TRANSCRIPTION OF THE
COMMISSION OF INQUIRY
MARIKANA
BEFORE TRIBUNAL
THE HONOURABLE MR JUSTICE FARLAM (RETIRED) - CHAIRPERSON
MR TOKOTA SC
MS HEMRAJ SC
HELD ON
DAY 5  29 OCTOBER 2012  PAGES 359 TO 489
HELD AT
CIVIC CENTRE, RUSTENBURG, NORTH WEST PROVINCE

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asked him what the practical value of that would be because, in my view, I don't think any of the families were forced to attend, only those who wanted to would have attended in the first place. He said that there is no statutory basis as of now for the Department to fund the attendance of the families and that the amendment would serve the purpose of a statutory provision for the funding. And he said that they are pushing for this to be finalised today. I then asked him how soon would they be in a position to then fund the attendance of the families. He said that would happen soon after the amendment.

Then on the question of legal aid, I was contacted by Mlambo, JP who chairs Legal Aid South Africa and he raised certain questions with us, the evidence leading team. We responded to those. Those questions related to the funding of Mr Mpofu's clients. We responded to the questions that he was raising and he contacted me in the evening yesterday and said that they are going to have a teleconference as the Board of Legal Aid South Africa and that they will revert to me either this afternoon or early evening today.

Insofar as the families of the deceased Lonmin security guards are concerned, he said that they want to treat those similarly as they have done with the families of the deceased people, the families that are being represented by Mr Ntebeza. They want to treat those in the same manner but he said that there are certain formalities that have to be met.

I have already spoken to Mr Rampile who is representing the families of the deceased Lonmin security guards and I've already given him the name of the contact person that he must sort out those formalities with, so that one seems on course, Chairperson.

Thank you, Mr Madlanga.

Thank you, Mr Madlanga.

Then on the last issue, the arrests, what one glean's from the correspondence received from SAPS is that, amongst others, SAPS is saying we are entitled to exercise our rights, if not obligations or responsibilities, to arrest whoever we have a reasonable suspicion of having committed an offence. No-one can quarrel with that, I accept that without any reservations, they do have that right.

The second point they make is that to divulge information relating to the arrests may be disadvantageous to the process of investigations which are at a sensitive stage at this moment. I would want to take issue with that and the submission I would make in that regard is that, one, I do not believe that SAPS or at least my colleagues on the other side representing SAPS, are not going to trust the Commission if the Commission were to take the stance that we, as the Commission, are going to treat the information that you divulge to us as the Commission confidentially. If they were to say that they would distrust the Commission, I would be quite surprised. I doubt that they will say so and I would urge that that information be availed to the Commission and the reason why that should be done is because a point has been made that Mr Dali's clients - or indeed even the legal representatives themselves, Mr Dali Mpofu included - are of the view or perception or belief that the arrests are in fact taking place in order to thwart the endeavours of Mr Dali Mpofu's clients in the presentation of their case before this Commission.

This Commission can only be in a position to test that contention, that belief, that perception, if it is given an opportunity to have sight of the contents of the docket to see whether indeed, at least on the basis of what is contained in there, there was a basis for a reasonable suspicion and therefore a basis for the arrests.

Those would be our submissions on the three matters, Chairperson.

Yes, thank you very much.

Thank you.

Mr Madlanga, you indicated that one seems on course, Chairperson.
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MR MADLANGA SC: Yes, yes, Chairperson.

It’s something unrelated to the issues that the Commission has raised. Last, on the last occasion the Commission sat it was brought to my attention by one of my learned juniors, Mr Matthews Mojapelo behind me, that the gentleman standing there with a camera is recording or is doing a video recording of the proceedings on behalf of the South African Police Service. We spoke to him as soon as the matter had been brought to my attention and asked him to move away from where he is. We are not making a point that he should not do what he is doing, but the point is we turn to the back, we talk to our juniors at the back and some of what we’re saying as counsel is confidential and he just refused to move. He said let me do my duty and you do yours. And despite us saying, do your job but do not do it here, he just would not budge and he even made a point which I think is quite ridiculous, that his microphone does not capture what we say here but that it only captures what comes through the speakers. And, and more importantly than what I’ve said thus far, my learned junior Mr Mojapelo said the day before, that is the day before I actually spoke to him, the gentleman doing the video recording, the day before he said to him, “I focused my camera on your screen and I videoed what you have or you had on your computer screen, I hope you don’t mind.” That, he said so according to Adv Mojapelo in so many words. He is refusing to move and we totally object to him standing where he is. If he must record, and he said he is doing it for the National Commissioner of Police, if he must do what he’s doing, he must do it elsewhere, Chairperson. Thank you.

CHAIRPERSON: Yes, I take it he hasn’t got media accreditation. Those who have got media accreditation have got certain privileges and access to places, facilities here, which ordinary members of the public have not got. So he’s here, I take it, in his capacity as a member of the public. I’m not sure that members of the public have got the right to do the things that you say he’s doing but perhaps then we must Mr Semenya to comment on what you’ve said on this issue before we deal with the other three issues.

MR SEMENYA SC: Chairperson, it was earlier brought to my attention and I raised it with client that that ought not to happen. There shouldn’t be any reason why he cannot be positioned differently and still have that capturing – I think we do have some accreditation but there’s no basis for him to do it in the manner that is being complained about.

CHAIRPERSON: Can I ask, where was he positioned?

MR MADLANGA SC: He has always been there to Adv Mojapelo in so many words. He is refusing to move and we totally object to him standing where he is. If he must record, and he said he is doing it for the National Commissioner of Police, if he must do what he’s doing, he must do it elsewhere, Chairperson. Thank you.

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CHAIRPERSON: Can I ask, where was he positioned?

MR MADLANGA SC: He has always been there.
Chairman is that until the families are here, until they are here because they have told us they want to be here, it would be improper for the Commission proceedings to proceed.

If, as Mr Skosana has indicated, the regulation will have been promulgated by today and that everything would have been done to enable and facilitate the presence of the families tomorrow, then let's wait for tomorrow and see what happens tomorrow. I say so because on our instructions, our clients were here when Mr, Colonel Botha was testifying. They are keen to know what it is that Mr Botha is going to say further. He was cross-examined by a whole range of people, he was cross-examined closely by some of those who represent AMCU, Adv Bruinders, very closely by Adv Bizos, very closely by the Chairman of the Commission – indeed the Chairman of the Commission enquired from me as to whether I want to cross-examine him and I said, in view of the issues that have been raised by some of those who put questions, including the Chairman of the Commission, I would like to consider a process of approaching his evidence.

Now, we know because of the relationship that we have with our clients, that they are interested in the developments that will ensure in the further cross-examination of Colonel Botha and they feel that they have a right to be here, to hear for themselves how that is going to turnout. I am not trying to be difficult, Mr Chairman, we have tried everything in our power all the time to make sure that something must be done, but this is critical. We are seeking to establish from a witness who, in his statement, says he was called by a brigadier to get onto a chopper to go and record an operation. And that is the operation from what happened, the deaths of our clients' relatives.

CHAIRPERSON: Mr Ntsebeza, I just want to interrupt you at this stage. It seems to me that the question of a possible postponement may well arise in respect of one or other of the other aspects as well, so perhaps we can deal with the aspects in the absence of the question of whether they lead to a postponement at first. And then if there's going to be a postponement application or a series of postponements applications, they can be dealt with conveniently together. So forgive me for interrupting you but would you agree that that's the best way of going forward at this stage?

MR NTTSEBEZA SC: Yes, I do. I just wanted to indicate, Chairman, that we have a difficulty as things stand to accept, certainly on our instructions, the veracity of what has been said. We are now told that there was no statutory basis for the funding of the families and these families were here and the last time that they were here, they were brought because we have said they ought to be brought and we were made to believe that there is a basis for them to be brought here. They were made to believe that there is a basis – they even were told that only one member per family will be allowed to come.

CHAIRPERSON: Yes, no, we know that, Mr Ntsebeza. I don't know that we need to spend time further on that aspect of the matter. If the regulation is forthcoming today or even early tomorrow, then what you said in this regard will have been rendered academic.

MR NTTSEBEZA SC: Yes.

CHAIRPERSON: But anyway, we can get there when we get there, if –

MR NTTSEBEZA SC: Yes.

CHAIRPERSON: Any of the other counsel or representatives –

MR NTTSEBEZA SC: Can I just say?

CHAIRPERSON: - finish.

MR NTTSEBEZA SC: I thought I could say something else also about – there are three aspects that you wanted attention to be drawn to, the first one I've just dealt with. The second one is legal aid and I think whilst it is so that we have been, that Socio-Economic Rights Institute have been provided legal aid by the Legal
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1. Aid Board, there is a cloud that has never been uncovered
2. about what that means and it is because it is now
3. important, critically important now, some things must be
4. called by their names. There will always be a view that
5. now the families are properly represented and are equally
6. represented. The truth of the matter is that Legal Aid has
7. committed itself to fund one silk for 20 days for the
8. entirety of your sitting here as a Commission, 40 days for
9. juniors. Adv Bruinders and I are briefed to be here in
10. this Commission to – and we will be paid only for our
11. appearances here. You know as well as I do that a lot of
12. work happens in preparation, consultations and all of that.
13. We don’t get paid for that. In fact, Adv Bruinders and I
14. have donated our time and preparation for the entirety of
15. the month of September that we were engaged. So there
16. shouldn’t be this illusion that there’s – I for one am very
17. grateful, Judge Mlambo is a person that I have a great deal
18. of respect for but there shouldn’t be created an illusion
19. that at least now the families are properly represented.
20. They are not even equally represented. Those silks who
21. come into this team like Adv Bruinders, are people who
22. should be asked whether they do not need their heads to be
23. examined because it is unsustainable that anyone, even with
24. the greatest or the largest of hearts, that any advocate
25. would be able to spend the length of time that it is

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1. expected of us to spend here, to consult, to prepare, to go
2. all, through all these reams of documents and electronic
3. versions of documents and all that to be donated pro bono.
4. We also, I mean I donate and I’m sure Adv Bruinders does
5. so, we do a lot of work for pro bono. We do it because we
6. want to do it, but it is unsustainable for purposes of this
7. Commission and I have indicated to your, to the Commission
8. and to you Mr Chairman, 20 days for me, 40 days for
9. juniors. What happens thereafter?
10. So the question again, if we were to go elsewhere
11. – we are not talking here about other people in your
12. Commission being dealt with on a Cinderella basis, we are
13. talking here about the equity, the morality that says in
14. order for me to get to the bottom, me and my commissioners
15. to get to the bottom of the truth of what happened here,
16. there needs to be a reasonable equality of alms that will
17. afford those who represent those who are affected by the
18. terms of reference of the Commission, to effectively deal
19. with the issues that come before them. If it is – what is
20. sauce for the gander should be sauce for the goose. I can
21. do with another silk, I can do with another senior/junior,
22. but we can’t do that and I’m simply saying, we therefore
23. need to say the fact that we have been funded to the extent
24. that we have – and we are grateful for that – should not
25. obscure the real issue. The real issue here is, your

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1. Commission should enquire equality of alms.
2. Mr Dali Mpofu will deal with the other issues of
3. arrests and again to some extent –
4. CHAIRPERSON: I think we will stay with
5. the first issue, namely the transportation and
6. accommodation of the families’, before we move onto the
7. other issues. Do any of the representatives of any of the
8. parties wish to say anything about the transportation and
9. accommodation of the parties in the light of the statement
10. which, speaking for myself, I’m inclined to accept that Mr
11. Skosana told Mr Madlanga that he was busy with an amendment
12. to the regulations.
13. MR BIZOS SC: Perhaps we should listen to
14. what Mr Mpofu has to say as well, because we want to
15. address the Commission on both issues and very briefly what
16. we want to say to the Commission is that we appeal to all
17. of us here to seriously consider that almost a month after
18. this Commission started, we have dealt with half a witness
19. and this is something which is –
20. CHAIRPERSON: I’m sorry to interrupt you,
21. Mr Bizos, I thought you wanted to say it after Mr Mpofu has
22. spoken.
23. MR BIZOS SC: Yes.
24. CHAIRPERSON: Perhaps if you say it when
25. you say it and don’t say it before you’re going to say it,

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1. if you know what I mean.
2. MR BIZOS SC: I will contain myself until
3. then, Mr Chairman.
4. CHAIRPERSON: Mr Mpofu?
5. MR MPOFU: Thank you very much,
6. Chairperson, and honourable commissioners. Chair, I just
7. want to say that we, Mr Madlanga correctly, in referring to
8. the arrests –
9. CHAIRPERSON: I’m sorry Mr Mpofu, I want
10. to hear counsel at the moment on the question of the
11. transportation and accommodation of the families.
12. MR MPOFU: Oh yes –
13. CHAIRPERSON: I can deal with the other
14. questions later, but it would be easier if we deal with
15. them seriatim, as it were, one by one. Have you anything
16. to say on that issue?
17. MR MPOFU: Yes. Chair, all I want to say
18. on that issue is that we support Mr Ntsebeza’s submission
19. and our understanding, if there’s a legal basis that is
20. needed, allow Mr Sibanyoni – the only legal basis can only
21. be the fact that an undertaking or promise or whatever you
22. call it, was made to the families that they would be here
23. for the duration and I don’t know what – number 1. Number
24. 2, if they’re saying that they want to make amendments to
25. the regulations, that can only mean that as the regulations
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- The families are allowed to be here. Thank you, Chair.
- **CHAIRPERSON:** Do any of the other representatives representing other parties wish to say anything on the first aspect, that is to say the transportation and accommodation of the families?
- **MR BURGER SC:** Mr Chairperson –
- **CHAIRPERSON:** It's Mr Bruinders? Mr Bruinders, is it?
- **MR BURGER SC:** It's Mr Burger on behalf of CASAC.

