaller gap from what you have</td>
<td>3 else then he would understand. I’m not quoting him</td>
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<td>4 said between the people who are sitting in the two</td>
<td>4 verbatim.</td>
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<td>5 different koppies there’s another gap and which one is the</td>
<td>5 CHAIRPERSON: Do you remember making a</td>
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<td>6 bigger gap between that gap and the gap in front?</td>
<td>6 statement along those lines?</td>
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<td>7 MR HANABE: Sorry Counsel, I didn’t</td>
<td>7 MR MAGIDIWANA: Yes I remember,</td>
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<tr>
<td>8 follow.</td>
<td>8 Commissioner.</td>
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<td>9 MR MPOFU: Sorry. No I’m saying there</td>
<td>9 CHAIRPERSON: Explain it us because I</td>
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<td>10 are also - you can also observe on that picture that</td>
<td>10 think it needs more explanation for me to understand it.</td>
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<td>11 there’s a group that’s on groot koppie and there’s another</td>
<td>11 MR MAGIDIWANA: I still remember the</td>
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<td>12 gap that is on koppie two yes koppie two, the smaller</td>
<td>12 thing I said on that day. The reason why I said that when</td>
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<td>13 koppie. And I’m asking the same question about the gaps in</td>
<td>13 we had got shot we had not even reached the road. As I was</td>
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<td>14 relation to what is between those two groups and the front</td>
<td>14 lying my body was not even on the road and it was my hands</td>
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<td>15 group gap that was testified about in cross-examination.</td>
<td>15 that were near or close to the road. That’s why then I</td>
</tr>
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<td>16 MR MAGIDIWANA: It is between the two of</td>
<td>16 asked a question that if we had intended to attack them why</td>
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<td>17 these groups there is indeed a distance or a gap but this</td>
<td>17 did they not at least wait for us to cross the road and it</td>
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<tr>
<td>18 one looks even wider.</td>
<td>18 was going to be obvious that indeed by crossing the road we</td>
</tr>
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<td>19 MR MPOFU: I thought the witness said the</td>
<td>19 were approaching or going to them.</td>
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<td>20 [African language] which is wider.</td>
<td>20 MR MPOFU: Thank you and we know you</td>
</tr>
<tr>
<td>21 MR HANABE: He is referring to the gap,</td>
<td>21 never reached the road but as far as you know what would</td>
</tr>
<tr>
<td>22 it’s wider than the other one, that’s why I’m saying it’s</td>
<td>22 you have done once you had reached that road?</td>
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<tr>
<td>23 wider. I was referring to the first one.</td>
<td>23 MR MAGIDIWANA: If I had reached the road</td>
</tr>
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<td>24 MR MPOFU: No but the witness didn’t.</td>
<td>24 I was going to go Nkaneng where I had intended to go.</td>
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<td>25 Okay that’s fine. Alright look we’ll also leave the rest</td>
<td>25 MR MPOFU: Thank you very much. The next</td>
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<td>1 CHAIRPERSON: What we all can do, during</td>
<td>1 topic I want to deal with is the - it was dealt with</td>
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<td>2 argument bring our magnifying glasses along and have a look</td>
<td>2 indirectly, the issue of the muti and the belief that was</td>
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<tr>
<td>3 at the photographs and decide for ourselves which gap is</td>
<td>3 ascribed to yourselves. In relation to - let’s start with</td>
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<td>4 wider. We don't need, with respect, the assistance of Mr</td>
<td>4 the issue of the alleged incisions which were made there.</td>
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<td>5 Magidiwana to solve that problem.</td>
<td>5 There are two aspects that I want to deal with. The first</td>
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<td>6 MR MPOFU: Ja but, Chairman, when they're</td>
<td>6 one is to confirm that you have stated that such incisions</td>
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<td>7 making - so I won't even justify it. Okay alright, okay</td>
<td>7 as might be on your body were done in the Eastern Cape</td>
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<td>8 the issue about slide 191 and the measurements there,</td>
<td>8 during rituals at your home but more importantly you have</td>
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<td>9 Chairperson, I’m going to assume - I was going to deal with</td>
<td>9 agreed that if the police have an expert which might age</td>
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<td>10 the measurements given on slide 191 but on the safe</td>
<td>10 those incisions then they should do so.</td>
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<td>11 assumption that there will be another inspection then I</td>
<td>11 MR MAGIDIWANA: Yes I said so, Sir.</td>
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<td>12 will defer that. Oh yes among the key or rather what I</td>
<td>12 MR MPOFU: Thank you and secondly</td>
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<td>13 call the rhetorical questions this one might have been made</td>
<td>13 according to Mr X the incisions that were done after the</td>
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<td>14 as statement. You asked a question which may become</td>
<td>14 burning of the sheep were done on people’s ears and you</td>
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<td>15 important at the end so I’d like you to clarify that for</td>
<td>15 indicated that you had no incisions on your ears, is that</td>
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<td>16 the Commission. You said that if the police had waited</td>
<td>16 correct?</td>
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<td>17 until you either crossed the road or turned left into</td>
<td>17 MR MAGIDIWANA: Yes.</td>
</tr>
<tr>
<td>18 Nkaneng you would understand their action and I’d like you</td>
<td>18 MR MPOFU: Now well before we move to</td>
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<td>19 to please, because this is, at least from our version, is</td>
<td>19 another issue Mr X also testified that there was a request</td>
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<td>20 going to be quite important. I’d like you to explain that</td>
<td>20 for a white sheep and a black sheep which were quickly</td>
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<td>21 evidence to the Chairperson and the Commissioner.</td>
<td>21 procured from nearby. Well do you know if - well have you</td>
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<td>22 [14:54] MR HANABE: You said if or as they had</td>
<td>22 ever seen a black sheep in your life?</td>
</tr>
<tr>
<td>23 turned left.</td>
<td>23 MR MAGIDIWANA: Never, I’ve never seen</td>
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<td>24 MR MPOFU: Words to that effect, the gist</td>
<td>24 it. Hence I said that the relevant person for that is him</td>
</tr>
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<td>25 so that he can come he can and explain as to where he ever</td>
<td>25 so that he can come he can and explain as to where he ever</td>
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1 went and bought such a sheep. The relevant person for that is him.
2 MR MPOFU: Sorry Chairperson.
3 Chairperson, I see that it's tea time.
4 CHAIRPERSON: I'm still hopeful we will conclude the re-examination before the end of the day and because there may be extra cross-examination. We'll take a fairly short tea time, it's now three minutes past 3, we must be back here by twenty past, at the latest.
5 MR MPOFU: Yes, Chairperson I'm doing my best to cut out some of the material.
6 CHAIRPERSON: I'm not suggest you're not, I'm just reminding you. We'll take the adjournment.

