

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 184

Lukmos
—communications—

13 FEBRUARY 2014

TRANSCRIPT PAGES 22144 TO 22312

1 **[PROCEEDINGS ON 13 FEBRUARY 2014]**

2 **[09:10] CHAIRPERSON:** The Commission resumes. I

3 hope everyone who has a cell phone has turned it off.

4 Provincial Commissioner, you are still under oath.

5 **MIRRIAM NOSAZISO ZUKISWA MBOMBO:** s.u.o.

6 **CHAIRPERSON:** Ms Lewis.

7 **CROSS-EXAMINATION BY MS LEWIS (CONTD.):**

8 Good morning, General.

9 **GENERAL MBOMBO:** Good morning,

10 Chairperson.

11 **MS LEWIS:** General, just to orientate

12 ourselves, can I ask for day 136 of the transcript to be

13 put up again? Page 14511, lines 3 to 7. So General,

14 you will recall that we were looking at the testimony of

15 Colonel Scott who testified about a group that was brought

16 together and he said, his testimony was that they were

17 brought together to look at the policies of the police and

18 then he said, "And then obviously," and he used the word

19 "obviously," "the operation weighed up against the

20 policies." You see that, General?

21 **GENERAL MBOMBO:** I see it, Mr Chairperson.

22 **MS LEWIS:** And the persons who he

23 identified as, or whom he could remember as having been part

24 of that group were Brigadier Mkhwanazi, Mr Ally, Brigadier

25 Hunter, and Colonel Twala. Can I ask for exhibit JJ203 to

1 be put up on the screen? General, this is the call-up
2 instruction, or the call-up instructions for that group.
3 So if we go to page 4 we see the full group and that was
4 Major General Geldenhuys from Legal Services, Brigadier
5 Mkhwanazi, Brigadier Hunter, Colonel Makari, Colonel Twala,
6 Colonel Siva, Captain Percy Govender, and then two members
7 from ORS, and then Mr Faizel Ally. You see that?

8 **GENERAL MBOMBO:** I see it, Mr Chairperson.

9 **MS LEWIS:** Now this group met on a number
10 of occasions, General, and I just want to take you through
11 that, so if we go back - the group, the full group or
12 members of the group. So if we go back to page 1 we see
13 that from the 29th until the 31st of August five members of
14 the group - I don't think it is necessary for me to read
15 specifically which ones, but it seems as if the core group
16 met at the Burgers Park Hotel in Pretoria. You see that?

17 **GENERAL MBOMBO:** I see it, Mr Chairperson.

18 **MS LEWIS:** And then if we turn to the
19 third page we see - and this was a meeting of the full
20 group - we see that they met from the 10th of September,
21 this is 2012, until the 16th of September 2012 at the Elgro
22 Hotel in Potchefstroom. You see that?

23 **GENERAL MBOMBO:** I see it.

24 **MS LEWIS:** And then if we turn to page 5
25 we see that six members of the group were called up to meet

1 from the 3rd of September 2012 until the 7th of September

2 2012, also at Potchefstroom. You see that, General?

3 **GENERAL MBOMBO:** I see it. I see that.

4 **MS LEWIS:** If we turn to page 7, General,

5 we see that the group met from the 16th of September 2012

6 until the 20th of September, again at the Elgro Hotel in

7 Potchefstroom. You see that, General?

8 **GENERAL MBOMBO:** I see it, Mr Chairperson.

9 **MS LEWIS:** Now General, did you attend

10 any of these sessions?

11 **GENERAL MBOMBO:** Not all of them, Mr

12 Chairperson.

13 **MS LEWIS:** General, which sessions did

14 you attend?

15 **GENERAL MBOMBO:** The first day they

16 arrived I attended, when they came and told us what they

17 came there to do.

18 **MS LEWIS:** And General, what did they

19 tell you they were there to do?

20 **GENERAL MBOMBO:** They said they were sent

21 by the National Commissioner to come and see if the

22 operation was in accordance with our policies, look into

23 what challenges were there that were faced.

24 **MS LEWIS:** And General, did you attend

25 any other sessions on any other days?

1 **GENERAL MBOMBO:** They were also sent to
2 be present at Roots when I was also present there.

3 **MS LEWIS:** So sorry, before we get to
4 Roots, did you attend any of the other, of the sessions
5 that are referred to in this call-up instruction?

6 **GENERAL MBOMBO:** No, only the first one
7 when they told me the purpose of their visit there.

8 **MS LEWIS:** And General, were you required
9 to do anything on that first day?

10 **GENERAL MBOMBO:** Not from what I can
11 remember, or the way I can remember it.

12 **MS LEWIS:** So they did not interview you
13 or ask you to report on anything?

14 **GENERAL MBOMBO:** I did not have an
15 interview with them or anything being reported to me –

16 **CHAIRPERSON:** Did they ask you –

17 **GENERAL MBOMBO:** I do not remember them
18 saying so.

19 **CHAIRPERSON:** Did they ask you any
20 questions at all?

21 **GENERAL MBOMBO:** There was no question
22 directed to me, Mr Chairperson.

23 **CHAIRPERSON:** Did you speak to them? Did
24 you give them an address, make some remarks at the
25 beginning of their session?

1 **GENERAL MBOMBO:** When I met with them and
2 they were telling me the purpose of their visit, they told
3 me that they would ask to speak to certain police officers
4 from time to time when they are at Roots. I did not have a
5 problem with that because they were doing their job as they
6 were sent by the National Commissioner.

7 **CHAIRPERSON:** Do you know how many
8 officers they spoke to before they completed their work?

9 **GENERAL MBOMBO:** I am not sure, Mr Chairperson,
10 but I know when I spoke to them they asked to see General
11 Mpembe. I am sure about General Mpembe.

12 **CHAIRPERSON:** And at the end of their
13 session did you see any report they produced?

14 **GENERAL MBOMBO:** I did not hear the
15 question, Mr Chairperson.

16 **CHAIRPERSON:** After their sessions were
17 over did you see any report which they produced?

18 **GENERAL MBOMBO:** There is a report that
19 they sent, Mr Chairperson.

20 **CHAIRPERSON:** The question was did you
21 see the report they produced?

22 **GENERAL MBOMBO:** I saw it.

23 **CHAIRPERSON:** I see, and do I understand
24 you to say that you do not know, apart from General Mpembe,
25 you do not know which other officers they spoke to?

1 **GENERAL MBOMBO:** I am not sure, Mr Chairperson,
2 but I believe they spoke to other officers as well.

3 **CHAIRPERSON:** I take it they must have
4 done so because they sat over quite an extended period of
5 time, and in addition to that, from what you tell us, they
6 also spoke to people at Roots. Do I understand correctly?

7 **GENERAL MBOMBO:** On a day when I was at
8 Roots I saw them with the officers who were there at Roots.
9 They appeared to be helping each other compiling the
10 report.

11 **CHAIRPERSON:** Thank you. Sorry, Ms
12 Lewis.

13 **MS LEWIS:** General, can you tell us when
14 you saw the report? The report that the group produced,
15 when did you see that report?

16 **GENERAL MBOMBO:** I am not sure, Mr Chairperson,
17 but it was some time last year.

18 **MS LEWIS:** And do you recall what the
19 conclusions were, just briefly and in general?

20 **GENERAL MBOMBO:** I do not have certainty
21 about their conclusions.

22 **MS LEWIS:** Did they highlight what they
23 saw as problematic aspects of the operation?

24 **GENERAL MBOMBO:** I think there are things
25 that they highlighted, but I do not remember the contents

1 of their report exactly.

2 **COMMISSIONER HEMRAJ:** Mr Budlender, is

3 this report to hand?

4 **MR BUDLENDER SC:** There was a short

5 document, which we were provided, Chairperson, but I do not know

6 whether it is the same report as the General is referring

7 to.

8 **CHAIRPERSON:** Let me ask a question. How

9 long was this report that you saw?

10 **GENERAL MBOMBO:** Mr Chairperson, it was not a

11 long report –

12 **CHAIRPERSON:** Five pages, 10 –

13 **GENERAL MBOMBO:** - I am not sure whether

14 it was two pages or three.

15 **CHAIRPERSON:** Oh, two or three pages, I

16 see. I have done a quick calculation. It appears from the

17 dates that are set out in the letters to which Ms Lewis

18 referred you that the task team, whatever they were called,

19 appears to have sat for something like 20 days, if my

20 arithmetic is correct. Are you able to confirm that that

21 is so?

22 **GENERAL MBOMBO:** Mr Chairperson, I am not sure

23 if they were there for the duration of all those days, but

24 I saw them the first day and I saw them again at Roots.

25 I am not sure if they were there continuously.

1 **CHAIRPERSON:** But if one goes through the
2 dates set out in the call-up letters it is 20 days, as far
3 as I can see, and when you were there, was there a
4 secretary present when you saw them on the first day?

5 **GENERAL MBOMBO:** At the time when they
6 called General Mpembe I do not remember seeing a secretary,
7 Mr Chairperson.

8 **CHAIRPERSON:** Was what he said recorded?

9 **GENERAL MBOMBO:** I cannot remember, Mr
10 Chairperson, whether they had means to record what was happening.

11 **CHAIRPERSON:** Yes, Ms Lewis.

12 **MS LEWIS:** And so, General, would you
13 know then whether minutes were kept?

14 **GENERAL MBOMBO:** I am not sure, Mr Chairperson.

15 As I said, I am not even sure whether there was anybody
16 taking notes or minutes.

17 **CHAIRPERSON:** If they saw people for 20
18 days the probabilities are that either the proceedings were
19 recorded, or they themselves would have kept notes as to
20 what they were told by the various officers that they
21 interviewed. You are not able to throw any light on that?

22 **GENERAL MBOMBO:** Not at all, Mr Chairperson.

23 **MS LEWIS:** And General, do you know what
24 role they performed at Roots?

25 **GENERAL MBOMBO:** From what I saw it

1 appeared they were helping, assisting in correcting the
2 terminology that was used in the operation.

3 **CHAIRPERSON:** Was it just a question of
4 terminology? Or I understood you to say earlier that they
5 wanted to know what happened and then they were going to
6 check it against the standards and policies and so forth of
7 the Police Services Act. That is what you said, is it not?

8 **GENERAL MBOMBO:** I did not hear the last
9 part, Mr Chairperson.

10 **CHAIRPERSON:** I understood you to say –
11 if I misunderstood you I'd be grateful if you'd correct me
12 – That their task was to find out what happened and then to
13 see to what extent what happened or was done by the members
14 of service complied with the policies and prescripts and
15 orders, Standing Orders, of the police service. Is that
16 correct?

17 **GENERAL MBOMBO:** That is so, Mr Chairperson.
18 That is how they explained it.

19 **CHAIRPERSON:** So that includes whether
20 the policies on Public Order Policing were complied with,
21 whether the doctrine of minimum force was complied with,
22 whether the doctrine of situational appropriateness was
23 complied with, all matters of that kind would be within the
24 terms of their remit. Is that right?

25 **GENERAL MBOMBO:** I think so, Mr Chairperson,

1 because what they told me was that they came there to see
2 if the operation went according to the prescripts of the
3 public order.

4 **MS LEWIS:** Thank you. Can I ask for
5 exhibit S to be put up again, please? Paragraph 3.5.
6 General, you will recall that we looked at this particular
7 provision on Tuesday when I began this line of cross-
8 examination. If we look at the wording again, "Every time
9 minimum force is used a review of the action taken must
10 always be done by an officer holding the rank of Captain
11 and above, who is not part of the action and who was also
12 not on the scene." Now General, surely what this, be it
13 the exercise or the review that this group performed
14 accords with what is required under paragraph 3.5.

15 Wouldn't you agree?

16 **GENERAL MBOMBO:** I totally do not agree,
17 Mr Chairperson.

18 **MS LEWIS:** Chairperson, that concludes our
19 cross-examination.

20 **CHAIRPERSON:** Thank you, Ms Lewis. Mr
21 Gumbi, I think you are next. Mr Gumbi, you are next? Are
22 you ready to commence with your cross-examination? Mr
23 Mpofu will be after that. I understood he was being cross-
24 examined in the East London Magistrate's Court yesterday in
25 the case in which he is a complainant. I do not see him

On his way?

2 **SPEAKER:** He is indeed, Mr Chairperson. He's

3 unfortunately held up, but he will be coming.

4 **CHAIRPERSON:** Held up by whom?

5 **SPEAKER:** He got a slight challenge. He

6 is coming indeed.

7 **CHAIRPERSON:** I see.

8 **SPEAKER:** Thank you.

9 **CHAIRPERSON:** Mr Gumbi, you can cross-

10 examine. If Mr Mpofo has not arrived, yet that does not mean

11 you must ask extra questions just to fill in the time.

12 Just ask the questions you want to ask and with a bit of

13 luck Mr Mpofo will be here before you finish.

14 **MR GUMBI:** Yes, Chairperson, but my

15 microphone *[inaudible]*.

16 **CHAIRPERSON:** Well then Ms Lewis's

17 microphone was working, so perhaps if she does not mind

18 moving sideways, you can sit next to her.

19 **COMMISSIONER HEMRAJ:** Mr Budlender, while

20 that is taking place, do you think we might have sight of

21 this report, the one that has just been read?

22 **MR BUDLENDER SC:** Yes, we are arranging

23 copies now.

24 **COMMISSIONER HEMRAJ:** Thank you very

25 much.

1 **MR BUDLENDER SC:** It is a two-page report.

2 **CHAIRPERSON:** And perhaps the SAPS could

3 tell us who all the people were who gave evidence before

4 that task team, whatever they were called, and whether what

5 the people said was recorded and if so, if we can have a

6 copy of it.

7 **[09:30]** Also ask the legal team of the SAPS, as I said,

8 firstly tell us who exactly gave evidence before this task

9 team or this work session, I think it was called, whether

10 what was said was recorded – if so, are copies available?

11 If not, whether the individual members kept notes of what

12 was said and then whether copies of those notes could be

13 made available to us. Mr Gumbi, are you now behind a

14 working microphone?

15 **MR GUMBI:** Yes Chairperson, my microphone

16 is working well

17 **ZUKISWA MBOMBO:** s.u.o.

18 **CROSS-EXAMINATION BY MR GUMBI:** Good

19 morning, General.

20 **GENERAL MBOMBO:** Good morning, Advocate.

21 **MR GUMBI:** Thank you very much. As you

22 know, General, that I represent the family of the late

23 Warrant Officer Lepaaku who was killed on the 13th of August

24 2012 and Lieutenant Baloyi who was injured on the same day.

25 The topic that I am going to canvass with you is very, very

1 briefly and I will make reference to some of the exhibits

2 so that you will understand the proposition that I am going

3 to put, you understand me?

4 **GENERAL MBOMBO:** I hear you, sir.

5 **MR GUMBI:** The topics that I am going to

6 discuss with you, General, is dealing with the firing of

7 instruction, with firing without instruction near the

8 railway line on the 13th of August 2012 and this is a topic

9 that was briefly canvassed by my learned colleague Adv.

10 Barnes on Tuesday. When we cross-examined General Mpembe

11 who was an operational commander on the 13th of August 2012,

12 on behalf of the family of the late Warrant Officer Lepaaku

13 and Lieutenant Baloyi we made a commitment to this

14 Commission that we would assist this Commission to leave no

15 stone unturned surrounding the death of the late Warrant

16 Officer Lepaaku and injury of the late – and the injury of

17 Lieutenant Baloyi. Can I refer you to the testimony of

18 General Mpembe. General Mpembe, we cross-examined General

19 Mpembe on behalf of the family of the late Warrant Officer

20 Lepaaku and Lieutenant Baloyi. On the –

21 **CHAIRPERSON:** Mr Gumbi, forgive me, you

22 drop your voice a bit so I would be grateful if you would speak up

23 because I am having difficulty in hearing what you say,

24 particularly towards the end of your sentences. Maybe the

25 Provincial Commissioner's hearing is better than mine but I

1 I would be grateful if you would speak up a bit.

2 **MR GUMBI:** Thank you very much,

3 Chairperson, I will do that. On the 10th of June, if I can

4 refer you to the testimony of General Mpembe, on the 10th of

5 June 2013 General Mpembe testified in evidence-in-chief

6 before this Commission that on the 13th of August 2012 near

7 the railway line he did not give an order to fire teargas

8 and stun grenades to disperse the crowds near the railway

9 line. And for the record the reference, that is, you will

10 find that on page 100, page 11158 line number 2 to 4, day

11 104. So after the incident, you testified before this

12 Commission that General Mpembe phoned you on your way to

13 Potchefstroom. Would I be correct, General, that when

14 General Mpembe telephoned you on your way to Potchefstroom

15 he did not inform you that near the railway line certain

16 members fired without his instruction as a commander?

17 **GENERAL MBOMBO:** I did not get that

18 explanation when we were talking on the phone.

19 **MR GUMBI:** According to your statement

20 again and your testimony before this Commission, after

21 General Mpembe informed you, in fact after he telephoned

22 you about the incident near the railway line you testified

23 that you returned back to Marikana and General Mpembe

24 briefed you about what transpired near the railway line, is

25 that correct?

1 **GENERAL MBOMBO:** That is so, Mr Chairperson.

2 **MR GUMBI:** Would I be correct again,

3 General, that when General Mpembe briefed you when you were

4 at Marikana about what transpired near the railway line,

5 General Mpembe did not inform you again that certain

6 members fired without instruction near the railway line,

7 when he briefed you.

8 **GENERAL MBOMBO:** He said he did not give

9 any instruction.

10 **MR GUMBI:** But in your statement you did

11 not highlight that, that General Mpembe briefed you that he

12 did not issue any instruction near the railway line.

13 **GENERAL MBOMBO:** I think so, Mr Chairperson.

14 **MR GUMBI:** Do you know the reason why you

15 omitted this information?

16 **GENERAL MBOMBO:** There is no reason I am

17 sure about that is important, I omitted it.

18 **MR GUMBI:** General Mpembe further

19 testified before this Commission that later that evening he

20 briefed the National Commissioner about what transpired

21 near the railway line. Were you present in that briefing?

22 **GENERAL MBOMBO:** I was present, Mr Chairperson.

23 **MR GUMBI:** And Brigadier Calitz was also

24 present in that meeting.

25 **GENERAL MBOMBO:** Yes, he was.

1 **MR GUMBI:** When we questioned Brigadier
2 Calitz in that briefing whether General Mpembe informed the
3 National Commissioner whether members fired without
4 instruction and his answer was that General Mpembe in his
5 presence, he did not remember General Mpembe informing the
6 National Commissioner that certain members informed – I
7 mean certain members fired without the instruction of
8 General Mpembe. Do you confirm that in your presence when
9 you were briefing the National Commissioner, indeed General
10 Mpembe did not inform the National Commissioner that
11 certain members fired without his instruction as an
12 operational commander?

13 **GENERAL MBOMBO:** I do not remember it
14 like that, Mr Chairperson.

15 **MR GUMBI:** When we asked General Mpembe
16 whether he informed the National Commissioner whether,
17 about this allegation that certain members fired without
18 his instruction as an operational commander near the
19 railway line, his answer was – and for the record the
20 reference, I will refer to day 121, if you can put it up?
21 That is the evidence of General Mpembe, day 121.

22 **CHAIRPERSON:** What page?

23 **MR GUMBI:** 121, from line 12 to 23.

24 **CHAIRPERSON:** Line 12?

25 **MR GUMBI:** To 23.

1 **CHAIRPERSON:** 12 to 23?

2 **MR GUMBI:** Yes –

3 **CHAIRPERSON:** I shall read it. “Mr Gumbi:

4 Yes, let me do that, Chairperson. When you briefed the

5 National Commissioner, General, did you inform the National

6 Commissioner that on that day you as the operational

7 commander, members under your command fired teargas, stun

8 grenade, without your instruction? Did you inform the

9 National Commissioner?” “Major-General Mpembe:

10 Chairperson, what I informed the National Commissioner is

11 that the teargas was used by Warrant Officer Kuhn, who said

12 that he heard an instruction, and I did indicate that he

13 does not know which instruction, who gave the instruction,

14 but I did not give him the instruction.” Is that the

15 passage you –

16 **MR GUMBI:** Yes, Chairperson, indeed.

17 Thank you very much, Chairperson. Do you have any

18 knowledge of this allegation, General? Yes, on the 13th -

19 **GENERAL MBOMBO:** Are you referring to the

20 day when he was explaining to the National Commissioner?

21 **MR GUMBI:** Yes, on the 13th.

22 **GENERAL MBOMBO:** I do not remember him

23 mentioning someone’s name but he said he did not give the

24 instruction for teargas to be fired.

25 **MR GUMBI:** When you had the briefing with

1 Lonmin –

2 **CHAIRPERSON:** I am sorry, were you present

3 when General Mpembe said to the National Commissioner what

4 he is repeated here in the passage that was put to you by Mr

5 Gumbi? Did you hear him say that to the National

6 Commissioner?

7 **GENERAL MBOMBO:** I was present, Mr Chairperson.

8 I was present, Mr Chairperson, but as I say I do not remember him

9 mentioning anybody's name but he did explain that teargas

10 and stun grenades were fired without him giving that

11 instruction.

12 **MR GUMBI:** Okay. When General Mpembe

13 conveyed this information to the National Commissioner,

14 would I be correct, General, that Brigadier Calitz was

15 present?

16 **GENERAL MBOMBO:** He was present, Mr

17 Chairperson, if I remember correctly.

18 **CHAIRPERSON:** Brigadier who?

19 **MR GUMBI:** Brigadier Calitz.

20 **CHAIRPERSON:** Brigadier Calitz.

21 **MR GUMBI:** And it is possible that

22 Brigadier Calitz heard General Mpembe informing the

23 National Commissioner about this.

24 **GENERAL MBOMBO:** That is possible.

25 **MR GUMBI:** And Brigadier Calitz testified

1 before this Commission that he cannot remember General

2 Mpmembe informing the National Commissioner about this

3 allegation. What is your comment on that?

4 **GENERAL MBOMBO:** Repeat the question

5 please?

6 **MR GUMBI:** I am saying Brigadier Calitz

7 testified before this Commission and he said he cannot

8 remember General Mpmembe informing the National Commissioner

9 about this allegation I have quoted.

10 **GENERAL MBOMBO:** Is it now about the

11 allegation of the firing of the stun grenades and the

12 teargas or the mentioning of the person's name?

13 **MR GUMBI:** The firing without

14 instruction.

15 **GENERAL MBOMBO:** I would not be sure

16 there, Mr Chairperson, but I remember him explaining that teargas

17 and stun grenades were fired without his instruction but I

18 do not remember him mentioning anyone's name.

19 **MR GUMBI:** Right. Briefing the Lonmin on

20 that day, the 13th, later on, would I be correct again,

21 General, that in that briefing there was not any allegation

22 of certain members firing without instruction when you were

23 briefing the Lonmin. Was it discussed there?

24 **GENERAL MBOMBO:** I do not understand which

25 briefing are you talking about with Lonmin?

1 **MR GUMBI:** You had, you met Lonmin senior
2 officials on the 13th of August 2012, is it not so?

3 **GENERAL MBOMBO:** From what I remember we
4 met them in the morning, that was before General Mpembe
5 went near the railway line. Then again the National
6 Commissioner met the Lonmin people and that had nothing to
7 do with the issue of General Mpembe itself.

8 **MR GUMBI:** Okay. Let us move on. On the
9 14th, the 15th and the 16th –

10 **CHAIRPERSON:** Sorry, before you move on.

11 **MR GUMBI:** Yes.

12 **CHAIRPERSON:** You are aware of the fact,
13 I take it, that standing order 262 says that force of any
14 kind, which includes teargas and stun grenades, may not be
15 used without the instruction of the operational commander,
16 you are aware of that?

17 **GENERAL MBOMBO:** That is so, Mr Chairperson.

18 **CHAIRPERSON:** And did you know who, that
19 General Mpembe was acting as operational commander at the
20 incident by the railway line on the 13th?

21 **GENERAL MBOMBO:** I became aware of that,
22 Mr Chairperson, when he was giving a report when I would arrive at
23 Lonmin.

24 **CHAIRPERSON:** That means that from what
25 he told you, that he had not given the instruction and he

1 was acting as operational commander, that whoever fired the
2 teargas canister or discharged the stun grenade was acting
3 contrary to the terms of standing order 262 because the
4 person who was functioning as operational commander stated
5 that he gave no such instruction. Is that correct?

6 **GENERAL MBOMBO:** You are correct, Mr
7 Chairperson.

8 **CHAIRPERSON:** Did you do anything to
9 cause an investigation to be made as to who it was who had
10 contravened the terms of the standing order in that
11 respect?