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- **MR BURGER SC:** Thanks very much, I just wanted to put that on record.
- **CHAIRPERSON:** I think we can move on then to the second aspect which was the subject of discussion, namely the application for legal aid. It sounds as if that's sub judice, if one remembers the Chairman of the Legal Aid Board is a judge. We will only hear presumably late this afternoon or we will hear tomorrow morning what the outcome is in that regard, but does anyone wish to say anything further on that at the moment while we are still waiting to hear what the Legal Aid Board has decided?
- **MR MPOFU:** Chairperson, as you know, we are in a worse position than even Mr Ntsebeza's sorry state and Chairperson, we want to emphasise just one thing here which is the fact that, as you said, this Commission is not essentially an adversarial process, it is a process of fact finding and we cannot understand how it is that anybody thinks that the establishment – or rather the establishment of the truth, which is what we all seek, can ever be attained by listening only to one side of the story - because that is the logical outcome of what is now being engineered by only funding the alleged perpetrators and not the victims. Because -

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- **CHAIRPERSON:** I'm sorry, Mr Mpofu, but it may be that the Legal Aid Board will come to your assistance –
- **MR MPOFU:** Well –
- **CHAIRPERSON:** So at this stage we don't know what they're going to do, so what I was suggesting to you was that we must surely wait to hear what the decision of the Legal Aid Board is going to be, before we take it further, otherwise you are shooting at a moving target which may not be in position by the time your bullets are expected to take effect.
- **MR MPOFU:** No, unfortunately now our situation, Chair, the target is already dead because they have already shot at us. We received a letter last week that said in no uncertain words that they're not going to fund us.

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- **[09:46] CHAIRPERSON:** I understood that that's the subject of what Mr Madlanga spoke to Judge Mlambo about and that's what they're going to have the conference about. As I understand, as of last week you've been -
- **MR MPOFU:** Yes.
- **CHAIRPERSON:** - turned down.
- **MR MPOFU:** Yes.
- **CHAIRPERSON:** But I understand from what Mr Madlanga said, that that may not be the position at the end of today when we hear what the Legal Aid Board decides after this Chile conference which is to take place.
- **MR MPOFU:** No, I accept that.
- **CHAIRPERSON:** That's the point I'm putting to you.
- **MR MPOFU:** No, I accept that, Chair.
- **CHAIRPERSON:** Then the only point I seek to make is that I don't want this debate to be just about the Legal Aid Board. Chairperson, you'll remember that when we raised this initially, our point was that if there is what I now understand to be R75 million which was set out, set aside for this Commission, then that – the victims are equally entitled to be funded on the same basis as everybody else. I don't think there's a taxpayer worth his salt who would say that the taxpayers’ money should only be used for what I call the alleged perpetrators, and that – so the legal aid issue was always a fall-back position which as such was set by Mr Madlanga, but our primary complaint is that we should be treated like everybody else.
- **CHAIRPERSON:** Yes, we hear you. Does anyone wish to say anything further on the second aspect and that is to say the legal aid aspect? I'll give Mr Madlanga a chance to reply on all three aspects when we've finished. Right, we now move onto the third one and that's the question relating to the arrests which Mr Madlanga
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Mr Mpofu:

Thank you, Chair. May I –

Chairperson:

Thank you, Mr Semenya. Any
of the representatives of the parties? I see Mr Bruinders
has left his seat and is talking to Mr Mpofo. Do you wish
to speak on this point, Mr Bruinders, or – it may be that
both of you want to speak. Do you want a short adjournment
so you can take instructions, so you don’t have to take
instructions in front of everybody while we’re sitting?

Mr Mpofo:

Thank you, Chair. May I –
thank you. Chairperson, I just want – let me start with
this last aspect so that we get it out of the way. This is
not about dockets. By the time we get to dockets, you
know, all the damage has already been done. We happen to
have access to some of the charge sheets and I will refer
to them, but in any event I don’t see how a perception of
impropriety which is held by our client can be cured by
giving access to the docket to Mr Madlanga. The issue here
is that these people are represented, the police know that
they are represented and all these arrests have been
effectuated without informing us, as much as just informing
us, but even when we make enquiries we get sent from pillar
to post.

This is the issue, Chair. Since, if you include
the first break and this last short break that we’ve had,
we have had not less than six and perhaps seven people
arrested at different twists and turns. The last four came
on Tuesday when we had called people to come here and, as
they were leaving, they were stopped, manhandled, made to
lie on the ground at night and then taken to – at least
four of them were arrested and taken to four different
police stations. So the perceptions that we have here are
not unfounded and unreasonable.

We could not understand, we thought that this was
intended to make us run from police station to police
station, which we ended up doing anyway. As I’m speaking
to you now, Chairperson, two of my attorneys are not here –

Chairperson:

Thank you, Mr Semenya. So that almost talks to the question of the
postponement, even though we have not come to that, Chair,
because our own cross-examination, we hope to facilitate it
by consulting with him quickly so that by the time we start
or ask for a short adjournment, so that by the time – we
don’t waste the time of the Commission.

Now what happened, Chair – and I’m not going to
give you the blow by blow, I’m just giving you the
highlights – on Friday, this Friday, we brought a bail
application. We brought a bail application in relation to
the four that I referred to and what subsequently happened,
if we – if anyone wants to dispel our perception that this
is meant to circumvent our participation in this Commission
then they have to explain this. Maybe before I say what
happened on Friday, I must say that the four people were
charged with murder that had occurred on the 12th of August.

Chairperson:

Yes.

Mr Mpofo:

So that leaves it without
doubt that those are matters that are covered by this
Commission and we raised this issue in court. Also the
bail application, or rather the people were brought to bail
after the 48, the statutory 48 hours, and so we raised
those two issues in the bail application.

The magistrate agreed with both submissions that
we made there and her ruling was the following. “In terms
of section 35(1)(d) emphasis to within 48 hours, not after
expiry only, state advanced no reason for delay.” In other
words for not doing it within the 48 hours. This is a
cryptic note that she made. 2, she said, “The matter is
struck pending the outcome of Commission of Inquiry.” This
was in response to the fact that we said that this matter
was covered by the outcome of this inquiry. And 3, “All
four accused to be released from custody without delay.”
So this was a court order from a judicial officer
and this is what happened. Within minutes of this, when
our attorneys went down to the cells to release, to take
the people out, they were refused and the people were
re-arrested and we were told that this was on the
instructions of the NDPP or rather the DPP. I’m not sure
whether it was the national one or the provincial one. I
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1. hope it was the national one because if it was the
2. provincial one, then this would mean it was the same
3. geniuses who charged these people with the murder of their
4. own colleagues.

So what we have here, Chair, is that – there are
5. two major complaints that we have. Not only does this
deprive us of the witnesses that we have brought there
6. obviously because they are needed, but what it has done now
is to instil a reign of terror among potential witnesses
7. because I cannot now, with a straight face, say to other
people in Ikaneng or the surrounding areas, "Oh, don’t
8. worry, I’ve organised a Combi for you, you can come to the
Commission next week” – because they’ll say, "Are you out
of your mind? Must I go there and make myself cannon
9. fodder for arrest like it happened to so-and-so and so-and-
so?” So it’s much wider than the people who have been
10. arrested.

It will literally hamper our participation in
11. this Commission and that, Chair, happens in the background
of the following facts and as I alluded to earlier – the
12. people that we represent, Chair, are the only people who
13. are capable of giving this Commission a version of what
happened, other than the version of the police. There is
14. no-one else. By definition, the mere fact that they were
15. injured at the scene, they were arrested at the scene, then
16. So it is distinguishable on that basis alone. What I’ve
17. charged for the murders that happened during the period
18. that is being investigated here, then there is no basis for
19. not arresting the policeman who did, who also did the – who
20. at least at a prima facie level shot our people and
21. committed what in our view, also a criminal act.

And I just want to make the following last point,
22. Chair. We must never be heard here –
23. CHAIRPERSON: I’m sorry, doesn’t it
depend upon which murders are the subject of the arrests?
24. I can understand in relation to the 16th. There are two
contrasting versions. Your clients say they were attacked
by the police while they were, as I understand their
argument is, they were lawfully proceeding to the informal
settlement beyond the point where the police were stationed
and they were attacked.
25. MR MPOFU: Ja.

CHAIRPERSON: The police say the other
way round, these people were coming to attack them and they
defended themselves. Now that, I can understand that’s
very much a matter to be decided by the Commission.

MR MPOFU: Ja.

CHAIRPERSON: But if – and I don’t know
whether this is so, I ask the question.

MR MPOFU: Yes.

CHAIRPERSON: If the murders in respect

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1. it means by definition they were eye witnesses to at least
some of the things that happened there. As I pointed out
3. last week, Mr Ntsebeza’s clients are deceased. So the
4. arrested and the injured are the only people who can assist
us.

Now, that is so much so that the evidence
7. leaders, and I’m sure they won’t mind me saying this, had
8. already approached us to say whether we would mind bringing
our witnesses first after this, so that that perspective is
10. put into the Commission. And we had not yet agreed but we
were in negotiations because we understood why they asked
us to do that, because it’s the only grouping that can
provide that.

Now if, for a period of the time we were running
15. from pillar to post making bail applications and not even
16. able to use the non-existent resources at our disposal,
then how are we going to be in a position to bring people
here, firstly because of our own capacity but also because
of their own fears of being brought here. That means our
participation is being rendered completely blunt,
19. Chairperson.

The second complaint which is the substantive
22. matter of the issue of equality that we raised on the
23. constitutional basis and I know I’ve raised this before but
25. I just want to re-emphasise it. If these people are being

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1. of which the arrests were taking place are different, for
2. example there was a witness who pointed out spots at the
3. inspection in loco who has subsequently been murdered. Now
4. this Commission is not going to decide whether his killing
5. amounted to a murder or a justifiable homicide. That’s not
one of the issues.

MR MPOFU: Mm.

CHAIRPERSON: And if the police have – if
9. they have reasonable suspicion that someone has committed
that murder, the fact that this Commission is sitting to
11. decide what, other issues, wouldn’t prevent, if the
12. circumstances were appropriate, an arrest. So we would
13. have to know what the murders are that you’re talking
14. about, in respect of which these arrests took place but
15. perhaps we can get Mr Semenya to tell us that in a moment.
16. I’m sorry to have interrupted you but –

MR MPOFU: No, no Chair –

CHAIRPERSON: It seems to me to be a
19. point that we just bear in mind.

MR MPOFU: Thank you, Chair. No, you
21. make a very valid point, Chair, and it will assist to focus
22. what I’m saying. Of course, the murder of Mr Daluvuyo
23. Bongo which you have alluded to is a matter, firstly, that
24. falls outside of the terms of reference of this Commission.
25. So it is distinguishable on that basis alone. What I’ve
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1 just said, Chair, is that the murder for which the four
2 people have been charged, according to the charge sheet
3 here in front of me, happened on the 12th of August 2012.
4 So that’s a different matter. In other words these murders
5 that are referred to here fall squarely within the terms of
6 reference. I accept the fact that they did not happen on
7 the 16th but the point I’m trying to make –
8 CHAIRPERSON: I’m sorry to interrupt you.
9 The point I’m making went further than that, that I’m not
10 sure whether it is intended that killing him on the 12th, if
11 someone was killed on the 12th – two people I think were
12 killed – I’m not sure whether it can be contended that
13 those killings were justifiable, didn’t constitute crimes.
14 The question may well be, who committed the crimes, who
15 killed the people? But that also is not necessarily a
16 matter which this Commission will be called upon to decide
17 on, so it’s not just that we’re confined to what happened
18 on the 16th. If what was patently a murder took place on
19 the 12th and if the police have evidence which gives rise to
20 reasonable suspicion as to the identity of the murderer,
21 then prima facie I don’t think the fact that this
22 Commission is sitting would preclude them from making an
23 arrest, provided it was a bona fide arrest and wasn’t in
24 fact done for the ulterior motive which you’ve suggested.
25 I’m sorry to interrupt you.

