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[PROCEEDINGS ON 25 MARCH 2013]

1 [10:12]  CHAIRPERSON: The Commission resumes. I understand that counsel for the Human Rights Commission wishes or might just wish to say something but I’ll call on him later. Mr Semenya?

6 MR SEMENYA SC: Chair, if I may be permitted, we would place – we would want to place on record that, as SAPS, it is with deep shock to learn of the assassination of the sangoma implicated in the Marikana muti rituals, who has been gunned down last, yesterday morning, early hours in the morning and this was immediately with an imminent attempt by the police to get hold of him as a witness in these proceedings.

13 CHAIRPERSON: Where did this take place?

14 MR SEMENYA SC: In Bizana.

16 CHAIRPERSON: In Bizana. Yes, well, thank you for giving us that information, putting it on record. Some of the parties have said that they deny that there was a sangoma involved, so all we can say is the person who is alleged to have been the sangoma and alleged to have done the things that were put to the witnesses, has been assassinated and that's obviously - you say just before the police were due to make contact with him. Well, that's obviously a very serious matter and thank you for drawing it to our attention. This is the second person who has links with this Commission in some way or other who has been killed and it's a matter of great concern to the Commission and I’m sure to everyone else involved. National Commissioner, you’re still under oath.

5 MANGWASHI VICTORIA PHIYEGA: s.u.o.

6 CHAIRPERSON: Mr Madlanga, I take it you want to continue with your cross-examination?

8 CROSS-EXAMINATION BY MR MADLANGA SC (CONT'D.):

9 Yes, Mr Chairman, thank you. National Commissioner, before I start my cross-examination on the subject where we left off, can I just briefly touch on a different subject. You mention in your statement and in testimony that you were briefed by certain commanders whom you mentioned, during the night of the 16th of August 2012 on what had taken place during the killings at Marikana on that day and you also say that there was an update in the morning of the following day, before you held the press conference, do you remember that?

13 GENERAL PHIYEGA: Yes.

20 MR MADLANGA SC: What I’m interested to find out is whether you ever received any further briefing, update or whatever you choose to call it, on the details of what happened on the 16th of August 2012, that is when the killings took place. Did you ever get any other briefing prior to the session at Potchefstroom?


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1 I would say yes, but there are other sub-commanders that report to them that would have been there.

11 MR MADLANGA SC: No, no, before we talk about anybody who might have said something to the commanders, so is your answer yes, to your knowledge, those who briefed you or rather of those that briefed you, only the two, according to your knowledge, had been at the scenes. Your answer is yes to that.

17 GENERAL PHIYEGA: I would still say in addition to those two, yes, those two but in addition to those there were others that were there.

20 CHAIRPERSON: Would there have been others who briefed you personally?

22 GENERAL PHIYEGA: No, Judge.

23 CHAIRPERSON: [inaudible] those who personally briefed you. I understand other people [inaudible] briefed you. He’s concerned with who actually
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1 briefed you yourselves and it seems clear from what you say 
2 that of the people who personally briefed you, as far as 
3 you know, the only two – the only ones who were on the 
4 scene at the time the incidents took place were General 
5 Naidoo and Brigadier Calitz. That’s correct, isn’t it? 
6 GENERAL PHIYEGA: Of the people who 
7 briefed me, yes. 
8 CHAIRPERSON: Yes, thank you. 
9 MR MADLANGA SC: Thank you, Mr Chairman. 
10 Did these further briefings bring to your attention 
11 information that you had not received at the briefing and 
12 update of the 16th and 17th respectively? 
13 GENERAL PHIYEGA: I have stated in my 
14 statements the information that was brought to my attention 
15 and also the information that is sitting in our 
16 presentation is part of the information that I have been 
17 privy to. The question is a little bit broad for me to say 
18 yes or no. 
19 CHAIRPERSON: Mr Madlanga, think the 
20 National Commissioner is correct, the question was what the 
21 constitutional lawyers would call over-broad. Perhaps you 
22 could narrow it a bit so that she could give a focused 
23 answer. 
24 MR MADLANGA SC: Thank you, Mr Chairman. 
25 National Commissioner, you do know what you were told 

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1 during the briefing of the 16th of August 2012, just like 
2 you would also know what you were told during the update of 
3 the morning of 17 August 2012, not so? 
4 GENERAL PHIYEGA: Yes. 
5 MR MADLANGA SC: Now what I would like to 
6 know is, what is it that you were told after the update of 
7 the morning of 17 August 2012, but before the Potchefstroom 
8 session, whatever the date or the first date of that 
9 session was? What new material came to your attention 
10 after the update of the morning of the 17th of August – but 
11 before the Potchefstroom session? 
12 GENERAL PHIYEGA: I would still say the 
13 question you are asking me is extremely broad because the 
14 information at hand was not only influenced by what you saw 
15 on TV, what you heard from people, so it’s very difficult 
16 to put your pulse on the finger to say what in the – you 
17 intend. 
18 COMMISSIONER HEMRAJ: General, may I just 
19 enquire whether any of those updates in that period 
20 referred to by Mr Madlanga were in writing in the form of 
21 memorandums or reports to you or were they all verbal 
22 briefings, oral briefings? 
23 GENERAL PHIYEGA: A lot of it was verbal 
24 briefings because we consolidated our information into what 
25 the joint was doing and the team that was there was doing,
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I'm quite open with you, I'm quite candid with you and I'm going to proceed to do that. Do you remember that that is what I would be seeking to demonstrate? General, you have indicated that you do know what the SAPS presentation is. What I would like to know now is whether you are also aware what the opening statement of the parties are and, in particular, what I mean by the SAPS opening statement.

GENERAL PHIYEGA: Yes.

[10:32] MR MADLANGA SC: And you said that you did have occasion to peruse the SAPS presentation. Did you have occasion to peruse the SAPS opening statement?

GENERAL PHIYEGA: Yes.

MR MADLANGA SC: Mr Chairman, commissioners, I'm being advised by Ms Pillay, and I think correctly so, that because the AMCU opening statement was handed in as an exhibit and marked as such, that perhaps we need to hand this one up and also have it marked as an exhibit.

CHAIRPERSON: For consistency we must do that. What is the next - the next? It'll be FFF something?

MS PILLAY: FFF9, Chair.

CHAIRPERSON: Thank you.

MR MADLANGA SC: Sorry commissioners, Mr Chairman. The opening statement, General, actually sets out what the evidence that will be led by SAPS is going to be and it also sets out the contentions that SAPS will be making. Do you understand and accept that?

GENERAL PHIYEGA: Yes.

MR MADLANGA SC: Now, you recall that the penultimate paragraph of the press statement that I referred you to, your press statement, says that some of the protesters charged at the police firing shots and that this was at scene 2, or at least the latter part was my contention, that is that in context this was plainly at scene 2. Do you remember that your statement does refer to protesters that charged at the police, firing shots?

CHAIRPERSON: That's the penultimate paragraph on the second page.

MR MADLANGA SC: Of the second page, thank you, Mr Chairman.

GENERAL PHIYEGA: Yes.

MR MADLANGA SC: Would you be surprised, General, if I were to take you paragraph by paragraph in the opening statement to find out that the opening statement makes no such allegation? Would that surprise you? This, of course, in relation to scene 2.

GENERAL PHIYEGA: No.

MR MADLANGA SC: Did you say you had read the opening statement?

GENERAL PHIYEGA: I have confirmed.

MR MADLANGA SC: And when did you read it? Perhaps let me ask a different question. Did you read it prior to evidence being led before this Commission?

GENERAL PHIYEGA: Yes.

MR MADLANGA SC: Just explain why would it not surprise you if it says something different to your media statement which you say you stand by, you continue to stand by as of today?

GENERAL PHIYEGA: I shall ask you to repeat your question because that - ja.

MR MADLANGA SC: I understood your response to an earlier question to be that it would not surprise you if you were to find out that the SAPS opening statement does not say that in respect of scene 2 there were any protesters who charged at the police, firing shots at them, and you said no, that would not surprise you. So my next question is, why would that not surprise you if it is at variance with what you say in your media statement which you say you continue to stand by to this day?

GENERAL PHIYEGA: It does not surprise me because, as I've said, the statement I issued on the 16th were the facts as given to me at that point in time and I've said to the best of my knowledge they represent the bona fide information that I received from those who were there.

MR MADLANGA SC: Do you accept that this is a material difference or departure from what your media statement says, that is, if the SAPS opening statement says nothing about protesters charging at police, firing shots at them? Don't you see that as a material difference?

GENERAL PHIYEGA: I would not agree because the statements are presented in two different fashions and unless you point me to a point where there is that categoric point where you are saying there is a material difference - I think they are different documents, as I look at them.

MR MADLANGA SC: A difference or lack of it, Commissioner, cannot lie in whether or not this document is one and the same but would lie more in the content and what I'm suggesting to you is - and I'm going to go, I'm still going to do what you are inviting me to do but now all I'm saying is, on the assumption that indeed the SAPS opening statement, as I say it does or does not, does not suggest that any of the protesters charged at the police firing shots at them, whereas your press statement says that some of the protesters did exactly that. Is that not a material difference? That is what my question is.

GENERAL PHIYEGA: I do not see it like that.
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25 know what it says. You obviously also know what your media
24 commencing. So you have read that opening statement, you
23 you read it prior to evidence before this Commission
22 now, but you have said quite the opposite. You have said
21 a document for the first time as you are cross-examining me
20 I never read the opening statement, I'm hearing about such
19 your stance if you had said to the Commissioners, no – no,
18 Let me take a step back. Commissioner, I would understand
17           MR MADLANGA SC:        Thank you, Mr Chairman.
15 that, so the witness gets a chance to reply to a focused
14 difference between the opening statement and what you said
13 in your media statement and that material difference is
12 this, your media statement says some protesters charged at
11 the police firing shots at them, and I say I'm going to
10 demonstrate to you that the SAPS opening statement does not
9 say so. If we accept for a minute, even before I take you
8 through the opening statement, if we accept for a moment
7 that indeed the opening statement says what I say it says,
6 do you accept that that is a material difference? It has
5 nothing to do with bona fides. Commissioner, this has to
4 do with what you say you were informed at the briefing of
3 the 16th that night, and the update you were given in the
2 morning of the 17th August 2012 and what you subsequently
1 read, what you yourself say you subsequently read in the