12 **GENERAL MBOMBO:** I remember, Mr Chairperson,
13 when we were at Roots that is the first time we heard about
14 Warrant Officer Kuhn's name.

15 **CHAIRPERSON:** That does not answer my
16 question. My question is, on the night of the 13th you
17 heard two things. One, that teargas had been fired, two,
18 that the person who was functioning as operational
19 commander had not given an instruction for it to be fired.
20 Therefore, in the light of your knowledge as to what
21 standing order 262 says, you knew that 262 had not been
22 complied with, had in fact been breached by whoever was
23 responsible for firing the teargas canister, is that
24 correct?

25 **GENERAL MBOMBO:** That is so, Mr Chairperson.

1 **CHAIRPERSON:** So what did you do about

2 it?

3 **GENERAL MBOMBO:** I tasked General Mpembe

4 that we should investigate this matter. That is why, when

5 we were at Roots, he came with the information that he

6 found out who had fired.

7 **CHAIRPERSON:** Was anything done about

8 that? Were disciplinary proceedings put in motion against

9 the person who fired? According to Mpembe that person had

10 done so without an instruction from the operational

11 commander at the time.

12 **GENERAL MBOMBO:** We gave an instruction

13 that we sent to the Gauteng office so that the Gauteng

14 office can take action but he was just like one of the

15 other people who were involved who also had to be

16 counselled – or disciplined, sorry.

17 **CHAIRPERSON:** When was that request sent

18 through to the Gauteng – I take it, it was the Gauteng

19 Provincial Commissioner's office to which that request was

20 sent, is that correct?

21 **GENERAL MBOMBO:** That is so, Mr Chairperson,

22 especially when General Mpembe was testifying, I do not

23 remember when it was.

24 **CHAIRPERSON:** So it was not done

25 immediately, it was not done in August 2012?

1 **GENERAL MBOMBO:** Yes, Mr Chairperson, because
2 at that time we were gathering all the information about
3 the mistakes that were done so that the offices from which
4 they came from, the people who were responsible for the
5 mistakes should be notified.

6 **CHAIRPERSON:** Were any other offices
7 notified of mistakes that you had discovered had been made?

8 **GENERAL MBOMBO:** We have a list of
9 certain people. I am not sure at this stage who they are
10 and where they are from.

11 **CHAIRPERSON:** Is this a list of people
12 who made what you call mistakes in respect of which
13 requests were sent to their Provincial Commissioners for
14 disciplinary steps to be instituted against them? Is that
15 what you are saying?

16 **[09:50] GENERAL MBOMBO:** Yes, Mr Chairperson, but only
17 after the finalisation of this Commission as I have always
18 been saying.

19 **CHAIRPERSON:** You say you have list.
20 Would it be possible for the list to be made available to
21 the Commission please?

22 **GENERAL MBOMBO:** I will do that, Mr
23 Chairperson.

24 **CHAIRPERSON:** Thank you. Yes, forgive me,
25 Mr Gumbi, I think you were moving onto the 14th before I

1 interrupted you.

2 **MR GUMBI:** Yes, Chairperson, but you have

3 covered quite a number of points. I will try and re-adjust

4 my cross-examination. You testify also again, General,

5 that General Mpembe reports to you. In his quarterly

6 report did he include this allegation that on the 13th of

7 August certain members fired without instruction?

8 **GENERAL MBOMBO:** I did not get the

9 question, Mr Chairperson.

10 **MR GUMBI:** I am saying to you General

11 Mpembe reports to you, do you confirm that?

12 **GENERAL MBOMBO:** That is so.

13 **MR GUMBI:** In his quarterly report did he

14 include this information that on the 13th of August 2012

15 near the railway line certain members fired without

16 instruction? Is it included in your report?

17 **CHAIRPERSON:** It is not certain members is

18 it? It is one member who fired one teargas canister.

19 **MR GUMBI:** Yes.

20 **CHAIRPERSON:** And one member fired a stun

21 grenade, that is the position is it not?

22 **MR GUMBI:** Yes.

23 **CHAIRPERSON:** Or are there others as

24 well?

25 **MR GUMBI:** It is Warrant Officer Kuhn and

1 we also have Captain Thupe who confirmed that the General
2 issued instruction –

3 **CHAIRPERSON:** No I know that, there's a
4 dispute as to whether the General gave the instruction, I
5 understand that. But I was merely concerned about your use
6 of the plural.

7 **MR GUMBI:** Yes. Let us confine ourselves
8 to Warrant Office Kuhn and Captain Thupe. Did he include
9 those allegations in his quarterly report that Warrant
10 Officer Kuhn and Captain Thupe are alleging that General
11 Mpembe issued the command to fire teargas and stun grenade
12 near the railway line?

13 **GENERAL MBOMBO:** I do not remember that
14 at the moment.

15 **MR GUMBI:** Do you have his quarterly
16 report?

17 **GENERAL MBOMBO:** It does send his
18 quarterly reports but I am not sure if he had included that
19 information.

20 **MR GUMBI:** Is it possible to make it
21 available to this Commission, that quarterly report of
22 General Mpembe?

23 **GENERAL MBOMBO:** I will do so, Mr Chairperson.

24 **MR SEMENYA SC:** Chairperson, for the record,
25 the statement of Kuhn is that he does not remember who gave

1 the instruction.

2 **CHAIRPERSON:** The evidence also indicates

3 that Captain Thule –

4 **MR GUMBI:** Thupe.

5 **CHAIRPERSON:** Thupe is it? Thupe, yes

6 sorry I apologise to him for getting his name wrong, but

7 he, when pressed on the matter of Roots, did not say he

8 knew from his own knowledge that that is what General Mpembe

9 said. He seemed to indicate he had heard it from someone

10 else, but again he was not able to say who it was. But that

11 matter was thrashed out in a sense at Roots already before

12 any quarterly report was filed.

13 **MR GUMBI:** Yes, Chairperson. Let me move

14 onto another aspect that I wanted to briefly converse with

15 you, General. Can I refer you to exhibit FFF6, that report

16 you compiled that was read at the funeral of the late

17 Warrant Officer Lepaaku? Are you in possession of that

18 report?

19 **GENERAL MBOMBO:** I have it.

20 **MR GUMBI:** Then you go to page 3,

21 paragraph 3 to 5 and that report again, General, you must

22 read it with FFF27, that is an extract from the Sowetan. Are

23 you in possession of FFF27?

24 **CHAIRPERSON:** We are looking for FFF27,

25 that is FFF6 now being shown, you want FFF27, is that

1 correct Mr Gumbi? This is now 27 you see, is that right?

2 This is the Soweto article -

3 **MR GUMBI:** Yes.

4 **CHAIRPERSON:** - which contains statements

5 which National Commissioner, Phiyega says were incorrectly
6 reported.

7 **MR GUMBI:** Yes.

8 **CHAIRPERSON:** Is that what you want?

9 **MR GUMBI:** No, I am saying FFF6 read with

10 FFF -

11 **CHAIRPERSON:** FFF6?

12 **MR GUMBI:** FFF6. That report by the

13 National Commissioner.

14 **CHAIRPERSON:** This is the tribute to the

15 funeral of Captain Lepaaku is it?

16 **MR GUMBI:** Yes Officer Ronnie Lepaaku,

17 dated 19 August 2012.

18 **CHAIRPERSON:** Yes, now what passage in

19 this tribute -

20 **MR GUMBI:** Page 3, if you go to page 3 -

21 **CHAIRPERSON:** We've got page 3, what

22 paragraph on page 3?

23 **MR GUMBI:** Paragraph 2 to 5.

24 **CHAIRPERSON:** How does paragraph 2 begin?

25 **MR GUMBI:** When you go to paragraph 2 to

1 5 –

2 **CHAIRPERSON:** No, what does paragraph 2 –

3 3, how does paragraph 3 begin?

4 **MR GUMBI:** Warrant Officer Lepaaku –

5 **CHAIRPERSON:** Oh I see, I called him a

6 Captain.

7 **MR GUMBI:** Warrant Officer Lepaaku.

8 **CHAIRPERSON:** I am sorry I promoted him

9 posthumously by mistake.

10 **MR GUMBI:** Yes.

11 **CHAIRPERSON:** Warrant Office Lepaaku, so

12 it starts off Warrant Officer Lepaaku was a police member

13 for 23 years.

14 **MR GUMBI:** Yes.

15 **CHAIRPERSON:** Yes, I see. That's the

16 passage. We now see it on the screen.

17 **MR GUMBI:** Yes, when you go down there

18 you described Warrant Officer Lepaaku as a loyal member of

19 the police who would never complain, refuse command to do

20 more than what is expected from him. Do you see that?

21 **GENERAL MBOMBO:** That is so, Mr Chairperson.

22 **MR GUMBI:** And I am going to put a

23 proposition, General, on behalf of the wife of the late

24 Warrant Officer Lepaaku and his entire family. They also

25 believe that indeed Warrant Officer Lepaaku was a loyal

1 member of the SAPS and he would never complain or refuse to
2 command to do more than what is expected. And they believe
3 that on the 13th of August 2012 Warrant Officer Lepaaku was
4 killed while carrying out a lawful instruction from his
5 superiors. So will they be correct, General –

6 **CHAIRPERSON:** Sorry to interrupt. What
7 instruction was Warrant Officer Lepaaku carrying out?

8 **MR GUMBI:** They also believe that on the
9 13th of August 2012 Warrant Officer Lepaaku was killed while
10 carrying out lawful instructions –

11 **CHAIRPERSON:** You haven't answered my
12 question. What was the lawful instruction which they
13 believe he was carrying out when he was killed?
14 Obviously he was there in the course of his duty,

15 he was assisting in an operation to escort the strikers
16 back to the hill.

17 **MR GUMBI:** Yes.

18 **CHAIRPERSON:** That is what he was ordered
19 to do and that is what he was doing.

20 **MR GUMBI:** Yes –

21 **CHAIRPERSON:** And then while he was
22 there, there was this incident, as a result of which he was
23 killed, but apart from that was there any other lawful
24 order you say he was carrying out at the time he was
25 killed?

1 **MR GUMBI:** Yes. The evidence of – a
2 statement from the police officers that were there,
3 extracts from the pocket book and the diaries indicate that
4 there was command issued by the commander who was in charge
5 of that operation, instructing members to disperse that
6 crowd.

7 **CHAIRPERSON:** Yes, I know about that
8 evidence and the accuracy of it will have to be considered
9 in due course, but the point is it suggested that Warrant
10 Officer Lepaaku was doing anything at the time he was
11 killed other than taking part in the operation to escort
12 the strikers back to the hill?

13 **MR GUMBI:** No, Chairperson.

14 **CHAIRPERSON:** No, so I understand, I mean
15 your argument is this, you say that if it is correct, as
16 some people allege, that General Mpembe gave an instruction
17 to disperse the strikers. And if that instruction led to
18 reaction on the part of the strikers, which in turn led to
19 the death of Warrant Officer Lepaaku, that would be the
20 basis of any claim that you would wish to bring against the
21 police services. Am I summarising it correctly?

22 **MR GUMBI:** Yes, that is our argument,
23 Chairperson before this Commission.

24 **CHAIRPERSON:** There are a number of legal
25 questions that may arise, but we do not have to debate that.

1 **MR GUMBI:** Yes.

2 **CHAIRPERSON:** That will be the factual

3 basis of your case -

4 **MR GUMBI:** Yes

5 **CHAIRPERSON:** - against the SAPS.

6 **MR GUMBI:** Yes, Chairperson.

7 **CHAIRPERSON:** Now this witness was not

8 there, I don't see how she can help you in regard to the

9 establishment of the facts upon which you will be relying

10 for your claim.

11 **MR GUMBI:** Yes, Chairperson, I do

12 understand that.

13 **CHAIRPERSON:** So what is the point of

14 asking her questions about it?

15 **MR GUMBI:** If I can establish from the

16 witness, Chairperson, when you delivered this tribute,

17 General, at the funeral of the late Warrant Officer Lepaaku

18 did you inform his wife and his family that on the 13th of

19 August 2012 certain members fired without instructions?

20 **GENERAL MBOMBO:** First let me correct

21 this. Actually this tribute was not given by me but by the

22 National Commissioner as she was present. Now to answer

23 your question, I do not remember the National Commissioner

24 doing that or me doing that.

25 **MR GUMBI:** Let us deal about you.

1 **CHAIRPERSON:** I am sorry to interrupt you,
2 Mr Gumbi, is it suggested that what you say was said or
3 was not said would have been included or should have been
4 included in the tribute? Or are you suggesting that
5 something should have been said apart from the tribute
6 privately by way of a personal communication to the widow?
7 What exactly are you suggesting?

8 **MR GUMBI:** It is not so, Chairperson, I
9 was going to put my instruction on the behalf of the family
10 of the late Warrant Officer Lepaaku on this particular
11 aspect.

12 **CHAIRPERSON:** Well let's put your
13 instruction to the witness and let us see how she responds.

14 **MR GUMBI:** You know, General, our
15 instruction from the family of the late Warrant Officer
16 Lepaaku and including Lieutenant Baloyi they were not told
17 that on the 13th of August 2012, near the railway line
18 certain members fired without instruction. They only
19 learnt that when General Mpembe testified before this
20 Commission. What is your comment on that?

21 **GENERAL MBOMBO:** I did not hear the last
22 part of the question.

23 **MR GUMBI:** I am saying that our
24 instruction on this particular aspect is that the wife of
25 the late Warrant Officer Lepaaku and her entire family and

1 including Lieutenant Baloyi who was injured on the 13th of
2 August 2012 they were never told that on the 13th of August
3 certain members fired without instruction near the railway
4 line. They only learnt that when General Mpembe was
5 testifying before this Commission on the 10th of June 2013.
6 What is your comment on that?

7 **GENERAL MBOMBO:** It is possible it could
8 be the case, Mr Chairperson.

9 **MR GUMBI:** Would it be correct, General,
10 that if indeed, as you allege that certain members fired
11 without instruction that information would –

12 **MR SEMENYA SC:** No, no, no –

13 **CHAIRPERSON:** You are not putting it
14 correctly, that is not what she alleges. I think her
15 attitude is she does not know. She says General Mpembe made
16 that report to her –

17 **MR GUMBI:** Yes.

18 **CHAIRPERSON:** - on the assumption that
19 what General Mpembe said was correct certain things follow.
20 But she cannot take it further than saying that is what
21 General Mpembe told me. She does not know whether he is
22 correct or not. There is a counter-allegation, as you say,
23 one of the things we've got to investigate at the end of
24 the hearing is what the true facts are in respect of that.
25 But this witness can only tell you, as I understand her

1 evidence, what General Mpembe told her.

2 **MR GUMBI:** Thank you, Chairperson. I can

3 move to another aspect. Let us move on, General. I wanted

4 to deal with this aspect of the police version of the

5 incident of the 13th of August 2012 and in that respect I

6 would like to refer you to exhibit HHH28. Are you in

7 possession of that document, General?

8 **GENERAL MBOMBO:** HHH, yes.

9 **MR GUMBI:** Can you go to page 35 of that

10 document?

11 **GENERAL MBOMBO:** Page 35?

12 **MR GUMBI:** 35. Then you go to paragraph

13 3. Are you on page 35, paragraph 3. General? Are you

14 there, General?

15 **GENERAL MBOMBO:** Yes.

16 **MR GUMBI:** Would it be correct, General,

17 that you read this report after Potchefstroom meeting?

18 **GENERAL MBOMBO:** That is so, Mr Chairperson.

19 **MR GUMBI:** And about the incident of the

20 13th of August 2012 you read what transpired before the

21 killing of Warrant Officer Lepaaku and Monene and injury of

22 Lieutenant Baloyi. Is that so?

23 **GENERAL MBOMBO:** Repeat the question

24 please.

25 **MR GUMBI:** You read the report about the

1 incident of the 13th of August 2012 what transpired before
2 the killing of the late Warrant Officer Lepaaku and Monene
3 and the injury of Lieutenant Baloyi.

4 **GENERAL MBOMBO:** That is so, Mr Chairperson.

5 **MR GUMBI:** Paragraph 3, are you there?

6 **GENERAL MBOMBO:** Yes.

7 **MR GUMBI:** It reads as follows. "Major-

8 General Mpembe issued a command for stun grenades and
9 teargas after which Warrant Officer Kuhn fired a shotgun CS
10 grenade. Do you see that?

11 **GENERAL MBOMBO:** I see it, Mr Chairperson.

12 **MR GUMBI:** Would it be correct, General,
13 that that was the police version of what transpired on the
14 13th of August near the railway line? Do you confirm that?

15 **CHAIRPERSON:** How can you ask that
16 question? The evidence is that that was an early draft of
17 the narrative as it was prepared at an early stage of
18 evidence, it was subsequently altered. And the final
19 version is the version we have in exhibit L. Now no
20 allegation is made in exhibit L, which is the final version
21 of the police presentation to the effect that Major-General
22 Mpembe issued a command. So all you can put to the witness
23 surely is that this was –

24 **MR GUMBI:** Yes, Chairperson.

25 **CHAIRPERSON:** You cannot say that it was

1 the police version. It was an earlier edition as it were
2 of the police presentation, but you cannot put it higher
3 than that can you?

4 **MR GUMBI:** Yes, Chairperson, that is where

5 I am heading in my –

6 **CHAIRPERSON:** No well, you have not put it
7 that way that is why I have had to intervene. So I suggest
8 you reformulate your question –

9 **MR GUMBI:** Yes, Chairperson.

10 **CHAIRPERSON:** - put it correctly so the
11 witness can then deal with it.

12 **MR GUMBI:** Yes. General, that was a
13 police version on the 5th of September 2012, exhibit HHH28,
14 do you agree with me?

15 **GENERAL MBOMBO:** Yes from what I know it
16 was a draft of the details. **MR GUMBI:** When you go
17 to exhibit L, we have exhibit L which was presented before
18 this Commission on about October or November 2012. When
19 you go slide 47, paragraph 223, are you in possession of
20 that flag, General?

21 **GENERAL MBOMBO:** I can see it on the
22 screen.

23 **MR GUMBI:** The allegation that is
24 contained in there, this allegation that General Mpembe
25 issued instruction to fire teargas and stun grenades is not

1 included in slide 47. Agree with me, it is not there.

2 **CHAIRPERSON:** That is correct. The second

3 bullet does not contain that. That was in an earlier

4 version that is been removed by the time the final version

5 was prepared. That is correct, is it not?

6 **GENERAL MBOMBO:** I see it, Mr Chairperson.

7 **CHAIRPERSON:** Now what do you want to ask

8 the witness about that?

9 **MR GUMBI:** My question is do you have any

10 knowledge why this allegation is not included in this

11 presentation, slide 47? That is a SAPS final product

12 presented before this Commission.

13 **GENERAL MBOMBO:** Although I am not

14 entirely sure, but I think General Mpembe explained that

15 it is not supposed to appear as it appears in the draft

16 because he did not give an instruction.

17 **MR GUMBI:** So General Mpembe has

18 knowledge of why this information is not included, it is

19 what you are telling us.

20 **GENERAL MBOMBO:** I think it is like that.

21 I am not sure why it is not included but General Mpembe

22 explained it is not supposed to appear as it appears in the

23 draft.

24 **[10:10] MR GUMBI:** Before you testified before

25 this Commission, you have read the statement of General

1 Mpembe, did you?

2 **GENERAL MBOMBO:** That is so, Mr Chairperson.

3 **MR GUMBI:** And you read his testimony

4 before this Commission?

5 **GENERAL MBOMBO:** That is so.

6 **MR GUMBI:** In his statement presented

7 before this Commission he did not make this allegation that

8 certain members fired without instruction.

9 **GENERAL MBOMBO:** As you say, Mr Chairperson.

10 **MR GUMBI:** And you don't know why he

11 omitted that, this crucial information. Would I be

12 correct?

13 **GENERAL MBOMBO:** I wouldn't know, Mr

14 Chairperson.

15 **MR GUMBI:** Okay, when we cross-examined

16 General Mpembe here we presented a statement, extracts from

17 the pocketbook and from the diaries. Some of that

18 information statement and the pocketbook, point at General

19 Mpembe as the person who issued instruction to fire

20 teargas. When did you become aware of the existence of

21 this statement and a pocketbook we presented before this

22 Commission?

23 **GENERAL MBOMBO:** I became aware of them

24 when they were discovered by the Commission.

25 **MR GUMBI:** And I hope we are also – I

1 assume, General, that you are aware that in terms of
2 section 34(1) of the Police Service Act of 1995, as
3 amended, the National Commissioner is empowered to initiate
4 inquiry on the death or injury of any members on duty. Are
5 you aware of that?

6 **GENERAL MBOMBO:** I understand it, Mr
7 Chairperson.

8 **MR GUMBI:** And General Mpembe when he
9 testified before this Commission, he made an undertaking
10 that indeed the inquiry will be carried out surrounding
11 this allegation that certain members fired without
12 instruction near the railway line. What we wanted to know,
13 what is the status of that investigation?

14 **GENERAL MBOMBO:** As I have already
15 explained, Mr Chairperson, that all those people who were found
16 to have made some mistakes, we are corresponding with their
17 stations and we have a list as to their identity. I will
18 then not be able to answer your question about the status
19 of the investigation, but I know this is being followed up.
20 Just like all the other things that I have told the
21 Commission would be looked at as soon as the Commission
22 finishes its job.

23 **MR GUMBI:** The outcome of that inquiry,
24 are you going to present it before this Commission before
25 it can conclude its investigation, after the Commission?

1 **GENERAL MBOMBO:** Mr Chairperson, I think I
2 mentioned that all these enquiries should be followed up
3 but we were thinking that the right time would be after the
4 Commission has finished its task.

5 **MR GUMBI:** Thank you very much, Chairperson,
6 I do not have any further cross-examination.

7 **CHAIRPERSON:** Thank you. I see, Mr
8 Mpofo, you have survived your cross-examination as a witness
9 in the East London Magistrate's Court.

10 **MR MPOFU:** I survived.

11 **CHAIRPERSON:** We are pleased to see that.

12 **MR MPOFU:** I survived. Thank you very
13 much, Chairperson. It was traumatic, but I survived.

14 **CHAIRPERSON:** Now you know what people
15 like the present witness have to go through.

16 **MR MPOFU:** Yes.

17 **CHAIRPERSON:** I think we shall take a
18 comfort break now before you start your – Mr Budlender –

19 **MR BUDLENDER SC:** After the comfort
20 break –

21 **CHAIRPERSON:** Sorry?

22 **MR MPOFU:** I shall appreciate it,
23 Chairperson.

24 **CHAIRPERSON:** We will take a comfort break
25 now and then when we resume Mr Budlender will say something

1 and then you'll get an opportunity to cross-examine the
2 witness.

3 **MR MPOFU:** Thank you very much,
4 Chairperson.

5 **[COMMISSION ADJOURNS / COMMISSION RESUMES]**

6 **[10:30] CHAIRPERSON:** The Commission resumes.

7 Provincial Commissioner, you are still under oath.

8 **MIRRIAM NOSAZISO ZUKISWA MBOMBO:** s.u.o.

9 **CHAIRPERSON:** Mr Mpofu. Sorry, Mr Mpofu,
10 before you start, we have been handed copies of what is
11 describe with a fair degree of contradiction as being the
12 final interim report. This is the report of the – I don't
13 quite understand that, but anyway – of this task team, work
14 session, whatever they call themselves. So you would like
15 that to be an exhibit, I take it.

16 **MR BUDLENDER SC:** Yes, Chairperson, exhibit
17 LLL11.

18 **CHAIRPERSON:** Sorry? LLL11?

19 **MR BUDLENDER SC:** LLL11. Chairperson, could a
20 copy be given to the witness and perhaps she can just
21 identify and answer some short questions about the document
22 after Mr Mpofu has completed, and give her the opportunity
23 to read it in the meantime? But this is the document which
24 we received from the SAPS legal team as the report produced
25 by the task team or work session, to which reference was

1 made this morning.

2 **CHAIRPERSON:** LLL11, yes thank you, I have

3 marked it. The witness has a copy. Can you confirm,

4 Provincial Commissioner, that this is indeed the final

5 interim report of the work session, which was discussed

6 earlier?

7 **GENERAL MBOMBO:** This is the one I have

8 seen, Mr Chairperson.

9 **CHAIRPERSON:** Now I see it is called

10 "Final interim report." Do you know whether a final-final

11 report was ever produced?

12 **GENERAL MBOMBO:** I have never seen the

13 final report, Mr Chairperson.

14 **CHAIRPERSON:** So you do not know whether

15 one has been produced?

16 **GENERAL MBOMBO:** No, I am not sure, Mr

17 Chairperson.

18 **CHAIRPERSON:** Perhaps Mr Semenya and his

19 attorney can make investigations on our behalf to see

20 whether this is really the final report or whether merely

21 the final interim report and there is another report

22 subsequently produced.