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1 MR MPOFU: No, no, I think it’s a useful
2 exchange, Chair, but the point of course is that the other
3 side of the coin must also apply and that’s why I was
4 raising an equality point. Nobody can tell me now that
5 there is no reasonable suspicion that the police shot other
6 people on the 16th and that those people who shot there
7 should by now, are known. In fact, the only agency,
8 government agency that comes out of this smelling like
9 roses is the IPID because the IPID, to its credit, has
10 taken statements, even in relation to the 16th and has even
11 dubbed some of the people from whom it has taken
12 statements, suspects, and I suppose that means murder
13 suspects. But the issue is that those murder suspects are
14 roaming the streets and they are working in the police and
15 they have not even as much as been suspended and yet other
16 so-called murder suspects, of issues that are covered by
17 this Commission, are languishing for the past two weeks in
18 the cells. That is the fundamental issue. I’m not saying
19 that this Commission is going to find anybody guilty of
20 murder but what I’m saying is that the basis upon which we
21 got the long postponement of the 272 was exactly that these
22 are some of the issues.
23 Remember, Chair, that one of the terms of
24 reference currently is that the Commission may recommend
25 that people must be prosecuted. Now that is the nub of the

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1 issue and the point I wanted to make further, it is clear,
2 we are not saying that the murders – what Mr Rampile was
3 saying – the murders of the people that happened before the
4 16th are equally reprehensible, like any other murder. So
5 that must be made clear. We must never be heard to be
6 saying there’s some murders that are bigger than others.
7 That is not what we’re saying, but what we’re saying is
8 that insofar as those murders can be called criminal
9 activities on behalf of the unknown murderers - and we
10 resist the temptation that is bandied about that it means
11 that those people who were killed by the 3 000 people who
12 were sitting at the koppie, or 300 of our clients who were
13 arrested – that we reject with the contempt it deserves.
14 But we are saying that – and we are not even saying, Chair,
15 that if the police know that Mr X who is one of the 270 was
16 involved in the murder of the 12, that they should sit and
17 do nothing.
18 [10:06] Surely there must be something that is less than
19 the drastic steps that are being taken which have a result
20 of hampering our participation in the commission of
21 Inquiry, ranking from informing us, of course not about the
22 details of the investigation, but that this person, we need
23 this person for fingerprinting because we think they had a
24 gun, or whatever it is, and then making arrangements that
25 those people are available for the Commission, and that

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1 their treatment is not such as to terrorise other potential
2 witnesses. But while we’re sitting here, people know who
3 we are; nobody has engaged us, and as I say, even when we
4 try to engage we’ve been – Mr Semenya kindly on Tuesday
5 gave me the list of police stations where the four people
6 were held, but after that it was once again running up and
7 down at night and by lunchtime the following day we still
8 had not been able to locate the people, and that is the
9 gist of our complaint, Chair. I’m sure with all these
10 legal minds sitting here, some practical solution can be
11 found of how to balance the interests of the Police in
12 making sure that the evidence doesn’t disappear. They
13 can’t just sit and do nothing for six months or however
14 long the Commission is going to take, but at the same time
15 making sure that the interests of the Commissioner are also
16 safeguarded, and the interests of our clients.
17 CHAIRPERSON: Is that all that you
18 propose to say on the second aspect?
19 MR MPOFU: No, Chair. The other issue is
20 that there has been allegations which –
21 CHAIRPERSON: I’m sorry, Mr Mpofu, I’m
22 reminded that what you said so far hasn’t been interpreted,
23 and in fairness to the interpreter, it might be helpful if
24 we stopped at this stage to give him an opportunity.
25 MR MAHLANGU: Thank you, Mr Chairperson.
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<td>1 CHAIRPERSON: Please proceed, Mr Mpofo.</td>
<td>1 here. They will give evidence when they're required to do so.</td>
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<td>2 MR MPOFU: Thank you, Chair.</td>
<td>3 CHAIRPERSON: Never mind giving evidence when required to do so. If it's necessary for the witness</td>
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<td>3 CHAIRPERSON: I was wrong, you're not dealing with the second issue now, you're actually dealing with the third –</td>
<td>4 concerned to give instructions to Mr Mpofo to enable him to cross-examine Colonel Botha, then it would be appropriate for that person to be here today so that those instructions could be given. Is he close by? Is he somewhere in the district of Rustenburg? Can he be brought here by lunchtime today?</td>
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<td>5 MR MPOFU: No, I'm still, I'm rounding up</td>
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<td>8 CHAIRPERSON: Yes, round up then.</td>
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<td>9 MR MPOFU: - rounding up the second,</td>
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<td>10 thank you, Chair. The only point I want to record, put for the record is that there have been allegations in relation to the persons who have been arrested of torture and assault, and as I've already mentioned, manhandling, and that behaviour is also to us supportive of the fact that the, whether by design or result, the attitude is that these people should not even be here.</td>
<td>11 The other point is that they were identified here clearly, because according to them they were followed from the Commission and clearly, I mean now that we understand there's a gentleman from SAPS who's taking videos, that makes us even more uncomfortable because it looks like when we bring people here, there is some undeclared identity parade that is conducted and they get identified. So all in all, Chair, our attitude, yesterday we had a consultation, the attitude of our clients is that firstly they do not see their way clear to coming here in the numbers that we would like them to come, or at least some of the specific people that we'd like to come, but also they might not see their way clear to further participation in the Commission if this is going to be the order of the day, or rather if nothing is done, which I'm sure the Commission will make some recommendations, or some of our learned colleagues. So I wouldn't expect that nothing will be done, but that something that needs to be done has got to be satisfactory and address the concerns that we have raised because otherwise it will not be possible for these victims and eyewitnesses to be of any assistance, or effective assistance to this Commission.</td>
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<td>11 –</td>
<td>13 I think we've already dealt with the first and the second, but Mr Bruinders, I beg your pardon, you indicated you wanted to speak next.</td>
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<td>13 MR BRUINDERS SC: Only about the third aspect. The people who have been arrested are all members of AMCU, and as you know, we act for AMCU. We have, of the four who were arrested we have three incomplete statements and we were hoping to complete them certainly this week. One of the reasons we were hoping to complete them was that at the end of last week the evidence leaders contacted us to ask us whether we would be prepared to lead in evidence some of the strikers, and they include Mr Mpofo's clients who happen to be our members. We gave an undertaking that we would, subject to their – because at that stage we knew that they were, they had been arrested – subject to their being released and subject to their being available here at the inquiry, so that we could take instructions from them for the purposes of preparing them for leading them, but secondly also as Mr Mpofo has already said, and I think we all now understand, the strikers are the only people with a different version than the Police. So we obviously also as AMCU, you will understand that Mr Mathunjwa left before the fatal shooting on the 16th and so he doesn't, he and his team were there, but I don't know either exactly how the shooting took place. But obviously AMCU's members do, and</td>
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<td>1 MR SEMENYA SC: I'm instructed that the individual is busy with a bail application.</td>
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<td>2 CHAIRPERSON: Maybe during the tea adjournment it will be possible for you and Mr Mpofo to get together and exchange notes on that. It would seem from the way he's shaking his head that your instructions may not be correct. But anyway, let's not spend time on that now, but I understand to be implicit in what you said is that if he isn't involved in a bail application the necessary arrangements would be made to have him here so that Mr Mpofo can take instructions during the lunch hour. Is that okay?</td>
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<td>3 MR SEMENYA SC: Indeed, Chair.</td>
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<td>4 CHAIRPERSON: Alright, okay. Anyone further wish to say anything on the three aspects that we –</td>
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so we need instructions from them throughout the course of this inquiry, not just for the purpose of leading them but so that we can ask properly prepared questions of whoever is giving evidence here, particularly the Police. Now Commissioners, Chair, Mr Mpofu has quite graphically painted the picture. Our difficulty is the following. Our team really cannot participate in the way that we would like to participate, and the way that the evidence leaders have asked us to participate, if our members are arrested and treated in this fashion. We simply can’t, Mr Chair. That’s the first point. The second point is that we now know, because not just only has Mr Mpofu told us this, but our client has been in contact with some of these people and they feel hugely intimidated by what’s happening here, and feel quite reluctant to meet with us to complete those statements because they feel that there will be further consequences down the line –

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consult with them away from the Police, out of earshot of the Police. So I wouldn’t think one could conclude that it would be impossible to get instructions from them, and of course any evidence they give here could never be used against them in a criminal trial because of the provision in the regulations to that effect. MR BRUINDERS SC: That might be so,

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form of apprehending a suspect. I would have thought that in the context of this inquiry, what the Police would have done is sought our assistance so that we can arraign people and have them arraigned properly, get them there, get whatever processes have to be followed for criminal courts, get that done and that, as far as I understand, has already been done. The Police have simply gone and unlawfully rearrested our members, so that they’re acting in contravention of an order by the Magistrate, but we can come to a practical arrangement as to how to deal with people whom the Police have identified and envisaged are needed for other investigations. We can come to a practical arrangement, and what we want to propose is that we do that today before we proceed, so that we don’t have the situation where we have this guerrilla warfare between the Police and us where on every second day somebody is arrested or they can’t be found or they won’t get here because they feel intimidated. Can we have that at least sorted out before we proceed today, Mr Chair?

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for instance the other parties, either that some arrangement has been reached, or there’s no further point in your having discussion? MR MADLANGA SC: Chair, Commissioners, it’s a practical suggestion and it’s acceptable to us. Chair, there’s an issue that my learned friend, subject to how the Commissioners feel, Mr Chaskalson would like to raise. It relates to, as I understand, to the definition of the issue which is –

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Chair. Of course one could do that, but it doesn’t take a lot of adding up to conclude that this is a campaign of intimidation of our members and our witnesses. It really doesn’t take a lot of adding up, and until they are released so that they can participate fully in this inquiry, as they should, the adding up won’t stop. Now we don’t want things to be postponed and we agree with our learned friend in the LRC that there’s no need for a postponement, but we certainly believe that we should stand down now – I don’t mean right now, I mean once you’ve heard from all of us we should stand down so that we can sort this out. You know, Commissioners, not all of us are criminal advocates or lawyers, but I would have thought –

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THAT’s not a happy way of putting it. I think we know what you mean. MR BRUINDERS SC: No, but I would have thought, Chair, that what the Police might have done, because of course arrest is the last, it’s the most extreme
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[INQUIRY ADJOURNS]

[INQUIRY RESUMES]


Those members of the public who are sitting in the auditorium who may have been puzzled at the long delay in coming back, the fact that we adjourned just after half past 10, will be pleased to hear that the time that has been spent in the interim has resulted, as I understand, in an accord between the Police Services on one hand and certain of the other parties on the other. Mr Semenya, are you able to tell us the details of that?

MR SEMENYA SC: Perhaps, Chair, I don’t share the good news you would have been told. Mr Mpofu wants to address us, I think.

CHAIRPERSON: Mr Mpofu, I’ll call upon you but I must point out to you we haven’t got the interpreter at the moment.

MR MPOFU: Oh.

CHAIRPERSON: So as soon as he comes you can start, I think. I had been told that there was an accord and it was good news. I hope that I was not misinformed but in view of the fact that the interpreter is now with us, you can address us.

MR MPOFU: Okay. Chairperson yes, I must say that until about five, 10 minutes ago I was also of the same view as you. The news was indeed good when we adjourned the meeting, the off-site meeting. It has since transpired that – or maybe I can just summarise without taking away from what Mr Semenya is going to say. Part of the good news was that the police were prepared to release the persons concerned upon certain conditions today and hopefully be able to have them coming here today and we indicated that in relation to the others, you know the time didn’t matter except for one, the one person that we had needed for the consultation. Unfortunately, our attorneys on the ground at the Ga Rankuwa court have now informed us that the first bail conditions that were granted were quite onerous and unacceptable, as it were. The amount of bail that has been suggested is R5 000 per person. They are still engaging with Mr Semenya on trying to relax the bail conditions, particularly in relation to the amount, and I have pointed out to him that in relation to the –

CHAIRPERSON: I’m sorry to interrupt you, Mr Mpofu.

MR MPOFU: Yes.

CHAIRPERSON: You’ve obviously been involved in these negotiations, you know what happened.

Those of us who were not involved don’t know what happened.

I simply heard that an accord had been reached and it was agreed that there would be a release of certain persons on bail, that’s all I know. I know nothing more than that and the people sitting in the audience who are entitled also to know what’s happening, know even less than I do. So I think before you deal in detail with the problems, you might give us a general outline so we can better follow what you’re going to tell us.

MR MPOFU: Thank you, Chair. Once again I’m sure my colleagues who were part of the meeting, evidence leaders and Mr Semenya in particular, might want to add but my understanding was that at the meeting three issues were addressed. One was the issue of giving access to the evidence leaders to some of the dockets in order to satisfy them about the grounds for arrest and I think that matter was resolved.

The second issue was the issue of the arrest of the persons and I must add that we, upon checking with my attorneys, the number of people involved is nine, nine people. I had forgotten earlier but there were two people who were denied bail last week on the basis that members of NUM were demonstrating outside the court and they were denied for their own safety. I’m just putting that as an aside. So that’s the issue that I was addressing.

The third issue, Chairperson and honourable commissioners, was what we suggested from our side, that there should be some kind of protocol of dealing with this kind of issue in the future involving, for example, us being informed promptly if someone has been arrested and that was resolved - not completely resolved but we were happy with the suggestion that such a protocol will have to be crafted bilaterally between us and the South African Police Services. So to that extent that matter was also resolved.

It would seem that of those three matters, the two are resolved subject to those qualifications and the third matter that we thought was resolved, was this issue of releasing people on bail and what – the rest of what I said then applies to that. Thank you. Chairperson before, if I may just interject for a second, maybe in terms of putting something concrete on the table, our proposition would be that it would seem that the attendance of the persons, even with the best will in the world, will not be secured now in the next couple of hours. Unfortunately we can’t – I cannot predict how long it will take before we can find each other with the police, so that’s all I’m prepared to say at this stage.

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It's just impossible to comply, Chair.

MR SEMENYA SC: Chair and members of the Commission, the real sharp question is, we have been attempting to assist the Commission as best we can and bail was finally secured for the affected individuals at R5 000 per person. And the other contention on the other side is that they must be released on warning. We're talking about people who are arrested for triple murders, possession of firearms, intimidation of individuals – there is serious apprehension about the possibility of continued violence with their release but that notwithstanding, we have attempted to do the best we can and the odds are - on either side, we have a deep appreciation that this does not necessarily fall within your province for the determination of bail, but at the point of stand down we were talking about four people. Now we're talking about nine people. It's just impossible to comply, Chair.

CHAIRPERSON: Yes, well, clearly –

MR TIP SC: Mr Chairman –

CHAIRPERSON: Yes, I'm sorry? Mr Tip?