[COMMISSION ADJOURNS  COMMISSION RESUMES] 
15:21] CHAIRPERSON: The Commission resumes in the absence of the witness who will be here shortly I take it. Mr Mpofu, unfortunately there's no way that we can devise whereby you continue your re-examination in the absence of the witness.

19 MR MPOFU: If you Mr Semenya will complain you're giving evidence.
20 MR MPOFU: Chair I could go and sit there then Mr Semenya won't complain. Chairperson I must apologise.

24 CHAIRPERSON: Well cross-examine instead.
25 MR MPOFU: The good news, Chairperson, is that the end is in sight.

29 CHAIRPERSON: The thing is the witness isn't in sight. Mr Magidiwana, you're still under oath.
30 MR Mpofo please proceed with your re-examination.
31 MR MPOFU: Thank you very much.

Chairperson. I've assured Mr Magidiwana that we'll finish with him today, he has been sitting there since the 27th February. Mr Magidiwana, it's just a small point that I wanted go through from one of the videos if you can remember. It's just to deal with what the Chairperson called the "free kick formation." Were you able to see the journalist that you were talking about at some stage behind the police, the policeman standing in front of you?

37 MR MAGIDIWANA: I last saw the journalist that was before they could stand in that way, in that manner.
38 MR MPOFU: Okay from where you were lying ja.
39 MR MAGIDIWANA: Yes.
40 MR MPOFU: Thank you. And then another quick aspect. You testified or rather you timed your going to lunch on the 16th with the arrival or whereabouts of the

1 bishop, of Bishop Seoka, do you remember that?
2 MR MAGIDIWANA: Yes it is so.
3 MR MPOFU: And do you remember we established that he was there by 20 to 2 so maybe he arrived round about 1:30 or so, that's not in contention, it's from the police documents that he was at least already there by 20 to 2. Now the question really that I wanted to ask you is did you - you went to lunch and then you came back, did you ever find out or hear whatever happened to the Bishop of the Pastor as they call them?
4 MR MAGIDIWANA: It was like he had promised to come back.
5 MR MPOFU: Okay. I think it was yesterday you said, or let's start by saying this. There was evidence about the shot on your thigh, do you remember when my learned friend Ms Lupuwana was asking you questions?
6 MR MAGIDIWANA: Yes, I remember.
7 MR MPOFU: And then there was a debate about which one was the entrance wound, which one was the exit wound and so on.
8 MR MAGIDIWANA: I remember.
9 MR MPOFU: Yes okay subject to that debate and irrespective of which one is the exit or entrance can you just tell the Commission how many wounds