23 **MR SEMENYA SC:** Indeed, Chairperson.

24 **CHAIRPERSON:** Thank you. Now Mr Gumbi,

25 we've just been handed a number of documents which we, it is

1 what we are told which, for us to look at. It is HHH27,
2 HHH29, and another document which is also marked HHH27 but
3 cannot be, that must be wrong. Were you responsible for
4 having our attention drawn to these documents?

5 **MR GUMBI:** Yes, Chairperson. Those are
6 the documents I was going to refer to during my cross-
7 examination –

8 **CHAIRPERSON:** But you did not refer to
9 them and –

10 **MR GUMBI:** Yes.

11 **CHAIRPERSON:** But if you wish to refer to
12 them, I know you stopped your cross-examination and I
13 wasn't aware of the fact that you were intending referring
14 to these documents, but if you wish to refer to them you
15 must please do so, feel free to do so. It is your cross-
16 examination and obviously – I know counsel sometimes decide
17 as they proceed with the cross-examination not to go in
18 certain directions and go to others, so it is your
19 prerogative to decide, but if you want to refer to these
20 documents I shall obviously afford you the opportunity to do
21 so.

22 **MR GUMBI:** No, I am fine, Chairperson. It
23 was for the witness to know my line of cross-examination.
24 I am not going to refer to them again.

25 **CHAIRPERSON:** Commendable restraint on

1 your part. Thank you. Yes, Mr Mpofu, having seen the
2 example that Mr Gumbi set, I do not know whether you see
3 your way clear to follow it.

4 **MR MPOFU:** Chairperson, yes, with my
5 usual brevity I shall deal with one or two questions.

6 **CHAIRPERSON:** [*Microphone off, inaudible*]

7 the issues which I gave you permission on.

8 **MR MPOFU:** Yes, yes.

9 **CHAIRPERSON:** And in respect of topics 1
10 and 2, the way I suggested that that be dealt with at the
11 same time.

12 **CROSS-EXAMINATION BY MR MPOFU:** Yes,
13 thank you, Chairperson. Good morning, Ma'am.

14 **GENERAL MBOMBO:** Morning, Counsellor.

15 **MR MPOFU:** How are you, Ma'am?

16 **GENERAL MBOMBO:** I am well, and you?

17 **MR MPOFU:** I am well. General, I am going
18 to deal – well, whenever I deal with the police witnesses I
19 just outline what the thrust of the case for the injured
20 and arrested is, which does not mean that I am going to ask
21 you about all those things, but just for you to situate
22 where we are coming from. Do you understand that?

23 **GENERAL MBOMBO:** I understand, Mr Chairperson.

24 **MR MPOFU:** We say that some of the key
25 things that influenced these events are firstly the terrain

1 where the killings happened, and we say that that was
2 informed by the fact that the people, by whatever made the
3 people to be at the mountain, or the hill, in the first
4 place. Would you accept that? That then dictated what
5 terrain the police would be operating in.

6 **GENERAL MBOMBO:** Yes, as you say so, Sir.

7 **MR MPOFU:** Secondly we say that the
8 events were also influenced by, very much influenced by the
9 events of the 13th insofar as those events influenced the
10 mood and the emotional state, possibly influenced the mood
11 and the emotional state of the members who had to perform
12 the operation. Would you agree with that?

13 **GENERAL MBOMBO:** Not entirely, Mr Chairperson.

14 **MR MPOFU:** Yes, none of these things are
15 entirely responsible. I am saying each one of them has had
16 a contributory effect on the events. So would you agree
17 that the emotional state of the people who participated on
18 the 13th had an effect on the operation?

19 **GENERAL MBOMBO:** Maybe, Mr Chairperson.

20 **MR MPOFU:** So you are saying it is
21 possible?

22 **GENERAL MBOMBO:** It could be the case,
23 but I am not certain.

24 **MR MPOFU:** Yes, that is good enough.

25 Thirdly we say that some of the considerations that were

1 taken into account in determining both the timing of the
2 operation and – mainly the timing, were political
3 considerations. Would you go along with that?

4 **GENERAL MBOMBO:** I do not agree with
5 that, Mr Chairperson.

6 **MR MPOFU:** Okay, so your evidence is that
7 political considerations played no part whatsoever in
8 influencing these events?

9 **GENERAL MBOMBO:** Not in influencing the
10 operation, Mr Chairperson.

11 **MR MPOFU:** But in influencing the actions
12 of the police?

13 **GENERAL MBOMBO:** When I am talking about
14 the operation I think I am referring to the actions of the
15 police.

16 **MR MPOFU:** Good, so your case then, your
17 evidence is that none of the actions of the police were
18 influenced whatsoever by any political considerations?

19 **GENERAL MBOMBO:** From my side I am sure of
20 that, Mr Chairperson.

21 **MR MPOFU:** Alright, we will then deal
22 with some of those topics. The other thing that I think I
23 should explain to you in terms of our opening statement is
24 that some of the issues that we have raised with the
25 Commission include the origins of the instruction to shoot

1 the people – or let's bring it into twofold; the
2 instruction to carry out the operation in the first place,
3 which had the result of killing the people. We have put
4 that as an issue that the Commission must make a finding on
5 and which we will assist the Commission to make a finding
6 on. Do you understand that?

7 **GENERAL MBOMBO:** I understand what you are
8 saying.

9 **MR MPOFU:** And we have listed some of those
10 considerations and one of them is that the killings
11 amounted to premeditated murder, more particularly those at
12 scene 2. You understand that? I am sure you disagree with
13 it, but you understand that that is what our case is?

14 **GENERAL MBOMBO:** I hear what you say.

15 **MR MPOFU:** Right, now let's start with
16 your role as the Provincial Commissioner. Am I correct
17 that you yourself, you don't pretend to have any experience
18 in crowd management?

19 **GENERAL MBOMBO:** That is so, Mr Chairperson.

20 **MR MPOFU:** And therefore you placed your
21 reliance on what needed to be done almost entirely on your
22 operational commanders, correct?

23 **GENERAL MBOMBO:** That is so.

24 **MR MPOFU:** And if one looks at the
25 applicable prescripts, it is quite clear that the

1 responsibility for an operation lies with the operational
2 commander and the overall commander, that you yourself have
3 no direct role to play in the operation itself, correct?

4 **GENERAL MBOMBO:** That is correct.

5 **MR MPOFU:** And that at best your role
6 could be described as that of being the chief executive.

7 You are the person who's overall in charge. It is a
8 management role, but it is not an operational role, correct?

9 **GENERAL MBOMBO:** As you explain it, yes.

10 **MR MPOFU:** And I think the way you have
11 articulated that in your statement is to say that the legal
12 authority of the province rests with you, correct?

13 **GENERAL MBOMBO:** That is so, Mr Chairperson.

14 **MR MPOFU:** So if that is indeed the case,
15 would you agree that it was inappropriate for you to be the
16 person who determined when the operation should take place
17 - I am now talking about the operation of the 16th - when it
18 is not, according to your evidence it is not your role to
19 make those operational decisions, but yours is a more
20 general leadership and managerial role?

21 **GENERAL MBOMBO:** I would not entirely
22 agree with you there, Mr Chairperson.

23 **MR MPOFU:** Okay, to the extent that you
24 partly agree with me, would you then say that it was
25 inappropriate for you to be the deciding factor?

1 **GENERAL MBOMBO:** Even there I do not
2 agree that I was not supposed to give such decisions, or
3 make such decisions.

4 **MR MPOFU:** General, I think maybe let me
5 try it like this. You and I have now agreed that your
6 role, you have no role in the operational sphere. That
7 role is at best confined to the operational and overall
8 commander, and that has to be so because that is what it
9 says even in the prescripts, and that is not to take away
10 your leadership role as the person who's overall in charge
11 of everything in the province. Whether it is criminal
12 investigations, whether it is forensics, you are the person
13 who is in the leadership position, but that does not mean
14 that you yourself must go and take the samples of blood.
15 Do you understand that?

16 **GENERAL MBOMBO:** I understand you
17 clearly.

18 **MR MPOFU:** Now if we agree on that then
19 what I am putting to you is a simple proposition that says a
20 person whose role is supposed to be at that overall level
21 and not at the hands-on level should not be the person who
22 made the most important decision as to when the operation
23 must take place, (1); (2), especially if that person has
24 agreed, as you and I have agreed, that they have no
25 operational experience in crowd management. It might have

1 happened that if it was something to do with finance where
2 you are an expert, you might have dabbled a little bit, but
3 this one was something foreign to you.

4 **GENERAL MBOMBO:** I am not sure if I
5 understand you correctly. Are you maybe referring to when
6 the operation should take it, or whether it should take
7 place?

8 **MR MPOFU:** I am referring to both. As it
9 happens, you took a decision in respect of both. You
10 decided that it must happen and you also decided that it
11 must happen on the 16th.

12 **GENERAL MBOMBO:** As to the question that
13 it should happen, that is something I think as a
14 Commissioner there I was supposed to do. As you have made
15 an example about forensics, I was not going to go into
16 details of how it should be done and when.

17 **MR MPOFU:** Yes, well firstly I do not
18 agree with you, but that is a matter for argument. Let's
19 assume that I concede that the mere fact that something has
20 to be done, or an operation has to be carried out, is
21 something that is within your province. Sorry, I am using
22 that word in small letters – within your area of concern.
23 But you would agree with me that the question as to on what
24 day it must happen now gets to be an operational decision.
25 It is now longer the overall managerial decision about we

1 have to do something about this situation, correct?

2 **GENERAL MBOMBO:** Maybe you could be

3 right, but I do not entirely agree with you.

4 **MR MPOFU:** Okay, you only partly agree

5 with that proposition?

6 **GENERAL MBOMBO:** Yes.

7 **MR MPOFU:** So can we at least agree then

8 that to the extent that you made the decision on D-day – or

9 I am not saying that those words came from your mouth – on

10 the day on which the operation must happen, that was partly

11 a deviation from what should be expected in terms of the

12 prescripts, correct?

13 **GENERAL MBOMBO:** You must remember, Mr

14 Chairperson, how it happened that it, how it came about that it

15 happened in that way.

16 **MR MPOFU:** Yes, General, I do not want us

17 to waste much time. There might well be an explanation and

18 I will allow you a chance to give that explanation, and if

19 I do not, Mr Semenya will. But all I am saying to you is

20 that at face value the fact that someone who is not

21 supposed to be operationally involved happens to be the one

22 who determines such an important thing as the date on which

23 an operation must happen is, to use your language, partly

24 something that deviates from the norm of what is in the

25 prescripts, correct?

1 **GENERAL MBOMBO:** That is what I am saying,
2 Mr Chairperson. Maybe if I am given a chance to explain I will
3 explain.

4 **MR MPOFU:** Okay, no as long as we agree
5 on the proposition, now you can explain.

6 **GENERAL MBOMBO:** Mr Chairperson, if something
7 happens in the province and I am aware of it, it is reported
8 to me, then I send people to go and work on it. It is
9 still my responsibility to see to it how it is dealt with
10 and when, especially if it is something that causes fear
11 amongst the people.

12 **[10:50]** I am then able to give an instruction to the
13 person who is in charge of the operation that the situation
14 is tense, if you see an opportunity to do the work, let us
15 work but in this case, particular case, there was an
16 important reason that caused me to act as I acted.
17 Firstly, it was a promise I had heard about Mr Mathunjwa. I
18 then had to think, if this does not materialise, if this
19 promise of Mr Mathunjwa does not materialise as we had
20 hoped for, that could change the attitude of the people
21 there, causing more tension.

22 **MR SEMENYA SC:** Chairperson, can we state in
23 fairness, in relation to whether the witness can be
24 involved operationally so that at least standing order 262
25 references, amongst others, the witness as a person who is

1 designated to do certain things in relation to these
2 operations.

3 **MR MPOFU:** Yes, that is correct, Chairperson,
4 and one of those certain things, General, is the
5 appointment of the people that I mentioned, the overall
6 commander and the operational commander to do the actual
7 operation and to make decisions in relation thereto,
8 correct?

9 **GENERAL MBOMBO:** That is so, Mr Chairperson.

10 **MR MPOFU:** The 262 does not enjoin you
11 yourself to play an operational role, correct?

12 **GENERAL MBOMBO:** As it is written, yes,
13 but it does not exclude me from giving advice.

14 **MR MPOFU:** Yes. No, that is –

15 **CHAIRPERSON:** It surely goes further than
16 that. You are ultimately responsible for what happens in
17 the province. So that must mean that at any time you can
18 interfere. Whether it is sensible for you to interfere in a
19 particular instance, regard being had to your lack of
20 expertise in a particular area is another matter but it
21 must flow from the fact that you are responsible, that you
22 have the power to intervene at any stage when you consider
23 it appropriate, regard being had to the fact that you would
24 ultimately be responsible for what happens. That is right,
25 is it not?

1 **GENERAL MBOMBO:** That is what I was
2 trying to explain, Mr Chairperson.
3 **MR MPOFU:** Yes, well, that is exactly why I
4 raised this question to do with your leadership
5 responsibilities and your expertise. I was distinguishing
6 you from somebody who might have that responsibility but
7 also have a particular expertise in something that is being
8 done. That is why I granted you that – if it was finance,
9 for example, which we all know you have expertise in, but
10 you and I when I started this cross-examination established
11 that you have no expertise whatsoever in crowd management
12 and that is the reason I asked you that question. Do you
13 understand that?

14 **GENERAL MBOMBO:** I hear you clearly.

15 **MR MPOFU:** And that is why I was then
16 distinguishing the situation where here, although you are
17 the ultimate legal authority and I think you put it nicely
18 in your statement, but it does not mean that you must make
19 the crucial decisions in relation to the carrying out, for
20 example, of a murder investigation just simply because the
21 criminal investigation department ultimately reports to
22 you. Do you accept that?

23 **GENERAL MBOMBO:** Mr Chairperson, you are making
24 another example. Even in a criminal case I do not have the
25 expertise needed in an investigation but it is my

1 responsibility to make sure that the people doing that job
2 do it correctly and quickly because at times it happens
3 that I have to give them advice in certain cases.

4 **MR MPOFU:** Yes, that is exactly and I have
5 distinguished again very clearly between advice and giving
6 a particular instruction that has a bearing on the outcome
7 of an operation such as the current one because what you
8 did here was not to give advice, you gave an instruction.
9 Do you understand the difference?

10 **GENERAL MBOMBO:** I hear you, Mr Chairperson.

11 **MR MPOFU:** We will come back to that but I
12 just want to ask you, you would agree with me that the
13 instruction that you gave or the decision to undertake this
14 particular operation on a particular day was one of the
15 most important decisions you made in your career.

16 **GENERAL MBOMBO:** I am not sure if you are
17 saying this because of the results or what.

18 **MR MPOFU:** Well, was it for any reason
19 whatsoever, one of the most important decisions in your
20 career?

21 **GENERAL MBOMBO:** Yes, that is so.

22 **MR MPOFU:** And you are aware that – you
23 have testified or written in your statement that you have
24 been involved, once again at the overall level in some
25 criminal investigations, correct?

1 **GENERAL MBOMBO:** That is correct, Mr

2 Chairperson.

3 **MR MPOFU:** So if we accept that you have

4 some expertise in that area then can you, you'll help me

5 with the following questions. Firstly, I think you have

6 testified, I think either in chief or when Mr Budlender was

7 asking you questions, that you approved of the opening

8 statement of the police, correct?

9 **GENERAL MBOMBO:** I was part of the people

10 responsible for that approval.

11 **MR MPOFU:** Yes, I am sorry, I asked the

12 question badly. It is that you approved the statement, you

13 are one of the people who approved it, correct?

14 **GENERAL MBOMBO:** That is so.

15 **MR MPOFU:** And you also approve of it in

16 the sense that you agree with it, correct?

17 **GENERAL MBOMBO:** That is so, Mr Chairperson.

18 **MR MPOFU:** And also, you made some input

19 in its development, correct?

20 **GENERAL MBOMBO:** That is correct.

21 **MR MPOFU:** And nothing so far that you

22 have heard in this Commission diminishes your approval of

23 the statement, correct?

24 **GENERAL MBOMBO:** I would not be entirely

25 sure about that, Mr Chairperson.

1 **MR MPOFU:** Now, with your admitted or
2 admittedly limited experience and limit in criminal
3 investigations but as a police officer of considerable
4 experience, you understand that what we are dealing with
5 here is a situation where, if someone has been killed then
6 usually or most, in most instances there would be a murder
7 investigation, correct?

8 **GENERAL MBOMBO:** That is correct, Mr
9 Chairperson.

10 **MR MPOFU:** And if you find me holding a
11 gun next to a dead body oozing blood, in most circumstances
12 you would arrest me and charge me with murder, correct?
13 The fact that I might have an explanation that this person
14 was attacking me is another matter but you would arrest me,
15 correct?

16 **GENERAL MBOMBO:** That would depend on the
17 explanation you will be giving, Mr Chairperson.

18 **MR MPOFU:** Okay, so let's take two
19 situations. The first one is, I do not give an explanation.
20 The second one is, I give an explanation and I say
21 whatever, this person owed me money or [speaking Xhosa] as
22 we would say in East London. In other words, they were just
23 taking me for granted or they stole my car or whatever,
24 you would still arrest me for murder, correct?

25 **GENERAL MBOMBO:** If the investigations

1 lead us to arrest you for murder, yes.

2 **MR MPOFU:** Yes. No, what I am trying to

3 say, General, is simply that that explanation that I give

4 may or may not succeed in court at a later stage but that is

5 not a matter for the police. The police would arrest me

6 for murder and whether I succeed or not succeed in the

7 court is my business, do you accept that?

8 **GENERAL MBOMBO:** The police would first

9 have to investigate your explanation.

10 **MR MPOFU:** Yes and if I give an

11 explanation such as the one that I have given and I say,

12 well, this person took my girlfriend, will you then not

13 arrest me?

14 **GENERAL MBOMBO:** If the investigations

15 allow us, yes, we will arrest.

16 **MR MPOFU:** Thank you. Where I am getting

17 at is that you would agree with me that if there is a

18 murder scene and there are people who are murder suspects

19 and there is no explanation, this is now - as you said, it

20 depends on the explanation - let us now say there's no

21 explanation as to, you ask me why did you shoot this person

22 and I just keep quiet or I say I am not sure, it might be

23 because it was Thursday or it might be because they looked

24 suspicious or it might be - and if I don't give an

25 explanation or give you a wishy-washy one then that would

1 not assist me. You would arrest me, correct?

2 **GENERAL MBOMBO:** If all the other means

3 of investigation lead to you, point to you that you are

4 responsible for that act, yes, you would be arrested.

5 **MR MPOFU:** Yes, so let's make it even

6 better. You ask me now, you say did you shoot this person

7 and I say yes, you do not need an investigation, then you would

8 arrest me.

9 **GENERAL MBOMBO:** It does not work like

10 that, Mr Chairperson. I must be sure, through my investigations,

11 that you are indeed the person who did that.

12 **MR MPOFU:** Yes and – that is what I am

13 trying to say. Now once you are sure that I am the person

14 who shot the person, would you arrest me?

15 **GENERAL MBOMBO:** Yes, I would.

16 **MR MPOFU:** Right. Now, in this case, in

17 this particular case we have a situation where the police

18 in their opening statement have said that they do not have

19 an explanation for the deaths of at least 13 people of the

20 people who died and we are sure, to use your language, that

21 they shot those people. So under those circumstances, they

22 shot the people, there is no explanation, would you agree

23 that those people should be charged with murder?

24 **GENERAL MBOMBO:** Firstly, Mr Chairperson, can

25 you show me in the opening statement where the number of

1 those people is 13?

2 **MR MPOFU:** Yes, I will show you but for

3 now let us, do not worry. 13, 12, 11, 9, 7, if there are

4 deaths in respect of which we know that the police killed

5 and they have no explanation, they should be charged with

6 murder. Yes, we shall come to the number just now.

7 **GENERAL MBOMBO:** I am not sure again

8 whether there was no explanation that explains the whole

9 thing.

10 **MR MPOFU:** But General, please, I am

11 telling you assume that there is no – if there was no

12 explanation and we know who killed the people, would you

13 agree that they should be charged with murder? I will now

14 then show you whether those ifs are correct or not and the

15 number of 13 or whatever, okay?

16 **CHAIRPERSON:** Mr Mpofu, I do not know that

17 this is a topic in respect of which you have got leave to

18 cross-examine.

19 **MR MPOFU:** Murder?

20 **CHAIRPERSON:** No –

21 **MR MPOFU:** Well, that is what we are here

22 for.

23 **CHAIRPERSON:** Where is it in the grounds?

24 **MR MPOFU:** I thought that is what has been

25 detaining us for 18 months is the murder of the people but

1 -

2 **CHAIRPERSON:** No - no, it is not an

3 adequate reply. You applied for leave to cross-examine on

4 certain topics. I gave you leave on certain topics. I am

5 asking you, the point that you are, the issue that you are

6 now busy with, where that is covered by the topics in

7 respect of which I gave you leave?

8 **MR MPOFU:** Two, which I do not want to

9 read out because it will show where I am going.

10 **CHAIRPERSON:** I have difficulty in seeing

11 that that is covered but in the - but I won't press you for

12 the reason that you have alluded to. I shall allow you to

13 continue for a while.

14 **MR MPOFU:** I will not belabour the point,

15 Chairperson.

16 **CHAIRPERSON:** Please do not.

17 **MR MPOFU:** Yes. Thank you very much,

18 Chairperson.

19 **CHAIRPERSON:** Do not belabour any points.

20 **MR MPOFU:** Yes. If I may, yes. Sorry,

21 I am sure you have forgotten the question. The question was,

22 if I can show you that in respect of 13 or whatever number

23 of people, those people were killed by the police and

24 there is no explanation for those killings, would you agree

25 that they should be charged with murder?

1 **GENERAL MBOMBO:** If there is hard
2 evidence that they could have been killed by the police.

3 **MR MPOFU:** Yes, there's more than
4 evidence, they have admitted that they killed the people. So
5 we are agreed now.

6 **GENERAL MBOMBO:** If you want me to assume
7 then yes, if there is evidence pointing to that, my
8 assumption would be to agree with you.

9 **MR SEMENYA SC:** But Chairperson –

10 **CHAIRPERSON:** Sorry, carry on.

11 **MR SEMENYA SC:** I am the one who is
12 seeking audience, Chairperson.

13 **CHAIRPERSON:** No, I understood that the
14 interpreter was still interpreting her answer. So if he is
15 still interpreting her answer we must hear the answer
16 before I hear you but I want to raise a problem of my own
17 but perhaps I should allow you to raise yours first. Yes,
18 please finish. Is there more of the answer that you were
19 interpreting?

20 **MR MAHLANGU:** No, I was finished, Mr
21 Chairperson.

22 **CHAIRPERSON:** Yes, Mr Semanya?

23 **MR SEMENYA SC:** In the opening statement
24 paragraph 45.5, it is not correct that we have given no
25 account in relation to the death of the 13.

1 **CHAIRPERSON:** Alright, well, that point
2 you will deal with, Mr Mpofu, but there is another point as
3 well. You were asking her questions on the basis of
4 whether she would have you arrested if there was a
5 reasonable ground to suspect that you were guilty of
6 murder, but I am not sure whether it is as simple as that
7 where you are dealing with a crime allegedly committed by a
8 member of the police service. I would like to ask a question
9 about that first. We know that the killings at Marikana
10 were reported to IPID by Brigadier Pretorius shortly after
11 4 o'clock, in fact two minutes past four on the 16th. So
12 IPID were seized with the matter thereafter and IPID still
13 is. Now, I know that you would order that Mr Mpofu be
14 arrested if you had a reasonable ground for suspecting he
15 was guilty of some or other crime in your area of
16 jurisdiction, but what is the position where the allegation
17 of an alleged crime relates to the alleged commission
18 thereof by a member of the police service? In those
19 circumstances do you say the person must be arrested or is
20 that a matter for IPID to deal with?

21 **[11:10] GENERAL MBOMBO:** Thank you, Mr Chairperson, for
22 explaining it. If our officers, police officers, appear to
23 have been involved in such criminality, we call the IPID
24 people. They will then take over that task from the scene
25 stage and they would then also investigate that case.

1 **MR MPOFU:** Yes, well, I am afraid that is
2 not going to assist matters. You understand that this
3 Commission will possibly make its findings before, or is
4 permitted to make its findings before IPID finishes its
5 work, that those are two independent processes? You are
6 aware of that?

7 **GENERAL MBOMBO:** I understand that.