MR TIP SC: Yes, may I just put something on record in respect of the position of NUM. When this matter was adjourned early this morning or at about 10:30, we had understood very clearly that it was a question of discussion between, essentially, the South African Police

Service and the affected counsel who wished to call the individuals concerned and that this was a discussion that would go around facilitating access for the purpose of consultation. We thought it inappropriate for NUM to be present at a discussion about consultations with essentially AMCU members and so we remained out of that discussion.

It was with considerable shock that we learnt at the end of it that an agreement had been struck that a number of people would be released on bail and these are people, as my learned friend Mr Semenya has just said, are – some of them involved in allegations of being culpable in respect of three murders. Now those are essentially killings of NUM members and at least in some of those cases the person to whom you referred earlier, Mr Bongo who was the man who pointed matters out to the Commission and by the end of that week had been shot dead. So that we had understood, at the very worst, that there was a discussion that would take place about four people and they were the four people who'd been arrested at the conclusion of the proceedings last Tuesday.

I now hear for the first time that there's talk about nine people. Now even Mr Semenya appears to be surprised at that.

Now Mr Chairman, we are absolutely of the view that this is not a matter that is really within the Commission's jurisdiction but it has arisen and various facilitations have been attempted. From the perspective of NUM, though, we must place on record that the release of persons who have been arrested on charges of this nature is extremely prejudicial to other NUM members and officials and also to our already very fragile prospect of securing the witnesses who will be prepared to come and testify before this Commission. So I'd hoped, Mr Chairman, that whenever I had anything to address the Commission on, it would be positive and would readily advance the position of the Commission. In this instance unfortunately that's not possible. It is a matter of very, very grave concern to us.

CHAIRPERSON: Yes, thank you. As you said, it's not a matter within the province of the Commission. If there are bail applications and there are contentions as to what conditions would be appropriate, that's a matter for the court in which the bail application is brought. It wouldn't be proper for us as commissioners to express our views and try to influence the judicial officer concerned with the bail application in one way or the other.

The only reason it came here was that Mr Bruinders suggested when the matter was debated, that it might be possible if there was a meeting between the representatives of the various parties, for an accord or an agreement of some kind to be worked out and it's for that reason that we adjourned and I indicated, if it became clear at any point that agreement would not be possible, that was to be reported to me so we could resume. And it was eventually reported to me that an accord had been reached, which is why we came back, but it would seem at the moment from what you said that there isn't an accord and it doesn't seem likely there will be one before the end of the hearing today, so we may as well proceed, subject to any application people may wish to bring. But Mr Bizos, you want to say something? You raised your hand.

MR BIZOS SC: Yes, Mr Chairman, we started almost a month ago and we are halfway through the first substantial witness. Your patience led you to adjourn the proceedings in the hope that there would be an accord. We all thought, when we dispersed before the lunch adjournment, that there was an accord.

I want to make a submission for your consideration, Mr Chairman. We know that there are difficulties and that Mr Dali Mpofu, Mr Mpofu has, but the witness is in the witness box, we are in the afternoon of the day that we thought that we would finish him. We are mindful of the difficulties of the would-be cross-examiner
but surely he can proceed to cross-examine. If there is
anything that he wants to check or cross-examine on, on
which he is not ready, he will have the evening and early
in the morning to get instructions. But we cannot, with
the greatest respect, in a matter of such importance – not
only to the parties but the country as a whole – to kick
for touch so often that this Commission is going to last
far beyond the envisaged period that anyone may have had,
ever mind the four months.

So what I would submit for your consideration is
that we proceed this afternoon and sit late in order to
make up for lost time so that the substantial portion of
the cross-examination of the witness can take place during
the time available and we are accustomed – I am sure as Mr
Mpfou is – of getting instructions during non-court hours,
so to speak. That is the submission that I make for your
consideration.

CHAIRPERSON: Thank you, Mr Bizos. There
is, of course, a further consideration that Colonel Botha
was present at the inspection in loco, he pointed out
points at the inspection in loco in the presence of
counsel. Parties – other people who weren’t present at the
time, came later. There would have been an opportunity for
instructions to be taken then. My own instinct at the
moment is along the lines that you suggest and to sit late

if necessary, to make up some of the lost time subject to –
there will be an application, I understand, for a
postponement or there may be, which we’d have to deal with
and I must keep as open a mind as I can on that. But
before you proceed, there are two points I want to make
that may be relevant to what is now under discussion.

The first is that I understand that the question
of transportation and accommodation of the families has
been addressed and the Minister of Justice has issued a
statement which I understand Mr Mdlanga has a copy of in
his possession, so I shall ask him to read. He says he
hasn’t. Well Mr – he now has it in his possession. I’ll
ask him to read it. That’s the first point, so that means
that the family attendance issue is now out of the way.

The second point I want to make is, I understand
from something I was told during the adjournment, that a
request has come from the side of the – what Mr Bizos
called the would-be cross-examiners – that Colonel Botha
should show the video that he took, or rather the video
which he took when he was in the helicopter should be shown
as a necessary preliminary to his, to the further cross-
examination. And subject to what people may say, I was
minded to grant that request and once the video has been
seen – I understand it takes about 40 minutes, 40-odd
minutes – to allow those who have already cross-examined,

if they’re so minded, to ask further questions in the light
of what is on the video and thereafter an opportunity would
be afforded to the would-be cross-examiners to cross-
examine.

I am also minded to sit until six o’clock tonight
to make up for some of the time that we’ve lost. Time –
the time available to this Commission is not unlimited and
it behoves us to make as much use of the time that’s
available to us and if, for whatever reason, time cannot be
spent during the day on the main work of this Commission,
then we must be prepared to sit longer hours in order to
compensate, to some extent, for that. I think Mr Mpfou
raised his hand and so did Mr Bizos.

MR BIZOS SC: Yes.

CHAIRPERSON: But should we not get the
statement read first, because I don’t think that many
people know what exactly the Minister has said and it’s
certainly important in respect of one aspect, so Mr
Mdlanga you’ve now got the document in front of you –
would you be kind enough to read it to us?

MR MDLANGA SC: Thank you Chair,
commissioners. It says, “Document issued by Mr Mthunzi
Mhaga, the spokesperson of the Department of Justice and
Constitutional Development.” It reads as follows,
"Minister of Justice, Jeff Radebe, has instructed the state
law advisers to amend the regulations governing the
Marikana Commission of Inquiry to ensure that the state
makes arrangements to assist representatives of the
deceased victims of the tragic incidents to attend and to
remain in attendance for the duration of the inquiry or for
such time as they wish to remain in attendance.
[14:09] The department has liaised with the Commission
this morning to convey its intention to submit the proposed
amendment to the President before the end of business. The
Minister of Justice and Constitutional Development, Mr Jeff
Radebe, regrets any confusion and misconception that may
have been created by the decision taken by the Department
this past Saturday. Government has the interests of the
families of victims at heart, hence that we are working
tirelessly to salvage the situation. It should also be
noted that the interests of the families are safeguarded by
the seasoned legal representatives currently participating
in the inquiry which is underway.” Thank you, Chair.

CHAIRPERSON: Before I call upon one of
the seasoned legal practitioners who was referred to, I’d
like to enquire from – I think it’s Mr Budlender is the one
I was asked the question of – whether it is correct, when I
said that I’d been told that there had been a request that
Colonel Botha’s video be seen, the practitioners concerned
nodded their heads. Is it possible for us to see that
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1. video this afternoon?

2. MR MADLANGA SC: It is possible, Chair.

3. Arrangements have already been made with the gentleman who takes, or rather who does the video recording for the Commission and copies are up there already. Thank you.

4. CHAIRPERSON: Thank you.

5. MR MPOFU: Yes Chair, if –

6. CHAIRPERSON: Sorry, I think that was recorded. It seems sensible we should watch the video and it can be seen – I just want to enquire from Mr Budlender whether there's anything, I don't know whether any members of the family are here. I know some of the local people may well be here. Is there anything which is likely to cause distress because if so, we should give that warning beforehand.

7. MR MADLANGA SC: Chair, commissioners –

8. CHAIRPERSON: Mr Madlanga, you are [indistinct] not Mr Budlender, forgive me.

9. MR MADLANGA SC: Thank you. Chair, commissioners, we have viewed Colonel Botha’s video. I do not think there’s any material that might be offensive in it but Chair, may I take this opportunity to make a request? Colonel Botha approached me and he assured me before saying anything that he was not going to discuss the case as he is under cross-examination. He said he’s aware of kicking for touch. And also we cannot have people of the ethics around that issue but he insisted on talking to me and he made the request that, prior to anything relating to him taking place today, he would like to say something to the Commission. I do not even know what it is but he said he would really, really like to say something to the Commission. Thank you, Chair.

10. CHAIRPERSON: I suppose I must grant his request. Colonel? Before you speak, is this going to be part of your evidence because if so, I may as well remind you anyway, you’re still under oath in respect of the oath you took last time. Mr Mpofu, what do you want to say now?

11. MR MPOFU: Mr Chair, I just wanted to address the issues that were raised in relation to what we said, but also touch on this issue of the cross-examination that you, the sequence that you have suggested. Chair, I just want to say that we are as keen as everyone to have the matter moved on and we don’t take kindly to suggestions of kicking for touch. And also we cannot have people detained forever simply because a grouping of people will not like it. I mean that’s not how it works.

12. CHAIRPERSON: Mr Mpofu, you don’t have to tell me that. I’ve already indicated that as far as the bail is concerned, that’s a matter for another court. It would be improper for us to say anything, so you don’t have to make the speech you’re making to me now because if you want to make it, make it in the magistrate’s court when the bail application comes –

13. MR MPOFU: It has been made there, Chair.

14. CHAIRPERSON: Well, good. It’s not necessary to repeat it now, just carry on with your argument.

15. MR MPOFU: Yes. Chairperson, I’m sorry I have to insist on this – if remarks have been made regarding my clients about their ability to attend here, I have to correct them now. For example, it has been said here that we’ve said anything about four people. We never said anything about four people. This morning’s record will show that I said about six or seven people and all I did was to explain about another two, but two people have misrepresented what I said and therefore I have to make the speech. Thank you.

16. CHAIRPERSON: Thank you. The next issue that I wanted to talk about was the issue of the video that, Chairperson, you’ve touched on. We made the request this morning, since we were in the middle of the cross-examination, that the video should be prepared in order to be interposed in that cross-examination. So we would kindly request that the – or rather it’s two videos but I think the important one is the one that is ascribed to Colonel Botha. So we would kindly request that if anybody else is going to ask questions regarding those videos, that that should be done after we have dealt with the issues that we wish to deal with, for which we asked for the video to be played in the first place.

17. CHAIRPERSON: Mr Burger, you look as if you want to say something?

18. MR BURGER SC: Chair, I just do not follow the process. Is the idea now that we will watch a video and then certain people will cross-examine and my learned friend Mr Mpofu will then ask for a postponement, or is the application for a postponement not there anymore or when does it come or when can we go on with this evidence, I would like to know?

19. CHAIRPERSON: I understand – I suppose I shouldn’t say that I understand, maybe Mr Mpofu will tell us but first I will say what I understand. My understanding is, we’re going to see the video of the Colonel after the Colonel has made the statement he wants to make. I had indicated that I would then allow further cross-examination based on the video and I would go back to where we started in cross-examination and allow counsel who’ve already cross-examined, to cross-examine if they wish on matters emerging from the video. Mr Mpofu has pointed out that he’s the one who requested the video to be shown. It being shown is really to be regarded as part of

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his cross-examination and he'd like to cross-examine on it
before the others get a chance. It seems to be a
reasonable suggestion in the circumstances.
I didn't understand him to be saying he doesn't
want to cross-examine, he doesn't want – he wants a
postponement. I understood him to say he would like to
cross-examine before Mr Bizos and Mr Semenya and you and Mr
Tip get a chance to cross-examine, and Mr Bruinders, get a
chance to cross-examine further. So it sounds to me, if I
may say so – if I'm wrong, Mr Mpofu, I'm sure you will
immediately hasten to correct me but that's my
understanding. Have I got it right, Mr Mpofu?
MR MPOFU: Yes, you've got it right, at
least to the extent that I never mentioned the word
"postponement" this afternoon.
CHAIRPERSON: No, you did mention it this
morning but not this afternoon, right. No, I take what you
said. Right, now Colonel, I've already reminded you,
you're still under oath. Oh sorry, Mr Ntsebeza indicated
he wanted to say something. Have you still got something
you wanted to say, Mr Ntsebeza?
MR NTSEBEZA SC: Well, if that's your
ruling, Mr Chairman, that's your ruling, I cannot take it
further but I was submitting that the families were here
when the cross-examination of Colonel Botha started and
they would like to be here when his cross-examination
continues.
CHAIRPERSON: I understand that but on
the other hand, as I pointed out earlier, the time
available to this Commission is not limitless. We have to
make the best use of it. I could understand that the
families would want to be present when evidence is given
about the actual killing of their loved ones, but it seems
Constitutional Development during the adjournment and we
immediately consulted our attorneys and established as to
what their instructions are. Our attorneys have asked us
to indicate to you that there is a lack of specificity
about what is intended to be done and your experience, Mr
Chairman and members of the Commission, will testify to the
fact that not everything that has been stated as being the
intention has actually actualised.
The families were here when Mr Botha was cross-
examined and since then have expressed a further wish of
being present when further cross-examination of Mr Botha
takes place. We now are told that that may be as soon as
tomorrow or we do not know when it is going to be. Our
request is that whatever arrangements are made to transport
and get the families to be here, made by the Commission or
by people on behalf of the Commission, should be done in
liaison with the attorneys who are in constant contact with
the families.
We keep on being told that the families have said
this to representatives from the Department of
Constitutional Development and Justice, that they have
preferred money instead of being transported to here. When
we –
CHAIRPERSON: Mr Ntsebeza, I don't want
to interrupt you but really, I don't think that point is
to me that regard being had to the nature of the evidence
the Colonel is giving, it would be in order if that
evidence – if they wished to know what he says – could be
interpreted to them from the transcript when they arrive.
They can also be shown the video. I'm not sure whether
they'd be able to give any meaningful instructions on the
cross-examination, regard being had to the nature of the
evidence he's giving, but if they were to give meaningful
instructions to counsel then an application could be made
for the recall of the witness and if it was considered
appropriate, the recall of the witness would be allowed so
that these meaningful instructions, if any, could be the
subject of further cross-examination. That is my ruling.
LT-COL BOTHA: Mr Chairman, I've got one
ting to say and then I've got a request after that. The
last remark on Tuesday afternoon, last Tuesday afternoon by
Adv Mpofu was actually that he will bring someone that, or
a witness that sounds to me that said that they were shot
from the chopper and it made me think what could or
could not have happened where I was which could've given
that impression. And just before we walked out of here, we
already broke, I remembered that two stun grenades were
released from the chopper while I was in the chopper. I
didn't remember it by then, I remembered it just as we
broke and I didn't want to – I mean I couldn't inform
anyone in the meantime because I was under oath, so I
didn't want to go that way. I decided this morning early
that I would rather come and say it here than say it to
someone else at some other place.