1 and say where they are that are on your body as a result of that attack?
2 MR SEMENYA SC: Can Mr Mpofu explain to us when the witness was attacked Chair?
3 MR MPOFU: 16th August 2012 Chairperson.
4 MR SEMENYA SC: And I object, there's no evidence of the witness being attacked.
5 CHAIRPERSON: I think Mr Mpofu would like further and better particulars.
6 MR MPOFU: Thank you, Chairperson. Well okay, Chairperson, yes, I will rephrase the question. After the shooting incident I just wanted to ask for you to describe to the Commission how many wounds you sustained and where they are on your body.
7 MR MAGIDIWANA: Okay when the police attacked me then -
8 MR HANABE: He's pointing at the right thigh there are two wounds or scars. There is one, he's pointing on the left side and then on the further right side which he says on the lower side he says there's also another scar. He says the wound and also in the private parts and also on the left side, he's pointing at that.
9 And then he's also pointing at the pelvic area.
10 MR MADLANGA SC: Pubic area.
11 MR HANABE: Pubic area, sorry. Okay he's
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1 pointing on the right side of the rib at the same time and
2 he's pointing at the rib but saying also this arm, elbow.
3 CHAIRPERSON: He seems to be pointing to
4 his left elbow.
5 NR HANABE: Yes the elbow, sorry
6 Commissioner.
7 MR MPOFU: Okay yes you've pointed at
8 about eight places. The issue really or what I wanted to
9 clarify is if there has been a confusion with the
10 translation in respect of the wound on your -
11 CHAIRPERSON: I counted six, perhaps we
12 should check it again.
13 MR MPOFU: He can check, he can just
14 count. Okay can you just count, don't tell us where it is
15 just count where the wounds are.
16 MR MAGIDIWANA: Eight, eight of them.
17 MR MPOFU: Thank you.
18 CHAIRPERSON: Mr Mpofu, your arithmetic
19 is better than mine.
20 MR MPOFU: Thank you very much. Now the
21 evidence that you led regarding this which is more
22 important than the number of wounds is that you said at
23 some stage that the injury on your testicle could not have
24 been sustained while you were standing up. Can you explain
25 that to the Commission?

1 friend Ms Lupuwana debated about yesterday, in the end we
2 all agreed that the entrance wound on your leg is at the
3 back of the leg. Do you remember that?
4 MR MAGIDIWANA: I remember that.
5 MR MPOFU: Now assuming it is correct
6 that the bullet entered from the back of your thigh and
7 given the evidence at least from the police that you were
8 approaching towards the people who were shooting could that
9 particular wound have been sustained while you were making
10 that approach?
11 MR SEMENYA SC: Chairperson, this is a
12 matter for expert evidence. I don't see how this witness
13 would assist us in giving accurate information about what
14 an entrance wound would suggest. These are ballistic
15 issues.
16 CHAIRPERSON: I think Mr Semenya is
17 right. I mean I don't know if the witness takes it any
18 further but according to the medical report the gunshot
19 wound at the front of the thigh is described as an exit
20 wound.
21 MR MPOFU: That's correct.
22 CHAIRPERSON: And the gunshot wound -
23 MR MPOFU: At the back.
24 CHAIRPERSON: At the back is described as
25 an entrance wound.