8 **MR MPOFU:** Okay, so let's forget about
9 IPID. I am saying to you that forget about IPID and what I
10 am putting to you is that if – let's forget all these
11 examples now because I think they are confusing either you
12 or me. If there are 13 deaths perpetrated by the police
13 for which there is no explanation offered, I am going to
14 argue that those deaths must – we do not even have to go
15 into the nitty-gritties because those people were killed,
16 they are human beings, by the police and there is no
17 reasonable explanation as to why they were killed and for
18 those deaths, before we go anywhere, there is a case for
19 criminal charges of murder against the police. That's the
20 point I am making to you.

21 **MR SEMENYA SC:** Chairperson, Mr Mpofu has not
22 responded to the point we raised.

23 **MR MPOFU:** Oh yes, the first point. Yes,
24 okay thank you, yes. Do you agree with what I am saying,
25 firstly?

1 **COMMISSIONER HEMRAJ:** But Mr Mpofu,
2 before she answers, are you suggesting that there should be
3 no investigation simply on the facts that you have
4 sketched?

5 **MR MPOFU:** No, please Commissioner, I am
6 obviously not, I am not suggesting that. I am saying that
7 if you have the situation, if anybody has to investigate, I
8 don't know, the theft of fruit from a room and we know that
9 the only person who was in that room was me and the fruit
10 is gone and I have no explanation as to why it was gone
11 when I was there for 24 hours, then I am saying unless if
12 something else – I am not saying you don't have to, if you
13 want to you can still investigate what time did I take it
14 and so on but the point of the matter is that as far as
15 that is concerned, absent an explanation, we have the
16 situation where there's prima facie – remember we are
17 talking charging, remember we are not talking conviction,
18 we are talking charging –

19 **CHAIRPERSON:** I am sorry, we are still busy
20 with the IPID point. Assuming Constable Mpofu is in a room
21 for 24 hours and when he went in there was a whole sack of
22 potatoes and when he came out the sack of potatoes was
23 empty. The only inference was that he had eaten them, stolen
24 them. Would you charge him with theft or would you report
25 it to IPID?

1 **GENERAL MBOMBO:** I will report it, Mr
2 Chairperson, to IPID but surely IPID will also investigate before
3 they charge him.

4 **MR MPOFU:** Yes. No, that is fine, that is
5 fine. You would report it to IPID and good luck to them
6 but if you were the station commander charged with
7 investigating that theft, irrespective of what IPID might
8 or might not find, would you agree that – and if your
9 findings will come long after or before IPID may or may not
10 finish its work, that you would be able to at least
11 conclude that there was this one person, constable with a
12 gun in a cell and one of the inmates died and he has
13 admitted that he shot the inmate. Would you agree that it
14 means that the person has been killed by that person and at
15 a prima facie, which means charging, not convicting, prima
16 facie level, that person should be charged with murder?

17 **CHAIRPERSON:** The question is, if that
18 person is a policeman then has this witness the right to
19 interfere with an IPID investigation and say, I know you
20 people investigate but never mind, I have investigated it and
21 I am satisfied that Constable Mpofu should be charged and
22 I am arresting him? There would be serious problems, as I
23 understand it, in regard to the independence of IPID, the
24 way IPID operates, its relations with the police – anyway,
25 so perhaps we can get the witness –

1 **MR MPOFU:** No, Chairperson, let me –

2 **CHAIRPERSON:** Perhaps we can get the

3 witness's views on that before you carry on.

4 **MR MPOFU:** No, Chairperson –

5 **CHAIRPERSON:** May I suggest – yes, I am in

6 charge here – we shall now take the tea adjournment, she will

7 answer my question and then you can raise your –

8 **MR MPOFU:** Yes, but can I just clarify –

9 **CHAIRPERSON:** No, no –

10 **MR MPOFU:** To you.

11 **CHAIRPERSON:** I am running this

12 Commission, Mr Mpofu. We are taking the tea adjournment.

13 **[COMMISSION ADJOURNS / COMMISSION RESUMES]**

14 **[11:49] CHAIRPERSON:** The Commission resumes.

15 Provincial Commissioner, you are still under oath.

16 **MIRRIAM NOSAZISO ZUKISWA MBOMBO:** s.u.o.

17 **CHAIRPERSON:** Can you perhaps answer the

18 question first that I asked you and then Mr Mpofu will

19 continue with his cross-examination.

20 **GENERAL MBOMBO:** If you could just remind

21 me what the question was, Chairperson?

22 **CHAIRPERSON:** The question was, dealing

23 with the hypothetical case that Mr Mpofu put, if you had a

24 strong prima facie case against a police officer in respect of

25 some crime, the matter was being investigated by IPID,

1 would you then interfere, as it were, and arrest that

2 person or would you leave it to IPID?

3 **GENERAL MBOMBO:** Chairperson, matters

4 pertaining to police with criminal acts, these are sent

5 directly to the IPID and we do not interfere with the job

6 of IPID.

7 **CHAIRPERSON:** Thank you. Yes, Mr Mpofu.

8 **CROSS-EXAMINATION BY MR MPOFU (CONTD.):**

9 Thank you, Chairperson. General, just to allay any further

10 confusion; I agree with what you have just said, but it has

11 nothing to do with what I am investigating to you. I am

12 going to stay away from making any examples because I think

13 it is a source of confusion. I am concerned about this

14 Commission, the Marikana Farlam Commission, whatever you

15 call it. Do you understand? Not whatever IPID or – now

16 that we've established who's in charge of this Commission,

17 do you understand that this Commission can make its

18 findings, but firstly do you understand that this

19 Commission is compelled among other things to make

20 recommendations for prosecutions? Do you know that?

21 **GENERAL MBOMBO:** That is how I know it,

22 Chairperson.

23 **MR MPOFU:** Right, do you know also that

24 this Commission in terms of the terms of reference drawn by

25 the President of South Africa is also enjoined to find out

1 whether use of force and killings by the police were
2 justified, or justifiable, correct?

3 **GENERAL MBOMBO:** I think it is so, yes.

4 **MR MPOFU:** Right, and do you understand

5 that this Commission, which originally it was meant to be

6 for four months or whatever, can conclude its job and do

7 those two things irrespective of what IPID is doing? Do

8 you understand that?

9 **GENERAL MBOMBO:** I think so, yes.

10 **MR MPOFU:** Right, okay. Now that we've

11 cleared any confusion in that regard, I am going to take you

12 to – well, just to end the confusion even further, the

13 questions I am asking you have something to do with what I am

14 going to put to you at the end is going to be our argument

15 as to what this Commission should conclude. You understand

16 that?

17 **GENERAL MBOMBO:** I understand that, Sir.

18 **MR MPOFU:** Thank you. Alright, now we

19 have this situation; I have said to you if you go to – let's

20 start with FFF9, which is the police opening statement.

21 Right, go to paragraph –

22 **GENERAL MBOMBO:** FFF9?

23 **MR MPOFU:** FFF9, yes, Ma'am. It is the

24 police –

25 **CHAIRPERSON:** It is now the one on the

1 screen. It is the opening statement –

2 **MR MPOFU:** Of the police.

3 **CHAIRPERSON:** I think the heading is

4 wrong, but it is the opening statement –

5 **MR MPOFU:** Yes.

6 **CHAIRPERSON:** - by the South African

7 Police Service. It was not on your list that you received.

8 I do not know –

9 **GENERAL MBOMBO:** I did not have it.

10 **CHAIRPERSON:** So that may be why you

11 have not got a copy of it, but it is on the screen and I

12 think there's a relatively short paragraph that Mr Mpofo

13 wants to put to you. Perhaps we could look at that. If

14 you want to have it in front of you I am sure a copy can be

15 made available to you by the police service.

16 **MR MPOFU:** It is in her bundle.

17 **CHAIRPERSON:** But you also – yes, I am

18 reminded that though Mr Mpofo did not draw your attention to

19 it, one of the other cross-examiners, Mr Bizos did. So

20 you have already had it and – sorry? Mr Budlender. Mr

21 Budlender did, so you have already had it for the purpose of

22 cross-examination. You have already read it for the purpose

23 of cross-examination. So if you have got your copy of the

24 documents that Mr Budlender referred you to for his cross-

25 examination, you will find it there. Have you got that here?

1 Perhaps those assisting you can find it.

2 **GENERAL MBOMBO:** I think I have it, Sir.

3 **CHAIRPERSON:** Look, I do not want you to

4 be at a disadvantage, so get it. Where is it in Mr

5 Budlender's bundle?

6 **MR MPOFU:** I think it is the fourth

7 document – third, the third document. It is the third

8 document.

9 **CHAIRPERSON:** It is the third document, so

10 I suggest get Mr Budlender's bundle, put it on the desk in

11 front of you. Look at the third document in it. Mr Mpofo

12 will then tell you what paragraph he wants you to look at,

13 and then we shall carry on. Mr Pretorius, can you or one of

14 your assistants perhaps help the witness, speed things up?

15 It seems the way Mr Mpofo is approaching the matter he

16 regards it as an important point, so we don't want the

17 witness to be at a disadvantage.

18 **MR MPOFU:** Thank you, Chairperson.

19 **CHAIRPERSON:** You've now got the

20 document. Mr Mpofo will tell us what paragraph you must

21 look at.

22 **MR MPOFU:** The first one is 45.5.

23 **CHAIRPERSON:** 45.5. Can we get that on

24 the –

25 **MR MPOFU:** It is on page 18 –

1 **CHAIRPERSON:** We're getting that on the
2 screen. If you turn to page 18, you will find it.

3 **MR MPOFU:** Page 19 of 30.

4 **CHAIRPERSON:** 19?

5 **MR MPOFU:** Yes, correct. Have you got
6 it? And I know you –

7 **CHAIRPERSON:** Let's read it aloud just so
8 that everyone can follow –

9 **MR MPOFU:** That is correct.

10 **CHAIRPERSON:** - everyone in the
11 auditorium, because it is, obviously the way you are present
12 it, it is an important point.

13 **MR MPOFU:** Yes, Chairperson.

14 **CHAIRPERSON:** 45.5 reads as follows, "The
15 evidence will be that some of the 13 protesters who were
16 shot and killed at hill 3 had charged the police officers
17 with dangerous sharp weapons and had been shot in self-
18 defence. These are accounted for below. Others could have
19 been killed when police officers returned sharp fire,
20 believing shots to have been fired from the bushes and
21 crevices in the hill by protesters. The police officers
22 are prepared to accept that they may have been responding
23 to 'friendly fire,' believing it to be fire from the
24 protesters. Without forensic evidence, we are unable to
25 give an unqualified account explaining the death of some of

1 the persons inside hill 3." That is the paragraph upon
2 which Mr Mpofo is relying.

3 **MR MPOFU:** Yes, thank you, Chairperson,
4 and for the sake of saving time I shall ask you questions in
5 respect of each of the passages. The next one is 45.8.3,
6 Chairperson.

7 **CHAIRPERSON:** Then for the benefit of
8 those in the auditorium who may not understand the English
9 on the screen I shall read it and it will be interpreted as I
10 read it. 45.8.3, "The bodies mark D, E, G, H, J, K, L, M,
11 were among the large group of armed protesters who were
12 inside the hill. Gunshots were fired at the police from
13 inside the hill. The police fired shots in the direction
14 of the firing group, killing at least eight persons. The
15 police service does not yet have ballistic reports relating
16 to these deaths and is at this stage unable to speak more
17 specifically to each of the deaths. The evidence may
18 reveal that the response of some police officers may have
19 been disproportionate to the danger they faced from the
20 group of more than 200 armed protesters."

21 **MR MPOFU:** Thank you. There are other
22 examples, but we shall just stick with those two. Now what
23 I am saying to you, Commissioner, firstly you see that –
24 because you did say, I suppose correctly, it would depend
25 if the person, if there is evidence that the person was

1 killed by the suspect – you do see the part that the
2 Chairperson has just read which says the police fired shots
3 in the direction of the firing group, killing these eight
4 persons. So there is no doubt about that. You understand
5 that?

6 **GENERAL MBOMBO:** I see it, yes.

7 **MR MPOFU:** Right, now the simple point

8 I am making to you is this; that from the point of view of
9 the Marikana Commission, unless when it finishes there have
10 been these where the police say they are unable, they don't
11 know why and how these people were killed, unless those
12 explanations are forthcoming then it must be concluded that
13 there's no justification which has been presented to the
14 Commission in respect of those deaths at least. Let us say
15 eight, let us start with the eight.

16 **GENERAL MBOMBO:** I think it is clear from
17 the statement, Chairperson, that it is mentioned there that
18 unless the investigation is completed, there is no
19 conclusion that can be made.

20 **MR MPOFU:** Yes. No, that I accept. I am
21 postulating to you, I am saying if the Commission finishes
22 before those possible justification from ballistics or
23 whatever are presented, if the situation that is postulated
24 here remains until the end of the Commission, you would
25 accept that in respect of at least those eight or 13 or

1 whatever number of deaths the situation is that there is no
2 justification which may be considered by the Commission?

3 **MR SEMENYA SC:** Chairperson, that proposition

4 is not correct. The Commission may very well find at the
5 end that it is unable to make any finding because the
6 investigation, or whatever proposition Mr Mpofu is putting,
7 is not there. It don't conclude that the killings are
8 unjustified, or the defence is unjustified.

9 **MR MPOFU:** May I respond, Chairperson?

10 Yes, Chairperson, yes, the nuances of what Mr Semenya is
11 proposing now will no doubt be argued at the end. Suffice
12 at this stage to say this; that the position which is
13 postulated by the terms of reference is that the police,
14 whoever admitted to having shot dead people, must show the
15 Commission whether or not there is a justification for
16 doing so. If that justification is not forthcoming, and it
17 may well be forthcoming if they find the ballistics that
18 they are talking about, but if it is not forthcoming then
19 at the very least, the minimum, Chairperson, must be that,
20 not that the people who killed those people are guilty of
21 murder as such, but at least that they must be prosecuted,
22 which is one of the functions of the Commission. Whether
23 at that subsequent trial they succeed or fail is no concern
24 of the Commission. The point of the matter is that absent
25 a justification – and we know who killed the human beings –

1 then the only consequence for the Commission as explained
2 in the terms of reference is a referral to prosecution.
3 **CHAIRPERSON:** Mr Mpofo, I do not want to
4 deal at this stage with issues that arise at the end, but
5 it is not quite as simple as that. My information at the
6 moment is that the ballistic evidence is inconclusive.
7 Because R5 bullets disintegrate inside a body it is
8 impossible, as I understand it – there may be one or two
9 exceptions, but it is impossible to link any dead striker
10 with any shooters. So that is the first problem.
11 The second point is of course it may well be, you
12 know and obviously one must keep an open mind on this;
13 there are various possibilities as you say and Mr Semanya
14 says, but it may be that we will find that there was, we
15 may find that there is a prima facie case against people,
16 that we refer it to the DPP to investigate further and
17 consider charging these people concerned, not necessarily
18 with murder because if you cannot link a shooter to a
19 deceased, absent of finding common purpose you'll have
20 difficulty in charging the shooter with murder, but if the
21 shooter was shooting in circumstances where if he had
22 killed somebody he would have been guilty of murder, then –
23 but you don't know if he did actually hit anybody – then a
24 charge of attempted murder would obviously be one which
25 would be available to the prosecution.

1 But these are all matters which are still very
2 much in the melting pot. They presumably will be the
3 subject of detailed analysis in argument before us, and
4 obviously we can't at this stage indicate with any degree
5 of certainty, or even probability, what findings we shall make
6 at the end.

7 **MR MPOFU:** Yes.

8 **CHAIRPERSON:** But I think I can
9 understand the thrust of your question, so perhaps you can
10 adjust it to deal with the points I have put to you and then
11 put it to the witness.

12 **MR MPOFU:** Fair enough, Chairperson.

13 Thank you very much. Maybe just to, let us simplify it by
14 dealing with just one case, one. You know that at least
15 one of the killings at hill 3 was performed by somebody
16 who took out a gun and shot at somebody and when asked to
17 explain said, "These people deserve to die"? You know
18 that?

19 **GENERAL MBOMBO:** I remember such a
20 statement –

21 **MR MPOFU:** I think there is an objection
22 from Mr Budlender.

23 **COMMISSIONER HEMRAJ:** Actually, Mr Mpofu,
24 what are you referring to –

25 **MR BUDLENDER SC:** It was not an objection,

1 but we do not actually know that. There's a dispute as to
2 whether that happened.

3 **MR MPOFU:** Well, the witness seems to
4 know it.

5 **MR BUDLENDER SC:** Well, the witness knows
6 what the witness so far knows.

7 **MR MPOFU:** Well, to –

8 **CHAIRPERSON:** Is this a reference to
9 Warrant Officer Myburgh?

10 **MR MPOFU:** Yes, I am going to –

11 **CHAIRPERSON:** Of course there is another
12 statement which is, I do not know whether you have seen it
13 yet, it is been filed by the police which, if correct – and
14 obviously I don't know if it is, but if correct puts a
15 totally different complexion on that whole incident.

16 **MR MPOFU:** Yes –

17 **CHAIRPERSON:** And so we do not know
18 anything about it at this stage at all. All we do know is
19 that what Warrant Officer Myburgh said inter alia I think
20 to this witness, I am not even sure that it is clear from
21 what Warrant Officer Myburgh said that the person that he
22 is referring to actually killed the person in respect of
23 the shots that were fired. Now there are a number of –

24 **MR MPOFU:** Yes, well let's assume –

25 **CHAIRPERSON:** There are a number of

1 issues –

2 **MR MPOFU:** Okay, let's assume we meet,

3 then the –

4 **CHAIRPERSON:** There are a number of –

5 yes, yes, there are a number of issues hanging in the air

6 in that regard, but I think what Mr Mpofu is putting to

7 you, if I may venture to try to rephrase his question, is

8 that you know what Warrant Officer Myburgh said. You have

9 dealt with that I think in your evidence.

10 **GENERAL MBOMBO:** It is so, Chairperson.

11 **CHAIRPERSON:** If he is correct, or if he

12 may well be correct, what he says amounts to an accusation

13 certainly against another member of the service, that that

14 person is guilty at the very least, I take it, of attempted

15 murder. That is his point. Now what do you want the

16 witness to say in relation to that?

17 **MR MPOFU:** Yes, well Mr Madlanga when he

18 was still with us, he narrowed that to about two people.

19 Are you aware of that evidence? I do not want to take you

20 through the whole thing.

21 **GENERAL MBOMBO:** I do not remember that

22 quite so clearly.

23 **MR MPOFU:** Okay, I shall just tell you

24 blandly, by a process of elimination and because Warrant

25 Officer Myburgh had said the person was an NIU member, Mr

1 Madlanga very meticulously narrowed the possibilities of
2 who that is to two people. I do not want us to go through
3 that. Just accept that as something that happened in the
4 Commission and which was accepted by the witness then. I
5 cannot remember, I think it was the National Commissioner.

6 **[12:08] GENERAL MBOMBO:** I hear what you say,

7 Sir.

8 **MR MPOFU:** Now I want to use that example
9 to illustrate the point that I was making. So now what I am
10 saying is that if at the end what Warrant Officer Myburgh
11 said happened and it can be narrowed down to those two
12 people, and - which is the thrust of my question - there is
13 no justification which is presented in relation to that,
14 and if I argue at the end that just in respect of that one
15 case the Commission should recommend the prosecution of
16 that person, or, you know, or one of them -

17 **CHAIRPERSON:** No, no, no, it is not as
18 simple as that, Mr Mpofu. As you say, there were two
19 potential suspects.

20 **MR MPOFU:** Yes.

21 **CHAIRPERSON:** And obviously if the case
22 were investigated further one assumes that Warrant Officer
23 Myburgh might be asked -

24 **MR MPOFU:** Yes, if we narrow it to one.

25 **CHAIRPERSON:** - might be asked to attend

1 an identification parade in which –

2 **MR MPOFU:** Correct.

3 **CHAIRPERSON:** - some of those, those two

4 people were there with others, and he might well identify

5 one of them. So it is conceivable that investigation may be

6 done to eliminate – sorry, to eliminate one of the two.

7 **MR MPOFU:** Yes.

8 **CHAIRPERSON:** So that then there would be

9 a prima facie case against the other –

10 **MR MPOFU:** Yes.

11 **CHAIRPERSON:** - at least on a charge of

12 attempted murder.

13 **MR MPOFU:** That is correct.

14 **CHAIRPERSON:** Based on the evidence that

15 he would give and the inferences there from. That's your

16 point, is it not?

17 **MR MPOFU:** That's correct, Chairperson,

18 yes. Yes, or let us say Warrant Officer Myburgh came here to

19 the Commission and testified and we showed him the two

20 pictures of the Madlanga suspects and he said no, it is not

21 this one, it is this one. Okay, yes.

22 **CHAIRPERSON:** Ms Hemraj, who is a former

23 public prosecutor and now does a fair amount of defence

24 work, is horrified at the suggestion that a witness could

25 be called to the witness box and shown two photographs and

1 asked to identify one of them as the accused. That would
2 almost certainly lead to the acquittal of whatever trial,
3 but anyway, we won't assume that the – and if that scenario
4 were to play itself out –

5 **MR MPOFU:** If it happened here, not at a
6 trial.

7 **CHAIRPERSON:** Yes, it would not help
8 because the evidence given here, I am not sure it could be
9 used elsewhere. But anyway, we would assume that the way I
10 suggest it is done, which would be more scientific, an
11 identification parade and so on. So let's leave your
12 photographs out of it. Take my advice; do not go down that
13 avenue. It will only lead you to trouble.

14 **MR MPOFU:** Okay.

15 **CHAIRPERSON:** Proceed the other way.

16 **MR MPOFU:** Yes. Once again I think I am
17 compelled to remind you that I am not talking about any
18 other proceedings; I am talking about this Commission,
19 anything that would have happened here. But be that as it
20 may, if we knew somehow by some method – legitimate – that
21 it was Warrant Officer X and not Warrant Officer Y –

22 **CHAIRPERSON:** [*Microphone off, inaudible*]

23 X out of it. That letter has been used already. Y or Z.

24 **MR MPOFU:** Oh yes, yes. A and not

25 Warrant Officer B, and if I then argued that given the

1 absence of justification from the police, either because
2 the ballistics is inconclusive or whatever, then that the
3 Commission should recommend that the Warrant Officer A
4 should be charged, would you be able to comment as to
5 whether I can make that proposition successfully?

6 **GENERAL MBOMBO:** I think also that even
7 there, Mr Chairperson, that would need thorough
8 investigation to support what you are saying.

9 **MR MPOFU:** Okay, alright.

10 **CHAIRPERSON:** I must tell you, Mr Mpofu,
11 I do not see this in the list of topics I allowed you to
12 cross-examine on, but anyway, you have done it now so the
13 water is under the bridge. But please try to adhere to the
14 topics in respect of which I gave you permission.

15 **MR MPOFU:** Well, I am still on topic 2,
16 Chairperson. But anyway, maybe to make that even clearer,
17 let's do this –

18 **CHAIRPERSON:** I will not read the opening
19 part of 2 because that is something you asked me not to do
20 because you don't want the witness to know where you are
21 coming from –

22 **MR MPOFU:** Yes, I am moving up –

23 **CHAIRPERSON:** But anyway, but you will
24 also remember what I said in paragraph 4 of the permission
25 I granted you.

1 **MR MPOFU:** Yes, Chairperson. Yes, I am
2 indebted to the Chairperson for not reading out. I am quite
3 aware of the deal, yes. You see, General, the reason why
4 I am doing all this is because I am going to make some
5 serious propositions about your position, so I want to give
6 you an opportunity to deal with those serious allegations.
7 From JJJ192 and from the questions I think that
8 were put to you by various people it would be fair to say
9 that for various reasons you foresaw that there might be
10 bloodshed and death in the operation of the 16th, correct?

11 **GENERAL MBOMBO:** As I have already
12 indicated, Chairperson, whenever such an operation is being
13 conducted all the angles that could pose risk are being
14 looked into.

15 **MR MPOFU:** Yes. No, that is part of the
16 answer, certainly. In other words you foresaw the
17 eventuation of death and injury because of the type of
18 operation that was in the offing, correct?

19 **GENERAL MBOMBO:** As I have already said,
20 Chairperson, that such angles had been conceded, but
21 everything possible would be done to avoid any spill of,
22 blood spillage.

23 **MR MPOFU:** No, I am sorry, I think the
24 witness said "Yes, that was done," but I shall assist you by
25 asking it like this. Because of the reasons that you have

1 stated, it was foreseen that there might be death or
2 injury, yes?

3 **GENERAL MBOMBO:** As being amongst the
4 risks that were being looked into, Mr Chairperson.

