

# RealTime Transcriptions

TRANSCRIPTION OF THE

## COMMISSION OF INQUIRY

### MARIKANA

#### BEFORE TRIBUNAL

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

#### HELD ON

DAY 70    2 APRIL 2013    PAGES 7437 TO 7569

#### HELD AT

CIVIC CENTRE, RUSTENBURG, NORTH WEST PROVINCE



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1 [PROCEEDINGS ON 2 APRIL 2013]  
 2 [10:02] CHAIRPERSON: The Commission resumes.  
 3 The South Africa Human Rights Commission has applied to the  
 4 Commission for an order compelling National Union of  
 5 Mineworkers, NUM, to discover the following documents. 1,  
 6 Records of discussions relating to disputes over benefits  
 7 associated with employment at Lonmin over the five years  
 8 preceding August 2012; and 2, NUM's records on format of  
 9 interaction between unions and employer. This includes  
 10 correspondence, as well as individual members' complaints  
 11 regarding benefits, especially housing. NUM has opposed  
 12 the application.  
 13 The Commission has had the benefit of submissions  
 14 made by counsel for the Human Rights Commission and NUM, as  
 15 well as from Mr Chaskalson SC, one of the evidence leaders.  
 16 It was common cause that the Commission's power to issue  
 17 the order sought is a discretionary one, in the exercise of  
 18 which it must weigh up the relevance and importance of the  
 19 documents sought, against the invasion of the private  
 20 rights of the party whose documents are sought, and compare  
 21 the likely prejudice suffered by the party requesting  
 22 discovery if the application is refused, with the prejudice  
 23 likely to be suffered by the party compelled to make  
 24 discovery if the application is granted.  
 25 In the present case the request is both too vague

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1 and too broad and many of the documents sought will not be  
 2 relevant to the issues on which the Commission has to  
 3 decide. The expense to which NUM will be put if discovery  
 4 is ordered and the time which will be required for it to go  
 5 through its documents to track down those covered by the  
 6 request, will be enormous. It is relevant in this regard  
 7 that counsel for the Human Rights Commission did not  
 8 suggest any way in which the broad ambit of the request  
 9 could be cut down. So the prejudice to NUM if the  
 10 application is granted will be substantial.  
 11 On the other hand, if one looks at the prejudice  
 12 likely to be suffered by the Human Rights Commission is the  
 13 application fails, it's clear that such prejudice will be  
 14 significantly less because the relevance of those documents  
 15 requested, which are covered by the Terms of Reference, is  
 16 relatively slight. Furthermore, insofar as those documents  
 17 are concerned, that is to say those that are relevant, they  
 18 are of such a nature that they could more appropriately be  
 19 sought from Lonmin rather than from NUM. In the  
 20 circumstances the Commission is satisfied that the  
 21 application should fail. National Commissioner, you're  
 22 still under oath.  
 23 MANGWASHI VICTORIA PHIYEGA: s.u.o.  
 24 CHAIRPERSON: Mr Bizos, I understand you  
 25 have further questions to ask in cross-examination.

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1 CROSS-EXAMINATION BY MR BIZOS SC (CONTD.):  
 2 National Commissioner, on the 20th of October 2012 you  
 3 instructed Major-General Johnson to carry out an  
 4 investigation into the possible tampering of evidence at  
 5 the crime scene of the 16th of August 2012. Major-General  
 6 Johnson presented you with an "information note" during  
 7 November last year. You signed this note on the 20th of  
 8 November and the head of the SAPS Protective Service signed  
 9 it on the 21st of November. Am I correct, and would you  
 10 accept the dates on which these things happened? It's  
 11 exhibit FFF15, Mr Chairman.  
 12 GENERAL PHIYEGA: Yes, it is.  
 13 MR BIZOS SC: Have you read that  
 14 information?  
 15 GENERAL PHIYEGA: Yes, I have.  
 16 MR BIZOS SC: And the explanations that  
 17 have been given?  
 18 GENERAL PHIYEGA: Correct.  
 19 MR BIZOS SC: The so-called investigation  
 20 – have you, sorry, I didn't hear your answer.  
 21 GENERAL PHIYEGA: I did say correct.  
 22 MR BIZOS SC: You did?  
 23 GENERAL PHIYEGA: I did say correct.  
 24 MR BIZOS SC: The information can best be  
 25 described as little more than a brief paraphrasing of

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1 various short and some very long statements. Do you agree  
 2 with my characterisation of the information given by  
 3 General C Johnson?  
 4 GENERAL PHIYEGA: I note the short  
 5 paragraphs, but I also note the statements that are  
 6 attached to it.  
 7 MR BIZOS SC: It does not draw any  
 8 conclusions, and does not offer any advice or  
 9 recommendations, and it ends in paragraph 23 with a  
 10 statement, "Progress with the investigation will be  
 11 reported."  
 12 GENERAL PHIYEGA: Yes.  
 13 MR BIZOS SC: Has any progress been  
 14 reported since?  
 15 GENERAL PHIYEGA: Yes.  
 16 MR BIZOS SC: Where is it?  
 17 GENERAL PHIYEGA: It has been submitted.  
 18 MR BIZOS SC: To whom?  
 19 GENERAL PHIYEGA: To the Commission.  
 20 MR BIZOS SC: To whom?  
 21 GENERAL PHIYEGA: To the Commission.  
 22 MR BIZOS SC: Please speak up.  
 23 GENERAL PHIYEGA: I said the report has  
 24 been received - I'm not sure whether it has been recorded  
 25 and noted by the Commission, but there is a report, a final

<p style="text-align: right;">Page 7441</p> <p>1 report.</p> <p>2 MR BIZOS SC: We have not been informed</p> <p>3 or given a copy of that –</p> <p>4 CHAIRPERSON: Sorry, Mr Bizos, I'm sorry</p> <p>5 to interrupt you. I haven't seen it, but let's ask the</p> <p>6 evidence leaders if they've got it. If they got it</p> <p>7 recently they may still be in the process of circulating</p> <p>8 it –</p> <p>9 MR BIZOS SC: I've already had a shaking</p> <p>10 of the head by the leader of –</p> <p>11 CHAIRPERSON: Well, I can't go on body</p> <p>12 language. It doesn't get recorded. Mr Budlender, this</p> <p>13 document to which the National Commissioner refers,</p> <p>14 obviously she didn't personally hand it over to you, so</p> <p>15 she's obviously relying on information she received that</p> <p>16 it's been sent to the Commission. Has it in fact been</p> <p>17 received by the evidence leaders?</p> <p>18 MR BUDLENDER SC: No, Chair, we haven't</p> <p>19 seen it.</p> <p>20 GENERAL PHIYEGA: But I have a copy –</p> <p>21 CHAIRPERSON: Well, let's ask Mr Semenya,</p> <p>22 he may be able to help us. Thank you, Mr Budlender. Mr</p> <p>23 Semenya, can you throw light on this matter?</p> <p>24 MR SEMENYA SC: We received the document</p> <p>25 last week and my instructing attorney tells me by 11</p>	<p style="text-align: right;">Page 7443</p> <p>1 in front of you?</p> <p>2 GENERAL PHIYEGA: Ja, we've got it.</p> <p>3 MR MAHLANGU: Exhibit L, yes. What</p> <p>4 slide, Sir?</p> <p>5 MR BIZOS SC: 154. In the police's</p> <p>6 engagement with all the relevant parties, a commitment had</p> <p>7 been reached that the violence had to end on that day,</p> <p>8 Thursday, the 16th of August 2012, and weapons had to be put</p> <p>9 down by 9 o'clock that morning. Should the commitment not</p> <p>10 be honoured, the police would need to act within their</p> <p>11 mandate to ensure that peace and stability were resorted in</p> <p>12 the area. Lieutenant-General Mbombo was reported on</p> <p>13 several news channels on the morning of the 16th, saying</p> <p>14 that, "Today we are ending this matter." We want to show</p> <p>15 the video, Mr Chairman, to refresh everyone's memory of</p> <p>16 this speech, but we are told that the technicians are not</p> <p>17 yet here, so we will remind the witness, so that we can get</p> <p>18 on with it, what the vital parts are. She said amongst</p> <p>19 other things, "Today is unfortunately D-day." Sorry,</p> <p>20 sorry, I thought that we would have the video, but I'll use</p> <p>21 my notes and put it. "I don't want to explain to you if</p> <p>22 they don't want to, what then? What I told you is today we</p> <p>23 are ending this matter," words to that effect. What I want</p> <p>24 to ask you, Commissioner, is this. On whose authority did</p> <p>25 the speaker make that announcement?</p>
<p style="text-align: right;">Page 7442</p> <p>1 o'clock it will be forwarded to the evidence leaders.</p> <p>2 CHAIRPERSON: So the evidence given by</p> <p>3 the National Commissioner so far is anticipatory. Mr</p> <p>4 Bizos, perhaps you can postpone then your – or perhaps</p> <p>5 "postpone" is an unhappy word – you can defer your cross-</p> <p>6 examination on this point until after the tea adjournment</p> <p>7 when this document will be available.</p> <p>8 MR BIZOS SC: Yes. I will do that, Mr</p> <p>9 Chairman, because – and I will give notice of the question</p> <p>10 that I want to –</p> <p>11 CHAIRPERSON: No, you don't have to give</p> <p>12 notice of questions, unless you want to really. You're</p> <p>13 under no obligation to do so.</p> <p>14 MR BIZOS SC: I'll wait until we have</p> <p>15 seen this document, Mr Chairman.</p> <p>16 CHAIRPERSON: She'll answer all the</p> <p>17 questions you're going to ask anyway, so let's see the</p> <p>18 document first and then we can take it further, if</p> <p>19 necessary.</p> <p>20 MR BIZOS SC: I'll leave it over. I now</p> <p>21 want to deal with whether or not there was political</p> <p>22 direction in relation to the events of the 16th,</p> <p>23 Commissioner. At 9:30 on the 16th General Mbombo took part</p> <p>24 in a media briefing. It's to be found on slide 154 of</p> <p>25 exhibit L, Mr Chairman. I'll read it out. Have you got it</p>	<p style="text-align: right;">Page 7444</p> <p>1 GENERAL PHIYEGA: I've already indicated</p> <p>2 earlier on that there is full delegation for the Provincial</p> <p>3 Commissioner to be in charge of the environment that she is</p> <p>4 tasked and mandated to be in charge of. She is the</p> <p>5 Provincial Commissioner of North West.</p> <p>6 MR BIZOS SC: Who was present to</p> <p>7 authorise her to make that statement at that meeting?</p> <p>8 GENERAL PHIYEGA: She has the full right</p> <p>9 and the responsibility to do so.</p> <p>10 MR BIZOS SC: The question was, who was</p> <p>11 present. I want a list of the names, please.</p> <p>12 GENERAL PHIYEGA: I don't understand your</p> <p>13 question then.</p> <p>14 MR BIZOS SC: What do you not understand?</p> <p>15 GENERAL PHIYEGA: What I do not – you've</p> <p>16 asked me a question. I said she is the highest most senior</p> <p>17 official in this province and she has the right, the</p> <p>18 responsibility, and the mandate, to take those type of</p> <p>19 decisions, and then you asked me a question, who was</p> <p>20 present. That's why I say I do not understand.</p> <p>21 MR BIZOS SC: Were you not consulted as</p> <p>22 the National Commissioner?</p> <p>23 GENERAL PHIYEGA: It was not necessary</p> <p>24 because I have said she is the highest most senior official</p> <p>25 in this province. She has the full mandate to do what she</p>

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1 did.

2 MR BIZOS SC: In the same morning Dennis

3 Adriaio, if I'm pronouncing his name correctly, A-D-R-I-A-O,

4 said, "Today is unfortunately D-day. It is an illegal

5 gathering. We've tried to negotiate and we'll try again.

6 If that fails, we'll obviously have to go to a tactical

7 phase." He calls himself the police spokesperson. Who

8 authorised him so early in the morning to make that

9 statement?

10 GENERAL PHIYEGA: I do not know about the

11 authority, but I can say that there is the topmost person

12 in charge of this province, and I'm sure when she testifies

13 she may be able to talk to that.

14 MR BIZOS SC: Were you consulted when the

15 decision was made that this was D-day?

16 GENERAL PHIYEGA: I've already answered

17 on that one to say it was not necessary for them to consult

18 me –

19 MR BIZOS SC: It was not necessary. So

20 you can't –

21 GENERAL PHIYEGA: The commissioner has

22 full powers and mandates to run this province.

23 [10:22] CHAIRPERSON: The question isn't whether

24 she was authorised to do it, or it wasn't necessary for her

25 to consult you. The question I understand is whether you

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1 were consulted. Whether it was necessary for you to be

2 consulted, that's another matter. Were you consulted by

3 the Provincial Commissioner before this decision was taken

4 and before this media briefing took place?

5 GENERAL PHIYEGA: The answer to that is

6 that again I will say, Judge, the commissioner had the

7 powers to take decisions together with everybody. I wasn't

8 consulted necessarily on what is going to be said in the

9 press conference. I wasn't consulted necessarily on how

10 they are going to engage AMCU, which had already indicated

11 that by that morning they will be putting down their arms.

12 CHAIRPERSON: If they were putting down

13 their arms, or if they said they were putting down arms,

14 there's some debate about that which we don't have to raise

15 with you. If they had said they were putting down their

16 arms, then obviously the problem would have been solved on

17 the phone, as it were. The problem was, however, if that

18 didn't happen and they didn't put down their arms, was it

19 then necessary to go over to action, some kind of

20 operation, to deal with the matter finally, or was it

21 something that would be considered in due course? I think

22 that's one of the issues that arises here. Now you said

23 that you didn't have the details of what's going to be

24 done. I think you left that to the commanders, is that

25 correct? And to the Provincial Commissioner, the details

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1 of the plan.

2 GENERAL PHIYEGA: Yes.

3 CHAIRPERSON: Did you know that if they

4 didn't lay down their arms that morning, as it was

5 indicated they would, that immediately that day there would

6 be action by the police within their mandate – to quote the

7 words of the Provincial Commissioner – to ensure that peace

8 and stability were restored in the area on that very day?