MR MADLANGA SC: Commissioner, this has nothing to do with bona fides. Commissioner, this has to do with what you say you were informed at the briefing of the 16th that night, and the update you were given in the morning of the 17th August 2012 and what you subsequently read, what you yourself say you subsequently read in the SAPS opening statement. So what I'm suggesting to you is, there is in fact a material difference. I'm going to take you through this. I'm saying there is a material difference between the opening statement and what you said in your media statement and that material difference is this, your media statement says some protesters charged at the police firing shots at them, and I say I'm going to demonstrate to you that the SAPS opening statement does not say so. If we accept for a minute, even before I take you through the opening statement, if we accept for a moment that indeed the opening statement says what I say it says, do you accept that that is a material difference? It has nothing to do with bona fides. Commissioner, this has to do with what you say you were informed at the briefing of the 16th that night, and the update you were given in the morning of the 17th August 2012 and what you subsequently read, what you yourself say you subsequently read in the SAPS opening statement. So what I'm suggesting to you is, there is in fact a material difference. I'm going to take you through this. I'm saying there is a material difference.
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<td>1 MR MADLANGA SC:</td>
<td>1 reference to protesters who were charging and also firing</td>
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<td>2</td>
<td>2 shots at the police, at least not in this part. Do you see</td>
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<td>3 that?</td>
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<td>4</td>
<td>4 GENERAL PHIYEGA: Maybe I read a</td>
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<td>5</td>
<td>5 different thing.</td>
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<td>6</td>
<td>6 MR MADLANGA SC: Yes, tell me how you</td>
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<td>7</td>
<td>7 read it?</td>
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<td>8</td>
<td>8 GENERAL PHIYEGA: You were going to 45.5,</td>
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<td>9</td>
<td>9 am I right?</td>
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<td>10</td>
<td>10 MR MADLANGA SC: Yes.</td>
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<td>11</td>
<td>11 GENERAL PHIYEGA: And you read paragraph</td>
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<td>12 - is it the second sentence or the third sentence?</td>
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<td>13</td>
<td>13 MR MADLANGA SC: Right from the</td>
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<td>14 beginning, “The evidence will be that some of the 13</td>
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<td>15</td>
<td>15 protesters all the way up to &quot;self-defence.&quot;</td>
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<td>16</td>
<td>16 GENERAL PHIYEGA: I’m not sure how 45.5</td>
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<td>17</td>
<td>17 is different from the statement that I’ve given.</td>
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<td>18</td>
<td>18 MR MADLANGA SC: Show me where paragraph</td>
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<td>19</td>
<td>19 45.5, National Commissioner, refers to protesters that</td>
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<td>20</td>
<td>20 stormed at the police firing shots at them. Show me where</td>
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<td>21</td>
<td>21 paragraph 45.5 says so?</td>
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<td>22</td>
<td>22 GENERAL PHIYEGA: Perhaps it’s a wording</td>
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<td>23</td>
<td>23 issue because what I read there, it says “some of the 13</td>
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<td>24 protesters who were shot and killed at koppie 3 had charged</td>
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<td>25 at police officers with dangerous sharp weapons and had</td>
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<tr>
<td>1 protesters charged with firearms, shooting at the police,</td>
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<td>2 that has nothing to do with what I’m focusing on. You</td>
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<td>3 understand that?</td>
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<td>4 [10:52] GENERAL PHIYEGA: Yes, let’s continue.</td>
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<td>5 MR MADLANGA SC: Now let me take you to</td>
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<td>6 paragraph 45.5 at page 19 of the SAPS opening statement.</td>
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<td>7 CHAIRPERSON: I think it might be</td>
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<td>8 sensible to begin on page 18, the heading D, “Scene 2:</td>
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<td>9 koppie 3” in the middle of page 18 sets the scene as it</td>
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<td>10 were, literally, for what follows on page 19.</td>
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<td>11 MR MADLANGA SC: Thank you. That is very</td>
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<td>12 correct, thank you, Mr Chairman. If I take you to page 18</td>
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<td>13 first, against the marginal letter capital D, or upper case</td>
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<td>14 D, there it says “Scene 2: koppie 3.” So that indicates</td>
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<td>15 that we are indeed dealing with scene 2, you see that?</td>
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<td>16 GENERAL PHIYEGA: Yes.</td>
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<td>17 MR MADLANGA SC: And then I take you to</td>
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<td>18 paragraph 45.5 and do you see there the part that says,</td>
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<td>19 “The evidence will be that some of the 13 protesters who</td>
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<td>20 were shot and killed at koppie 3 had charged at the police</td>
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<td>21 officers with dangerous sharp weapons and had been shot in</td>
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<td>22 self-defence,” do you see that?</td>
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<td>23 GENERAL PHIYEGA: Yes, I see that.</td>
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<td>24 MR MADLANGA SC: And do you see that at</td>
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<td>25 least in this part of the opening statement there is no</td>
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<td>1 been shot in self-defence.”</td>
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<td>2 CHAIRPERSON: Yes, but doesn’t say that</td>
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<td>3 they were firing shots, which is what you said in the</td>
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<td>4 penultimate sentence of the penultimate paragraph on page 2</td>
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<td>5 of your statement.</td>
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<td>6 GENERAL PHIYEGA: That may not be</td>
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<td>7 reflected but I was focusing on the charging, so if the</td>
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<td>8 question is about that, if the question is about, they</td>
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<td>9 charged with sharp weapons but no guns, it’s a different</td>
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<td>10 story. If the focus is on the guns, their statement is not</td>
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<td>11 saying –</td>
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<td>12 CHAIRPERSON: Why do you say may not have</td>
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<td>13 been reflected? It’s either reflected or it isn’t. Is it</td>
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<td>14 reflected or isn’t it?</td>
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<td>15 GENERAL PHIYEGA: Judge, what’s the</td>
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<td>16 question?</td>
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<td>17 CHAIRPERSON: You said it may not have</td>
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<td>18 been reflected and I said to you, why do you say it may not</td>
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<td>19 have been reflected? It was either reflected or it wasn’t</td>
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<td>20 reflected - [inaudible]. Was it reflected?</td>
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<td>21 GENERAL PHIYEGA: Perhaps let me walk</td>
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<td>22 that to say how do I read these two paragraphs.</td>
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<td>23 CHAIRPERSON: Before you say how you read</td>
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<td>24 the two paragraphs, it would be helpful if you answered the</td>
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<td>25 question that has been put to you, then you can go back to</td>
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<td>the two paragraphs and give the explanation you wish to give.</td>
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<td>3</td>
<td>GENERAL PHIYEGA: The paragraph I've read</td>
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<td>4</td>
<td>talks about sharp weapons and dangerous sharp weapons, it</td>
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<td>5</td>
<td>didn’t refer to guns.</td>
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<td>6</td>
<td>MR MADLANGA SC: You say it did not refer</td>
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<td>7</td>
<td>to guns.</td>
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<td>8</td>
<td>GENERAL PHIYEGA: 45.5 refers to sharp</td>
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<td>9</td>
<td>weapons and it didn’t talk about guns.</td>
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<td>10</td>
<td>MR MADLANGA SC: And for me the operative</td>
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<td>11</td>
<td>words, and which I seek to emphasise, contained in your</td>
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<td>12</td>
<td>press statement, the penultimate sentence of the</td>
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<td>13</td>
<td>penultimate paragraph of page 2, “firing shots at the</td>
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<td>14</td>
<td>police.” Those are the operative words. They did not only</td>
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<td>15</td>
<td>storm or charge but they stormed towards the police and I</td>
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<td>16</td>
<td>emphasise, “firing shots.” Those are the operative words.</td>
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<td>17</td>
<td>Now, what I’m saying to you is, show me in paragraph 45.5</td>
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<td>18</td>
<td>where it’s said that the people who charged at the police</td>
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<td>19</td>
<td>were firing shots. That’s the emphasis. “Firing shots” –</td>
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<td>20</td>
<td>does paragraph 45.5 say any such thing?</td>
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<td>21</td>
<td>CHAIRPERSON: I think you should give the</td>
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<td>22</td>
<td>witness a chance to read the whole paragraph to herself.</td>
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<td>23</td>
<td>MR MADLANGA SC: Yes.</td>
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<td>24</td>
<td>GENERAL PHIYEGA: Let me start with our</td>
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<td>25</td>
<td>paragraph in this statement and then I will go to the</td>
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<td>opening statement. I will start with, not with the</td>
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<td>2</td>
<td>penultimate paragraph, I will start with the paragraph</td>
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<td>3</td>
<td>preceding that because the context I think is important for</td>
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<td>me to grasp what you are asking me. “When the police</td>
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<td>5</td>
<td>started deploying the barbed wire fencing, a group of</td>
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<td>6</td>
<td>protesters armed with dangerous weapons and firearms</td>
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<td>7</td>
<td>hastily flanked the vehicles deploying the wire. They were</td>
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<td>8</td>
<td>met by members from the police who tried to riposte their</td>
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<td>9</td>
<td>advance with water cannon, teargas as well as stun</td>
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<td>10</td>
<td>grenades. The attempt was unsuccessful and the group – and</td>
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<td>11</td>
<td>the police members had to employ force to protect</td>
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<td>12</td>
<td>themselves from the charging group. The dispersion action</td>
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<td>13</td>
<td>had commenced at this time and the armed protesters were</td>
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<td>14</td>
<td>driven from their stronghold to a high bushy ground in the</td>
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<td>15</td>
<td>close vicinity. The police members encircled the area and</td>
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<td>16</td>
<td>attempted to force the protesters out by means of water</td>
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<td>17</td>
<td>cannons, rubber bullets and stun grenades. The militant</td>
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<td>18</td>
<td>group stormed towards the police, firing shots and wielding</td>
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<td>dangerous weapons. Police retreated systematically and</td>
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<td>20</td>
<td>were forced to utilise maximum force to defend themselves.”</td>
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<td>21</td>
<td>45.5 says, “The evidence will be that some of the 13</td>
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<td>22</td>
<td>protesters who were shot and killed at koppie 3 had charged</td>
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<td>23</td>
<td>at police officers with dangerous sharp weapons and had</td>
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<td>24</td>
<td>been shot in self-defence. These are accounted for below.</td>
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<td>Others could have been killed with police officers returned</td>
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<td>sharp fire, believing shots to have been fired from the</td>
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<td>bushes and crevices in the koppie by protesters.” And when</td>
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<td>I read these paragraphs up to there, I see commonality in</td>
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<td>the two. That’s my position.</td>
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<td>5</td>
<td>MR MADLANGA SC: I go back to my last</td>
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<td>6</td>
<td>question before you started reading from the two documents,</td>
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<td>7</td>
<td>National Commissioner. Please show me in paragraph 45.5</td>
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<td>where it does not only say some protesters charged at the</td>
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<td>police but it says they did so firing shots at the police,</td>
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<td>so they are charging or storming towards the police but at</td>
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<td>the same time firing shots at them. Show me where it says</td>
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<td>so in paragraph 45.5.</td>
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<td>13</td>
<td>GENERAL PHIYEGA: I read, “Others could</td>
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<td>have been killed when police officers returned sharp fire,</td>
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<td>15</td>
<td>believing shots to have been fired from the bushes and</td>
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<td>16</td>
<td>crevices on the koppie by protesters.”</td>
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<td>17</td>
<td>MR MADLANGA SC: And where does that say</td>
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<td>18</td>
<td>that the protesters who might have been shot in that manner</td>
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<td>19</td>
<td>were charging at the police or storming towards the police?</td>
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<td>20</td>
<td>Where does that sentence say so? Where is the charging or</td>
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<td>21</td>
<td>the storming towards the police, if all that the sentence</td>
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<td>seems to say is that the police believed that some</td>
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<td>23</td>
<td>protesters might have been firing from within the bushes</td>
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<td>24</td>
<td>and crevices? Where is the charging or the storming, that</td>
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<td>25</td>
<td>is my question.</td>
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25 and how it's linked to the third. After we resume after
appropriate to take the tea adjournment at this stage.

[11:12] CHAIRPERSON: Mr Madlanga, perhaps it’s
appropriate to take the tea adjournment at this stage.

22 Thereafter the witness can deal with the fourth sentence
and how it's linked to the third. After we resume after

23 CHAIRPERSON: The second is that these
are accounted for below. That's -

24 MR MADLANGA SC: I'm sorry, I'm sorry,
yes, yes -

25 CHAIRPERSON: The third sentence begins,
"Others could have been killed" -

26 MR MADLANGA SC: Yes -

27 CHAIRPERSON: Which I think is the one
you mean.

28 MR MADLANGA SC: Yes, yes, I guess I'm
referring to the second sentence that the Commissioner has
dealt with but you are quite correct, Mr Chairman, it's the
third sentence of paragraph 45.5. Now let's deal with the
third sentence of the opening statement but which is the
second sentence that you are relying on and it reads,
"Others could have been killed when police officers
returned sharp fire, believing shots to have been fired
from the bushes and crevices in the koppie by protesters."

29 Now my question is, does that talk about any protesters who
were storming towards or charging at the police, firing
shots? Does that sentence say anything of the sort?

30 GENERAL PHIYEGA: I have answered this
and I've said I see those two sentences connected because -
linking with.

31 MR MADLANGA SC: You can't just link
without showing us how the link comes about, Commissioner.

32 You have agreed that the first sentence does not say so.

33 Now show me in the second sentence how exactly that link
that you refer to arises, where is it, where is it said in
the third sentence of paragraph 45.5, where is it said that
some protesters charged at or stormed towards the police
and then I emphasise, firing shots? Where does this say
so? Where does this sentence say so? Show me the link.

34 GENERAL PHIYEGA: My link remains the
fact that the third paragraph starts at "The evidence" and
that the sentence you are referring to starts by saying
"others," which means it already talks to what has happened
before and that's how I read it. I may be reading it not
the way you are reading it, but I read it as a connected
paragraph.

35 [11:12] CHAIRPERSON: Mr Madlanga, perhaps it's
appropriate to take the tea adjournment at this stage.

36 Thereafter the witness can deal with the fourth sentence
and how it's linked to the third. After we resume after

37 second sentence.

38 CHAIRPERSON: I think it's the third
sentence actually.

39 MR MADLANGA SC: Sorry, Mr Chairman, yes,
I could even take you to the third but let's start with the
second.

40 CHAIRPERSON: The second is that these
are accounted for below. That's -

41 MR MADLANGA SC: I'm sorry, I'm sorry,
yes, yes -

42 CHAIRPERSON: The second is that these
are accounted for below. That's -

43 MR MADLANGA SC: I'm sorry, I'm sorry,
yes, yes -

44 CHAIRPERSON: The second is that these
are accounted for below. That's -

45 MR MADLANGA SC: I'm sorry, I'm sorry,
yes, yes -

46 CHAIRPERSON: The third sentence begins,
"Others could have been killed" -

47 MR MADLANGA SC: Yes -

48 CHAIRPERSON: Which I think is the one
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returned sharp fire, believing shots to have been fired
from the bushes and crevices in the koppie by protesters."

50 Now my question is, does that talk about any protesters who
were storming towards or charging at the police, firing
shots? Does that sentence say anything of the sort?

51 GENERAL PHIYEGA: I have answered this
and I've said I see those two sentences connected because -
linking with.

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without showing us how the link comes about, Commissioner.

53 You have agreed that the first sentence does not say so.

54 Now show me in the second sentence how exactly that link
that you refer to arises, where is it, where is it said in
the third sentence of paragraph 45.5, where is it said that
some protesters charged at or stormed towards the police
and then I emphasise, firing shots? Where does this say
so? Where does this sentence say so? Show me the link.

