

RealTime Transcriptions

TRANSCRIPTION OF THE

COMMISSION OF INQUIRY

MARIKANA

BEFORE TRIBUNAL

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

HELD ON

DAY 101 04 JUNE 2013 PAGES 10730 TO 10874



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1 [PROCEEDINGS ON 4 JUNE 2013]
 2 [10:06] CHAIRPERSON: The Commission resumes in
 3 our new venue, beginning our second century of hearings. I
 4 hope we won't get to 199 but it's a very auspicious place
 5 to start the new century in Centurion. Mr Tip, I
 6 understand you wanted to say something?
 7 MR TIP SC: Yes, thank you, Chair. It's
 8 an unfortunate thing to have to say on the first day that
 9 we are at our new venue but there was an incident that
 10 everyone I think will have become aware of yesterday, at
 11 Marikana, which fills one with profound dismay and that was
 12 a shooting incident at the Western Platinum office of NUM
 13 whilst, I understand, there was a meeting in progress of
 14 the local branch structures. Chair, one person lost his
 15 life and a second one is in hospital apparently with
 16 critical injuries and I thought it appropriate that that
 17 should be placed before the Commission. I may add that, to
 18 the best of my knowledge at present, there is nothing to
 19 suggest that the incident was in any way committed,
 20 connected with the work of the Commission and that is all
 21 that I would want to say about that at this stage.
 22 CHAIRPERSON: Thank you, Mr Tip. I hope
 23 the last comment you made is correct, that there is no
 24 connection. I would like, on behalf of the Commission, to
 25 extend our condolences to the family and loved ones of the

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1 deceased and I would be grateful, Mr Tip, if you'd see to
 2 it that that message is conveyed to them and also to wish
 3 the other gentleman who was injured a speedy recovery from
 4 the injuries that he sustained. Thank you.
 5 MR TIP SC: Chair, I shall certainly see
 6 to it that those remarks are conveyed.
 7 CHAIRPERSON: Thank you. National
 8 Commissioner, you are still under oath.
 9 GENERAL PHIYEGA: Yes, Chair.
 10 CHAIRPERSON: Mr Mpofo, I understand you
 11 still have questions to ask in cross-examination.
 12 MANGWASHI VICTORIA PHIYEGA: s.u.o.
 13 CROSS-EXAMINATION BY MR MPOFU (CONTD.):
 14 Yes, thank you very much Chairperson. Good morning,
 15 General.
 16 GENERAL PHIYEGA: Good morning, Advocate.
 17 MR MPOFU: When we broke on Wednesday, I
 18 think –
 19 CHAIRPERSON: Tuesday, actually.
 20 MR MPOFU: Tuesday, yes. Thank you,
 21 Chairperson. There was just one issue that I wanted to
 22 round up that we were busy with. I don't want to spend
 23 much time on it so I'll just explain to you where I'm
 24 coming from with it. You remember one of the 10 points
 25 that we had agreed could be gleaned from the prescripts was

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1 the fact, the need for accurate and up-to-date information
 2 in an operation of the kind that we are debating. Do you
 3 remember that?
 4 GENERAL PHIYEGA: Are these the 10 points
 5 that you led as your key 10 points?
 6 MR MPOFU: Ja, these are the 10 points
 7 that you and I agreed could be extracted from the
 8 prescripts viewed as a whole. You remember we extracted 10
 9 points which you and I had agreed on in April, when we
 10 started?
 11 GENERAL PHIYEGA: This is why I'm asking
 12 whether it's the 10 points –
 13 MR MPOFU: Yes, it's the –
 14 GENERAL PHIYEGA: - that you mentioned.
 15 MR MPOFU: Yes.
 16 GENERAL PHIYEGA: I noted them.
 17 MR MPOFU: Alright, well, when you do
 18 that then I have to refer you – the reason why I had wanted
 19 us to agree on those 10 points is so that I don't every
 20 time have to read the prescripts to say these are the
 21 points that come from the prescripts but we'll do it the
 22 long way. If you go to FFF1 –
 23 CHAIRPERSON: Mr Mpofo, wouldn't it be
 24 quicker if you referred the witness to the passage in the
 25 record –

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1 MR MPOFU: Oh yes.
 2 CHAIRPERSON: Where you previously went
 3 through the prescripts and where, as far as I can recall,
 4 she agreed with what you put to her.
 5 MR MPOFU: She did, yes.
 6 CHAIRPERSON: That would save a bit of
 7 time, I think.
 8 MR MPOFU: Yes, yes. Alright,
 9 Chairperson, I don't have it at hand now but I think that's
 10 the best way. General, I'm trying to short circuit things.
 11 When I cross-examined you in April and when I started now
 12 last week, I revisited the issue of the 10 points that you
 13 had agreed. You remember, in one of them I even remember
 14 you went "hm-mm" and I said no, if you say "hm-mmm" it
 15 won't record, you have to agree or not agree. Remember
 16 those 10 points? I will in due course find the exact
 17 passage. I'm hoping to rely on your memory more than
 18 having to read it out to you because I just don't have it
 19 in front of me.
 20 CHAIRPERSON: Mr Mpofo, if there is a
 21 specific prescript, as you call it, which you want to put
 22 to her now, won't you read that one out?
 23 MR MPOFU: Ja.
 24 CHAIRPERSON: And if she disagrees she'll
 25 tell you and if she agrees she'll say "um-mm" or "yes" and

<p style="text-align: right;">Page 10734</p> <p>1 then we can carry on.</p> <p>2 MR MPOFU: Thank you. Alright, I'll read</p> <p>3 them out in turn and then I will put to you what is the</p> <p>4 clear implication of those prescripts. The first one is</p> <p>5 FFF1, 3.1 or rather 3.3.1 and it says, "Situational</p> <p>6 appropriateness is the assessment by the operational</p> <p>7 commander of a public order situation and the taking of the</p> <p>8 most appropriate action at that time," with the emphasis on</p> <p>9 the last three words. Remember we are discussing the</p> <p>10 accuracy and to the minute accuracy of information. And</p> <p>11 then the next one, 3.3.2 is a bit long so I'll just read</p> <p>12 it. It says, "The situation in which these interventions</p> <p>13 will take place must be also considered. Thus the</p> <p>14 operational commander must consider the situation at that</p> <p>15 specific moment and in that specific area in terms of the</p> <p>16 legal provisions. It is the operational commander's</p> <p>17 responsibility to take into account the situational</p> <p>18 appropriateness. To do this correctly, the operational</p> <p>19 commander needs continuous and accurate information on the</p> <p>20 situation at all times." Thank you, and then the last one</p> <p>21 is SS2 which is standing order 262. It says at 9.4</p> <p>22 thereof, the first one says "The C-JOC" – or rather, "The</p> <p>23 appointed C-JOC is responsible for a well-planned and co-</p> <p>24 ordinated action for the duration of an operation." And</p> <p>25 then the important part which I'm going to read out is 2,</p>	<p style="text-align: right;">Page 10736</p> <p>1 reference I want to refer you to is that you say, "The mine</p> <p>2 management informed the SAPS delegation that there were</p> <p>3 ongoing clashes between members of two labour unions, AMCU</p> <p>4 and the NUM." Did you –</p> <p>5 CHAIRPERSON: Let's put this in context.</p> <p>6 This is the discussion which took place on the evening of</p> <p>7 Monday the 13th –</p> <p>8 MR MPOFU: 13th, correct.</p> <p>9 CHAIRPERSON: - when the National</p> <p>10 Commissioner rushed off to Lonmin in consequence of what</p> <p>11 had happened earlier that day.</p> <p>12 MR MPOFU: Thank you, Chairperson.</p> <p>13 CHAIRPERSON: And she had a meeting,</p> <p>14 firstly a meeting I think with her senior officers and</p> <p>15 thereafter a meeting with Lonmin and this passage relates</p> <p>16 to that meeting with Lonmin.</p> <p>17 MR MPOFU: Thank you. I'm sorry,</p> <p>18 Chairperson. That's correct, yes. Ja, you were told that</p> <p>19 there were ongoing clashes between members of two labour</p> <p>20 unions, AMCU and the NUM.</p> <p>21 GENERAL PHIYEGA: Yes.</p> <p>22 MR MPOFU: Yes. Well, would you – what</p> <p>23 would your reaction be if I say that statement is not</p> <p>24 correct, that there were no clashes between AMCU and NUM?</p> <p>25 MR SEMENYA SC: Well, Mr Mpofu -</p>
<p style="text-align: right;">Page 10735</p> <p>1 "For the purposes of pre-planning the C-JOC must follow the</p> <p>2 following procedure" and I'll jump 1 to 3. Number 4 says,</p> <p>3 "Implement an effective information gathering system for</p> <p>4 the operation to proactively gather up-to-the-minute,</p> <p>5 relevant and accurate information, enlisting the assistance</p> <p>6 of –" and so on. Yes, and the simple question is, from</p> <p>7 what I've read it's obvious, isn't it, that the prescripts</p> <p>8 require not only accurate but up-to-the-minute information</p> <p>9 in the course of an operation, correct?</p> <p>10 GENERAL PHIYEGA: Yes.</p> <p>11 MR MPOFU: And therefore if - you and I</p> <p>12 have already gone through the one situation where the</p> <p>13 information relied on even to trigger stage 3, let's say</p> <p>14 may not have been accurate, namely the so-called breaking</p> <p>15 of the promise by Mathunjwa. Agreed?</p> <p>16 GENERAL PHIYEGA: I do not agree because</p> <p>17 it is exactly the point of difference between the police</p> <p>18 and your position.</p> <p>19 MR MPOFU: Chair, if you'll bear with me.</p> <p>20 Getting used to this place is a bit of a challenge. Yes,</p> <p>21 in paragraph 17 of your statement which is FFF2 – sorry,</p> <p>22 Chair – well, that version of your statement –</p> <p>23 CHAIRPERSON: Well, I think 17 is</p> <p>24 probably the same in all of hers.</p> <p>25 MR MPOFU: It is, yes. The first</p>	<p style="text-align: right;">Page 10737</p> <p>1 CHAIRPERSON: I don't understand how the</p> <p>2 witness can answer. You're putting to her that what she</p> <p>3 was told by Lonmin was not correct.</p> <p>4 MR MPOFU: Yes.</p> <p>5 CHAIRPERSON: And you're asking her to</p> <p>6 comment. Well, what sort of comment can she make really?</p> <p>7 Perhaps you should put the question –</p> <p>8 MR MPOFU: Well, she can –</p> <p>9 CHAIRPERSON: - more specifically</p> <p>10 directing her to a particular area of concern that you're</p> <p>11 busy with at the moment.</p> <p>12 MR MPOFU: Okay. Well, the area of</p> <p>13 concern is that the police – I thought I had laid that out</p> <p>14 – the area of concern is that the police were acting on the</p> <p>15 basis of information which was not accurate. That's what</p> <p>16 we are discussing right now.</p> <p>17 MR SEMENYA SC: Chair, it's still not</p> <p>18 clear to us which information was incorrect.</p> <p>19 MR MPOFU: Okay. Well okay, in that –</p> <p>20 CHAIRPERSON: I don't think you should</p> <p>21 say that, Mr Mpofu –</p> <p>22 MR MPOFU: Yes, that's true. That's</p> <p>23 true, correct. Well, I've already said the one about</p> <p>24 Mathunjwa but I'm saying now the second piece of</p> <p>25 information that was not correct was the fact that at that</p>

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1 time there were ongoing clashes between AMCU and the NUM.
 2 I'm putting that to you.
 3 MR BURGER SC: Chair, I object to that
 4 question.
 5 CHAIRPERSON: Yes.
 6 MR BURGER SC: That's not the evidence
 7 before the Commission and in any event the comment of this
 8 witness on that version put, is irrelevant.
 9 CHAIRPERSON: Mr Semenya also turned on
 10 his light.
 11 MR SEMENYA SC: Well, I still don't know
 12 why it is contended that the information isn't correct.
 13 CHAIRPERSON: Mr Mpofo, I think the
 14 question is rather vague, the way you've phrased it, to say
 15 the information is incorrect without indicating in what
 16 respect the information is incorrect. Otherwise you elicit
 17 the objection from Mr Burger but there's a further point,
 18 of course, and that is what is the purpose of getting this
 19 witness to comment? It may be that there is a relevance
 20 that you haven't yet made apparent but may I suggest,
 21 reformulate the question in a more focused way and then
 22 perhaps we can proceed.
 23 MR MPOFU: Okay, Chairperson. Firstly,
 24 let me deal with the issue of relevance. I'm reading from
 25 the witness's own statement. If it was irrelevant, why was

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1 it put in her statement? That's the whole point. How can
 2 I do better than cross-examine her on her own statement,
 3 really? All I'm saying is that the information contained
 4 in her statement, insofar as it suggests that – and I do
 5 acknowledge that it was second-hand information given by
 6 other people but I'm saying that information, insofar as it
 7 was given to her and it was important enough for her to
 8 include in her statement, reflected factually incorrect
 9 content in the sense that, to answer Mr Semenya's question,
 10 in the sense that there is no evidence that there were
 11 clashes between AMCU and the NUM. And I don't want to go
 12 through all – we've gone through this with Mr Zokwana and
 13 various, and Mr Mathunjwa and it is clear that the unions
 14 per se, at least AMCU has said that it played no role
 15 whatsoever in –
 16 CHAIRPERSON: I would've thought the
 17 better way to do it is to ask this witness what importance,
 18 if any, she attached to this information –
 19 MR MPOFU: Well –
 20 CHAIRPERSON: - whether it caused her to
 21 do or not do certain things and then there would be a
 22 direct connection between the information and the kind of
 23 evidence she can give. There's a good deal of hearsay in
 24 her statement, statements will presumably be repeated by
 25 other witnesses, having in some cases already been made by

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1 other witnesses but if you're going to cross-examine this
 2 witness on every piece of hearsay in her statement, even if
 3 it has no bearing on anything she did or didn't do, then I
 4 don't think the time of the Commission will be gainfully
 5 employed. Let's ask the witness the question as I
 6 formulated it. This piece of information, National
 7 Commissioner, you were given, that according to Lonmin
 8 there had been ongoing clashes between members of two
 9 unions, AMCU and NUM, it's suggested that that piece of
 10 information is incorrect because according to the case that
 11 Mr Mpofo is putting up, members of AMCU as such who weren't
 12 involved in any clashes – but the point of the question I'm
 13 asking you is, did that information that you were given,
 14 erroneous or not, have any influence on anything that you
 15 did or didn't do in the period after you received it on the
 16 evening of the 13th of August?
 17 GENERAL PHIYEGA: No, Judge.
 18 [10:26] MR MPOFU: Okay, I'm going to put the
 19 other statement similarly and ask you the same as the Judge
 20 and then I'll ask you the real question which I want to ask
 21 you at the end. Your statement goes on to say, "The
 22 management further stated that the clashes had already
 23 claimed the lives of nine people, as we were briefed by the
 24 police." In other words, the clashes between AMCU and NUM
 25 had already claimed nine lives. Well, first of all I'm

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1 putting to you that that was incorrect and to follow the
 2 Judge's example, did that play any role in anything that
 3 the police did? And maybe to – sorry, before you answer –
 4 to pre-empt Mr Semenya's question, in what respect was it
 5 inaccurate? I'll put to you that at least five of those
 6 nine people, I won't even go to the others, were killed on
 7 the 13th and the NUM and AMCU had no role to play in those
 8 or the clashes between the two of them.
 9 GENERAL PHIYEGA: I think it is
 10 important, Adv Mpofo, to say to you that when nine lives
 11 are lost, whether it's on the 10th or the 9th or the 13th or
 12 the 16th or whatever, it's a very important issue for the
 13 police so we would have to concern ourselves with those
 14 nine lives that were lost, do our investigations and see
 15 what's happening. This is how far it would affect me and
 16 we would want to know what is the cause of that.
 17 MR MPOFU: Yes. No, I agree with you
 18 100%. That's exactly my worry, that you were told that the
 19 cause of that were the clashes between AMCU and NUM and
 20 that was not the cause of those clashes, that's exactly the
 21 point I'm making.
 22 CHAIRPERSON: The point I put to you, Mr
 23 Mpofo, is surely it's only relevant to know what that
 24 information, if it was erroneous or even if it wasn't, what
 25 role that played in anything that the witness did or didn't

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1 do because she can't, from her own knowledge, comment on
 2 the accuracy of the information.
 3 MR MPOFU: No.
 4 CHAIRPERSON: All she says is that's the
 5 information she got. It's important to know whether that
 6 information influenced her in her subsequent conduct.
 7 That's the only aspect, surely, on which she can
 8 meaningfully help us.
 9 MR MPOFU: Yes, Chair –
 10 CHAIRPERSON: Shouldn't you concentrate
 11 your questions on that aspect?
 12 MR MPOFU: Yes. Chairperson, exactly.
 13 I'm going to, following your example and putting that
 14 question but I'm going to put the inaccuracies first if –
 15 and then I have a theory as to the importance or non-
 16 importance.
 17 CHAIRPERSON: Why not list the
 18 inaccuracies as you contend they are –
 19 MR MPOFU: Yes.
 20 CHAIRPERSON: List the inaccuracies for
 21 her benefit –
 22 MR MPOFU: That's what I'm doing.
 23 CHAIRPERSON: And then put the question
 24 that I've suggested.
 25 MR MPOFU: Thank you, Chairperson.

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1 Alright, I'm going to list them, all five of them, Chair.
 2 As I said, the first one we dealt with last week which was
 3 the fact that Mathunjwa had made a promise which he did not
 4 make. The second one is the fact that there were ongoing
 5 clashes between AMCU and NUM. The third one is the one I
 6 was dealing with now that those clashes had already
 7 claimed, in other words cost, the lives of nine people.
 8 The fourth one is, fourth inaccuracy is the fact, "The mine
 9 management further stated that the protesters were not
 10 their employees." We already know that you, the police
 11 contested that successfully. That's the –
 12 CHAIRPERSON: That misinformation, if it
 13 was misinformation, it appears to have been, played no role
 14 in anything which she did or didn't do because her senior
 15 officers were able to demonstrate to Lonmin by reference to
 16 the photographs and so on, that their members were indeed
 17 involved.
 18 MR MPOFU: Yes.
 19 CHAIRPERSON: So that one has got no, is
 20 not causally connected with anything she did or didn't do,
 21 is that right?
 22 MR MPOFU: Yes. The faceless people,
 23 yes. Yes, and the last one is also an inaccuracy but it's
 24 a more complicated one and it probably falls under the
 25 category that the Chairperson has just spoken about. It's

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1 in paragraph 24 of your statement which says that – and
 2 this is not from the mine, it's from Mbombo – "She relayed"
 3 –
 4 CHAIRPERSON: 24?
 5 MR MPOFU: 24, yes Chairperson. It's –
 6 CHAIRPERSON: Just to put it again in
 7 context –
 8 MR MPOFU: It's General Mbombo.
 9 CHAIRPERSON: It's something that she was
 10 told by Lieutenant-General Mbombo, that's the Provincial
 11 Commissioner of North-West, on the afternoon or possibly
 12 even early evening of the 16th August after the shootings on
 13 the 16th had taken place.
 14 MR MPOFU: That's correct, Chairperson.
 15 And supposing this one merely as an inaccuracy, so I'm
 16 conceding the point that the Chairperson has made that it
 17 was said after the first, so obviously it didn't influence
 18 what actions you took but she said that, she relayed that
 19 the police had also been fired at and that the police had
 20 shot and killed a number of protesters, which later turned
 21 out as 34, in private defence. The reason why I'm saying
 22 that's inaccurate is that the police's own version accepts
 23 that about 10, if I'm not mistaken, of the people shot at
 24 scene 2 may not have been shot in self-defence.
 25 CHAIRPERSON: It is the police's version,

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1 as I understand it from the opening statement and Mr
 2 Semenya will confirm this if I'm correct, that they claim
 3 that all 34 people who were shot on the 16th by members of
 4 the police service were shot in circumstances where the
 5 policemen – they were all men – policemen concerned were
 6 acting in private defence. That's their case, as I
 7 understand it.
 8 MR MPOFU: Well –
 9 CHAIRPERSON: Is that correct, Mr
 10 Semenya?
 11 MR SEMENYA SC: That is correct, Chair.
 12 CHAIRPERSON: That's one of the issues
 13 that we are called upon to decide. The present witness
 14 will not be able to assist us, I don't think, in any way in
 15 deciding that question because she wasn't there but she
 16 made statements thereafter, based on the information she
 17 had received but I don't see how, even – I understand from
 18 your point of view, your argument is that this information
 19 was either totally or partially incorrect, that's your case
 20 and that's something that you'll argue fully at the end of
 21 the evidence but what's the point of taking the point up
 22 with the present witness who merely says what she was told
 23 by the Provincial Commissioner who, in any event, will be
 24 coming to give evidence at some stage in the near future?
 25 MR BURGER SC: Chair, I have another

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1 problem with this whole debate. My learned friend, if he
 2 puts factual inaccuracies, can only put it on the basis
 3 that that's his version. I don't for a moment accept these
 4 as factual inaccuracies. In fact, my people haven't given
 5 evidence yet. General Mpembe hasn't given evidence yet.
 6 Whether this is the result of a turf war between NUM and
 7 AMCU –
 8 CHAIRPERSON: General Mbombo.
 9 MR BURGER SC: Mbombo. Whether this is
 10 the result of a turf war between two unions is very much a
 11 live debate, from my perspective. So my learned friend can
 12 put these, quote, "inaccuracies" as his version and no
 13 more.
 14 MR MPOFU: Okay. Well, Chairperson,
 15 CHAIRPERSON: I think impliedly, to be
 16 fair, that's what he was doing. He perhaps didn't say it
 17 expressly but I understood that and if there was anyone
 18 here who didn't so understand it, they will now so
 19 understand it.
 20 MR MPOFU: Yes.
 21 CHAIRPERSON: Please proceed in a focused
 22 way on this point.
 23 MR MPOFU: Yes. Mr Chairperson, yes,
 24 Chairperson not only do I put it on the basis that it's my
 25 version, I go further. I put it on the basis that it is