9 GENERAL PHIYEGA: Yes, I was aware,

10 because I said on our morning of the 15th I did say we

11 endorsed her plan to go out to encircle, disperse, and

12 ensure that those protesters are disarmed. That was known.

13 The tactical and the operational plans were left to the

14 province, but we knew that we needed to collect the arms

15 that were promised to be given; if not, make sure that we

16 collect them.

17 MR BIZOS SC: Do you agree that the final

18 phase, whatever that may mean, was a very important point

19 to be decided by you as the National Commissioner and by

20 the Minister?

21 GENERAL PHIYEGA: Perhaps I should be

22 made to understand what you mean by "final phase."

23 MR BIZOS SC: Please speak up. I'm sorry

24 –

25 CHAIRPERSON: Mr Bizos, I've got another

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1 suggestion. Is it possible to turn up the volume slightly

2 with your equipment so that those who can't hear as clearly

3 as others are assisted by the amplification? I'm sure the

4 Commissioner doesn't like to have to shout when she gives

5 her evidence and we wouldn't expect her to do that.

6 GENERAL PHIYEGA: Thank you, Chair.

7 CHAIRPERSON: On the other hand, Mr Bizos

8 must hear what's said. Is it possible to amplify what is

9 said?

10 GENERAL PHIYEGA: My question was, I

11 would like to be able to answer after understanding what

12 you mean by "final phase."

13 MR BIZOS SC: That's what we want to know

14 from you and the generals and the brigadiers and the

15 colonels, what did they mean when they say, when they used

16 that phase in the plan. We haven't had an answer yet.

17 Have you asked the question? The tactical phase, what does

18 that mean? Tactical phase. Your subordinates used it;

19 they have not defined it anywhere clearly for us to know

20 what they meant. Perhaps you can help us.

21 GENERAL PHIYEGA: I shall leave that

22 definition to the operational commanders because they are

23 coming to this Commission.

24 MR BIZOS SC: In their summary, and

25 particularly in paragraph 78 of exhibit L, "Address

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1 protesters, disperse into smaller groups, encircle, and  
2 disarm.”

3 MR MAHLANGU: Is it slide 78?  
4 MR BIZOS SC: 78.  
5 GENERAL PHIYEGA: Okay.  
6 MR BIZOS SC: Have you seen it? Now  
7 where do they say what would the police do if they did not  
8 disperse into smaller groups, if they could not encircle  
9 them, and if they refused to be disarmed? What were they  
10 going to do?  
11 GENERAL PHIYEGA: My response to that is  
12 that I have said there was a plan, and clearly that slide  
13 talks to an operational plan. The plan was disrupted.  
14 MR BIZOS SC: Was there a plan what would  
15 they do if the people in the crowd did not do the bidding  
16 of the police?  
17 GENERAL PHIYEGA: Perhaps let me start  
18 off by saying what I understand is that you're saying slide  
19 78 – is it 78? Ja, slide 78, represents a plan.  
20 MR BIZOS SC: Please give us the answer  
21 to the question. Looking at 78, I don't think that it  
22 answers the question. Do please try to answer it.  
23 CHAIRPERSON: Sorry, Mr Bizos, before you  
24 press that question, you referred to slide 78, but my  
25 colleague Adv Hemraj pointed out that the plan is dealt

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1 with also in 79 and 80, and in particular in 80 in the  
2 second paragraph something is set out which was also  
3 clearly part of the plan. If they refuse to disperse  
4 [inaudible] down, etcetera, then certain things would  
5 happen. So that's also part of the plan, isn't it?  
6 MR BIZOS SC: Yes. Thank you, Mr  
7 Chairman. I think that that's part of the answer, but  
8 where anywhere in exhibit L or elsewhere was it said that  
9 sharper ammunition would be used in order to kill people?  
10 GENERAL PHIYEGA: Advocate, I think what  
11 is very clear after looking at all those slides that  
12 represents the plan, is that there was a disruption; there  
13 was never an intention by the police to use that type of  
14 ammunition. So the disruption and the unintended  
15 consequences talks to the unprecedented nature of this  
16 matter.  
17 CHAIRPERSON: Mr Bizos, I think it would  
18 be necessary for you also therefore to refer to the first  
19 bulleted point in slide 80, which is relevant, I think.  
20 MR BIZOS SC: Yes, thank you, Mr  
21 Chairman. If what is said in slide 80, was it anticipated  
22 that sharp ammunition was to be used in order to kill  
23 people?  
24 GENERAL PHIYEGA: It is important to note  
25 that in that very paragraph that you are referring to, TRT,

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1 NIU and STF would be responsible for close-quarter  
2 confrontations in support of what the POP was doing, and  
3 indeed when you look at the 16th, there has been a whole  
4 build-up; a lot had happened, and you can see that there  
5 was a lot of information informing this plan.  
6 CHAIRPERSON: National Commissioner –  
7 sorry, Mr Interpreter, please interpret. National  
8 Commissioner, I referred Mr Bizos to the first bullet of  
9 slide 80. “Should the protesters attack the members of POP  
10 in the dispersion line who will be outside their Nyalas, a  
11 second line of armed members of the Tactical Response Team,  
12 backed by the NIU and the STF, and following behind the POP  
13 line, would,” these are the words that are important –  
14 GENERAL PHIYEGA: Proportionately.  
15 CHAIRPERSON: - “respond proportionately  
16 to address the threat.” Now if we bear in mind that the  
17 people in the second line were armed, they were armed with  
18 weapons for the firing of sharp ammunition, unlike the  
19 members of POP, how else could they have responded  
20 proportionately to address the threat except by firing the  
21 weapons they had?  
22 GENERAL PHIYEGA: They were then, given  
23 their ability, given what they can use to support POPs to  
24 do so, so indeed, their response would have been based on  
25 what they had, and if I may say, it means by the time they

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1 actually pass the POP members, it means all efforts to use  
2 the POP level of force would have failed.  
3 MR BIZOS SC: Were you aware –  
4 CHAIRPERSON: Mr Bizos, you and I are  
5 making the same mistake. Neither of us is allowing Mr  
6 Mahlangu a chance to interpret, which is very important.  
7 So I will try to remember in future, if you promise to do  
8 the same.  
9 MR BIZOS SC: I'll try. You, new as you  
10 might have been to the job, must have been familiar with  
11 the Standing Orders of the police?  
12 GENERAL PHIYEGA: Yes, I was aware.  
13 MR BIZOS SC: Were you aware of the  
14 Standing Order which says that nobody is to shoot at people  
15 without a warning, without an order from the commanding  
16 officer of the unit –  
17 GENERAL PHIYEGA: Yes, I –  
18 MR BIZOS SC: And they must shoot below  
19 the belt? Were you familiar with those orders?  
20 CHAIRPERSON: Mr Bizos, Mr Semanya has  
21 got something to say.  
22 MR SEMENYA SC: Chair, in fairness, that  
23 is in reference to the use of rubber rounds.  
24 MR BIZOS SC: I'm sorry? Mr Chairman, I  
25 think with respect that I have a brief description of the

<p style="text-align: right;">Page 7453</p> <p>1 Standing Orders, which will support me if we go to the 2 details. I ask that the witness be asked to answer the 3 question. 4 CHAIRPERSON: - the Standing Order first 5 before she replies to anything. Are you referring to the 6 Standing Order, Mr Bizos, or the two glosses on it, the one 7 December 2011, the second one issued by the present witness 8 shortly after she took office? 9 MR BIZOS SC: Yes. 10 CHAIRPERSON: Or are you referring to the 11 Standing Order itself? 12 MR BIZOS SC: I am referring to exhibit 13 S, Mr Chairman, which is signed by the witness. 14 CHAIRPERSON: Yes, that's the gloss which 15 she issued which relates only to the use of rubber balls. 16 We had this debate last week. 17 MR BIZOS SC: Yes. 18 CHAIRPERSON: What the, I think was the 19 result of the debate last week, was the Standing Order is 20 what generally applies. 21 MR BIZOS SC: Yes. 22 CHAIRPERSON: It applies to the use of 23 sharp ammunition. 24 MR BIZOS SC: Yes. 25 CHAIRPERSON: And everything else.</p>	<p style="text-align: right;">Page 7455</p> <p>1 CHAIRPERSON: Prima facie I'm inclined to 2 think Mr Semenya is correct, but I must give you an 3 opportunity to persuade me that that view is incorrect, if 4 you so submit - 5 [10:42] MR BIZOS SC: No, Mr Chairman, to confine 6 it to rubber bullets, we submit that reading paragraph 11 7 of the Standing Orders in all, before we get to 11.7, the 8 cautions set out in paragraph 11 put defensive measures in 9 place as a priority. We are going to finish up that what 10 applies to rubber bullets is a fortiori for sharp 11 ammunition. 12 CHAIRPERSON: We had that argument last 13 week - 14 MR BIZOS SC: Yes. 15 CHAIRPERSON: And the a fortiori 16 objection, and what I then put to you was that her notes 17 of, her gloss as I called it, of I think it was July 2012, 18 didn't deal with that; it dealt with rubber bullets, that 19 it didn't have anything to say about the Standing Order 20 insofar as it related to sharp ammunition. The principles 21 which you contend on a sort of an a fortiori basis, if 22 applicable, would apply I would think as part of the basic 23 principles of the law of private defence. 24 MR BIZOS SC: Yes. 25 CHAIRPERSON: Which are referred to in</p>
<p style="text-align: right;">Page 7454</p> <p>1 MR BIZOS SC: Yes. 2 CHAIRPERSON: Thereafter two notes were 3 issued, as it were, which are glosses on the Standing 4 Order. 5 MR BIZOS SC: Yes. 6 CHAIRPERSON: And the second one 7 effectively, the one issued by the witness, withdrew the 8 first and that deals with the use of rubber balls and 9 rubber bullets, and so forth. 10 MR BIZOS SC: Yes. 11 CHAIRPERSON: You're not asking her 12 questions about the use of rubber balls at the moment; 13 you're asking her about sharp ammunition. That's governed 14 by Standing Order General 262, and what particular 15 paragraph of that Standing Order are you referring to? 16 Otherwise if you're referring to her note about rubber 17 balls, which doesn't apply in the context of sharp 18 ammunition, it's not a fair question and Mr Semenya is 19 right. 20 MR SEMENYA SC: The relevant section of 21 the Standing Order, Chair, is clause 11.7 of the Standing 22 Order. 23 CHAIRPERSON: Mr Bizos, I think the - 24 well, I haven't heard you yet, I'm sorry. 25 MR BIZOS SC: Yes.</p>	<p style="text-align: right;">Page 7456</p> <p>1 the paragraph to which Mr Semenya referred, but those 2 principles then apply not because of anything she said, 3 because she spoke about rubber bullets, but because of the 4 rules of private defence which are as it were incorporated 5 into paragraph 11.7 of the Standing Order, and I think to 6 cross-examine her on her instruction which dealt with 7 something else is in the circumstances unhelpful. So 8 perhaps you can - I'm not stopping you from following this 9 line; I'm just wanting you to do it correctly, so please 10 reformulate your question and let's proceed. 11 MR BIZOS SC: Very well. Were you aware 12 of the - now ignore your summary that you signed. I'm 13 quoting from Standing Order 262, paragraph 11 headed 14 "Execution." I'm going to read them to you one by one and 15 ask you whether you knew about them or not, whether your 16 generals and your brigadiers and your colonels knew about 17 them, and on your information when you made the praising 18 statements of the police you knew that all these had been 19 complied with. 11.2, "If negotiations fail and life or 20 property is in danger, the following procedure must 21 peremptory be followed. Put defensive measures in place as 22 a priority." Do you know whether the police at about 23 approximately 4 o'clock on the afternoon of the 26th, if 24 there was any danger, whether they put themselves - 25 CHAIRPERSON: 16th, I think Mr Bizos.</p>