55 GENERAL PHIYEGA: My link remains the
fact that the third paragraph starts at "The evidence" and
that the sentence you are referring to starts by saying
"others," which means it already talks to what has happened
before and that's how I read it. I may be reading it not
the way you are reading it, but I read it as a connected
paragraph.

56 [11:12] CHAIRPERSON: Mr Madlanga, perhaps it's
appropriate to take the tea adjournment at this stage.

57 Thereafter the witness can deal with the fourth sentence
and how it's linked to the third. After we resume after

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<td>1 -</td>
<td>1 not at this stage, Mr Chairman. If anything perhaps only</td>
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<td>2</td>
<td>tomorrow, Mr Chairman.</td>
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<td>3</td>
<td>CAIRPERSON: Thank you. National</td>
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<td>4</td>
<td>Commissioner you're still under oath. Mr Madlanga, please</td>
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<td>5</td>
<td>proceed with your cross-examination.</td>
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<td>6</td>
<td>MR MADLANGA SC: Thank you Mr Chairman.</td>
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<td>7</td>
<td>General let's go to the sentence that the Chairman referred</td>
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<td>8</td>
<td>to just before the tea adjournment. That sentence reads</td>
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<td>9</td>
<td>and it follows the third sentence that you were relying on</td>
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<td>10</td>
<td>or reading conjointly with the first sentence. It reads</td>
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<td>11</td>
<td>&quot;the police officers are prepared to accept that they may</td>
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<td>12</td>
<td>have been responding to 'friendly fire' believing it to be</td>
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<td>13</td>
<td>fire from the protestors,&quot; do you see that?</td>
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<td>14</td>
<td>GENERAL PHIYEGA: Yes, I do.</td>
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<td>15</td>
<td>MR MADLANGA SC: And looking at that</td>
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<td>16</td>
<td>together with the third sentence that you were relying on</td>
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<td>17</td>
<td>in support for the charging at or storming towards the</td>
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<td>18</td>
<td>police, do you still maintain that this paragraph, that is</td>
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<td>19</td>
<td>45.5, supports the view held in your media statement or</td>
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<td>20</td>
<td>expressed in your media statement that a militant group</td>
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<td>21</td>
<td>stormed towards the police, firing shots and were then shot</td>
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<td>22</td>
<td>at by the police?</td>
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<td>23</td>
<td>GENERAL PHIYEGA: Yes, I still stand by</td>
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<td>24</td>
<td>that.</td>
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<td>25</td>
<td>MR MADLANGA SC: Okay let's deal with it</td>
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<tr>
<td>1 perjury before this Commission. If she did or she didn't</td>
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<td>2 is a matter we will have to deal with at the end of the</td>
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<td>3 hearing in our report but it's inappropriate for any party</td>
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<td>4 to make a statement to that effect before we've dealt with</td>
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<td>5 it in our report and au fortiori while she's still under</td>
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<td>6 oath being cross-examined. With regard to the other</td>
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<td>7 matter, you say you haven't yet had an opportunity to</td>
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<td>8 listen to the radio interview, I understand a clip is being</td>
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<td>9 sent to you electronically. It either has been or will be.</td>
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<td>10 So by tomorrow morning at 9:30 I expect you to deal with</td>
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<td>11 that as well. Mr Semenya, is there anything you wish to</td>
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<td>12 say?</td>
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<td>13 MR SEMENYA SC: Chair, thank you. We</td>
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<td>14 will await the retraction and an explanation for why that</td>
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<td>15 instruction happened in the first place. This is a Human</td>
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<td>16 Rights Commission.</td>
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<td>17 CAIRPERSON: Thank you. I may well feel</td>
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<td>18 called upon to make some general remarks tomorrow addressed</td>
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<td>19 to the public in general -</td>
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<td>20 MR SEMENYA SC: Thank you, Chairperson.</td>
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<td>21 CAIRPERSON: - relating to the other</td>
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<td>22 matter which is dealt with on the radio interview but that</td>
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<td>23 can stand over until tomorrow morning as well. Mr Madlanga</td>
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<td>24 is there anything you wish to say at this stage?</td>
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<td>25 MR MADLANGA SC: Not on this subject and</td>
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| Step by step. I will not again read the first sentence. |
| The second one says "these are accounted for below." Do you |
| see that? |
| GENERAL PHIYEGA: Yes. |
| MR MADLANGA SC: And those being |
| accounted for below being "those that were shot in self |
| defence when they were charging at the police with |
| dangerous weapons." Do you see that? That is in the first |
| sentence. |
| GENERAL PHIYEGA: I'm probably a bit lost |
| because after that sentence what I see is "these are |
| accounted for below, others could have been" I don't know |
| if I'm reading at the same place with you. |
| MR MADLANGA SC: I'm trying to clarify to |
| you based on my understanding of the opening statement what |
| the word "these" is referring to. The word "these" |
| obviously refers back to the sentence immediately preceding |
| the "these." Do you accept that? |
| GENERAL PHIYEGA: I think I'm confused |
| because I thought, maybe it's the interpretation that |
| confuses me. Maybe if you lead me again to tell me what |
| you are asking. Are you saying - you know just maybe |
| explain it again. You lose me. |
| MR MADLANGA SC: I was trying to avoid |
| reading something that we have read over and over again but |
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21 obviously on the forensic evidence. Subject to the
22 the other side of the hill. That seems to be what the
23 them may have been friendly fire fired by policemen from
24 wrong because the shots that we thought were coming from
25 they were firing at us. We now accept we may have been
19 accept that we thought we were defending ourselves because
18 people may not actually be self defence because we're prepared to
17 saying is look some people definitely self defence, other
16 described as friendly fire. So in other words what they're
15 came from the protestors may have come from what is
14 have been mistaken because the shots which they thought
13 suffering from the_deep: Yes.
12 may have believed the protestors were shooting
11 no may have believed that they were acting in self defence
10 they may have believed the protestors were shooting
9 of what the police now say about what I call the B maybe,
8 it may be subject to revision because some of the people
7 may not actually have been shot in self defence. They may
6 may have been shot by police who thought they were acting in
5 shooting. That must be right surely, that's what it says.
4 may have been based on a mistaken belief that they were
3 self defence because it may not have been self defence. It
2 the case of these others that they were definitely shot in
1 forensic evidence they say we can't say categorically in

18 or misleading then the witness - Mr Madlanga is entitled to
17 have an answer to it and in fact it might even be better
16 for your client to rather give an answer without having the
15 benefit of hearing what you're going to submit later
14 because it might add force and credibility to what she
13 says.
12 Indeed Chair the second
11 part of the statement we propose to make is that the
10 statement was what I believed at the time but in the light
9 of what the police say about what I call the B maybe,
8 it may be subject to revision because some of the people
7 may not actually have been shot in self defence. They may
6 may have been shot by police who thought they were acting in
5 self defence but were misled by what amounts to friendly
4 fire. Is that your point Mr Madlanga?
3 you answering the question for the witness?
2 contradiction is better explained by -
1 of the “others” because the maybe comes in. So
0 what one now has to say is A plus B maybe if you understand
"without forensic evidence we are unable to give an
"an unqualified account.”
"So what that says is this, some people were shot
in self defence other people were shot by police who say
they may not have actually be acting in self defence. They
may have believed that they were acting in self defence
because they may have believed the protestors were shooting
at them but they now are prepared to accept that they may
have been mistaken because the shots which they thought
came from the protestors may have come from what is
described as friendly fire. So in other words what they're
saying is look some people definitely self defence, other
people may be not self defence because we're prepared to
accept that we thought we were defending ourselves because
they were firing at us. We now accept we may have been
wrong because the shots that we thought were coming from
them may have been friendly fire fired by policemen from
the other side of the hill. That seems to be what the
statement says. Would you agree with that? And it depends
obviously on the forensic evidence. Subject to the
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24           GENERAL PHIYEGA:          I accept that with the
23 by this friendly fire.  Do you accept that?
22 fire was fire by other police which is what they refer to
21 the bushes and crevices whereas it may well be that that
20 police returned fire that they believed to be coming from
19 The "others" may well have been shot by mistake when the
18 have been shot at by mistake, that's the essence of it.
17 sentences say that the other lot of protestors may well
16 it or rather on my reading of them the third and fourth
15 MR MADLANGA SC:          Mr Chairman. We will argue at the end that the witness was
14 obviously being evasive on this point. I'm now proceeding
13           MR MADLANGA:          It was your question, Mr
12 Chairman.
11 firearms being fired at the police. Do you see that?
10 with firearms or it does not mention firearms, let alone
9 time and read it and it does not refer to that group charging
8 charged with pangas, spears and knobkerries. Take your
7 opening statement and that paragraph refers to a group that
6 fired at the police. I take you to paragraph 45.8.1 of the
5 dangerous weapons and not with firearms that were being
4 the police with dangerous weapons, charged only with
3 sentence "are accounted for" that it's those who charged at
2 that those the opening statement says in second
1 to do what I said I would do which is to demonstrate to you
0 paragraph is not strictly as my learned colleague is

1 "we were not able to pass judgement when this statement was
0 MR MADLANGA SC:          Even if one tries to put
9 at its lowest by using the word "may" it is still a far
8 cry from the categorical point made in the first sentence
7 which is that "protestors charging at the police were shot
6 at - charging at the police with dangerous, sharp weapons
5 were shot in self defence." Saying that protesters may well
4 have been shot by mistake is totally different from saying
3 that they were charging at police with dangerous weapons
2 and were shot in self defence. Those are two different
1 statements, not so?
0 GENERAL PHIYEGA:          I continue to disagree.

13           CHAIRPERSON:          I put - it was intended to
12 move on unless you feel strongly about that.
11 warrants a warning but perhaps for what it's worth the
10 Commissioners I'm going to be mentioning the names of some
9 of deceased. Not showing any pictures, I do not think that
8 CHAIRPERSON:          Mr Madlanga, I think you've
7 clearly put I think. Her reply is clearly put, it's for us
6 perhaps later after the benefit of the argument Mr Semenya
5 promises to give us to decide whether this is a good point
4 or a bad point. Isn't that so? I don't know if you can
3 take it any further by questioning or she can take her
2 answer any further by further replies but I think we should
1 perhaps later after the benefit of the argument Mr Semenya
0 Mr Madlanga.

13           GENERAL PHIYEGA:          I think after all this,
12 I will ask you to state your question again.
11 MR MADLANGA:          It was your question, Mr
10 Chairman.
9 CHAIRPERSON:          I put - it was intended to
8 apologise, if you don't want to put any new bits then you
7 don't have to.
6 MR MADLANGA SC:          I understand, Mr
5 I don't agree with that
4 objection and I overrule it and the witness may now answer
3 the question put.
2 GENERAL PHIYEGA:          I think after all this,
1 I will ask you to state your question again.
0 CHAIRPERSON:          That's a further question,

14           MR MADLANGA SC:          Thank you I'll move on,
13 Mr Chairman. We will argue at the end that the witness was
12 obviously being evasive on this point. I'm now proceeding
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13 Mr Chairman. We will argue at the end that the witness was
12 obviously being evasive on this point. I'm now proceeding
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1 minutes after what I’ve said has been interpreted.
2 MR MADLANGA SC: Mr Chairman, even though
3 the two minutes may not be up it doesn’t look like there’s
4 any movement. Shouldn’t I continue perhaps?
5 CHAIRPERSON: I suggest that you
6 continue, yes.
7 [12:15] MR MADLANGA SC: General, according to
8 the opening statement, the same paragraph 45.8.1, Mr Anele
9 Mdizeni and Mr Thabo Thelejane whose bodies are
10 respectively referred to as A and B, were part of this
11 group, that is the group that is said to have charged with
12 pangas, spears and knobkerries. Do you see that? Of
13 course only mention of A and B is made, not the two names
14 that I’ve given.
15 GENERAL PHIYEGA: Yes, I do see that.
16 MR MADLANGA SC: And both of them were
17 shot dead, you see that as well.
18 GENERAL PHIYEGA: Yes.
19 MR MADLANGA SC: Mr Thobile Mpumza, whose
20 body was subsequently marked C, is referred to in paragraph
21 45.8.2 and he is said to have come out running towards the
22 police armed with a spear and knobkerrie, again no mention
23 of a firearm and that he lunged at a police officer with
24 the spear. Do you see that? Take your time to read it.
25 And he too was shot dead.