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1 nobody's version in these proceedings that the five people
 2 killed on the 13th were as a result of clashes between AMCU
 3 and NUM.
 4 CHAIRPERSON: Well, apparently it's
 5 Lonmin's version –
 6 MR MPOFU: Well –
 7 CHAIRPERSON: - and Lonmin haven't had an
 8 opportunity to lead evidence yet so Mr Burger says –
 9 MR MPOFU: Okay.
 10 CHAIRPERSON: - we can't make a finding
 11 at this stage in anticipando, as it were, before he's even
 12 been given a chance to lead any evidence and that must be
 13 right, so –
 14 MR MPOFU: Yes, well –
 15 CHAIRPERSON: It's not a matter of moment
 16 for the moment –
 17 MR MPOFU: No, no.
 18 CHAIRPERSON: It's clear your version is
 19 different from his. Let's just carry on, on that basis.
 20 MR MPOFU: Thank you, Chairperson. The
 21 further point, General, that I want to put to you is that
 22 part of the to-the-minute information included the fact
 23 that, for example, Bishop Seoka had had a discussion with
 24 the protesters and your members of SAPS and informed them
 25 or rather informed your people – I'm sorry, I mean General

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1 Mbombo and others – about what the protesters wanted as at
 2 about 13:45, which was to the minute information of what
 3 was happening and that the police ignored the Bishop, to
 4 put it mildly. You are aware of that?
 5 CHAIRPERSON: Before you answer, National
 6 Commissioner, Mr Semenya wishes to say something.
 7 MR SEMENYA SC: The question again,
 8 Chair, it's unclear whether this is reference to the Bishop
 9 saying the people want water and food. Which part is
 10 wrong?
 11 MR MPOFU: Okay. Let me preface this by
 12 taking you back to what I said earlier. Your prescripts
 13 say that you need to know accurate and to the minute
 14 information. I'm saying to you, part of the most important
 15 to the minute information which might have even averted the
 16 massacre, was the fact that the Bishop had interacted with
 17 the strikers and they had basically sent him to management
 18 with a message which he wanted to relay, not only to
 19 management but also to the police but the police ignored
 20 him. That is a crucial part of the to the minute reality
 21 of what was happening, do you understand?
 22 CHAIRPERSON: How can this witness help
 23 us on that issue?
 24 MR MPOFU: Well –
 25 CHAIRPERSON: We've had the evidence of

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1 the Bishop, we're going to have the evidence of the
 2 Provincial Commissioner about her dealings with the Bishop
 3 but how can the National Commissioner help us on that
 4 point?
 5 MR MPOFU: Chairperson, with the greatest
 6 respect, this is the witness who has said to this
 7 Commission that one of the key things for their acting is
 8 the accuracy of information. I'm busy showing her that
 9 they acted or might have acted on information which was
 10 inaccurate. How can the witness, who is the National
 11 Commissioner of Police, not be able to comment as to
 12 whether that is, as she says, in conformity with the
 13 prescripts for which she thanked the people or it is not?
 14 MR BURGER SC: Chair, then I formally
 15 object to the question on the basis you've put to my
 16 learned friend and I request a ruling. This is quite
 17 irrelevant, what this witness's version on a contentious
 18 issue in this case is. She wasn't there, she didn't know
 19 what happened. The Bishop was here, he was cross-examined,
 20 we'll hear the police when they come. This is wasting time
 21 and I seek a ruling.
 22 MR MPOFU: Well, Mr – I've already
 23 answered the objection but I don't know how, Mr Burger is
 24 not a witness here, I don't know how he knows where the
 25 witness was or was not because -

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1 CHAIRPERSON: Come on, Mr Mpofo, that
 2 answer isn't worthy of you. The witness has already said
 3 that she wasn't there. It's never been suggested that she
 4 was, so I think we can take it as a given that she wasn't
 5 there.
 6 MR MPOFU: Well, then she may have been
 7 told. She wasn't there for everything, then Chairperson,
 8 why is she here? She wasn't there the whole day, then why
 9 does she have to say anything about the 16th?
 10 CHAIRPERSON: At the end of the day this
 11 commission will have to decide certain factual issues and I
 12 regret to say that the views of the National Commissioner
 13 on those factual issues which relate to points that arose
 14 when she wasn't present, in respect of which she has no
 15 special knowledge, will cut no ice with the Commission at
 16 all and will be ignored. So let us not indeed even elicit
 17 information or evidence from her which will merely be
 18 ignored.
 19 MR MPOFU: Okay, let me –
 20 CHAIRPERSON: So the ruling I give is in
 21 favour of Mr Burger.
 22 MR MPOFU: Yes, thank you. I'll go back,
 23 step back. Do you know that Bishop Seoka tried to
 24 intervene and to prevent the massacre? Do you know,
 25 General?

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1 CHAIRPERSON: There's some static on the
 2 line. I don't know what's happening. It's someone's cell
 3 phone, so everyone who has a cell phone please turn it off
 4 otherwise, unless it's someone whose presence is essential
 5 for the ongoing work of the Commission, I'll ask for that
 6 person to be removed from the room. So whether the witness
 7 knows about whether Bishop Seoka's intervention clearly
 8 will depend on hearsay, it will depend on something that
 9 she was told or something which she read in the newspaper.
 10 Again I don't understand any relevance of her comments upon
 11 whether he was present or whether he wasn't or what exactly
 12 he did or tried to do.
 13 MR MPOFU: Fine, Chair.
 14 CHAIRPERSON: Perhaps you can explain
 15 that to me before I rule on it?
 16 MR MPOFU: No, obviously I don't think I
 17 can even go that far to explain. If the witness knows now
 18 that there was something which could have prevented the
 19 massacre and that is irrelevant, well, then I'll just move
 20 to something else. I don't know how that could ever be
 21 irrelevant.
 22 CHAIRPERSON: Mr Mpofo, the witness's
 23 knowledge of these matters is a matter for her herself. If
 24 it could have prevented the massacre, it's a matter you
 25 will argue in due course. If you are correct we will

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1 uphold you –
 2 MR MPOFU: Yes.
 3 CHAIRPERSON: - and make a finding
 4 accordingly. If you are wrong, we'll make a finding the
 5 other way but nothing this witness can say will help us in
 6 making that finding because her knowledge in the matter is
 7 based on hearsay and she has no particular expertise or
 8 anything of that kind which can assist us in resolving the
 9 factual dispute that would arise in consequence of the
 10 argument that you're going to put up before us.
 11 MR MPOFU: Ja.
 12 CHAIRPERSON: So it's on that basis that
 13 I rule that the evidence is irrelevant.
 14 MR MPOFU: Okay.
 15 CHAIRPERSON: And I suggest you move on
 16 to a point that has more relevance than the ones you're
 17 busy with at the moment.
 18 MR MPOFU: Okay. Well, General,
 19 unfortunately the only thing I can ask you is simply that
 20 whether, or rather say to you what I'm going to argue and
 21 ask for your comment, which is that if the police acted on
 22 inaccurate and not to the minute information, that would
 23 have caused disastrous consequences if the factual basis
 24 was incorrect. Or maybe to put it in the reverse, the
 25 reason why these prescripts that I read to you put so much

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1 emphasis on the accuracy of up to the minute information is
 2 exactly to avert a situation where the police act on an
 3 incorrect factual basis and cause a disaster.
 4 [10:46] CHAIRPERSON: I have received a note
 5 informing me that a group of injured people who are
 6 represented by Mr Mpofo want to sit in the chamber, despite
 7 limited space. There are 31 in number and – are there 31
 8 seats available?
 9 MR SETATI: [Inaudible]
 10 CHAIRPERSON: There have been,
 11 arrangements have been made for them to sit in a room
 12 across the courtyard where there'll be a television
 13 screening of what's happening.
 14 MR SETATI: [Inaudible] they are saying
 15 they cannot watch the screen while they are [inaudible].
 16 CHAIRPERSON: Well, that's a matter which
 17 we'll deal with when we get there. There is accommodation
 18 for the people who want to come in and I suggest if they
 19 want to come in, they should come in and if they don't want
 20 to come in they can stay out.
 21 MR MPOFU: Thank you, Chair.
 22 MR SETATI: Excuse me, Chairperson.
 23 Chairperson, it's me.
 24 CHAIRPERSON: I was looking for a light
 25 but I fear your computer's top may have blocked the light

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1 so I couldn't – I was looking for a microphone light. Is
 2 your microphone on? Well, your computer is blocking it, I
 3 can't see. Alright yes, please proceed.
 4 MR SETATI: Chairperson, you know, I
 5 think the best thing to do – we have suggested that they
 6 wait for the adjournment, the tea adjournment, then what we
 7 will do, we'll add an extra row of chairs, you know, the
 8 free chairs that side and I think that will accommodate
 9 them.
 10 CHAIRPERSON: I'm told there are 31
 11 outside and there are 31 chairs available now. I don't
 12 know why they're not inside here.
 13 MR SETATI: I am sure we do have that
 14 number of chairs and I'm not – what I'm not sure of is that
 15 whether they will fit inside but we will try to fit a last
 16 row –
 17 CHAIRPERSON: As far as I can see, making
 18 a quick estimate, I would guess there are 31 chairs. If
 19 they didn't come on time before we started, I'm not sure
 20 that they can demand that we stop proceedings to
 21 accommodate them because they happen to be late but if they
 22 want to come in they can come in, as long as they do so
 23 quietly. Let's carry on.
 24 MS MOTLOENYA: I'm sorry, Chair, while Mr
 25 Setati is making arrangements for the injured, can they

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1 also keep in mind that the family members will be attending
 2 the Commission tomorrow and I think –
 3 CHAIRPERSON: The Commission won't be
 4 sitting tomorrow but –
 5 MS MOTLOENYA: I mean on Thursday.
 6 CHAIRPERSON: The question of the
 7 arrangements for the family will be discussed during the
 8 adjournment.
 9 MS MOTLOENYA: Yes, Chair.
 10 CHAIRPERSON: I don't think it's anything
 11 we need discuss here in the auditorium.
 12 MS MOTLOENYA: Yes, Chair.
 13 MR SEMENYA SC: Chair, I was seeking
 14 clarity. Is Mr Mpfu's case that the disaster, as he uses
 15 the word, was caused by the failure to take up to the
 16 minute, accurate information? Is that his case?
 17 CHAIRPERSON: I think that is his case.
 18 MR MPOFU: No -
 19 MR SEMENYA SC: And there will be
 20 evidence –
 21 MR MPOFU: Amongst other things, yes,
 22 Chair.
 23 MR SEMENYA SC: And there'll be evidence
 24 to that effect, Chair?
 25 CHAIRPERSON: Either evidence or

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1 argument, I would think, but – there will be an argument
 2 but I take it he'll have a factual basis. It may be based
 3 on circumstantial, arguments based on circumstantial
 4 evidence, not necessarily direct evidence but certainly
 5 circumstantial evidence to establish that. Whether the
 6 argument is good or bad is something we can't decide now.
 7 So that's your point, is it, Mr Mpfu?
 8 MR MPOFU: That's all, Chairperson, and
 9 I'm moving on to something else.
 10 CHAIRPERSON: I regret to say in all the
 11 excitement about the adequacy of the seating for people who
 12 want to come in, I think I missed the answer if there was
 13 one. So would ask the National Commissioner to please
 14 repeat it, if she gave it, or to give it for the first time
 15 if she didn't.
 16 GENERAL PHIYEGA: I think listening to
 17 the argument that is going around, the issue of accurate,
 18 to the minute information, that matter is going to be
 19 argued. There'll be a standpoint of the police, there is
 20 your standpoint and those that were there, I think General
 21 Annandale has started talking about some of it, General
 22 Mbombo is coming, General Mpenbe is coming, so there would
 23 be an argument on that matter and there would be
 24 disagreement.
 25 MR MPOFU: Thank you very much, General,

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1 we will have that argument, I can assure you.
 2 Incidentally, have you found whether or not there was a
 3 recording of Mr Lepaaku's funeral where you allegedly made
 4 the statement that SAPS should not be sorry? I've asked,
 5 my learned friend could not find it but he said he was
 6 going to ask you. Have you found it?
 7 GENERAL PHIYEGA: I have indicated in
 8 this Commission that we didn't have that recording.
 9 MR MPOFU: No, that's – well, that's the
 10 first time you are making that indication. And are you
 11 also equally saying that there's no recording in existence
 12 of your press conference on the 17th and that of General
 13 Mbombo - a SAPS recording, I am asking?
 14 GENERAL PHIYEGA: I've also said yes, we
 15 don't have.
 16 MR MPOFU: There is – Chairperson, if I
 17 may ask a document which will be an exhibit, I had given it
 18 to Mr Semanya last week so that he, insofar as it relates
 19 to the record, rather to the recording, so that he could
 20 satisfy himself.
 21 CHAIRPERSON: Have you given us copies or
 22 not?
 23 MR MPOFU: No, Chairperson.
 24 CHAIRPERSON: So you're giving us now?
 25 MR MPOFU: I am, yes.

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1 CHAIRPERSON: And your learned friends
 2 for the –
 3 MR MPOFU: Just one line, Chairperson.
 4 CHAIRPERSON: Okay, but your learned
 5 friends, have they also got copies or been given copies?
 6 MR MPOFU: They will –
 7 CHAIRPERSON: I see. That's being
 8 attended to, good.
 9 MR MPOFU: Yes. If there are some –
 10 CHAIRPERSON: Ms Pillay, am I correct in
 11 thinking that FFF20 – sorry, FFF30 is the next exhibit?
 12 MS PILLAY: That's correct, Chair.
 13 CHAIRPERSON: Is it the transcript of the
 14 Rylands video, Mr Mpofo, is that how I describe it? Mr
 15 Mpofo? Mr Mpofo?
 16 MR MPOFU: Yes?
 17 CHAIRPERSON: Do I describe this as
 18 transcript of Rylands video?
 19 MR MPOFU: Yes, correct, Chairperson.
 20 Transcript Rylands video 26 maybe to be exact, in case
 21 there's another one later. Is it 25? Oh, there's also a
 22 25. 26, Chairperson.
 23 CHAIRPERSON: Oh, alright. It will be
 24 marked exhibit FFF30.
 25 MR MPOFU: Thank you, Chairperson.

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1 MS PILLAY: Chair, just to be clear,
 2 there is another exhibit of a transcript of Captain
 3 Ryland's video.
 4 MR MPOFU: That's why this one is 20 –
 5 MS PILLAY: That's GGG36. I'm just
 6 wondering if we shouldn't make this GGG36.1.
 7 MR MPOFU: Oh yes.
 8 MS PILLAY: To keep it with the other
 9 transcript.
 10 MR MPOFU: I would agree with that,
 11 Chairperson. It's actually the same conversation. The
 12 only difference is that here we've translated the Sesotho
 13 part.
 14 MS PILLAY: GGG36.1.
 15 CHAIRPERSON: I actually wasn't on the
 16 microphone – I'm sorry, I've changed the exhibit
 17 description now to exhibit GGG36.1.
 18 MR MPOFU: Yes. Right, I'm just going to
 19 refer you – just for background, sorry General, this
 20 transcript as Ms Pillay has correctly pointed out, was
 21 given but obviously whoever was doing the transcription
 22 could not, either could not understand the Sesotho part and
 23 we've just inserted those. It's in the same genre as what
 24 you and I discussed at the beginning about –
 25 CHAIRPERSON: It would be helpful if we

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1 had the Sesotho portions – is it Sesotho, is it?
 2 MR MPOFU: Ja.
 3 CHAIRPERSON: The vernacular portions, if
 4 we had them translated as well.
 5 MR MPOFU: I'm hoping that – yes, we
 6 will. Thank you, Chairperson, that's a valid point but I'm
 7 hoping to test the interpretations with the witness.
 8 CHAIRPERSON: I can't remember what the
 9 first language of the National Commissioner is. I seem to
 10 remember it was Sepedi, but let's ask her. What is your
 11 home language or your mother tongue, National Commissioner?
 12 GENERAL PHIYEGA: Sepedi.
 13 CHAIRPERSON: Sepedi. Now Sepedi of
 14 course is northern Sotho and presumably someone who speaks
 15 Northern Sotho can understand 95% of something in Southern
 16 Sotho, is that –
 17 MR MPOFU: Correct, Chairperson. Most of
 18 the experts we get in the courts only know about 80% of
 19 what they're talking about, but for background let's start
 20 with the – before we even go to the Sotho can you look at
 21 entry 00:42 to 00:46? I'm sorry, do you have the same
 22 document? GGG36.1, the new one that's just arrived now.
 23 Yes, that one. If you can read for us against the entry
 24 00:42 to 00:46.
 25 GENERAL PHIYEGA: Before I read that,

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1 Judge, can I just – what is this that you're asking me to
 2 read?
 3 CHAIRPERSON: This is a transcript of the
 4 soundtrack of a video taken by Captain Rylands who is one
 5 of the members of the police service who was present at
 6 scene 2. We've seen the video already, we listened to the
 7 soundtrack but the point being made is that there were
 8 portions of the soundtrack in the vernacular which were not
 9 translated, so they've had it transcribed again with the
 10 portions of the vernacular. I can't remember whether the
 11 portions in the Afrikaans vernacular were translated but
 12 certainly the portions in the Sesotho vernacular weren't.
 13 The passage he wants you to look at, at the same time I'll
 14 read, it reads, "Ryland" which I take it indicates the
 15 Captain's voice, "Pyp hom live, daai enetjie, pop hom
 16 live." Is that correct, is that the passage you want?
 17 MR MPOFU: That's the one, Chairperson.
 18 Can you see that part, General?
 19 GENERAL PHIYEGA: Before I see that, I
 20 want to be clear. Is it the translation you gave me as
 21 homework and you asked me to go and listen to?
 22 MR MPOFU: Yes, it's part – the Rylands
 23 videos, yes, were part of the homework about a week or so
 24 ago, ja.
 25 GENERAL PHIYEGA: Thank you. And I did

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1 listen, I didn't hear. I think it's important for me to do
 2 that, to tell you that when I listened, I did my homework
 3 and I didn't understand. So you are saying somebody has a
 4 better ear, this is the person with the better ear.
 5 MR MPOFU: Yes. Okay General, let me
 6 explain how we are proposing to do this. First I gave you
 7 the homework.
 8 GENERAL PHIYEGA: Yes.
 9 MR MPOFU: And then, as I say, I gave the
 10 transcript to your legal team last week so that they
 11 themselves could go to the people upstairs and listen and
 12 satisfy themselves. So it's either they have done that or
 13 they have not done it. If they have done it then they
 14 would, they are satisfied that this is what reads, it says
 15 on the tape. If they have not done so then obviously they
 16 are taking the risk that maybe later they'll find there is
 17 someone, as you put it, with a better ear in which case
 18 we'll deal with it but for now just deal with it on the
 19 basis that this is the transcript. If that is wrong, for
 20 some reason, we will apologise to the Commission and all
 21 sorts of things will happen but that's why we took those
 22 precautions. Thank you. So –
 23 GENERAL PHIYEGA: But Judge, I just want
 24 to say it is important for me as a witness to actually say
 25 I did my homework, I took what you gave me, I listened and

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1 indeed the inaudible places remained inaudible to me.
 2 MR MPOFU: Yes. No, in fairness to you,
 3 I did say to Mr Semenya when I gave him the document that
 4 even for us, when we played it on a sort of normal TV we
 5 couldn't pick up those parts, we had to use earphones. So
 6 I can believe what you're saying but for now I think let's
 7 just move on. All those will be done - we can't do them
 8 right now – will be done in time. So okay, I'll just read
 9 out the part and then I'll ask you the question. The first
 10 one is the one that the Judge has already read, "Pyp hom
 11 live daai enetjie, pop hom live."
 12 CHAIRPERSON: It says "pyp" as the first
 13 word and "pop" as the second.
 14 MR MPOFU: Ja, "pop hom."
 15 CHAIRPERSON: I'm not sure if that was a
 16 misprint or whether "pyp" was said the first time and "pop"
 17 was said the second time.
 18 MR MPOFU: Yes, yes.
 19 CHAIRPERSON: I'm not quite sure.
 20 Perhaps Mr Burger, who's a better Afrikaans linguist than I
 21 am, can tell us what either of those words mean in the
 22 context.
 23 MR BURGER SC: We're dealing with POP,
 24 it's probably pop.
 25 MR MPOFU: That will be a matter of

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1 argument. And this one fortunately we don't need Mr
 2 Burger's assistance. The next one is 02:15 which - up to
 3 02:30. I'll read it out just out of respect for you.
 4 "That motherfucker, I shot him at least 10 times. He keeps
 5 coming and coming. These things of 17 magazines keeps" –
 6 and then there someone else speaks. That's the second one
 7 that I'm referring you to.
 8 MR SEMENYA SC: Chair –
 9 CHAIRPERSON: Is Captain Ryland going to
 10 come?
 11 MR SEMENYA SC: We'll get the witness, if
 12 so directed Chair, but the basis of my objection now is, I
 13 really don't know where Mr Mpofu is going but if this
 14 witness is not able to understand and what prompted these
 15 comments, her evidence would be again totally irrelevant.
 16 CHAIRPERSON: I think that we're going to
 17 get the question about the highest standards of
 18 professionalism at the end but -
 19 MR MPOFU: Yes –
 20 CHAIRPERSON: Am I right? You're reading
 21 a bit of – you're reading some passages which you think,
 22 you're going to submit reflect badly on the policemen
 23 concerned –
 24 MR MPOFU: Yes.
 25 CHAIRPERSON: And then you're going to –

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1 the punch line or the final culminating question is going
 2 to be, is that in accordance with the highest standards of
 3 professional –
 4 MR MPOFU: Something like that.
 5 CHAIRPERSON: - professionalism, you
 6 know, is that right? Well, let's –
 7 MR MPOFU: Best of responsible policing.
 8 CHAIRPERSON: Let's get that over with as
 9 quickly as we can.
 10 [11:05] MR SEMENYA SC: Well, Chair, shouldn't
 11 the witness first tell us whether, when she made that
 12 statement, all these utterances were known to her?
 13 CHAIRPERSON: No, no –
 14 MR MPOFU: No.
 15 CHAIRPERSON: No – no, Mr Semenya, that's
 16 not Mr Mpofu's point. Mr Mpofu, as I understand it,
 17 doesn't suggest that the witness knew all the things that
 18 he put to her. What he's asking her is whether she still
 19 says-
 20 MR MPOFU: Ja.
 21 CHAIRPERSON: - they're in accordance
 22 with the highest standards of professionalism. I think
 23 that's his point. It's marginally relevant but I'm
 24 inclined to think, in the interests of moving on, it's
 25 better to allow him to ask the question than not. So