1 CHAIRPERSON: I don't think it's a matter
2 for laughter at all. The witness is describing a very
3 painful and a very embarrassing injury that he received and
4 I think he should be treated in an appropriate spirit.
5 Dignity should be displayed.
6 MR MPOFU: Thank you, Chairperson, in
7 fact before you answer my question let's first clarify is
8 there a problem with the translation on this issue? You
9 had pointed to a wound in your private parts, I think let's
10 call it that and you've also pointed to a separate wound in
11 what Mr Madlanga correctly referred to as "a pubic area."
12 Is that correct?
13 MR MAGIDIWANA: Yes.
14 MR MPOFU: Okay thank you. Now that
15 that's been cleared up that these are two separate wounds
16 your evidence was that the wound that is in your private
17 parts could not have been sustained while you were standing
18 up. Can you explain that to the Commissioner?
19 MR MAGIDIWANA: If I was standing there
20 is no way I could have been shot.
21 MR HANABE: He's pointing at the
22 testicles.
23 MR MAGIDIWANA: And whilst standing.
24 MR MPOFU: Right. The second issue is
25 the other wound, Chairperson, and myself and my learned
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1 back to the shooters?
2 MR SEMENYA SC:  Objection, Chair.
3 MR MPOFU:  Yes.
4 MR SEMENYA SC:  We know as a matter of fact that there was somebody with a firearm behind Mr Magidiwana in his own group.  Unless there is a basis to establish that this gunshot wound from the back is linked to police missile, the basis for the point in the question is without foundation.
5 CHAIRPERSON:  I think he's right but let's approach it differently.  At the stage before you fell down did you hear any shots being fired in your vicinity from behind you while you were facing forward towards the police?
6 MR MAGIDIWANA:  As I had already said at the beginning that those people who were shooting I never saw them.  In my group in fact I never saw those who were shooting.  This that the senior counsellor has just said is shocking me.
7 CHAIRPERSON:  You see but the question is whether it's possible that that wound was inflicted by someone standing behind you who fired and that's why I asked you whether you were aware of any shot being fired in your vicinity from behind you at the stage when you were facing the police before you fell down.
8 MR MPOFU:  Thank you, Chairperson.  Now, the – I am not sure so I don't want to blame the interpreter whether the question that the Chairperson related to him being shot before he fell down or any shots?
9 CHAIRPERSON:  Whether he was aware of any shots being fired in his vicinity from behind him at a time where he was standing up facing the police who were ahead of him and before he fell, obviously before he fell down.
11 MR HANABE:  I will repeat the question to him again, Commissioner.
12 MR MAGIDIWANA:  I say no.
13 MR MPOFU:  Alright, now the – okay, we will leave that for argument.  The only issue that I wanted to ask you is, I don't know if you've already answered this question, is whether at any stage you were facing away from the people who were shooting.
14 MR SEMENYA SC:  I must make a firm objection, Chair.
15 MR MPOFU:  Which is?
16 MR SEMENYA SC:  That unless we are given a premise that none of the people who were behind him with those firearms, fired.  This question cannot be a proper question.
17 MR MPOFU:  No, Chairperson, with the greatest respect –
18 CHAIRPERSON:  I don't know that - I understood the question to be, unless I misunderstood it, was there any stage before you fell, when you were facing, by what previously - here, was that you turned your back upon the police and were looking the other way.  That's the question.
19 MR MPOFU:  Yes, Chairperson, and what conclusion I might be drawing to that –
20 CHAIRPERSON:  My colleague, Commissioner Hemraj, says you didn't make it clear that he would have had his back to the police.  So perhaps you can rephrase the question, in a way which follows the line that I set out, and I think you may be able to resist an objection from Mr Semenya.
21 MR MAGIDIWANA:  You mean, are you saying I looked where I was coming from?, directly, where I was coming from?
22 MR MPOFU:  Yes, exactly were you faced back where you had been coming from?
23 MR MAGIDIWANA:  No.
24 MR MPOFU:  Thank you.  Now, I just want to, this is something that Mr Ngwala put to you which I assume is going to be the evidence of the police, and I want you to check with you whether you agree with what Mr Ngwala said or you don't.  He said that when the first sentence, he said then, at that stage, the police were nowhere near the road to Nkaneng, which is next to the kraal.  Would you agree with that?
25 MR MAGIDIWANA:  Yes.
26 MR MPOFU:  Thank you.  Now, the – I am sure Mr Ngwala will be pleased here, could we move to the last batch.  There was also evidence, remember once again yesterday and I think on another day from Mr Ngwala, there was the issue of where the fence that we see on exhibit B16M, which we resolved yesterday, you remember.
MR MAGIDIWANA: That place is a bit far, it's really far, very far.
MR MPOFU: And if I can ask you, in relation to what was going on there on that day, the option of running on the veldt for that distance, whatever the distance is, where you say is far, was that option one that occurred to you, and if it did not, why not?
MR MAGIDIWANA: That never occurred to me, and further that running to the veldt was really a big or great danger because in fact there were helicopters that were flying above us, if there were not three, there were four in number.
MR MPOFU: Thank you, Chairperson, I have nothing further.

CHAIRPERSON: I indicated that if any of the parties' representatives wish to cross-examine on the new matter, particularly in relation to the videos, I permit them to do so. I see Mr Semenya is raising his hand. Does anybody else wish to do so? Mr Semenya, you may proceed.

MR SEMENYA SC: Thank you, Chair. Mr Magidiwana, the last battery of video material you are being shown, when do you see those for the first time?
MR MAGIDIWANA: The video clips that were shown or played here, I saw them for the first time yesterday.

CHAIRPERSON: It's not fair to make snide remarks like that. You have been asked a question, please answer it.