<p style="text-align: right;">Page 7457</p> <p>1 MR BIZOS SC: Pardon.</p> <p>2 CHAIRPERSON: 16.</p> <p>3 MR BIZOS SC: 16, sorry.</p> <p>4 CHAIRPERSON: Afternoon of the 16th.</p> <p>5 MR BIZOS SC: Yes, August the 16th, did</p> <p>6 the police take any defensive measure before deciding that</p> <p>7 they were in danger and they shot sharp ammunition? Do you</p> <p>8 know whether they did that?</p> <p>9 GENERAL PHIYEGA: Yes, according to the</p> <p>10 report I received.</p> <p>11 MR BIZOS SC: "Warn participants</p> <p>12 according to the act of the action that will be taken</p> <p>13 against them should defensive measures fail." Did they do</p> <p>14 that? Did anybody warn the people?</p> <p>15 GENERAL PHIYEGA: No, because there was a</p> <p>16 disruption.</p> <p>17 MR BIZOS SC: Well, we'll say something</p> <p>18 about your answers about the disruption and to what extent</p> <p>19 it is an excuse to ignore the orders. "Give a second</p> <p>20 warning before the commencement of the offensive measures,</p> <p>21 giving innocent bystanders the opportunity to leave the</p> <p>22 area." Did they do that?</p> <p>23 GENERAL PHIYEGA: No, because there was a</p> <p>24 disruption.</p> <p>25 MR BIZOS SC: "Plan all offensive actions</p>	<p style="text-align: right;">Page 7459</p> <p>1 informed it was disrupted.</p> <p>2 MR BIZOS SC: Paragraph 3, "If the use of</p> <p>3 force is unavoidable it must meet the following</p> <p>4 requirements. (a), The purpose of offensive actions are to</p> <p>5 de-escalate conflict with the minimum force to accomplish</p> <p>6 the goal, and therefore the success of the actions will be</p> <p>7 measured by results of the operation in terms of cost,</p> <p>8 damage to property, injuries to people and loss of life."</p> <p>9 The question is, before praising them on the 17th and the</p> <p>10 20th, did you ask them whether they complied with that</p> <p>11 order?</p> <p>12 GENERAL PHIYEGA: Yes, I did.</p> <p>13 MR BIZOS SC: And what did they say?</p> <p>14 That they had complied with it fully?</p> <p>15 GENERAL PHIYEGA: That their plan was</p> <p>16 disrupted.</p> <p>17 CHAIRPERSON: Mr Bizos, you know I think</p> <p>18 we're going around in circles. I can understand you may</p> <p>19 want to find argument later on this aspect of the matter,</p> <p>20 but the witness's evidence seems to be quite clear. She</p> <p>21 says, when you asked her about the Standing Order she says</p> <p>22 there was a plan, it was disrupted and therefore what</p> <p>23 happened, happened because of the disruption.</p> <p>24 MR BIZOS SC: Yes.</p> <p>25 CHAIRPERSON: And I think she's already</p>
<p style="text-align: right;">Page 7458</p> <p>1 well and execute them under strict command after approval</p> <p>2 by the CJOC." Was that done?</p> <p>3 GENERAL PHIYEGA: The plan was done, the</p> <p>4 plan was interrupted.</p> <p>5 MR BIZOS SC: No, was it done? Was</p> <p>6 anything like that done on the afternoon of the 16th of</p> <p>7 August?</p> <p>8 GENERAL PHIYEGA: Yes, the plan was done,</p> <p>9 the plan was disrupted.</p> <p>10 CHAIRPERSON: National Commissioner, it's</p> <p>11 not as simple as that. Mr Bizos has read you a paragraph</p> <p>12 of the Standing Order which deals with specific things that</p> <p>13 had to be done and he's asking you whether they were done.</p> <p>14 Now it may be that because you weren't there and you had to</p> <p>15 rely on the briefings you received, you don't know whether</p> <p>16 those things precisely were done, in which case it would</p> <p>17 save a lot of time if you just say so because otherwise</p> <p>18 he's going to keep on hammering on the point and it's not</p> <p>19 going to get us anywhere.</p> <p>20 GENERAL PHIYEGA: Judge, the last</p> <p>21 sentence says, "Plan all offensive actions well and,"</p> <p>22 second part, "execute them under strict command," and my</p> <p>23 answer is in two parts. I have said when I started,</p> <p>24 according to the information I received, yes the plan was</p> <p>25 done. On the second part I'm saying no because I was</p>	<p style="text-align: right;">Page 7460</p> <p>1 said and other people said it, it was part of their</p> <p>2 statement that they contend that what they did amounted to</p> <p>3 a reliance on sub-paragraph 7; they were acting in self-</p> <p>4 defence and private defence. That's what she says, that's</p> <p>5 the information she received. Now I hope you'll forgive me</p> <p>6 if I say I think we're going around in circles just a bit</p> <p>7 and repeating what's been covered already. We know that's</p> <p>8 their case. The question is whether that's correct. I'm</p> <p>9 not sure - and I say this with great respect to the</p> <p>10 National Commissioner - that she's able to help us whether</p> <p>11 the argument in relation to self-defence and private</p> <p>12 defence can succeed because she wasn't there. All she</p> <p>13 knows is what she was told, so I think some of the</p> <p>14 questions you're asking are not calculated to elicit</p> <p>15 answers that will help us to answer the questions that the</p> <p>16 President has set for us in the Terms of Reference. Please</p> <p>17 bear that in mind when you proceed. You'll have the</p> <p>18 fullest opportunity -</p> <p>19 MR BIZOS SC: I would like to read the</p> <p>20 orders to her because we want, when we do argue that this</p> <p>21 was - on expert evidence and on the facts as they are known</p> <p>22 to us - that there was not a proper consideration as to</p> <p>23 what should happen or may happen -</p> <p>24 CHAIRPERSON: Is she the right person to</p> <p>25 ask these questions of? She says the Provincial</p>

<p style="text-align: right;">Page 7461</p> <p>1 Commissioner made the decision, had full authority to act.  2 She says there were a lot of other high-ranking people who  3 are in her eyes experts in the field; she wasn't informed  4 of the details. She is the manager and the leader of the  5 service but she has to rely on her subordinates who, as she  6 said, are high-ranking officials with experience. Now if  7 you have a quarrel with what happened, it seems to me it's  8 more appropriate to raise those points that you want to  9 raise with those people who could answer it. She will  10 simply say, "I don't know, I was told things. I accept  11 they're correct. Whether they are correct or not, ask  12 them." So we will go round and round and round, and also  13 you have the disadvantage of having shown your hand, which  14 is not always a sensible thing for a cross-examiner to do.  15 But please proceed in the light of what I said.  16 MR BIZOS SC: No, Mr Chairman, let me try  17 and justify why I am putting this. Our submission will be  18 that there is joint responsibility of the Minister, of the  19 witness, of her generals that approved this plan, or  20 allowed it to happen, and I do not want the Commission to  21 have the difficulty when it comes to write its report, that  22 you can't ask us that the National Commissioner was liable  23 because it was not put to her. This is the concern that I  24 have.  25 CHAIRPERSON: Put it to the witness, but</p>	<p style="text-align: right;">Page 7463</p> <p>1 the question, let's get the witness's answer. If it's in  2 accordance with what she said earlier, so be it. If it  3 isn't, well we'll see. Don't worry about whether your  4 answer is the usual answer, just give us the answer and if  5 it's in line with what you said earlier, so be it. If it  6 isn't, so be it also.  7 GENERAL PHIYEGA: Yes, it did confuse me  8 and it made me not to concentrate on the question. Can I  9 ask for the question again?  10 CHAIRPERSON: This time without comment,  11 Mr Bizos.  12 MR BIZOS SC: Yes, thank you. The  13 violence that took place between the police and  14 demonstrators, the demonstrators or part of them, and the  15 destroying of property at or near trade unions, all of this  16 happened away from the koppie, didn't it? So the deaths  17 and damage to property prior to the 16th did not take place  18 at the koppie.  19 GENERAL PHIYEGA: Yes.  20 MR BIZOS SC: In fact, the 14th and the  21 15th were violence-free –  22 CHAIRPERSON: No, I don't think the 14th  23 was violence-free. Mr Twala died on the 14th.  24 MR BIZOS SC: 14th –  25 CHAIRPERSON: Tuesday the 14th was the day</p>
<p style="text-align: right;">Page 7462</p> <p>1 put it as briefly as you can because as I say, we have  2 covered this ground before and we're going to cover it  3 again, but I understand your point. In relation to the  4 National Commissioner you have to put your case to her with  5 sufficient particularity to enable her to answer the  6 submissions that you are going to make.  7 MR BIZOS SC: Because, Mr Chairman, it's  8 my friends' right to say that they don't apply. The facts  9 don't support him, but that will be a matter of argument.  10 Let me, in response to the Chairman's request, not read all  11 this to you, but let me deal with 4, 11.4. "The following  12 are prohibited or restricted during crowd management  13 operations. The use of 37mm stoppers, prohibited. The use  14 of firearms and sharp ammunition, including birdshot and  15 buckshot, prohibited. The use of rubber bullets, shotgun  16 batons may only be used to disperse a crowd in extreme  17 circumstances if less forceful methods prove to be  18 ineffective, restricted." Now have you any further comment  19 other than your usual in relation whether that was done on  20 the 16th of August or not?  21 GENERAL PHIYEGA: Advocate, you talk  22 about my usual – I've answered a lot of questions. I don't  23 know which one is the usual.  24 CHAIRPERSON: Mr Bizos, I think that was  25 a sarcastic comment which is not worthy of you. Just put</p>	<p style="text-align: right;">Page 7464</p> <p>1 Mr Twala died.  2 MR BIZOS SC: That was one, yes.  3 CHAIRPERSON: So that isn't – he died  4 through violence. He died as a result of violence, Mr  5 Twala. So the 15th is violence-free –  6 MR BIZOS SC: Yes, well I'll concentrate  7 on the 15th –  8 CHAIRPERSON: - but the 14th isn't  9 correct.  10 MR BIZOS SC: Yes. On the 15th there was  11 no violence.  12 MR MPOFU: Sorry to interrupt,  13 Chairperson. This point did arise before and I think the  14 ruling that the Chair made was on the basis that we can  15 only accept that the body of Mr Twala was found on the 14th.  16 When he died, we don't know.  17 CHAIRPERSON: The body was found on the  18 Tuesday and it hadn't been there earlier. I mean it seems  19 pretty clear from what we've been told that it was noticed  20 at that point in the middle of the afternoon from the  21 helicopter. If it had been there earlier it would have  22 been noticed earlier. So I think we can assume the body  23 was found there, and I don't remember giving the ruling you  24 say, but I won't quarrel with you, but it may well be that  25 he could have been killed the day before, but I don't think</p>



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1 the point Mr Bizos wants to make depends on that.  
 2 MR BIZOS SC: I will confine myself –  
 3 CHAIRPERSON: So if Mr Bizos can rephrase  
 4 his question and we won't have to go into those waters at  
 5 all.  
 6 MR BIZOS SC: In order to avoid it I will  
 7 confine myself – there was no violence on the 15th.  
 8 GENERAL PHIYEGA: Yes, according to the  
 9 report I received.  
 10 MR BIZOS SC: There was no violence in  
 11 the morning of the 16th.  
 12 GENERAL PHIYEGA: Yes.  
 13 MR BIZOS SC: Correct?  
 14 GENERAL PHIYEGA: Yes.  
 15 [11:02] MR BIZOS SC: Now the gathering on the,  
 16 at the place where 34 people were killed and 84 people were  
 17 seriously wounded, is an isolated place on which the  
 18 gathering took place.  
 19 CHAIRPERSON: Mr Bizos, I don't know what  
 20 you mean by "isolated." The evidence [inaudible] which is  
 21 important. So perhaps you should define more tightly what  
 22 you mean by "isolated."  
 23 MR BIZOS SC: Well, let me say what it is  
 24 not, as far as gatherings are concerned. It is not a  
 25 gathering in an urban area where the gathering blocks

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1 traffic and the road has got to be cleared. There is no  
 2 immovable property around with shops, where people cannot  
 3 move freely. It was not a place where, as it happens at  
 4 some gatherings, in the urban area shops are looted.  
 5 People were gathered on a hillside. They were singing.  
 6 Some of them were armed. On the later version of the  
 7 police story there were many who were not armed. Would you  
 8 agree with all that?  
 9 GENERAL PHIYEGA: I would agree with the  
 10 fact that there were many people on the koppie; they were  
 11 armed –  
 12 MR BIZOS SC: Some of them were armed, or  
 13 do you say they were all armed, like one or two of your  
 14 juniors?  
 15 GENERAL PHIYEGA: They had been meeting  
 16 in that koppie over a number of days and they were  
 17 gathering illegally.  
 18 MR BIZOS SC: They were gathering  
 19 illegally?  
 20 GENERAL PHIYEGA: Yes.  
 21 MR BIZOS SC: We'll come to the  
 22 illegality of it. What was so urgent on the 16th to decide  
 23 on D-day, that it would be D-day? Why couldn't they wait  
 24 for another day or two or three, to give negotiations a  
 25 chance?

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1 GENERAL PHIYEGA: On the 16th, according  
 2 to the report I received, there was an agreement that there  
 3 shall be a handing in of the weapons by those who were  
 4 gathering.  
 5 CHAIRPERSON: I've got to interrupt you  
 6 to tell you that that's not the evidence we have so far.  
 7 The evidence so far indicates that Mr Mathunjwa said  
 8 certain things to the police, which gave rise to that  
 9 belief. It doesn't seem to be backed up by the evidence  
 10 that there was in fact such an agreement on the part of the  
 11 people on the koppie that they would put down their  
 12 weapons. I think Mr Mathunjwa thought he could persuade  
 13 them to do so, but I don't know that the evidence goes any  
 14 further than that, but I think it's true that the police  
 15 concerned with the JOC believed that there had been such a  
 16 commitment, which is obviously what you were told, but it  
 17 may well be – or let me put it this way, might well be at  
 18 the end of the Commission we may not be able to find that  
 19 there was such an agreement; there was perhaps something  
 20 approximating to a misunderstanding, but it's clear,  
 21 however, that your information was that there was an  
 22 agreement, and your understanding, I take it, is influenced  
 23 by that. Is that fair?  
 24 GENERAL PHIYEGA: Yes, Judge, that's my  
 25 understanding and I'm sure the other people like General

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1 Mbombo and the commanders will talk to that.  
 2 MR BIZOS SC: A bishop came, who tried to  
 3 intervene, and promised to negotiate between the employer  
 4 and the protesters. Why was not Bishop Seoka given an  
 5 opportunity to negotiate, and why was the door closed to  
 6 him?  
 7 CHAIRPERSON: Can the witness be expected  
 8 to answer that, Mr Bizos?  
 9 MR BIZOS SC: Sorry?  
 10 CHAIRPERSON: Can the witness be expected  
 11 to answer that question? That's clearly a matter that  
 12 should be asked of some of the other witnesses.  
 13 MR BIZOS SC: Yes.  
 14 CHAIRPERSON: Anything she will say on  
 15 the matter, if she knows what she thinks is the answer,  
 16 will in any event be hearsay, so I don't think you should  
 17 persist with that. But anyway, if you want to do so, you  
 18 can, but I've expressed my prima facie view.  
 19 MR BIZOS SC: Well, I will accept the  
 20 Chairman's advice. What I want to ask is this. Before  
 21 making your exculpatory statements of the 17th and 20th, did  
 22 you ask why could the demonstrators not have been monitored  
 23 and contained as opposed to being confronted on the 16th?  
 24 GENERAL PHIYEGA: My understanding of the  
 25 facts that were given to me was that the process of

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1 containing the protesters continued until the plan to  
2 contain them was disrupted.

3 MR BIZOS SC: Did you ask them, why did  
4 you stop the negotiations on the 16th? Whom did you ask,  
5 and what was his or her answer to you as the responsible  
6 National Commissioner?

7 GENERAL PHIYEGA: I am sure the other  
8 people that will testify here will talk about even  
9 discussions they had on the morning of the 16th – cell phone  
10 contacts, and communication even on the morning of the 16th.

11 MR BIZOS SC: At one stage of your  
12 evidence, Commissioner, you told us that you were involved  
13 on the matters relating to these events. Did you use that  
14 expression, “you were involved?”