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1 GENERAL PHIYEGA: Yes.
2 MR MADLANGA SC: In paragraph 45.8.4 the
3 opening statement says that Mr Mkhosandile Mkhonjwa, whose
4 body was subsequently marked N, was part of a group that
5 came from inside the koppie to the edge of the koppie armed
6 with spears, pangas, knobkerries – again no mention of
7 firearms, let alone firearms that were being fired at the
8 police, do you see that?
9 MR MADLANGA SC: Mr Mkhonjwa and another
10 person from the group charged towards the police, who
11 killed Mr Mkhonjwa and injured the other person. Do you
12 see that?
13 GENERAL PHIYEGA: I see that.
14 MR MADLANGA SC: Mr Mkhonjwa and another
15 person from the group charged towards the police, who
16 killed Mr Mkhonjwa and injured the other person. Do you
17 see that?
18 GENERAL PHIYEGA: I am trying to –
19 MR MADLANGA SC: Mr Mkhonjwa is the N,
20 the letter N I referred to.
21 GENERAL PHIYEGA: You lost me because you
22 didn’t name the N before. I see that.
23 MR MADLANGA SC: In paragraph 45.8.5 the
24 opening statement says Mr Nkosinati Xalabile whose body was
25 subsequently marked O, was among the group that was inside
26 the koppie, armed with pangas, spears and knobkerries, do
27 you see that?
28 GENERAL PHIYEGA: Yes, I see that.
29 MR MADLANGA SC: The opening statement

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1 does, of course, state that the group in which Mr O was,
2 was in the vicinity from where gunshots were fired at
3 police officers who were walking to the koppie. The police
4 returned fire in the direction from which the gunfire came.
5 And it goes on and says, “A person charged at the police,
6 who were in the vicinity of O and the police
7 shot at the person.” Do you see that?
8 GENERAL PHIYEGA: Yes, I see that.
9 MR MADLANGA SC: Crucially, do you notice
10 that the opening sentence does not say that as Mr Xalabile
11 was charging towards the police he was firing shots at
12 them? Do you see that no such allegation is made?
13 GENERAL PHIYEGA: I do see that but you
14 have also alluded to a statement there where you were
15 saying the person is in the vicinity from where gunshots
16 were fired at police.
17 MR MADLANGA SC: No, I’m satisfied with
18 the part where you accept that the statement does not say
19 he charged at the police firing shots at them. I’ll take
20 you to the next point. Nor does the opening statement say
21 that as he charged at the police, he was part of a group
22 that was firing shots at the police and as they fired the
23 shots they were also charging at the police. So, one, not
24 a group firing shots and, crucially, charging at the
25 police. The group was just him, do you see that?

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1 MR SEMENYA SC: Chair, can we make the
2 objection again on grounds of fairness? Both the opening
3 statement as well as the media statement are statements
4 informed by a whole host of evidence and if the inquiry is
5 whether there was this group or not, may I refer the
6 witness properly to the statement of Modiba which we all
7 have, where both the charging and the firing happened. So
8 to take the two documents as though they are a conclusive
9 total picture of what happened is unfair to the witness,
10 with respect.
11 CHAIRPERSON: [Inaudible]
12 MR SEMENYA SC: The statement of Colonel
13 Modiba of the NIU, paragraph 7 thereof.
14 CHAIRPERSON: I see. Mr Madlanga, you’ve
15 heard what Mr Semenya says. What reply do you have?
16 MR MADLANGA SC: Which paragraph did my
17 learned friend say?
18 MR SEMENYA SC: Paragraph 7 of the
19 statement of Colonel Modiba.
20 CHAIRPERSON: I think I’m correct in
21 saying that statement, although it is part of the SAPS hard
22 drive, is not an exhibit so I haven’t seen it, but Mr
23 Madlanga is in possession of a copy and so he’d be able to
24 respond to what you say.
25 MR MADLANGA SC: May the Commissioners
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24 were shots fired from the group towards our team. Some of
23 pistol number PX1722E, into the ground. At that time there
22 saying, 'stop, stop' while firing warning shots from my
21 metres, charging at us. I therefore shouted at them by
20 knobkerries, axes and spears at a distance of about 12
19 from hiding behind the rocks, armed with pangas, assegais,
18 approaching at the mountains, there were warriors that came
17 mountains (scene 2) in order to have them swept. Upon
16 members of National Intervention Unit to move to the
15 paragraph reads, Commissioner, "I immediately directed the
14           MR MADLANGA SC:          Yes – yes. This
13 sentence of Modiba.
12 bachelor, who is a police officer and his name is
11 Modiba.
10 for more than a moment, for some time and as soon as you
9 seem to have the statement. I will – I’ll just read the
8    - a call tone which we can hear, which
7            CHAIRPERSON:          Someone’s phone has got a –
6 what do you call it – a call tone which we can hear, which
5    turned off because it interrupts the proceedings.
4            MR MADLANGA SC:          Yes – yes. This
3   - a ring tone which I think that cell phone should be
2 what do you call it – a call tone which we can hear, which
1    therefore shouted at them by

25 Modiba.
24 which is paragraph 7 of the statement of Mr Kaizer Ntlou
23 paragraph that my learned friend Mr Semenya referred to,
22 Perhaps it’s fair to the National Commissioner to read the
21 paragraph that my learned friend Mr Semenya referred to,
20 which is paragraph 7 of the statement of Mr Kaizer Ntlou
19 statement of Modiba.
18 statement yourself prior to today?
17 that the statement addresses, do you mean you read the
16 does not because if you’re not, I’m going to ask a question.
15 because if you’re not, I’m going to ask a question.
14 I was aware of.
13 that you are raising, that I have, they may not be able to rely on the defence of self-
12 Modiba and, in particular, paragraph 7 which I read to you.
11 that the statement addresses, do you mean you read the
10 not aware of the existence of the statement of Colonel
9 going to deal with 45.8.3, anything further about that,
8 before we do that, are you
7 address you made to the police at –
6   - a ring tone which I think that cell phone should be
5 what do you call it – a call tone which we can hear, which
4    - a ring tone which I think that cell phone should be
3    therefore shouted at them by
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25 commander and that he would have taken a statement
24 commander and that he would have taken a statement
23 disproportionate to the danger they faced. So in the
22 defence or private defence if their response was
21 have, they may not be able to rely on the defence of self-
20 more than 200 armed protesters.” That means they may not
19 disproportionate to the danger they faced from the group of
18 were killed at the koppie, that’s the small koppie, and it,
17 we’re busy with – it refers to eight of the protesters who
16 were killed at the koppie, that’s the small koppie, and it,
15 paragraph reads, Commissioner, "I immediately directed the
14 paragraph reads, Commissioner, "I immediately directed the
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25 that it would be looking for trouble to send nine members
24 that the forces on the ground were still far behind us and
23 in the Casspir to stay inside the vehicles as I could see
22 spraying at the crowd. At this stage I ordered the members
21 the same time and at this stage the water cannon was still
20 “The Casspir and the water cannon arrived at koppie 3 at
19 ran into the bushes and rocks at koppie 3.” Paragraph 10,
18 He says, “I could notice that a large group of protesters
17 paragraph 10. Or perhaps let me start at 9, paragraph 9.
16 Lieutenant-Colonel is referring to scene 2. I’ll start at
15 few paragraphs, in particular to indicate that the
14 provided to the Commissioners. For context I will read a
13 MR MADLANGA SC: General, may I ask to
12 that issue that answers that question under 45.5.
11 didn’t say that herself.
10 MR MADLANGA SC: Yes, Mr Chairman,
9 Commissioner, and a copy -
8 CHAIRPERSON: Does it become an exhibit?
7 Gaffley, I will give you a copy.
6 refer you to the statement of Lieutenant-Colonel Cheston
5 not identify any person within the crowd that was visible
4 of private defence. Do you see that?
3 therefore they would not be entitled to rely on the defence
2 conduct was not proportionate to the danger they faced and
1 some of the police officers who killed protesters, their
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responding to" - is that what you are referring to?
1. MR MADLANGA SC: I’m referring to that
2. and the sentence preceding that one, National Commissioner.
3. GENERAL PHIYEGA: And I recall you
4. saying, when we closed this one, that your conclusion is
5. that I did not answer you the way you wanted me to answer
6. you because I kept on saying if we read the mail in context
7. I would understand what you say.
8. MR MADLANGA SC: Let me perhaps ask the
9. question again then. Looking at the two sentences
10. together, is that not indicative of an acceptance by the
11. police that they may well have shot and killed some of the
12. protesters by mistake?
13. [13:00] GENERAL PHIYEGA: If I paraphrase what
14. you’re saying, may have - may have, I think that’s very
15. operative for me to say the statement as it stands there
16. captured our standpoint.
17. CHAIRPERSON: I’m not sure - you say you
18. stand by what you said in your original media statement.
19. In your media statement you didn’t say people, some of the
20. people who were shot may have been shot in self-defence.
21. You said they were, and what this statement appears to say
22. is that they may have been shot in self-defence in the
23. belief that the fire to which the police were responding
24. came from them, but in fact that those shots may have been
25. what are described as friendly fire. Isn’t that an
1. accurate way of putting it?
2. GENERAL PHIYEGA: Judge, I am on record
3. saying we should read that with the last sentence because
4. at this point in time I have said I have not – without that
5. forensic evidence and all those issues it makes it very
6. difficult to just give a categoric yes and no.
7. CHAIRPERSON: You haven’t been asked to
8. give a categoric yes or no, you’re being asked to give a
9. categoric maybe and the maybe is based upon the last
10. sentence because if there is ballistic evidence on the
11. point, it may put it either into a yes category or a no
12. category but at the moment it’s maybe because we don’t know
13. but the police are prepared to accept that they may have
14. been responding to friendly fire. Isn’t that a fair
15. summary of the position?
16. GENERAL PHIYEGA: I’m comfortable in
17. saying maybe.
18. CHAIRPERSON: Well, on that comfortable
19. note I suggest we take the lunch adjournment. We will
20. resume at 1:30 but you don’t have to be back here, National
21. Commissioner, for that because we’re going to have an
22. argument from the Human Rights Commission on a question of
23. discovery and I take it Mr Tip will be responding and the
24. evidence leaders as well and while I won’t encourage other
25. parties to take part in the debate, if they have
1. submissions they wish to make, if they believe the ruling
2. we’re called upon to make may affect their clients, then
3. obviously I can’t stop them, but hopefully the relevant
4. points will be fully covered by the arguments we will
5. receive, so it won’t be necessary for other interventions
6. but we’ll now adjourn to half past one.
7. [COMMISSION ADJOURS  COMMISSION RESUMES]
9. After we adjourned I told the National Commissioner that we
10. would be dealing with this matter about the discovery of
11. documents, as I’d indicated earlier, at half past one. If
12. we concluded it before two o’clock I would adjourn and we’d
13. reassemble at two o’clock. I said if the matter went on
14. beyond two o’clock then I wouldn’t adjourn but I told her
15. she only had to be back by two o’clock. So that was the
16. discussion I had with her. Mr Malindi, you wish to bring
17. an application?
18. MR MALINDI: Thank you, Chairperson. In
19. fact, the NUM is objecting to our request for discovery but
20. if Mr Chairperson finds it convenient that I begin, I shall
21. begin.
22. CHAIRPERSON: You’re bringing the
23. application. You would bear the onus of showing that
24. you’re entitled to the relief you seek, so obviously you
25. must start.
1. MR MALINDI: I will start then,
2. Chairperson. Chairperson, on 10 January 2013 the Human
3. Rights Commission made a request for discovery by the NUM
4. and that appears on page 23 of the bundle which I’ve been
5. made to believe has been made available to the
6. Commissioners and the evidence leaders. The documents
7. required to be discovered are set out in paragraphs 5.1 and
8. 5.2 of the request and that is that the NUM should discover
9. records of discussions relating to disputes over benefits
10. associated with employment at Lonmin over the five years
11. preceding August 2012 and their records on format of
12. interaction between the unions and the employer. This
13. includes correspondence as well as individual member’s
14. complaints regarding benefits, especially housing.
15. We submit, Chair, that the discovery request
16. falls within the topics that the Human Rights Commission
17. has indicated that it wishes to address in phase 2. These
18. are training and career pathing for mineworkers at Lonmin’s
19. Marikana mine, as appears on page 26 of the bundle,
20. especially under topic number 2, specifically under topic
21. number 2 which reads that, the topic deals with the lived
22. experience of mineworkers, point 1, conditions of work for
23. mineworkers at Lonmin’s Marikana mine. Point 2, living
24. arrangements for the mineworkers at Lonmin’s Marikana mine.
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1. Point 3, training and career pathing for mineworkers at
2. Lonmin’s Marikana mine and the extent to which Lonmin has
3. failed to comply with its Mining Charter obligations and
4. the reasons therefor as appears on page 32 of the bundle,
5. especially specifically under topic 16 which reads, “Mining
6. Charter issues. Point 1, the identification of Lonmin’s
7. obligations under the Mining Charter, the extent to which
8. Lonmin has failed to comply with these obligations and the
9. reason for such non-compliance. Point 3, the
10. responsibility of the Department of Mineral Resources for
11. not taking steps in relation to any non-compliance.”
12. The NUM, by letter of 15 March 2013 –
13. CHAIRPERSON: Letter of?
14. MR MALINDI: 15 March 2013, which appears
15. on page 37 of the bundle, has objected to the discovery
16. requirement request for the reasons set out in paragraphs 2
17. and 3 of the letter. Essentially, Chairperson, the
18. objection is that the request does not fall within the
19. parameters of paragraph 7.1 of the timetable issued as a
20. ruling of the Commission on 12 March 2013.
21. Paragraph 7.1 requires that the topics – let me
22. start with the main paragraph. The discovery obligations
23. are subject to the following conditions, point 1, the
24. topics do not in any way supersede the terms of reference
25. of the Commission. So a party is obliged to make discovery