CHAIRPERSON: I understand you’re going
to show, we’re going to see your video. By way of
introduction I’d just like to ask you something about it.
How many helicopters were there in the air at the time?
LT-COL BOTHA: Sir, according – as far as
I can remember there were four, four choppers.
CHAIRPERSON: Four choppers. I think you
said you were in the air for about 41 minutes, I think
that’s – that’s either in what you said or it’s in the
statement that you made, which is part of the IPID trial,
is that correct?
LT-COL BOTHA: It must’ve been in the air
for a bit longer than 41 minutes because the video is 41
minutes.
CHAIRPERSON: I see. Right, can we now
see the video? Do you want to say something further,
Colonel, before we see the video?
LT-COL BOTHA: Sir, then I’ve got a
request. I’m going to ask the Chairman to make a ruling on
that, that I just express myself better in Afrikaans, I
would prefer to testify further in Afrikaans although I
started in English but I will stick to your ruling if you
feel it’s not appropriate.
CHAIRPERSON: We will have the difficulty
that I think some of the people here don’t understand
Afrikaans, so we’d have to have it interpreted twice, once
into English and once into isiXhosa. I hope you’ll forgive
my saying that I found your English very good but I take it
you forgive me for saying that.
[14:29] May I suggest that you give your evidence in
English, but if at any time, you are at loss for a word, or
you feel you can express yourself on a particular topic
better in Afrikaans, then feel free to switch over to
Afrikaans, and then the interpreter can interpret what you
said in Afrikaans. Would that meet the thrust really of
your request?
LT-COL BOTHA: Mr Chairman, I am fine
with that, thank you.
CHAIRPERSON: Alright, okay.
MR MPOFU: Chairperson, just to try and
save time, I just wanted to indicate that there are two
videos that we had asked for, this one, we would like it to
be played in full, but to save time, the next one can just
play even five minutes or so because it’s more for
comparative purposes rather than the content.

CHAIRPERSON: It’s the other video that
you want to see?
MR MPOFU: It’s another, it’s the same,
it’s a helicopter shoot, footage rather from a different
helicopter.
CHAIRPERSON: Alright, that sounds
right. That sounds acceptable. Colonel, perhaps you
can, if you consider it necessary, you might give us a
little bit of commentary from time to time, for example, I
take it what we have on the screen at the moment is the
beginning of the video. Is that true? I will ask those
who are responsible for the lighting to turn the lights
off, so that we can see the screens better. Mr Bizos has
said that we can start while the switch is being looked
for. I think that’s the problem. So shall we start? And
if there’s something that we can’t see when the lights are
turned off, we can perhaps go back to that point.
[VIDEO BEING SHOWN]
[14:29] [VIDEO BEING SHOWN]
[14:49] [VIDEO BEING SHOWN]
[15:09] [VIDEO BEING SHOWN]
Are the lights all fully back on? Are you happy to
continue then, semi in darkness, Mr Mpofu? We will throw
some light on the matter by your cross-examination.

CHAIRPERSON: Colonel, you were still
under oath. U is nog steeds onder eed.
MR MPOFU: Thank you, Colonel we left off
where I was asking you a non-contentious issues. I am just
going to continue with those for a while. It is so, isn’t
it, that you are a video, you have been a video camera
operator for the past 26 years?
LT-COL BOTHA: Yes, I am a video camera
operator.

MR MPOFU: For 26 years?

LT-COL BOTHA: I did training 26 years
ago, yes, let’s say 26 years is correct.
MR MPOFU: You are also a crime scene
expert?
LT-COL BOTHA: That is correct, Mr Chair.
MR MPOFU: And on the 16th at least you
were asked to come and film a particular crime scene.
LT-COL BOTHA: I was requested to film
the dispersal and disarmament of people, that should have
taken place.
MR MPOFU: Did you do that?
LT-COL BOTHA: Yes, I did.
MR MPOFU: Is part of what you observed
the fact that the particular scene was surrounded by Nyalas
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LT-COL BOTHA: I cannot deny it, but I deny that they were surrounded.

MR MPLOFU: The question is, you cannot see them on the video. They were surrounded, what I say is there was a lot of policemen, you could see them on the video.

LT-COL BOTHA: Yes.

CHAIRPERSON: I take it you saw the Nyalas. You can confirm there were Nyalas?

LT-COL BOTHA: Yes.

CHAIRPERSON: You can confirm they were Nyalas. Your inability relates to confirm what you saw, as it's put to you relates to Dog Unit handlers and what else?

LT-COL BOTHA: And people on horseback.

CHAIRPERSON: People on horseback.

MR MPLOFU: Alright, further it is when you still airborne or when you were grounded, you did see some policemen on horseback.

LT-COL BOTHA: Mr Chair, at no stage did I see policemen on horseback.

MR MPLOFU: What is known as the Mounted Unit, does that refer to police on horseback?

LT-COL BOTHA: That is correct, Mr Chair.

MR MPLOFU: And if someone says there were members of the Mounted Unit, would you be surprised or rather what would your evidence be?

LT-COL BOTHA: I cannot confirm or either.

CHAIRPERSON: What that means, I take it is that there could have been members of the Dog Unit, it's possible they were there. You can't confirm it, you also can't deny it? Is that correct? It is possible that they were there. Would that be a fair comment?

LT-COL BOTHA: It's possible that they were there, if I told you that there were also members of the Dog Unit, what - would your response be the same?

LT-COL BOTHA: I cannot - well, if you say so, I'll either have to believe you or don't believe you.

CHAIRPERSON: What means, I take it is that the kraal is J, Mr Chair.

MR MPLOFU: Okay. Yes, then H, if that is the case, would be the large koppie, isn't it?

LT-COL BOTHA: That is correct, Mr Chair.

MR MPLOFU: And K would be the small koppie.

LT-COL BOTHA: Mr Chair, Mr Mpofu just said K as the large koppie, is that what you confirm to as the small koppie or the large koppie?

MR MPLOFU: No, my understanding is the first shooting happened near the kraal, is that correct?

LT-COL BOTHA: That is correct.

MR MPLOFU: Okay, where in relation to B1 is that?

LT-COL BOTHA: The kraal is J, Mr Chair.

MR MPLOFU: Okay. Yes, then H, if that is the case, would be the large koppie, isn't it?

LT-COL BOTHA: That is correct, Mr Chair.

MR MPLOFU: So the gist of my question therefore was that you can confirm that there were Nyalas which were located behind location K.

LT-COL BOTHA: That is correct, Mr Chair.

MR MPLOFU: And there were Nyalas that were still around position J.

LT-COL BOTHA: I think it's visible on the videos so I am not 100% sure now, but it is visible on the video, that's correct, yes.

MR MPLOFU: It is yes. And I think your evidence was that some of the people who were running from J to K, towards K, from H, the vicinity of J and H towards K.

LT-COL BOTHA: No, Mr Chair, I did not say that they were running from a specific point, what I did say, you can see on the video that people are running. Even at a later stage in the video, you can clearly see that people are running.
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1. MR MPOFU: Are you aware of people who
2. were hiding at position K?
3. LT-COL BOTHA: No, Mr Chair, not evening
4. the video can you – it is just too high up, you cannot see
5. those people hiding there.
6. MR MPOFU: What do you mean, you were too
7. high up? Which helicopter were you in, of the two that we
8. saw?
9. LT-COL BOTHA: I was in the first one.
10. MR MPOFU: Your evidence earlier was that
11. part of the activities of the people in your helicopter was
12. to throw a stun grenade, two stun grenades if I am correct.
13. Is that right?
14. LT-COL BOTHA: That is correct, Mr Chair.
15. MR MPOFU: At whom or at what? What was
16. the target?
17. LT-COL BOTHA: Sir, it was a operation
18. proceeding taken by Brigadier Fritz he just gave the
19. instruction.
20. MR MPOFU: Well what will your comment
21. be, I am going to argue at the end that if you were close
22. enough to throw stun grenades, then you would have been
23. close enough to see the people because you wouldn't be
24. throwing stun grenades from so high up, otherwise they
25. could have gone anywhere.

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1. LT-COL BOTHA: Mr Chair, you can clearly
2. hear in the video on the sound of the chopper that it went
3. up and down and when it made that loud noise, it is either
4. tilting up or tilting down. We did not fly at the same
5. height the whole time.
6. MR MPOFU: Thank you. So at times, you
7. were low enough to be able to throw stun grenades onto the
8. ground.
9. LT-COL BOTHA: That is correct, Mr Chair.
10. MR MPOFU: And you will correct me if I
11. am wrong, I would have seen that stun grenades were being
12. thrown at people, so you would have been close enough at
13. those times to be able to observe the people at whom you
14. were throwing the stun grenades, correct?
15. LT-COL BOTHA: Sir, there were people on
16. the ground where the stun grenades were thrown.
17. MR MPOFU: Thank you. Now, the
18. helicopter that you were flying in, you've already
19. testified, I think more than once, that – well, let me put
20. it like this, the distance between the Nyalas that were
21. behind position K, which are, I put to you were part of the
22. surrounding group, I know you said you can't confirm or
23. deny it so I don't want to put words in your mouth. So I
24. will only confine myself to the Nyalas that we both agree
25. were at the back of K, and the ones that were at the front.

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1. I don't know, do you know what a radius is?
2. LT-COL BOTHA: Yes, Mr Chair.
3. MR MPOFU: Okay, if those two sets of
4. Nyalas were forming part of a circle, what would be the
5. radius of that circle, the distance between the two points?
6. LT-COL BOTHA: Mr Chair, let me just
7. confirm, I said there was Nyalas behind the people. I
8. cannot recall saying they were on the other side of the
9. kopjie. I can remember that there was I think a water
10. canon, because it looks a bit different than an Nyla, on
11. the other side of the kopjie.
12. MR MPOFU: Okay, sorry, Captain, no, you
13. did say, remember when I took you to the map, you did
14. confirm that there were Nyalas behind position K. So I
15. don't want us to go back there.
16. LT-COL BOTHA: So, can we just get where
17. is behind, is it on J side, on let's say G's side of the
18. map?
19. MR MPOFU: Well, where do you think it
20. was when you said, yes, there were Nyalas.
21. LT-COL BOTHA: I thought on J side that
22. you were talking about, on the eastern side.
23. MR MPOFU: Okay, so that moves us right
24. back. Did you observe Nyalas way from J and K, and I
25. suppose that's the western side, in other words, behind the

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1. position K on the western side.
2. LT-COL BOTHA: There were Nyalas at the,
3. let me, if you look at the video, can I just explain it in
4. that way? At some stage in the beginning of the video you
5. can see that there are Nyalas behind, let's say to the
6. eastern side of K. I did look at the video even now, and I
7. can't recall now if there was any on the western side of K,
8. but if the video shows that, then it's obviously there.
9. MR MPOFU: Okay, what I am getting at is
10. the following, and I am going to put it like this, between
11. the position J where you and I agree there were Nyalas and
12. position, behind position K, that distance would be about a
13. kilometre.
14. LT-COL BOTHA: I think it was measured at
15. 6 – between 5 and 600 metres. It's somewhere on the key.
16. MR MPOFU: No –
17. LT-COL BOTHA: Not?
18. MR MPOFU: - that's the one distance you
19. did not –
20. LT-COL BOTHA: Is it not there?
22. LT-COL BOTHA: Okay, sorry.
23. MR MADLANGA: Mr Chair, Commissioners –
24. CHAIRPERSON: Yes, Mr Madlanga.
25. MR MADLANGA SC: It was measured, except
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LT-COL BOTHA: If I must look at the map, if I recall the video middle of scene 2, correct?

MR MPOFU: Yes.

LT-COL BOTHA: Mr Chair, that's correct.

MR MPOFU: One of them was right in the middle of scene 2, correct?

LT-COL BOTHA: Sir, if I recall the video correct, there was a water canon in the middle at the end, where we circled around the koppie at some stage, yes.