15 GENERAL PHIYEGA: In order to understand  
16 what – maybe the question is just too broad. When you say  
17 I was involved, and I say –

18 MR BIZOS SC: You said that you were  
19 involved, if I remember correctly.

20 GENERAL PHIYEGA: In what?

21 MR BIZOS SC: You tell us.

22 GENERAL PHIYEGA: I just want –

23 MR BIZOS SC: Did you say that you were  
24 involved, at one stage of these proceedings?

25 CHAIRPERSON: It would be fairer to say,

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1 did you say that you were involved to some extent at some,  
2 in the course of your evidence, and then if the answer to  
3 that is yes, then the next question is, to what extent were  
4 you involved. But I see it's quarter past 11. Would you  
5 like to think about that and we can resume the discussion  
6 after the tea adjournment? Unless you want to answer it  
7 now.

8 GENERAL PHIYEGA: No, I'll answer that  
9 when, after having a hot cup of tea.

10 CHAIRPERSON: Alright. We will now take  
11 the tea adjournment, resume I hope at half past 11.

12 [COMMISSION ADJOURNS COMMISSION RESUMES]

13 [11:37] CHAIRPERSON: The Commission resumes. I  
14 see that someone was very busy during the tea adjournment  
15 because we've now all got a piece of paper on our desk that  
16 heads “Investigation into possible tampering of the crime  
17 scene - shooting incident Lonmin Mine, Marikana, 16 August  
18 2012.” This is the statement that I take it, it was  
19 promised we would get. Do you want it to be given an  
20 exhibit number, Mr Bizos? Because you were going to deal  
21 with it in your cross-examination.

22 MR BIZOS SC: Yes, I'd like to read it  
23 before I cross-examine.

24 CHAIRPERSON: No, no, no, I understand  
25 that, but should we give it an exhibit number while we're

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1 dealing with it?

2 MR BIZOS SC: But if it is going to be  
3 admitted now, it should be given a number.

4 CHAIRPERSON: Yes, Ms Pillay with her  
5 customary efficiency will tell us what the next exhibit  
6 number is.

7 MS PILLAY: It's FFF23.

8 CHAIRPERSON: FFF23. “Possible tampering  
9 at,” and it's dated the 18th of March. Well, we'll deal  
10 with it at the appropriate time, but it's now properly  
11 before us. You're still under oath, National Commissioner.

12 MANGWASHI VICTORIA PHIYEGA: s.u.o.

13 CHAIRPERSON: Remember the question we  
14 were busy with was you had said you were involved – yes, I  
15 think you said you were involved to some extent in what  
16 happened, and the question was, (a), did you say that, and  
17 if so, what was the extent of your involvement, remember?  
18 And you said you'd like to think about the answer to the  
19 question over a cup of tea. Are you now able to answer it?

20 GENERAL PHIYEGA: Yes. Yes, I was to  
21 some extent involved, and as I've already indicated to this  
22 Commission, in my role as a strategic leader of the police.

23 CROSS-EXAMINATION BY MR BIZOS SC (CONTD.):  
24 I want to put to you that your reliance on the statement  
25 that the crowd disrupted the plan – remember that? You

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1 said on a number of occasions the crowd disrupted the plan.  
2 What did the crowd do before the use of any force to  
3 disrupt the plan?

4 GENERAL PHIYEGA: I think it is important  
5 to say that type of disruption would in intricate and  
6 detailed terms be explained by the commanders that are  
7 going to come here, how they, you know, they'll talk about  
8 how they pulled the fence. They'll talk about where it was  
9 disrupted for the first time. They will talk about where  
10 it was disrupted for the second time, and I'm sure lots of  
11 lots of details that are intricate and intense will come  
12 out of that.

13 MR BIZOS SC: You chose to defend your  
14 position by answering numerous questions, “The crowd  
15 disrupted the plan.” Am I correct?

16 GENERAL PHIYEGA: You are very correct.

17 MR BIZOS SC: Huh?

18 GENERAL PHIYEGA: You are very correct.

19 MR BIZOS SC: Ja, I'm correct. I am  
20 going to put to you on the authority of experts that are  
21 going to give evidence here, that it was not the crowd that  
22 disrupted any plan there may have been, it was the police  
23 that disrupted the crowd and its behaviour. Let me give  
24 you the details. The expert will say that an excessive  
25 show of force is disruptive to peaceful crowds. Are you in

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1 a position to agree or disagree or say you don't know?  
 2 GENERAL PHIYEGA: I would say to you that  
 3 I would disagree. With my knowledge I would say visibly  
 4 policing should be a deterrent.  
 5 CHAIRPERSON: Mr Bizos, you said your  
 6 expert will say that.  
 7 MR BIZOS SC: Yes.  
 8 CHAIRPERSON: Can you tell us who the  
 9 expert is who will say that?  
 10 MR BIZOS SC: Yes, Mr Hendrickx sitting  
 11 behind me, among others, because there are other experts  
 12 being called by other people.  
 13 CHAIRPERSON: You've answered my  
 14 question, thank you.  
 15 MR BIZOS SC: Now if that is said, what  
 16 experience have you got to say that Mr Hendrickx will be  
 17 wrong if he says that?  
 18 GENERAL PHIYEGA: You've asked me for my  
 19 opinion. I've given you my opinion to say where I see many  
 20 police, I think visible policing in my opinion is a  
 21 deterrent.  
 22 MR BIZOS SC: Yes.  
 23 GENERAL PHIYEGA: I am not debating the  
 24 expert. I haven't seen his report. I haven't heard him.  
 25 MR BIZOS SC: Yes. The other that the

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1 expert will say is provocative acts like the use of force  
 2 or the threat of a force, or what happened here, putting  
 3 out razor wire between the crowd and the police and their  
 4 vehicles, would - and apparently was - be considered a  
 5 highly provocative act by the police, why are they doing  
 6 this - I beg your pardon, by the crowd, why are they doing  
 7 this to us, what are they going to do to us. Are you  
 8 prepared to contradict Mr Hendrickx when he says that to  
 9 the Commission? May I just finish? Particularly without  
 10 any warning or explanation.  
 11 GENERAL PHIYEGA: I shall again give you  
 12 my personal interpretation. When there is a peaceful  
 13 gathering and people are meeting to discuss issues  
 14 peacefully, based on some of the statistics I've already  
 15 shared that in three years we have managed 33 000 similar  
 16 protests, 30 000 of which were peaceful, I would therefore  
 17 conclude that there would be trust to say the police are  
 18 here to support us to continue with our peaceful protest.  
 19 But where there is probably something else, the outcome  
 20 would be different.  
 21 MR BIZOS SC: You yourself said that this  
 22 was an exceptional event, and I don't know whether what may  
 23 have happened in thousands of other gatherings is of any  
 24 help to the Commission. The question is, do you agree or  
 25 not that where you have three to three and a half thousand

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1 people, some of who may be armed, many of whom are not  
 2 armed, even according to Mr Semenya, being surrounded by  
 3 razor wire, would that not be a provocative act to peace-  
 4 loving people that wanted a higher wage?  
 5 CHAIRPERSON: Mr Bizos, Mr Semenya wants  
 6 to say something before the witness answers the question.  
 7 MR SEMENYA SC: Chair, there's no  
 8 evidence of a razor wire surrounding the crowd of  
 9 protesters.  
 10 CHAIRPERSON: Yes, the evidence isn't  
 11 that they were surrounds. They could have gone away from  
 12 the area if they'd gone in a southerly direction. As we  
 13 can see from the photographs which are in exhibit L there  
 14 was sort of a line of wire between the strikers and the  
 15 koppie on the one hand, and the police and the informal  
 16 settlement on the other.  
 17 MR BIZOS SC: Yes.  
 18 CHAIRPERSON: But they weren't  
 19 surrounded, so I think you'll have to rephrase it.  
 20 MR BIZOS SC: Well, I'll withdraw the  
 21 word "surrounding" - laying out razor wire without an  
 22 explanation may be a provocative act. Do you agree with  
 23 that?  
 24 GENERAL PHIYEGA: No, I do not agree with  
 25 that.

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1 MR BIZOS SC: Very well. Now the use of  
 2 water cannon without any warning, without any explanation,  
 3 would that be a provocative act?  
 4 GENERAL PHIYEGA: I would again say  
 5 should the disruption not have taken place, and in  
 6 accordance to the plan that announcement would have been  
 7 made.  
 8 MR BIZOS SC: We're dealing with the  
 9 facts that are before us. There was no warning. No-one  
 10 has suggested even in their statements that there was any  
 11 explanation or any warning to the crowd that water cannon  
 12 would be used, for what purpose it would be used. Let's  
 13 deal with the facts of this case.  
 14 GENERAL PHIYEGA: My interpretation of  
 15 the facts is that should there have not been a disruption,  
 16 that communication would have taken place.  
 17 MR BIZOS SC: Do you think you've  
 18 answered the question?  
 19 GENERAL PHIYEGA: To the best of my  
 20 ability, yes.  
 21 MR BIZOS SC: Let's go to the next one.  
 22 The use of teargas at a crowd, true that some of them may  
 23 have been armed, but the vast majority, or many others were  
 24 not armed, would that be a provocative act?  
 25 GENERAL PHIYEGA: No, it would not be a

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1 provocative act.

2 MR BIZOS SC: Not? Even though no

3 warning was given or nothing was explained?

4 GENERAL PHIYEGA: On that matter I go

5 back to what I've said to say had there been no disruption,

6 there would have been loudhailers talking to the

7 protesters, explaining to them precisely what is going to

8 take place.

9 MR BIZOS SC: Stun grenades were used

10 without any warning, without any explanation. Would that

11 be a provocative act?

12 GENERAL PHIYEGA: No.

13 MR BIZOS SC: Not. Well, I am going to

14 put to you that your bland denials as to whether these were

15 provocative acts or not is going to be contradicted by

16 certainly Mr Hendrickx and other experts on the management

17 of crowds. Mr Chairman, I am informed that the clip that

18 we wanted to show is now available, if we may do that.

19 CHAIRPERSON: You started on this line of

20 cross-examination and then deferred it because the clip

21 couldn't be shown.

22 MR BIZOS SC: Yes, yes.

23 CHAIRPERSON: Now it can be shown.

24 MR BIZOS SC: Now it's –

25 CHAIRPERSON: You can go back to that

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1 part of your cross-examination and proceed from there.

2 MR BIZOS SC: Yes, it's the – may I just

3 clarify, that apparently it's the same as AAA13, but the

4 portion that we want to play was – or I am informed was not

5 played to the Commission.

6 CHAIRPERSON: Well, if we haven't had it

7 before, we have to give it an exhibit number.

8 MR BIZOS SC: Yes.

9 CHAIRPERSON: And the next exhibit number

10 I would – Ms Pillay is shaking her head. The next exhibit

11 number would be FFF24, if this is in fact new material that

12 we've not actually seen before. If we have seen it before,

13 of course we just mention the previous description of the

14 exhibit. Can you help us, Ms Pillay?

15 MS PILLAY: I understood that the clip

16 that Mr Bizos wanted to play was part of AAA13, Chair, but

17 if not, then it would be FFF24.

18 CHAIRPERSON: Let's see it first and then

19 we can have consensus as to whether it needs a separate

20 exhibit number or whether AAA13 will cover it.

21 MR BIZOS SC: There's no sound, and I'm

22 sorry if I turn my back – I can see better what's on the

23 screen.

24 [VIDEO RECORDING PLAYED]

25 CHAIRPERSON: - ask you two things. Can

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1 you do something to stop that irritating noise that we

2 hear, and secondly, that we go back to the beginning so we

3 hear everything that the lieutenant-general, Provincial

4 Commissioner is saying.

5 [VIDEO RECORDING PLAYED]

6 CHAIRPERSON: Ms Pillay can tell us – is

7 that what we saw before?

8 MS PILLAY: Chair, my understanding is

9 that that portion is covered by AAA13.

10 CHAIRPERSON: Alright. Well, let's

11 regard it as coupled by AAA13. It's a very small, short

12 passage. She says "Hope we can deal with the matter, sort

13 the matter out amicably. If we can't, then I'm not going

14 to give you details, but this matter has got to end today."

15 I think that's basically what she said.

16 [11:57] MR BIZOS SC: Yes, that was it. Now to

17 be quite correct -

18 CHAIRPERSON: Mr Bizos, I don't think

19 your microphone is on.

20 MR BIZOS SC: Sorry. To be quite

21 correct, what secret was there that the commissioner was

22 not prepared to disclose? What did she not want to tell

23 the audience?

24 CHAIRPERSON: Can the witness tell us?

25 Isn't it a question you must ask her when she gives

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1 evidence? She will, I understand, be giving evidence. Is

2 that correct, Mr Semenya?

3 MR SEMENYA SC: That's correct.

4 CHAIRPERSON: The real question should

5 be, does this witness know what the secret was, as you put

6 it, which the Provincial Commissioner wasn't prepared to

7 mention. If she says she doesn't know, well that's the end

8 of it. If she says she does know, you can then ask her

9 what it was.

10 MR BIZOS SC: Are you aware what was

11 being held back?

12 GENERAL PHIYEGA: I don't know. I'm sure

13 General Mbombo will answer to that.

14 MR BIZOS SC: I am assuming that there

15 were no secrets between the Provincial Commissioner and

16 you?

17 GENERAL PHIYEGA: I think in the manner

18 that we run our business –

19 MR BIZOS SC: It was none of your

20 business?

21 GENERAL PHIYEGA: No -

22 CHAIRPERSON: She said in the manner in

23 which – she's going to continue her answer. She's saying

24 "I think in the manner in which we run our business," and

25 then you interrupted her. I don't think she was suggesting

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1 -

2 MR BIZOS SC: I'm sorry.

3 CHAIRPERSON: - that it was none of

4 anyone's business.

5 MR BIZOS SC: Yes.

6 GENERAL PHIYEGA: Advocate, let me just

7 say, perhaps we may be not on the same side, but I do

8 conduct myself with a lot of professionalism.

9 MR BIZOS SC: What do you mean by that?

10 GENERAL PHIYEGA: I would never say to

11 you it's none of my business.

12 CHAIRPERSON: I think she means your -

13 what she's saying to you, Mr Bizos, is she behaves in a

14 professional manner; she would never say to you when you

15 ask her a question, it's none of your business. That's not

16 the way she does thing -

17 MR BIZOS SC: I see.

18 CHAIRPERSON: - and she didn't say that

19 and she said she never would have said it. That's what

20 she's telling you, so let's move on to something else, I

21 think.