5 **MR MPOFU:** Yes. Now you foresaw the risk
6 of death more particularly being heightened in this
7 particular operation, among other things because of what
8 you termed the emotions being high in respect of what had
9 happened on the 13th, correct?

10 **GENERAL MBOMBO:** Not in that way, Mr
11 Chairperson.

12 **MR MPOFU:** JJJ192, page 6 thereof –

13 **GENERAL MBOMBO:** I have it, Chairperson.

14 **MR MPOFU:** This is the discussion that
15 you are having with Mr Mokwena, which we have established was
16 on the 14th, correct? Of August.

17 **GENERAL MBOMBO:** It is correct, Sir.

18 **MR MPOFU:** If you can read against the
19 letter, or rather line, let's start from line 15, "So I
20 said," I shall read it out to you, "So I said to them if once
21 again the other thing why I delayed them, remember what was
22 happening yesterday; it was annoying to the cops." Let's
23 start with that one. So if you are saying "what happened
24 yesterday," you are referring to the incident of the 13th of
25 August, correct?

1 **GENERAL MBOMBO:** That is correct,

2 Chairperson.

3 **MR MPOFU:** "If you could have sent them

4 there, emotions are high," Mr Mokwena says, "Emotions are

5 high." You say, "Emotions are very high. Whatever

6 instructions you will have given, but because of the

7 emotions," Mr Mokwena says, "They would have forgotten

8 about the instructions," and you say – this is the

9 important part – "They will have forgotten about the

10 instruction and I do not want a situation where 20 people

11 will be dead." Now I am putting to you a very simple

12 proposition. I am saying you foresaw, apart from the

13 general foresight which you have admitted to because of the

14 nature of the operation, you foresaw further that in this

15 particular operation, because of what had happened the 13th,

16 the risk of death was more heightened because of that

17 reason, as evidenced by what I have just read to you,

18 correct?

19 **GENERAL MBOMBO:** Remembering, Mr

20 Chairperson, that I am talking about the Tuesday, I was

21 referring to the policemen who were involved in the

22 operation on Monday. That is why I spoke of the delay,

23 that we had delayed them because we had requested

24 additional police, so that we could release these people,

25 particularly those that had admitted to have been affected,

1 and those who had been seen by our EHW department not to be
2 good to be involved.

3 **MR MPOFU:** Yes, and the reason you are
4 taking all those steps of sending them away or whatever was
5 because you foresaw that the risk of them killing 20 people
6 – and I know you were using that loosely – killing many
7 people, let's say, was additionally heightened by what they
8 had experienced on the 13th, correct?

9 **GENERAL MBOMBO:** You can say so, yes.

10 **MR MPOFU:** Yes, thank you. Now let's
11 just go along with what you are saying. So the people who
12 would be removed would be those who admitted to having been
13 emotionally affected, correct?

14 **GENERAL MBOMBO:** Firstly according to
15 General Mpmembe he was releasing all the people who were
16 involved in the operation of the 13th. But he mentioned, he
17 said because the people are already being counselled by the
18 social workers and the psychologists, he then said those
19 that would be found not to be suitable in terms of the
20 report would then be released, and those that had no
21 problems and would go on with the work would then be
22 allowed to go on.

23 **MR MPOFU:** Yes, so in other words
24 consideration had been given to releasing all the people
25 who had been involved in the operation of the 13th because

1 they might cause a situation where many people are killed,
2 but after what you have discussed, that was abandoned and it
3 was decided to retain some of them. Is that what you are
4 saying?

5 **GENERAL MBOMBO:** I am not saying it was
6 just abandoned, Chairperson. What I am trying to explain is
7 that the members were given a chance themselves to say
8 whether they are fit to be deployed, and our EHW department
9 which was there would also have said what do they see wrong
10 with this and that one.

11 **MR MPOFU:** General, you have just testified
12 a few minutes ago that – I accept that you are saying now
13 subsequently, but your evidence is that initially General
14 Mpembe wanted to release all the people who were involved
15 in the operation of the 13th, correct?

16 **GENERAL MBOMBO:** Possibly we did not
17 understand one another there. General Mpembe's intention
18 was the following, Mr Chairperson, that the people who were
19 involved in the operation of the 13th and who themselves
20 felt that they would not be able to go on, those would be
21 released. He also then also used the assistance of the
22 people that helps us in the healing of the police.

23 **MR MPOFU:** General, I am afraid you are
24 busy changing your evidence now. The record will show that
25 before I asked you further questions and it was clear where

1 I am going with this, your evidence was that Mpembe, I think
2 you said he was releasing all of them and later it was
3 decided that, everything that you said, those who admitted
4 to having been affected and those that EHW had assessed as
5 unsuitable, only those should be released. Am I right or
6 am I wrong?

7 **GENERAL MBOMBO:** I don't know how to
8 clarify, to explain this clearly. If there is an operation
9 the operational commander will ask the police whilst the
10 operation is still going on, particularly if there has been
11 something that happened, a problem, he would ask them if
12 they are still fit enough to go on. At the time General
13 Mpembe was conducting this job, the EHW people were there
14 already; he would also have asked for their advices. His
15 intentions was even if all of them wanted to leave he would
16 have done so.

17 **MR MPOFU:** Okay, I am going to move on,
18 but I just want to ask you, because you are evading the
19 question now; did General Mpembe at some stage consider
20 releasing all the people or not?

21 **GENERAL MBOMBO:** That was his intention,
22 Chairperson.

23 **MR MPOFU:** Yes, thank you. And
24 subsequently that plan was changed to what you have now
25 described, correct?

1 **GENERAL MBOMBO:** I do not understand this

2 was changed that you use.

3 **MR MPOFU:** Okay, let me put it this way;

4 in the end some of the people who were involved in the

5 operation of the 13th were involved in the operation of the

6 16th where 34 people were killed, correct?

7 **GENERAL MBOMBO:** Now I understand you.

8 Yes, it is so.

9 **MR MPOFU:** And all I am saying is that the

10 mere fact that you or General Mpenbe or whoever in SAPS had

11 considered the possibility of releasing all those people

12 was because it was foreseen and foreseeable at that stage

13 that they might act in a manner where many people would be

14 killed, as you indicate in your discussion with Mr Mokwena

15 on JJJ192. Comment?

16 **GENERAL MBOMBO:** I think what General

17 Mpenbe was doing was what he was supposed to do as an

18 overall commander.

19 **MR MPOFU:** And I am going to argue

20 therefore that you yourself clearly foresaw the bloodshed,

21 including the death, and you were reckless as to its

22 eventuation.

23 **[12:28]** In the sense that knowing that these people might

24 have murderous tendencies due to their emotions you

25 nevertheless unleashed them onto the protestors.

1 **GENERAL MBOMBO:** I do not understand

2 really why you say so.

3 **MR MPOFU:** I am saying so because you and

4 I have established that you foresaw this and you and I and

5 everyone knows that in any event those people were, or some

6 of them, were present when the 34 people were killed on the

7 16th.

8 **GENERAL MBOMBO:** I do not think that could

9 be a sufficient reason, Mr Chairperson. The job of the

10 police takes many different ways.

11 **MR MPOFU:** And one of those ways is not

12 to deploy people who might have motives of revenge and high

13 emotions into a volatile situation. I am sure that is not

14 one of the ways that the police use.

15 **MR MBOMBO:** In our prescript,

16 Chairperson, fortunately we do not have anything stating

17 that. But because we know the manner in which we work we

18 sometimes do allow that. But this does not necessarily

19 mean, Chairperson, that if police have been to a scene of

20 an accident where 10 people have died that those policemen

21 could not be sent to do some other jobs.

22 **MR MPOFU:** No, General, that cannot be

23 correct. Remember the prescripts can't foresee every

24 situation under the sun, but what we know the prescripts do

25 say is that success or failure of an operation is judged

1 among things by the number of people who lose their lives
2 and who are injured. So surely that must mean that the
3 reverse side of that, that people like you must see to it
4 that there is minimum loss of life. And if - the other
5 side of that is that if you then unleash people that in
6 your own contemplation might have murderous tendencies onto
7 members of the public then you are not likely to adhere to
8 the prescript that says you must minimise that.

9 **MR SEMENYA SC:** The witness, Chairperson, did
10 not say she held a view that some of these members were
11 murderous, that was not the evidence of the witness.

12 **MR MPOFU:** Okay.

13 **CHAIRPERSON:** I think that question goes
14 beyond the facts before us.

15 **MR MPOFU:** Sure.

16 **CHAIRPERSON:** What she said was there
17 were people who were in a very high emotional state, whose
18 emotions were very high and persons who on the Tuesday,
19 would have forgotten about an instruction to behave
20 properly and not to go beyond what is - I think that is
21 effectively what she said. Your point is, of course, is
22 that how could you be sure if there was this danger on
23 Tuesday how could you be sure that that danger was not
24 present, at least in some degree, still on Thursday. I
25 think that is your point is it not?

1 **MR MPOFU:** Yes, Chairperson.

2 **CHAIRPERSON:** If you put it directly to

3 her then she might follow it.

4 **MR MPOFU:** Yes that is the point. Surely

5 at the stage when it was contemplated to remove these

6 people because of what they had done on – or of what they

7 had experienced on the 13th, it was not contemplated that

8 they'll be removed for one day and they'll come back on the

9 15th. It was proposed that they will be removed from that

10 situation, correct?

11 **GENERAL MBOMBO:** It is correct,

12 Chairperson.

13 **MR MPOFU:** Yes so let's come back to the

14 question. I am saying to you that on your own say so this

15 issues of the emotional state of these people was

16 foreseeably likely to result in the death of many people.

17 I am running away from the two because I am sure you were

18 using that just as an example. Let us use the neutral term,

19 many people.

20 **GENERAL MBOMBO:** Not that I am saying

21 there would be many in that emotion because our EHW was

22 already doing work on those people.

23 **MR MPOFU:** All right I shall leave that for

24 argument. Suffice to say that I am going to use that as one

25 of the basis on which the people who had such foresight,

1 including you should be prosecuted for murder.

2 **GENERAL MBOMBO:** I have no comment,

3 Chairperson.

4 **MR MPOFU:** You also - at some stage you

5 also foresaw, or rather contemplated I think is a better

6 term in this regard, that the most feasible option which

7 might result in minimising injury or death would be

8 encircling the people at the hill, at some stage,

9 correct?

10 **GENERAL MBOMBO:** I said so, Chairperson,

11 yes that was contemplated at one stage.

12 **MR MPOFU:** And I assume that would have

13 entailed and you can correct me if I am wrong, the

14 encirclement of a group at the hill and then

15 communicating to them that look if you want to leave here

16 you are going to have to abandon your dangerous weapons.

17 Otherwise we won't let you go, something of that nature, it

18 might not be exactly that, but that kind of thing, correct?

19 **GENERAL MBOMBO:** I do not have complete

20 details as to what and how it was going to be conducted.

21 **MR MPOFU:** Well since you suggested that

22 how did you see it panning out, what would then happen

23 after the encirclement?

24 **CHAIRPERSON:** I do not think the evidence

25 is that she suggested it. I think the evidence says that

1 she was told by the commanders that, that the plan that was
2 being considered and I think the plan was actually on the
3 table for it to be implemented on the Tuesday. And that
4 she approved of it is what I can understand from her
5 evidence. But she did not suggest it. But I think you have
6 gone a bit further than the evidence justifies. And you
7 say you did not know the details, but the details suggested
8 to you by Mr Mpofo that they would encircle the hill and
9 then say to the people inside the encirclement look here if
10 you want to leave your weapons behind. That would have
11 been a practical way of dealing with the matter. I take it
12 you will agree with that.

13 **GENERAL MBOMBO:** As she says, yes,
14 Chairperson, but I am saying I did not have those details at
15 the time.

16 **MR MPOFU:** Yes okay, but I shall just show
17 you that the Chairperson is making a mistake. Go to
18 JJJ192, sorry page 5 again. Page 5 yes, we were at page 6,
19 just the page before that. Start from the middle,
20 Chairperson, about, I think it is line 17 or so. You
21 understand – I shall read it out for the sake of everybody
22 “You understand whilst you know, now what we have just
23 decided because when I was up I wanted to view and see what
24 is going on” just to that far, when you say when you are up
25 you mean when you were in the helicopter, correct?

1 **GENERAL MBOMBO:** That is correct,

2 Chairperson.

3 **MR MPOFU:** "So when I was on there I told

4 these guys, I said," and you are quoting yourself now "Look

5 these people, they are less than 1 000. With the number of

6 officers we have let us circle these people, let us not do

7 anything, let us settle them. Let us talk to them and say

8 listen bring your firearms and you'll leave it here one by

9 one we shall give you enough time to do that." You are

10 quoting yourself. Is that what you said to Mr Mokwena?

11 **GENERAL MBOMBO:** This is how I thought,

12 yes. That is correct.

13 **MR MPOFU:** So not only did you suggest

14 the encirclement as I proposed to you which I think you

15 denied, but you even went further to answer my second

16 question which is what would then happen once they are

17 encircled and you say you will say to them listen here you

18 can leave one by one, blah, blah, blah. So that is what

19 you, yourself as General Mbombo had contemplated might be

20 the solution, correct?

21 **GENERAL MBOMBO:** That is how I thought,

22 yes.

23 **MR MPOFU:** Thank you. Now again, we now

24 know today that that plan – or let me start by saying this,

25 had that plan that you envisaged there been carried out you

1 would agree that death might have been avoided, correct?

2 **GENERAL MBOMBO:** I would not be sure of

3 that, Chairperson, but I think, as you say –

4 **MR MPOFU:** I do not understand what you

5 mean you think as I say, do you agree with me or don't you

6 agree with me?

7 **CHAIRPERSON:** - finished her answer. I

8 think she is saying she is not sure it would have happened,

9 but I got the impression she was going to say – then go

10 further and say something more. So let's –

11 **MR MPOFU:** No –

12 **GENERAL MBOMBO:** I would not be sure of

13 that, Chairperson.

14 **MR MPOFU:** Oh it was said that that is not

15 your complete answer. So from that answer then are you

16 saying that we have two options now on the table. One is

17 and settle the people say to them listen here you come out

18 one by one and leave your arms there, that is the one

19 option. Let us call it option 1. The second option is what

20 happened, you go there you put the TRT, you shoot them, 34

21 of them died. Do you agree that option 1 is better than

22 option 2?

23 **MR SEMENYA SC:** Chairperson, I do not know where

24 this takes us, there were no such options. Like we put

25 them there then the TRT shoots them.

1 **MR MPOFU:** Okay well I shall put it nicer.

2 Option 1 is you encircle them and tell them to abandon

3 their arms and go. The other option, whatever it is,

4 involves the risk which eventuated that 34 people would die

5 and they did die. That is option 2. Which one do you think

6 is better, option 1 or option 2?

7 **GENERAL MBOMBO:** Chairperson, all the

8 options that you are referring to now had their own risks.

9 **MR MPOFU:** General, I might even accept

10 that, yes. Maybe those people might have decided to stay

11 there and starve themselves to death. So I am prepared –

12 I am just saying that given these two options, which you

13 had, to say to the people come out one by one and leave

14 your arms. If you had those two options and the one that

15 had higher risk of death which eventuated which one was

16 riskier? Let us assume that they both had their risks,

17 which one do you think was riskier?

18 **GENERAL MBOMBO:** I would not be sure of

19 that, Mr Chairperson.

20 **MR MPOFU:** Well I put it to you that you

21 are lying now, General.

22 **CHAIRPERSON:** No, no, no, we have had this

23 before. As I reminded your colleague, Mr Ngalwana, while

24 he was still here, good counsel do not accuse witnesses

25 directly of lying. They say what you say isn't correct,

1 it is not acceptable, you are making a mistake, it is not
2 true, but good counsel don't accuse people of lying like
3 that. Please bear that in mind and I am sure the other
4 advocates here will also have to bear it in mind because
5 I am not going to allow it. I have not allowed it up to now,
6 I am not going to let you do it. But anyway I know what you
7 want to put, put it in a more restrained fashion. You will
8 get as effective an answer for your purposes as you would
9 if you put the way you have.

10 **MR MPOFU:** Yes, yes fine. I am prepared
11 to use a euphemism. I put it that what you are saying now,
12 that you do not know which one is riskier between my option
13 1 and option 2 is a blatant untruth. That is as friendly as
14 I can put it.

15 **GENERAL MBOMBO:** I think, Chairperson,
16 that is how you see it.

17 **MR MPOFU:** Thank you. And I put it to
18 you further that because you clearly foresaw that there was
19 an option which would result in less deaths and you
20 nevertheless proceeded to give an instruction for an option
21 which was much riskier and which did eventuate in death.
22 For that reason alone you and those people who are in that
23 position should be charged with murder.

24 **GENERAL MBOMBO:** I do not have a comment
25 there, Chairperson.

1 **MR MPOFU:** Finally in that regard I also
2 want to put to you that even in terms of the numbers, once
3 again if there was, I shall give you again two options. This
4 time let us go option C and option D. If there was an
5 option, let's now forget about the encirclement, let's say
6 now the only thing that you can do is the razor wire and
7 all that. Even if you eliminate there is possibility of
8 encirclement, if there was an option between carrying out
9 the operation, tactical stage 3, when there were the least
10 number of people at the hill and carrying it out, that is
11 option C. And carrying it out under option D when there
12 was the maximum number of people that the riskier option in
13 terms of resulting in death would be option D. The one
14 where there are much more people, would you go along with
15 that?

16 **GENERAL MBOMBO:** Any operation, Mr
17 Chairperson, any one depends very much on the person who is
18 there where the operation is taking place, who is in charge
19 of that operation. Your options, the two options that
20 you are referring to it would have depending on the person
21 who was there who would make a decision as to how he goes
22 about it.

23 **MR MPOFU:** Yes, General, that may well be
24 so, but that does not answer my question. I am saying to
25 you, you, General Mbombo, if you are faced with two options

1 which we have all accepted now that there were inherent risk
2 of deaths and so on and so on, we have gone past that. I am
3 saying if given all that you are now faced with, two
4 options of mounting that operation when there are a few
5 people and mounting it when there are three or four times
6 the number of people. Would you agree that of those
7 options the one that is likeliest to result in more deaths
8 is the one where there are more people at the place? Do
9 you agree?

10 **GENERAL MBOMBO:** I would not say totally
11 so, but according to your hypotheses it possibly could be
12 so.

13 **[12:48] MR MPOFU:** Okay, that is enough. Now, I am
14 saying that, armed with that knowledge, you and the other
15 decision makers elected to mount the operation at a time
16 when there was probably the highest number of people on
17 that mountain, which was the afternoon of the 16th and for
18 that reason you ought to have foreseen and you did foresee
19 that there was a higher risk of people dying and to the
20 extent that they did die, you are responsible for their
21 deaths and you should, for that reason alone, be arraigned
22 for murder.

23 **GENERAL MBOMBO:** I have already said, Mr
24 Chairperson, that to what is being put to me, I would not
25 have a comment or an explanation.

1 **MR MPOFU:** You do accept, do not you, that
2 had you not given the instruction for the operation to be
3 carried out on the 16th, on D-day, the 34 people who died
4 might still be alive?

5 **GENERAL MBOMBO:** I do not really
6 understand how you say this. I am not sure about it.

7 **MR MPOFU:** Okay, once again I think you
8 know exactly what I am saying. You are evading the question
9 but I shall ask it again. Do you accept, General Mbombo, or
10 do you not accept that had you not given the instruction
11 for the operation to be carried out on the 16th as you did,
12 that there is a high possibility that those 34 people would
13 be alive today?

14 **GENERAL MBOMBO:** My instruction, Mr
15 Chairperson, depended on the people who were responsible
16 for the operation as to how they were going to go about it.

17 **MR MPOFU:** Yes. No – sorry.

18 **GENERAL MBOMBO:** My instruction, Mr
19 Chairperson, was not that people should, that they should
20 go there to kill people.

21 **MR MPOFU:** Thank you, I accept both of
22 those statements but I am asking you something different,
23 whether you agree or accept that had you not given that
24 instruction for the operation to be carried out on the 16th
25 – in other words if you take it out of the equation, let's

1 say you were off sick or whatever, had you not given that
2 instruction, those people might possibly and there's a
3 great possibility that those 34 people who died would still
4 be alive today.

5 **GENERAL MBOMBO:** There is no evidence
6 that shows, Mr Chairperson, that had I not been there or
7 that the operation would have gone on, would not have been
8 conducted.

9 **MR MPOFU:** Fine, even that I am prepared
10 to accept for the purposes of progress, that somebody else
11 might have just rocked up and given the instruction but I am
12 now talking about what we know happened from the minutes,
13 from your evidence and so on. I am saying, not
14 hypothetically, if you on the 16th of August had not issued
15 that instruction, from everything that you know do you
16 accept that the 34 people would be alive today?

17 **GENERAL MBOMBO:** Maybe, Chairperson, it
18 becomes necessary that I explain the following. Even if
19 I had given that instruction, if the people were involved in
20 the operation would have had the reasons not to go on with
21 that operation, would have been able to do so, not to go on
22 with it.

23 **MR MPOFU:** Yes, but you are evading the
24 question, I am afraid, General. I am saying let's assume you
25 are correct once again that even if you gave the

1 instruction, someone might have had a discretion to deviate
2 from it. I questioned Brigadier Calitz a lot about that
3 discretion so for now let us assume you are correct, but I am
4 saying in respect of what actually happened, knowing that
5 they did not exercise that discretion, do you accept that
6 if you had not given the instruction the situation in which
7 they would exercise that discretion would not have even
8 arisen. Do you understand that?

9 **GENERAL MBOMBO:** I do not agree with
10 that, Mr Chairperson.

11 **MR MPOFU:** So you are saying that the
12 fact that you gave the instruction irrelevant, it did not
13 lead to the operation being carried out on the 16th?

14 **GENERAL MBOMBO:** I did not say that,
15 Chairperson.

16 **MR MPOFU:** Did your giving of that
17 instruction lead to the operation being carried out on the
18 16th?

19 **GENERAL MBOMBO:** Partly yes, but it
20 would, it could not have been forced onto the people.

21 **MR MPOFU:** That is fine. So you admit
22 that partly the reason why that operation was carried out
23 on the 16th was your instructions?

24 **GENERAL MBOMBO:** It was an instruction,
25 Chairperson, that the person in charge of the operation saw

1 fit that he could go on with the operation.

2 **MR MPOFU:** And you accept at the very

3 least that when you gave the instruction according to

4 exhibit EE and according to the evidence of Major-General

5 Annandale, you did not give all these qualifications that

6 you are giving now. You did not say listen here, General

7 Annandale, I am instructing you to move to stage 3 if you

8 and the other people see it fit, blah-blah-blah. You

9 simply said I am giving you an instruction to move to stage

10 3 now, correct?

11 **GENERAL MBOMBO:** As far as I know,

12 Chairperson - Chairperson we do not prescribe the

13 instruction, the police know that they have got to work

14 there in accordance to what the prescript allowed.

15 **MR MPOFU:** And because of that, you did

16 not qualify the instruction, you simply said they must move

17 on to stage 3, correct?

18 **GENERAL MBOMBO:** I was talking to

19 generals, Chairperson.

20 **MR MPOFU:** Yes, I know.

21 **CHAIRPERSON:** It is not as simple as that,

22 Provincial Commissioner, because if you look at the last

23 page of exhibit EE you will see that you are reported –

24 perhaps we could see that on the screen. Exhibit EE, last

25 page, heading “Closing remarks” second paragraph.

1 "Provincial Commissioner indicated that she had already
2 communicated with the National Commissioner informing her
3 of the current situation and that a deadlock was reached
4 with negotiations and also that phase 3 of the operational
5 plan will be executed. She also indicated that the
6 National Commissioner indicated that she will inform the
7 Minister of Police on the current situation and actions
8 that will be taken." So in the circumstances this does not
9 say anything about you said to the National Commissioner,
10 well, depending on the circumstances and how the
11 operational commanders sort of sense the situation, they
12 may or may not go on to execute phase 3 and the National
13 Commissioner did not then say, well, I shall tell the Minister
14 of Police that that is what may happen if the operational
15 commanders think it appropriate. And the way it is recorded
16 at the beginning of the minutes on the first page, if we
17 could see that please, what there appears is – second
18 paragraph, "The Provincial Commissioner instructed Major-
19 General Annandale to proceed with the implementation of
20 stage 3 of the operational plan." No question of if he
21 feels like it or thought it was appropriate or thought it
22 was wise. And before you answer let me tell you something
23 that Brigadier Calitz told us. Brigadier Calitz was asked,
24 was it a sensible thing to do? He was not involved in this
25 discussion, he was out in the field when this meeting was

1 held. He was asked, there were all these, about the risks,
2 why did not you say well, it is not sensible to proceed at
3 this stage, we must rather wait until tomorrow morning or
4 words to that effect. And his answer was, it wasn't open
5 to me, I could not do that. In fact, if I hadn't done it
6 and something serious had happened that night, I would have
7 been in trouble because I would have disobeyed the
8 instruction given by the Provincial Commissioner. That was
9 his evidence, as I recall it. Now in the light of that I
10 want you to think about what is been put to you by Mr Mpofu,
11 that you gave an unequivocal instruction. We'll take the
12 lunch adjournment and when we resume at about quarter to 2,
13 I hope that you will be in a position to give the answer to
14 Mr Mpofu.