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1 anyway, let him – is that right, am I right, Mr Mpofo?
 2 MR MPOFU: You have –
 3 CHAIRPERSON: You don't suggest for a
 4 moment that this witness knew about the Rylands video and
 5 what was on it when she made the statement she made?
 6 MR MPOFU: No, Chairperson, that's why I
 7 had to play 16 for her to show the dragging, to show the
 8 boots, to show all those things. If I thought she knew all
 9 those things already I wouldn't have played it for her.
 10 Alright, the next one. The next one was just the one below
 11 that - [Reading Sesotho]. Now we'll take it – this is the
 12 part where they say –
 13 CHAIRPERSON: He translated it into, from
 14 Sesotho into Xhosa.
 15 MR MPOFU: He has already.
 16 CHAIRPERSON: Are you still busy with it,
 17 translating it into isiXhosa?
 18 MR MAHLANGU: We are still busy with the
 19 last sentence.
 20 CHAIRPERSON: When you've done that would
 21 you be kind enough to help those of us who are
 22 linguistically challenged in another direction, by
 23 translating it into the English please?
 24 MR MPOFU: Thank you, Mr Mahlangu.
 25 CHAIRPERSON: [Inaudible]

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1 MR MAHLANGU: Into Xhosa first, yes, yes.
 2 CHAIRPERSON: [Inaudible]
 3 MR MAHLANGU: Yes. In English this would
 4 be, "Yō, yō, Pat, I have blasted him, I have blasted him,
 5 jong. I have blasted him, yes, yes. "I don't see how it
 6 could be if I could hit him with a knob stick" – and then
 7 the sentence is not complete.
 8 MR MPOFU: Thank you, Chairperson, I'm
 9 happy with that translation, save to remind the tribunal
 10 that earlier on the witness had agreed to a closer
 11 interpretation which was, "I have blown him apart" but "I
 12 have blasted him," I'm happy with that. Right, then the
 13 next one –
 14 GENERAL PHUYEGA: It's very confusing.
 15 MR MPOFU: - is at 2:00 to 3:00 and just
 16 for context I'll read the whole thing and Mr Mahlangu will
 17 help us with the other part. "There's muti there, there's
 18 muti there. Ja, all over the body. Leave it, leave it,
 19 leave it." And then "Unknown," another person, "Ja, that
 20 muti shit does not work here, baba" – [Speaking Sesotho].
 21 MR MAHLANGU: The translation in English
 22 would be, "There's muti there, there's muti there. Ja, all
 23 over the body. Leave it, leave it, leave it. Ja, that
 24 muti shit does not work here, baba." Baba means father but
 25 it's a reference to any male person. "Ja, baba." And then

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1 it says – [speaking Sesotho]. This is very vulgar, it
 2 refers to your private parts. And then he says to that
 3 person – "[speaking Sesotho], go down." He was insulting a
 4 person who was seated there, your, referring to his private
 5 parts and then saying to this person, "Go down, [speaking
 6 Sesotho]."
 7 CHAIRPERSON: Could you then please
 8 translate that into Xhosa for the benefit of those who want
 9 the Xhosa interpretation?
 10 MR MPOFU: But the last line is –
 11 [speaking Sesotho] – and I'll also read it in full for
 12 trans – rather, for context. "Blom, blom, ready the
 13 position, boss. Hierdie, het jy gesien hoe die ding ons
 14 aanval, die ding vang ons sommer so. Wie Sebatchesane, hy
 15 slaat hom tien, hy is die mag", the "mag" or the "mag" –
 16 the "mag" yes, "hy het die mag leeggemaak maar hy kom nog
 17 steeds." "Mag" I assume is magazine.
 18 CHAIRPERSON: Translate the Afrikaans
 19 into English and then also into Xhosa and I suspect that
 20 "mag" there is probably an abbreviation for the English
 21 word "magazine" but you'll know better than I.
 22 MR MAHLANGU: If I may say, Mr
 23 Chairperson, this sounds like the Afrikaans spoken by the
 24 coloured population of the Western Cape. The word "blom"
 25 usually means sit but I cannot say in this context this was

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1 sitting here. "Blom, blom, ready the position, boss."
 2 That's how it reads and then he says, "Hierdie, Here,
 3 hierdie, het jy gesien hoe die ding ons aan, die ding vang
 4 ons sommer so." Did you see how this thing attacked us?
 5 This thing just comes. "Die ding vang ons sommer so."
 6 This thing just catches up – yes, like this, or unaware.
 7 "Wie Sebatchesane, hy slaat hom tien," that one is not really
 8 - "Wie Sebatchesane, hy slaat hom tien." Sebatchesane hit him
 9 10 times. "Hy het die mag leeggemaak," he emptied his
 10 stomach but he –
 11 CHAIRPERSON: I suspect it may be the
 12 magazine of the firearm.
 13 MR MAHLANGU: Die mag, not die maag. Die
 14 mag, ja. He emptied his magazine –
 15 CHAIRPERSON: Maybe Captain Rylands when
 16 he comes, can tell us how he understood it but I suspect
 17 that he emptied his magazine –
 18 MR MAHLANGU: Yes, "mag" here is another
 19 one of those terms used there, "en hy het die mag
 20 leeggemaak." He emptied his magazine, "maar hy kom
 21 steeds," but he is still coming.
 22 MR MPOFU: Thank you. General, I just
 23 want to try and save time. I'll round off, I'll ask you a
 24 kind of rounded question that covers all the statements and
 25 without belabouring the point I'd like you to confirm to

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1 the Commission that those statements, including those made
 2 in Sesotho, are vulgarities, as Mr Mahlangu has suggested,
 3 which have no place in a humane police service that you and
 4 the SAPS legal team have made us to believe you were
 5 running.
 6 GENERAL PHIYEGA: Judge, let me just put
 7 it this way before I answer that question. I have a
 8 problem with all these versions of information as presented
 9 to me to respond to. First there was the translation which
 10 I was given too, which had a lot of gaps. I was asked to
 11 go and listen, which I did and again I came out unclear.
 12 Today there's a version her that sounds more like Fanagolo
 13 that is being presented to us and perhaps at some point
 14 really if one is to start commenting and putting opinions
 15 on the matter, we may need people with better equipment,
 16 ability to read this type of thing and then maybe we can
 17 respond to those. At this point in time I find it very
 18 difficult to accept the statement that has been read to me.
 19 MR MPOFU: Yes. Thank you, General. No,
 20 that's understandable but you see how these things work is
 21 that you are a very busy person, we don't want to bring you
 22 back here in two months' time just for the sake of
 23 listening to this. So for now please just believe that the
 24 question is simply as follows. If these translations are
 25 correct and that "if" depends on if Mr Semenya for some

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1 reason – I can be 1000% sure about this – if he speaks one
 2 word that is incorrect, him and I will sit down and as
 3 colleagues we'll agree and we'll inform the Commissioners
 4 and so on and so on. So take that for granted that that
 5 will happen. In fact he doesn't even have to listen. If I
 6 listen to and find something wrong, I will – I am duty
 7 bound to come and say no, that word was not correct and so
 8 on, so accept all that. Now if, after all those processes,
 9 these translations are found to be correct, would you agree
 10 that they display vulgarities which have no place in the
 11 humane and compassionate police and all the other things
 12 that you said the police are doing?
 13 GENERAL PHIYEGA: Advocate, I think the
 14 "if" factor will remain a very serious bother for me in
 15 answering questions in this Commission because the "if"
 16 factor, you know, you are actually saying being the
 17 National Commissioner I must make very serious comments
 18 about things that I would have considered very rationally
 19 and objectively. I'm saying to you, this version, this
 20 translation, I am very concerned to put my comment on these
 21 type of issues. I wouldn't even mind coming back if we
 22 have had people who have listened to this, all these
 23 versions and have given us a translation, then I can
 24 comment.
 25 CHAIRPERSON: Mr Mpofu, we'll take the

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1 tea adjournment now.
 2 MR MPOFU: Thank you, Chairperson.
 3 [COMMISSION ADJOURNS COMMISSION RESUMES]
 4 [11:48] CHAIRPERSON: The Commission resumes.
 5 National Commissioner, you're still under oath. Mr Mpofu.
 6 MR MPOFU: Thank you, thank you,
 7 Chairperson. Commissioner, before we move on I just want
 8 to once again clarify the question I'm putting to you. In
 9 paragraph 39 of the opening statement of the police among
 10 other things it says, "The South African Police Service is
 11 committed to humane policing, in a humane," I suppose, it's
 12 spelt human but I'm sure they meant humane. "Humane
 13 policing in a humane society." You yourself have thanked
 14 the police for what they did and you have described their
 15 work as the best of responsible policing. And all I'm
 16 putting to you is that in the same way as the images that I
 17 showed you of policemen placing a boot on somebody's body,
 18 dragging people, laughing around them and all the things
 19 that we dealt with when we resumed our cross-examination,
 20 that the statement - those were actions, physical actions.
 21 Now I'm showing you verbal actions, if you like, which fall
 22 into the same genre, as I said, and what I'm putting to you
 23 is that if these statements are indeed as they appear in
 24 the document in front of you then they do not, A, represent
 25 a commitment to humane policing in a humane society or the

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1 best of responsible policing and it's nothing for you to
 2 direct your gratitude towards. What do you say to that?
 3 GENERAL PHIYEGA: I shall say to you,
 4 Advocate, that there is a lot that I have to express my
 5 gratitude to in terms of the operation that took place.
 6 And I shall also say in a large operation such as that one
 7 there may be one or two errors and those we will look into.
 8 As this Commission finishes we will look at those errors
 9 but ordinarily the operation was indeed delivered in a
 10 humane manner.
 11 MR MPOFU: So going back to where we
 12 started, you and I accept I think as Mr Semenya has pointed
 13 out and the Chairperson has confirmed, I accept that all
 14 the things that I've shown you, starting with the material
 15 from the videos to this, were not things that you
 16 necessarily knew when you made your statement of gratitude
 17 and best of responsible policing, what have you. The
 18 question I'm asking you is now, as you are sitting there,
 19 now that I've pointed all these things to you is your
 20 answer that you're not prepared to withdraw, qualify your
 21 statements about gratitude for whatever happened and thank
 22 you for what you did? You're not prepared to do that?
 23 GENERAL PHIYEGA: No, I am not because
 24 I've already indicated in my previous answer to you that
 25 there is a lot that I have gratitude for.

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1 MR MPOFU: Thank you.

2 CHAIRPERSON: Mr Mpofu, I get the

3 impression you've taken the point as far as you can. I can

4 understand that there are points you may wish to advance in

5 argument but whether they are good points or bad points –

6 MR MPOFU: Is another matter.

7 CHAIRPERSON: It's not appropriate to

8 decide now but I imagine you've got the material upon which

9 you'll base the argument.

10 MR MPOFU: Yes.

11 CHAIRPERSON: So may I suggest you move

12 on to another point?

13 MR MPOFU: Yes Chair, that question was

14 meant exactly for that purpose. And I put it to you that

15 this kind of behaviour and language portrays not a so-

16 called compassionate and humane police force but one that

17 was motivated by anger, malice and even a sense of revenge.

18 What do you say to that?

19 GENERAL PHIYEGA: I have disagreed and I

20 shall continue to disagree because I do not believe that we

21 as police had what you are putting forward.

22 MR MPOFU: And do you remember before we

23 moved to what I call the next game changer, do you remember

24 where we started with this was that the events of the 13th,

25 in particular the killing of the policemen, are what

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1 produced this sort of brutality, for lack of - well I don't

2 think it's anything short of that - and strong language and

3 unlawful actions and what I want to put to you is that the

4 police themselves knew that some of the policemen would be

5 so affected by the killing of their fellow policemen that

6 they would lose their professionalism or that they would no

7 longer be able to function as expected. What do you say to

8 that?

9 COMMISSIONER HEMRAJ: Mr Mpofu, when you

10 say the police knew, exactly who are you referring to?

11 MR MPOFU: Okay let me say SAPS or the

12 leadership of SAPS on the ground knew that because of the

13 killing of the policemen in particular, some of their

14 members would be so affected as not to be able to carry on

15 their duties as expected and that these were just

16 demonstrations thereof. What do you say to that?

17 CHAIRPERSON: Mr Semenya, you have your

18 light on.

19 MR SEMENYA SC: I was going to say that,

20 Chair, the word leadership does not answer Commissioner

21 Hemraj's enquiry. We want to be able to bring those

22 witnesses so that they can refute the allegations that is

23 being put to them. To just say the leadership knew, to me

24 suggests even premeditated murder.

25 MR MPOFU: Sorry, Commissioner.

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1 COMMISSIONER HEMRAJ: My next question to

2 you, Mr Mpofu, was going to be are you suggesting that the

3 commanders that have been named are the persons who knew

4 about this?

5 MR MPOFU: Maybe my next question will

6 clarify, Commissioner Hemraj. The proposition that I'm

7 putting to you really is this, that to your knowledge, to

8 your knowledge members of the police who were present

9 during the operation knew some of the policemen would be so

10 affected by the killing of other policemen that they would

11 not be able to function normally to the extent that is

12 expected of them.

13 MR SEMENYA SC: Chair –

14 CHAIRPERSON: Yes, Mr Semenya?

15 MR SEMENYA SC: We still require

16 specificity. We had General Annandale there, it was not

17 put to him that he knew that those people would, because of

18 the events of Monday, kill the others.

19 CHAIRPERSON: I seem to remember that

20 when he was asked a question along those lines and he said

21 he couldn't say, the Provincial Commissioner might be able

22 to but if he couldn't and it's a matter for the Provincial

23 Commissioner, I don't see the point in asking this witness

24 the question. But Mr Mpofu aren't you asking this question

25 of the wrong witness?

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1 MR MPOFU: Okay, once again I have to

2 show my hand. I have to say where I'm going with this.

3 You have testified that you approved the opening statement

4 of the police, correct?

5 GENERAL PHIYEGA: Yes.

6 MR MPOFU: In that statement, paragraph

7 35 says the following: "When police officers are targeted

8 the police service steps in, suppressing the human response

9 of the moment in order to render a professional service."

10 Suppressing the human response of the moment in order to

11 render a professional service. "Some members who may have

12 been affected by the death of their colleagues in the

13 events of 13th August, of Monday 13th August 2012, were

14 removed from Marikana and posted elsewhere." That's the

15 statement which you approved. The statement doesn't say

16 who or all these things that Mr Semenya is asking but what

17 it does say is that some of the members were removed from

18 Marikana because of the knowledge that the death of their

19 colleagues would have so affected them that it might

20 suppress the human response of the moment in order to

21 render a professional service.

22 MR SEMENYA SC: Chair, that opening

23 statement contends to the contrary and I don't understand

24 where Mr Mpofu is going.

25 MR MPOFU: Okay, I'll assist my learned

<p style="text-align: right;">Page 10778</p> <p>1 colleague. The only proposition I'm putting is that if the 2 police realised even before the 16th that some of their own 3 would have been so affected by the death of their 4 colleagues, as it says here, to such an extent that they 5 had to be removed because they may not be able to render a 6 professional service, then it was then to the knowledge of 7 this witness when she approved the statement at least, if 8 no other time, the proposition that - the grand or the big 9 proposition which I put in terms of what I call game 10 changer 2, namely that the deaths of police on the 13th were 11 such a game changer to the extent that they denuded or 12 removed the sense of professionalism from the police to the 13 extent that they had to do and say all the vulgarities and 14 the brutality that I've shown to the witness. 15 CHAIRPERSON: Mr Mpofo, I don't see the 16 nexus between what was described in the passage you read 17 from the opening statement and what we see here in GGG36.1 18 because the picture that one saw on the video was a 19 situation where it is contended by the police that the 20 members of the police who were there were being attacked. 21 And it will be contended that in self-defence or private 22 defence they responded. Now if people, even if they 23 weren't there on the 13th, are at scene 2 on the 16th and 24 they're being attacked - assuming for the moment that 25 that's correct, something we may have to find as to the</p>	<p style="text-align: right;">Page 10780</p> <p>1 killed people, innocent people and so on and so on, so 2 whether they were present or not once again does not come 3 into it. That's not the proposition I'm putting. I'm 4 simply saying that - and I'm not even saying it's the sole 5 cause. 6 CHAIRPERSON: I'd like to know what 7 proposition you are putting, not the proposition you're not 8 putting but the proposition you are putting. 9 MR MPOFU: Yes. Well, I first have to 10 de-ascribe the one that's ascribed to me first and then 11 I'll say what I'm putting. Also what I'm not saying is 12 that it's the sole cause for them behaving 13 unprofessionally. All I'm saying, Chair, is this, that the 14 killing of the police, to the knowledge of themselves and 15 of this witness so affected some of them that they even had 16 to be removed and what I'm going to argue obviously at the 17 end is that they didn't remove enough. That some of those 18 who displayed the vulgar behaviour that I have displayed 19 were motivated inter alia, I'm prepared to concede that, by 20 the same inability to render a professional service that 21 has been displayed, yes. Thank you, Chair. 22 [12:08] CHAIRPERSON: I'm afraid you've lost me. 23 I still don't understand the proposition you're putting - 24 MR MPOFU: Okay. 25 CHAIRPERSON: And if I don't understand</p>
<p style="text-align: right;">Page 10779</p> <p>1 circumstances in which they were there and so on - then 2 they will react in a particular way. And they mightn't 3 always speak the English that Doctor Bowdler would approve 4 of or that you would find used in polite drawing rooms but 5 how can you show or base a contention that this behaviour, 6 this vulgar speech was caused by the fact that these 7 people, or some of them were on the scene on the 13th? The 8 nexus seems to be missing unless I'm not understanding the 9 question properly. 10 MR MPOFU: No, no I'm afraid you're not, 11 Chairperson. That is not what I'm putting. It's got 12 nothing to do with the present at all, at all. All I'm 13 putting is this, assume that they were attacked, assume 14 that they were acting under self-defence, assume all those 15 things. I'm saying that their behaviour that I have 16 displayed of dragging people, of insulting them, of all the 17 things that I have shown to the General, assuming all those 18 things to be so, do not display the requisite 19 professionalism from a police force that is attacked or not 20 attacked. So the issue of whether they're attacked doesn't 21 come into it, number one. Number two, I'm not suggesting 22 that necessarily they were present on the 13th. I will show 23 actually, Chair, that one of the Captains when he was 24 briefing the TRT members said to the police just in case 25 they were not there on the 13th, remember these people have</p>	<p style="text-align: right;">Page 10781</p> <p>1 then I don't think, it may be my fault but if I don't 2 understand then I can't expect the witness to understand it 3 either. So if you could put it with greater clarity, I 4 would appreciate it. 5 MR MPOFU: Okay, thank you, Chair. Okay 6 General, I'm going to put a simple proposition to you and 7 you can agree or disagree. If members of the police were 8 of the view that some of their numbers were so affected by 9 the death of their colleagues that they had to be removed 10 and posted elsewhere, then I will argue that that 11 demonstrates that they knew that those members who had to 12 be removed were being removed, among other things, because 13 of what is said in paragraph 35, namely the potential 14 inability to render a professional service. 15 MR SEMENYA SC: Chair - 16 CHAIRPERSON: Mr Semenya, you've turned 17 your light on. 18 MR SEMENYA SC: That contention requires 19 no answer from this witness. It is the police case, it's 20 not even an "if," that the people were removed who were 21 believed may have been affected by the events of the 13th. 22 So they were not part of the 16th operation, some of them. 23 CHAIRPERSON: Yes. Mr Semenya, you'll 24 remember that Major-General Annandale was asked about this 25 and I seem to remember Adv Jele asked him a number of</p>

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1 questions about the debriefing and it turned out there are
 2 two types of debriefing. The one kind is what one can call
 3 sort of emotional debriefing where they interviewed people
 4 who had been involved in the incident to see whether they
 5 were emotionally affected, whether they traumatised and
 6 those were given therapy in some cases and in other cases
 7 actually removed from the operation for the many reasons
 8 that are set out in paragraph 35. Now it may be that you
 9 will want to argue that the choice of those to be removed
 10 wasn't done adequately, there were some others who should
 11 have been removed, but I'm not sure that this witness can
 12 answer that question. Maybe you must – remember he also
 13 said that this was a matter that fell under the Provincial
 14 Commissioner, do you remember, when he was asked about that
 15 and these are questions you may well wish to ask the
 16 Provincial Commissioner and when you ask them I'll allow
 17 them, but I don't know that this witness can help us very
 18 much.

19 MR MPOFU: Thank you, Chairperson, I'll
 20 leave it but for the record let it be shown that I'm only
 21 asking this witness insofar as she has confirmed to this
 22 Commission that she approved the statement and therefore to
 23 her knowledge these things happened, but I won't pursue it
 24 any further. That's all I'm doing.

25 CHAIRPERSON: We know that she approved

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1 the statement, you've established that and that may well
 2 form a basis of argument at a later stage ex post facto,
 3 but anyway you've now –

4 MR MPOFU: I'll move on.

5 CHAIRPERSON: - move on to the next
 6 point.

7 MR MPOFU: I'll move on. Thank you,
 8 Chairperson. No, before I move on, just would you also
 9 accept – I'm going to also argue that there is a direct
 10 link between the killing of the policemen specifically and
 11 the death threats that were made to General Mpenbe. In
 12 other words, what I'm saying is that people like Merafi who
 13 threatened to kill Mpenbe would not have threatened to kill
 14 him had it not been for the fact that their colleagues,
 15 policemen had been killed - in other words, if it was
 16 civilians who had been killed.

17 MR SEMENYA SC: Chair –

18 CHAIRPERSON: Mr Semenya wants to say
 19 something –

20 MR MPOFU: Yes.

21 CHAIRPERSON: - but my recollection is
 22 that Merafi was not there on the 16th.

23 MR SEMENYA SC: Exactly.

24 CHAIRPERSON: According to his statement
 25 he was somewhere else.

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1 MR MPOFU: No, I'm not talking about-
 2 CHAIRPERSON: We may well discover that
 3 he was somewhere else because the Provincial Commissioner
 4 sent him there for the very reason - so he's a bad example
 5 actually –

6 MR MPOFU: No -
 7 CHAIRPERSON: - to illustrate your point.

8 MR MPOFU: No, that's a misunderstanding,
 9 Chair, on your part, with respect. I'm not talking about
 10 the 16th. I'm not talking about the 16th –

11 CHAIRPERSON: There's another point that
 12 I'm reminded – Merafi's statement doesn't say he made death
 13 threats. My recollection of his statement was that he
 14 heard the death threats and therefore he considered it
 15 appropriate for steps to be taken that those death threats
 16 weren't implemented.

17 MR MPOFU: No.
 18 CHAIRPERSON: So –

19 MR MPOFU: No, that's also incorrect.
 20 That's Vermaak, you're mistaking it with Vermaak. That's
 21 not correct, Chair. What happened –

22 CHAIRPERSON: Does Merafi say in his
 23 statement that he threatened to kill –

24 MR MPOFU: No.
 25 CHAIRPERSON: - Mpenbe. He doesn't say

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1 that.