22 GENERAL PHIYEGA: I was saying the manner

23 in which we run our business, I truly believe that General

24 Mbombo in the statements that she made, she was mindful of

25 the protocols, the prescripts, the governance of how we run

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1 things, and therefore when she answers she will be

2 answering within that framework. She can never run this

3 organisation like her personal business.

4 MR BIZOS SC: Do you intend to say that

5 there are some things that may have been said between you

6 and the commissioner in relation to this matter, you're not

7 prepared to talk about? Are you saying that, or am I

8 misinterpreting you?

9 GENERAL PHIYEGA: No, I'm not saying

10 that.

11 MR BIZOS SC: Will you agree that you

12 were given information at 1:30 in the afternoon that the

13 tactical phase would be put into operation on that day?

14 GENERAL PHIYEGA: I'm not aware of that

15 information and by whom.

16 MR BIZOS SC: Do you deny that that

17 information was passed to you at 1:30, or later perhaps?

18 The time is not so important. Are you denying that you

19 were informed that the tactical phase was going to be

20 enforced that afternoon?

21 GENERAL PHIYEGA: I have no recollection

22 of that because my statement doesn't even refer to that.

23 CHAIRPERSON: Mr Bizos is referring you

24 to - if I'm wrong he'll correct me. I think he's referring

25 you to paragraph 23 of your statement where you say that on

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1 the afternoon of August the 16th you received a call from

2 Lieutenant-General Mbombo who informed you of the decision

3 to implement stage 3 of the plan, which information I think

4 you've relayed to the Minister, but in other words you were

5 informed at some stage in the afternoon before the plan was

6 implemented, or stage 3 of the plan was implemented,

7 informing you that that decision has been taken, and I

8 think that's what Mr Bizos is asking you about.

9 MR BIZOS SC: Yes.

10 GENERAL PHIYEGA: Okay.

11 CHAIRPERSON: Let's take it step by step.

12 The telephone call to which you refer in paragraph 23 of

13 your statement

14 GENERAL PHIYEGA: Okay, I see that.

15 CHAIRPERSON: - what time did you receive

16 that call?

17 GENERAL PHIYEGA: Judge, I wouldn't

18 recall, but it was in the afternoon and that's when I was

19 informed that the 9 o'clock promise did not happen of

20 laying down the arms.

21 CHAIRPERSON: Because you had previously

22 said that you were told I think the previous night that

23 there was this promise that Mr Mathunjwa had made -

24 GENERAL PHIYEGA: Yes.

25 CHAIRPERSON: - and that if the promise

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1 wasn't kept, undertaking wasn't complied with, then the

2 police - you used the words "the police would have to

3 disperse the crowd."

4 GENERAL PHIYEGA: Yes.

5 CHAIRPERSON: So that's what you knew the

6 previous night. Now you were told that the promise hadn't

7 been kept.

8 GENERAL PHIYEGA: Yes.

9 CHAIRPERSON: And therefore the next

10 stage of the rocket was going to come into operation,

11 namely the decision had been taken to implement stage 3 of

12 the plan. Is that -

13 GENERAL PHIYEGA: Yes.

14 CHAIRPERSON: That's the gist, is it?

15 GENERAL PHIYEGA: Yes, that is like that.

16 CHAIRPERSON: So that's where you are in

17 your cross-examination, Mr Bizos. Is that right?

18 MR BIZOS SC: Yes, Mr Chairman. I want

19 to refer you to paragraph 23 of your statement. Does that

20 confirm what you have told the Chairman of the Commission

21 that, "On the afternoon of August the 16th, 2012, I received

22 a call from Lieutenant-General Mbombo, who informed me of

23 the decision to implement stage 3 of the plan, which

24 information I relayed to the Minister."

25 MR SEMENYA SC: We have been past this

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1 point before, Chair. We have been past this point before  
 2 that the statement has been corrected –  
 3 CHAIRPERSON: Yes, yes, I know, but Mr  
 4 Bizos is going back to it as a sort of launching pad to  
 5 which to move on to his next point. So –  
 6 MR SEMENYA SC: No, no, no, he's reading  
 7 the wrong statement, Chair.  
 8 CHAIRPERSON: Well I think I read the  
 9 wrong statement too. Give him the right statement so he  
 10 can read that and then we can proceed.  
 11 MR BIZOS SC: In the corrected statement  
 12 you do not mention the Minister. What I want to know from  
 13 you is did you communicate with the Minister what you had  
 14 been told by the commissioner?  
 15 GENERAL PHIYEGA: No, I did not.  
 16 MR BIZOS SC: Why not?  
 17 GENERAL PHIYEGA: The responsibility of  
 18 presenting, of implementing a dispersal and operations  
 19 plan, as I've said is within the remedy and responsibility  
 20 of the Provincial Commissioner. It is operation; it was  
 21 not necessary for us to say to the Minister now we are  
 22 encircling, we are disarming, and we are dispersing the  
 23 crowd. It is not the type of report I give to the  
 24 Minister.  
 25 MR BIZOS SC: In the earlier form of your

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1 statement you said that you did inform the Minister. Was  
 2 that a mistake?  
 3 GENERAL PHIYEGA: The earlier form of my  
 4 statement is the one you are reading.  
 5 CHAIRPERSON: Alright, if the later form  
 6 of your statement contains that section that he read, that  
 7 you relayed this information to the Minister, and I think  
 8 what Mr Bizos wants to know is where did that information  
 9 come from, how did those words find their way into the  
 10 later version of your statement, which you've now  
 11 repudiated, as it were? How did that mistake come about?  
 12 GENERAL PHIYEGA: Judge, what I can say  
 13 is that I submitted a statement on the 3rd and I was told  
 14 that there was a page I didn't sign. When it came back we  
 15 started seeing those things, but my statement that I  
 16 circulated to this Commission, that's what I said to the  
 17 Commissioner –  
 18 CHAIRPERSON: In other words what you  
 19 were saying, if I may be so bold as to summarise what  
 20 you're saying, what you're saying is you don't know  
 21 yourself how that mistake occurred. You weren't aware of  
 22 it until later, I take it, and then you corrected it and  
 23 drew the correct position to our attention. Is that what  
 24 you're saying?  
 25 GENERAL PHIYEGA: Precisely, because I

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1 was signing because I was told there was a page I didn't  
 2 sign, there were words that shifted, but the statement that  
 3 I gave to the Commission, as you can see, is signed the 7th.  
 4 That's my statement to this Commission.  
 5 MR BIZOS SC: You know that we have the  
 6 minutes of the meeting of that day and let me read the  
 7 second-last paragraph of the meeting. "The Provincial  
 8 Commissioner indicated that she had already communicated  
 9 with the National Commissioner, informing her of the  
 10 current situation and that a deadlock was reached with  
 11 negotiations and also that phase 3 of the operational plan  
 12 will be executed. She also indicated that the National  
 13 Commissioner indicated that she will inform the Minister of  
 14 Police on the current situation and actions that will be  
 15 taken." Is that minute a correct minute?  
 16 CHAIRPERSON: Mr Bizos, you didn't give  
 17 us the – is that an exhibit? I beg your pardon, I  
 18 understand you're quoting from the police hard drive. Are  
 19 those minutes already before us as an exhibit?  
 20 MR BIZOS SC: I'll have to check that.  
 21 MS PILLAY: Chair, it's exhibit EE.  
 22 CHAIRPERSON: Thank you. Now just for  
 23 the benefit of my notes, it's a long time ago that we saw  
 24 that exhibit, it's EE, it's the minutes of what meeting?  
 25 MS PILLAY: The JOCOM minute of the 16th

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1 of August at 1:30.  
 2 MR BIZOS SC: So it's EE of the meeting,  
 3 it's to be found at page 696, I am informed –  
 4 CHAIRPERSON: National Commissioner, a  
 5 long time ago in this Commission a document was handed in  
 6 as exhibit EE and it's the minutes of the meeting of the  
 7 JOCOM held at Marikana on the 16th at 1:30, and the passage  
 8 that Mr Bizos read you appears in those minutes, where the  
 9 Provincial Commissioner said what he read to you. If you  
 10 would like him to read it to you again so you can focus on  
 11 it, then I'm sure he'll be happy to do so. If you haven't  
 12 got a copy, I see Mr Wesley is bringing you the evidence  
 13 leaders' copy. Perhaps you'd like to draw her attention,  
 14 Mr Bizos, to the paragraph on the page so that she can read  
 15 it for herself.  
 16 MR BIZOS SC: Yes, of course.  
 17 CHAIRPERSON: What's the paragraph number  
 18 that you –  
 19 MR BIZOS SC: It's the second-last – I  
 20 don't think that the paragraphs are –  
 21 CHAIRPERSON: It's the penultimate  
 22 paragraph on the first page?  
 23 MR BIZOS SC: Penultimate paragraph.  
 24 CHAIRPERSON: I haven't got it in front  
 25 of me either, but –

<p style="text-align: right;">Page 7489</p> <p>1 MR BIZOS SC: On page –</p> <p>2 MS PILLAY: Chair, it's on the last page</p> <p>3 of the document that –</p> <p>4 CHAIRPERSON: Penultimate paragraph of</p> <p>5 the last page of the document.</p> <p>6 MR BIZOS SC: Last page of the document.</p> <p>7 GENERAL PHIYEGA: I've seen it.</p> <p>8 MR BIZOS SC: Do you agree that this</p> <p>9 contemporaneous minute signed by Major-General Annandale</p> <p>10 seems to contradict your evidence that you did not inform –</p> <p>11 you were not informed and you did not inform the Minister?</p> <p>12 CHAIRPERSON: I'm sorry, there seems to</p> <p>13 be a misunderstanding.</p> <p>14 MR BIZOS SC: I'm corrected –</p> <p>15 CHAIRPERSON: There seems to be a</p> <p>16 misunderstanding. She doesn't say she wasn't informed.</p> <p>17 What she says is she didn't relay that information to the</p> <p>18 Minister, and the point you're making, if correctly put, is</p> <p>19 that that part is contradicted –</p> <p>20 MR BIZOS SC: Yes.</p> <p>21 CHAIRPERSON: - by the minutes.</p> <p>22 MR BIZOS SC: Yes, thank you, Mr</p> <p>23 Chairman. Do you agree that that is a contradiction of</p> <p>24 what you have said?</p> <p>25 GENERAL PHIYEGA: It is not a</p>	<p style="text-align: right;">Page 7491</p> <p>1 CHAIRPERSON: What statute is that, Mr</p> <p>2 Bizos? I'm not challenging your statement, but I don't</p> <p>3 remember such a statute, but if there is statutory</p> <p>4 provision, where there is one, I think in fairness to the</p> <p>5 witness you could at least –</p> <p>6 MR BIZOS SC: It's 207(2) of the</p> <p>7 Constitution.</p> <p>8 CHAIRPERSON: What does it say?</p> <p>9 MR BIZOS SC: We have notes. Inter alia</p> <p>10 that you control and manage the police service in</p> <p>11 accordance with the directions of the cabinet member</p> <p>12 responsible for policing.</p> <p>13 CHAIRPERSON: I think that's – you see, I</p> <p>14 seem to remember –</p> <p>15 MR BIZOS SC: The notes I have –</p> <p>16 CHAIRPERSON: I seem to remember words to</p> <p>17 that effect. I don't think they were accurately summarised</p> <p>18 in the question as you originally put it to the witness, so</p> <p>19 perhaps you should put the question again, this time</p> <p>20 quoting to her the exact words of the Constitution on which</p> <p>21 you rely and then we can get her answer.</p> <p>22 MR BIZOS SC: Yes, well see, I did have a</p> <p>23 copy. I don't know what happened to it in the meantime,</p> <p>24 but –</p> <p>25 CHAIRPERSON: I'm sure Mr Semenya will</p>
<p style="text-align: right;">Page 7490</p> <p>1 contradiction. It is a fact that I did not relay this</p> <p>2 matter to the Minister, and I have said to you that it is</p> <p>3 not necessary for me or even General Mbombo or any other</p> <p>4 person to say to the Minister now we are going to encircle,</p> <p>5 disarm, arrest, and disperse the crowd. It is not the</p> <p>6 nature of information that I give to the Minister, and I</p> <p>7 did not give that to the Minister.</p> <p>8 MR BIZOS SC: Didn't you tell</p> <p>9 Commissioner Mbombo that you were going to tell the</p> <p>10 Minister?</p> <p>11 GENERAL PHIYEGA: I did not tell the</p> <p>12 Minister this issue, and I don't even recall saying to</p> <p>13 General Mbombo that I would tell the Minister that we will</p> <p>14 encircle and disperse, because really, it is not the type</p> <p>15 of information I give to the Minister.</p> <p>16 [12:17] MR BIZOS SC: I want to put to you what</p> <p>17 you said to our learned friend Adv Madlanga. You said word</p> <p>18 to the effect that you were reporting to the Minister</p> <p>19 continuously and using of a multiplicity of platforms.</p> <p>20 This was a vital decision, wasn't it, to put it phase 3</p> <p>21 into operation? Your position as National Commissioner was</p> <p>22 not merely to be a rubberstamp, but to make important</p> <p>23 decisions in relation to the conduct of the police.</p> <p>24 Similarly the law says clearly that the Minister has the</p> <p>25 power and the duty to head the police. Do you agree?</p>	<p style="text-align: right;">Page 7492</p> <p>1 have a copy of the Constitution readily available.</p> <p>2 MR BIZOS SC: Oh, it's better print, yes.</p> <p>3 207(2), well let's deal with you first. 207(2), "The</p> <p>4 National Commissioner must exercise control over and manage</p> <p>5 the police service in accordance with the National Policing</p> <p>6 Policy and the directions of the cabinet member responsible</p> <p>7 for policing." Subsection (3) of section 207, "The</p> <p>8 National Commissioner with the concurrence of the</p> <p>9 provincial executive must appoint a woman or a man as a</p> <p>10 provincial commissioner for" – I beg your pardon, "under</p> <p>11 the direction of the cabinet member responsible for</p> <p>12 policing." That's the Minister of Police. A momentous</p> <p>13 decision such as this was, and your involvement and the</p> <p>14 Minister's involvement, you had come down to see what was</p> <p>15 happening. The Minister, according to certain evidence,</p> <p>16 was involved. How could you not possibly have communicated</p> <p>17 to him what was communicated to you by the local</p> <p>18 commissioner?</p> <p>19 MR SEMENYA SC: Chairperson, there is no</p> <p>20 evidence we're aware of, of the Minister being involved,</p> <p>21 whatever that connotes.</p> <p>22 CHAIRPERSON: I suspect that's reference</p> <p>23 to Mr Zokwana's evidence. You remember Mr Zokwana said</p> <p>24 that he phoned the Minister and urged the Minister to</p> <p>25 deploy more members of the police service in the area, and</p>

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1 the Minister undertook, as far as I remember, to attend to  
2 the matter. I think that is what Mr Bizos refers to. If  
3 I'm wrong, he will correct me.