1. of documents in relation to a topic only insofar as the
2. topic is relevant to the events in Marikana which led to
3. the deaths of approximately 44 people, the injury of more
4. than 70 persons and the arrest of more than 250 people.
5. We contend, Chairperson, that the request for
6. discovery is relevant for the following reasons. 1,
7. considering the topics that the HRC wishes to address under
8. phase 2, under the second and 16th topics, there is an
9. overlap between what we request from Lonmin, AMCU and NUM.
10. For example, the HRC’s request to Lonmin under page 23 of
11. the bundle, paragraph 4.1, 4.5, 4.6, 4.7 to 11 –
12. CHAIRPERSON: 4.1, 4 point?
13. MR MALINDI: 5, 6, 7 to 11, are matters
14. that both the NUM and AMCU would have concerned themselves
15. with and as Chairperson can see from the paragraphs that
16. have been referred to, it’s matters that have a bearing on
17. the social and labour plan of Lonmin. 4.5 employment
18. contracts of all levels of mineworkers, including benefits.
19. 4.6 salary scales of all Lonmin employees, with benefits.
20. 4.7 to 4.11 are similarly relevant as they refer to matters
21. of career development of miners, et cetera and other
22. benefits.
23. These requests, Chairperson, are relevant to
24. paragraphs 1.1.3 and 1.1.5 of the terms of reference and I
25. will refer to page 5 where those are captured, page 5 of

1. the bundle, which require that the conduct of Lonmin must
2. be investigated in the following regard – whether it, being
3. Lonmin, by act or omission created an environment which was
4. conducive to the creation of tension, labour unrest,
5. disunity among its employees, or other harmful conduct, to
6. examine generally its policy, procedure, practices and
7. conduct relating to its employees and organised labour.
8. In this context, Chairperson, it is important
9. that the Commission knows whether the NUM pursued the
10. issues set out in paragraph 4 of page 23 of the bundle.
11. against Lonmin and whether Lonmin responded thereto and
12. how.
13. CHAIRPERSON: Whether Lonmin responded
14. thereto and how, would be a document you’d presumably get
15. from Lonmin but I understand the point about whether NUM
16. pursued the point.
17. MR MALINDI: Absolutely, Chair.
18. Regarding the how, Chairperson, NUM might be helpful to
19. indicate how Lonmin has responded to its own application
20. for the attainment of the matters that we ask that need to
21. be investigated. It is also important to know whether
22. these matters were pursued as a united front by the trade
23. unions or whether they acted separately and whether
24. individual miners were left to their own devices.
25. The relevance to paragraph 7.1 on page 35 is that

1. it may be relevant, therefore, to know whether the unions’
2. approaches to these matters caused any tension, labour
3. unrest, disunity among employees, or other harmful conduct,
4. and whether Lonmin conducted itself in such a way as to
5. contribute to the environment referred to in paragraphs
6. 1.1.3 and 1.1.5 of the terms of reference. The terms of
7. reference require that NUM’s conduct be investigated in
8. regard to whether it had exercised its best endeavours to
9. resolve any dispute or disputes which may have arisen,
10. industrial or otherwise, between itself and Lonmin and/or
11. AMCU or any other parties. That will appear on paragraph
12. 1.4.1 of the terms of reference. It is submitted
13. therefore, Chairperson, that should the HRC find itself
14. able to continue with phase 2, the NUM is required to
15. comply with the request to discover.
16. Having made these submissions, Chairperson, I am
17. further instructed to indicate that the short time frame
18. that remains before the conclusion of the Commission on 31
19. May 2013 militates heavily against the HRC’s continuation
20. in phase 2 as it originally envisaged. There is currently
21. no ruling by the Commission on whether the topics set out
22. on page 26 to 34 fall within the terms of reference.
23. CHAIRPERSON: Has any of the parties
24. contended that it’s not? Has any of the parties contended
25. that they do not?
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[The text is a transcript of a discussion at the Marikana Commission of Inquiry, focusing on the proceedings and rulings on topics that were submitted to the commission.]

Mr Malindi:
There is no party that has so contended, Chairperson.

Chairperson:
Then why is the ruling called for?

Mr Malindi: Because, Chairperson, the HRC has concerns on the engagement of expert witnesses at great expense on public funds if, in the process leading up to the filing of such expert reports there is an objection on a topic that the HRC wishes to address and therefore that will be a problem regarding the HRC's endeavours to participate in these proceedings and especially in view of all the endeavours that the HRC has engaged in, Chairperson, to have a lot of these matters clarified before it expends money in pursuit of phase 2 topics.

Even if a ruling were made today, the experts that the HRC has approached to testify on matters pertinent to corporate social responsibility and in terms of the Mining Charter, have advised that the time frame is insufficient for a full and proper analysis to be undertaken. The second impediment is the one that I have just addressed, Chairperson, in regard to the expenditure that a chapter 9 body cannot justify without a ruling on the topics that are permissible.

Chairperson: Again, has there been any suggestion by any of the parties that these topics are not permissible? So why must we come and make a ruling that's called for?

Chairperson: Paragraph 7.4 which reads as follows, [inaudible] in this regard from the Commission. Now, Chairperson, I have made the point, I can't take it any further, that our hands are held at our backs because we are a public body, we can't justify the engagement of the experts that [inaudible] calling, we [inaudible] in terms of 7.4.1 - addressing these issues because we have got to justify the expenditure before we do so and that is the angle from which the HRC comes from and stating that from November and, in particular, in February, I think it must have been the 21st of February when we were in the Commission's chambers, we sought rulings on various things including discovery by various parties. We also sought rulings on phase 2 issues upon which the Chairperson advised that the matter should be deferred accordingly and in a further in which the HRC was in attendance with the evidence leaders, again it was emphasised that the phase 2 issues need to be addressed urgently because there has been no compliance by any of the parties, a situation that has created the hesitancy on our part to proceed with phase 2 matters as we end this phase, because of the reasons that I have stated. That situation has persisted -

Chairperson: What happened was, the matter was left over for discussions between the parties or evidence leaders in the hope that they could, it could be settled outside the Commission, as it were, by consensus among the parties and my understanding was that there's been a substantial degree of consensus in that regard.
There have been a number of meetings, I understand, convened by the evidence leaders, which Mr Chaskalson can tell us about, if necessary, and what exactly is still outstanding according to you? I know there’s a complaint about – which isn’t relevant to what you’re talking about now – about statements that you seek from the police. That’s the subject of a missive that I received on Friday but that’s not, we’re not busy with that now. Anything else?

Chairperson, if I’m not getting across on the impediments to the HRC on the phase 2 issues, I will pass that submission which we persist on and – because I have stated the two main impediments and absent a ruling as to whether those topics under topic number 2 and topic number 16 are relevant, we are unable to proceed with procuring sufficient funds to engage expert witnesses who must compile reports and make those statements available to the Commission, if I remember well by 22 April, and with the reply thereto which takes us into the middle of May and we make those submissions, Chairperson, and the Chairperson will make a ruling as to whether the submission has merit or not. For these reasons the HRC gives notice that it will not lead expert witness evidence under phase 2. It will pursue these topics in terms of its mandate as a chapter 9 body. The HRC will play a limited role under phase 2 by presenting its previous report to the Commission on relevant topics and by presenting evidence, evidence of fact, if any. Those are our submissions, Chair.

Chairperson: Thank you.

Mr Malindi, is there any relevance or particular import that attaches to the five year period because it sounds rather onerous, requesting documents for five years. Is there any particular reason for that period?

Chairperson: What happened in 2007 which set the clock ticking in respect of relations between NUM and Lonmin, because you go back five years, from 2012 you go back to 2007. So why 2007, what happened then, anything in particular?

Mr Malindi: It is –

Chairperson: What happened in 2007 which set the clock ticking in respect of relations between NUM and Lonmin, because you go back five years, from 2012 you go back to 2007. So why 2007, what happened then, anything in particular?

Mr Malindi: Chairperson, as I stand I can’t point to anything in particular but it is common cause that the existence of AMCU has been for a period longer than the preceding five years and if I’m mistaken in that regard –

Chairperson: AMCU started in the coal mines. I mean I’m not quite sure when AMCU moved into the platinum belt of the North-West Province, so I’m not sure if the mere fact that AMCU was in existence in 2007 is a sufficiently powerful factor to set the clock ticking in respect of discovery obligations.

Mr Malindi: Chairperson, it’s the period that experts would normally regard as relevant for them to conduct a proper study and analysis and I understand, I mean the question there is really whether the period of five years is justified or not and a period short of five years may just be adequate for our expert witnesses to conduct –

Chairperson: It’s not easy, though. You’re asking for NUM to go to a lot of trouble and presumably it might apply to AMCU as well, I don’t know, but NUM must go to a lot of trouble, go into their archives, produce lots of documents – sorry, NUM, sorry, did I say AMCU? NUM must go into their archives, go to a lot of trouble, produce documents that go back five years. Once it’s conceded that five years is too long a period, the question arises what is a proper period? And unless the period is defined then NUM will say, well, what must we do? Must we go back five years, four years, three years, what do you want? You can’t impose a discovery obligation of a vague nature like that.

Mr Malindi: Chairperson, firstly, that has not been the objection of NUM, the period, as I understand it. It’s been a different objection but –

CHAIRPERSON: Maybe they didn’t raise the objection. You’re asking us to make a ruling.

MR MALINDI: Yes.

CHAIRPERSON: And if you’re asking us to make a ruling that it’s five years, you’ve got to justify it and if it’s not five – you concede, well, five years may be too long, it’s just an arbitrary figure, then I’ll say what period is relevant because – I mean I can’t say to NUM, look here, you must give documents which go back over a reasonable period. They say what’s a reasonable period, how can you expect us to comply with an order that’s so vague. I have to put that problem to you in the hope of getting an answer from you.

COMMISSIONER TOKOTA: Furthermore, you are the one who is bringing an application, so the onus is on you to justify the period which you seek us to rule that NUM should produce those documents.

MR MALINDI: Chairperson, in that regard I am instructed that the experts require the five years because they consider it a reasonable period –

Chairperson: But that’s not enough. We would have to be satisfied that five years is a reasonable period. You’d have to satisfy us. I mean can you imagine, it’s not just going to the archives and taking our five years’ worth of files. What would be required would be for
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NUM to go through five years’ worth of documents, looking for documents that are relevant as opposed to documents that are irrelevant. Can you imagine the time and the expense that would be involved in that exercise? So if you ask us to make a ruling like that, regarding being had to the facts that I’ve mentioned, you’ve got to justify it.

MR MALINDI: Chairperson, the issues that we have addressed you, the Commission, on are matters that have been with the mining industry or in particular Lonmin in this instance, for a long period. For the experts to be able to make a proper analysis of say, for example, the social labour plan, they need to know what it was in 2010, if it existed –

CHAIRPERSON: Who is going to tell them that?

MR MALINDI: Well –

CHAIRPERSON: What the social labour plan is, is a matter that can easily be ascertained from the Department of Mineral Resources and from Lonmin. What do you expect NUM to tell you about that, that you can’t find out from these other people?

MR MALINDI: Chairperson, as we indicated, all the issues that are set out there, there’s an overlap between what Lonmin was doing and what NUM was agitating should –

CHAIRPERSON: I can’t understand an overlap in respect of the social economic plan. The plan is the plan. Lonmin and the department would know about that. There’s nothing extra you can expect from NUM on that, surely? An overlap means you’ve got two things that overlap at a certain point but it doesn’t mean that if you get – that there’s a total identity of coincidence, as it were.

MR MALINDI: Chairperson, as I was saying, we refer to a number on issues under page 23 of the bundle and they range from 4.1, 4.5, 4.6, 4.7 up to 4.11 and that is on the Lonmin side of the request. Those are matters that the NUM as a union would have agitated that they happen. NUM and AMCU are in a position to indicate where there are gaps, if we don’t get that information from Lonmin, what they have done and what the responses have been to themselves by the – by Lonmin.

As paragraph 5.2 on page 24 indicates, that we seek information especially on housing arrangements by the mining house, from NUM and NUM would have had that as an issue with the mine as to hostel dwellings, of the hostel, of premises, and that is the overlap of this one aspect and other aspects that we have alluded to.