2 MR MPOFU: He doesn't. Vermaak says
 3 Merafi –

4 CHAIRPERSON: I know – I know, but Merafi
 5 hasn't come here. You can't put it as a statement of fact.
 6 You could say possibly that Vermaak says it but you can't
 7 put it higher than that, can you?

8 MR MPOFU: Okay. Vermaak says that
 9 Merafi wanted to kill Mpenbe. You remember we've gone
 10 through that.

11 CHAIRPERSON: You've got your light on,
 12 what do you want to say?

13 MR SEMENYA SC: That is misquoting the
 14 evidence of, the statement of Colonel Vermaak.

15 MR MPOFU: Okay.

16 MR SEMENYA SC: But most importantly,
 17 Chair, Mr Mpofo cannot keep disguising irrelevant questions
 18 by stating that that is his argument. Is he going to be
 19 giving us evidence, direct evidence of these propositions
 20 he's making?

21 CHAIRPERSON: No, well, I've told you he
 22 doesn't of course have to give direct evidence, provided
 23 there's evidential material which gives rise to a
 24 circumstantial evidence argument. So direct evidence isn't
 25 all he requires but I'm inclined to agree with your view,

<p style="text-align: right;">Page 10786</p> <p>1 it's a ruling I've made several times, it's no good asking 2 this witness for her views on certain things because if 3 these are matters that we have to decide, her views, with 4 great respect, are irrelevant. That's why, on a number of 5 occasions, I've upheld objections that the cross- 6 examination is not appropriate because it's irrelevant. 7 Obviously it doesn't mean the witness, that Mr Mpofu can't 8 argue these points later if there's circumstantial evidence 9 that supports the proposition he's putting up but that's a 10 different matter. 11 MR SEMENYA SC: No, we concede, Chair. 12 If that is circumstantial evidence then we'll be pointed to 13 it, that based on A and B and C, that the argument will 14 rest on A, B and C to contend why – 15 MR MPOFU: Okay – 16 MR SEMENYA SC: Then the witness would be 17 able to respond to it. 18 CHAIRPERSON: Mr Mpofu, I don't want to 19 hamper your cross-examination because I know you've got a 20 difficult duty to discharge and you must be given every 21 opportunity but the fact is, when evidential material is 22 before the Commission such as statements, paragraphs in the 23 opening statement, evidence of other witnesses and so on, 24 you don't have to repeat it to this witness to get her 25 views, for the reasons I've explained in the past. It can</p>	<p style="text-align: right;">Page 10788</p> <p>1 CHAIRPERSON: I immediately realised that 2 it was a very explosive situation and I telephoned the 3 Provincial Commissioner and informed her of the threat and 4 informed her further that I was going to remove him from 5 the scene. I went directly to him, informed him that I was 6 going to remove him from the scene because of the threat to 7 his life. I arranged for a Nyala vehicle with two members 8 to take him away to the ops. That's the passage that we've 9 had before – 10 MR MPOFU: Thank you – 11 CHAIRPERSON: Now I've translated it for 12 you and for the witness. 13 MR MPOFU: Thank you – 14 CHAIRPERSON: Okay, now that doesn't say 15 of course that Merafi was one of the threateners. 16 MR MPOFU: Well, General Annandale 17 confirmed that – but that's not important. "Die lede," he 18 said "die lede," I don't care who it is, "die lede" – 19 CHAIRPERSON: No – no, "lede" are the 20 members. 21 MR MPOFU: Ja. 22 CHAIRPERSON: You put directly to the 23 witness that the evidence was, and you said Lieutenant- 24 Colonel Vermaak said it, that one of those who threatened 25 to kill General Mpembe was Merafi –</p>
<p style="text-align: right;">Page 10787</p> <p>1 still be open to you to argue the point and if a witness 2 comes who is directly affected with the proposition you're 3 putting, you can ask the witness, so – 4 MR MPOFU: That I appreciate, 5 Chairperson, and honestly I don't want to belabour this 6 point. All I'm doing is what has been done since this 7 Commission started, of putting a proposition that comes 8 from the police statements themselves and which actually we 9 have done, we've dealt with this issue with this witness. 10 All I'm saying is that if you go to Vermaak, Chairperson, 11 paragraph 5, you'll see that he says, "Van die lede het 12 saam met my teruggeloop en was baie ontsteld gewees en aan 13 my gemeld dat hulle Generaal-Majoor Mpembe kwalik neem vir 14 die lede wat dood is en dat hy verkeerde opdragte gegee 15 het. Hulle het aan my gesê dat" – 16 CHAIRPERSON: Sorry, Mr Mpofu, this 17 passage is being read in Afrikaans. I think it's been read 18 in English already. Among the members who walked back with 19 me were some who were very upset or disturbed and who 20 mentioned to me that they were very angry with Major- 21 General Mpembe for the members who were dead and that he'd 22 given wrong instructions. They said to me that Major- 23 General Mpembe today would go and lie together with these 24 members on the ground because they were going to shoot him. 25 MR MPOFU: Yes.</p>	<p style="text-align: right;">Page 10789</p> <p>1 MR MPOFU: Yes. 2 CHAIRPERSON: I've just read that passage 3 to you to indicate that that proposition was inaccurate and 4 certainly Major-General Annandale who wasn't there, he was 5 in the JOC the whole time, wasn't able to add anything 6 further – in fact he wasn't there at the time, that was on 7 the 13th – 8 MR MPOFU: Ja. 9 CHAIRPERSON: He wasn't even there at the 10 time. Major-General Annandale wasn't able to take that any 11 further. So that's the high-water mark of that allegation 12 and the proposition you put to the witness was incorrect 13 because it went beyond that. 14 MR MPOFU: That's fine. Chairperson, I 15 know what Annandale said, I don't want to go there. Let's 16 leave it at "die lede." Do you know that some of the 17 members, nameless, wanted to kill Mpembe? 18 GENERAL PHIYEGA: I'm going to answer you 19 in two ways. One, I would know that as reports as I read 20 the statement that is done by Vermaak and that you are also 21 saying that, is "die lede" nameless, and you say they are 22 nameless. And thirdly, that General Mbombo is here or is 23 going to come here, she is the one who was phoned by 24 Vermaak and I'm sure she can talk about the nameless people 25 and the allegation by Vermaak.</p>

<p style="text-align: right;">Page 10790</p> <p>1 MR MPOFU: General, let's make this very 2 easy. The only proposition I am putting to you is that the 3 threats that were made to Mpembe, it was said that he 4 should, "saam met daardie lede op die grond gaan lê," that 5 he, Mpembe, should be lying down together with those 6 members who are dead. And the only simple proposition I'm 7 putting to you is that those death threats were made 8 because members, other members of the police had been 9 killed, not because civilians were killed. It was, the 10 threats were directly linked met "saam met die lede op die 11 grond." Do you understand? 12 GENERAL PHIYEGA: I think I've given you 13 my understanding of this. 14 MR MPOFU: Okay, thank you. We'll leave 15 that for argument if that's your final answer. Now, going 16 back to the 10 principles and once again, if you somehow 17 don't remember that we agreed on this, I will take you to 18 the prescripts but is it correct that you and I have agreed 19 that one of the most important principles coming out of the 20 prescripts is that the police should act impartially. 21 Agreed? 22 GENERAL PHIYEGA: Yes, I do. 23 MR MPOFU: And the very first words of 24 section 218 of the Constitution, which has been retained, 25 say that – where it talks about the responsibilities of the</p>	<p style="text-align: right;">Page 10792</p> <p>1 agree that a large percentage of the work that the police 2 do, involves disputes of some sort between alleged victims 3 and alleged perpetrators and those kinds of parties, 4 correct? 5 GENERAL PHIYEGA: There are also those 6 issues, among others. 7 MR MPOFU: And it would be in those 8 typical situations of conflict or dispute that the police 9 need to display their impartiality the most, correct? 10 GENERAL PHIYEGA: I think overall they 11 must show impartiality. 12 MR MPOFU: And you would know, as a 13 social scientist, that in a society there is what some 14 might call an inherent conflict between capital and labour, 15 so to speak, between business people and workers, if you 16 don't want to use the grand terms. 17 GENERAL PHIYEGA: Maybe I don't 18 understand the context of what you are asking. 19 [12:28] MR MPOFU: Do you know or don't you know, 20 as a person who has studied social sciences, that there is, 21 in situations such as the one that we are discussing here, 22 a situation of conflict between what some call capital and 23 labour or, to put it in simple English, between the working 24 people and those that own the means of production. I don't 25 know if that's simple English.</p>
<p style="text-align: right;">Page 10791</p> <p>1 National Commissioner, "Subject to section 214 and the 2 directions of the Minister referred to in 216" – which you 3 can ignore – "the National Commissioner shall be 4 responsible for, (a) the maintenance of an impartial, 5 accountable, transparent and efficient police service." 6 The very first one of about 12 or 13 sections, the first 7 word that is imposed upon you is the duty for impartiality. 8 Do you accept that? 9 GENERAL PHIYEGA: Yes, I do. 10 MR MPOFU: And section 195(1)(d) of the 11 Constitution, which Mr Semenya read to you in chief, also 12 requires for the public service to be impartial, correct? 13 GENERAL PHIYEGA: [African language]. 14 MR MAHLANGU: That is true. 15 MR MPOFU: And section 25 of the Act 16 which, going down the ladder of the prescripts, also 17 prescribes for impartiality, so does – just to save time – 18 paragraph 2.2.5 of FFF1 and so does para, sorry, paragraph 19 34.4 of the police opening statement which says, "When 20 death, injury or damage results from internecine conflict 21 among any constituencies, the police service steps up and 22 conducts itself impartially." 23 MR MAHLANGU: That is the truth. 24 MR MPOFU: You'll also agree that – so 25 okay, so the prescripts definitely require this. Do you</p>	<p style="text-align: right;">Page 10793</p> <p>1 GENERAL PHIYEGA: Yes, I do understand. 2 MR MPOFU: And in this, taking it now 3 away from the esoteric level, in this particular situation 4 you were aware that there was a dispute as between Lonmin 5 and the protesters, correct? 6 GENERAL PHIYEGA: I think it's a very 7 shaded question that you are asking me. Are you asking me 8 whether there was conflict between Lonmin as the employer 9 and the protesters as employees and perhaps maybe if you 10 could take it a little bit further so that I can answer you 11 properly, what would have been the nature of the conflict? 12 MR MPOFU: Okay. Yes, were you aware 13 that there was a wage dispute as between those two parties? 14 MR BURGER SC: I object to that question. 15 There's no evidence that there was a wage dispute. There 16 was an unprotected strike and the strikers wouldn't talk 17 within the agreed structures in place between the workers 18 and the employer. That's the evidence thus far before the 19 Commission. 20 MR MPOFU: Do you know, General, that 21 another work for a strike is an industrial dispute? 22 CHAIRPERSON: I don't know that that is 23 entirely accurate. There are various kinds of industrial 24 disputes. Strikes are one of them, I think. 25 MR MPOFU: Yes, what the Chairperson –</p>

<p style="text-align: right;">Page 10794</p> <p>1 [inaudible].</p> <p>2 GENERAL PHIEGA: My response to you is</p> <p>3 that we were there as the police to deal with an</p> <p>4 unprotected strike.</p> <p>5 MR MPOFU: Yes and if someone was more</p> <p>6 verbose they could express exactly what you are saying to</p> <p>7 say you were there for an unprotected industrial dispute,</p> <p>8 correct?</p> <p>9 GENERAL PHIEGA: I don't have the</p> <p>10 capacity to extend my mind to that but I know that we were</p> <p>11 there to deal with an unprotected strike.</p> <p>12 MR MPOFU: Alright, look, I'm not going</p> <p>13 to argue semantics with you. I put it to you that you were</p> <p>14 informed, according to your own statement and the</p> <p>15 statements of many other witnesses, during the briefing of</p> <p>16 two things and I'm still dealing with the first one. It</p> <p>17 was said to you that there's a conflict between the NUM and</p> <p>18 AMCU - we've dealt with that in another context - and it</p> <p>19 was also said to you that there's a dispute about wages</p> <p>20 with the employees. And further on it was said to you,</p> <p>21 what Mr Burger is saying is correct, that the employees</p> <p>22 wanted to negotiation with the employer and the employer</p> <p>23 said it could not negotiate with faceless people. It was</p> <p>24 in that context that the whole issue of faceless people was</p> <p>25 raised. So you knew that there was this wage dispute.</p>	<p style="text-align: right;">Page 10796</p> <p>1 GENERAL PHIEGA: Advocate, it is</p> <p>2 important to contextualise the involvement of the police</p> <p>3 and I will again repeat that our involvement as police was</p> <p>4 because there was an unprotected strike. The drivers</p> <p>5 thereof are another thing. The causes, the underlying</p> <p>6 causes thereof are another thing but what brings us there</p> <p>7 as police, what puts us in that scene is because there is</p> <p>8 an unprotected illegal strike.</p> <p>9 MR MPOFU: Yes. No, I don't want to be</p> <p>10 sidetracked into labour law definitions but I'm sure you</p> <p>11 know also as a person who has been in management and in HR,</p> <p>12 that the unprotectedness of a strike is not a matter for</p> <p>13 policing, it's a matter for collective bargaining at best</p> <p>14 or at worst for the labour law, the Labour Court to either</p> <p>15 dismiss the unprotected strikers or not.</p> <p>16 GENERAL PHIEGA: I think it's important</p> <p>17 also again for me to mention that in public order, part of</p> <p>18 ensuring that there's public order is that economic</p> <p>19 activity must take place, social life must continue,</p> <p>20 property of people must be taken care of, all those.</p> <p>21 People should have the freedom to do what they are supposed</p> <p>22 to be doing. In whatever area they find themselves, we are</p> <p>23 coming there to ensure that that happens, that public order</p> <p>24 is restored and the normal life of that community can</p> <p>25 continue as it goes. So the issues, Chair, bargaining and</p>
<p style="text-align: right;">Page 10795</p> <p>1 MR BURGER SC: What my learned friend put</p> <p>2 is not correct. The evidence is that Lonmin could not</p> <p>3 negotiate principally because the unprotected strikers</p> <p>4 wanted to negotiate outside established wage negotiation</p> <p>5 structures. They couldn't do that because contractually</p> <p>6 they were bound to the existing structures. The faceless</p> <p>7 comment is taken out of context. That came about on the</p> <p>8 evidence thus far, that the strikers wouldn't disclose who</p> <p>9 they speak for, whether it's a trade union or not, and</p> <p>10 there was a suspicion that there were non-Lonmin employees</p> <p>11 in the crowd. It's in that context that there was a</p> <p>12 reference to faceless people but my learned friend should</p> <p>13 put it on that basis and not on the narrow basis he's done.</p> <p>14 MR MPOFU: Okay. Okay, for the sake of</p> <p>15 progress I'll put it on the wide or narrow basis that Mr</p> <p>16 Burger is suggesting, that you and the rest of the world,</p> <p>17 for that matter, knew that there was a dispute or a number</p> <p>18 of disputes about wages - another one is the one that Mr</p> <p>19 Burger has kindly told us, about whether or not these</p> <p>20 strikers could negotiate outside the collective bargaining</p> <p>21 systems without the union, given that although there was a</p> <p>22 two-year agreement, warra-warra, all those things, that</p> <p>23 there were disputes about wages, principally, and about how</p> <p>24 the issue should be taken forward. That you knew, you were</p> <p>25 told about that.</p>	<p style="text-align: right;">Page 10797</p> <p>1 whatever, really are not the issues that we concern</p> <p>2 ourselves with as the police. We are there to restore</p> <p>3 stability, public order and to ensure that the rights of</p> <p>4 people in their various shapes, social, economic and</p> <p>5 religious, continue to go the way it's supposed to go.</p> <p>6 MR MPOFU: Okay, maybe it's better if I</p> <p>7 put it to you that in the context of the dispute or the</p> <p>8 disputes that existed as between Lonmin and the employer,</p> <p>9 rather the employees, the protesters, even confining it to</p> <p>10 the basis that Mr Burger has articulated, the duty of the</p> <p>11 police was to act impartially vis-à-vis or as between those</p> <p>12 two parties, those protagonists in that dispute or</p> <p>13 disputes. Do you agree with that?</p> <p>14 GENERAL PHIEGA: I've heard, I wait for</p> <p>15 the question.</p> <p>16 MR MPOFU: That's the question -</p> <p>17 CHAIRPERSON: He's asked a question. The</p> <p>18 question is, do you agree that it was the duty of the</p> <p>19 police to act impartially between the two sides of what he</p> <p>20 describe as a wage dispute? Insofar as it was a wage</p> <p>21 dispute would you agree, says he, that it was the police's</p> <p>22 duty to act impartially as between the two contesting</p> <p>23 parties. I think that's your question, Mr Mpofo.</p> <p>24 MR MPOFU: Essentially, Chair.</p> <p>25 GENERAL PHIEGA: Actually Chair, I've</p>

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1 already indicated that the impartiality principle is fully
 2 embraced and yes, it continues to be embraced by the
 3 police.
 4 MR MPOFU: Okay, I'm now going to put to
 5 you a proposition at the end of which I will suggest
 6 whether or not, or what I will argue as to whether or not
 7 this very and sacrosanct principle of impartiality was
 8 observed but before I do that I want, once again taking
 9 advantage of your experience in industry, you are aware
 10 that collective bargaining is a process that involves the
 11 negotiation of that tension that I referred to between
 12 employers and employees and that - we were given a very
 13 rudimentary lesson by Mr Magidiwana on this - that on the
 14 one hand the employers withdraw their labour to hurt the
 15 employer, the employees, to hurt the employer's profit-
 16 making or chimneys, as Mr Magidiwana put it - and the
 17 employer on the other side has got the capacity to act
 18 against the employees by locking them out of their
 19 premises, that that is, those are the powerhouses that are
 20 at play in the process known as collective bargaining. You
 21 know that, correct?
 22 GENERAL PHIYEGA: Yes, I do.
 23 MR MPOFU: Yes. And you would agree, I
 24 am sure, that the spirit of our law and in particular
 25 section 23(5), I think, of the Constitution which enshrines

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1 the right for everyone to bargain collectively, that spirit
 2 is that that power play that you and I agree upon is best
 3 left to the relative power of the parties. In other words,
 4 if the union is weak, well, then they have themselves to
 5 blame if they are overpowered, so to speak, and if the
 6 employer somehow is weak then it has itself to blame and
 7 that our entire ethos, constitutional ethos, is that that
 8 is a power play that is best left to the parties.
 9 GENERAL PHIYEGA: Ja, I take it those are
 10 philosophical points of departure for bargaining and all
 11 those things but we as police don't get involved in it.
 12 MR MPOFU: Thank you. Now knowing that,
 13 all that, is it correct that when you arrived at the site
 14 of this industrial dispute you only visited one of the
 15 parties to the conflict -
 16 CHAIRPERSON: What date was that?
 17 MR MPOFU: On the 13th, thank you,
 18 Chairperson. You only visited one of the parties to that
 19 conflict or the protagonists, as I would have called them,
 20 namely Lonmin and you were briefed by only one of them.
 21 MR BURGER SC: Perhaps my learned friend
 22 can tell us what the industrial dispute is he referred to.
 23 We've had that skirmish. I thought he accepted my
 24 definition which takes an industrial dispute out of the
 25 equation. This was the police arriving, on the evidence

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1 thus far, to address an unprotected illegal strike.
 2 CHAIRPERSON: An unprotected illegal
 3 strike, if it goes no further and it's peaceful, would
 4 presumably be qualified as an industrial dispute. If, of
 5 course, it goes beyond that and there's a breakdown in law
 6 and order because there's violence, intimidation, murder,
 7 damage to property and so on, then that would be a
 8 different matter and then it would be appropriate for the
 9 police to come, I would have thought.
 10 MR BURGER SC: Chair, no, we don't have
 11 to be in a philosophical debate on that. We know the
 12 evidence before the Commission, nine people are dead at
 13 that stage or people have been killed, by the 16th nine are
 14 dead. This is not an innocent unprotected strike, this is
 15 violence in the community, this is a mine at a standstill
 16 and that's the evidence. I'm not putting any words before
 17 anybody and in that context, to put it that there was an
 18 industrial strike is not correct and my learned friend
 19 should -
 20 CHAIRPERSON: Industrial dispute. Well,
 21 there may well have been an industrial dispute but
 22 superadded would have been other factors such as the ones I
 23 mentioned, which constituted a breakdown in law and order
 24 and the real question is whether it would have been
 25 appropriate for the police to come in circumstances where

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1 there was a breakdown in law and order, where people had
 2 been murdered - killed, anyway - property had been damaged,
 3 threats of violence had been uttered, other people had been
 4 injured. That's the real question, is it not?
 5 MR BURGER SC: Indeed -
 6 CHAIRPERSON: I'm not suggesting that's
 7 Mr MpoFU's question but that's -
 8 [12:47] MR BURGER SC: No - no, but what is being
 9 explored is, as I understand it, is the unfairness of
 10 talking to only one side to a dispute whereas I say the
 11 true facts are, the question is do you have to negotiate
 12 with unprotected strikers in the view of nine corpses or
 13 are you entitled to talk only to the employer, that's the
 14 question.
 15 CHAIRPERSON: You've heard the debate, I
 16 think the question could be reformulated in a manner which
 17 avoids those difficulties which are there.
 18 MR MPOFU: Chairperson, I'm afraid - let
 19 me maybe make an attempt to address you and the
 20 Commissioners. What I'm saying, Chair, and I think the
 21 Chairperson has put it correctly, the evidence is that
 22 there was a dispute, a wage dispute. There's no doubt
 23 about that. What Mr Burger is correctly saying is that
 24 there was that dispute and more, which I'm comfortable with
 25 but to argue that there was no wage dispute is really

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1 pushing it too far, one. Two, I said to this witness, the
 2 very first question or first two questions I asked her, I
 3 said please understand that we are coming from the point of
 4 view that the presence of the police there we're not taking
 5 any issue because of the things that the Chairperson has
 6 correctly pointed out. So I'm not there, I'm not saying
 7 they should not have come, I'm talking about the behaviour,
 8 impartially or otherwise once they had come. Not whether
 9 they should have come or should have left it at all, that's
 10 not what I'm questioning. Thank you, Chairperson.
 11 CHAIRPERSON: Reformulate your question
 12 that takes on board the factors that you've mentioned and
 13 we'll get the answer of the witness.
 14 MR MPOFU: Thank you, Chair.
 15 MR SEMENYA SC: Chair, Chair, just so
 16 that we follow, is a proposition being made that when the
 17 National Commissioner got to Marikana between half past six
 18 and seven she ought not to have spoken to Lonmin alone, to
 19 maintain the prescript of impartiality?
 20 CHAIRPERSON: I don't know about alone, I
 21 think Mr Mpofu's point is - whether it's a good or a bad
 22 point is another matter but his point seems to be that
 23 regard being had to the fact that there were at least two
 24 antagonists, it was a departure from the principles of
 25 impartiality only to speak to the Lonmin side and not to

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1 speak to the other side. Whether that's a bad point or a
 2 bad point is for the witness to answer but I would have
 3 thought that that's the question. He's not suggesting that
 4 they had to have a meeting of the two together, what he's
 5 suggesting is that having heard the Lonmin side, attempts
 6 should have been made to hear the other side. That's his
 7 question. Whether it would have been appropriate in the
 8 circumstances is a matter the witness will be able to tell
 9 us. Isn't that so?
 10 MR SEMENYA SC: But, Chair, the evidence,
 11 as we already know, even people like McIntosh were brought
 12 specifically to talk to the other side.
 13 CHAIRPERSON: But McIntosh only came the
 14 following day.
 15 MR SEMENYA SC: Yes, that's why I'm
 16 asking whether on the evening -
 17 CHAIRPERSON: That's the way I understand
 18 the question. Mr Mpofu can correct me if I'm wrong. On
 19 the 13th, it was confined to the 13th as I understand it.
 20 We all know that McIntosh came the following day. McIntosh
 21 repeatedly said and we've seen it in transcripts, that
 22 we're not concerned about your disputes with your employer,
 23 we're concerned about the weapons you've got, we're
 24 concerned about law and order. That was McIntosh's
 25 approach, clearly expressed, but Mr Mpofu as I understand

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1 it is busy with another point and that's on the 13th before
 2 McIntosh came and said all that to the people on the
 3 koppie, whether it was impartial on the part of the police
 4 only to speak to Lonmin and not try to hear the other side.
 5 I think that's his question, is that right?
 6 MR MPOFU: That's right, specifically to
 7 the witness.
 8 CHAIRPERSON: Okay, well let's hear what
 9 the witness has to say.
 10 GENERAL PHIYEGA: Let me start off by
 11 saying I don't see impartiality there and I'll explain why
 12 I'm saying that.
 13 MR MPOFU: Yes, in fairness to you I'm
 14 sure you -
 15 GENERAL PHIYEGA: Can I answer?
 16 CHAIRPERSON: No, let her explain. She's
 17 busy with her answer, let's give her the chance to finish
 18 her answer -
 19 MR MPOFU: - I won't help.
 20 GENERAL PHIYEGA: Thank you for allowing
 21 me to answer.
 22 CHAIRPERSON: Mr Mpofu's point was you
 23 said impartiality when you meant partiality. I think you
 24 meant to say I don't see evidence of partiality in what
 25 happened and let me explain.