4 MR BIZOS SC: Partly, maybe I was  
5 enforced by what I expect what was said about it by other  
6 witnesses, Mr Chairman. I want –

7 CHAIRPERSON: No, but you can't put  
8 things to the witness based on what you expect other  
9 witnesses will say. At this stage you actually put to him  
10 that what you were saying was in accordance with the  
11 evidence so far, and if it's evidence that's to be led then  
12 you've got to specify to her what evidence will be, but I  
13 thought you were referring to what Mr Zokwana had said,  
14 which is before us, which seemed to afford some kind of  
15 basis for the question you asked.

16 MR BIZOS SC: Yes, I wasn't here for it,  
17 Mr Chairman, but I am informed by my colleague who was here  
18 that the president of NUM said that he had spoken to the  
19 Minister about the matter. I'll repeat the question. How  
20 could you, and the Minister, could be bypassed by the  
21 Provincial Commissioner and the senior officers whether the  
22 action that was taken on the 16th at 4 o'clock should have  
23 taken place?

24 GENERAL PHIYEGA: I was not bypassed  
25 because when I look at the very document that you are

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1 legislation, and subject to the power of the National  
2 Commissioner to exercise control over and manage the police  
3 service in terms of subsection (2)." Leaving the Minister  
4 aside for the moment, you appear to be where the buck stops  
5 in relation to anything that may happen anywhere in the  
6 country.

7 GENERAL PHIYEGA: It is correct.

8 MR BIZOS SC: But are you suggesting that  
9 the buck didn't stop on your desk in relation to what  
10 happened in the afternoon of the 16th of August last year?

11 GENERAL PHIYEGA: I'm not suggesting  
12 that. I am saying to you that the mandates, the  
13 delegations, and the relevant responsibilities to deal with  
14 the situation were appositely, correctly, and policy-wise  
15 given to the Provincial Commissioner, and I have fully  
16 delegated some of those responsibilities to the Provincial  
17 Commissioner.

18 MR BIZOS SC: The impression that your  
19 evidence, given in answer to our learned friend before I  
20 started, seemed to suggest that you were in close contact  
21 with the Minister and you took political and practical  
22 advice from him, if I remember your words correctly.  
23 Sorry, I have been reminded that you actually used  
24 "leadership and support." Did you physically look to the  
25 Minister for leadership and support?

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1 using, the Constitution, that section 4 tells of the  
2 responsibility of the commissioner. It says the Provincial  
3 Commissioners are responsible for policing their respective  
4 provinces, and what binds us is that they're not doing it  
5 on their own; there are very clear prescriptions and  
6 protocols in terms of how they do that. It does say in  
7 (a), "as prescribed by the national legislation," and (b),  
8 it talks about the delegations that I've been talking  
9 about, subject to the power of the National Commissioner to  
10 exercise control and manage the police service in terms of  
11 that section 2, in their respective provinces, so she had  
12 the full remedy and powers really to do what she was  
13 supposed to do in this province.

14 MR BIZOS SC: If you did not advise the  
15 Minister, as suggested by certain of the evidence, did you  
16 intend advising him, and when did you intend informing him?

17 GENERAL PHIYEGA: In response to that I  
18 just want to go back to what you've said, to say I've said  
19 to Mr Madlanga that I continuously advised the Minister of  
20 the progress and the events of Marikana, and I would  
21 continue to do so.

22 MR BIZOS SC: I want to read to you  
23 subsection (4) of section 207. "The Provincial  
24 Commissioners are responsible for policing in their  
25 respective provinces, as prescribed by the national

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1 GENERAL PHIYEGA: In a relative sense,  
2 because I've qualified my answer to Mr Madlanga, I've said  
3 the Minister is a strategic leader, politically, and  
4 operationally I am the strategic leader.

5 MR BIZOS SC: National Commissioner, this  
6 gathering of three and a half thousand people wasn't a  
7 completely apolitical occurrence, was it?

8 GENERAL PHIYEGA: I would not know that.

9 MR BIZOS SC: I'm sorry?

10 GENERAL PHIYEGA: I would not know that.

11 All I know is that in doing our work, the political  
12 processes and issues that were sitting in there are not  
13 things I can account for.

14 MR BIZOS SC: You said according to our  
15 notes, "I can say in all my reporting he is our political  
16 leader. He gave us political support that enabled us to do  
17 our work. That is the best answer I can give you. Maybe  
18 I'm short of answering your question." You introduced the  
19 word "political" in your evidence, and not I.

20 GENERAL PHIYEGA: But that is not the  
21 question you asked me. You said the gathering was in  
22 itself not just a gathering; it had – I cannot say that  
23 political overtures. You're talking about the gathering.  
24 That's the question you asked me, and I said I cannot be  
25 able to tell whether the gathering was political or



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1 apolitical. I was looking at a gathering of armed people,  
 2 of workers who were armed. The political nature of that  
 3 gathering is not for me to answer and I'm not able to  
 4 answer that. That's the question I understood you're  
 5 asking me.

6 MR BIZOS SC: Were you not aware that  
 7 this unprotected strike had grave political and economic  
 8 aspects that required solution as a matter of some urgency?  
 9 GENERAL PHIYEGA: In terms of the  
 10 question you are asking, economic, absolutely, because we  
 11 were invited a mine whose economic activity had been  
 12 challenged and they were wanting us to assist in looking at  
 13 the protest, the illegal protest that was taking place.  
 14 There were labour unions involved. I'm not aware of this,  
 15 the political issues I'm not able to answer to.

16 MR BIZOS SC: Now Commissioner, we will  
 17 eventually submit that you are avoiding truthful answers to  
 18 the questions relating to the Minister. You told our  
 19 learned friend that you look to the Minister for political  
 20 and other guidance, and you also said that you often  
 21 reported to him. Can you give us by way of example what  
 22 you reported to him but considered what you were informed  
 23 by the Provincial Commissioner you did not talk to him  
 24 about? You told us that you often spoke to the Minister.  
 25 Am I correct in that?

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1 GENERAL PHIYEGA: Yes, you are correct.  
 2 MR BIZOS SC: Can you give us examples of  
 3 the sort of thing that you talk to him about regularly that  
 4 may have been of greater importance of what was going to  
 5 happen on the 16th of August?  
 6 [12:37] MR SEMENYA SC: Chair, I think once a  
 7 question gets compounded it doesn't make sense, with  
 8 respect.  
 9 CHAIRPERSON: It's a very broad and a  
 10 wide question, Mr Bizos, I think. I don't think, if I may  
 11 say so, you intended it quite as broadly as it actually has  
 12 come out, so perhaps you must think about reformulating it  
 13 –  
 14 MR BIZOS SC: Yes.  
 15 CHAIRPERSON: Because I think there is  
 16 force in what Mr Semanya has said.  
 17 MR BIZOS SC: In order for the Commission  
 18 to assess your evidence, can you give us a few examples of  
 19 what it was that you spoke to the Minister about so  
 20 regularly?  
 21 GENERAL PHIYEGA: I'll start at the back.  
 22 Your point 24 on my statement, that last sentence will show  
 23 you the type of – that last, that paragraph would show you  
 24 the type of things I would say to the Minister.  
 25 MR BIZOS SC: You refer to paragraph 24?

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1 GENERAL PHIYEGA: Yes.  
 2 MR BIZOS SC: This was after the event.  
 3 GENERAL PHIYEGA: Yes.  
 4 MR BIZOS SC: What I am asking you was to  
 5 give us examples of what you discussed with the Minister  
 6 before an event occurred, not afterwards.  
 7 GENERAL PHIYEGA: I did say I'll start at  
 8 the end because you had asked me the type of things that I  
 9 would tell the Minister, and I was just saying one of the  
 10 type of things is what is in 24, but if you are asking me  
 11 about before, I would tell the Minister that, "We are in  
 12 Marikana. The matter is, issues are escalating. We are  
 13 having challenges with capacity; I am redeploying more  
 14 capacity to go to the area, and I will keep you posted with  
 15 developments." That's the type of report I would give to  
 16 the Minister.  
 17 MR BIZOS SC: Did you ask him –  
 18 GENERAL PHIYEGA: And maybe if I could  
 19 just conclude that, it is also important because this type  
 20 of thing is already being reported in the press, so I have  
 21 to say, to keep him abreast with what is happening in the  
 22 area.  
 23 MR BIZOS SC: Let us confine to  
 24 directions or instructions. Did you ask him for directions  
 25 or instructions on any other important matter, so that we

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1 can compare whether you should have asked him for  
 2 directions or instructions as to what ought to be done on  
 3 the 16th of August?  
 4 GENERAL PHIYEGA: Advocate, I think you  
 5 have read 207 for me. It says I must manage and control  
 6 the service. I would seek advice where I need to seek that  
 7 type of cabinet, political advice, but in this regard it  
 8 was management and control of a situation by those who were  
 9 in operation.  
 10 MR BIZOS SC: Did the Minister from time  
 11 to time give you directions or instructions?  
 12 CHAIRPERSON: About Marikana, or in  
 13 general?  
 14 MR BIZOS SC: Generally.  
 15 GENERAL PHIYEGA: The Minister would not  
 16 give directions or instructions, but he would ask questions  
 17 around whether we have sufficient capacity, what have we  
 18 done about capacity, as I give feedback, and I would share  
 19 with him what we have done as the operatives.  
 20 MR BIZOS SC: You've told us about  
 21 capacity, which may be important because he has the final  
 22 say, or may have the final say, but the question is did he  
 23 give you any directions or instructions as to what the  
 24 police ought or ought not to do in relation to any specific  
 25 matter?

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1 GENERAL PHIYEGA: The operational  
2 decisions are not the remedy of the Minister.  
3 MR BIZOS SC: Are you able to state  
4 categorically that the decision to confront the miners on  
5 the 16th of August had no connection whatsoever with any  
6 communication or directions you received from the Minister  
7 or other higher authority?  
8 GENERAL PHIYEGA: I think I hear many  
9 questions out of that; maybe if you could just dismember  
10 them.  
11 CHAIRPERSON: Mr Bizos, I think the  
12 witness wants to know from you what you mean by any other  
13 higher authority, so perhaps you could ask the question  
14 firstly confining it to the Minister, and then once you've  
15 got that answer, then you can give her, tell her what you  
16 mean by other higher authority and then she can answer it,  
17 but I think it's just a bit vague, the way you're phrasing  
18 it.  
19 MR BIZOS SC: We'll deal with the  
20 question of higher authority. Let's deal with the Minister  
21 first.  
22 GENERAL PHIYEGA: Our operational  
23 instructions, as I've already said, are not coming from the  
24 Minister.  
25 MR BIZOS SC: There is information that

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1 the matter was discussed in the cabinet –  
2 CHAIRPERSON: Mr Semenya, you want to  
3 raise a point?  
4 MR SEMENYA SC: Well, perhaps if Mr Bizos  
5 could tell us whether that is going to be the evidence, or  
6 what is the evidence? What's the source for that  
7 proposition being put to the witness?  
8 MR BIZOS SC: Well I will withdraw this  
9 question and I understand that my learned friends intend,  
10 that have not yet been heard, want to deal with –  
11 CHAIRPERSON: There are also problems of  
12 course in relation to admissibility of evidence [inaudible]  
13 discussion which we also have to deal with, you know –  
14 MR BIZOS SC: This is why I deliberately  
15 used the word "information," Mr Chairman, yes.  
16 GENERAL PHIYEGA: Am I supposed to  
17 answer?  
18 MR BIZOS SC: No, I think leave it. Now  
19 I want to turn –  
20 CHAIRPERSON: You asked a question first  
21 in relation to the Minister and other higher authority.  
22 The problem was, what did you mean by "other higher  
23 authority?" So you said you withdrew –  
24 MR BIZOS SC: I leave it, because it's  
25 only information –

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1 CHAIRPERSON: You withdrew the point  
2 about the higher authority –  
3 MR BIZOS SC: Because it's only  
4 information that I want to –  
5 CHAIRPERSON: Are you not persisting with  
6 the question about the Minister either?  
7 MR BIZOS SC: No, no, no, the Minister,  
8 the question – please answer the question in relation to  
9 the Minister.  
10 GENERAL PHIYEGA: I've answered –  
11 CHAIRPERSON: Repeat the question to the  
12 witness so that she can remember exactly what you've asked  
13 and give an exact answer.  
14 MR BIZOS SC: I'll read the question  
15 again. Are you able to state categorically that the  
16 decision to confront the miners on the 16th of August had no  
17 connection whatsoever with any communication or directions  
18 you received from the Minister?  
19 GENERAL PHIYEGA: Not to any of my  
20 knowledge.  
21 MR BIZOS SC: I don't know what that  
22 means. Might you have been directed by him and you have  
23 forgotten about it?  
24 GENERAL PHIYEGA: I said not to any of my  
25 knowledge and information.