As to the question of five years being arbitrary, we obviously can – we can take instructions on that. Our initial instructions from our experts who had given us an outline of what the scope of their work would be, was the requirement of five years which we believed to be reasonable but it’s a period that –

CHAIRPERSON: But shouldn’t you have taken instructions? It’s a bit late now to talk about taking instructions. Once you decide to bring an application in respect of which you bore the onus, wasn’t that the appropriate time for you to take an instruction and seek to justify the five year period? You haven’t done that, so what are you going to do? Do you want a postponement or, if you lose this application, do you want to go back to your experts and then come with a new application? I mean there must be an element of responsibility in the way that the proceedings of this Commission are conduct, regard being had to the fact that there’s no provision for cost orders or anything of that kind. You’re seeking to put a heavy onus on NUM, which would – I would imagine would involve them in expenditure of considerable sums of money to get the information you seek. If it’s not required, if it’s not reasonably required then what can they do about it? They can’t sue you for the cost, surely. I mean one has got to approach this in a practical, reasonable fashion, surely. I understand that all matters that are reasonably relevant to the issues before us have to be investigated. I understand there is a great responsibility on us to ensure that we give a proper, adequate report on these matters, regard being had to the importance of the events which precipitated this Commission, but having said that, the other factors I have mentioned cannot be ignored.

MR MALINDI: Chairperson, obviously I don’t have instructions beyond the fact that the experts require information for that period and our request for that discovery will then, it appears, stand or fall on this aspect alone and it has – this proceeding has been characterised as an application by the HRC, whereas the HRC complied with the ruling of the Commission that parties must make requests for discovery by a set date, which we did, and now there’s an objection to that –

CHAIRPERSON: [Inaudible]

MR MALINDI: And –

CHAIRPERSON: - declining to give you the discovery because they say you’re not entitled to it. That’s not an objection as = please carry on, you understand the point.

MR MALINDI: So in the event,

Chairperson, if this be construed as an application for us to compel NUM to make discovery, which it declines, we have made our submissions on relevance and the Commission seems
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25 th been identified could be described as comprising material
24 particular sense, that not one of the 20 topics that has
23 of reference viewed as a whole. And I say that in this
22 recommendations of the Commission in respect of the terms
21 their way ultimately into the report, conclusions,
20 practical level and the manner in which they are to find
19 findings of the Commission that bear on the topic of
18 sufficiently distilled material that is relevant for the
17 Migrant labour may well play a role and there may be
16 have not been swift to object to topics as a whole.
15 I may just echo, that is why we imagine that the parties
14 so against that – and that is again, Mr Chair, if
13 secure a particular result as expeditiously as can be.
12 particular purpose, in a particular hearing and in order to
11 conventional criteria and of what relevance means in a
10 submission, a question of the application of
9 that guides the Commission, which is that ultimately there
8 anything that is already not within the legal framework
7 that is a common view of it. Of course it doesn’t say
6 addition and I, in discussion with many of my colleagues
5 Now, paragraph 7.1 is, I’ve said, a welcome
4 scrutiny.
3 questions of period, of documentation, may fall for
2 question of relevance under which rubric potentially
1 years or six months, because it’s ultimately a broad

MR MALINDI: Thank you, Mr Malindi.

[14:13]  CHAIRPERSON: Mr Tip?

MR TIP SC: Thank you, Chair,

Commissioners. Before we adjourned for the lunch break,
Chair, you made the observation that this particular
application and the response to it and the input from the
evidence leaders might well be of interest to parties other
than merely the Human Rights Commission and NUM and we
would, with respect, endorse that observation. We consider
this to be a significant application and a significant
objection and a significant hearing because what it brings
to focus is the relationship between 20 topics in phase 2
and the manner in which they are to be dealt with at a
practical level and the manner in which they are to find
their way ultimately into the report, conclusions,
recommendations of the Commission in respect of the terms
of reference viewed as a whole. And I say that in this
particular sense, that not one of the 20 topics that has
been identified could be described as comprising material

potentially that is of no interest and perhaps not of great
interest to anybody examining a situation in the mining
environment which has led to difficulties, led to, in this
case, acute conflict and tragically, a number of deaths.
But that of course requires it, those topics to be
funnelled through the process of relevant and we have
observed with pleasure the introduction of paragraph 7.1 in
the most recent version of the timetable that the evidence
leaders have prepared and circulated and 7.1, it’s worth
repeating – I know that my learned friend Mr Malindi has
already read it out but it’s a very important paragraph and
the pertinent part is that “The topics do not in any way” –
and that’s all 20 of the topics – “do not in any way
supersede the terms of reference of the Commission, so a
party is obliged to make discovery of documents in relation
to a topic only insofar as the topic is relevant to the
events” and of course the events are then described. And
that is why this particular argument this afternoon is a
significant one because it brings into relief the need to
examine precisely what is entailed with that phrase, “to
the extent that it is relevant” and that is really where we
join issue with our learned colleagues for the Human Rights
Commission and that is why, in our letter of the 15th March,
we did not confine ourselves to issues around vague
formulations or a period of five years as opposed to 10

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only request that has come to us from any of the parties here for discovery, so that it was then an opportune - and we hope helpful - step to let us say well, let us test just what the parameters are of this process. And that is why we are engaged in the way that we are today.

Now, my learned friend Mr Malindi has tried to identify topics in respect of which the requests that are set out in the letter to us of 10 January of this year falls and he’s referred to the lived experience of mineworkers and he’s referred to the Mining Charter and he’s referred to matters such as career pathing and the like, but what is in fact the scene in that letter and it, again it bears repetition. My learned friend has read it but I want to dwell on the particular content a little longer perhaps than did he. They say they want the following from NUM, paragraph 1, records of discussions relating to disputes over benefits associated with employment at Lonmin over the five years preceding August 2012. Now that’s the only paragraph - there’s a second one which I’ll read in a moment, this is the only one that has a period attached to it. I’d read that as arbitrary, my learned friend says well, that’s what experts say is a good time and of course if you say two weeks it’s too little, if you say 10 years it might be too much, but what is really being asked for here - records of discussions relating to disputes over benefits. Now, that is a very, very substantial request and I may say, Mr Chair, it was no exaggeration to say that digging all this sort of material out from archives of NUM, which are not necessarily arranged under the topic headings that we have in this Commission, is a very substantial task but what is to be done with it for the purpose of this Commission? And perhaps that question may best be addressed by a reference to paragraph 2 of this letter addressed to us, which is that the HRC wants their records on format of interaction between the unions and the employer. The format of interaction between the unions and the employer, all records on that. Now, frankly, we’re not sure what that means. We can say, well, there’s a recognition agreement that says how we interact but of what utility is that? And it goes on then -

CHAIRPERSON: Presumably interactions would presumably be minuted meetings and there are many matters, topics, many topics covered in minutes of meetings or in correspondence between the union and the employer would be totally irrelevant to any approach to the terms of reference of the Commission -

MR TIP SC: It’s indefinite. And then the second part of that says this includes - so it doesn’t confine that - this includes correspondence as well as
more generally, in South Africa.

We take a different view. We say that there is a task that the President has given this Commission. Had he wanted an examination, an evaluation, a conclusion making process of the scale that the HRC evidently contemplates, the President would, with respect, never have said you've got four months to complete your work. So in our submission this, with respect, is not a good application, request for discovery, and we would ask that our objection to it be upheld.

CHAIRPERSON: Do any of the other parties wish to say anything before I ask the evidence leaders to give us their submissions? It doesn't seem so. Which of the evidence leaders is going to address on this, is it you, Mr Chaskalson?

MR CHASKALSON: It is, Mr Commissioner.

Mr Commissioner, while I propose to deal with this specific application, I would like also to make certain general submissions about the discovery process and the powers of the Commission in relation to the discovery process because, as Mr Tip has pointed out, this application may serve to guide all of the parties, at least as to the position of the evidence leaders in relation to discovery and the powers of the Commission on compulsion.

With that introduction, I propose to deal with four topics. The first is, what are the Commission's powers in relation to compelling discovery or in relation to discovery? The second is to link these proceedings to the discovery timetable that has been issued as a ruling by the Commission. The third is to turn to the specific submissions about the discovery process and the powers of the Commission in relation to the discovery process because, as Mr Tip has pointed out, this application may serve to guide all of the parties, at least as to the position of the evidence leaders in relation to discovery and the powers of the Commission on compulsion.

To start then with the Commission's powers, we submit that the Commission has two separate powers in relation to discovery. The first is the power to compel production of documents, to order a party or a witness to produce documents.

The second is a slightly different power, it's the power to rule that in the absence of production of documents relevant to an issue, a party in control of those documents who refuses to make discovery of the documents will not be permitted to participate in the hearing. If I might take those two powers separately, the power to compel flows from section 3 of the Commissions Act and 3.1 states, “For the purposes of ascertaining any matter relating to the subject of its investigations a
the coercive step of compelling production of documents in a particular case, it can make the continued participation of a party subject to the production of those relevant documents. So those are the two powers.

If we link the present application to the discovery timetable that was agreed, very briefly to run through that timetable, it started at 30 November 2012 where it was agreed at a pre-hearing meeting. The timetable was then subsequently ignored by most parties and had to be extended by the evidence leaders and on 12 March a ruling was issued by the Commission to give effect to the remaining stages of the timetable and that's the document in the bundle from pages 35 to 36.

The ruling took place after certain of the earlier stages of the discovery process had already passed and if I might go back to identify the important provisions of the agreed timetable that preceded the ruling, the first was that the parties would identify topics within the terms of reference that they wanted to address in phase 2. The second was that the evidence leaders would circulate a consolidated list of topics. This was ultimately done on 8 February 2012. The third was that by a specified date, which was ultimately extended to 11 March 2013, parties would address requests to other parties to make discovery on particular topics on the consolidated list. So if there

was a topic on the list in respect of which you wanted discovery, you could ask a party to make discovery.

Now, these first three stages were not included in the ruling issued by the Commission on the 12th of March because they'd already been concluded by the 12th of March. The remaining stages that were included in the ruling are, for present purposes, the following. The first is that the discovery obligations were obviously subject to the terms of reference and that's paragraph 7 of the ruling which both Mr Tip and Mr Malindi have addressed, I don't propose to dwell on that, but the first stage of the timetable relevant to the current dispute was set out in paragraph 1 of the ruling and that was by 18th of March parties had to make discovery of documents relevant to any topics that they proposed to address in phase 2 and to any topics in respect of which they'd been requested to make discovery by other parties. If I might draw an analogy to civil proceedings, that would be ordinary discovery in terms of Rule 35(2).

The next stage of the timetable was set out in paragraph 2 of the ruling and it's the equivalent of Rule 35(3) of the Rules of Court. Parties had until 25 March 2013, in other words today, to address requests to other parties for supplementary discovery. Discovery, original discovery has already been made, parties can now peruse that discovery and say there are missing documents, I want you to discover this document and the parties requested to make supplementary discovery then had until 3 April to make supplementary discovery.

Now, in terms of that timetable, we would submit that the present request is, if anything, premature. It's framed as a section 35(3) request, it's framed as a request for certain specific categories of documents, at any rate, but the time for making supplementary discovery only expires on 3 April 2013. Now, as NUM is willing to engage with the request head-on, I don't suggest that the Commission should refuse to hear it but I would emphasise that ordinarily the Commission will be better placed to adjudicate on section 35(3) or rule paragraph 2 disputes after 3 April because by that stage the Commission will have received all of the discovery and supplementary discovery made by all of the parties and this will put it in a much better position, first of all to know what documents have already been obtained, secondly to identify what other documents are out there and thirdly and most importantly, to assess the importance of obtaining those documents in the light of documents that the Commission has already gathered through the discovery process. But as NUM is the parties who is going to be prejudiced by any adverse ruling or any ruling on this
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if 3.2 is, we submit, too vague, we submit both
3.1 and 3.2 are too broad. They embrace potentially
thousands of documents which would put NUM to an extremely
arduous task to identify and to collate and we would submit
that the relevance of the documents or the immediately
apparent relevance of the documents is not of such a nature
to justify a request of this broad nature and the Human
Rights Commission hasn't set out a case for pressing
relevance in this application, so we can only go by the
apparent relevance of these documents.

Finally, we would submit that if there is to be a
request for documents of this nature, we would submit that
they are more appropriately requested from Lonmin than from
NUM because they appear to be more relevant to passages of
the terms of reference specifically dealing with Lonmin.

We don’t see passages of the terms of reference relating to
NUM, to which these documents would be relevant. So we
would oppose the application on those grounds.

Finally, we must briefly respond to the complaint
that there hasn’t been a ruling on topics 2 and, I think,
18 and that this has prejudiced the Human Rights Commission
in relation to expert evidence. We specifically included
paragraph 7.4 of the ruling, 7.4 of the ruling that was
issued on the 12th of March to cover this situation. 7.4
says that if any party seeks to lead expert evidence on a

topic but seeks a ruling that the topic falls within the
terms of reference before it incurs the expenditure
necessary to engage an expert, that party must, on or
before 15 March 2013, 1) formally commit itself to calling
expert evidence on the topic if it is held to be within the
terms of reference and 2) seek a terms of reference ruling
from the Commission. Now, to the best of my knowledge, the
SA Human Rights Commission never did this, so we don’t see
how they can now complain that there hasn’t been a ruling
and that they never saw it. Those are our submissions.

CHAIRPERSON: Thank you, Mr Malindi,
anything you wish to say in reply?