MR MPOFU: And so the other that you referred to which was behind position K, would be the second one?

LT-COL BOTHA: If I must look at the map, it's more or less in the south western side, yes.

MR MPOFU: Thank you. Now, I don't want to waste time on this, because as the chair says, it's actually leading up to the next point. I don't want to tie you to a particular distance, but would you agree that – and the distance will be confirmed later by another witness, that the distance between the first set of Nyalas and the water tank was in the vicinity of a kilometre or less.

LT-COL BOTHA: Sir, if we talk about the first set of Nyalas, at what stage of the videos are you talking about the first set of Nyalas? Sorry, I'm not trying to be difficult, I really don't understand.

MR MPOFU: No, Sir. I don't think you are being difficult. I'm saying we're using the water tank that was behind the position K as a marker.

LT-COL BOTHA: Okay.

MR MPOFU: Ja, between that and the set of Nyalas that were at scene 1, would you agree with me that the distance would be about a kilometre or less?

LT-COL BOTHA: If you talk about when the video starts, there are Nyalas in like a half moon, if that's the Nyalas you are talking about, that is more or less – it must be less than a kilometre.

MR MPOFU: Thank you. Right, and that –
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line –

CHAIRPERSON: Ja, then the straight line between the two would be the diameter of a circle.

MR MPOFU: Okay.

LT-COL BOTHA: If you took the middle of that line as being the centre, and got a compass and –

MR MPOFU: Yes, and the equidistance –

CHAIRPERSON: Ja, for the purpose of clarity, when you talk about radius do you really mean radius or do mean diameter of the imaginary circle?

MR MPOFU: Of the imaginary circle, in that sense I mean the diameter, Chair. In other words, the distance, let's say the straight line – let's just simplify it, let's forget the geometry. The straight line between the Nyalas and the second water tank would be about a kilometre or less?

LT-COL BOTHA: That is correct, Mr Chair.

MR MPOFU: And that straight line would determine the scene?

LT-COL BOTHA: If you take it as that, yes, Mr Chair.

MR MPOFU: Now the purpose of this is to suggest to you that in the video that we observed for about 40 minutes, or 41 minutes, the time that you spent at the scene, as you have now defined it, and this is not a

scientific estimation, is in the region of 10 to 20% to be generous, would that be fair?

LT-COL BOTHA: Mr Chair, if I know at that stage that that was a scene, I most probably would have concentrated more on that, but there was the people went into different directions and I video graphed that also.

CHAIRPERSON: Colonel, I understand your answer, but you haven't really answered the question the witness ask – the counsel asked you. Counsel said do you accept that 10 to 20% of the total time of the video is devoted to pictures of what he called the scene, by which he means the scene which is covered by that imaginary circle which we spoke about. Your answer, I understood, implied that the answer was yes, but you said the reason was – and did what witnesses shouldn't do, is you thought what the next question would be and you answered it in advance, which is not always a smart thing for a witness to do, but the point is you do concede, I take it, that counsel is right when he says that about only 10 or 20% of the video is devoted to, what he called the scene, would that be right?

LT-COL BOTHA: What we described as the scene now, yes.

MR MPOFU: Thank you.

CHAIRPERSON: And then you went on to say, the reason for that was that you didn't realise at the time that that was where most of the action was going to be, if you had, there would have been far greater percentage of video pictures of what was happening at that scene, is that correct?

LT-COL BOTHA: If we could fly there, and we were allowed to, Sir, most probably yes.

MR MPOFU: I take it that Brigadier Van Zyl, when he commissioned you to partake in this mission, did inform you that the activities would be taking place at the koppie?

LT-COL BOTHA: Brigadier Van Zyl informed me that they were going to disarm and disperse people. I cannot remember if he said the koppie, but that was the scene, yes.

MR MPOFU: But anyway, you knew that the people were at the koppie?

LT-COL BOTHA: I knew that.

MR MPOFU: Yes. And you knew that the people were not at the mine operations?

LT-COL BOTHA: That's correct, Mr Chair.

MR MPOFU: And you knew that the people were not at the housing units, including the hostels, which are far away from there?

LT-COL BOTHA: That is not where the koppie is.

MR MPOFU: And you knew that the people were not in the rest of the open veld further away from the koppie?

LT-COL BOTHA: Mr Chair, that's not were they were gathered.

MR MPOFU: Thank you. And yet, your video devotes about 80 to 90% of its attention, among others, to those areas that I've just mentioned.

LT-COL BOTHA: When I arrived on the scene, there weren't anyone on the koppie anymore, and there were people dispersing in the veld into the area where the people live, and I also video graphed that.

MR MPOFU: In your sworn affidavit, which was –

CHAIRPERSON: Mr Mpofu, all affidavits are sworn.

MR MPOFU: Well –

CHAIRPERSON: Please get your terminology right, I mean it's irritating. A sworn affidavit is what illiterate people say, an affidavit is a statement which is sworn. So I'm sorry to interrupt you, but get it right.

MR MPOFU: Chairperson, okay, I don't want to be involved in a debate about grammar, but this is
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for emphasis, and I’m talking to a lay witness, I’m just trying to cover two things at the same time, otherwise I’m going to have to ask him two questions. Did you swear to this statement, because your signature does not appear to it?

CHAIRPERSON: In short, he confirmed on oath, last time, that that statement was correct, that’s enough, isn’t it?

MR MPOFU: Yes –

CHAIRPERSON: That’s enough isn’t it?

MR MPOFU: Yes. Thank you, Mr Chair.

about this Colonel, all I’m trying to establish is the statement which you confirmed under oath – maybe if I put it like that it will be better. In the statement that you confirmed under oath, you stated at paragraph 7, and I’m reading from it now, “On 16 August 2012, I made an aerial video recording of the SAPS operation at Wonderkop, Marikana.” Is it correct that you did not do anything of the sort?

LT-COL BOTHA: That is not correct, Sir.

MR MPOFU: So according to you, what we saw here is a video recording of the SAPS operation at Wonderkop?

LT-COL BOTHA: According to me, I was video graphing people that’s been dispersed – that are dispersing into the job into the area, into the living area also, and because you can see it on the video.

MR MPOFU: And the disarming, did you shoot any disarming of anybody?

LT-COL BOTHA: Sir, it’s too high up, you will not see if someone is disarmed, and if it was disarmed, then it could have shown on the video, but I don’t see anything like that on the video.

MR MPOFU: I’m also going to suggest that the – or let me put it this way, when did you first see the footage of your coverage?

LT-COL BOTHA: I cannot remember specifically when, but when it was downloaded. When I downloaded it.

MR MPOFU: Okay, I’m going to suggest to the Commission that the video footage that we saw does not accord with the evidence that you gave, and I’m now going to deal with that. And I’m going to suggest, in that light, that you were either in a different helicopter, or in the second one that we saw, but maybe in – the question is, your evidence is that you were sitting right next to Brigadier Fritz, correct?

LT-COL BOTHA: That is correct, Mr Chair.

MR MPOFU: And Brigadier Fritz was giving instructions or communicating with people on the ground?
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MR MPOFU: Yes. But whatever the technology was on your video camera, it was able to pick up the noise of the helicopter, we all heard it, correct?

LT-COL BOTHA: That's correct, Mr Chair.

MR MPOFU: And it is on that basis that I want to suggest that the activities that you described on Tuesday, which happened inside the helicopter, are not confirmed by the footage, and therefore it is possible – I won't put it higher than that, that that footage came from a different person?

LT-COL BOTHA: Mr Chair, if you look at the – at the reflection in the video that I took in the chopper, you can clearly see my yellow watch reflecting in the video. I made that video.

MR MPOFU: Okay, where is this yellow watch on the video?

CHAIRPERSON: For the benefit of those who later have to read the transcript, the witness put up his hand at that point and showed wrist watch that he has on his left wrist.

MR MPOFU: Okay, I'll look for the event, you did not observe the shooting, the second shooting, correct?

LT-COL BOTHA: No sir, I did not observe the second shooting.

MR MPOFU: But you said, "I was told" –

CHAIRPERSON: Sorry, I think you mean the noise as captured on the camera is overwhelmed by the noise of the helicopter, not by the video camera – or am I saying it incorrectly?

LT-COL BOTHA: No, that's what I meant, Mr Chair.

MR MPOFU: Okay, so are you now saying that the verbal conversations were drowned out by the helicopter noise?

LT-COL BOTHA: I said some of the verbal conversation can be drowned out because you can hear clearly at some stage that someone is calling and, if I'm not mistaken, that is Brigadier Fritz's voice.

MR MPOFU: You also testified that when you disembarked from the helicopter, the shooting at scene 1 had already happened but the shooting – no, no, I'm sorry, that you were told when you disembarked that the shooting at scene 1 had already happened and that there was a shooting at scene 2, if I'm quoting you correctly.

LT-COL BOTHA: No, that's not what I said, Mr Chair.

MR MPOFU: Okay, let's take it one step back. When you went to the scene at about 4 o'clock, you testified that the shooting at scene 1 had already happened, correct?

LT-COL BOTHA: Is that when I went on the ground to the scene or in the air to the scene?

MR MPOFU: In the air to the scene at about 4 o'clock, sir.

LT-COL BOTHA: Mr Chair, in hindsight, if I look at the video, I mean then I can see it already happened.

MR MPOFU: And you said that somebody – that the shooting at scene 2 had not yet happened.

LT-COL BOTHA: I said that I wasn't sure at what stage the shooting at scene 2 happened, so I'm not sure if it had happened or not.

MR MPOFU: Okay, I'll look for the passage but my recollection was that you said the video – in fact, not my recollection, that's what the transcript says. Mr Tip said to you, "As far as you able to tell, at that time did you capture the entire operation on your video recording?" And your answer was, "No, Mr Chair, definitely not. The video, we determined that the video actually started after the shooting at scene 1 had already happened." And then elsewhere, I think you – and in any event, you did not observe the shooting, the second
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LT-COL BOTHA: That is correct, Mr Chair.

MR MPOFU: In fact –

SPEAKER: - to be common cause.

MR MPOFU: Okay, according to the evidence that we will given, it might not be common cause.

The second video that we saw this afternoon came from something identified as a Lonmin helicopter but in any event, all I want to establish, which you have established, is that there was at least one helicopter which did not belong to the police.

LT-COL BOTHA: That is correct, Mr Chair.

MR MPOFU: This was a very sensitive operation, correct?

LT-COL BOTHA: Sir, I can’t really answer on it. It was a displacing and a disarmament operation.

MR MPOFU: It was a big operation.

LT-COL BOTHA: Yes, it was a big operation.

MR MPOFU: There was – there were members of the tactical response unit.

LT-COL BOTHA: I didn’t – yes, if that’s the guys with the black next to their legs then it’s

MR MPOFU: Okay, I’ll make it easier. Sorry, Mr Chair, there was.

MR MPOFU: There was also the national intervention unit.

LT-COL BOTHA: I’m not sure if they were there. I can only know the guys on their uniform. I’m not sure if they were national intervention people.

MR MPOFU: Okay.

LT-COL BOTHA: At that stage I wasn’t sure if they were there. In hindsight, I think they were there, yes.

MR MPOFU: Okay, I’ll make it easier. You cannot dispute that there were also members of the following units, special task force, LCRC, dog unit, mounted unit, air wing, crime intelligence, detectives, crime prevention unit and negotiators.

LT-COL BOTHA: No sir, I cannot dispute that.

MR MPOFU: Okay. At some point in your video I observed there was a group of Nylas. I counted about 62 Nylas clustered in one area. It is –

MR SEMENYA SC: That can’t be true.

LT-COL BOTHA: No, sir.

MR MPOFU: Do you remember that spot where there are – there’s a collection of Nylas on the

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MR MPOFU: Okay, fair enough but you yourself have never observed a private helicopter hovering with police helicopters.

LT-COL BOTHA: Not in an operation where I was involved.

MR MPOFU: You didn’t notice whether the other helicopters also released stun grenades?

LT-COL BOTHA: No, Mr Chair, I will not know.

MR MPOFU: And you didn’t know whether, in addition, there were shots that were fired from one of the other helicopters?

LT-COL BOTHA: No, Mr Chair, I don’t.

MR MPOFU: I don’t know if you can help us with this, maybe just as an expert – as accepting for now that you’re not in the Lonmin helicopter or the other helicopter, the audiovisual or rather the audio material from that helicopter seems to suggest that the people, despite the higher altitude that they were flying at, that they were able to identify people and objects and vehicles in the other helicopter from which the other video pictures were taken. He says, and they have had, subjected that to some kind of analysis, produced the transcript. He says if that is what happened, it was what somebody said in the other helicopter and it’s been correctly transcribed, would you accept that even from the height at which the helicopter was, they could see, amongst other things, that people were hiding in the, at the koppie below? I think that’s the question that you asked, is that correct, Mr Mpofu?

[16:44] MR MPOFU: Yes, thank you Chair, for the clarity. Is the question now clear?

LT-COL BOTHA: It’s clear. Mr Chair, I cannot accept that the people can just see because I don’t know if it’s a police radio talking to the chopper, or the chopper, passenger in the chopper talking downwards. So if I know where the person was that made the comment, then I can answer it, but I can’t answer it before then.