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1 GENERAL PHIYEGA: Okay.
 2 CHAIRPERSON: Please explain.
 3 GENERAL PHIYEGA: I'll put it in my own
 4 language. I do not believe that I stood with the one party
 5 there and I will explain why I say so.
 6 CHAIRPERSON: The witness is answering,
 7 it's her fullest right to do so in Sepedi, then I think you
 8 must interpret it for the benefit of the Xhosa speakers in
 9 the auditorium so they can hear or understand also what
 10 she's saying. I don't they all are bilingual, I don't
 11 think all the Xhosa speakers here can also speak Sepedi.
 12 GENERAL PHIYEGA: I come to Marikana on
 13 the 13th when this event, when this process had first
 14 started from the 10th and a lot is happening in the pipeline
 15 and being part of large operation I do not operate alone, I
 16 link up and leverage what my other team members have been
 17 doing. If we want to park on the 13th itself, there had
 18 been a lot of engagement with the strikers by the police
 19 and many other people during the day. There had been
 20 engagement by the commanders on the ground with the
 21 strikers. My intervention is not an isolated intervention,
 22 it's part of the police intervention and throughout our
 23 involvement we've worked with all the stakeholders. And
 24 it's for that reason any debate and view that says there's
 25 this partiality doesn't resonate with my thinking.

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1 MR MPOFU: Yes you see, General, once
 2 again I'll give you the benefit of the doubt as it were
 3 because you had not been there before but I'm telling you
 4 now, I'm putting it to you, sorry, that as at the 13th when
 5 you got there, there had been or rather there's no evidence
 6 of any contact between the police and the strikers. So
 7 take that as a -
 8 CHAIRPERSON: That's not correct, Mr
 9 Mpofo.
 10 GENERAL PHIYEGA: That's not true.
 11 CHAIRPERSON: The evidence indicates that
 12 at least those people who were at the railway line and who
 13 were addressed by and in fact engaged in a debate with
 14 General Mzembe, had been fully addressed by him.
 15 MR MPOFU: Ja, that's fine.
 16 CHAIRPERSON: I'm not sure whether there
 17 was at that stage any contact that we know about between
 18 the commanders of the police and those, and the others on
 19 the koppie but certainly the group who were involved in the
 20 engagement, if one calls it that, on the afternoon of the
 21 13th had been addressed by General Mzembe by the railway
 22 line and had exchanged views with him and so on.
 23 MR MPOFU: Fair enough.
 24 CHAIRPERSON: So the question isn't
 25 correct.

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1 MR MPOFU: Ja, fair enough, thank you.
 2 There is no evidence that as at the 13th, with the exception
 3 of the 120 or so people who were addressed by General
 4 Mzembe some eight kilometres away, there is no evidence
 5 that there had been any contact between the police and the
 6 protestors at the koppie.
 7 GENERAL PHIYEGA: And this is why, when I
 8 answered you now I said freeze the day on the 13th and I was
 9 going to tell you that earlier that day the police
 10 commanders that were there were talking to the strikers.
 11 MR MPOFU: Yes, I've asked you now the
 12 question accommodating that fact.
 13 MR SEMENYA SC: Chair, I really don't
 14 understand. We're going to be spending a whole lot of
 15 time, Chair, really achieving with respect very little.
 16 There's no point in putting a proposition that excludes
 17 this evidence, the consequences be the other -
 18 MR MPOFU: No.
 19 MR SEMENYA SC: It's just axiomatic.
 20 CHAIRPERSON: Mr Mpofo, may we not
 21 perhaps approach it differently? The point you're trying
 22 to make is you say the police didn't act with the necessary
 23 impartiality and you concede that the police did speak to
 24 the people by the railway line.
 25 MR MPOFU: Yes.

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1 CHAIRPERSON: There were other people,
 2 well they were on the way back to the koppie.
 3 MR MPOFU: Still eight kilometres.
 4 CHAIRPERSON: They'd been to the koppie
 5 and they were on the way back to the koppie. They were
 6 among - they were strikers, part of the striking group.
 7 Your point is that there was no attempt as far as we know
 8 on the evidence to communicate with the remainder on the
 9 koppie. And the real question is and those facts are
 10 before us, the real question is what are her comments on
 11 your suggestion that police displayed lack of required
 12 impartiality by acting in that way. Is that not your
 13 question?
 14 MR MPOFU: That is it.
 15 CHAIRPERSON: Alright, now you heard my
 16 attempt to reformulate Mr Mpofo's question, are you able to
 17 answer it?
 18 GENERAL PHIYEGA: I do not see any act of
 19 partiality on our side. As I've said this is a broader
 20 context, I look at the day, I look at the evening and even
 21 the people I met, was it the executive or the board or
 22 whatever of Lonmin. I met a few people because I wanted to
 23 understand what was happening and I had the context of what
 24 was happening during the day. So I don't see the argument
 25 that you're putting forward to me.

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1 MR MPOFU: Yes, I think let's confine it
 2 to you -
 3 CHAIRPERSON: I'm sorry to interrupt you
 4 but the point that concerns me is that is it fair to draw
 5 the curtain, put the curtain down as it were on the
 6 question of partiality or impartiality on the Monday
 7 evening because it is correct that the police spoke to
 8 Lonmin people on the Monday night, but isn't it appropriate
 9 to have regard to what they did on the Tuesday to decide
 10 whether they acted impartially? I don't how practical it
 11 would have been for them to have tried to establish contact
 12 after they'd spoken to the Lonmin people, to establish
 13 contact with the strikers at that point. We know what they
 14 did the next day, so in the context, the broad context of
 15 looking at what happened on the 13th and the 14th together,
 16 was there partiality? Now you may contend there was still
 17 a lack of the requisite impartiality at that stage but I
 18 would have thought a fair question would incorporate both
 19 what the police did on the 13th and the 14th. So the
 20 question so framed, let's get the witness's comment. What
 21 do you say about that, National Commissioner?
 22 GENERAL PHIYEGA: Judge, I really am -
 23 you know from the bottom of my heart I do not see the
 24 partial intervention of the police. I really think we
 25 reached out to various stakeholders at various points and

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1 we could not talk peace, encourage people to strive for
 2 peace if we were not talking to all the stakeholders
 3 because it would be anomalous to -
 4 MR MPOFU: Okay, General -
 5 CHAIRPERSON: We'll take the lunch
 6 adjournment now. If you still contend that the police
 7 showed a lack of the requisite impartiality by only
 8 speaking to Lonmin on the Monday night and not attempting
 9 to speak to the strikers that same night instead of the
 10 following day, then you can proceed with the point after
 11 lunch.
 12 MR MPOFU: Chairperson, just for the - to
 13 make it clear, I've never said anything about the police, I
 14 was talking about the 13th and this witness whether she was
 15 briefed and attended to Lonmin only, but we'll deal with it
 16 after lunch now.
 17 [COMMISSION ADJOURNS COMMISSION RESUMES]
 18 [14:02] CHAIRPERSON: The Commission will now
 19 resume. We understand that the National Commissioner
 20 sometimes has urgent matters to attend to by telephone and
 21 she's in another building, so we quite understand. In
 22 future we will make a practice of only coming in to resume
 23 when we are informed that the witness is at the witness
 24 table, but don't feel upset about it, we quite understand.
 25 GENERAL PHIYEGA: Thank you.

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1 CHAIRPERSON: But I have to remind you
 2 that you're still under oath.
 3 GENERAL PHIYEGA: I am.
 4 CHAIRPERSON: And Mr Mpofo, you're still
 5 cross-examining.
 6 MANGWASHI VICTORIA PHIYEGA: s.u.o.
 7 CROSS-EXAMINATION BY MR MPOFU (CONTD.):
 8 Yes, thank you, Chairperson. I just want to say,
 9 Chairperson, the witness I'm sure hopes there's no "in
 10 future" to talk about but -
 11 CHAIRPERSON: To some extent it's in your
 12 hands, Mr Mpofo.
 13 MR MPOFU: Thank you, Chairperson.
 14 General, I'm going to shorten this portion of my cross-
 15 examination for two reasons. Firstly, let me explain to
 16 you where it comes from. You remember I had asked you to
 17 read our opening statement and one of the points raised
 18 there is the allegation about the toxic collusion, toxic
 19 relationship between Lonmin and the police, remember that
 20 in the statement? 9.3 or so.
 21 GENERAL PHIYEGA: 9.3.
 22 MR MPOFU: Yes 9.3, yes. That's the
 23 subject I'm busy with now and the reason I'm going to run
 24 through these points quickly is because I've already put
 25 about 13 points to General Annandale in relation to that

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1 issue and to you I'm going to put fewer, maybe eight or so,
 2 some of which are new and others are overlapping. So it
 3 was in that context that I was asking you the first
 4 question and the question really relates to the section
 5 218. Section 218 of the Constitution that I read to you
 6 referred to you as the National Commissioner specifically.
 7 The other section on impartiality I concede relates to the
 8 police in general but that one relates to you. So having
 9 given that background, which hopefully will shorten things,
 10 I just want to ask you whether it is so or not so that on
 11 the 13th you, as National Commissioner, only were present at
 12 the Lonmin premises and you were briefed by Lonmin
 13 representatives and nobody else from the other side, as it
 14 were.
 15 CHAIRPERSON: Mr Burger?
 16 MR BURGER SC: Chair, may I object in
 17 principle to this line of questioning. As I understand my
 18 learned friend he wants to debate eight factual situations
 19 with the witness as being indicative of a relationship.
 20 Now with great respect, what this witness's view is on what
 21 has to be made of that relationship would be irrelevant.
 22 That's for the Commission to decide. To the extent that
 23 these are factual statements, the witness can't add to it.
 24 What the spirit of the Constitution is or what her
 25 statutory duties under the Constitution might be is a

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1 matter for legal interpretation. Who she spoke to is a
 2 factual inquiry, she can clearly be asked on that but what
 3 my learned friend, as I understand it and I mean him no
 4 disservice, wishes to do is to argue his closing speech and
 5 ask the comments of the witness on his closing speech. Now
 6 I can't wait for the opportunity to deal with that closing
 7 speech in my closing speech but that's the forum for it and
 8 that's where we'll debate the merits or the demerits of
 9 conclusions to be drawn from facts. This is not the place
 10 nor the witness for that, so on that general basis I raise
 11 an objection to this line of questioning.
 12 CHAIRPERSON: Of course he can ask
 13 questions about factual propositions upon which he's going
 14 to base his argument, clearly he can do that, I think you
 15 concede that.
 16 MR BURGER SC: But that's not my
 17 objection.
 18 CHAIRPERSON: No, I know it's your
 19 objection.
 20 MR BURGER SC: Yes.
 21 CHAIRPERSON: I understand your objection
 22 is based on the fact that he introduces his first
 23 proposition by reference to statutory provisions,
 24 particularly in the Constitution and those are statutory
 25 provisions, they are law, they are legal propositions which

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1 can be the subject of argument and interpretation. That's
 2 your main objection.
 3 MR BURGER SC: Well, I'm really objecting
 4 to the second question in the line. The second question
 5 is, on the 13th is it so you only spoke to Lonmin? Now
 6 she's given the evidence. Whether she agrees with it or
 7 not, we're not interested in, it's on the record. To ask
 8 her that is unnecessary, it's time wasting. What the
 9 argument is, that do you agree that that's indicative of a
 10 certain relationship, that's my problem.
 11 MR MPOFU: Okay.
 12 CHAIRPERSON: Perhaps he can reformulate
 13 the question with the benefit of having received guidance
 14 from you on the point.
 15 MR MPOFU: Chair, I prefer the guidance
 16 that I got from you, Chairperson, which is that –
 17 CHAIRPERSON: Don't spurn Mr Burger's
 18 guidance, I'm sure he can be a useful guide in some
 19 respects.
 20 MR MPOFU: Ja, I'm sure he can, Chair,
 21 but I'd rather stick to asking the factual basis of what I
 22 will argue one day, as he correctly puts it. And
 23 Chairperson it would be unfair to argue those things having
 24 not put them to the witness. The witness might well say,
 25 you know what, Mr Mpofu, on my way back from Lonmin I

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1 popped in and spoke to so-and-so. I mean I think we know
 2 that it didn't happen but it's only fair to put it to the
 3 witness.
 4 CHAIRPERSON: Be as focused as you can.
 5 MR MPOFU: Yes, I will, Chair.
 6 CHAIRPERSON: Remember everyone is here.
 7 MR MPOFU: Yes. Yes, thank you,
 8 Chairperson. So really the only issue was that you
 9 yourself did not speak, or rather you only spoke to
 10 representatives of Lonmin and got a briefing from them on
 11 the 13th. Fact, correct?
 12 GENERAL PHIYEGA: It is correct and I've
 13 answered you earlier on to say it's within the milieu of a
 14 broader operation and the police did talk to other
 15 stakeholders.
 16 CHAIRPERSON: Mr Mpofu, I think part of
 17 Mr Burger's complaint is, when you put a proposition it's
 18 based upon something she's said already, you then say is
 19 that correct and then she says yes and we know it's correct
 20 because she's said it already. So I think if you put a
 21 series of facts or propositions, none of which she can
 22 disagree with because they're based on she's said already,
 23 you don't have to ask her every time is that right.
 24 Perhaps you can preface it by saying I'm putting a number
 25 of propositions to you which I understand to be based on

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1 your evidence, if there's anything you disagree with or
 2 anything you feel requires, in the context, explanation or
 3 elaboration, do so. I think if you do it that way -
 4 MR MPOFU: Ja.
 5 CHAIRPERSON: - you're going to have less
 6 displeasure from Mr Burger than would otherwise be the
 7 case.
 8 MR MPOFU: Thank you, Chairperson, I was
 9 more worried about the displeasure from you, Chairperson,
 10 because one day you told me it has to be a question not a
 11 statement but it's fine, I'll do it like that. You,
 12 General, also acquiesced or agreed with the fact that the
 13 police had decided to set up the JOC at the Lonmin
 14 premises, correct? I'll avoid the "correct," that's one of
 15 the propositions on which I'm going to rely and – well, I
 16 think we need to punctuate it with whether you agree or –
 17 CHAIRPERSON: Having put the basis, if
 18 she disagrees –
 19 MR MPOFU: Okay, thank you.
 20 CHAIRPERSON: I think we can rely on the
 21 National Commissioner to be sufficiently -
 22 MR MPOFU: Silence means consent, okay.
 23 Number 3, the next basis on which I'm going to rely is that
 24 the police conducted meetings in which their plans were
 25 discussed in the company of private individuals who worked

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1 for Lonmin who were, in a way, party to the dispute that
 2 you and I have spoken about earlier.
 3 CHAIRPERSON: - actually correct. As far
 4 as I can see from the statements of the Lonmin witnesses,
 5 they say that on several occasions the police asked them
 6 please to leave because they were going to discuss the
 7 plans.
 8 MR MPOFU: Ja.
 9 CHAIRPERSON: And they then left. So I
 10 don't know that that proposition can be put in an
 11 unqualified a fashion as you have done.
 12 MR MPOFU: Yes. Obviously I'm referring
 13 to the other occasions when they did not do that but the
 14 Chairperson is correct. And specifically I'll refer you to
 15 paragraph 49 of Botes' statement which says – I'll just
 16 read it out to you – "On 16 August 2012 I had arrived at
 17 the SAPS JOC fairly early in the morning. From discussions
 18 I overheard I gathered that the SAPS had formulated a plan
 19 to proceed with disarming the group at the koppie."
 20 MR BURGER SC: Chair, but this is my very
 21 objection. We are now going to have eight pieces of
 22 evidence which is before the Commission –
 23 MR MPOFU: No.
 24 MR BURGER SC: - read to the witness.
 25 CHAIRPERSON: The Botes one hasn't been

<p style="text-align: right;">Page 10818</p> <p>1 put before the Commission yet.</p> <p>2 MR MPOFU: It hasn't.</p> <p>3 CHAIRPERSON: He hasn't given evidence</p> <p>4 yet. The statement was put before us but that particular</p> <p>5 passage wasn't highlighted or referred to, so –</p> <p>6 MR BURGER SC: That passage was read out</p> <p>7 in this Commission and – before, I'm quite confident on</p> <p>8 that, it was read out but that's not my objection. What if</p> <p>9 it was read out and what if Botes is going to say that?</p> <p>10 How can this witness contribute? If it isn't done in the</p> <p>11 context that, General, I'm going to use that as one of the</p> <p>12 arguments in order to substantiate a relationship. Well,</p> <p>13 that's irrelevant what the witness says on that, so we can</p> <p>14 reformulate this question till the cows come home, the</p> <p>15 debate is irrelevant and that's my objection.</p> <p>16 CHAIRPERSON: Well, he's already put of</p> <p>17 his propositions.</p> <p>18 MR MPOFU: Yes.</p> <p>19 CHAIRPERSON: Let's see whether the other</p> <p>20 four are subject to the same criticism.</p> <p>21 MR SEMENYA SC: Chair –</p> <p>22 CHAIRPERSON: Mr Semenya wants to say</p> <p>23 something.</p> <p>24 MR SEMENYA SC: The statement doesn't say</p> <p>25 that the police plans were discussed in the presence of</p>	<p style="text-align: right;">Page 10820</p> <p>1 I'm going to put and then I'm going to put a proposition to</p> <p>2 you, is that the police shared their radios and other means</p> <p>3 of communication with private individuals working for</p> <p>4 Lonmin and for that proposition I rely on the statement</p> <p>5 submitted by Lonmin of Amanda van der Merwe. I'll read one</p> <p>6 paragraph for you. She says that, "On the 14th August 2012</p> <p>7 at 14:22 SAPS reported" – this is after she says she had</p> <p>8 access to radios and so on – "SAPS reported and I recorded</p> <p>9 that there were approximately 2 000 persons at the top</p> <p>10 koppie and that they needed instructions 'on whether or not</p> <p>11 they should shoot at them all.'" If I can finish, Mr</p> <p>12 Mahlangu? "This report came via SAPS radio and I recorded</p> <p>13 it on the log sheet as I was instructed to do. I</p> <p>14 understood this to mean that the SAPS had requested</p> <p>15 authorisation from the Commissioner" – I don't know which</p> <p>16 Commissioner – "to use water cannons, rubber bullets and</p> <p>17 the like to disperse the crowd."</p> <p>18 [14:22] And in respect of those, the last two things that</p> <p>19 I spoke to you, Botes and Van der Merwe, if I do the other</p> <p>20 three I just want to put to you what I'm going to argue,</p> <p>21 which is a much more serious proposition. Given that we</p> <p>22 have agreed, you and I, that the bargaining what-do-you-</p> <p>23 call-it, collective bargaining is a matter of power</p> <p>24 relations between the two parties, I'm going to argue that</p> <p>25 if Lonmin knew as long as 6 o'clock in the morning that –</p>
<p style="text-align: right;">Page 10819</p> <p>1 what-do-you-call –</p> <p>2 MR MPOFU: Botes.</p> <p>3 MR SEMENYA SC: - people. The statement,</p> <p>4 as I gathered, how he gathered is not necessarily a</p> <p>5 function of him being present when the plans were discussed</p> <p>6 and that it had been discussed.</p> <p>7 MR MPOFU: Chairperson, two things.</p> <p>8 General Annandale has testified that Mr Botes was present</p> <p>9 at the 6 o'clock meeting. Secondly, we know that from, I</p> <p>10 think it's GGG40, the whiteboard where the attendees at the</p> <p>11 Provincial JOC were, that one of their names there was</p> <p>12 Botes.</p> <p>13 CHAIRPERSON: Yes. Mr Semenya, what do</p> <p>14 you say about what Mr Mpofu says?</p> <p>15 MR SEMENYA SC: But it doesn't –</p> <p>16 CHAIRPERSON: I gathered, it's ambiguous</p> <p>17 but I must confess my impression of reading it was that he</p> <p>18 was there and he overheard it and certainly the evidence is</p> <p>19 he was there a good deal of the time when he wasn't asked –</p> <p>20 I think let him put his eight –</p> <p>21 MR SEMENYA SC: I reserve my –</p> <p>22 CHAIRPERSON: You've reserved your</p> <p>23 position. Let him put his eight propositions, let your</p> <p>24 witness comment and then we can move on.</p> <p>25 MR MPOFU: Thank you. And the next one</p>	<p style="text-align: right;">Page 10821</p> <p>1 or rather as long as since the 14th that the police were,</p> <p>2 quote/unquote, "planning to go into them all" and, two, as</p> <p>3 long as 6 o'clock on the 16th that the plan was there to</p> <p>4 move into phase 3 as it were, then what incentive would</p> <p>5 they have to negotiate with the protesters and that's a</p> <p>6 rhetorical question but I'm going to argue that police's</p> <p>7 action in allowing these people to be privy to what they</p> <p>8 were planning to do, disturbed the collective bargaining</p> <p>9 positions against the protesters and was not a display of</p> <p>10 impartiality.</p> <p>11 CHAIRPERSON: It's just a proposition, Mr</p> <p>12 Burger. He admits it's a rhetorical question so she</p> <p>13 doesn't have to answer it, so let's move on.</p> <p>14 MR BURGER SC: As long as she needn't</p> <p>15 answer I don't have an objection, sir.</p> <p>16 MR MPOFU: We're also going to put that</p> <p>17 the police used equipment, including aircraft, which</p> <p>18 belonged to one of the parties in the dispute in which one</p> <p>19 of them was a party.</p> <p>20 CHAIRPERSON: There's an objection to</p> <p>21 that. That's not entirely correctly formulated. The</p> <p>22 videographers apparently used – I'm not sure if this</p> <p>23 evidence is out yet but it's in a statement that has been</p> <p>24 before, may or not be before us yet, they used cameras</p> <p>25 provided by Lonmin and the police used a helicopter, a</p>