MR MALINDI: Yes please, Chairperson.
Chairperson, ironically the HRC is the only party that has
complied with the deadline to request discovery and the NUM
also acted within the time frames to register its
objection. Having listened to my learned friend
Chaskalson, I would urge the Commission to exercise its
powers, as he has set out and especially use its discretion
as set out on page 6 of the bundle before the Commissioners
in reference to paragraph 5 of the terms of reference,
which is that the Commission shall, where appropriate,
refer any matter for prosecution, further investigation or
the convening of a separate inquiry to the appropriate law
enforcement agency, government department or regulator

regarding the conduct of a certain person. And as Mr Tip,
my learned leader here, has indicated as well, some of the
topics are very important but cannot be dealt with
satisfactorily within the compressed time frames that this
Commission has and to the extent that the Commission is
inclined to see those topics, all 20 topics which have not
been objected to as relevant, the Commission can use its
powers to narrow the requests that are made by the parties
to each other, as Chaskalson has indicated, to not make a
ruling on this application pending any further narrowing of
the request by the HRC on discovery to NUM or any other
party. That will be our submission, Chairperson, because
if it turns out that the topic is too broad for ventilation
before the Commission, it may be referred as provided by
the terms of reference.

And Chairperson, Mr Fisher was trying to retrieve
a document or documents that we have forwarded to the
evidence leaders and the Commission regarding our request
that there be rulings on these matters, but it seems like
we don’t have it red lettered.

MR TIP SC: Mr Chairman, if I might
assist there because I must withdraw the submission that I
made in that regard because a request for a ruling has been
drawn to my attention and possibly I can assist there. On
the 11th of March the Human Rights Commission did address a
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MR TIP SC: From my side I must just
apologise on two counts, the first is for making the
submission that there had been no application, the second
is for not attending to it in the time period since it's
been made.

CHAIRPERSON: Well, you can now attend to
it. We'll give you an extension of two days to do that.

Mr Malindi, anything further you wish to say?

MR MALINDI: Nothing further and what's
the word, thanking my learned friend for, indebted to my
learned friend for assisting -

CHAIRPERSON: - to your learned friend.
I'm sure [inaudible]. We will reserve judgment on this
matter, we'd like to think about it, the points that have
been put to us but we will give our ruling as soon as
possible. We'll indicate to the parties [inaudible]. We
understand that [inaudible]. Thank you. I did say the
Commission, I hoped very much, would be ready to proceed at
2 o'clock with the evidence. I suggest that it might be
appropriate, if the reporter from the City Press is here,
for us all to adjourn to have tea and we'll reassemble
after the tea adjournment to continue with the cross-

examination.

MR MALINDI: Chairperson, before you
adjourn may I interrupt you? Chairperson, Mr Chaskalson
goes through the various agreements on discovery that
parties had to adhere to and we have been bombarding the
evidence leaders and the SAPS with our insistence that they
should discover. It's been over some two weeks now that
the Chairperson indicated that if there's still no
satisfaction on the part of SAPS to discover as we
requested, or the inadequacy of their discovery, they may
be put on terms, in fact they were to be put on terms
before the commencement of the SAPS evidence. Chairperson,
if you permit us we would like -

CHAIRPERSON: To interpose, as far as I
understand what you're going to say to me, based on
something you told me in Mr Semenya's presence last week, I
think it was, there are still some statements that you're
asking for, asking the SAPS for which they haven't given.
I understand they're in the process of getting them for
you. They relate to individuals who were involved in the
events of the 16th, I think primarily. I understand they
are going to be given to you. I don't think the evidence
we're hearing at the moment or the evidence of the next
witness, for example, are likely to be of such a nature
that you require those documents but certainly if we reach
a stage where a witness is going to come and give evidence
and those documents are necessary, certainly you can raise
the matter again and we'll deal with it but I understood Mr
Semenya to say in your presence that I give you an
understanding, and in my presence, that he would see to it
then that as soon as reasonably possible you would get the
documents you sought. I think that's correct, Mr Semenya,
is it not?

MR SEMENYA SC: It is correct, yes.

CHAIRPERSON: So we can leave that -

let's go and enjoy our tea with the City Press and then
come back -

[COMMISSION ADJOURNS COMMISSION RESUMES]

National Commissioner, before I remind you you're under
oath, I would apologise to you. I proved to be a very poor
prophet as to how long the argument would take and the
application, so you were due to come back here at 2 o'clock
to continue your evidence. You weren't able to do so, I'm
sorry that your time has been wasted in this way. You're
still under oath.

MANGWASHI VICTORIA PHIYEGA: s.u.o.

CHAIRPERSON: Mr Madlanga, I take it
you're to proceed with your cross-examination.

CROSS-EXAMINATION BY MR MADLANGA SC (CONTD.):

Yes, thank you, Mr Chairman. General, before the lunch
adjournment I took you to the statement of Lieutenant-
Colonel Gaffley that indicates that some SAPS members or
rather SAPS members were shooting from different directions
and thereafter I took you to, or back to paragraph 45.5
where it appears that some protesters may have been killed
when some SAPS members might have been firing in response
to friendly fire by other SAPS members. Now, I want to
take you to the statement of Mr de Rover, I hope I'm
pronouncing the name correctly, it's the lower case d-e and
then the surname is R-o-v-e-r. I ask that a copy be placed
in front of you -

CHAIRPERSON: I think we have to make it
an exhibit, do we? FFF11.

MR MADLANGA SC: Thank you, yes, Mr
Chairman. Do you have a copy there, General?

GENERAL PHIYEGA: Yes, I do.

MR MADLANGA SC: Yes. Now General, if
you want to you may read perhaps the two paragraphs that
precede the paragraphs that I want to focus on and the
paragraphs I want to focus on are paragraphs 81 and 82 of
that statement. If you've read the paragraphs before that,
please indicate then I will read paragraphs 81 and 82 into
the record. And whilst you are reading let me, for the
record, indicate that Mr de Rover is the South African
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1. Police Service expert on public order policing, are you aware of that?
2. GENERAL PHIYEGA: Yes, I am aware.
3. MR MADLANGA SC: Please indicate then when I should go ahead and read paragraphs 81 and 82.
4. GENERAL PHIYEGA: I have read 79 and 80.
5. MR MADLANGA SC: Thank you, thank you, General. Now, paragraph 81 reads, “At the time of scene 1 and immediately thereafter, the problems with the analogue radio network conspired to prevent the overall commander to stay abreast of developments and to call a halt to police operations in a bid to regroup and reassess. It virtually goes without saying that SAPS doctrine and experience in crowd management dictate such a decision.” Do you see that?
6. GENERAL PHIYEGA: Yes, I see.
7. MR MADLANGA SC: And obviously the analogue radio network referred to must be the SAPS analogue radio network, not so?
8. GENERAL PHIYEGA: Yes.
9. MR MADLANGA SC: Paragraph 82 reads, “In the absence of a countermanding order, the implementation of the operation at scene 2 went ahead with the on scene commander unaware of the incidents that had just produced at scene 1.” Do you see that?

10. Mr de Rover meant was a decision to call a halt to police operations in a bid to regroup and reassess. That seems to be the plain meaning of the paragraph, doesn’t it?
11. GENERAL PHIYEGA: And I have answered, Judge, to say I do not know. The operational person may answer that well because I’m not qualified to actually underscore or not underscore that statement.
12. CHAIRPERSON: Yes, no – well, I’m not [inaudible] whether you were asked whether you agree with what Mr de Rover says and, as you correctly say, this is a field of expertise which is different from your normal field of expertise. The question is, is that what Mr de Rover is saying?
13. GENERAL PHIYEGA: I have said yes to that already but I was asked a different question, as I understood. Maybe I was wrong.
14. MR MADLANGA SC: National Commissioner, I did not ask you a different question, I asked you exactly the question that Mr Chairman put to you just now. It’s not a different question. What I’m asking you for is meaning and right now, after the two or so answers that you have given I’m confused as to what your answer is. Do you accept that what this paragraph says is what the Chairman has just articulated? Do you accept that is what this paragraph means? I’m not asking you about commanders, what
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commanders would have decided, meaning that's what my question is about.

GENERAL PHIYEGA: I understand it even better in Xhosa. I have read the contents of this paragraph and I recognise what the contents of the paragraph says, yes.

MR MADLANGA SC: And this Mr de Rover bases on what he calls SAPS doctrine and he says SAPS doctrine, doctrine and experience – he bases it on SAPS doctrine and experience and in crowd management and he says that those, that is doctrine and experience, dictate in those circumstances a decision that the operation be halted, again meaning you accept that?

CHAIRPERSON: It's fair to say that she accepts that's what Mr de Rover says. I think she makes it clear that she can't be heard, she's not in a position to say whether Mr de Rover is right or wrong.

MR MADLANGA SC: I agree, Mr Chairman, and is why I keep emphasising that all I'm concentrating on is meaning, meaning the meaning of paragraph 81. Do you accept the last proposition?

GENERAL PHIYEGA: I must say you, at times, confuse me. When you say meaning, meaning maybe differs. I say I read, I see, I understand it as the English language puts it in this document in 81 and 82.

CHAIRPERSON: Mr Madlanga, I think if you say the meaning of Mr de Rover then there won't be a problem. I think I understand why she's reluctant to answer the question in unqualified affirmative but if it's qualified by saying Mr de Rover's meaning, I don't think she should have a problem.

MR MADLANGA SC: Thank you. May I rephrase the question then and say, to my last proposition, do you accept that that is what Mr de Rover means?

GENERAL PHIYEGA: Yes, I have read what is written here.

MR MADLANGA SC: But I'm asking a different question. Do you accept that Mr de Rover means what I have suggested he means?

CHAIRPERSON: I understood her to say yes, and then she gave her reasons for saying yes, because she's read what's written here. I don't think it – I don't think one dare suggest she's not answering the question.

MR MADLANGA SC: I get confused, Mr Chairman, because of the lengthy and qualified responses to very simple questions, I honestly get confused.

CHAIRPERSON: I don't think that was a lengthy or a qualified response to your question. I really think that's a comment that certainly doesn't apply to the last answer she gave.

MR MADLANGA SC: But just to make sure, is your short answer yes, to my last proposition?

GENERAL PHIYEGA: My problem is the word you have used “accept.” It's got a deeper and stronger meaning.

MR MADLANGA SC: I will avoid the use of the word “accept.” Does what Mr de Rover is saying mean what I have suggested it means?

GENERAL PHIYEGA: You've gone back to meaning and you've used meaning before. You confuse me.

MR MADLANGA SC: What exactly confuses you about meaning?

MR SEMENYA SC: Chair, this must constitute the badgering of the witness.

CHAIRPERSON: No, he's not –

MR SEMENYA SC: This must constitute the badgering of the witness, Chair.

CHAIRPERSON: Well, some people might argue that it's something that's got two sides to it, but let's not get involved in that. I think the problem is that the questions are framed in a way that the witness doesn't fully understand them and she's reluctant to – if she's not quite sure what they mean, she's reluctant to answer yes or no because of the consequences she can't foresee, so I can understand that. That's why I've been trying to help her a bit, but anyway, Mr Madlanga will bear in mind what you've said. I don't think you went quite as far as badgering but maybe you were approaching the borders of badgerdom, so maybe you must move back a bit.

MR MADLANGA SC: The last question, Commissioner, was – when Mr de Rover says that SAPS doctrine and experience in crowd management dictate such a decision, does he mean that SAPS doctrine and experience in crowd management dictate that after events like those that had taken place in scene 1 have taken place, there should be a halting or stoppage of the operation –

GENERAL PHIYEGA: I have –

MR MADLANGA SC: Is that what Mr de Rover means? I've avoided “acceptance” – yes, I can't avoid using the word “mean.”

CHAIRPERSON: I think to be fair, she can't say she necessarily knows what Mr de Rover meant. All she can say is that's what he appears to mean. He may have had some mental reservation or may have expressed himself badly but all she can be expected to answer is what he appears to mean on an ordinary meaning of the sentence. Perhaps if the question is put that way, the witness shouldn't have a problem.
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25 May again be a large number of casualties.

We as SAPS have already killed 16 people at scene 1, let us pursue them to koppie 3. Just like one could well have been that because circumstances there would have been a need to regroup and reassess, what do you think the purpose of the regrouping and reassessing would have been?

One in the circumstances.

we do not know what the result of the reassessment would’ve been. The reassessment might have involved a decision to advance on scene 2 and take certain action which might have led to the death of some of the people. So I’m not sure that the question in the absolute form that you put it, was a fair one in the circumstances.

I’ve asked her the question a few times, I will not ask the full question again. All I will do is just to add this. On your reading of what Mr de Rover says, do you accept the meaning that I’ve suggested to you?

Mr de Rover says or refers to the SAPS doctrine and experience in crowd management, do you see that?

Do you see that he also says that, that is doctrine and experience in crowd management, dictate the taking of a decision, do you see that?

I do.

Do you also see that if you read “decision” in the last sentence, that must be a reference back to a decision to halt, to call a halt of the operation.

So you’re reading “decision” with the previous sentence?

Yes, decision – what I’m suggesting to you is that decision refers back to a decision to call a halt to police operations.