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1 MR BIZOS SC: Now I want to return to  
2 your 17th of August statement - FFF5, Mr Chairman – and I am  
3 going to ask you, did you in view of the appalling and  
4 injuries of people, did you give any thought to holding  
5 back from exonerating the police until a credible  
6 investigation had been completed?  
7 GENERAL PHIYEGA: I reported the facts as  
8 they were presented to me, and the statement that you read  
9 were the facts that were presented to me.  
10 MR BIZOS SC: You didn't reserve in your  
11 statement on the present facts that I have, been given by  
12 members of the police that took part, you pronounced,  
13 pronouncements are made by people in authority which has a  
14 judgmental element. You pronounced.  
15 GENERAL PHIYEGA: I did do that because  
16 the very last sentence does say the police will give their  
17 full cooperation with any investigation into this tragic  
18 incident, because at this point in time we didn't even know  
19 what the nature of investigation will take place, and we  
20 are saying here are the facts as we understand them, but we  
21 will cooperate, comply, participate in any investigation  
22 and we hope that that investigation would then give any  
23 other additional information. On the basis of that then we  
24 would consider any other, but at this point in time we're  
25 saying here are the facts; should there be an investigation

<p style="text-align: right;">Page 7505</p> <p>1 we'd participate, we would comply, and we would make sure 2 that we give our full inputs. 3 MR BIZOS SC: This is what you say now. 4 GENERAL PHIYEGA: It is in the statement. 5 CHAIRPERSON: The last paragraph of FFF5 6 - 7 MR BIZOS SC: Yes, it was drawn to my 8 attention and I will thank you. 9 CHAIRPERSON: Yes, so she said it then 10 and she says it now. 11 MR BIZOS SC: Yes. Yes, but I'm asking 12 you about the word "pronouncement" that you used. It has a 13 certain meaning. It's people in authority who say I have, 14 I say, and it must be accepted. There is at least an 15 implied meaning on it. Was the word "pronounced" 16 deliberately used by you? 17 GENERAL PHIYEGA: Given the facts that 18 were given to me on the day, that is the only information 19 that I had at hand and that was the facts that as they came 20 from the police. What happened afterwards, I have already 21 articulated in my statement that we will give full 22 cooperation with any investigation into this tragic 23 incident. 24 MR BIZOS SC: Part of your announcement 25 reads, "The militant group stormed towards the police,</p>	<p style="text-align: right;">Page 7507</p> <p>1 what I see and read. 2 MR BIZOS SC: You're influenced? 3 GENERAL PHIYEGA: I'm not ignorant of 4 what I read and see. 5 MR BIZOS SC: Are you influenced by what 6 you see and hear and read? 7 GENERAL PHIYEGA: I'm giving what I think 8 is my best answer to your question. I'm not ignorant of 9 what I see and read. 10 MR BIZOS SC: I'll ask you for the last 11 time. Are you influenced by what you see, what you hear, 12 and what is reported to you, and do you take it all on face 13 value? 14 GENERAL PHIYEGA: Advocate, I've given 15 you what I think is my best answer. 16 [12:57] MR BIZOS SC: But you see, even before 17 you made the statement of the 17th there were allegations 18 that this was a massacre. 19 GENERAL PHIYEGA: On the very day that I 20 made that statement a question was asked to me about the 21 massacre and my response on that day was that it is an 22 unfortunate choice of words. I was responding to a 23 journalist that asked me that question. 24 MR BIZOS SC: Did you ask them what 25 information they had that prompted them to call it a</p>
<p style="text-align: right;">Page 7506</p> <p>1 firing shots and yielding general weapons." Is it 2 dangerous weapons? 3 CHAIRPERSON: The reference is to the 4 penultimate paragraph on the second page, the penultimate 5 sentence in fact of the penultimate paragraph on the second 6 page. 7 MR BIZOS SC: "Police retreated 8 systematically and were forced to utilise maximum force to 9 defend themselves." That tells the public in South Africa 10 and the world at large that you, the Commissioner of 11 Police, accept everything your subordinates told you. 12 GENERAL PHIYEGA: Yes, it is true, and 13 also other evidence that we've seen on a lot of footage 14 that was shown even in this place. 15 MR BIZOS SC: We're talking about the 16 17th. We'll come to the 20th. At that stage what other 17 evidence, if any, did you have to corroborate what your 18 police generals, or brigadiers or colonels, told you? 19 GENERAL PHIYEGA: Facts from the police, 20 visual evidence on the screens, video reports, newspaper 21 reports, carried a lot of information that also further 22 informed me. 23 MR BIZOS SC: Are you influenced by what 24 you read and what you listen to on the radio? 25 GENERAL PHIYEGA: I'm not ignorant of</p>	<p style="text-align: right;">Page 7508</p> <p>1 massacre? 2 GENERAL PHIYEGA: In a press conference 3 you don't have that nature of dialogue. He asked the 4 question and I responded to the question. 5 MR BIZOS SC: Do you believe that it is 6 your right to accept one side of a story as to what the 7 police have done and pronounce upon it on that basis? 8 GENERAL PHIYEGA: I don't understand your 9 question. 10 MR BIZOS SC: Do you believe that it is 11 your right to come to conclusions as to what the police did 12 or did not do upon the word of members of the police force 13 only? 14 GENERAL PHIYEGA: Because that question 15 is carrying many things I would say the view will always be 16 informed by information at one's disposal, from the police, 17 from the media, from other people. That's what your view 18 will be shaped by. 19 MR BIZOS SC: What is your answer to my 20 question? 21 GENERAL PHIYEGA: My answer to your 22 question is that views and positions are informed by 23 multiplicity of feeders. 24 MR BIZOS SC: Please repeat that. 25 GENERAL PHIYEGA: Views and positions are</p>

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1 informed by a multiplicity of feeders and inputs.  
 2 MR BIZOS SC: And not on what the police  
 3 told you only?  
 4 GENERAL PHIYEGA: I have said  
 5 multiplicity of feeders.  
 6 CHAIRPERSON: Mr Bizos, are you going to  
 7 be long with this point? Because it's 1 o'clock and I'm  
 8 proposing that we should resume at 1:30 because we started  
 9 at 10 this morning. So if you want to round this point off  
 10 before we adjourn, do so.  
 11 MR BIZOS SC: I'll come to the next  
 12 question after the adjournment, Mr Chairman.  
 13 CHAIRPERSON: The Commission will now  
 14 adjourn for lunch. We resume as soon after half past 1 as  
 15 we can.  
 16 [COMMISSION ADJOURNS COMMISSION RESUMES]  
 17 [13:38] CHAIRPERSON: You're still under oath.  
 18 Mr Bizos.  
 19 MANGWASHI VICTORIA PHIYEGA: s.u.o.  
 20 CROSS-EXAMINATION BY MR BIZOS SC (CONTD.):  
 21 Thank you, Mr Chairman. Commissioner, would you agree that  
 22 persons in your position as the head of a couple of hundred  
 23 thousand police officers, has to apply her mind to act  
 24 cautiously and with circumspection? Would you agree  
 25 generally speaking that the head of an organisation

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1 shouldn't just speak to one side and pronounce upon the  
 2 matter?  
 3 GENERAL PHIYEGA: Indeed it is necessary  
 4 for a leader to take various aspects into account.  
 5 MR BIZOS SC: In making up your mind to  
 6 exonerate the whole, all 600-odd police officers from any  
 7 blame or any liability for what happened in Marikana,  
 8 without hearing from anyone else, was not in accordance  
 9 with the expectations we have of people who hold leading  
 10 positions in the administration in the governing of this  
 11 country.  
 12 GENERAL PHIYEGA: Only if what I said  
 13 earlier on to say in taking the decision and making the  
 14 inputs that I made and the statement that I have indicated  
 15 at the last sentence, and also some of the, what I said, I  
 16 mean if I look at this transcript, what I said towards the  
 17 end of my statement, which was not in the statement, if I  
 18 may just read it from a document that we were given by the  
 19 evidence leaders, where I was talking about it wasn't time  
 20 for finger-pointing, it wasn't time for all those type of  
 21 things, it was time for looking at many other things, and  
 22 I've also said I was not ignorant to what I was seeing on  
 23 TV, what I was reading, what I was hearing. So I have  
 24 looked at a number of things.  
 25 MR BIZOS SC: I want to put to you that

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1 in making those two statements you did not act with  
 2 caution, nor circumspection, but on the contrary you did  
 3 not apply your mind to the circumstances. You accepted the  
 4 police version without question because of your strong bond  
 5 of loyalty to the police.  
 6 GENERAL PHIYEGA: Advocate, that is your  
 7 conclusion; it is not my conclusion.  
 8 MR BIZOS SC: It's not your conclusion.  
 9 There has been an outcry again calling for the end of the  
 10 police culture that appears to be apparent that the police  
 11 are more interested in solidarity among themselves than  
 12 seeking to speak the truth. Have you heard what I have  
 13 said from many voices since you accepted this position?  
 14 GENERAL PHIYEGA: I have heard what you  
 15 have said and I have read many books globally that also  
 16 talk about that.  
 17 MR BIZOS SC: Are you concerned about the  
 18 allegations that are made about this police culture?  
 19 GENERAL PHIYEGA: I think what is  
 20 important is what you've mentioned to say about the  
 21 allegations. I would be concerned if I was experiencing  
 22 that. I haven't as yet experienced that. Maybe it's, my  
 23 eight months is too short.  
 24 MR BIZOS SC: Are you not aware that  
 25 there is an outcry in the public domain that this police

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1 culture has to stop?  
 2 GENERAL PHIYEGA: I have heard of that.  
 3 MR BIZOS SC: And examples are given in  
 4 the public domain that you have a group of nine officers,  
 5 where a person was killed and somehow none of the nine are  
 6 prepared to say one of our number, so-and-so pulled the  
 7 trigger. What do you think that does to the reputation of  
 8 the police force that you are leading?  
 9 GENERAL PHIYEGA: I'm not sure whether my  
 10 view on, my views on that one would have any influence to  
 11 the questions you've asked me before because really, I  
 12 thought that was a legal process. The court had to look  
 13 into the matter and the court had to decide based on facts  
 14 and information before them on, of that outcome.  
 15 MR BIZOS SC: I don't want to discuss the  
 16 case that you're probably correctly thinking that I am  
 17 talking about, and I don't want to discuss the judgment  
 18 given. What I am asking is that there were nine policemen  
 19 together with a person that pulled the trigger and not a  
 20 single policeman came forward and said my colleague so-and-  
 21 so pulled the trigger. What does that do to the reputation  
 22 of the police force that you are heading?  
 23 GENERAL PHIYEGA: Advocate, I think there  
 24 are many other things that happen in the police and that  
 25 particular one, really, I'm not able to say why those nine

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1 answered the way they did. I cannot be able to cast a  
2 position on that one.

3 CHAIRPERSON: Mr Bizos, I hope you're not  
4 going very much further down this line of investigation -

5 MR BIZOS SC: No, I'm not. That was the  
6 last question -

7 CHAIRPERSON: I don't know if it's going  
8 to help us at all, frankly.

9 MR BIZOS SC: That was the last question,  
10 Mr Chairman. It's too long to - the line is too long to  
11 burden the Commission with it, Mr Chairman. Now the  
12 statement that you made on the 17th and the statement that  
13 you made on the 20th were given the widest publicity. Your  
14 words, particularly on the 20th, which were read out to you  
15 by our learned friend that cross-examined you first, I  
16 won't quote all of them, I want to remind you of what you  
17 said. "So for that I just want once more to thank you for  
18 having done what you did, for having endured the challenges  
19 that we endure, and as we mourn as a country, let us  
20 remember that the pain that everybody is feeling is felt by  
21 all of us, but all we did was to do our job and to do it in  
22 a manner that we are trained, that we know it should be  
23 done responsibly, caringly, focusing on that which is our  
24 responsibility." What were you thanking the 1000-odd  
25 policemen that you were addressing, what were you thanking

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1 them for?

2 GENERAL PHIYEGA: I will go back to the  
3 paragraph that you are reading so that I can contextualise  
4 my answer to you, and also say part of my evidence to this  
5 Commission, I requested that this whole tape be played  
6 because all that was played throughout the media was a  
7 snippet and it decontextualised my message. But to go to  
8 the paragraph that you have read, let me again go through  
9 it. I said, "So for that I just want to once more thank  
10 you for having done what you did, for having endured the  
11 challenges that we endured, and as we mourn as a country,  
12 let us remember the pain that everybody is feeling, that it  
13 is felt by all of us, but all we did," and I now highlight,  
14 "was to do our job in a manner that we were trained." We  
15 had a plan. We were going to roll out our plan. That was  
16 disrupted and we had unintended outcomes. I thanked them,  
17 as I said to Mr Madlanga, for having done their work  
18 according to the prescripts, according to the protocols  
19 that they were supposed to follow, and I did not celebrate  
20 death because in an earlier paragraph I talk about  
21 mourning. In this paragraph I talk about the regrettable  
22 incident.

23 MR BIZOS SC: You also said in the  
24 previous but one paragraph that they, those present, and  
25 those that were in Marikana, represent the best of

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1 responsible policing -

2 CHAIRPERSON: Mr Bizos, you're wrongly  
3 quoting it. It was pointed out when she was being cross-  
4 examined by Mr Madlanga that the transcript is incorrect,  
5 that the word "we" shouldn't be there. So the sentence  
6 reads, "I come before you to actually say trying as it may  
7 be, mourning as we are, let us take note of the fact that  
8 whatever happened represents the best of responsible  
9 policing." That's the way it should read and that's the  
10 way it was corrected.

11 MR BIZOS SC: Yes.

12 CHAIRPERSON: So the "we" is out, so it's  
13 not referring to people who represent the best of  
14 responsible policing; it's whatever happened represents the  
15 best responsible - that's what she said. It doesn't  
16 necessarily detract from your question, but it's useful to  
17 put it correctly.

18 MR BIZOS SC: Yes. Well, taken that as  
19 corrected by the Chairman of the Commission, together with  
20 the next paragraph but one, were they being thanked and  
21 were they being praised for among other things killing 34  
22 people and injuring 84 others?

23 CHAIRPERSON: Yes, Mr Semanya?

24 MR SEMENYA SC: Chair, the question has  
25 been repeatedly asked and repeatedly answered.

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1 CHAIRPERSON: I think that's correct, Mr  
2 Bizos. What do you say?