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1 Protea – which was under contract from Protea Coin, it
 2 actually belonged to Protea Coin but it was the subject of
 3 a contract between Protea Coin and Lonmin.
 4 MR MPOFU: Yes, no –
 5 CHAIRPERSON: That's the correct
 6 formulation.
 7 MR MPOFU: That's correct, Chairperson,
 8 that's correct. The word "belonging" is a bit much in the
 9 circumstances insofar as the aircraft is concerned.
 10 Remember I said including aircraft, but the point is that
 11 other equipment such as the – what do you call it, the CCTV
 12 screens and other materials at Lonmin belonged to Lonmin
 13 but as far as the aircraft is concerned the Chairperson is
 14 right, it was only procured by them, subcontracted from
 15 Coin.
 16 CHAIRPERSON: I don't know if I've been
 17 counting correctly, is that your sixth of the eight
 18 propositions or seventh?
 19 MR MPOFU: Well, on our list it's the
 20 fifth, Chairperson. Maybe I have split some of them or
 21 combined some of them.
 22 CHAIRPERSON: Okay, carry on –
 23 MR MPOFU: There are few left –
 24 CHAIRPERSON: Carry on.
 25 MR MPOFU: The next one is that the 270

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1 or so people who were arrested were taken to number 1 shaft
 2 at Lonmin and processed there before they were taken to the
 3 police station. In addition, your well-known press
 4 conference on the 17th of August, the day after the
 5 massacre, was held at the Lonmin game farm. And before I
 6 come to the last one or the last two, the key point in my
 7 argument is that in the eyes of the protesters at least,
 8 but also of the reasonable citizen of South Africa, these
 9 specific actions would not be viewed as not taking sides or
 10 to use one word, exhibits of impartiality. The penultimate
 11 one is that the police, although they have given some
 12 severe criticisms to Lonmin now after the fact, turned a
 13 blind eye to what they saw as offensive behaviour on the
 14 part of one of the parties in, for example, dubbing the
 15 people as faceless but were prepared to punish perceived
 16 offensive behaviour on the part of the other party with
 17 death.
 18 CHAIRPERSON: No – no, Mr Mpofu, I think
 19 that question, that proposition can't stand.
 20 MR MPOFU: Well, then I'll break it down
 21 –
 22 CHAIRPERSON: A number of points, the
 23 first one is I'm not sure that they turned a blind eye on
 24 the allegation of facelessness. On the contrary, they went
 25 out of their way to rebut it. And the second question is

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1 that – of course it's a controversial matter upon which we
 2 will have to decide – whether the police decided or planned
 3 to kill the people or whether the killing that took place
 4 was a consequence of, as the police allege, a threatened
 5 attack against which they had to defend themselves and
 6 their colleagues.
 7 MR MPOFU: Yes, no –
 8 CHAIRPERSON: You've got trouble with
 9 that proposition, if I were you I would withdraw it.
 10 MR MPOFU: Yes, the second proposition
 11 you can ignore but what I'm going to put to you is that it
 12 is the view of the police, at least according to their
 13 opening statement, that Lonmin's inconsistent approach must
 14 have sent mixed messages to the protesters and that's a
 15 reference to the fact that they had negotiated with the
 16 RDOs allegedly in July and that they were refusing now.
 17 That's the view of the police. It is also their view that
 18 Lonmin created the beast that it later found impossible to
 19 tame, the beast being the violent strikes that contributed
 20 to this tragedy, that was also the view of the police.
 21 MR BURGER SC: Is my learned friend now
 22 putting indications of a toxic relationship between Lonmin
 23 and the police?
 24 CHAIRPERSON: I thought so. I couldn't
 25 quite understand the last one myself –

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1 MR BURGER SC: I'm lost.
 2 CHAIRPERSON: I think we're together in
 3 that but let him put his propositions, he's near the end,
 4 let's get the comments of the witness and then we can move
 5 on. Otherwise we have debates about it, it just takes more
 6 time. Let him – but I take your point, the last two don't
 7 sound like evidence of toxic collusion. If anything, they
 8 –
 9 MR MPOFU: No.
 10 CHAIRPERSON: - something else but
 11 anyway, that's a matter for argument. Mr Mpofu, you've got
 12 one more proposition to put, have you?
 13 MR MPOFU: Yes. Chairperson, I have to
 14 say this now, all I'm saying – obviously I've said, I've
 15 even played open cards before. I'm saying despite these
 16 criticisms, they did not do a certain thing. So you can't
 17 reduce it to an infantile –
 18 CHAIRPERSON: No – no.
 19 MR MPOFU: - you know, level. Okay.
 20 CHAIRPERSON: [Inaudible]
 21 MR MPOFU: Thank you, Chairperson. All
 22 I'm saying –
 23 CHAIRPERSON: [Inaudible]
 24 MR MPOFU: Yes. Thank you, Chair. Thank
 25 you, Chairperson.

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1 CHAIRPERSON: Let's have the last
 2 proposition.
 3 MR MPOFU: Thank you, Chairperson.
 4 CHAIRPERSON: None of what I've said was
 5 on record but just as well.
 6 MR MPOFU: Yes. Thank you, Chairperson.
 7 You – it was also, despite the view of the police that the
 8 blame of the two unions is not mitigated by Lonmin's
 9 conduct in fanning the flames of inter-union rivalry, when
 10 on 23 July it negotiated the wage deal directly with the
 11 workers –
 12 MR BURGER SC: I object to this question,
 13 it's completely out of order and I'd like a ruling on this.
 14 This witness cannot help you on it, sir, and to simply
 15 allow Mr Mpofu to go on and on and on is unfair to my
 16 client.
 17 CHAIRPERSON: Mr Mpofu, what do you say
 18 about the objection to this last point?
 19 MR MPOFU: Well –
 20 CHAIRPERSON: That may be the view of the
 21 police as stated here –
 22 MR MPOFU: Ja.
 23 CHAIRPERSON: But does it really advance
 24 the debate on the point that you're busy arguing?
 25 MR MPOFU: Well –

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1 CHAIRPERSON: And if it does, you could
 2 argue it at the end surely?
 3 MR MPOFU: Yes.
 4 CHAIRPERSON: I don't think you should
 5 put it to the witness.
 6 MR MPOFU: Okay.
 7 CHAIRPERSON: You've put a number of
 8 propositions to her –
 9 MR MPOFU: Chair, I won't put it to the
 10 witness. All I'm going to do is just to tell you where I'm
 11 going with it and as you say, one day it may or not be –
 12 all I'm saying is this, the police had valid or invalid
 13 criticisms of the behaviour on each side and that on the
 14 one side where they were residing, being served with tea
 15 and using equipment and so on they turned a blind eye to
 16 those infractions. And on the other half a side they
 17 turned semi-automatic rifles, that's all.
 18 CHAIRPERSON: I don't know that turning
 19 semi-automatic rifles is evidence of toxic collusion but
 20 let me try to reformulate your question. What I understand
 21 Mr Mpofu to be saying is that we know from the passage he
 22 read from the opening statement that the police were
 23 critical of Lonmin's conduct at various stages during the
 24 period covered by our investigation but what he says is
 25 they didn't communicate those objections to Lonmin at the

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1 time, they went along with Lonmin and acted in a way as if
 2 they had no objection to what Lonmin were doing or not
 3 doing. And he is suggesting that that reticence by the
 4 police, that failure to communicate this disagreement with
 5 Lonmin on certain points is evidence that there was a kind
 6 of a collusion between the two. I think that's your point,
 7 is it?
 8 MR MPOFU: That's correct, Chair.
 9 CHAIRPERSON: Have we now got all your
 10 propositions?
 11 MR MPOFU: No, Chair, we've got another
 12 one. The last one is something which is a bridge to the
 13 next topic that I'm going to deal with and it is that,
 14 significantly, you – I'll connect it to you at the end –
 15 the Police Minister at least allowed himself to be
 16 influenced and directed towards certain actions and
 17 positions by individuals who happened to be directly in,
 18 part of Lonmin, who also happened to be politically
 19 powerful - which concerns, quote/unquote, were communicated
 20 to you, according to the Minister.
 21 MR BURGER SC: Chair, there's no factual
 22 basis for that statement, none whatsoever. This witness is
 23 on record to say that when the Minister spoke to her he
 24 didn't mention any names. There was no suggestion that the
 25 Minister put any pressure on her. There was no suggestion

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1 that she put any pressure down the line. General Annandale
 2 gave evidence too long, there was no suggestion to him that
 3 he had pressure put upon him by anybody from higher up, so
 4 there's no factual basis for this statement and it's, with
 5 respect, out of order to put it to this witness. I've
 6 objected before, I repeat my objection.
 7 MR MPOFU: Chairperson –
 8 MR SEMENYA SC: More pertinently –
 9 MR MPOFU: Sorry, sorry –
 10 CHAIRPERSON: Mr Mpofu, Mr Semenya wants
 11 to say something too.
 12 MR SEMENYA SC: Mr Mpofu is not a mind
 13 reader, Chair, with respect, that the Minister allowed
 14 himself to be influenced. Where is he going to get the
 15 evidence to support that?
 16 MR MPOFU: Okay. Firstly Chairperson,
 17 the factual basis of what I'm putting I'm going to read out
 18 from the Minister's statement. Secondly, Mr Semenya is
 19 correct, it's actually not even the witness, it's me who
 20 said I'm going to assume in her favour that he did not
 21 mention names. That's not the point I'm canvassing. I
 22 can't go against my own say-so. The only thing I'm putting
 23 to the witness and the only thing that connects her with
 24 this is paragraph 18, which I'm going to read now, of the
 25 statement. So it's not mind reading –

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1 CHAIRPERSON: 18 of the Minister's –
 2 MR MPOFU: Sorry, of the Minister's
 3 statement, yes and before I read it, Chairperson, I just
 4 want to make it clear that when I'm reading it now as I was
 5 reading it earlier, you'll remember that I – when I'm
 6 reading it now as I was reading it earlier, I'm assuming in
 7 the witness's favour that all that was communicated to her
 8 were the concerns without necessarily them being labelled
 9 as belonging to X or Y, but that the so-called concerns
 10 were related to her comes from what I'm going to read which
 11 I've read before. Paragraph 15, "I am advised that Mr
 12 Senzeni Zokwana, the president of the National Union of
 13 Mineworkers, testified before this honourable Commission
 14 that on 12 August" –
 15 CHAIRPERSON: Has the witness got the
 16 statement in front of her?
 17 MR MPOFU: I'm sorry, yes.
 18 CHAIRPERSON: FFF29.
 19 MR MPOFU: It's FFF29, sorry, sorry
 20 General. I think she's got it in front of her, ja. "I am
 21 advised that Mr Senzeni Zokwana, the president of the NUM,
 22 testified before this honourable Commission that, 1. on 12
 23 August 2012 he had a telephonic conversation with me (the
 24 Minister) concerning the Marikana incident." 15.2, "During
 25 that said conversation he requested that adequate SAPS

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1 members be deployed at Marikana to avoid a further loss of
 2 life." 16, "I (the Minister) also had a telephonic
 3 conversation with Mr Cyril Ramaphosa regarding his concerns
 4 about Marikana." And it's the next two paragraphs that
 5 connect the witness. "I informed both Mr Zokwana and Mr
 6 Ramaphosa in response that I would convey their requests
 7 and concerns to the National Commissioner and ensure that
 8 SAPS was dealing with the matter. I also informed them
 9 that I would ensure that SAPS attended to this matter."
 10 18, "Having been alerted to the situation in Marikana as
 11 indicated above, I discussed the issue with the National
 12 Commissioner and received assurances that SAPS was able to
 13 handle the matter." So -
 14 [14:41] MR BURGER SC: Chair, Chair, then what
 15 was put to the witness was quite improperly put. If that's
 16 the basis for what was put as improper pressure on a
 17 Minister then perpetuated from the Minister down to the
 18 National Commissioner, it is improperly put. I object to
 19 it and I invite my learned friend to withdraw that
 20 statement.
 21 CHAIRPERSON: Well, there's a further
 22 problem and that is that it appeared from some of the
 23 evidence we had that Mr Ramaphosa must have communicated
 24 with the Minister on I think the 15th and I can't remember
 25 if the witness actually confirmed that but that certainly

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1 was the 15th. So if the conversation referred to in para 18
 2 was on the 15th or possibly even the morning of the 16th,
 3 then I'm not sure if there's any causal connection between
 4 the discussions because by that time the NIU people, the
 5 STF people, the TRT people, all the other people who were
 6 brought to Marikana had already arrived. They'd started
 7 coming a day or two before that. I'm not sure if there's a
 8 causal connection but anyway. They'd been deployed much
 9 earlier, it would appear, before any conversation took
 10 place between the Minister and the National Commissioner
 11 who is reported in the next, well, in para 20, as having
 12 said that the SAPS was already dealing with the matter and
 13 she gave an assurance that the SAPS was capable of handling
 14 the matter. So it would appear that there's, if all that's
 15 correct, there's no causal connection between any telephone
 16 conversation between the Minister and the National
 17 Commissioner in relation to the build up of police
 18 personnel on the scene and the deployment and so on. So
 19 there are two problems –
 20 MR MPOFU: yes.
 21 CHAIRPERSON: I'll give you a chance to
 22 deal with them.
 23 MR MPOFU: Yes, thank you Chairperson.
 24 Well, thank you Chairperson, I'm glad that at least I'm
 25 privy to the Chairperson's prima facie view on the causal

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1 connection. I will explain the causal connection.
 2 CHAIRPERSON: [Inaudible] - the causal
 3 connection, what Mr Burger complains about is that you
 4 suggested, that what you had put constituted improper
 5 pressure brought on the National Commissioner by the
 6 Minister and then somehow transmitted down and his
 7 complaint, as I understand it, related to that phrase
 8 "improper pressure."
 9 MR MPOFU: Well –
 10 CHAIRPERSON: He invited you to withdraw
 11 that and reformulate the question in a less objectionable
 12 fashion.
 13 MR MPOFU: Yes. Well Chairperson,
 14 remember the topic we are dealing with. I'm saying the
 15 pressure is improper, (a) insofar as it comes from the one
 16 side of the dispute which is the Lonmin side, that's the
 17 first thing. The second thing which I said is that it's
 18 improper insofar as it came from politically powerful
 19 individuals who had access to the Minister. So those are
 20 matters that we can argue. If someone thinks that those
 21 are rightful things, well, we'll argue that one day but I'm
 22 entitled certainly to put to the witness those two
 23 propositions, that one, it was from the one side and he
 24 acted on it with – together or rather transmitted it as you
 25 correctly put it, Chair, to this witness. And two, what I

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1 call the political – remember there’s a third game changer
 2 in my earlier formulation, is exactly the fact that there
 3 was political pressure put to bear. Whether at the end I
 4 will succeed in that is another matter but I can’t be
 5 disentitled now from putting it to the witness, one. Two,
 6 coming to your point, Chair, of the causal connection, I
 7 have –
 8 CHAIRPERSON: Sorry Mr Mpofu, before you
 9 get to the second point –
 10 MR MPOFU: Yes.
 11 CHAIRPERSON: You’ve got the first point,
 12 it suggests an improper pressure. What’s improper about
 13 one party to a dispute who complains there’s been a
 14 breakdown of law and order, that his side or its side is
 15 being subjected to violence, intimidation, damage to
 16 property, murder and so on, in complaining about that to
 17 the police and if he gets the impression that the police
 18 are not dealing with it properly, going higher up in the
 19 police and saying look here, something must be done about
 20 this. Is that improper? Would that not be a perfectly
 21 proper approach by the party concerned to endeavour to
 22 protect his rights?
 23 MR MPOFU: Well Chairperson, with the
 24 greatest respect, if it would have been equally accessible,
 25 let’s put it that way, to the other side to fly about to

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1 Cape Town and demand a meeting with Ministers and for
 2 messages to be passed to the President and the Minister of
 3 Police and all that, then of course it would be proper but
 4 the point I’m making –
 5 CHAIRPERSON: Sorry, can I put a problem
 6 to you about it? What exactly should the Minister have
 7 received, what kind of representation should the Minister
 8 receive from the other side, the side allegedly involved in
 9 a breakdown of law and order? Could AMCU have been heard
 10 or the non-unionised strikers perhaps because I think it’s
 11 controversial whether AMCU were involved. Could the non-
 12 unionised strikers have phoned the Minister and said look
 13 here, there’s been a breakdown of law and order here, there
 14 have been murders, NUM people have – well, employees of
 15 Lonmin have been killed, Lonmin property has been damaged
 16 but please listen to our side and don’t ask the police to
 17 send in more people. I mean surely that would be a totally
 18 unrealistic proposition to expect anyone to even consider.
 19 MR MPOFU: No Chairperson, I’m sorry.
 20 The point is simply this, I’m putting to this witness that
 21 the Minister – remember the Minister might say later that I
 22 actually told the witness about these phone calls but I’m
 23 assuming in her favour for now that he didn’t mention
 24 names. All I’m putting to her is that she was the
 25 recipient, to put it mildly, of communication which sought

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1 to influence operational matters from one side of the
 2 equation. Remember Chairperson, that it’s not a fairly
 3 simple matter of just the deployment and so on. There’s
 4 the big question of what I call the characterisation of the
 5 problem at Lonmin. That was also the subject of these
 6 communications. Actually it was the major subject that the
 7 government people, the Minister must be told to stop
 8 characterising this as a labour dispute but to characterise
 9 it as, only purely as a criminal matter. That
 10 characterisation, Chairperson, is much more cynical than
 11 meets the eye because remember that the Minister –
 12 CHAIRPERSON: Surely it would be cynical
 13 to say that this was only a labour dispute. It’s true
 14 there were some dead bodies on the ground and there were
 15 some cars that had been burnt –
 16 MR MPOFU: Exactly.
 17 CHAIRPERSON: - and there was other
 18 damage that had been done but that doesn’t matter, this is
 19 purely a labour matter. That would be a cynical –
 20 MR MPOFU: It is.
 21 CHAIRPERSON: - observation, would it
 22 not?
 23 MR MPOFU: Oh certainly, Chair, and in
 24 fact this is exactly how it is put in the e-mail in
 25 question. “I’ve had two discussions with the DG, in each

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1 case I’ve characterised this as not, and it’s put in bold
 2 letters, “as not an industrial relations issue but a civil
 3 unrest, destabilisation, criminal issue that could not be
 4 resolved with political intervention and needs the
 5 situation to be stabilised by the police or army.” So
 6 let’s not trivialise this, Chairperson.
 7 CHAIRPERSON: I don’t think it’s being
 8 trivialised. The other point that you have to deal with is
 9 what the Minister says in paragraph 21 of his statement.
 10 MR MPOFU: I’m going to –
 11 CHAIRPERSON: He now makes the point that
 12 he regularly receives complaints and requests from members
 13 of society regarding policing matters. “In such
 14 situations,” he says, “I take these up with the National
 15 Commissioner in order to ensure that these matters are
 16 attended to.” And then he says this, “My approach is based
 17 on the constitutional segregation of the roles of the
 18 Minister of Police from that of the National Commissioner
 19 referred to above.” Now is there any basis upon which it
 20 can be suggested on material before us now, I’m not saying
 21 that you may not have other grounds later when the Minister
 22 gives evidence, but is there any basis on what’s before us
 23 at the moment which justifies you in suggesting that the
 24 Minister acted in a manner not consistent with the
 25 constitutional segregation of the roles of the Minister of