I’ll go to the next question. Can that decision, that is the decision to call a halt to the operation, had that decision been taken do you accept that the killings at scene 2 would not have taken place?

I don’t think that’s a fair question, Mr Madlanga, because to call a police - to call a halt to police operations in a bid to regroup and reassess.

Now, if the police operations had been halted and there was then a regrouping and a reassessment, we do not know what the result of the reassessment would’ve been. The reassessment might have involved a decision to advance on scene 2 and take certain action which might have led to the death of some of the people. So I’m not sure that the question in the absolute form that you put it, was a fair one in the circumstances.

Let me ask you this question. Thank you, Mr Chairman. I know that you were new at SAPS at the time but I want to find out what your own thinking is. If, as Mr de Rover says, in such circumstances there would have been a need to regroup and reassess, what do you think the purpose of the regrouping and reassessing would have been?

I sincerely find that a hard question to answer. I would say I do not know.

Would it not possibly, Mr Madlanga, do you see that part of the problem that made it impossible even for the national commissioner had been on the scene at the time, in charge of the operations, conjectural questions of this kind might be directly relevant but regard being had to the fact she wasn’t there and there is a strong element of conjecture, I’m not sure we are assisted by the answers she gives or her reluctance to give answers. I’m sure there are other matters you can ask her about which do not involve conjecture of this kind.

But you accept that part of the problem that made it impossible even for the regrouping and reassessing to be done was the problem with the analogue radio network.

I’m sure the commanders would be able to talk to that. I do not know.

May I ask you a question about that? It appears from Mr de Rover’s statement that he must have been informed by those who briefed him that the overall commander had a problem in staying abreast of developments because of problems with the analogue radio network. That seems a fair inference, you’d agree with that, I’m sure. No conjecture required. Now that’s a fair inference, isn’t it? He must have been told that. He didn’t take that himself out of the air. Now when you received your various briefings about what had happened on the night of the 16th, morning of the 17th and thereafter, were you ever told that the overall commander had problems...
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GENERAL PHIYEGA: On the 16th and the 17th, Judge, I was not informed of the radio thing.

CHAIRPERSON: Were you informed a bit later?

GENERAL PHIYEGA: As we were preparing our statements to come to the Commission and many, most of the information was coming, we noted the issue of the radio.

CHAIRPERSON: Was that at the time of the Potchefstroom conference or meeting?

GENERAL PHIYEGA: I missed that?

CHAIRPERSON: Was that at the time of the Potchefstroom meeting?

GENERAL PHIYEGA: I think –

CHAIRPERSON: The evidence is that various police generals and others gathered at Potchefstroom, I think it was for over a week, and prepared a number of things, particularly exhibit L which is the police presentation. Was it before then that this was, you were told about the analogue radio network problem?

GENERAL PHIYEGA: Maybe let me answer this way, Judge. The building of our submission was a progressive process and we continued to pick up input along the way. The overall commander must have been aware of fact, which the overall commander must have been aware of.

CHAIRPERSON: The evidence is that the overall commander would have known about it at the time. To have surfaced fairly early on in the development of the, what one can call the police case, but I don’t think it’s fair to ask you that question. That’s something, that’s a question the overall commander will have to deal with when he comes there. That’s right, isn’t it?

GENERAL PHIYEGA: Yes, Judge.

MR MADLANGA SC: When you say that you read the issue about the problems with the analogue radio network in the submission, are you referring to the SAPS presentation, exhibit L?

GENERAL PHIYEGA: I’m hoping that it was mentioned in that, or also in the statements of the members.

MR MADLANGA SC: Please bear with me, Commissioners. Now, at the risk of sounding, being repetitive but may the Commissioners and you, General, please bear with me because after what may sound repetitive I am leading to a question. From the information that we have received from SAPS and which I’ve debated with you after the tea break, one believes the following therefrom.

Some SAPS members fired shots in response to what may have been “friendly fire” from other SAPS members. Do you accept that? Do you accept that one does glean this from the information that you and I have been debating?

GENERAL PHIYEGA: Just refer me again to –

CHAIRPERSON: The word “accept” has caused her trouble in the past and I can understand why. I’m sure you can put it in a way which doesn’t raise the kind of problems which encourage her to be cautious, for which one cannot blame her.

MR MADLANGA SC: Is it so – thank you, Mr Chairman – is it so that it does appear from the information that you and I have debated, that some SAPS members fired shots in response to what may have been “friendly fire” from other SAPS members? This is in paragraph 45.5 of the opening statement.

MR SEMENYA SC: No Chair, I think my learned colleague should have used the word “may.”

CHAIRPERSON: They don’t say in 45.5 it was friendly fire. They say it may have been friendly fire. They don’t know that it was friendly fire, they don’t know that it wasn’t friendly fire, that’s why they were hoping ballistic evidence would solve the problem. We will find out in due course if it does but the point Mr Semenya puts is correct, if you can – you’ve got to use the subjunctive “may” when you convey the point that you make.

MR MADLANGA SC: Mr Chairman, I only did not use the “may” and I accept what Mr Semenya says in
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1 respect of the “fired” at the beginning of this sentence,
2 but where the Chairman is referring to I actually did use
3 it but I will just again read what I said and then I will
4 insert the “may” that Mr Semenya so correctly says should
5 be inserted. Is it so that what paragraph 45.5 says may be
6 read to mean this, some SAPS members may have fired shots
7 in response to what may have been “friendly fire” from
8 other SAPS members?
9 GENERAL PHIYEGA: Yes, the statement is
10 saying that.
11 MR MADLANGA SC: And does the statement
12 also say that some protesters may have been killed when the
13 SAPS members concerned might have been firing in response
14 to the “friendly fire” by other SAPS members?
15 GENERAL PHIYEGA: I'm not sure is it
16 something you are reading or is it an interpretation?
17 MR MADLANGA SC: I introduced this
18 present debate by saying that on my reading of the material
19 provided by SAPS, this is what one gleans from the
20 material.
21 CHAIRPERSON: I think it's Mr Madlanga's
22 paraphrase. I think it's Mr Madlanga's paraphrase -
23 GENERAL PHIYEGA: Okay, that's different.
24 CHAIRPERSON: - of the relevant section
25 of paragraph 45.5.

1 what is written here, now I can
2 have the statement, I read what is written here, now I can
3 listen to the paraphrase.
4 GENERAL PHIYEGA: I'm not able to accept
5 your paraphrasing.
6 MR MADLANGA SC: Why not?
7 GENERAL PHIYEGA: As I read the
8 statement, it doesn't give me that understanding.
9 CHAIRPERSON: How would you paraphrase
10 it?
11 MR MADLANGA SC: As the Chairman has just
12 asked, how would you paraphrase it?
13 GENERAL PHIYEGA: My understanding of
14 this, I ordered the members to fall back and take position
15 behind the vehicles as it was clear that the police are
16 firing from different directions and members could be
17 caught – could be caught – in cross-fire. And I'm also
18 seeing, he's talking about shooting from different
19 directions and I'm sure he can talk about that – earlier on
20 he said he looked into the bushes and did not see somebody
21 with the firearms. I'm not even sure whether his statement
22 – he needs to be questioned on that so that your
23 paraphrasing can be put into context. I'm the wrong person
24 to do that.
25 MR MADLANGA SC: You can take time to

1 order the members to fall back and take position behind the vehicles as it
2 was clear the police were firing from different directions
3 and members could be caught in cross-fire."
4 MR MADLANGA SC: Yes, that is where I'm
5 reading from or rather I'm paraphrasing from that
6 paragraph, Mr Chairman. Do you accept my paraphrase?
7 GENERAL PHIYEGA: I'm going to ask you to
8 paraphrase again because I just read that state – I didn't
9 have the statement, I read what is written here, now I can
10 listen to the paraphrase.
11 MR MADLANGA SC: According to Lieutenant-
12 Colonel Gaffley, SAPS members were firing shots from
13 different directions and some SAPS members could have been
14 shot by SAPS members in the cross-fire.
15 GENERAL PHIYEGA: I'm not able to accept
16 your paraphrasing.
17 MR MADLANGA SC: Why not?
18 GENERAL PHIYEGA: As I read the
19 statement, it doesn't give me that understanding.
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23 asked, how would you paraphrase it?
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25 this, I ordered the members to fall back and take position

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CHAIRPERSON: I think paragraph 12, the first sentence in para 12. “At this stage I heard gunshots from the direction of the bushes in front of us but I could not see any person shooting.” There were – I think the test is “in the bushes in front” and it would appear that there may well have been policemen as well. So the word “any” as you know is a very wide word, so it could cover either protesters or policemen, so. It’s now 4 o’clock.

When you think it’s a suitable stage for us to take the adjournment, please let me know.

MR MADLANGA SC: Thank you, Mr Chairman.

In paragraph 12, the same paragraph that the Chairman read from, which is the paragraph before the one that I’m focusing or was focusing on, the following sentence appears, second last sentence, “Then the canine members also started firing from behind us into the koppie. I also heard shots from our left and right.” And then in paragraph 13 he says, “At this stage the Scorpion had joined us and the members had formed a line in front of the Casspir, ready to approach the koppie on foot. I ordered the members to fall back and take position behind the vehicles.” You accept that he’s – or rather let me avoid accepting – he is referring to SAPS members, is he not?

GENERAL PHIYEGA: Yes.

MR MADLANGA SC: And he gives the reason why he made that order and he says, “as it was clear that the police are firing from different directions,” do you see that?

GENERAL PHIYEGA: Yes, I read that.

MR MADLANGA SC: - “and members could be caught in cross-fire,” do you see that?

GENERAL PHIYEGA: Yes, I see that.

MR MADLANGA SC: Would you not accept that the cross-fire refers also by, or refers also to fire by SAPS members?

GENERAL PHIYEGA: I actually read in his statement that he says the police are firing from different directions. That’s what he writes in his statement.

MR MADLANGA SC: And members, that is SAPS members, could be caught in cross-fire. What I’m suggesting to you is, whatever the source of the cross-fire might have been, but he is certainly suggesting that part of that cross-fire would have been fire from or by the police, do you accept that?

GENERAL PHIYEGA: What is important is what you’ve said, part of the cross-fire could have been. In that sense I agree.

MR MADLANGA SC: You spoke at the same with Mr Mahlangu. What, your answer may not appear in the transcript. So you say because I have used the word “part” of the cross-fire may have emanated from SAPS, you accept what I’m putting to you?

GENERAL PHIYEGA: I’m saying you have used the phrase “part,” particularly having listened to, I did not see any person shooting and the police, so the “part” represents a better understanding of what you’re saying.

MR MADLANGA SC: And because he says that he gave an instruction or a command that they should go behind the vehicles to avoid the fire, so effectively he means that part of that cross-fire which emanated from the police could have injured the police themselves, do you accept that? Do you agree? Do you agree that this is what this means?

GENERAL PHIYEGA: From what I’ve read, I understand that part of that could have been.

CHAIRPERSON: I take it one can go further. One could even say all of it might have been friendly fire. There’s no basis for saying that only part of it may have been friendly fire. Of course it’s again speculation –

GENERAL PHIYEGA: It is.

CHAIRPERSON: - we’re in the area of conjecture, aren’t we, but while we’re busy conjecturing, we may as well get it right. It was fire. The police,

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why he made that order and he says, “as it was clear that the police are firing from different directions,” do you see that?

GENERAL PHIYEGA: Yes, I read that.

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**1.0 The Nature of the Inquiry**

The Commission of Inquiry into the Marikana Massacre was established to investigate the events of 16 August 2012, which resulted in the deaths of 34 miners and the wounding of many others. The inquiry aimed to determine the circumstances surrounding the violence and to establish the truth about what occurred. The Commission was chaired by Judge Bonang Bojane and was conducted in Rustenburg, North West Province.

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**2.0 The Evidence**

A significant amount of evidence was presented during the Commission, including statements from witnesses, expert testimony, police reports, and other documents. The Commission heard from a wide range of individuals, including miners, police officers, and other figures involved in the events.

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**3.0 The Findings**

The Commission found that the violence was a result of a complex set of factors, including the presence of armed police, the use of excessive force, and the failure of the authorities to prevent the conflict. The Commission also highlighted the importance of a free and fair media environment in the event.

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**4.0 Conclusion and Recommendations**

The Commission concluded that the violence was unjustified and that the authorities had failed in their duty to protect the lives and rights of the miners. It recommended several measures to prevent similar incidents in the future, including the provision of adequate training for police officers, the establishment of a special unit to handle labour disputes, and the implementation of a comprehensive human rights training program for all law enforcement officials.

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**5.0 Acknowledgments**

The Commission would like to thank all those who testified before it, as well as the families of the deceased miners. The Commission also recognizes the efforts of the Commission's legal team and staff, who worked tirelessly to ensure a fair and transparent process.

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**6.0 Endnotes**

[1] Information provided by the Marikana Royal Commission of Inquiry.

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**Appendix**

A summary of the Commission's findings and recommendations is provided in an appendix to this report.
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