MR MPOFU: Okay. Now, thank you, Colonel, it was a little bit unfair, I was just hoping you’d help us as an expert, but I accept that you were not in that particular helicopter. In your helicopter, the video equipment that you were using, was it of such a standard and quality that you would have been able, had you concentrated on the copy, you would have been able to pick up the people there?
Chairperson: So I don't think your explanation which I have repeated to you.
Chairperson: - but he gave the explanation which I have repeated to you.
Chairperson: Yes.
Chairperson: So I don't think your question, with respect, proceeds from the correct premise, but perhaps you can reformulate it, and take the point further.
Mr Mpofu: Thanks, Chair, no, all I was saying is he established or rather you can establish when I asked you, maybe I must quote from the thing, when I asked you on Tuesday that your camera a zoom function and that you utilised it, you confirm that on Tuesday.
LT-Col Botha: That is correct, Mr Chair.
Mr Mpofu: And this vibration that makes it a bit difficult that you described was not seen on the video, was it?
LT-Col Botha: It was seen on the video, you can see by zooming, that it shakes quite a lot, and sometimes I will zoom in and zoom out because of the vibration. It is seen in the video.
Mr Mpofu: Okay, you obviously, as the person who took the footage would know at which points you had zoomed in and zoomed out, but my question is simply that at the question at which you had zoomed in, were you able to pick up smaller targets?
LT-Col Botha: You will be able to see, well, we will have to define smaller targets, but you will be able to see smaller things on the ground.
Mr Mpofu: Finally, I want to ask you, you testified that when you are assigned – before we do that, was Brigadier van Zyl at the scene?
LT-Col Botha: I can't – was it at, with the operation or at the scene afterwards?
Mr Mpofu: Both.
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LT-COL BOTHA: No, what do you mean with the second civilian, sorry?

MR MPOFU: Well, I am using, I am saying the person at F, at least our evidence will be that two civilians died on that day, one of them died at E, and the other died, that was trying to cross the river, and died at 4, or rather at F, I accept, I mean, you may or may not have been involved. I am just clarifying whether your information is in accordance with our evidence. In other words, our evidence is that two policemen died and two civilians died.

LT-COL BOTHA: Mr Chair, I’ve got it different, that two – one policeman died on the scene, one policeman died in hospital –

MR MPOFU: Correct.

LT-COL BOTHA: - and three civilians died.

MR MPOFU: And three – so there was, okay. But one of them died across the river.

LT-COL BOTHA: That will be point G.

MR MPOFU: Thank you, so, E, F, G would be the civilians.

LT-COL BOTHA: That is correct, Mr Chair.

MR MPOFU: Thank you, Mr Chairman, that will be all, thank you.

CHAIRPERSON: Thank you, Mr Mpofu. Mr Ntsebeza, have you questions for the witness?

MR NTSEBEZA SC: Yes, I do, Mr Chairman.

Colonel Botha, let’s just begin with the last question that was put to you by Mr Mpofu, relevant to G, you did not process that crime scene. Is that right?

LT-COL BOTHA: No, Mr Chair, I did not process it.

MR NTSEBEZA SC: It was your colleague who did so?

LT-COL BOTHA: One of my colleague processed the scene.

MR NTSEBEZA SC: Captain Moshwana.

LT-COL BOTHA: That is correct, Mr Chair.

MR NTSEBEZA SC: I don’t know where I picked this up. I seem to have picked up a suggestion that when we did an inspection in loco you were present, is that correct?

LT-COL BOTHA: I actually walked far behind the Commission, I first picked up my conés at my scene, after I had put out. And then I walked with, but I never – I can’t, ja, I did come to the scene, yes because I met one of the Commissioners, he was walking up and I actually stopped apart away from the scene.

MR NTSEBEZA SC: The short answer will be that you were present at the inspection.

LT-COL BOTHA: I was present at the inspection.

MR NTSEBEZA SC: And on the second day, you did point things out, did you?

LT-COL BOTHA: The day of the inspection?

MR NTSEBEZA SC: Yes.

LT-COL BOTHA: Yes, I did.

MR NTSEBEZA SC: You would recall or perhaps you were still far back at that time, but you will recall if you were there you saw it, that relevant to body G, there was an explanation given by your colleague. Do you recall that?

LT-COL BOTHA: But Chair, that’s why I said I can’t just unequivocally say I was there, because I was way behind. When I arrived at the point this, on the, let’s call it the western side of the stream, Captain Moshwana and some people was on the other side of the stream, I never crossed the stream that day with the inspection.
I've always wanted to ask you whether you made any report after you had gone to do the aerial video recording of the operation at Wonderkop Marikana, did you?

LT-Col Botha: With report, what do you mean, Sir?

Mr Ntsebeza SC: You will forgive me if I am ignorant, I would have thought that having been asked to come and do a particular task, you would then file a report with whomever had asked you. Is that not the process?

LT-Col Botha: Mr Chair, I normally, the video downloaded, then I give out a statement, and then whoever must receive the video, will receive the video in a statement.

Mr Ntsebeza SC: I see. And that would constitute your report? It would be the video, and the statement accompanying the video that you have downloaded.

LT-Col Botha: That is correct, Mr Chair.

Mr Ntsebeza SC: Now, you have been asked to provide a report, what do you constitute your report? It would be the video, and the statement accompanying the video that you have downloaded.

LT-Col Botha: I see. And you were doing these video recordings in respect of various crime scenes which you have described in your statement which you made on the 22nd of October.

LT-Col Botha: Sir, I was called to process the crime scene of the CAS 117, 118, and 119. I actually called for help, for the other two on that, that was on the 13th. The 14th, I've also processed the scene of the –

Mr Ntsebeza SC: The body behind the koppie.

LT-Col Botha: - the body behind the koppie, yes, and on the 14th, I was not at the JOC, then I was called by Brigadier Van Zyl, then asked him to come to the JOC because they are going to need a videographer.

Mr Ntsebeza SC: Where were you called from?

LT-Col Botha: I was called from the body behind the koppie.

Mr Ntsebeza SC: The body behind the koppie.

LT-Col Botha: [17:04] I was called from the scene of the 13th. I did the – I attended to the post-mortems of six people that morning and I went back to the scene with ballistics. I was on the scene when the Brigadier called me.

Mr Ntsebeza SC: Maybe I was not very clear in my question. Where are you based? In other words, when you say I was called, where were you called from? Where are you based? Where is your head –

LT-Col Botha: Mr Chair, I'm based at Phokeng police station.

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25 scenes which you have described in your statement which you are to video record on the 16th, seems to have a culmination of at least a series of events that started with you attending crime scenes on the 13th of August 2012.

LT-Col Botha: I came to know of him. The Brigadier Fritz, the section head of the special task force?

Mr Ntsebeza SC: You came to know him as –

LT-Col Botha: I came to know him afterwards.

Mr Ntsebeza SC: You came to know him as a person stationed at the special task force national office in Pretoria.

LT-Col Botha: I don't know where he's stationed but I do know he's from the special task force.

Mr Ntsebeza SC: You came to know of Brigadier Fritz during this whole process.

LT-Col Botha: Yes, because on the 16th he is the one with whom you went into the sky in the chopper, isn't it?

Mr Ntsebeza SC: That is correct, sir.

LT-Col Botha: But the one thing that you came to establish on the 13th was that there had been an unfortunate incident in which two policemen got killed.

LT-Col Botha: Sir, I processed the
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LT-COL BOTHA: There was one body of a policeman on the crime scene and at that –

CHAIRPERSON: You haven’t answered the mortems.

LT-COL BOTHA: That is correct, Mr Chair.

MR NTSEBEZA SC: And did – yes. Both of those policemen - I’m asking you now about you as a photographer and a video camera operator of many years – did you take photographs of the bodies of those two police officials?

LT-COL BOTHA: I did, Mr Chair.

MR NTSEBEZA SC: Many photographs?

LT-COL BOTHA: I attended to their post-mortems.

CHAIRPERSON: You haven’t answered the question. You were asked did you take many photographs?

LT-COL BOTHA: Sorry Mr Chair, yes, many photographs.

MR NTSEBEZA SC: So you compiled an album disk and then given to me so that I can compile an album.

LT-COL BOTHA: It was downloaded on a digital images?

MR NTSEBEZA SC: And what did you do with the digital images?

LT-COL BOTHA: It was downloaded on a disk and then given to me so that I can compile an album.

MR NTSEBEZA SC: So you compiled an album of the photos.

LT-COL BOTHA: That is correct, Mr Chair.

MR NTSEBEZA SC: I am told that they were a gruesome sight. Would you confirm that?

LT-COL BOTHA: Sir, people were hacked to death, it didn’t look good and there was a person that was

Sometimes it is easy to be philosophical about these things but these were colleagues of yours. What was your – I see you nod – what was your first reaction at seeing these?

It’s one thing to see a dead colleague and it’s one other to see a colleague in the nature which you have left to our imagination.

LT-COL BOTHA: I cannot answer it in any other way. After 26 years of seeing dead policemen, dead people, when you get to a crime scene, no matter how gruesome it is, you know you’ve got to do a job and you cut yourself off from that because otherwise if you get – nou het ek nie die Engelse woord nie.

CHAIRPERSON: Gebruik maar die Afrikaanse woord en die tolk –

LT-COL BOTHA: If you get emotional you’re not going to do a decent job.

MR NTSEBEZA SC: Can I just push you a little bit and say, did it not cross your mind that whoever was responsible for that must be brought to book?

LT-COL BOTHA: Can you qualify "brought to book" please?

MR NTSEBEZA SC: To put it in colloquial language, did it not cross your mind that whoever did this must pay for it? That is, you –

LT-COL BOTHA: Whoa, whoa, I don’t think I want to answer the question.
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<tr>
<td>1 CHAIRPERSON:</td>
<td>The question –</td>
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<td>2 LT-COL BOTHA:</td>
<td>Mr Chair –</td>
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<tr>
<td>3 CHAIRPERSON:</td>
<td>The question has been asked, I understand why counsel asks the question. I think he's entitled to an answer. Would you like him to repeat the question or do you understand the question?</td>
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<td>4 LT-COL BOTHA:</td>
<td>I understood the question.</td>
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<td>5 MR NTSEBEZA SC:</td>
<td>Colonel, it appears to me that you are affected by these questions.</td>
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<td>6 LT-COL BOTHA:</td>
<td>I saw the question as an insult. All criminals are supposed to be brought to book, no matter who he is. If you kill a policeman you're supposed to be brought to book, if you kill a civilian you're supposed to be brought to book.</td>
</tr>
<tr>
<td>7 MR NTSEBEZA SC:</td>
<td>I see. I agree, I don't disagree. The only thing I find difficult is that you didn't find it was necessary for you to answer the question the first time I put it to you and you said you don't want to answer it. You called the question an insult.</td>
</tr>
<tr>
<td>8 MR NTSEBEZA SC:</td>
<td>Why do you think it is an insult, Colonel?</td>
</tr>
<tr>
<td>9 LT-COL BOTHA:</td>
<td>To say that I pick people to be punished. That's not the way that I do things.</td>
</tr>
<tr>
<td>10 MR NTSEBEZA SC:</td>
<td>I do not recall that I said so or I did so.</td>
</tr>
<tr>
<td>11 CHAIRPERSON:</td>
<td>I think the witness is saying that was the insinuation which he picked up. Whether he was correct in picking it up is neither here nor there, but that seems to be the answer.</td>
</tr>
<tr>
<td>12 MR NTSEBEZA SC:</td>
<td>Yes. Colonel, let me - right from the beginning or in the middle of my cross-examination say to you that I do not enjoy to ask people questions that would insult them, please accept that.</td>
</tr>
<tr>
<td>13 LT-COL BOTHA:</td>
<td>Mr Chair, I accept it and if I interpreted it like that, I'm sorry.</td>
</tr>
<tr>
<td>14 MR NTSEBEZA SC:</td>
<td>Apologies accepted, Colonel. Now, I want to push you a little bit on this aspect. If many of your colleagues came it see those images which you saw, which you took graphically and you put on digital mode, do you think they would've felt - and I'll use the word I noted – as revolted as what you were because of what they saw?</td>
</tr>
<tr>
<td>15 MR SEMENYA SC:</td>
<td>Chair, I really appreciate where Mr Ntsebeza is seeking to go but it is not in the province of this witness to tell what his other colleagues would think of a similar image he's seeing.</td>
</tr>
<tr>
<td>16 CHAIRPERSON:</td>
<td>Mr Ntsebeza, isn't that area, Mr Chairman, I will not take it –</td>
</tr>
<tr>
<td>17 MR NTSEBEZA SC:</td>
<td>It's a very sensitive question, the objection taken is that he can't speak for his other colleagues. That's the objection taken. Now if you persist with the question I may have to rule on it. If you're not going to go further on this issue, having made the points possibly that you set out to make, then I don't have to give a ruling.</td>
</tr>
<tr>
<td>18 MR NTSEBEZA SC:</td>
<td>No, Mr Chairman, I don't always seek to have you make a ruling on everything that I say. No, I take the point that my learned friend – it's a touchy area we are working – Let me just ask one last question on this aspect and – do you know if these images were circulated widely among your colleagues?</td>
</tr>
<tr>
<td>19 [17:24]</td>
<td>LT-COL BOTHA: No, Mr Chair. I had my disk with me and images I downloaded, it's downloaded by Rustenburg LCRC. I get a working copy and they make a master copy that's sent to province, so it's not distributed widely.</td>
</tr>
<tr>
<td>20 MR NTSEBEZA SC:</td>
<td>I accept that, but you wouldn't say that it wasn't circulated. You wouldn't know that?</td>
</tr>
<tr>
<td>21 LT-COL BOTHA:</td>
<td>No, I cannot say that.</td>
</tr>
<tr>
<td>22 MR NTSEBEZA SC:</td>
<td>Now my learned junior reminds me that you said earlier that you attended six post-mortems.</td>
</tr>
<tr>
<td>23 LT-COL BOTHA:</td>
<td>That is correct, Mr Chair.</td>
</tr>
<tr>
<td>24 MR NTSEBEZA SC:</td>
<td>Were those in respect of your attendance at the crime scene on the 13th and the 14th?</td>
</tr>
<tr>
<td>25 LT-COL BOTHA:</td>
<td>I've done the post-mortems for all five people of the 13th and then the body that was found behind the koppie of the 14th.</td>
</tr>
<tr>
<td>26 MR NTSEBEZA SC:</td>
<td>I see. I'm told by my learned junior here, who whispers into my ear, that only three post-mortem reports have been received. Would you know where the – on the 13th only three of those that were dealt with on the 13th.</td>
</tr>
<tr>
<td>27 LT-COL BOTHA:</td>
<td>I would not know where their post-mortem reports are, sir.</td>
</tr>
<tr>
<td>28 MR NTSEBEZA SC:</td>
<td>Well, perhaps that's something that we'll take up with the leaders of evidence. Now, I am keen to get a sense of the atmosphere that was prevailing in Marikana from the 13th to the day on which you say you were summoned by Brigadier Fritz, was it, Brigadier Fritz?</td>
</tr>
<tr>
<td>29 LT-COL BOTHA:</td>
<td>Brigadier Van Zyl, sir.</td>
</tr>
<tr>
<td>30 MR NTSEBEZA SC:</td>
<td>Oh, I see. Brigadier</td>
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Mr Ntsebeza, you don’t in policing unit. You were aware that there was, in the JOC, the public order awareness. You started talking about – after the 13th. Now you’re dealing with his awareness –

LT-COL BOTHA: That is correct.