<p style="text-align: right;">Page 10838</p> <p>1 Police on the one hand and the National Commissioner on the 2 other?</p> <p>3 MR MPOFU: Yes –</p> <p>4 CHAIRPERSON: If there isn't any basis 5 for suggesting that then I don't see how you can put it to 6 the witness.</p> <p>7 MR MPOFU: No, there is, Chairperson, 8 two. There are two bases. One of those bases is a matter 9 that I'm going to come to, which is that when this witness 10 says that her statement in paragraph 23, that she's 11 discussed with the Minister the action to be taken – that's 12 her cross-examination that came from Mr Burger – paragraph 13 23 of her statement, I'm going to argue that that evidence 14 must be disbelieved and if I have to, obviously I'm not 15 going to go through that whole thing about page 7 and what 16 have you, I'll assume that the Commission has heard enough 17 of that. So that's the first basis, that if it's going to 18 be disbelieved then she did discuss this matter at an 19 operational level with the Minister, that's –</p> <p>20 CHAIRPERSON: That's another matter.</p> <p>21 MR MPOFU: Thank you –</p> <p>22 CHAIRPERSON: But you can scarcely put a 23 question to her, a hypothetical question, on the basis that 24 the Commission doesn't believe you and on the basis that 25 the Commission makes a finding adverse to your evidence on</p>	<p style="text-align: right;">Page 10840</p> <p>1 Minister has said, said somewhere in Mpumalanga, "There 2 must be a good appreciation of the distinction between the 3 need to use maximum force against violent criminals and 4 minimum force in dealing with fellow citizens. We should 5 not have any blurring lines when it comes to command and 6 control." We have this witness who has said in FFF5 that 7 maximum force was used and I know there's a debate about 8 that and, yes, that is the second basis, that if anyone who 9 knows that there is this distinction, which is wrong by the 10 way, should be hell bent in trying to show the Minister and 11 the witness that this is a situation that requires maximum 12 force according to their wrong formulation and not the one 13 where you are dealing with fellow citizens. So these are, 14 that flying around in aeroplanes to change the 15 characterisation was not a matter of semantics, it was a 16 matter to prepare the ground and that's the causal 17 connection point, to prepare the ground for the murder of 18 these people using maximum force as this witness has –</p> <p>19 CHAIRPERSON: The points you've raised 20 are all matters for argument. I don't know that it's 21 appropriate for you to put the arguments to the witness 22 because I don't know that her answers, with respect, will 23 take the matter any further and I say with respect to her.</p> <p>24 MR MPOFU: Yes.</p> <p>25 CHAIRPERSON: But so I'm not disposed to</p>
<p style="text-align: right;">Page 10839</p> <p>1 this particular point, what do you say about that? I don't 2 think –</p> <p>3 MR MPOFU: I'm going there, Chairperson.</p> <p>4 CHAIRPERSON: No, I don't see how such a 5 question can be put to a witness.</p> <p>6 MR MPOFU: Yes but –</p> <p>7 CHAIRPERSON: What do you say, cross- 8 examining counsel says to the witness, what do you say if 9 the court doesn't believe you when it says you weren't 10 there but – and then a question is asked based on the 11 hypothesis. A witness would be entitled to refuse, to say 12 I don't accept the hypothesis, I say my evidence should be 13 believed.</p> <p>14 MR MPOFU: I'm not –</p> <p>15 CHAIRPERSON: Whether the evidence will 16 be believed is a matter that time alone will tell.</p> <p>17 MR MPOFU: Chairperson, I'm not 18 addressing the witness right now, I'm addressing you. 19 You've asked me whether there's a basis, on the evidence 20 before us, on which I will attach the argument and I was 21 answering you. The second basis is that – and this 22 attaches to the crucial question of characterisation – why 23 is it that this political individual wanted the 24 characterisation to be changed cynically, as we have said? 25 Here is the answer and it's before this Commission. The</p>	<p style="text-align: right;">Page 10841</p> <p>1 allow you to ask those questions, but the general 2 proposition, the series of propositions you put to her, you 3 asked her what does she say about your contention that 4 there's a toxic collusion – I take it you've now reached 5 the stage where that question can be put, so let me put it 6 on your behalf. You've heard a series of propositions –</p> <p>7 MR MPOFU: No, Chairperson, I'm sorry.</p> <p>8 If you'd just allow me to put one –</p> <p>9 CHAIRPERSON: Alright –</p> <p>10 MR MPOFU: No, not a new proposition –</p> <p>11 CHAIRPERSON: Well, let's –</p> <p>12 MR MPOFU: Just to preface your 13 assistance to me, ja.</p> <p>14 COMMISSIONER HEMRAJ: Mr Mpofo, before 15 you do that, the question about undue influence, are you 16 relying only on the contents of the statement of the 17 Minister or are there other facts that shore up that 18 allegation? I just need to understand that carefully 19 before the question is put, please.</p> <p>20 MR MPOFU: Ja. Chairperson and 21 Commissioners, obviously one of the handicaps that I have 22 in this line of questioning is the fact that at least two 23 of the dramatis personae that I'm relating to, namely the 24 Minister and Mr Ramaphosa, have not yet testified. So 25 obviously the handicap that I have or rather the best I can</p>

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1 do in curing that inherent handicap is to use, (a) the
 2 statement of the Minister and the –
 3 CHAIRPERSON: The e-mail that Mr
 4 Ramaphosa wrote –
 5 MR MPOFU: Which the Minister has now
 6 confirmed, at least partially. You must remember when I
 7 said this at the opening address it was still open to
 8 someone to say, oh, Mpfu has manufactured these e-mails or
 9 whatever, or there was no such communication. Now we are
 10 in a different terrain where the Minister has under oath
 11 confirmed that such communication occurred and bearing in
 12 mind that what I call those inherent handicaps, at the very
 13 least, I can't be expected to then recall this witness once
 14 –
 15 CHAIRPERSON: Mr Ramaphosa –
 16 MR MPOFU: - has testified.
 17 CHAIRPERSON: Sorry, Mr Mpfu, I'm sorry.
 18 I don't understand why you can't. If more information
 19 becomes available which you didn't have at your disposal
 20 when this witness was being cross-examined you would be
 21 perfectly entitled to get up and say, in the light of this
 22 fresh evidence which takes the matter significantly further
 23 than it was when the National Commissioner was in the
 24 witness box, questions which I couldn't ask her at the time
 25 because I didn't have this material, then I ask for her to

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1 come back. If there is such material which justifies her
 2 being recalled, you can bring the application and depending
 3 on the strength of the material, the application will
 4 succeed.
 5 MR MPOFU: Fair enough. Thank you,
 6 Chairperson.
 7 MR BURGER SC: Chair, may I say
 8 something?
 9 MR MAHLANGU: May I just very briefly, I
 10 see the people at the back are all looking at me and are
 11 surprised why I am so quiet about all the discussion that
 12 is taking place. Very briefly.
 13 MR BURGER SC: Chair, may I say
 14 something? Have you finished? It is now nearly 3 o'clock.
 15 The witness has played no role for the past hour in what is
 16 an inquiry into what happened from the 6th to the 19th.
 17 This is not a monologue. This is not a forum for one
 18 party. This is a forum where we have to ascertain the
 19 facts and we don't get to the facts but what I want to say
 20 is this, this whole debate about improper pressure being
 21 put on the Minister you will remember arose when we
 22 produced documents, we're one of the few parties, Lonmin,
 23 who produced documents right up front and we produced the
 24 Ramaphosa e-mail as we were duty bound to do. That was
 25 then used by Mr Mpfu in his opening as the evidence of a

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1 toxic relationship between the police and Lonmin. In fact
 2 I read about it the next day in The Star when the e-mail
 3 was highlighted and I read about this relationship between
 4 my client and Lonmin in The Star on the front page. We, to
 5 this day, know how The Star got that e-mail. So that was
 6 the first leg he relied upon. Then we had evidence and we
 7 had this theme being developed from time to time. We had
 8 evidence from this witness indicating that there was no
 9 substance in it and I don't want to repeat her evidence,
 10 she's given her evidence. We've received an affidavit from
 11 the Minister indicating that there's no substance
 12 whatsoever in this pressure point. The Commissioner asked
 13 today a very valid question, what do you rely upon for your
 14 submission that there was a toxic relationship? What do
 15 you rely upon for what submission? We hear it is the e-
 16 mail, which is neutral, and we hear it is the Minister's
 17 affidavit, which is neutral. We don't hear anything about
 18 NUM having phoned the Minister with a very similar request
 19 as every responsible citizen will do, but the fact of the
 20 matter is that we again today have a whole spiel to this
 21 witness suggesting that there was an imbalance in the
 22 relationship, that somehow my client had an improper
 23 relationship with the police. Based on what? On nonsense.
 24 The submission is opportunistic, I say it's irresponsibly
 25 made and it's no good for my learned friend to ride over

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1 objections, make long speeches and then go on with the next
 2 question. It's harmful to my client and I invite you to
 3 protect my client from this type of cross-examination which
 4 has got no factual basis up to now. My learned friend may
 5 come one day, grab a rabbit from a hat and produce evidence
 6 to substantiate that. I'll be the first to concede that
 7 it'll then be a responsible submission but if these are the
 8 two grounds for the submission it's not responsible.
 9 [15:01] MR MPOFU: Well, Chairperson, I think
 10 that begs the second point which I was making to you about
 11 the causal connection issue which you raised, validly
 12 Chairperson, and I'm going to try and put it very
 13 simplistically. The argument is simply this, Chairperson,
 14 that the efforts by politically powerful individuals, which
 15 were successful, to change the characterisation by the
 16 government of the event to a criminal event - strictly
 17 criminal, no labour matter – were intended and did result,
 18 were intended and did result in two things. One, it was to
 19 convince the Minister, as it is said in one of the e-mails
 20 289E where it says, "I've just had a discussion with Susan
 21 Shabangu in Cape Town. 1 –" this is from Mr Ramaphosa –
 22 "She agrees that what we are going through is not a labour
 23 dispute," which is what it was out for at 9 o'clock, "but a
 24 criminal act." So now we've got the stage for murder set.
 25 "She will correct her characterisation of what we are

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1 experiencing. 2. She is going into Cabinet and will brief
 2 the President as well and get the Minister of Police, Nathi
 3 Mthethwa, to act in a more – more – “pointed way.”
 4 Now if, with the greatest respect, Chairperson,
 5 that, those actions and the communications have obviously
 6 achieved their intended result as at 3 o'clock on the 15th,
 7 had nothing whatsoever to do with the fact that all of a
 8 sudden on the 16th in the morning it's D-day, warra-warra,
 9 all those things and people get killed in a more pointed
 10 way and are dealt with as criminals with maximum force,
 11 according to this witness, then nothing ever will be
 12 connected under the Sun.
 13 CHAIRPERSON: Mr Mpofo –
 14 MR TIP SC: Chair yes, I unfortunately
 15 need to enter the debate and certainly not with a view to
 16 prolonging it because it has already been a very extensive
 17 and less than productive one but I'm drawn into it because
 18 of the treatment that my learned friend Mr Mpofo has given
 19 to what he calls politically powerful interventions or
 20 rather interventions by politically powerful individuals.
 21 He has focused his submissions on Mr Ramaphosa and hence,
 22 via Mr Ramaphosa, they're directed towards Lonmin, that
 23 he's drawn our attention to the paragraphs from the
 24 statement of the Minister where the very first person who
 25 enters the arena of communications to the police and

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1 invitations to the police to secure a proper presence and
 2 the effective restoration of law and order, is Mr Zokwana,
 3 the president of my client and he does that, not on the
 4 15th, he does that on the 12th and perhaps I can just
 5 recapitulate very briefly the essence of it because it is
 6 important in the context of the thesis that Mr Mpofo is now
 7 placing before the Commission, ultimately with a view to an
 8 answer to some set of propositions, that on the 12th Mr
 9 Zokwana arrives because he has heard reports about the
 10 incident on the morning of the 12th in which two security
 11 men were killed and he comes to Lonmin because he is very,
 12 very concerned. The first thing that he does is to arrange
 13 a meeting with Lonmin and it's a logical and perfectly
 14 proper recourse because Lonmin have the security apparatus
 15 that is in place and he needs to establish whether or not
 16 there is sufficient security. He is not entirely satisfied
 17 – I know that I'm repeating things I've said previously,
 18 but he then calls the Provincial Commissioner's office. He
 19 is not yet satisfied that there has been a sufficient
 20 response on the part of the police and he then telephones,
 21 on the 12th of August, the Minister.
 22 Now Mr Zokwana has given evidence and his
 23 evidence on this topic has been very, very clear and it is
 24 entirely unchallenged. He seeks police intervention
 25 because there has been a breakdown of law and order. There

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1 is intimidation, there is violence and there is now killing
 2 and he made it absolutely clear that it was not because
 3 there were people striking who had gathered on the koppie.
 4 It was not a matter for him that this was a collective
 5 bargaining issue or that it was an issue that Mr Mpofo
 6 inaccurately, incidentally, describes as a wage dispute.
 7 He called for law and order forces because of the killings.
 8 Now if that is part of the undue influence that
 9 people were seeking to exert on the security and police
 10 establishment of this country then I need to know that and
 11 I am not deriving that from what Mr Mpofo is saying about
 12 Mr Ramaphosa and Lonmin. If Mr Zokwana was on a similar
 13 mission, if Mr Zokwana was concerned was to secure murder,
 14 then that needs to be made clear today and we will
 15 establish in due course why it was not put to Mr Zokwana.
 16 CHAIRPERSON: I'll take the tea
 17 adjournment now. Mr Mpofo, you can consider your position.
 18 It may well be in the light of submissions that have been
 19 made that you'd wish to reformulate your question.
 20 Basically you want to put to the witness that there was
 21 improper or undue influence. The complaint relates to what
 22 the allegation of impropriety or undueness rests on.
 23 Perhaps if you can put that succinctly to the witness –
 24 MR MPOFU: Yes.
 25 CHAIRPERSON: You may find a way through

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1 the problem, because I imagine you want to move on to other
 2 points.
 3 MR MPOFU: I do.
 4 CHAIRPERSON: Well, let's take the tea
 5 adjournment, give you a chance to think about it,
 6 reformulate your question and we'll resume in quarter of an
 7 hour's time.
 8 [COMMISSION ADJOURNS COMMISSION RESUMES]
 9 [15:32] CHAIRPERSON: The Commission resumes.
 10 Major-General, sorry, National Commissioner – the last
 11 witness was a Major-General. National Commissioner, you're
 12 still under oath. Mr Mpofo, have you found a way out of
 13 the thicket in which we were all involved before we took
 14 the adjournment?
 15 MR MPOFU: Yes, yes Chairperson, I have.
 16 It's very simple, Chairperson.
 17 CHAIRPERSON: Before you do that, forgive
 18 me, when we came back here we found documents on our desk,
 19 on the table, statement of the National Commissioner base
 20 document, advancement base document, a not signed and not
 21 commissioned statement, amendments on paras 3 and 24,
 22 signed and commissioned statement, scanned document. Now
 23 to whom must we say thank you for these documents?
 24 MR MPOFU: To SAPS.
 25 MR SEMENYA SC: Chair, it's us. You'd

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1 recall we had requested documents of the statement as and
 2 when they were generated. Those are the documents.
 3 CHAIRPERSON: Thank you, and presumably
 4 you will deal with them in re-examination. Alright, okay
 5 thank you. Mr Mpofo, sorry, I interrupted you.
 6 MR MPOFU: Thank you, Chairperson. I
 7 just want to say that those documents, insofar as they may
 8 be dealt with in re-examination, we also just received them
 9 now so obviously we will reserve our rights. But
 10 Chairperson, yes, to respond to you or rather to Mr Tip
 11 through you, Chairperson and Commissioners, unfortunately I
 12 was interrupted when I was still – Mr Tip is correct – when
 13 I was confining my line of questioning to Mr Ramaphosa.
 14 However, contrary to what Mr Burger said, I had in reading
 15 the Minister's statement, I deliberately started at 15.1 so
 16 as to cover the point that Mr Tip is correctly raising and
 17 the answer is this. The only appellation, as it were, to
 18 which I will argue Mr Zokwana conforms is the one I've made
 19 of politically powerful individuals for the obvious reasons
 20 that were led in the evidence but I absolve him completely
 21 from the rest of the things that I had observed to you,
 22 Chairperson, namely the "campaign" to re-characterise the
 23 events, one. Two, the desire to bring out the army
 24 although that one is a bit marginal, I'll explain just now.
 25 And the desire expressed in the e-mails for maintaining the

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1 police presence at about 800, that's in one of the e-mails.
 2 And fourthly, the desire for getting the Minister "to act
 3 in a pointed way." So the only common ground, which is Mr
 4 Tip's question, is simply the issue of the appellation.
 5 However, where I do join issue with NUM in
 6 response to these issues is where, insofar as there is
 7 coincidence between the call for the army and the police in
 8 the e-mails by Lonmin and a similar call being made in BBB7
 9 where it says that, quote, in the NUM statement, "We call
 10 for the deployment of a special task force or the SANDF to
 11 deal decisively with the criminal elements in Rustenburg
 12 and its surrounding mines" and so on, says the NUM general
 13 secretary. And if I'm going to argue any second
 14 coincidence it will simply be that there was, whether it
 15 was fortuitous or not, but that both Lonmin and the NUM to
 16 that extent called for the involvement of the army and in
 17 this case it says special task force. The other one
 18 didn't, it just said the police but that's a minor, that's
 19 a minor issue. So I hope that deals sufficiently with Mr
 20 Tip' concerns, in other words insofar as some bring him in
 21 and some of the issues bring him out.
 22 CHAIRPERSON: Ask your question and let's
 23 see whether we, it's – Mr Tip, I beg your pardon.
 24 MR TIP SC: Yes, just a matter of
 25 courtesy really to say to my learned friend Mr Mpofo that

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1 that clarifies the position, that is what I sought and I
 2 appreciate that.
 3 CHAIRPERSON: You've put a long series of
 4 propositions, some of which have had to be left out for the
 5 moment at least -
 6 MR MPOFU: Yes.
 7 CHAIRPERSON: - to the witness. The main
 8 concern was the suggestion, putting that there was undue
 9 influence or improper pressure. That was the thrust, as I
 10 understood it, of Mr Burger's complaint, one of the main
 11 ones. Now are you minded to reformulate your question?
 12 MR MPOFU: Yes I am, Chairperson, and I'm
 13 not going to put any new propositions, that I promise.
 14 What I wanted to do is, before the Chairperson was going to
 15 crystallise the crux I just wanted to put one, one little
 16 proposition as a preface, if the Chair doesn't mind. It is
 17 this –
 18 CHAIRPERSON: Just a little proposition.
 19 MR MPOFU: Yes. General, the only
 20 connection that you have to this – and I'm sorry because as
 21 I've conceded already, I'm putting to you things that other
 22 witnesses are going to come and say and what have you,
 23 which is partly unfair because you were obviously not privy
 24 to their communications – the only reason I'm putting this
 25 to you is insofar as you are drawn into those discussions

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1 and the following, that I'm going to argue that the only
 2 reason why these so-called concerns were communicated to
 3 you by the Minister was to transform those political
 4 concerns, as I say, into operational action as desired by
 5 those politicians. You may once again – all I'm saying is
 6 that you were told so that you can operationalise the
 7 thing. What motivated the Minister or whoever, I don't
 8 expect you to be answerable for.
 9 CHAIRPERSON: The question is, you've
 10 heard it suggested that it's going to be argued on the
 11 basis of what we call circumstantial evidence that there
 12 was indirect, sorry, there was undue influence or indirect
 13 - or sorry, undue influence or improper pressure brought to
 14 bear on you and through you and the whole SAPS as a result
 15 of the factors that were relied on. Now what do you say to
 16 the proposition that there was improper pressure or undue
 17 influence? Would you agree with that?
 18 GENERAL PHIYEGA: No, I do not agree.
 19 CHAIRPERSON: Anything you want to add,
 20 or are you content to rest with that answer? Anything you
 21 want to add, or are you content to abide by that answer
 22 you've just given?
 23 GENERAL PHIYEGA: No, I don't agree.
 24 I've already given a lot of testimony around this issue.
 25 CHAIRPERSON: I see, alright.

<p style="text-align: right;">Page 10854</p> <p>1 MR MPOFU: Thank you, Chairperson. 2 General, we'll leave it at that for argument and that's in 3 relation to what I call the last point, the political 4 pressure point but in relation to the other six or seven 5 points I'm going to argue that viewed from the point of 6 view of the protesters and even a neutral citizen, all the 7 other things, the use of the radios, the joint use of this 8 and that, that I mentioned earlier, I'm going to argue that 9 those were not instances which displayed the requisite 10 amount of impartiality and that they would be viewed, they 11 can be viewed as having taken sides and that's all – 12 CHAIRPERSON: Now there are two points 13 about that, Mr Mpofo. 14 MR MPOFU: Yes. 15 CHAIRPERSON: The first one is whether 16 this witness's opinion about that is receivable for the 17 reasons we discussed before. 18 MR MPOFU: Sure. 19 CHAIRPERSON: The second point is that 20 there may be a legal question. Where the law says, where 21 the Act and the Constitution say that the police must be 22 impartial, does that mean must also appear to be impartial 23 or is it enough that they are actually impartial, never 24 mind what impression may be created to the contrary? But 25 that's also a matter which you will debate at the end of</p>	<p style="text-align: right;">Page 10856</p> <p>1 MR MPOFU: Yes, thank you, Chairperson. 2 The next point is somewhat linked but separate and it is 3 this, I take it that you and I agree that from everything 4 that we've heard from you, from the Minister, from the 5 Constitution, from the Act, it would be fair to say that 6 you are the conduit or the bridge between the political 7 sphere and the operational sphere and by that I mean when 8 things have to be transposed from the one sphere to the 9 other, you stand at the intersection between those two 10 spheres. Would that be a fair statement? 11 MR SEMENYA SC: I don't understand the 12 question, Chair. All we know are the duties of the 13 National Commissioner of Police and we know what the 14 ministerial responsibilities are under the law. 15 MR MPOFU: Chairperson, I'm sure the 16 witness understands the question but I'll try and rephrase 17 it. The simple proposition that I'm putting to you, madam, 18 is that in terms of how the relationship is structured as 19 between what we may call the political sphere which is 20 referred to in the Constitution and which you yourself have 21 testified about as being the purview of the Minister, and 22 the operational sphere which is the policing side of 23 things, to put it colloquially, the National Commissioner – 24 maybe I shouldn't say you – the National Commissioner, 25 whoever it is, is constitutionally speaking the bridge</p>
<p style="text-align: right;">Page 10855</p> <p>1 the hearing. 2 MR MPOFU: Yes. 3 CHAIRPERSON: It's not something that the 4 witness can appropriately help us on. 5 MR MPOFU: I concede that, Chairperson. 6 My question to her is limited only to the factual 7 propositions but as far how they can be interpreted, I 8 concede what you're saying Chairperson, namely that I can't 9 ask her that one derives from this – I'm only saying what 10 I'm going to argue. She can – 11 CHAIRPERSON: Well, she's heard what 12 you're going to argue. 13 MR MPOFU: Yes. 14 CHAIRPERSON: And her counsel has also 15 heard what you're going to argue. 16 MR MPOFU: Yes. 17 CHAIRPERSON: And if he wants to get some 18 answers from her in re-examination – 19 MR MPOFU: He will. 20 CHAIRPERSON: - which refutes or attempts 21 to refute the point you're going to argue, I'm sure we can 22 depend upon him to do so. 23 MR MPOFU: Thank you, Chairperson. 24 CHAIRPERSON: So would you like to move 25 on to your next point?</p>	<p style="text-align: right;">Page 10857</p> <p>1 between those two spheres, between the so-called political 2 advice leadership, all the terms that you used, and the 3 operational sphere. The National Commissioner is, by 4 prescription of the Constitution, the conduit through which 5 those two spheres are connected, correct? 6 GENERAL PHIYEGA: I think in the 7 statement that was led by Adv Semanya and yourself too, you 8 clearly articulated the roles, those powers and within that 9 context I understand my role to be, you know, as 10 articulated in that manner. 11 CHAIRPERSON: I think what Mr Mpofo 12 suggests is that if the Minister has got anything to say to 13 the police he says it to you. He doesn't ring up Sergeant 14 Van der Merwe in the Tshwane police station or he doesn't 15 even speak to a Provincial Commissioner, he speaks to you 16 on the basis that you will then take it further insofar as 17 you consider it appropriate with the rest of the service. 18 I think that's basically his point, is that right Mr Mpofo? 19 MR MPOFU: That's correct, Chair. 20 GENERAL PHIYEGA: I think – 21 MR SEMENYA SC: The evidence has already 22 been given on this point, that the Minister can speak to 23 the National Commissioner, the Minister can speak to the 24 Provincial Commissioner, as he did. 25 CHAIRPERSON: I think he's asking the</p>