15 **MR MPOFU:** Thank you, Chairperson.

16 **[COMMISSION ADJOURNS / COMMISSION RESUMES]**

17 **[13:53] CHAIRPERSON:** The Commission resumes.

18 You are still under oath, Provincial Commissioner.

19 **MIRRIAM NOSAZISO ZUKISWA MBOMBO:** s.u.o.

20 **CHAIRPERSON:** Before we adjourned I

21 reformulated the question Mr Mpofu had put to you. Are you

22 in a position to answer it?

23 **GENERAL MBOMBO:** That is so, Mr Chairperson.

24 Can I please explain this, Mr Chairperson? In all the instances

25 when I give instructions to the police I have never given

1 instructions where I had to explain what exactly an officer
2 had to do because I take it for granted I am giving
3 instructions to people who know what we are talking about.
4 In this statement what was mentioned by Brigadier Calitz
5 here, Brigadier Calitz was the one who was in a position to
6 give a better advice in order as to shape up this
7 instruction, how it should be done. That is the way, Mr
8 Chairperson, I always function.

9 **CHAIRPERSON:** Is that your answer?

10 **GENERAL MBOMBO:** That is so.

11 **CHAIRPERSON:** Thank you. Mr Mpofu.

12 **CROSS-EXAMINATION BY MR MPOFU (CONTD.):**

13 Thank you, Chairperson. Let me just, I shall try, just as the
14 Chairperson did before lunch, to paraphrase without quoting
15 directly what Brigadier Calitz's evidence was in this
16 regard. I questioned him quite extensively as to the
17 extent of his discretion in the large scheme of things. He
18 certainly indicated that he could not have changed – when
19 somebody like you had said that the operation must happen
20 today and somebody like Annandale had said it must happen
21 at half past 3, that to that extent there would have had to
22 be a very big reason for him to deviate because when the
23 two seniors have declared, one you and the other one
24 Annandale, you dictated the day, as it were, and Annandale
25 dictated the time, 15:30, that unless if there were serious

1 reasons he would not be able to deviate from those. Do you
2 accept that as a general state of affairs?

3 **GENERAL MBOMBO:** I agree with that if he
4 has reasons, but another thing that is important, whoever
5 gave instructions in that operation was dependent on him
6 whether it was possible to carry out that instruction.

7 **MR MPOFU:** Yes, General, I really want us
8 to be clear on this. For the purposes of this discussion
9 I am accepting that there was some level of discretion among
10 many people going down the line. The only point I wanted
11 to make is that all that was triggered by your instruction
12 – that is all, I am just saying the whole episode, if you can
13 just accept that the whole episode was triggered by your
14 instruction, add to the fact that in it carrying out your
15 instruction people may have exercised discretion here and
16 there, I am prepared to accept that. I don't think that you
17 could have said, you know, drive the Nyala to the right and
18 then when this happens – you could not, I am not saying that.

19 All I am saying is that given those limited amounts of
20 discretion that people had down the line, but nevertheless
21 that the unleashing of the operation was triggered by your
22 instruction. Do you accept that much?

23 **GENERAL MBOMBO:** I already said, Mr
24 Chairperson, I agree with that to a certain extent.

25 **MR MPOFU:** Okay, that is good enough. And

1 do you also accept, just to give an example that at some
2 stage you were minded to give an instruction for the
3 operation to be done on the 15th. Remember that?

4 **GENERAL MBOMBO:** Already on the 14th, Mr
5 Chairperson, I indicated that I would have loved for it to happen
6 on the 15th.

7 **MR MPOFU:** And for some good reason or
8 another you did not issue that instruction, correct?

9 **GENERAL MBOMBO:** I issued it on the 14th
10 in the afternoon.

11 **MR MPOFU:** That the operation must happen
12 on the 15th?

13 **GENERAL MBOMBO:** I testified, Mr Chairperson,
14 here that on the 14th, the afternoon of the 14th after I have
15 learned of the body that was found on the hill, when I
16 was on the way to a meeting in Midrand I phoned Generals
17 Mpembe and Annandale and I told them that we are supposed to
18 proceed with the operation the next day, tomorrow. But
19 because of certain reasons that they had, or that they saw,
20 it did not proceed. They told me about it and I agreed
21 with them.

22 **CHAIRPERSON:** Wasn't the reason that
23 arrangements had been made in the meanwhile for the
24 presidents of the two trade unions to come and address the
25 strikers and try to persuade them to lay down their arms?

1 **GENERAL MBOMBO:** Those were some of the
2 reasons, Mr Chairperson, that these two people come and talk to
3 the workers and the police and we should all find a way in
4 solving this problem.

5 **MR MPOFU:** Thank you. And was another
6 reason the fact that some of the personnel, or as you call
7 them resources had not yet sufficiently arrived?

8 **GENERAL MBOMBO:** They also mentioned
9 that, Mr Chairperson.

10 **MR MPOFU:** Yes, and there may well have
11 been other reasons, but at least those two reasons were
12 paramount. Now the point that I simply wanted to make is
13 that the discussion, or rather when they saw a reason or
14 reasons – which we have now gone into – for not carrying
15 out that instruction, they reverted back to you to convince
16 you to alter that instruction, to which you agreed. Is
17 that correct?

18 **GENERAL MBOMBO:** That is what General
19 Mpmembe did, Mr Chairperson.

20 **MR MPOFU:** Yes, and that is the point I am
21 making, that they could not have just willy-nilly decided
22 well, you know, we don't know what is wrong with this
23 Provincial Commissioner, we are just going to do it on
24 Thursday. Once you had given that instruction they had a
25 duty to come back to you as to its alteration.

1 **GENERAL MBOMBO:** They could have done

2 that on the 16th as well, Mr Chairperson.

3 **MR MPOFU:** Yes, well, but we know that on

4 the 16th – well, let's pursue one of the reasons why you

5 did not proceed on the 15th. It was because there was a

6 possibility that the union leaders might avert the problem

7 through negotiation, correct?

8 **GENERAL MBOMBO:** That is so, Mr Chairperson.

9 **MR MPOFU:** And we now know that on the

10 16th when you gave that instruction, that possibility was

11 still there, correct?

12 **GENERAL MBOMBO:** That is not how I knew

13 it at that time.

14 **MR MPOFU:** No, General, you knew it very

15 well. Mr Mathunjwa said to you – you asked Mr Mathunjwa,

16 "Why have you not honoured your undertaking to persuade the

17 people," or words to that effect, correct?

18 **GENERAL MBOMBO:** That is so, Mr Chairperson.

19 **MR MPOFU:** And he said to you very

20 clearly that he has been trying. The only missing link is

21 that management is not prepared to cooperate with him and

22 to engage in negotiations with the strikers. He told you

23 that.

24 **GENERAL MBOMBO:** He mentioned that, but

25 the way I knew it and the way I was told, I did not know

1 that his promise depended on the management.

2 **MR MPOFU:** Yes, let's assume you did not

3 know it up to that stage, but now he is telling you, he

4 says, "The reason that I have not delivered on my side is

5 because management has failed to play along, as it were, or

6 to do its part." So now you know.

7 **GENERAL MBOMBO:** I understand it, Mr

8 Chairperson.

9 **MR MPOFU:** And despite that knowledge,

10 firstly that should have told you one of two things, or

11 both - that the effort has not been yet finally aborted,

12 (1); the second thing that it should have told you is that

13 should management be persuaded to do its part, then the

14 danger might be averted, correct?

15 **GENERAL MBOMBO:** I will not be sure about

16 those details, Mr Chairperson, because I did not know what his

17 discussions were with the management.

18 **MR MPOFU:** No, but General, I have just

19 told you he reported their discussions with you, so you

20 knew now. He told you that they are refusing, so what do

21 you mean you did not know?

22 **GENERAL MBOMBO:** No, according to me he

23 said they delayed him, the managers of Lonmin delayed him.

24 He did not say they were refusing.

25 **CHAIRPERSON:** While Mr Mpofu is looking

1 at his notes to see what his next point is, I want to put
2 something to you. What would you say to the proposition
3 that the commander's ability to say we're not going to
4 proceed with the operation today for various reasons would
5 have been made more difficult to sustain in view of the
6 fact that you had announced to the world at 9:30 that
7 morning that the matter was going to be dealt with that
8 day?

9 **GENERAL MBOMBO:** Mr Chairperson, I do not think
10 that would have been a reason for them to think that we
11 would not proceed because if I later had to tell the world
12 again that because of these reasons we did not proceed, I
13 would have done that.

14 **MR MPOFU:** But you must admit that the
15 fact that the commanders, or the generals, or let's say the
16 commanders because some of them were not generals, knew
17 that you had taken the trouble specifically to convene a
18 media conference to tell the world that "This matter will
19 be ended today," must have influenced their decision as to
20 the seriousness that today was D-day, as indeed Adriano said
21 after your media conference.

22 **GENERAL MBOMBO:** According to me it was
23 not D-day, and my generals would have taken the opportunity
24 to ask me questions or advise me if they thought it was not
25 suitable to proceed.

1 **MR MPOFU:** Yes, General – I am sorry,

2 Chairperson.

3 **CHAIRPERSON:** Did you know that Captain

4 Adriano had told the press that “Today was D-day” after your

5 media conference?

6 **GENERAL MBOMBO:** At that time of the 16th,

7 Mr Chairperson, I did not know. I heard about that the 17th or

8 later.

9 **CHAIRPERSON:** If you had known on the 16th

10 that that is what Captain Adriano would have said, had said,

11 would you have said to him look here, you’d better change

12 that, you had better tell the people that it may be D-day,

13 that we may be acting, but we may not, depending on

14 particular circumstances? Would you have said that to him?

15 **GENERAL MBOMBO:** That is exactly what I

16 would have said, Mr Chairperson, that you cannot put it that way,

17 as I know the way in which we function.

18 **MR MPOFU:** Well, firstly Captain Adriano

19 was not the only one to have perceived the situation as the

20 16th was D-day, as indicated by the notes of the meeting,

21 the first meeting on the 16th. Would you agree with that?

22 **GENERAL MBOMBO:** I see the notes, Mr

23 Chairperson.

24 **MR MPOFU:** Yes, and secondly, just to put

25 the Chairperson’s question in perspective, would you at

1 least accept that had you not called the press conference
2 and said what you said there, it is unlikely that Captain
3 Adriano would have said to the media "Today is D-day"? In
4 other words that statement was directly linked to your
5 announcement.

6 **GENERAL MBOMBO:** It is maybe for him to
7 say so, Mr Chairperson. I am not sure whether what he said was
8 linked to my statement.

9 **MR MPOFU:** So you are telling the
10 Commission that Captain Adriano could have, without you
11 having called a press conference, without you having made
12 any announcement, just went around saying, "Today is D-
13 day"?

14 **GENERAL MBOMBO:** That is why I say he is
15 the one to explain that. I cannot be sure that he was
16 influenced by my statement. It is for him to say so.

17 **MR MPOFU:** Okay. Now I think you have
18 accepted that the events were at the very least triggered
19 by your instruction, if I am correct. I do not want to
20 attribute to you something that you have not admitted to.
21 Correct?

22 **GENERAL MBOMBO:** I said to a certain
23 extent, yes.

24 **MR MPOFU:** That is fine. Do you also
25 accept that the deaths on the 13th of the five people there

1 were also traceable to the instruction that you gave on
2 that day?

3 **[14:12] GENERAL MBOMBO:** I agree to that because
4 I have an OB entry saying the work should be done in that
5 way but again there, Mr Chairperson, that depended on the person
6 who had to do the job. He will weigh the situation, see
7 what he is supposed to do.

8 **MR MPOFU:** Yes. Okay, I do not want us to
9 go through this again but the point is that that person
10 would not even be there to exercise that discretion if you
11 had not issued the instruction, correct?

12 **GENERAL MBOMBO:** We cannot be sure about
13 that, Mr Chairperson, if he could have been seen by someone else
14 other than me.

15 **MR MPOFU:** Yes, but we are not
16 speculating here, General, we are talking about things that
17 actually happened. Is it correct that what actually
18 happened is that Mr Sinclair pointed out the people to you
19 and others and you gave an instruction that Major-General
20 Mpembe and others should go there – in actual fact, not if
21 and wherefore.

22 **GENERAL MBOMBO:** Mr Chairperson, I said so but
23 to answer the question I am saying if I was not there for
24 instance and General Mpembe saw that situation, he would
25 not have gone there without me telling him to.

1 **MR MPOFU:** Yes, but he might have not gone

2 there as well, correct?

3 **GENERAL MBOMBO:** We are not sure about

4 that.

5 **MR MPOFU:** And in actual fact the reason

6 he went there was not necessarily because of what he saw

7 but it was because of your instruction for him to do so.

8 **GENERAL MBOMBO:** Firstly, my instruction

9 was not that he himself should go there personally. Anyone

10 delegated by him would have went there but to go back to

11 your question, yes, he went there according to the

12 instruction.

13 **MR MPOFU:** Thank you very much. And once

14 again just in relation to the question that the Chairperson

15 asked you before lunch, on that occasion as well you gave

16 an unequivocal instruction, correct?

17 **GENERAL MBOMBO:** I made an OB entry as I

18 made it.

19 **MR MPOFU:** Now, okay, I am looking for

20 something, maybe I shall find it during the comfort break so

21 we shall come back to that point about whether or not Mr

22 Mathunjwa said to you or told you what management, that

23 management was refusing to co-operate with him, but without

24 apportioning any blame on any specific person, would you

25 accept that the miscommunication – let's call it that

1 generously – the miscommunication as to whether or not the
2 Mathunjwa effort was completely aborted and had failed or
3 whether it was still on-going, that miscommunication or
4 confusion, whoever is to blame for it, was directly
5 connected to the instruction to move to tactical phase 3
6 whilst that effort was on-going.

7 **GENERAL MBOMBO:** I can say so, Mr Chairperson,
8 because I just took what I was told by General Mpembe.

9 **MR MPOFU:** And that what – or let me put
10 it that way, that SAPS in general is to blame for that
11 miscommunication, correct?

12 **GENERAL MBOMBO:** I am not sure about
13 that, Mr Chairperson.

14 **MR MPOFU:** Come on, General. If we have
15 a situation where General Mpembe tells you that it is all
16 over with the Mathunjwa effort and at the same time as you
17 were shown on the TV screen or rather on the screen,
18 Brigadier Calitz is saying to the media, well, we are going
19 to wait for Mathunjwa to come back and he was coy as to
20 whether in the meantime they were going to move in,
21 whatever that means, or not, now if that situation
22 obtained, a few hundred metres Mpembe telling you the
23 Mathunjwa effort is done, a few hundred metres on the other
24 side Calitz is telling the media that he is going to wait
25 for Mathunjwa, that miscommunication must be blamed on

1 SAPS, surely.

2 **GENERAL MBOMBO:** I think there could be

3 truth in the way you put it.

4 **MR MPOFU:** Thank you.

5 **CHAIRPERSON:** [*Microphone off, inaudible*]

6 there wasn't a causal connection, as I understand the

7 evidence, between the miscommunication as you call it and

8 the commencement of the implementation of the tactical

9 option because as a fact the tactical option was not

10 implemented until after Mr Mathunjwa had come back, spoke

11 to the people and then left without reporting success. In

12 fact, the implementation which was supposed to start at

13 3:30 was delayed until after Mr Mathunjwa had finished. So

14 as you say, Calitz said we are not going to do anything

15 until after Mathunjwa comes back, by implication, and they

16 did not do anything until after Mathunjwa not only came

17 back, address the people with all the eloquence at his

18 command, endeavouring to persuade them to leave the hill

19 and only after he left without reporting success did the

20 roll-out of the barbed wire begin. So it does seem prima

21 facie, obviously subject to what argument we may hear later

22 or evidence we may get later but prima facie it does look

23 as if there wasn't a causal connection between the

24 miscommunication and the actual implementation of the

25 tactical option, isn't that correct?

1 **MR MPOFU:** General, do you accept that
2 had what the Chairperson is saying, had it happened, then
3 the knowledge that Mr Mathunjwa's effort had failed would
4 have been gained at about quarter to four on the 16th of
5 August?

6 **GENERAL MBOMBO:** I do not –

7 **MR MPOFU:** Do you accept – we know from
8 the evidence, we know from the evidence that Mr Mathunjwa
9 departed from the hill at about 20 to four, 15:40, that
10 is from exhibit L. Now do you accept that if the operation
11 had been withheld, as it should have been, until such time
12 that it was clear that the Mathunjwa effort was
13 unsuccessful, that knowledge would only have been gained at
14 around quarter to four on the 16th of August after his
15 second visit?

16 **GENERAL MBOMBO:** I think so and I think
17 that is how it was obtained.

18 **MR MPOFU:** And that if that had happened,
19 then even if at that time it was then accepted that the
20 Mathunjwa effort had failed, it would be humanly impossible
21 to have carried out the operation on the 16th seeing that,
22 according to Annandale, it should have been carried out at
23 about half past three.

24 **GENERAL MBOMBO:** I don't understand what
25 you mean it would have been impossible.

1 **MR MPOFU:** Alright, we shall do it bit by

2 bit. If Mathunjwa had –

3 **CHAIRPERSON:** I am sorry. The evidence

4 was from General Annandale, that he fixed half past three

5 as a time because it was still winter, it was the middle of

6 August and he anticipated the sun would be going down

7 sometime round about half past four, five o'clock it would

8 be – shadows would be lengthening and so on. So if they

9 had delayed it much later than the time he fixed, it would

10 not have been practically possible to have implemented the

11 tactical option because of the lateness of the afternoon

12 and the problem with failing light and so forth. That was

13 his evidence and that is the point Mr Mpofu is putting to

14 you.

15 **GENERAL MBOMBO:** I think that if that was

16 the case, Mr Chairperson, then that would have been the case

17 really.

18 **MR MPOFU:** Thank you, yes. It would have

19 been too late.

20 **CHAIRPERSON:** There is another aspect and

21 that is that if you had given a conditional instruction,

22 implement the tactical option if Mathunjwa fails to

23 persuade them to lay down their arms, when he comes back,

24 then of course this point wouldn't apply, would it?

25 **GENERAL MBOMBO:** I do not get the

1 question clearly, Mr Chairperson?

2 **CHAIRPERSON:** If you'd given a

3 conditional – you, according to what we can see in the

4 occurrence book and in the minutes of the meeting, the 1:30

5 meeting, you gave an unconditional instruction that the

6 tactical option should be implemented. If you had given a

7 conditional instruction, if your instruction had been

8 implement the tactical option but only if Mathunjwa fails

9 after he returns for the second, he goes back there for the

10 second time to persuade the strikers to lay down their

11 arms, then the point that Mr Mpofo has just put to you

12 would fall away.

13 **GENERAL MBOMBO:** I hear what you say, Mr

14 Chairperson, that is correct.

15 **MR MPOFU:** But in actual fact we know

16 that your instruction, we know that your instruction to

17 Annandale, sorry, to Major-General Annandale to proceed

18 with the operation was linked directly to the supposed

19 failure of the Mathunjwa effort, correct?

20 **GENERAL MBOMBO:** As it was reported to

21 me, yes Mr Chairperson.

22 **MR MPOFU:** In fact, in the meeting which

23 is on exhibit EE, that decision is premised on three

24 untruths, shall we call them. If you go to EE, the front

25 of EE. In motivating the decision or in what preceded the

1 decision is very telling. If you look under the heading
2 "Purpose of the meeting," if you look under the "Purpose of
3 the meeting" which I suppose is the most important part,
4 the first thing there is that, "The Provincial
5 Commissioner, Lieutenant-General Mbombo, informed the
6 meeting that she was involved in meetings with the
7 leadership of AMCU, namely Mr Joseph Mathunjwa, to resolve
8 the current situation for the whole morning." We now know
9 that is false, correct?

10 **GENERAL MBOMBO:** Yes.

11 **MR MPOFU:** The second one, it says "Mr
12 Mathunjwa was supposed to indicate at nine whether the
13 protesters on the hill were prepared to lay down their
14 weapons." I shall give you the benefit of the doubt on that
15 one. The third one says, "Mr Mathunjwa failed to provide
16 feedback as agreed." That's also false.

17 **GENERAL MBOMBO:** As I said earlier on, Mr
18 Chairperson, these minutes are not recorded exactly as I said.

19 **MR MPOFU:** And then after those
20 falsities, then the punch line comes, "The Provincial
21 Commissioner instructed Major-General Annandale to proceed
22 with the implementation of stage 3 of the operational
23 plan." So what I am saying to you is that from a reading of
24 these minutes that punch line which I have just read to you
25 was directly linked to the supposed, but wrong, failure of

1 the Mathunjwa effort.

2 **GENERAL MBOMBO:** That is so, Mr Chairperson.

3 **MR MPOFU:** Thank you.

4 **CHAIRPERSON:** What time did you – those

5 minutes, we looked at them earlier when I asked you a

6 question about them. At the end of those minutes it is said

7 that you had stated that you had already communicated with

8 the National Commissioner informing her of the current

9 situation, that a deadlock was reached with negotiations

10 and that phase 3 of the operational plan will be executed.”

11 What time was that conversation with the National

12 Commissioner when you told her that?

13 **GENERAL MBOMBO:** It is, if I am not

14 mistaken, after I had spoken to General Mpmembe.

15 **CHAIRPERSON:** What time was that? We’ve

16 got your telephone records, perhaps we can identify the

17 time of the phone call.

18 **GENERAL MBOMBO:** I do not remember

19 clearly, Mr Chairperson. Well, I told her round about 11, 11,

20 that Mr Mathunjwa had left for the hill. I do not

21 remember exactly the time. These minutes were supposed to

22 read, Mr Chairperson, that I told the National Commissioner that

23 if Mr Mathunjwa’s promise does not materialise, I said to

24 her we will, we are ready to implement stage 3.

25 **CHAIRPERSON:** Is that what you told us

1 previously when you spoke about these minutes and the
2 inaccuracy of that paragraph? Did you in fact talk about
3 the inaccuracy of that paragraph? I remember you gave
4 evidence to the effect that this paragraph we're looking at
5 now on the first page was incorrect, the paragraph headed
6 "Purpose of the meeting," but I must confess I don't
7 remember your having stated that the paragraph at the end
8 that I just read to you was inaccurate. That's something
9 you have just mentioned now. Have you ever raised it any
10 stage before?

11 **GENERAL MBOMBO:** Mr Chairperson, I indicated
12 earlier on that the minutes are not written as I have said.
13 **[14:32]** I did not specify the details where they
14 contacted, is what I said. What I did mention was the
15 paragraph in the closing remarks, that what is said in the
16 closing remarks paragraph is not supposed to be there
17 because I had already left when the meeting closed.

18 **CHAIRPERSON:** You did tell the -

19 **GENERAL MBOMBO:** And I -

20 **CHAIRPERSON:** Sorry, sorry.

21 **GENERAL MBOMBO:** - corrected that part
22 again where I said it is possible that the National
23 Commissioner is telling the Minister about it.

24 **CHAIRPERSON:** Did you tell the meeting,
25 the 1:30 meeting, that you had already communicated with

1 the National Commissioner, informing her of the current
2 situation, that a deadlock was reached, and did you mention
3 the execution of phase 3 of the operational plan? Did you
4 mention all that at the meeting, at the 1:30 meeting?

5 **GENERAL MBOMBO:** I think I did, Mr Chairperson.

6 **CHAIRPERSON:** And did you indicate that
7 the National Commissioner indicated that she would inform
8 the Minister of Police on the current situation and the
9 actions that will be taken?

10 **GENERAL MBOMBO:** That is a part I
11 corrected, Mr Chairperson, that I said I think she is talking to
12 the Minister, telling the Minister about it.

13 **CHAIRPERSON:** Yes. So you did talk
14 about, you did mention at the 1:30 meeting that the
15 National Commissioner would talk, or probably talk to the
16 Minister of Police about the matter? You did mention that?

17 **GENERAL MBOMBO:** I mentioned it, Mr
18 Chairperson, but I want to correct this; she should be telling
19 the Minister about the progress.