MR NTSEBEZA SC: But who you went into

the chopper with was Brigadier Fritz?

LT-COL BOTHA: That is correct, Mr Chair.

MR NTSEBEZA SC: Now, I’m just confirming

with you but I understand that from the 13th – and I don’t want to say necessarily it was because of the unfortunate deaths of the police officers, but it does appear that there developed a plan, and I don’t know if you know about it, that was conceptualised for the deployment of a police strategy by using various available forces in the South African Police Service. Are you aware of that?

LT-COL BOTHA: No.

MR NTSEBEZA SC: So would that mean that although you were aware that, I thought this is what I heard you say, you were aware that there was public order policing at the place in the joint operations centre, you were aware of that?

LT-COL BOTHA: Sorry, just rephrase the question. Not rephrase, just repeat the question, please?

MR NTSEBEZA SC: I could rephrase it.

You were aware that there was, in the JOC, the public order policing unit.

CHAIRPERSON: Mr Ntsebeza, you don’t in

your question say when he was aware. You started talking about – after the 13th. Now you’re dealing with his awareness –

MR NTSEBEZA SC: Yes.

CHAIRPERSON: - of public order policing being involved. I think it only right that you should indicate from when you suggest or ask whether that awareness was present on his part.

MR NTSEBEZA SC: I understand, I understand, Chairman. Thank you very much. Maybe I should preface this by saying after your first operation which you talk about in your statement, 13th of August, is it fair for me to think that you became aware that at the joint operations centre, there was, which developed from the 13th, yes.

LT-COL BOTHA: That’s correct, after the 13th.

MR NTSEBEZA SC: Yes.

LT-COL BOTHA: That is correct, Mr Chair.

MR NTSEBEZA SC: And those units were the ones that Mr Mpolu asked you about, tactical response teams, national intervention unit, special task force, air wing, dog unit.

LT-COL BOTHA: Mr Chair, I said that I’m not sure that everyone was there but I cannot dispute that they were there.
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1 aerial photos of the area and the people on the koppie.
2 MR NTSEBEZA SC: Perhaps you can explain
3 this for me. One of what Colonel Scott says was going to
4 be the usage of the SAPS helicopters, he says one of the
5 SAPS helicopters would become an aerial command post should
6 the police need to mobilise outside of the planned
7 activity. Now can you just explain in lay terms what that
8 means, if you are able to?
9 LT-COL BOTHA: Sir, you'll have to ask
10 Colonel Scott.
11 MR NTSEBEZA SC: Indeed. Now, you
12 testified that there were four choppers on the 16th of
13 August that were –
14 LT-COL BOTHA: That is correct, Mr Chair.
15 MR NTSEBEZA SC: I don't know whether I'm
16 correct in recalling, you seemed to be uncertain as to
17 which they were, other than the one in which you were.
18 LT-COL BOTHA: Mr Chair, I said we were
19 two police shoppers, the big White one, according to my
20 information, was an Oryx. I'm not sure if – I think it's
21 an air force chopper – and then another one.
22 MR NTSEBEZA SC: I see. And the two
23 others, you do not know who they belonged to or what – ja,
24 who they belonged to?
25 LT-COL BOTHA: No, I found out later that

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1 the Oryx is an air force chopper. The other one was either
2 blue or black, I can't even remember the colour, I know it
3 was a dark chopper.
4 MR NTSEBEZA SC: The air force meaning
5 the South African Air Force?
6 LT-COL BOTHA: That was what I was
7 informed, sir.
8 MR NTSEBEZA SC: So at some stage would
9 you not say there was anticipated – or let me put the
10 question differently. Was the South African Air Force, to
11 you knowledge, part of the joint operation or was the South
12 African Air Force helicopter on loan to SAPS or don't you
13 know?
14 LT-COL BOTHA: I don't know, sir.
15 MR NTSEBEZA SC: Well, at least the
16 statement by Colonel Scott explains what it was but I
17 thought you might know what it was all about. Now, you do
18 not know the other two. You have described the Oryx and
19 then the SAPS and then – oh ja, the one – you do not know
20 where that other one belonged, who that one belonged to?
21 LT-COL BOTHA: I don't know who belonged
22 to it, who it belonged to, sir.
23 MR NTSEBEZA SC: No, I'm asking because
24 one of the videos, the high flying sort of video was
25 presented to us by evidence leaders as labelled "Lonmin

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1 video."
2 LT-COL BOTHA: I cannot confirm that,
3 sir.
4 MR NTSEBEZA SC: Yes, okay. Your chopper
5 – because this is something that I think you'll assist me
6 with – I read through some of these documents that we
7 received from the police, I don't know whether one uses
8 "chopper" and "papa" interchangeably. Do you understand
9 what I'm saying? When you say chopper 1 are you also
10 saying the same thing as papa 1?
11 LT-COL BOTHA: Sir, normally call signs
12 won't be confusing, so what I mean by that is you won't
13 give me a call sign chopper 1 and papa 1. Does that answer
14 the question?
15 CHAIRPERSON: I think the question is, do
16 they mean the same thing? So a reference in a document to
17 chopper 1 and in the same document or perhaps another
18 document a reference to papa 1, will that be a reference to
19 the same thing? I think that's what counsel wants.
20 MR NTSEBEZA SC: Yes. Yes, Mr Chairman,
21 thank you.
22 LT-COL BOTHA: Sir, I don't know. It's
23 not supposed to be, that's the closest I can come to the
24 answer.
25 [17:44] MR NTSEBEZA SC: You see because I want
25 comes with your experience, Mr Chairman. Now, why I want
24           MR NTSEBEZA SC:          The OB, okay, okay. It
23 occurrence book, Mr Ntsebeza.
22           LT-COL BOTHA:          No, sir.
21           MR NTSEBEZA SC:          It’s A192 and 00614,
20           LT-COL BOTHA:          I think I said chopper 1
19           Mr Chair, I've got a
diary. Officers in the South African Police Service have a
diary, it's not pocket books, and I did note some times. I
did not note the time of the chopper, I did note the time
that I arrived at the JOC and the time that I left the JOC
again. I did make an entry that it took aerial photos. I
did not note the times because my diary was in the vehicle,
not with me in the chopper.
18           MR NTSEBEZA SC:          Right. Where is the
diary?
17 by good old days, Mr Ntsebeza.
16           MR NTSEBEZA SC:          Yes, chopper 1 actually
15 that’s where it starts. It records Thursday 2012-08-16.
14           LT-COL BOTHA:          I think that’s the
13 diary?
12           LT-COL BOTHA:          If I have to I will, sir.
11 pocket book?
10               LT-COL BOTHA:          If I have to I will, sir.
9           MR NTSEBEZA SC:          Now there’s one other
8           CHAIRPERSON:          I don’t know what you mean
7           LT-COL BOTHA:          Yes, Mr Chair.
6           CHAIRPERSON:          I don’t know what you mean
5           LT-COL BOTHA:          Yes, Mr Chair.
4 Do they still have those today?
3 good old days, police officers used to have pocket books.
2 reminded me about occurrence books. In the old days, the
1 good old days, police officers used to have pocket books.

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1 some clarification relevant to your time when you took off
2 in chopper 1, as you think chopper 1 was the aircraft, is
3 that this log or this occurrence book on the Thursday, this
2 Thursday we are talking about, 16th of August, serial
1 number/volgnommer 1016, time 15:45, aard van voorval/nature
1 of occurrence situation report, chopper 1 reported that the
1 people are moving from the koppie. Now, I was puzzled as
0 whether this is a correct reflection of a report from
1 the aircraft in which you were, the chopper in which you
0 were or to the extent that the times are different, it
0 might be a reflection of your mistake as to when you took
0 off maybe – but you can explain it. Maybe there’s some
0 explanation which is not –
1 LT-COL BOTHA:          Sir, I said I’m not sure
1 if the call sign was chopper 1. I could’ve been in chopper
1 2, chopper 3. I didn’t give attention to the call sign
1 that was given to our chopper, so – I was definitely not in
1 the chopper that got into there at quarter to four.
1 MR NTSEBEZA SC:          I see, I see, but if you
2 were in chopper 1, as you thought you were or as you think
1 you were, then if this log report in this occurrence book
2 is correct then it would be reasonable to say that you are
2 probably mistaken about when you took off.
2 LT-COL BOTHA:          But then I wasn’t in the
25 chopper, in that specific chopper.
24 some clarification relevant to your time when you took off
2 in chopper 1, as you think chopper 1 was the aircraft, is
3 that this log or this occurrence book on the Thursday, this
2 Thursday we are talking about, 16th of August, serial
1 number/volgnommer 1016, time 15:45, aard van voorval/nature
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1 people are moving from the koppie. Now, I was puzzled as
0 whether this is a correct reflection of a report from
1 the aircraft in which you were, the chopper in which you
0 were or to the extent that the times are different, it
0 might be a reflection of your mistake as to when you took
0 off maybe – but you can explain it. Maybe there’s some
0 explanation which is not –
1 LT-COL BOTHA:          Sir, I said I’m not sure
1 if the call sign was chopper 1. I could’ve been in chopper
1 2, chopper 3. I didn’t give attention to the call sign
1 that was given to our chopper, so – I was definitely not in
1 the chopper that got into there at quarter to four.
1 MR NTSEBEZA SC:          I see, I see, but if you
2 were in chopper 1, as you thought you were or as you think
1 you were, then if this log report in this occurrence book
2 is correct then it would be reasonable to say that you are
2 probably mistaken about when you took off.
2 LT-COL BOTHA:          But then I wasn’t in the
25 chopper, in that specific chopper.
that the video camera is – because my watch and the digital
camera’s time was the same and I realised that the digital,
that the video camera’s time is plus-minus eight minutes
out and in the statement that’s in my docket – I can send
someone to go and collect it – I’ve rectified that.

MR NTSEBEZA SC: Now, if I proceed on the
basis that what you say in paragraph 4 is what it says and
I read what is logged in the occurrence book about how, at
15:45 there was a report from a chopper 1 that the people
are moving from the koppie, isn’t it most likely that it is
so, in fact, that at quarter to four chopper 1 was the
chopper in which you were when in fact you were recording
at 15:49 the scene at Wonderkop, Marikana?

LT-COL BOTHA: Mr Chair, I can just say
that I did say I’m not sure what the call sign of my
chopper was and I did realise after that statement go out,
went out, that the digital time on my video or the time on
my time on my video – and it doesn’t show when you make the
video – and the time on my digital camera differs with
about eight minutes and my digital camera is correct with
my watch, so I presume that’s the correct time.

CHAIRPERSON: Mr Ntsebeza it’s now – Mr
Ntsebeza, it’s now just after six o’clock. I’m not going
to adjourn until you tell me you wish me to adjourn because
you may be busy with a point. I don’t want to interrupt

you but when you are, consider it appropriate for us to
take the adjournment till tomorrow morning, I’ll adjourn
but it’s for you to say when.

MR NTSEBEZA SC: If I could just put,
just – I’m not very clear about these digital things but
I’ve seen in some videos an indication of the time and the
date on the footage itself. Does your camera not do that
kind of thing, because then I suppose it would put beyond
doubt any conjectures you are making.

LT-COL BOTHA: No, Sir, unfortunately
not.

MR NTSEBEZA SC: Mr Chairman, I’m going
to seek to explore this area in a bit more detail.

[18:04] CHAIRPERSON: I put it to you that I’m
not rushing you. I understand sometimes counsel, where
he’s busy with a point, wants to take it to the end before
the adjournment is taken.

MR NTSEBEZA SC: Yes.

CHAIRPERSON: So I’m not –

MR NTSEBEZA SC: No, I appreciate that.

CHAIRPERSON: It’s for you to tell me
when you consider that you’ve dealt with the point
adequately and you’re happy we adjourn till tomorrow.

MR NTSEBEZA SC: This point, I think I
will develop another aspect of the video camera and to the
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