MR MPOFU: Chairperson, I am sorry, I agree that the witness is not entitled to do that but in fairness, Mr Semenya was not here when the cross-examination on this issue was done at – extensively by Mr Ng alwana, and my objection specifically is, I don't see how this particular issue arises from the video, because it was canvassed extensively, but extensively by Mr Ng alwana.
CHAIRPERSON: Yes, this particular question wasn't asked, and he question doesn't actually derive so much from the video, as from the medical report, which you put in for the first time in re-examination, which reveals the exit and entrance wounds. So I will allow the question to be put.

MR MPOFU: Chairperson, I am not, I want – sorry, Mr Semenya, I am not challenging the ruling, all I want to understand is, whether this invitation was or was not confirmed – confined to the video.
CHAIRPERSON: I did say to the video. But then I corrected myself and I remembered that the medical report had also been handed in, in re-examination. So I extend my ruling in respect of that.
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1  25  MR MAGIDIWANA:  The time then that you
1  23  actually.
1  22  CHAIRPERSON:  More or less the hip area
1  21  MR MAGIDIWANA:  And after that, I fell.
1  20  Commissioner.
1  19  MR HANABE:  Okay, thank you,
1  18  it actually.
1  17  CHAIRPERSON:  His left thigh, the side of
1  16  MR HANABE:  He is pointing at the left
1  15  MR MAGIDIWANA:  As I said, already said
1  14  MR HANABE:  Okay, thank you,
1  13  MR MAGIDIWANA:  That's not an answer to
1  12  MR SEMENYA SC:  With your chest to the
1  11  MR MAGIDIWANA:  Yes, immediately when
1  10  they came back after an hour?
1  9  MR SEMENYA SC:  Alright. As we see you
1  8  lying on the clips, with your arms outstretched, had you at
1  7  that stage sustained the second injuries caused by the
1  6  MR MAGIDIWANA:  Thank you, Commissioner.
1  5  MR HANABE:  Okay, you sustained injuries as a result of being shot for the
1  4  MR SEMENYA SC:  Okay, let me try again.
1  3  MR SEMENYA SC:  Maybe you did not
1  2  understand my question.
1  1  MR MAGIDIWANA:  And I think you wanted to
1  0  know in fact what the time that had passed, the time frame,
0  9  MR SEMENYA SC:  No, Mr –
0  8  MR MAGIDIWANA:  - and then you saw me
0  7  with two shots.
0  6  MR SEMENYA SC:  Not the two shots, I am
0  5  trying to say the second occasion you are alleged to have
0  4  been shot.
0  3  MR MAGIDIWANA:  When I was shot for the
0  2  second time, when they had returned, I was not lying on my
0  1  chest –
0  9  MR HANABE:  He was not lying down in that
0  8  fashion.
0  7  MR SEMENYA SC:  On the video clip we see
0  6  you lying in that way. All I am trying to establish is had
0  5  you sustained injuries as a result of being shot for the
0  4  second time?
0  3  MR MAGIDIWANA:  Those people shot at me,
0  2  when they came back from there, and the people was talking
to, and the one who shot me in fact shot at me whilst I was
0  1  lying on my back.
0  9  MR SEMENYA SC:  That's not an answer to
0  8  the second shooting rather, would have happened almost
0  7  the ground, and your arms outstretched in front of you, as we
0  6  see in these clips.
0  5  MR MAGIDIWANA:  If then there I don't
0  4  have my towel with me, by then in fact I was already fired
0  3  with two shots.
0  2  MR SEMENYA SC:  Not the two shots, I am
0  1  trying to say the second occasion you are alleged to have
1  25  MR MAGIDIWANA:  The time then that you
1  23  actually.
1  22  MR HANABE:  Okay, thank you,
1  21  MR MAGIDIWANA:  And after that, I fell.
1  20  Commissioner.
1  19  MR HANABE:  He is pointing at the left
1  18  MR MAGIDIWANA:  As I said, already said
1  17  MR HANABE:  Okay, thank you,
1  16  MR MAGIDIWANA:  That's not an answer to
1  15  MR SEMENYA SC:  With your chest to the
1  14  MR MAGIDIWANA:  Yes, immediately when
1  13  they came back from where they were, they came straight to
1  12  me.
1  11  MR SEMENYA SC:  That's the time lapse I
1  10  am trying to work through, Mr Magidiwana.
1  9  MR MAGIDIWANA:  I am telling you that I
1  8  didn't have a watch.
1  7  MR SEMENYA SC:  Just for illustration,
1  6  did they come back after an hour?
1  5  MR SEMENYA SC:  Could it have been long
1  4  as an hour, when they came for the second time?
1  3  MR MAGIDIWANA:  If you mention or talk
1  2  about time on that date to me, Sir, you will no be talking
to me, because I am in no position to estimate or to tell
you about the time lapses to the time when they left me,
and then came back again. I cannot know, I don't know
that.
1  20  MR SEMENYA SC:  Alright. As we see you
1  19  lying on the clips, with your arms outstretched, had you at
1  18  that stage sustained the second injuries caused by the
1  17  second shooting?
1  16  MR MAGIDIWANA:  How was I lying, Sir?
1  15  MR SEMENYA SC:  With your chest to the
1  14  MR MAGIDIWANA:  The time then that you
1  13  actually.
1  12  MR HANABE:  Okay, thank you,
1  11  MR MAGIDIWANA:  And after that, I fell.
1  10  Commissioner.
1  0  MR MAGIDIWANA:  And I think you wanted to
0  9  know in fact what the time that had passed, the time frame,
0  8  MR SEMENYA SC:  Yes.
0  7  MR MAGIDIWANA:  Hence I am saying that I
0  6  never had a watch to look at what time it was.
0  5  MR SEMENYA SC:  Okay, let me try again.
0  4  To the extent you are able, can you estimate the time lapse
0  3  between the first shooting, and what you say was the second
0  2  time shooting with the police, with you lying down?
0  1  MR MAGIDIWANA:  Sir, when I was shot on
1  0  this side, and upon hearing the footsteps as I was lying
1  0  like this, when I lifted my head, as I was lying there,
1  1  they then spoke, saying that I must take of the towel. As
1  0  I was busy then taking off that towel, and then he shot me
1  0  here.
1  0  MR HANABE:  He is pointing at the left
1  0  elbow.
1  0  [16:01] MR MAGIDIWANA:  I threw it there, and I