20 **CHAIRPERSON:** Yes, now the point I am
21 making is that if those topics were discussed by you at the
22 1:30 meeting, it may be that they are wrongly reflected in
23 the last paragraph under closing remarks, but that would
24 simply mean that they're in the wrong place in the minutes,
25 but if you had said something along those lines at the

1 meeting then they would be in the minutes somewhere. That

2 must be right?

3 **GENERAL MBOMBO:** I agree with you, Mr

4 Chairperson.

5 **CHAIRPERSON:** Alright, now in the

6 statement that you made, either of the statements you made,

7 did you mention that, what was wrong with this particular

8 paragraph of the minutes? Did you mention that what the

9 minutes should have said was that you had said to the

10 National Commissioner that phase 3 would be executed if and

11 only if Mr Mathunjwa was unable to persuade the strikers to

12 lay down their arms?

13 **GENERAL MBOMBO:** I do not think I said

14 so, Mr Chairperson.

15 **CHAIRPERSON:** So you don't think you said

16 so?

17 **GENERAL MBOMBO:** I don't think I said

18 so –

19 **CHAIRPERSON:** So why did not you –

20 **GENERAL MBOMBO:** - because my objective

21 was for us to correct the minutes, but we did not proceed

22 with that because there was never another meeting of this

23 nature.

24 **CHAIRPERSON:** I am asking you something

25 else. In the statements that you made for this Commission,

1 the first one is exhibit GGG5 and the second is exhibit
2 LLL1, did you in either of those statements mention the
3 fact that the minutes were incorrect in this respect and
4 that you had not told the Provincial Commissioner – sorry,
5 you had not told the National Commissioner as the minutes
6 indicated, that phase 3 of the operational plan would be
7 executed without the additional condition which you have now
8 said you mentioned when you spoke to her?

9 **GENERAL MBOMBO:** I did not include that,
10 Mr Chairperson.

11 **CHAIRPERSON:** Now we have another
12 difficulty here, and that is according to the exhibit of
13 the phone calls which has been handed in, we can't find the
14 telephone call that you made – it is exhibit KKK4. Now it
15 may be that it is somewhere there and we haven't noticed it,
16 but we can't find it. Mr Budlender, are you able to assist
17 us in this regard?

18 **MR BUDLENDER SC:** Sir, I have also just
19 been looking at KKK4. It is not there, but it might – I
20 just want to be sure that it is not on LLL3, which are the
21 witness's own phone calls.

22 **COMMISSIONER HEMRAJ:** Yes, but the two
23 text messages are reflected –

24 **MR BUDLENDER SC:** Yes –

25 **COMMISSIONER HEMRAJ:** - so it is unlikely

1 that –

2 **MR BUDLENDER SC:** It should be there.

3 **COMMISSIONER HEMRAJ:** Yes.

4 **MR BUDLENDER SC:** But I just want to be

5 sure that it isn't before saying that it isn't. It is not

6 on the KKK4.

7 **CHAIRPERSON:** So it is possible that you

8 spoke on someone else's telephone, I suppose, but can you

9 explain that to us?

10 **GENERAL MBOMBO:** Mr Chairperson, that is

11 possible, but I did speak to the National Commissioner.

12 **CHAIRPERSON:** You see, what is important

13 is to know at what time you made that report or

14 communication to the National Commissioner, and that is why

15 I am interested in it. Now this communication to the

16 National Commissioner that you are talking about here where

17 you say you communicated, or you are reported as having

18 said that you had already communicated with the National

19 Commissioner before going to the 1:30 meeting, informing

20 her of the current situation that a deadlock was reached

21 with negotiations and that phase 3 of the operational plan

22 would be executed, was that a telephone conversation or was

23 that an SMS you sent her?

24 **GENERAL MBOMBO:** I am not sure, Mr Chairperson,

25 but I will look at my records.

1 **CHAIRPERSON:** You can't help me at the
2 moment, but you say you'll look at your records and you'll
3 come back, report –

4 **GENERAL MBOMBO:** That is correct.

5 **CHAIRPERSON:** Thank you very much.

6 **MR MPOFU:** Yes, thank you –

7 **COMMISSIONER HEMRAJ:** Have you found the
8 calls, Mr Budlender?

9 **MR BUDLENDER SC:** I have looked on LLL3 and
10 I don't find a call before the JOCCOM meeting of 1:30.

11 **COMMISSIONER HEMRAJ:** Yes, there are two
12 text messages at around –

13 **MR BUDLENDER SC:** There's a text
14 message -

15 **COMMISSIONER HEMRAJ:** - 32.

16 **MR BUDLENDER SC:** There's a text message
17 coming in and going out, as it were. In fact two text
18 messages, that is quite correct, but that is all.

19 **CHAIRPERSON:** Are they both messages sent
20 by the witness to General Phiyega, the National
21 Commissioner? Because you see –

22 **MR BUDLENDER SC:** Yes, Chairperson, just a few
23 seconds apart.

24 **CHAIRPERSON:** You see, what occurs to me
25 is that she does say, having made the communication, having

1 mentioned the communication with the National Commissioner,
2 which of course could have been sent by SMS, she then says
3 she also – that is the witness – also indicated according to
4 the minutes that the National Commissioner indicated she
5 would inform the Minister of the current situation and
6 actions will be taken. Now she obviously couldn't have
7 known that unless the National Commissioner had SMSd her
8 back, or telephoned her back, and said that. So if these
9 communications were effected by SMS then you need two SMSs,
10 one from the witness to the National Commissioner and the
11 other one the other way around.

12 **MR BUDLENDER SC:** That's one in each
13 direction.

14 **CHAIRPERSON:** Yes.

15 **MR BUDLENDER SC:** These appear to be two
16 SMSs from General Mbombo to General Phiyega, a few seconds
17 apart.

18 **GENERAL MBOMBO:** Mr Chairperson –

19 **CHAIRPERSON:** So anyway, she raised her
20 hand and turned her microphone on, so it may be she's got
21 some important information for us. Yes, Provincial
22 Commissioner?

23 **GENERAL MBOMBO:** I am trying to correct
24 the last sentence in that paragraph, Mr Chairperson. I am the
25 one who said, Mr Chairperson, the National Commissioner is

1 probably informing the Minister, not that she said she will
2 inform the Minister.

3 **MR SEMENYA SC:** Chairperson, can I refer us to
4 the evidence of the witness on page, day 178, page 21379.
5 She's repeating exactly what she said around this matter,
6 from line 20.

7 **CHAIRPERSON:** I am sorry, what page?

8 **MR SEMENYA SC:** 21379.

9 **CHAIRPERSON:** 21379, what day?

10 **MR SEMENYA SC:** Day 178.

11 **CHAIRPERSON:** Alright, let's look at
12 that.

13 **MR SEMENYA SC:** Line 20.

14 **CHAIRPERSON:** Yes, your question is from
15 line 3 onwards. What is the answer? We haven't got that on
16 the screen. So in other words what you were saying is that
17 you told the National Commissioner and you believed that
18 she would give the information to the Minister. So in
19 other words we don't have to find two SMSs, one from you
20 to the National Commissioner telling her what you say here,
21 and another one from her to you telling you she's going to
22 speak to the Minister, because that is not what you in fact
23 conveyed to the meeting. It was merely your belief, or
24 your supposition I suppose, that this would in turn be
25 conveyed by the National Commissioner to the Minister. So

1 we don't need to look for a communication from the National
2 Commissioner addressed to you, indicating that the National
3 Commissioner had said she was going to inform the Minister,
4 because as you say here, you merely said you thought or
5 assumed or believed that that is what she'd do. Is that
6 right?

7 **GENERAL MBOMBO:** That is correct.

8 **CHAIRPERSON:** Alright, that then seems to
9 solve the mystery, because that then means that we have a
10 communication, we have two communications in fact by SMS
11 from you to the National Commissioner and they were at
12 10:35 in the morning. So that was shortly after you media
13 conference when you told the world that the matter was
14 going to be dealt with that day, and long before you had
15 any feedback one way or another from Mr Mathunjwa. You
16 did not even know, I mean Mr Mathunjwa had in fact not yet
17 gone to the hill at that stage.

18 **GENERAL MBOMBO:** Yes.

19 **CHAIRPERSON:** So I think that appears to
20 be cleared up. Would you accept that?

21 **GENERAL MBOMBO:** I agree, Mr Chairperson.

22 **CHAIRPERSON:** Mr Mpofu, I am sorry I have
23 taken over some of your cross-examination. I am sure you'll
24 forgive me.

25 **MR MPOFU:** No, thank you, Chairperson. I

1 forgive you, but unfortunately, unlike you I am not
2 satisfied with that answer. I am going to argue, General,
3 that your evidence –

4 **CHAIRPERSON:** Mr Mpofu, let's be careful

5 about this. The fact that I say – I am not saying I am
6 satisfied; I am not saying I am not satisfied.

7 **MR MPOFU:** Yes.

8 **CHAIRPERSON:** I try – not always with

9 success – to keep a poker face –

10 **MR MPOFU:** Yes.

11 **CHAIRPERSON:** - so that people don't know

12 whether I am satisfied or not.

13 **MR MPOFU:** Yes.

14 **CHAIRPERSON:** Don't assume that merely –

15 although I may be satisfied with this answer, but don't

16 assume as a general rule it is a fact I am like Brer Rabbit

17 and I say nothing, that I am necessarily am satisfied with

18 everything I hear here, because I am not always satisfied

19 with everything I hear.

20 **MR MPOFU:** Yes. No, thank you,

21 Chairperson. No, I thought you said so – I was not

22 assuming – I thought you said you are satisfied. I am happy

23 if you are not satisfied, Chairperson. And I am not

24 satisfied, and I am going to argue that your answers in this

25 regard are untruthful and I shall tell you now, why. First of

1 all, I asked General Annandale, I asked him specifically –

2 I can't find the reference now – Chairperson, sorry, I

3 can't find the reference now, but I shall find it. I

4 specifically asked General Annandale, who took these notes,

5 or rather who was chairing the meeting, whether that

6 paragraph reflected what you said at the meeting and he

7 said it did. Do you understand that?

8 **GENERAL MBOMBO:** I hear what you say.

9 **MR MPOFU:** Secondly - so for that reason,

10 sorry, just to round off that point, for that reason I am

11 going to argue that your ex post facto clarifications are

12 just meant to mislead the Commission into believing that

13 that conversation with the National Commissioner did not

14 take place as reflected in EE, when it did according to

15 Annandale.

16 **MR SEMENYA SC:** Chairperson, in fairness, can

17 Mr Mpofo give us that reference so that the witness is –

18 **MR MPOFU:** I just said I would –

19 **CHAIRPERSON:** What he is looking for,

20 insofar as what I said indicated satisfaction, I must tell

21 you, I'd like to get back to the satisfaction issue because

22 it is important. I don't know whether I am satisfied or not

23 because it will depend upon evidence that may come out or

24 an argument at the end. It is an answer which may be

25 correct, may not be correct. I don't know yet. But what I

1 am satisfied about prima facie at this stage is what I
2 originally thought was the case that we had to look for
3 two-way communication, either a telephone conversation or
4 SMSs both ways. That problem appears to be solved on what
5 the witness now tells us that she communicated to the
6 National Commissioner. She may well have done so by SMS,
7 and the National Commissioner did not come back to her and
8 say I am going to tell the Minister. So that is what she
9 assumed or believed would happen. That was the bit which
10 prima facie appears to be in accord with the telephone
11 records that we have. Okay, now –

12 **MR MPOFU:** Thank you, Chairperson.

13 **CHAIRPERSON:** Alright.

14 **MR MPOFU:** I am going to solve that
15 mystery as well, but for now I am simply saying that the
16 fact that General Annandale – and I take Mr Semanya's
17 point, I will have to find the –

18 **CHAIRPERSON:** I see that attempts are
19 being made by those assisting you to find the –

20 **MR MPOFU:** Frantically, yes.

21 **CHAIRPERSON:** - find the –

22 **MR MPOFU:** But I am – yes –

23 **CHAIRPERSON:** You may not by the close –

24 **MR MPOFU:** Somehow I think –

25 **CHAIRPERSON:** - by the close of business

1 today, so if you are still cross-examining tomorrow you'll

2 be able to give it to Mr Semanya then.

3 **MR MPOFU:** No, that is highly unlikely,

4 Chairperson. But in the unlikely event that I am still

5 cross-examining tomorrow, then I think even after the tea

6 break, between my attorney and Ms Pillay we shall find it.

7 But let's just say this; okay, so let's – the Annandale

8 issue, let's put it on ice. We'll find the reference.

9 Let's just resolve the Chairperson's mystery about when the

10 communication may or may not have happened. I will show

11 you that, that communication I will show you must have

12 happened by telephone and just to be as broad as possible,

13 at any time between 12 noon and 1:30 on the 16th. What do

14 you say to that?

15 **GENERAL MBOMBO:** I cannot be sure as to

16 exactly when it happened.

17 **MR MPOFU:** Chairperson, I have just fixed a

18 time – I could see that you were –

19 **CHAIRPERSON:** Yes, I am grateful to you.

20 I was actually asking Adv. Hemraj about another aspect of

21 the same point.

22 **MR MPOFU:** Yes.

23 **CHAIRPERSON:** But, which I shall share with

24 you so you can help us too.

25 **MR MPOFU:** Yes, thank you, Chairperson.

1 **CHAIRPERSON:** My recollection is that the
2 National Commissioner in her evidence dealt with having
3 received a report from this witness, communication with
4 this witness.

5 **MR MPOFU:** That's where I am going.

6 **CHAIRPERSON:** And then there was a bit of
7 difficulty about whether she then passed it on to the
8 Minister and there were various drafts of her statement
9 which Mr Burger went through in great detail, and I then
10 dealt with as well.

11 **MR MPOFU:** I dealt with –

12 **CHAIRPERSON:** And you remember in the end
13 she responded to what I put to her by in effect withdrawing
14 something that she said earlier. Now those statements are
15 FFF1 and 2, round thereabouts, so that will tell us when –
16 we can find that – when the National Commissioner said she
17 received the communication from this witness.

18 **MR MPOFU:** Exactly. But I –

19 **CHAIRPERSON:** You say you have got
20 something else that you are going to –

21 **MR MPOFU:** No, that is exactly what I
22 have, Chairperson.

23 **CHAIRPERSON:** No, we were both thinking
24 on the same point.

25 **MR MPOFU:** Well, great minds,

1 Chairperson. That's why I was saying that on what I am
2 going to tell you, one would fix that communication to
3 between 12 o'clock and 1:30, and it would be telephonic.
4 I am just going to demonstrate that to you now. And the
5 Chairperson is quite correct; we have to be careful on this
6 one, because I dealt with this issue with the National
7 Commissioner as well and the less said about that, the
8 better. But on at least one of the versions of the
9 National Commissioner she says at paragraph 23 of FFF –

10 **[14:52] CHAIRPERSON:** Which exhibit is that?

11 **MR MPOFU:** FFF2, Chairperson.

12 **CHAIRPERSON:** Well, there was a 2, and a
13 3, and a 3A, and there was an interesting series of
14 documents put before us in that part.

15 **MR MPOFU:** We won't go there,
16 Chairperson, and the original notes and so on. If we can
17 have FFF2, please? Let's go to paragraph 23. Right, I shall
18 just read it out. National Commissioner says, "On the
19 afternoon of August 16th, 2012, I received a call from
20 Lieutenant General Mbombo who informed me of the decision
21 to implement stage 3 of the plan, which information I
22 relayed to the Minister." So putting aside as to who
23 relayed what to the Minister or did not relay it, that would
24 seem to suggest that you called the National Commissioner,
25 as I say between 12, if you say it is in the afternoon,

1 between 12 and 1:30 because you were reporting that at the
2 1:30 meeting, and informed her of the decision to implement
3 stage 3.

4 **CHAIRPERSON:** Mr Mpofo, I am not sure
5 that is entirely right. Can we see paragraph 21, please?

6 **MR MPOFU:** 21 - Yes, Chairperson.

7 **CHAIRPERSON:** 21.

8 **MR MPOFU:** 21, yes. That's the previous
9 day, yes.

10 **CHAIRPERSON:** No, no, it is not.

11 **MR MPOFU:** Sorry.

12 **CHAIRPERSON:** Oh yes, it is. So 21, it is
13 clear then from what appears in 21 that what appeared in
14 22, appears in 22, was said on the evening of the 15th.

15 **MR MPOFU:** The 15th. So I -

16 **CHAIRPERSON:** The first mention of a
17 communication on the 16th is in paragraph 23. -

18 **MR MPOFU:** That's correct.

19 **CHAIRPERSON:** - when it talks about the
20 afternoon. That's your point?

21 **MR MPOFU:** That's correct, Chairperson.

22 **CHAIRPERSON:** Thank you.

23 **MR MPOFU:** Comment, General? I am sorry,
24 I shall just -

25 **CHAIRPERSON:** Sorry, again it is not as

1 simple as that. Let's go back to 23. 23, now I know what
2 the minutes say, that this witness told National
3 Commissioner Phiyega before she went to the meeting at
4 1:30, I know she said that.

5 **MR MPOFU:** Must have.

6 **CHAIRPERSON:** But of course it is not
7 inconsistent with a subsequent call after she left the
8 meeting, while she's on the way to see Lieutenant Baloyi in
9 hospital, that she may well have contacted the National
10 Commissioner as well –

11 **MR MPOFU:** No –

12 **CHAIRPERSON:** But the problem with that
13 theory is it is not reflected in the telephone records.

14 **MR MPOFU:** Yes, but also the problem with
15 that theory, Chairperson, would be if that had happened,
16 that particular conversation would not be the one reflected
17 in the minutes of the meeting at 1:30.

18 **CHAIRPERSON:** Yes, that is obviously
19 correct. So there's obviously a communication – whether
20 it is a conversation or an SMS, there's a communication
21 prior to 1:30. That's –

22 **MR MPOFU:** Between 12 and 1:30. If we
23 take the, what the National Commissioner says on the
24 afternoon –

25 **CHAIRPERSON:** So I –

1 **MR MPOFU:** - so I think we should be

2 generous, let's say from 1 minute past 12 to half past 1.

3 **CHAIRPERSON:** Well, that is on the

4 assumption that the National Commissioner's recollection of

5 the afternoon is correct.

6 **MR MPOFU:** Well, we shall –

7 **CHAIRPERSON:** It may be an assumption

8 that some people may not be prepared to make.

9 **MR MPOFU:** Yes, well she did not change it

10 in the few months that she spent here.

11 **COMMISSIONER HEMRAJ:** General, could I

12 just ask you to assist us in tracing this phone call? If

13 for some reason you tried and could not get hold of the

14 National Commissioner, would it be possible that you would

15 have called someone else who was with her, one of her

16 assistants or one of her deputies?

17 **GENERAL MBOMBO:** It is possible, Mr Chairperson,

18 I could have tried someone else, even someone in her

19 office.

20 **MR MPOFU:** Yes, thank you. But you

21 sitting there now, you have no reason to doubt what the

22 National Commissioner says when she says she received a

23 call from you that day, correct?

24 **GENERAL MBOMBO:** I think it is so, that

25 is the case, Mr Chairperson.

1 **MR MPOFU:** Okay, I think the mystery is
2 now solved, Chairperson. While you were talking I just
3 asked the witness whether she herself has any reason to
4 doubt the National Commissioner's say-so under oath that
5 she received a call from her in that period, and she has
6 said that she has no reason.

7 **CHAIRPERSON:** She's satisfied to accept
8 what the National Commissioner says.

9 **MR MPOFU:** That's correct, Chairperson.

10 **CHAIRPERSON:** All that takes –

11 **MR MPOFU:** That's the mystery solved.

12 **CHAIRPERSON:** That takes it a little bit
13 further. Shall we now take the tea adjournment?

14 **MR BUDLENDER SC:** Can I just say, just
15 for the sake of completeness, there is a call at 14:27 from
16 General Mbombo to General Phiyega.

17 **CHAIRPERSON:** So that could be the
18 communication referred to in paragraph 23.

19 **MR BUDLENDER SC:** That could be. There's
20 a call at 14:27.

21 **CHAIRPERSON:** So the mystery I am afraid
22 is still –

23 **MR BUDLENDER SC:** 14:26.

24 **MR MPOFU:** No, Chairperson –

25 **CHAIRPERSON:** Whether we will ever be

1 able to resolve it fruitfully is a matter that will have to

2 stand over for further discussion. Let's take tea now.

3 **MR MPOFU:** Okay, Chairperson.

4 **[COMMISSION ADJOURNS / COMMISSION RESUMES]**

5 **[15:31] CHAIRPERSON:** The Commission resumes. I am sorry

6 about the delay but we had housekeeping matters to attend

7 to during the tea adjournment. You are still under oath,

8 Provincial Commissioner. I see you are much warmer than the

9 others. There are complaints that the place is too cold

10 but there's nothing I can do about it but we shall leave it to

11 Mr Mpofu to ask a few questions and raise the temperature.

12 Mr Mpofu.

13 **ZUKISWA MBOMBO:** s.u.o.

14 **CROSS-EXAMINATION BY MR MPOFU (CONTD.):**

15 Thank you, Chairperson, I will oblige. General, I found

16 the references that Mr Semenya was asking me for. The

17 first one is day 87, page 19193, and line 23 I think. I said

18 to General Annandale, "Generally speaking that minute is a

19 fair reflection of the meeting which you chaired, correct?"

20 And then, "It is indicating how the meeting was held.

21 More notes were taken, it is correct. So he agreed with

22 me that EE was a fair reflection of the meeting.

23 **CHAIRPERSON:** I am not sure that that is an

24 entirely accurate translation. I would have thought

25 "indicating" probably means indicative of what happened at

1 the meeting.

2 **MR MPOFU:** Yes.

3 **CHAIRPERSON:** It is more notes that were
4 taken, that is correct, that is what he said. So I am not
5 sure that he is saying – well, he is agreeing in a way –

6 **MR MPOFU:** He is.

7 **CHAIRPERSON:** – with Mr Mpofu’s question,
8 it is a fair reflection, but he is qualifying it to some
9 extent by saying that it is indicative of the meeting but
10 it is more notes that were taken, which does not exclude the
11 possibility of some little wrinkle somewhere, that the
12 notes were not entirely accurate.

13 **MR MPOFU:** Yes, my Afrikaans is not that
14 good but I think I know what is the meaning of “It is correct.”
15 That means, that means what I was saying was true. Even in
16 Bantu education they taught us that much. Okay, anyway
17 then later on at day 90, I think, page 9585 –

18 **CHAIRPERSON:** What page?

19 **MR MPOFU:** I am sorry, it is day 90,
20 Chairperson.

21 **CHAIRPERSON:** Yes?

22 **MR MPOFU:** 9585.

23 **CHAIRPERSON:** 9585.

24 **MR MPOFU:** I think it starts against the
25 letter –

1 **CHAIRPERSON:** Line?

2 **MR MPOFU:** Line 9. Okay, I say I will

3 debate it with the other witnesses and so on. Now moving

4 on, Mr Chairperson, I am just going to deal with small issues that

5 I want to get out of the way and so on. I am sure I don't

6 have to give you the exhibit by now, we've dealt with it

7 before. "In exhibit EE there is the reference that

8 Lieutenant-General

9 Mbombo reported that she had spoken to the

10 National Commissioner who indicated that she, this is now

11 the National Commissioner, or rather General Mbombo told

12 her that the stage 3 of the plan would be implemented and

13 that the National Commissioner had indicated that that

14 information had been relayed to the Minister." The

15 Chairperson then gives an explanation what I am talking

16 about, which is closing remarks. Carry on a bit. Then I

17 agree with the Chairperson, then "She indicated that she

18 will inform the Minister of Police on the current situation

19 and actions that will be taken." The point really I want

20 to make is since you were chairing the meeting, that these

21 remarks were made in your presence and you can confirm that

22 part of the minute." "Chairperson it was done in

23 my presence." So once again he –

24 **CHAIRPERSON:** Well, the answer simply is,

25 Chairman, that was made in my presence.

1 **MR MPOFU:** Yes.

2 **CHAIRPERSON:** He does not answer the

3 second part whether he confirms that is part of the minute,

4 unless he does so further down on the page.

5 **MR MPOFU:** Well, he does not dispute it,

6 Chairperson, I am sure –

7 **CHAIRPERSON:** No, no, that is correct. He

8 does not dispute it –

9 **MR MPOFU:** Yes.

10 **CHAIRPERSON:** He does not say directly

11 that he confirms it. He merely answers the first part,

12 that these remarks were made in his presence.

13 **MR MPOFU:** Okay.