<p style="text-align: right;">Page 10858</p> <p>1 question –</p> <p>2 MR MPOFU: General –</p> <p>3 CHAIRPERSON: - summing up that answer as</p> <p>4 a springboard to something else, so let's move on.</p> <p>5 MR MPOFU: Yes, thank you.</p> <p>6 CHAIRPERSON: I'm just going to say – you</p> <p>7 say the Minister can speak to a Provincial Commissioner?</p> <p>8 Alright, okay, that's the evidence but primarily I suppose</p> <p>9 the Minister would speak to you. If the Minister has</p> <p>10 something general to say –</p> <p>11 MR MPOFU: Constitutionally.</p> <p>12 CHAIRPERSON: - to the police, the</p> <p>13 appropriate person, not necessarily the only person but the</p> <p>14 most appropriate person would be you and I take it from</p> <p>15 your evidence it seems that that what happens from time to</p> <p>16 time in a perfectly proper way, is that correct?</p> <p>17 GENERAL PHIYEGA: Judge, I think this is</p> <p>18 why I gave the answer the way I did because it was</p> <p>19 important for me to say the powers and the roles and the</p> <p>20 responsibilities are clearly articulated on how we relate.</p> <p>21 The way it is asked it carries a lot of overtures and</p> <p>22 that's why I wanted to constrict myself to what my roles,</p> <p>23 my responsibility, the flow of – and it's very clear. He</p> <p>24 has asked me about that, I've been led on that and I think</p> <p>25 I'd like to keep my answer as that.</p>	<p style="text-align: right;">Page 10860</p> <p>1 MR MPOFU: No, it doesn't, Chair.</p> <p>2 CHAIRPERSON: As a matter of accuracy</p> <p>3 that's what happened.</p> <p>4 MR MPOFU: No, no, thank you very much,</p> <p>5 Chairperson, it's still the political sphere so-called. Do</p> <p>6 you understand it now and if you do, do you agree with it?</p> <p>7 [15:32] GENERAL PHIYEGA: I've already answered</p> <p>8 you on that one to say, it's very consistent with what you</p> <p>9 asked about my roles and responsibilities then, today, and</p> <p>10 my answer is still the same on this point in terms of</p> <p>11 understanding my responsibilities.</p> <p>12 MR MPOFU: Okay, I'll move on but I will</p> <p>13 argue that you're really evading a simple question which is</p> <p>14 only a stepping stone to what I'm going to put to you. I</p> <p>15 think the laws, the Act and the Constitution are very clear</p> <p>16 as to the role of the National Commissioner, that's why I</p> <p>17 didn't, I'm removing it to you as such but I'll move on.</p> <p>18 COMMISSIONER HEMRAJ: But she has</p> <p>19 repeatedly said that she's answered that question.</p> <p>20 GENERAL PHIYEGA: Mm.</p> <p>21 MR MPOFU: Well, she –</p> <p>22 COMMISSIONER HEMRAJ: And she said –</p> <p>23 MR MPOFU: A "yes" would –</p> <p>24 COMMISSIONER HEMRAJ: Mr Mpofo, and she</p> <p>25 has said that she stands by her evidence as it was led and</p>
<p style="text-align: right;">Page 10859</p> <p>1 MR MPOFU: Maybe I can assist you by</p> <p>2 using an example. When on the 17th it was required to</p> <p>3 transmit information as to what has happened at the</p> <p>4 operational level, namely the tragedy or whatever you call</p> <p>5 it, and what I call the political sphere – in this case you</p> <p>6 had to transmit information to the President – you, in</p> <p>7 conformity with your duties as I have defined them, caused</p> <p>8 FFF4 I think to be compiled so that that information from</p> <p>9 the operational sphere, through you, could be transmitted</p> <p>10 to your political principals. That's the kind of role I'm</p> <p>11 explaining, that you are ordinarily speaking the conduit</p> <p>12 and I accept readily what Mr Semenya is saying, that in</p> <p>13 real life the police, the Minister might pick up the phone</p> <p>14 and speak to so-and-so. I'm talking constitutionally as</p> <p>15 things are set out, that you are generally speaking the</p> <p>16 main conduit through which the two spheres are conducted as</p> <p>17 happened on the 17th or on the evening of the 16th.</p> <p>18 CHAIRPERSON: Sorry to interrupt you. I</p> <p>19 don't know that it necessarily affects your point but as a</p> <p>20 matter of fact exhibit FFF4 was sent to the Minister of</p> <p>21 International Relations for the eyes of the President, as</p> <p>22 it happens, not directly to the Minister of Police.</p> <p>23 MR MPOFU: Fair enough.</p> <p>24 CHAIRPERSON: I don't know whether that</p> <p>25 affects your point –</p>	<p style="text-align: right;">Page 10861</p> <p>1 as she was cross-examined. Now how is that evasive?</p> <p>2 MR MPOFU: Well, a question just simply</p> <p>3 requires a yes in such a simple question. Even if she had</p> <p>4 answered it before, I am entitled under cross-examination</p> <p>5 to ask it again and she can just say yes. We would have</p> <p>6 long been gone –</p> <p>7 CHAIRPERSON: You said you were going to</p> <p>8 argue she's evasive. I take it Mr Semenya is going to</p> <p>9 argue she isn't.</p> <p>10 MR MPOFU: I'm sure.</p> <p>11 CHAIRPERSON: Let's move on.</p> <p>12 MR MPOFU: Yes. Okay, I'll address this</p> <p>13 rather – I think one day I've got the right to ask</p> <p>14 questions which have been asked before but that's another</p> <p>15 question. The reason I'm asking you that question is</p> <p>16 whether it would be fair to say that any information,</p> <p>17 generally speaking, any information that is found in the</p> <p>18 political sphere – you know what I mean by that, I've</p> <p>19 defined it – ordinarily would have come via yourself, such</p> <p>20 as FFF4, insofar as it comes from the ground, from the</p> <p>21 operational sphere. You are the person who would have</p> <p>22 transmitted that information upwards or downwards, so to</p> <p>23 speak.</p> <p>24 CHAIRPERSON: Mr Mpofo, isn't that the</p> <p>25 question you've asked already? So shouldn't you – I</p>

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1 thought you were going to move on. You've moved on by just
 2 jumping up and down on the same spot. I suggest you put a
 3 foot forward and move forward in the real sense.
 4 MR MPOFU: Fine, Chairperson, as long as
 5 it's recorded that I still don't have an answer. Your
 6 evidence, I asked you when I restarted my cross-examination
 7 if, having considered or rather having heard what you've
 8 heard up to then and up to now, you were prepared to admit
 9 to any mistake or mistakes that the police might have
 10 committed in the operation and your answer was no. I'm
 11 just reminding you. Is that still your answer?
 12 GENERAL PHIYEGA: Yes.
 13 MR MPOFU: Now assuming that, well, from
 14 what Commissioner Hemraj, you did answer the question so I
 15 want to assume in your favour that you've answered it in
 16 the affirmative. If indeed you are that conduit then the -
 17 can I take you to, oh, it doesn't have an exhibit number
 18 yet, Chairperson, but it's a statement that I gave to you a
 19 week ago.
 20 CHAIRPERSON: It will be exhibit FFF30.
 21 Is that right, Ms Pillay?
 22 MR MPOFU: 3-0?
 23 MS PILLAY: That's correct, Chair.
 24 MR MPOFU: That is a copy of the article
 25 from the Mail & Guardian website – rather The Guardian,

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1 sorry, in the UK, website – which says, "Jacob Zuma says
 2 response to Lonmin massacre shows democracy is working."
 3 We did –
 4 CHAIRPERSON: It looks like an article –
 5 I'm sorry to interrupt you – it looks like an article, it's
 6 taken from the Internet. It looks like an article
 7 appearing on the website of The Guardian, that's the UK
 8 newspaper on – it looks like the 13th December 2012. Look
 9 at the top right-hand corner, is that correct?
 10 MR MPOFU: That's correct, Chairperson.
 11 CHAIRPERSON: Alright. It's an article
 12 headed, "Jacob Zuma says response to Lonmin massacre shows
 13 democracy is working" and it appears to be a report of an
 14 interview between President Zuma and Mr David Smith, who I
 15 take it is the Guardian correspondent in South Africa.
 16 MR MPOFU: That's correct, Chairperson.
 17 Commissioner or General, I will take you to page 2. You'll
 18 see that the page numbering is cut out so just go to the
 19 second page at the top of which it says "Zuma, meanwhile"
 20 and so on and so on.
 21 MR BURGER SC: Can I just ask, Chair,
 22 what is the question going to be to this witness or is Mr
 23 Mpofo going to read the whole statement?
 24 CHAIRPERSON: No, he's referred the
 25 witness to page 2 and it's quite clear from the previous

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1 questions he asked that – it's the sixth paragraph I think,
 2 the paragraph beginning "How many other people," that's
 3 going to form the focus of his question I would think,
 4 based upon the previous question he's just asked. Is that
 5 right, Mr Mpofo?
 6 MR MPOFU: That's right, Chairperson.
 7 Yes, yes, I'm afraid Chairperson that is where I'm going
 8 but for context can I start at "Nobody expected Marikana?"
 9 CHAIRPERSON: I suppose in fairness to
 10 the witness and to those who are listening here who haven't
 11 got the benefit of the document in front of them, it's
 12 probably just as well if you read that, ja.
 13 MR MPOFU: I promise you Chair, I won't
 14 ask many questions or any questions about the other part.
 15 CHAIRPERSON: You can ask any relevant
 16 questions you like.
 17 MR MPOFU: Thank you, Chair. Quote,
 18 "Nobody expected Marikana," he said – he being the
 19 President - "but I think you can't fail to appreciate that
 20 Marikana happened in a democratic country. If it was
 21 during apartheid, there were many Marikanas almost on a
 22 daily basis, and there was nothing that anyone could do
 23 about it whatever. Once this one happened, you saw the
 24 reaction of the country. The churches were there, the
 25 traditional leaders were there, government was there. We

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1 established the ministerial committee immediately to deal
 2 with the issue, established a judicial commission of
 3 inquiry to make it a point that it does not happen again,
 4 but also to say what caused it. Zuma rejected calls for
 5 the Police Minister, Nathi Mthethwa, to quit, saying the
 6 unrest was caused by a dispute over wages. Now you can't
 7 say the Minister of Police is responsible for that, to
 8 start the thing. When the workers were striking, they had
 9 every other kind of weapon in their hands. In fact long
 10 before the shooting, 10 people had died including two
 11 policemen, two security policemen" which meant two security
 12 guards. "Now all of that is not taken into account." And
 13 as the Chairperson indicated, the important paragraph is
 14 the one that I'm going to read now. He said, "How many
 15 other people would have died if, for example, police did
 16 not move to disarm these people? Nobody can tell. At a
 17 spur of the moment, a mistake happened. Now if such a
 18 mistake happened, you throw the Minister away, I don't know
 19 on what basis because there are facts that need to be
 20 weighed." Now, the issues that I want to confine - there
 21 are various other issues which we, if we have time, will or
 22 will not deal with but the issue that I want to confine my
 23 question to now is that, firstly, assuming that as I have
 24 said the information that is available at the political
 25 sphere would have come from, among other people, yourself,

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1 whether you are aware of the mistake that happened at the
 2 spur of the moment in respect of the Marikana tragedy that
 3 the President was referring to.
 4 GENERAL PHIYEGA: I don't.
 5 MR MPOFU: And I read the statement in
 6 much fuller context, in fairness to you as the Chairperson
 7 said, but also to put what the President said in its proper
 8 context and, well, I'm going to put to you that what I'm
 9 going to argue insofar as it affects you, is that indeed of
 10 course we agree with the President that the whole thing was
 11 caused by a mistake but more importantly I'm going to argue
 12 that if you are the "conduit", quote/unquote, that I
 13 described earlier, that that information – we know that the
 14 President was not there – must have come from either
 15 yourself or people who had the ear of the people who were
 16 there who are your soldiers –
 17 CHAIRPERSON: I'm not sure that follows.
 18 I think we can assume that the President reads the
 19 newspapers, that he watches the television news programmes
 20 and he has a wide variety of sources of information and
 21 this is his opinion. I'm not sure we can confine it
 22 necessarily to information he received from the police
 23 service. Maybe we should ask that question directly.
 24 MR MPOFU: Yes, that's why I'm asking the
 25 question.

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1 CHAIRPERSON: Alright, this view which
 2 the President expressed that a mistake happened at a spur
 3 of the moment, as he put it, in accordance with your
 4 understanding based on all the information you received,
 5 would you agree with that?
 6 GENERAL PHIYEGA: No, I don't.
 7 CHAIRPERSON: You don't. So does it
 8 follow from your answer and what from you said to Mr Mpofu
 9 that the President did not receive that information from
 10 you or from the SAPS as far as you are aware?
 11 GENERAL PHIYEGA: I think, Judge, what's
 12 a little bit confusing here is, the question I was asked by
 13 Adv Mpofu is whether I know what mistake. I said I don't
 14 know what this mistake is. Maybe he knows, he can share
 15 what the mistake is because I don't know. He continues
 16 talking about a mistake. If he's got a standpoint about
 17 what the mistake is, maybe he can explain. I don't have
 18 that explanation of what is the so-called mistake.
 19 MR MPOFU: Chairperson, for that, I think
 20 in fairness I will deviate from tradition and answer your
 21 question. You see when the Chairperson put that question
 22 which was going to be my next question, there would have
 23 been two possible answers, either that it came from you or
 24 it didn't come from you, which you've now answered. If it
 25 didn't come from you then obviously I wouldn't expect you

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1 to go the extra step of unpacking what the so-called
 2 mistake is but if it had emanated from you or in your
 3 presence even, then I would have been entitled to ask you
 4 the further question as to the nature of the mistake which
 5 you or someone else transmitted to the President. So
 6 that's all dependent on the question that the Chairperson
 7 put to you.
 8 CHAIRPERSON: She said she doesn't know
 9 what the mistake was.
 10 MR MPOFU: Yes, that's exactly but I
 11 didn't know she was going to say that.
 12 CHAIRPERSON: No, no, I understand.
 13 Perhaps you can take the point up further, if you consider
 14 it worthwhile, tomorrow morning – I beg your pardon, not
 15 tomorrow morning, Thursday morning at 9:30.
 16 MR MPOFU: Thank you, Chairperson, I just
 17 want to indicate that I'm really, the next section is just
 18 going to be what I'm going to put. There's one or two
 19 things that –
 20 CHAIRPERSON: What you're saying is that
 21 General Mpenzima must be ready in the pavilion with his pads
 22 on, ready to bat quite soon after half past 9.
 23 MR MAHLANGU: Chairperson, the
 24 Commissioner wants to state something.
 25 CHAIRPERSON: Oh, sorry.

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1 GENERAL PHIYEGA: Chairperson, I have
 2 requested a long time ago when I started that I'm not
 3 available on the 6th and 7th.
 4 MR MPOFU: On the?
 5 GENERAL PHIYEGA: On the 6th and 7th I'm
 6 not available.
 7 CHAIRPERSON: I'm afraid we weren't told
 8 that beforehand but Mr Semanya, I take it you wouldn't
 9 object – at least I hope you wouldn't object to interposing
 10 General Mpenzima in chief at least on Thursday and the half
 11 of Friday we'll be sitting. I know it's not desirable
 12 normally to interpose witnesses but in this case I think
 13 it's important that we don't waste time. If it's only done
 14 on the basis of the evidence-in-chief then you shouldn't be
 15 prejudiced unduly. We're not establishing a precedent, I
 16 don't want to put pressure on you either of course.
 17 MR SEMENYA SC: Chair, if it were
 18 agreeable to everyone and Mr Mpofu's remaining point is a
 19 30-minuter, I think we'd be better served just to sit until
 20 5.
 21 [16:11] CHAIRPERSON: I think Mr Gumbi is going
 22 to ask some questions –
 23 MR SEMENYA SC: I only have one –
 24 CHAIRPERSON: And I have a few questions
 25 that I'm proposing to ask as well, so I'm not sure we can

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1 guarantee the curtain will coming down at 5 o'clock.
 2 MR SEMENYA SC: Chair, we will oblige but
 3 I must state that in our estimation this witness has been
 4 in the witness box precisely for this, because there was an
 5 interposition of a witness and the cross-examination that
 6 went with it. We started the cross-examination from the
 7 start and she's still in the witness box even now.
 8 CHAIRPERSON: I'm aware of that. I take
 9 it, as long as Mr Mpofo promises not to come up with any
 10 more questions based upon what the interposed witness has
 11 to say and so confines himself to the questions that he's
 12 already prepared then it shouldn't be a problem. There
 13 shouldn't be a problem, Mr Semenya. Only in chief, Mr
 14 Semenya.
 15 COMMISSIONER TOKOTA: Mr Mpofo, how long
 16 do you think it will take you to complete this cross-
 17 examination?
 18 MR MPOFU: Well, that's a difficult one
 19 if you put it in time terms because it depends on the
 20 answers. There's one issue which has something to do with
 21 the deployment of the SANDF and then there's a very small
 22 issue emanating from the President's thing about the inter-
 23 ministerial committee, those are definitely going to be
 24 short. And then it's a question of putting a series of
 25 propositions, so it shouldn't be long ordinarily but it

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1 depends on the answers.
 2 CHAIRPERSON: The problem, Mr Gumbi has
 3 indicated he's going to be half an hour –
 4 MR SEMENYA SC: Chair –
 5 CHAIRPERSON: And he's given us documents
 6 and things to read.
 7 MR SEMENYA SC: If Mr Mpofo finishes, I'm
 8 sure my prejudice is halved.
 9 CHAIRPERSON: It's now about 12 minutes
 10 past 4, do you think you can finish by, say quarter to 5?
 11 I understand there's a thing we colloquially call injury
 12 time over which you have no control, I understand that.
 13 MR MPOFU: Yes.
 14 CHAIRPERSON: But subject to that, do you
 15 think you can?
 16 MR MPOFU: Chairperson, if I can just
 17 confer with my attorney. Chairperson sorry, I'm reminded
 18 that some of the injured persons who are here and the
 19 persons that we're acting on behalf of, as of today
 20 obviously have to travel a longer distance and there's a
 21 bit of unrest in Marikana, as Mr Tip had indicated in the
 22 morning and so it might be unfair to continue in their
 23 absence, at least the primary ones because the bus has been
 24 prearranged but speaking for myself, I would meet that
 25 injury time.

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1 CHAIRPERSON: You could always tell them,
 2 they can always be told what happened in their absence once
 3 they've gone, couldn't they? I see people are leaving now
 4 anyway, not knowing what we're going to do.
 5 MR MPOFU: No, Chairperson, my
 6 instructions are that we should continue in the normal
 7 course whenever it is suitable to do so.
 8 CHAIRPERSON: Alright, we'll carry on
 9 until quarter to 5. Oh, you don't want to carry on until
 10 quarter to 5? Are you prepared to do so?
 11 MR MPOFU: Until?
 12 CHAIRPERSON: Your clients have gone
 13 already, they didn't even know what we were going to do.
 14 So they've gone, they can be told what – they can later be
 15 shown the transcripts, if necessary, and it can be
 16 interpreted to them specially. As soon as we have the
 17 transcript, which we'll have I take it by Thursday morning,
 18 they can have it translated to them.
 19 MR MPOFU: No Chairperson, yes, I don't
 20 think we can read anything from the fact that they have
 21 left. Once again it's what I call Hobson's choice.
 22 Obviously they would like to be here but they also don't
 23 want to be killed when they get home, so –
 24 CHAIRPERSON: So what do you suggest we
 25 do?

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1 MR MPOFU: Chair, let me try again,
 2 Chairperson. Thank you, Chairperson. Chairperson, yes –
 3 oh, sorry.
 4 MR MAHLANGU: The Commissioner is just
 5 consulting with [inaudible].
 6 CHAIRPERSON: Commissioner, it looks as
 7 if you want to say something. Would you like to turn your
 8 microphone on and say what you want to say, if there is
 9 something that you wish to say?
 10 GENERAL PHIYEGA: I've actually asked
 11 somebody to call the office to see if I cannot shift the
 12 Thursday issue to the session on Friday and Saturday and
 13 finish the thing, Judge, because I do want to finish.
 14 CHAIRPERSON: Does that mean we must wait
 15 a couple of minutes before you get the message back from
 16 your office? Shall we adjourn for five minutes in the hope
 17 that within those five minutes we get the information which
 18 you seek?
 19 GENERAL PHIYEGA: Sure.
 20 CHAIRPERSON: Alright, we'll take the
 21 adjournment for five minutes.
 22 [COMMISSION ADJOURNS COMMISSION RESUMES]
 23 [16:27] CHAIRPERSON: The Commission resumes. In
 24 the light of what Mr Semenya told me, I allowed Adv Hemraj
 25 to leave so that she could catch a plane. Would you like

1 to tell me in the auditorium what you told me outside, Mr
2 Semenya?

3 MR SEMENYA SC: Yes, Chair. The National
4 Commissioner will make herself available on Thursday.

5 CHAIRPERSON: Thank you very much,
6 National Commissioner, we appreciate the gesture you've
7 made. This is about a valid postponement. The Commission
8 adjourns until Thursday morning at 9:30.

9 [COMMISSION ADJOURNED]

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