1  0  lay down again. They passed through, so I don't know what
1  0  time it was when they passed.
1  0  MR SEMENYA SC:  So the first shooting -
1  0  the second shooting rather, would have happened almost
1  0  immediately after the first time.
1  0  MR MAGIDIWANA:  Yes, immediately when
1  0  they came back from where they were, they came straight to
1  0  me.
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<td>1 my question. Can we play maybe the video footage?</td>
<td>1 also has the clan name of Bai on that video. I don’t think</td>
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<td>2 MR MAGIDIWANA: What then do you want me to say, Sir?</td>
<td>2 it’s significant for Mr Semenya’s question, but I don’t want it be ascribed to me.</td>
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<td>3 MR SEMENYA SC: I’ll tell you. Speak.</td>
<td>4 MR SEMENYA SC: Do you remember a clip with the police dragging somebody next to where you were lying?</td>
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<td>4 Should we play you the video clip indicating you lying with your outstretched arms, chest to the ground.</td>
<td>5 MR MAGIDIWANA: I said I never saw, I didn’t see that person.</td>
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<td>5 MR MAGIDIWANA: If you feel like, you can play it.</td>
<td>6 MR SEMENYA SC: On the video clip?</td>
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<td>6 MR SEMENYA SC: Can you please play all the series of second video clips.</td>
<td>7 MR MAGIDIWANA: I saw him today in the video clip.</td>
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<td>7 MS PILLAY: Chair, I would imagine that’s EEE16 but there are a few portions to it, I am not sure exactly - I suppose the first one EEE16.</td>
<td>8 MR SEMENYA SC: At that stage, are you able to say that you had been shot for the second time?</td>
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<td>8 MR MAGIDIWANA: If I may assist, Chairperson, I think it’s the first segment.</td>
<td>9 MR MAGIDIWANA: At that stage when they did that.</td>
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<td>9 (VIDEO SHOWN)</td>
<td>10 MR SEMENYA SC: Chairperson, I am really sorry, this question is at worst unfair to the witness. If the witness says as he has said, that that dragging incident, he did not witness it on the 16th, but he saw it on the video. Then how on earth can he be asked whether at the time, whether he saw it six months later here, he had been shot on the 16th, I mean that’s really -</td>
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<td>10 MR SEMENYA SC: Yes, if you can stop at that frame. Yes, at this point. At this time, had you sustained injuries as a result of being shot the second time?</td>
<td>11 MR SEMENYA SC: If you feel like, you can play the video that it took place at some stage, he can’t tell us what the time lapse was between either that incident he’s been short or he’s been short in that incident. So I understand the relevance of your cross-examination, but I am not sure that an attempt to use that dragging incident as one of the six points from which to determine the time lapse is appropriate, if he didn’t know at the time that it had happened.</td>
</tr>
<tr>
<td>11 MR MAGIDIWANA: On this picture, or video clip in fact, I had already been shot with two shots.</td>
<td>12 MR SEMENYA SC: At that stage, are you able to say that you had been shot for the second time?</td>
</tr>
<tr>
<td>12 MR SEMENYA SC: Okay, let’s look at this frame. We see the police approaching you there, correct?</td>
<td>13 MR MAGIDIWANA: I saw him today in the video clip.</td>
</tr>
<tr>
<td>13 MR MAGIDIWANA: He is pointing the first one on the left thigh, I mean elbow.</td>
<td>14 MR SEMENYA SC: To me this is really an attempt to use that dragging incident as one of the six points from which to determine the time lapse is appropriate, if he didn’t know at the time that it had happened.</td>
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<td>1 MR SEMENYA SC: And you say that the police went past where you were lying.</td>
<td>1 MR SEMENYA SC: Chair, I am desirous in completing my cross, because it’s one point, but -</td>
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<td>2 MR MAGIDIWANA: Yes.</td>
<td>3 CHAIRPERSON: You told us you were shot, and you told us you fell on the ground. You also told us the police came back later. I know you didn’t have a watch and even if you had a watch, you wouldn’t have been looking at it, but did you, in the time you were lying on the ground, before the police came back, did you hear a lot of shots being fired some distance away at the next koppie?</td>
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<td>3 MR SEMENYA SC: Only to come back later.</td>
<td>4 MR MAGIDIWANA: Even at the time I was lying down, I could hear the shots being fired.</td>
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<td>4 MR MAGIDIWANA: They came back again.</td>
<td>5 MR SEMENYA SC: Okay, let’s look at this frame. We see the police approaching you there, correct?</td>
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<td>5 MR SEMENYA SC: But you agree that these video footages also show long after, with even mounted police on the scene. You agree? That’s what we saw.</td>
<td>6 MR HANABE: You mean to them as a group</td>
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<td>6 MR HANABE: Can you repeat, senior counsel, I didn’t get the question.</td>
<td>7 MR MAGIDIWANA: At that stage, are you able to say that you had been shot for the second time?</td>
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<td>7 MR SEMENYA SC: The battery of video clips you have seen, show the episodes where the police were approaching after the first burst of fire, and they also saw footages, long after, with the mounted police, even on the scene.</td>
<td>8 MR MAGIDIWANA: At that stage, are you able to say that you had been shot for the second time?</td>