14 **CHAIRPERSON:** It may be that he goes on

15 to deal with it. In any event, the point you make is that

16 presumably if he thought it was incorrect he should've said

17 so and did not.

18 **MR MPOFU:** As the chairman of the

19 meeting. Did you get those, the points that I am making?

20 Once again do you understand that is what I am going to

21 argue? You don't have to agree with me.

22 **CHAIRPERSON:** What answer does he give to

23 the point you make from line 11?

24 **MR MPOFU:** Which is, "And well, I am sure

25 the purpose of" – okay, it is here, yes. I go on and say,

1 "And well, I am sure the purpose of making the remarks I
2 will ask General Mbombo" – which I am doing now – "but from
3 your point of view did these remarks assure you that at
4 least the operation had the blessings of the National
5 Commissioner and would probably, or rather would also be
6 communicated to the Minister?" then he says, "Not
7 blessings, but the
8 National Commissioner" –

9 **CHAIRPERSON:** That does appear to answer
10 the point that you were making.

11 **MR MPOFU:** Yes –

12 **CHAIRPERSON:** He says Chairman, not
13 necessarily blessings or approval.

14 **MR MPOFU:** Yes.

15 **CHAIRPERSON:** Just that the National
16 Commissioner was –

17 **MR MPOFU:** Informed.

18 **CHAIRPERSON:** Informed.

19 **MR MPOFU:** Yes.

20 **CHAIRPERSON:** In that manner or –

21 **MR MPOFU:** That's correct. In other
22 words, although he –

23 **CHAIRPERSON:** Was so informed.

24 **MR MPOFU:** Yes, so informed, yes. So in

25 other words although he wouldn't go as far as me into

1 saying that therefore indicated that there were blessings,
2 but the conveyance of the information he confirmed. Do you
3 understand the point?

4 **CHAIRPERSON:** Of course General Annandale
5 does not then go on to say, does not go on to deal with the
6 second part about whether the National Commissioner was
7 going to communicate it to the Minister.

8 **MR MPOFU:** Yes.

9 **CHAIRPERSON:** That's still, unless
10 there's something that comes, follows further down on this
11 page, that is still in doubt.

12 **MR MPOFU:** Yes. No, no, I am not there
13 either. That's why I said, even when I was quoting the
14 National Commissioner's paragraph 23, leave aside the parts
15 that he changed as to whether – that she changed, as to
16 whether she communicated to the Minister or not.

17 **CHAIRPERSON:** Does anybody know why this
18 page has got a heading on the screen "Fight between Dali
19 and Schalk?"

20 **MS PILLAY:** Chairperson, I apologise, I
21 think that is one of my references in the –

22 **CHAIRPERSON:** A rather free summary of
23 what happened on the page.

24 **MR SEMENYA SC:** Chairperson –

25 **MR MPOFU:** I think it was a prophetic

1 piece of evidence that one day that will be cited.

2 **MR SEMENYA SC:** Chairperson would recall we

3 were going down this route at the back of Mr Mpofu saying

4 to the witness, I will demonstrate to you that your answers

5 are untruthful and that you are now giving an ex post facto

6 account because those minutes and the correctness was

7 confirmed by General Annandale. If he still persists with

8 that, he must show us where that appears, alternatively

9 withdraw the attack on the witness.

10 **MR MPOFU:** Well, Chairperson, there's no

11 reason for me to withdraw and I am not about to. Major-

12 General Annandale firstly states that the minutes of a

13 meeting that he was chairing are a true reflection or, to

14 be fair, he says are a fair reflection. So if there were

15 inaccuracies in the minutes I am sure he wouldn't have made

16 that statement. And secondly, although he is not prepared

17 to go as far as me to say that it meant that there were

18 blessings and so on, he confirms that the witness said in

19 his presence the words that appear on that paragraph.

20 **CHAIRPERSON:** No, only the first half.

21 He says –

22 **MR MPOFU:** Yes, but that is not the –

23 **CHAIRPERSON:** He says that, he clearly in

24 the answer given at lines 7 to 19 accepts that the witness

25 told the meeting that the National Commissioner had been so

1 informed.

2 **MR MPOFU:** Sure.

3 **CHAIRPERSON:** But the second half of it

4 that the National Commissioner indicated that she was going

5 to inform the Minister, that is the point really with which

6 the witness quarrels. The witness says she did not say

7 that. She said what – she said in chief already that what

8 she did say or she thinks she said was that she believed

9 that the National Commissioner would communicate that to

10 the Minister and that is the point that I understand her

11 evidence at the moment, that she's busy –

12 **MR MPOFU:** Yes.

13 **CHAIRPERSON:** - disagreeing with or the

14 point she's making. Now, as Mr Semenya says, you rather

15 confidently asserted that her evidence on this point was

16 untrue and you would demonstrate it. Well, Mr Semenya says

17 you haven't demonstrated it yet as far as the second half

18 is concerned and if you are not going to demonstrate it,

19 then he says the allegation that you made to her that she's

20 being untruthful must be withdrawn at least insofar as it

21 relates to the bit about the communication to the Minister.

22 **MR MPOFU:** No, Chairperson, I heard him

23 properly but I am not going to withdraw. That's what I am

24 saying, simply because if – you must remember these

25 extracts must be read together. I am saying the first one

1 he says these minutes, the whole EE is a fair reflection of
2 what happened. If that is not enough to show that every
3 word that is in EE is covered by the statement of whether
4 or not it is a fair reflection then nothing ever will be. I
5 say in addition to that and as far as the second piece of
6 evidence or support for my statement, I concede,
7 Chairperson, that the second piece of my supporting
8 evidence does not go as far as to cover the whole EE but
9 the first one covers the entire EE.

10 **CHAIRPERSON:** Well, except that that is
11 to some extent qualified by what happens when you
12 pertinently put to him both halves, what she said that she
13 told the National Commissioner and the statement that she
14 said the National Commissioner would communicate to the
15 Minister. When that is pertinently put to him –

16 **MR MPOFU:** No.

17 **CHAIRPERSON:** - he says not necessarily
18 blessings or approval, just that the National Commissioner
19 was so informed and he specifically does not deal with the
20 second half.

21 **MR MPOFU:** Thank you. At least he does
22 not deal, but let's not elevate it to that he disputes it
23 and it is clear what he is dealing with there is my imputing
24 to him that there was a blessing and I have already conceded
25 that he disputes the issue of the blessing, but insofar as

1 the –

2 **CHAIRPERSON:** I am sorry to interrupt you,

3 and what – your question said that these remarks tell you

4 that at least the operation had the blessings of the

5 National Commissioner and would probably or rather would

6 also be communication to the Minister and in dealing with

7 that, he only deals with the first half.

8 **MR MPOFU:** Yes, so 50/50. I am saying the

9 second one is 50/50, first one is 100% and then forget the

10 50/50, let's deal only with only the first one that he says

11 the minutes are a fair reflection. I am happy to just rely

12 on that alone so that we eliminate this discussion.

13 **CHAIRPERSON:** I don't think within the

14 report of the Commission at the end of the hearings we will

15 make a specific finding upon this particular point, so it

16 may well be appropriate to move on.

17 **MR MPOFU:** Yes, Chairperson –

18 **CHAIRPERSON:** Subject to the clear

19 understanding that at least on the second half there is

20 what you call 50/50, so that the witness knows that we know

21 that when the point was put pertinently to General

22 Annandale, he only dealt with the first half and not the

23 second.

24 **MR MPOFU:** Yes, fair enough and I am now

25 abandoning even the 50, I am just relying on the first.

1 I shall donate the 50%. I shall rely on the fact that he says it
2 was a fair reflection of the minute only. Okay, for now –
3 but go to page 8626.

4 **CHAIRPERSON:** This is day 86, is it, and
5 what page?

6 **MR MPOFU:** Day 82, I am sorry, Chairperson.

7 **CHAIRPERSON:** Day 82, yes?

8 **MR MPOFU:** Day 82.

9 **CHAIRPERSON:** What page?

10 **MR MPOFU:** 8626 from line 14. Yes, from
11 line 14 onwards, cross-examination by Mr Budlender. "Thank
12 you, Chairperson. General Annandale, on Friday you received
13 certain homework to look at, some minutes, to check that
14 you were satisfied with them. Have you been able to do
15 that?"

16 **CHAIRPERSON:** You don't have to read his
17 reply because it –

18 **MR MPOFU:** Yes, I won't read his reply.

19 **CHAIRPERSON:** We carry on line, it is line
20 25. Mr Budlender then deals with, says, "General, you
21 explained" – let's see the next page – "on Thursday that
22 these are not the minutes of an annual general meeting of
23 an association or the minutes of the board of directors of
24 a company, so they aren't formal and they aren't detailed.
25 I can understand that they will not be comprehensive." And

1 he says that is correct and then Mr Budlender says, "Can we
2 accept that what is stated in those minutes is correct?"

3 And he says, with the exception of grammar and spelling
4 mistakes –

5 **MR MPOFU:** Yes.

6 **CHAIRPERSON:** And then certain, and then

7 a few other aspects, it is in general correct or they are

8 in general correct, I suppose would be correct English. I

9 say, "Before we move on, what are the few other aspects

10 apart from spelling and grammar?" What does he say to

11 that, line 18 onwards.

12 **MR MPOFU:** Yes, can you move it up?

13 **CHAIRPERSON:** Then he says he'd have to

14 work through the notes to be able to show the Commission

15 about that and then Mr Budlender says he is not particularly

16 interested in –

17 **MR MPOFU:** He moves on to something else.

18 Anyway, okay look, all I am going to say, General, is that

19 at no stage – would you accept that at no stage in this

20 Commission did General Annandale, the Chairperson of the

21 meeting who had described the minutes as a fair reflection

22 of what has happened –

23 **CHAIRPERSON:** I am sorry to interrupt you.

24 Then in line 2, 3 on page 8628 he says, "How many matters

25 are there that are problematic in the minutes?" And he

1 says, "I can't count them quickly but there are a lot."
2 And then Mr Budlender says, well, he does not want to spend
3 a lot of time on this, he is prepared to take his chances
4 and then he moves on, but anyway so we've got the statement
5 that the minutes are a fair reflection which have to be
6 read in conjunction with the later statement that there are
7 a whole lot of matters that are problematic. So I am not
8 sure how conclusive your demonstration on the point is but
9 is the time being spent on this really likely to produce
10 any dividends?

11 **MR MPOFU:** Yes, well, okay again I am
12 donating that one away because it was, it is my fault, the
13 discussion had to do with TT4. The point I really want to
14 make, I don't want us to spend much time on this, would you
15 accept that General Annandale was the Chairperson of the meeting
16 who had remarked that the minutes were a fair reflection of
17 what had happened, has never said that you indicated –
18 whatever he said – that you thought maybe the National
19 Commissioner will relay this to the Minister. Do you
20 accept that?

21 **GENERAL MBOMBO:** I do not agree with you,
22 firstly because I knew what I had said in that meeting. If
23 there was any other meeting to be held where this was to be
24 corrected then I would have done so.

25 **MR MPOFU:** Please listen to the question

1 carefully. I am not saying, I am not saying that what – I am
2 not here saying that, yes, that what you are saying is true
3 or false or indifferent. I am asking you a simple question.
4 Do you accept that General Annandale, not you, that General
5 Annandale who chaired the meeting and who had remarked that
6 the minutes reflected the meeting, did not anywhere say
7 that you had indicated that perhaps the National
8 Commissioner would relay the information to the Minister.
9 Yes?

10 **GENERAL MBOMBO:** Yes, in the way in which
11 you put it.

12 **MR MPOFU:** Thank you very much. Now, I
13 had promised you to come back to the issue of whether or
14 not you knew that Mr Mathunjwa had been frustrated by
15 management and you said he only said he had been waiting,
16 he never told you that they would not talk to him. Do you
17 remember, and then I couldn't find the reference, I said
18 I shall come back to that.

19 **GENERAL MBOMBO:** Yes, I do remember that.

20 **[15:51] MR MPOFU:** Now, if you go to exhibit
21 L158.

22 **GENERAL MBOMBO:** Page 158?

23 **MR MPOFU:** L158 yes, exhibit L slide 158.

24 **CHAIRPERSON:** Slide 158, yes.

25 **GENERAL MBOMBO:** I get it.

1 **MR MPOFU:** The second bullet, it says,
2 "Lieutenant-General Mbombo phoned Mr Mathunjwa concerning
3 his failure to address the protesters. He reported at the
4 JOC in person where Lieutenant-General Mbombo entered into
5 dialogue with him. She enquired as to why he had gone back
6 on his word. She reminded him of the importance of his
7 commitment and how critical it was that he convinced the
8 protesters to lay down their arms." That's a separate
9 point which Mr Budlender dealt with. The point that I want
10 to deal with is the next point. "Mr Mathunjwa responded by
11 saying that he had been at Lonmin management's offices from
12 the early morning and that they did not want to commit to
13 continued negotiations and that was the reason for him not
14 addressing the protesters." So do you persist with your
15 answer that he had merely said I was waiting there and not
16 told you that actually they had refused to negotiate with
17 him?

18 **GENERAL MBOMBO:** According to me, he said
19 to me he has been in that office from seven o'clock, he
20 waited for management to talk to him. It was that which
21 delayed him. Yes, I remember now that he said something
22 about negotiations, she contained in negotiations.

23 **MR MPOFU:** Okay, alright. I won't accuse
24 you of anything more than the fact that you must have made
25 a mistake, so in the end you and I agree that Mr Mathunjwa

1 indicated to you that the reason for his, the failure of
2 his mission at least at that stage was the refusal of
3 Lonmin to co-operate with him, which was really the point I
4 was putting to you, correct?

5 **MR VAN AS:** No, sorry Mr Chairman, that is
6 put far too wide. It is a quantum leap from Lonmin refusing
7 to negotiate with Mr Mathunjwa to his mission being
8 successful and him getting the strikers off the hill.

9 **MR MPOFU:** Okay, okay, I shall put it
10 verbatim as it is put in L158. You and I would agree that
11 the reason that Mr Mathunjwa told you for the failure of
12 his mission up to that stage was that Lonmin did not want
13 to commit to continued negotiations, correct?

14 **GENERAL MBOMBO:** According to me,
15 Chairperson, what he said to me was that he had been long,
16 they arrived at Lonmin offices from seven. What delayed
17 him was Lonmin's management which did not want to talk to
18 them. The negotiations I refer to here, Mr Chairperson, is
19 that Lonmin did not want to negotiate with him and not that
20 Lonmin was not willing to negotiate with the workers.

21 **MR MPOFU:** So now from a situation where
22 you had forgotten this, you now remember it in that kind of
23 detail, that he was referring to his own negotiations as
24 opposed to what is reflected in the police version. Where
25 do you think this police version came from? It must have

1 come from you, you are the person who was speaking to

2 Mathunjwa, isn't that so?

3 **GENERAL MBOMBO:** I remember very well, it

4 was me.

5 **MR MPOFU:** Yes. So whoever was at Roots

6 could not have dreamt up what your conversation was with Mr

7 Mathunjwa. You are the person who had that conversation,

8 so you are the person who must have said that Mr Mathunjwa

9 told you that the reason was that Lonmin did not want to

10 commit to continued negotiations. Is there anyone else

11 from whom that information might have come apart from you?

12 **GENERAL MBOMBO:** Remembering,

13 Chairperson, that I did not ask him as to what the contents

14 of the negotiations were. I am saying I, according to me

15 that was negotiations between him and Lonmin. That is why

16 I said to him, please go to your people, and talk to them as

17 you had promised.

18 **MR MPOFU:** Yes, but General, he told you

19 that they refused or actually he told you that they ignored

20 him.

21 **GENERAL MBOMBO:** He said so yes, that he

22 was ignored.

23 **MR MPOFU:** Yes and therefore you knew

24 that the reason or reasons that Mr Mathunjwa had up to that

25 point been unsuccessful was that Lonmin had ignored him and

1 that they had refused to commit to negotiation. That you
2 knew, and that you are the only person who must have told
3 the Roots crowd that stuff, correct?

4 **GENERAL MBOMBO:** Remembering,
5 Chairperson, that when he spoke to me I wasn't alone there
6 at the time but to respond to your question, when he spoke
7 to me about this I did not know as to exactly what he was
8 referring to and I was not interested in that.

9 **MR MPOFU:** Yes, I think now we're getting
10 closer to the truth. That's the point, you were not
11 interested, as you are saying now and I am saying to you
12 that if the Mathunjwa effort was so pivotal as to whether a
13 deadly operation is going to be carried on or not, it was
14 very irresponsible of you not to be interested as to why
15 that effort might or might not be succeeding.

16 **GENERAL MBOMBO:** Possibly if I knew at
17 that time that the promise he was making was still
18 dependent on negotiations he was to conduct with Lonmin,
19 that was my problem, I did not know that.

20 **MR MPOFU:** Yes, well, we've gone through
21 that. I am not going to go through that with you again. I
22 can accept that you did not know before but now he was
23 telling you that that is the only stumbling block, so
24 obviously it was connected. Why would it be a stumbling
25 block if it was not connected?

1 **GENERAL MBOMBO:** He did not say to me, he
2 did not put it to me as that having been the stumbling
3 block. He said it was delayed by him, that he could not
4 have gone to the mountain up to that time.

5 **MR MPOFU:** No. I think, Mr Interpreter,
6 what she said is that he said that he was delayed by them.

7 **MR MAHLANGU:** Yes, he was delayed –

8 **MR MPOFU:** By them, not by him. Okay.

9 **MR MAHLANGU:** Oh no, yes, by them, not
10 him.

11 **MR MPOFU:** Yes and that he gave to you as
12 the reason, General, why he had not addressed the strikers,
13 correct?

14 **GENERAL MBOMBO:** It is so, but as a
15 person who did not have those details and what I kept on
16 saying to him was that you had promised that you would talk
17 to the workers there at nine o'clock.

18 **MR MPOFU:** Well, I don't want to go, to
19 do a merry-go-round with you. I put it to you that a
20 responsible person in your position being given that
21 crucial information about what could possibly avert
22 violence and being told that Mathunjwa says yes, I wanted
23 to deliver on my promise to convince the people but the
24 only reason I have not done so is the lack of co-operation,
25 or whatever is acceptable to Mr Van As, from Lonmin, that a

1 reasonable person in your position should have and ought to
2 have intervened and called your friend Barnard Makwena with
3 whom you were plotting the previous day –

4 **CHAIRPERSON:** No, no, Mr Mpofu, I am
5 sorry.

6 **MR MPOFU:** Well –

7 **CHAIRPERSON:** I am sorry, I am not going to
8 allow you to say that. I know it is late in the afternoon
9 but –

10 **MR MPOFU:** Well, I shall demonstrate it, Mr
11 Chairperson. I will demonstrate that on the 14th Mr Makwena and
12 this witness were conniving about how the people might be
13 arrested, how they –

14 **CHAIRPERSON:** That's a different word,
15 that is a different word now.

16 **MR MPOFU:** Pardon?

17 **CHAIRPERSON:** That's a different word
18 now. Anyway –

19 **MR MPOFU:** Yes.

20 **CHAIRPERSON:** Let's not go down side
21 alleys that just –

22 **MR MPOFU:** Fair enough.

23 **CHAIRPERSON:** - slow things down.

24 **MR MPOFU:** Fair enough, okay.

25 **CHAIRPERSON:** Concentrate on the main

1 point.

2 **MR MPOFU:** Okay. Thank you, Chairperson,

3 alright. Without that qualification, that given your

4 relationship – I shall put it like that – with Mr, given your

5 relationship with Mr Makwena and the conversation, I think

6 let's call it that to be neutral, given the contents of the

7 conversation that you had had with him, what you should

8 have done was to say, well, if this is the only thing now

9 that is standing in the way of this possible aversion of

10 violence, I am going to call Mr Makwena or anyone else to

11 stop this nonsense of not, of ignoring Mr Mathunjwa when he

12 is our last hope to save lives.

13 **GENERAL MBOMBO:** If I knew for certain as

14 you are saying now, I would have tried that one as well but

15 Mr Mathunjwa himself, he could have easily said to me, I am

16 not prepared to go to the hill there unless, until I have

17 spoken to these people. I wouldn't have forced him to.

18 **MR MPOFU:** No, you couldn't have. Mr

19 Mathunjwa's evidence is that you said, which you have now

20 confirmed a few minutes ago, that you were not interested

21 in that.

22 **GENERAL MBOMBO:** If he wanted me to know,

23 Chairperson, that his going up to the mountain depended on

24 the management, he would have made me understand that. He

25 could have easily said I am not prepared to go there until

1 they talk to me.

2 **MR MPOFU:** No General, please, really.

3 You have a person who says to you, you say to him, you are

4 the one who raises the issue, why did you not go and

5 address the strikers. He says to you, because I was

6 ignored and the people refused to negotiate. And you say

7 I am not interested in that, on his evidence and yours. Now

8 please, just – how can you say that that conversation did

9 not indicate that the only reason why – he did not give you

10 any other reasons, the only reason why he has not addressed

11 the protesters is because of what he told you. Please,

12 let's not –

13 **GENERAL MBOMBO:** There will not be any

14 other thing, Mr Chairperson, more than, Mr Chairperson,

15 that I knew, if I'd known that his promise to go up there

16 depended on what, on Lonmin.

17 **CHAIRPERSON:** You see the difficulty with

18 that answer is if one reads the last sentence of the second

19 bullet in slide 158 in exhibit L and then the third bullet,

20 one sees what happened according to what you obviously told

21 the people at Roots. Let's read it together. "Mr

22 Mathunjwa responded" – this is when you reminded him,

23 sorry, I should have read the previous paragraph. You

24 asked why he'd gone back on his word. You reminded him of

25 the importance of his commitment and how critical it was

1 that he convinces the protesters to lay down their arms. I
2 take it all this is correct this is what is in the slide.
3 It is what you told Roots, the people at Roots.
4 **GENERAL MBOMBO:** It is so, Chairperson.
5 **CHAIRPERSON:** Right, so then Mr Mathunjwa
6 responds. You say to him your commitment is important,
7 it is very critical you convince the protesters to lay down
8 their arms. So his answer is that he'd been at the Lonmin
9 management's office from the early morning and they did not
10 want to commit to continued negotiation and that that was
11 the reason for him not addressing the protesters. So he is
12 saying to you expressly, I am not going because, the reason
13 I am not going is because they won't commit to continued
14 negotiations. And then the next bullet says, "The
15 Provincial Commissioner reminded him her concern was with
16 his commitment to finding a peaceful solution, that he had
17 to honour his commitment to convince the group to disarm."
18 So that is saying that, is telling us that what you said
19 was I am not interested in the fact that they don't want to
20 commit to continued negotiations, I am not interested that
21 that is the reason that you are not addressing the
22 protesters, I say you must go, you are committed to go,
23 that is my concern and you have got to honour your commitment.
24 Now surely, without saying it in as many words expressly,
25 he was conveying to you unmistakably that he wasn't going

1 because there wasn't a commitment to continued negotiations
2 from the side of Lonmin, that was why he wasn't going to
3 speak to the protesters and you were saying to him, well,
4 that is what you say but my concern is your commitment to
5 finding a peaceful solution and you must go. That's why he
6 hadn't gone and clearly if you wanted him to go and it was
7 clearly important for you that he should go because it was
8 important that the protesters be convinced to lay down
9 their arms, surely you then should've said to him, well,
10 hang on a second, let's go together to Lonmin or I will go
11 to Lonmin by myself, I shall speak to them and tell how
12 important it is that this commitment be given so that the
13 very thing we all want to achieve, namely the laying down
14 of their arms, can happen. What do you say to that?

15 **GENERAL MBOMBO:** Chairperson, if he had
16 said to me clearly that he would not go up to the hill,
17 he would first have to talk to these people, I would not
18 have forced him to go up there, Mr Chairperson, because
19 then I would have known that his commit - his going up
20 there would have depended on what the Lonmin people say.
21 According to me, Mr Chairperson, the time I spoke to him I
22 was convinced that he would be the person able to talk to
23 those people according to my understanding.

24 **CHAIRPERSON:** - answer to my question.

25 Mr Mpofu, it is after four o'clock, would you like to

1 continue the discussion with the witness on this point?

2 **MR MPOFU:** Not on this point,

3 Chairperson. I shall simply argue at the end that that is

4 another blatant and deliberate untruth.

5 **CHAIRPERSON:** Well, you don't have to say

6 that. In other words what you, you are moving on to the

7 next point which you'll do tomorrow at nine o'clock. I

8 want to announce that for reasons that are not necessary

9 for me mention, we will be adjourning at 12:30 tomorrow but

10 we will try to start promptly at nine o'clock tomorrow

11 morning. The Commission now adjourns.

12 **[COMMISSION ADJOURNED]**