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<td>8 MR MAGIDIWANA: Hence I am saying, Sir, in what happened there, those clips that are being shown, in fact not everything is shown, rather, it’s not shown in the correct way, because many things happened there.</td>
<td>9 MR SEMENYA SC: Chairperson, I am desirous in completing my cross, because it’s one point, but -</td>
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<td>9 MR MAGIDIWANA: When Mr Bai was, as Mr Mpofu uses the word, dragged, had you been shot for the second time?</td>
<td>10 MR SEMENYA SC: At that stage, are you able to say that you had been shot for the second time?</td>
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<td>10 MR MPOFU: Chairperson, I am really sorry, this question is at worst unfair to the witness. If the witness says as he has said, that that dragging incident, he did not witness it on the 16th, but he saw it on the video. Then how on earth can he be asked whether at the time, whether he saw it six months later here, he had been shot on the 16th, I mean that’s really -</td>
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<td>11 MR SEMENYA SC: When Mr Bai was, as Mr Mpofu uses the word, dragged, had you been shot for the second time?</td>
<td>12 MR MAGIDIWANA: At that stage when they did that.</td>
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<td>12 MR MAGIDIWANA: I saw him today in the video clip.</td>
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1 or –
2 MR SEMENYA SC: That’s right.
3 MR HANABE: Okay, thank you, Senior Counsel.
4
5 MR SEMENYA SC: And on your version you would have sustained the thigh injury. Correct?
6 MR MAGIDIWANA: Talk, I am listening, Sir.
7
8 MR SEMENYA SC: Am I right?
9 MR MAGIDIWANA: Yes, it is so.
10
11 MR SEMENYA SC: When do you turn to face up?
12 MR MAGIDIWANA: Sir, this thing, a bullet, is really painful, and when you are being shot, it’s not like when you’ve just been kissed. I, after
13 seeing that they went, gone past, I turned again.
14
15 MR SEMENYA SC: And none of that appears in any of the clips when you are now facing up. Would you agree?
16 MR MAGIDIWANA: If it’s not here, you should then bring it, because I think I saw the other one here where I was lying on my back where I had bended my knee.
17
18 MR SEMENYA SC: The statement, your statement at paragraph 18, you say, and it is a statement
19 assisted by your legal representatives. You say, “After the gunfire stopped for a while,” you say, “shortly thereafter I could hear voices of police approaching the place, where most of us had fallen.” That is captured on these clips. Then you say in paragraph 19, “When they got to me, I was shot again several times, from close range whilst I was on the ground.” None of the video footages could capture that, you tell us.
20 [16:21]  MR MAGIDIWANA: For you to see that, do you want to see the body?
21 MR SEMENYA SC: Am I correct?
22 MR MAGIDIWANA: Sir, for you then to be able to see it, do you want to see the body?
23 MR SEMENYA SC: Do you agree that none of the video clips we have been seeing, with the police approaching you, while you are lying on the ground, and who according to your statement, you hear voices coming to you, and when they get to you, you get shot several times from close range. That must have been immediately after this frame, and I am saying, do you agree none of that episode with you being shot as you described is depicted in any of these video footages.
24 MR MAGIDIWANA: Sir, which one then is not appearing there?
25 CHAIRPERSON: The video we saw, the videos we saw, none of them shows policemen approaching you and then shooting you at close range while you are lying on the ground. I take it, you’ve got to admit that, because we saw the videos together and we didn’t see that incident depicted on those videos. That must be right, surely.
26 MR MAGIDIWANA: There is a video here, where I was in fact ordered to take off that towel. What were those police officers doing?
27 CHAIRPERSON: No, no, that’s not an answer to the question. The question is, there is no video that we saw which shows policemen shooting at you, while you are lying on the ground.
28 MR MAGIDIWANA: In these videos that are shown here, in fact I had already been shot with two bullets, hence I am saying when they went past and came back there was this police officer who had a firearm, and talking to me, asking me things I know nothing about. He is the one in fact who shot at me.
29 CHAIRPERSON: He shot at you, it wasn’t captured on any of the videos we saw, do you agree with that?
30 MR MPOFU: Well, Chairperson, with respect, this is exactly what I was trying to avoid, by asking questions to the witness, which Mr Semenya curtailed, there is indeed, and it might be a matter of argument or whatever, but there is, on our version at least on one of those segments, a situation where we see a policeman with a jerking movement accompanied by a sound, and we will argue once if we – we will ask the police, I suppose they will call an expert or whatever which I’ve discussed with Mr Bizos. So unless if anybody –
31 CHAIRPERSON: [Inaudible].
32 MR MPOFU: Yes, if that – thank you, Chairperson.
33
34 MR SEMENYA SC: Are you able to point us to any of these battery of witnesses depicting what you say happened to you on the video clips, depicting what you say happened to you. Let me tell you what you say happened. At paragraph 16, you say, “As soon as he emerged on the other side of the kraal, we were met with more rapid gunfire. I was hit on my left leg. I think it was corrected to hip. I stumbled and fell behind the other workers who had been shot, including Mr Noki. The gunfire stopped for a while. Shortly thereafter I could hear voices of policemen approaching the place where most of us had fallen.” And that is the frame we see the police approaching you. When they got to me I was shot again

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several times from close range while I was on the ground.”

I am saying do you accept at the very least none of these clips we have been seeing depict that which you are saying in your statement there.

MR MAGIDIWANA: I am saying, as I was being shot.

MR HANABE: He is pointing on the side.

MR MAGIDIWANA: And when that police officer who was busy questioning me, that one in fact is not appearing.

MR SEMENYA SC: That's precisely my point, because it didn't happen, I'll argue.

MR MAGIDIWANA: Am I the one then, who inflicted these injuries on myself?

MR SEMENYA SC: I will argue that you sustained your injuries at the first time of the shooting that happened as the Noki group, in which you were a part, was approaching the police.

MR MAGIDIWANA: Then it means you are not truthful.

MR SEMENYA SC: Those are my –

CHAIRPERSON: That's not a necessary comment. Counsel was just putting his instructions to you. But you said that you were shot several times when you were already lying on the ground after you’d fallen, and counsel puts to you on behalf of the police, they say that’s not true, that you were only shot while you were coming towards them. Is that a summary of this –

MR SEMENYA SC: That will be our argument, Chair. Thank you.

CHAIRPERSON: The Commission will now adjourn until 09:30 tomorrow morning. You are excused, Mr Magidiwana. I take it, it may be necessary at some stage for you to come back. It may not be, but subject to the fact that you may have to come back, if requested to do so, you are excused from further attendance.

MR MAGIDIWANA: Thank you, Sir.

[NO FURTHER QUESTIONS – WITNESS EXCUSED]

[COMMISSION ADJOURNED]
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