3 MR BIZOS SC: Not by me, Mr Chairman.

4 CHAIRPERSON: No, but it doesn't matter.  
5 The question has been asked already by Mr Madlanga.

6 MR BIZOS SC: Yes.

7 CHAIRPERSON: I'm not sure it helps for  
8 someone else to come along and ask the same question,  
9 otherwise we'll have each one of the parties asking the  
10 same question that everybody asked before, and we're  
11 sitting here until the next century.

12 MR BIZOS SC: I don't remember the  
13 question being put in the form in which I put it. It may  
14 be substantially similar, but be that as it may, what I  
15 want to ask you, Commissioner, what message were you  
16 sending on the facts and allegations that we know of, to  
17 the police force as a whole, other than it doesn't matter  
18 what you do, the commissioner is behind you, she will  
19 praise you and she will thank you? Is that a message to be  
20 sent to a police force whose reputation is being questioned  
21 by many people in South Africa, that you are on their side  
22 and that you will protect them, come what may?

23 GENERAL PHIYEGA: Advocate, that's your  
24 interpretation of the message. That is not my message, and  
25 I have articulated my message in this statement, and why I

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1 asked for this tape to be played the way it is, your  
2 interpretation of the message is not what I'm saying to the  
3 police.  
4 MR BIZOS SC: The question is, what  
5 message is it sending to the South African Police? I'm  
6 asking you what message is it - if you disagree with  
7 anything I say, that's your privilege, but I am asking you  
8 what message is it sending to the South African Police in  
9 the present circumstances, or at the time that you made  
10 them? Please answer that.  
11 GENERAL PHIYEGA: The message I was  
12 sending to the police was, (1), that we are mourning  
13 because there is a tragedy that has befallen us as a  
14 nation, and the message I sent to them was also that I do  
15 thank you for following the prescripts, the protocol, in  
16 executing your job, and it is separate from the mourning.  
17 [13:58] MR BIZOS SC: Would it not be  
18 deleterious, not only to the police, but the country as a  
19 whole, if the message is interpreted I will do what I like  
20 and the Commissioner will protect me and nothing will  
21 happen to me?  
22 GENERAL PHIYEGA: Advocate, that is your  
23 standpoint, not my standpoint and I'm not able to comment  
24 on your standpoint.  
25 MR BIZOS SC: Let us turn to the

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1 statement which was not made public by the police but our  
2 learned friends who are leading the evidence stumbled upon  
3 whilst you were in the box, the statement of Warrant-  
4 Officer Walter Myburgh.  
5 CHAIRPERSON: Mr Bizos, I don't think  
6 they will agree they stumbled on anything, but never mind.  
7 You can put that statement to that witness, I don't think  
8 they stumbled on it. I think they deny that but put the  
9 witness, put the statement to the witness without any  
10 reference to stumbling.  
11 MR BIZOS SC: This is a statement which  
12 was produced by our learned friends, the evidence leaders  
13 whilst you were in the box. You know what statement I am  
14 talking about?  
15 GENERAL PHIYEGA: Yes, FF7.  
16 MR BIZOS SC: You apparently knew about  
17 this statement in October 2012. You have interviewed him?  
18 GENERAL PHIYEGA: Yes, he informed me.  
19 MR BIZOS SC: And a very alarming  
20 allegation is made in that sworn statement.  
21 GENERAL PHIYEGA: Yes, you are correct.  
22 MR BIZOS SC: On the face of it, it's an  
23 alarming statement. Under oath by a warrant-officer in the  
24 police, lets for the purposes of my other questions accept  
25 that it may well be true. Can we proceed on that basis

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1 please?  
2 GENERAL PHIYEGA: I would not, it's a  
3 supposition. It may well be true, I, let's suppose I would  
4 like us to note it as a supposition.  
5 CHAIRPERSON: Yes, I think the question  
6 is very squarely based on the proposition that this is a  
7 supposition. We are not asking you to accept that the  
8 supposition is correct finally, but simply to assume for  
9 the purposes of your argument that it's correct. But he  
10 says if it is correct it's an alarming thing that he says  
11 and I take it that you agree with that?  
12 GENERAL PHIYEGA: Yes, if the supposition  
13 is correct.  
14 CHAIRPERSON: I think you said you  
15 referred it to IPID for further investigation.  
16 GENERAL PHIYEGA: Yes.  
17 MR BIZOS SC: They are, that's the  
18 appropriate directorate which is supposed to investigate  
19 allegations of this kind against members of the police, is  
20 that so?  
21 GENERAL PHIYEGA: Yes, I'm on record as  
22 saying, for this statement to be there, it's because I  
23 commissioned it, because there was no statement. I asked  
24 Myburgh to write the statement because I wanted to know if  
25 he knew about this, who did you report it to, did you make

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1 a statement on it and this is why I asked the commanders to  
2 make sure that this statement is there and then they gave  
3 it IPID.  
4 MR BIZOS SC: If the contents of the  
5 statement are found to be correct, do you agree that at  
6 least the one person that was shot in cold blood was not  
7 shot in the circumstances described by Myburgh in self-  
8 defence?  
9 GENERAL PHIYEGA: Only when facts that  
10 confirm this, can I be able to question.  
11 MR BIZOS SC: Did this statement come to  
12 your notice before you made your statement or statements  
13 placed before the commission?  
14 GENERAL PHIYEGA: No.  
15 MR BIZOS SC: You went with this  
16 statement -  
17 GENERAL PHIYEGA: Before I make my -  
18 MR BIZOS SC: When did this statement  
19 come to your notice?  
20 GENERAL PHIYEGA: I think it is indicated  
21 in one of the, I just want to look at that.  
22 CHAIRPERSON: Mr Bizos, I think your  
23 question was ambiguous. When you said the statements you  
24 made and placed before the commission, I must confess I  
25 thought you meant the exhibits, the witness statements, FF2

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1 the exhibit statements.

2 MR BIZOS SC: Yes.

3 CHAIRPERSON: But she obviously thought

4 you meant the media statements.

5 MR BIZOS SC: No, no.

6 CHAIRPERSON: And it occurred to me that

7 the question as framed could legitimately give rise to that

8 interpretation. So I think you must make it clear to her

9 that you are referring -

10 MR BIZOS SC: To her statement.

11 CHAIRPERSON: To her statement, which is

12 before us.

13 MR BIZOS SC: Yes, before -

14 CHAIRPERSON: The one which there are two

15 versions.

16 MR BIZOS SC: The two versions -

17 CHAIRPERSON: Yes, that one.

18 MR BIZOS SC: And I think that may have

19 probably added to the witness's confusion. I'm talking

20 about the, your sworn statement made for the purposes of

21 being submitted to the commission.

22 GENERAL PHIYEGA: Yes, I was aware of it.

23 MR BIZOS SC: Who had knowledge of

24 Myburgh's statement before you made those statements?

25 GENERAL PHIYEGA: Yes.

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1 MR BIZOS SC: Did you consider it

2 relevant to the issues that the commission was enjoined by

3 the President to look into?

4 GENERAL PHIYEGA: Because I considered it

5 important, I actually asked that IPID investigate the

6 matter and furnish us with facts.

7 MR BIZOS SC: Please answer the question.

8 Please listen to the questions and answer them. The

9 question was, did you think that it was an important

10 statement to which the commission should have had it's, an

11 opportunity to hear the other side of the story and why did

12 you not inform the commission here is a statement that has

13 come to my notice and deal with it in your statement to the

14 commission? Why did you not mention it?

15 GENERAL PHIYEGA: Because the matter is

16 being investigated by those who police us as police.

17 MR BIZOS SC: Don't you think that it was

18 sufficiently important, don't listen only to me. There is

19 the Commissioner, listen to my warrant-officer or what he

20 said in relation to the deliberate shooting of a helpless

21 man on the ground. Didn't it, wasn't it your duty to bring

22 that to the commission's attention?

23 CHAIRPERSON: Before you answer the

24 question, Mr Semanya wants to say something.

25 MR SEMENYA SC: This statement was

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1 brought to the attention of the commission by the South

2 African police service. The witness has already told us it

3 was created on her instruction. There is nothing untoward

4 -

5 CHAIRPERSON: Also sent to IPID, as we

6 all know. As far as I know anyway, all the IPID files and

7 dockets were made available to the evidence leaders. So I

8 don't know whether their attention was specifically drawn

9 to this statement among all the others.

10 MR SEMENYA SC: Yes.

11 CHAIRPERSON: But it certainly, well they

12 can tell us, Mr Budlender, how did the evidence leaders get

13 hold of this statement? Was it -

14 MR BUDLENDER SC: Chairperson, it was

15 amongst the statements produced by the, made available by

16 the police, that's correct. Amongst a number of other

17 statements made available by them. I have to say and I

18 don't want to give evidence and neither do I want to, and

19 this witness has been cross-examined already for us but

20 according to our information, there is a different account

21 of how it came to the attention of IPID or whether it came

22 to the attention of IPID.

23 MR SEMENYA SC: No, no, no.

24 MR BUDLENDER SC: Perhaps we shall put

25 in, we will make available the memorandum which we have

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1 received from IPID and it can be dealt with at that time.

2 MR SEMENYA SC: Ja, through a proper

3 witness and proper evidence.

4 MR BUDLENDER SC: - this statement

5 available to my learned friends and we will then see where

6 it goes from there.

7 CHAIRPERSON: What is clear, is that this

8 statement came before the commission via the evidence

9 leaders who got it from the South African Police. Now that

10 is -

11 MR BIZOS SC: Thank you, Mr Chairman, the

12 question is why the witness did not mention in her

13 statement that evidence came, never mind the statement,

14 evidence came to her knowledge that there was at least one

15 deliberate murder of an injured person in her statement.

16 CHAIRPERSON: Mr Bizos, I think you have

17 taken that a bit too far. We don't know from the statement

18 whether the person who was shot was one of those who died

19 or one of those who were injured. So I think to say, talk

20 of a deliberate murder is going too far. But I understand

21 your question to be, why was this statement, which was

22 evidence of deliberate criminality of either murder or of

23 attempted murder by a policeman, why was that not

24 specifically flagged and brought to the attention of the

25 commission in a specific manner? I take it that's your

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1 question.

2 MR BIZOS SC: That's my question.

3 GENERAL PHIYEGA: I think the same

4 question could be asked over why didn't I say, I talk about

5 the investigation of [inaudible] It wasn't for anything

6 because these facts are open, they have been declared, they

7 are in the knowledge of this commission, there is nothing

8 untoward. It is how I structured my statement. It wasn't

9 for any other thing that talks to those things. I didn't

10 refer for instance to the general investigation in my

11 statement but I know that it is something we have done and

12 that is significant.

13 MR BIZOS SC: Now in your evidence last

14 week when the question of follow up on the Myburgh

15 statement, you said "we at SAPS were stumped". What does

16 that mean? "And could not do anything". Do you want me to

17 read you everything that you said, I have it if it is going

18 to help you? The extract, "we at SAPS were stumped and

19 could not do anything, the statement was not helpful.

20 Walter could not identify or point to the person. I did

21 engage Walter. I wanted to understand the issues myself,

22 Mbombo and Naidoo asked him questions about the very

23 shooting so we could understand. He said he could not

24 point the person and did not see a nametag". Do you

25 remember that is what you said?

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1 GENERAL PHIYEGA: Yes, bar for that

2 difficult English word that you used.

3 MR BIZOS SC: What is the difficulty that

4 you have with which word?

5 GENERAL PHIYEGA: You used a word that I

6 haven't met in my life, stumped.

7 CHAIRPERSON: It's means nonplussed or

8 not knowing what to do. At a loss to know how to react.

9 GENERAL PHIYEGA: Ja.

10 MR BIZOS SC: It comes from cricket where

11 it means something different. So that's what it means in

12 this context I think.

13 GENERAL PHIYEGA: I have learned a new

14 word.

15 MR MPOFU: Chairperson -

16 MR BIZOS SC: You actually I'm informed -

17 MR MPOFU: No, no I just wanted to assist

18 or at least point out something, Chair. If the witness

19 says, she is meeting that word for the first time, when it

20 was used in a quotation of hers, then it must mean that the

21 quotation is wrong or that it was, she was using another

22 word.

23 CHAIRPERSON: Refer to the passage of the

24 transcript.

25 GENERAL PHIYEGA: Yes.

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1 CHAIRPERSON: The actual page and line so

2 we can then see, but if she says the word stumped she has

3 heard for the first time today -

4 MR BIZOS SC: Yes?

5 CHAIRPERSON: Then she obviously couldn't

6 have used that word, she must have used some other word,

7 which is perhaps not correctly transcribed.

8 MR BIZOS SC: It's a difficult word, in

9 fairness to the witness, it's suggested to me that she used

10 the word stunned.

11 GENERAL PHIYEGA: Yes.

12 MR BIZOS SC: Is that the word that you

13 used?

14 GENERAL PHIYEGA: I may not recall but

15 that word I know I may have used that.

16 CHAIRPERSON: Okay, would that word

17 accurately convey your impression of the situation you were

18 in when you heard what the warrant officer said and he said

19 he couldn't identify the face or the nametag of the person

20 concerned.

21 GENERAL PHIYEGA: Yes.

22 CHAIRPERSON: Stunted would be correct

23 word.

24 GENERAL PHIYEGA: Yes.

25 CHAIRPERSON: As far as you are concerned

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1 to convey your reaction to that, will that be right?

2 GENERAL PHIYEGA: Yes, that surprised us

3 to say you have been there, you say you saw a person you

4 heard the shot. We asked can you point at the person, do

5 you know the person, because we wear nametags.

6 CHAIRPERSON: Now what exactly is the

7 word? There are three possibilities, stumped which has now

8 been rejected, stunted or stunned with N's? Is it stunned

9 with two N's? Or stunted, NT?

10 MR BIZOS SC: I will give a reference -

11 GENERAL PHIYEGA: Judging from -

12 MR BIZOS SC: My colleague on my left

13 says that the word is stunted and it appears on page 6926

14 at line 19 of the record but don't lets argue about the

15 fine meaning.

16 CHAIRPERSON: Mr Bizos, she was going to

17 say something when you went on to give the page reference.

18 What were you going to tell us?

19 GENERAL PHIYEGA: I think the word

20 stunned or the reaction coming from there would be a better

21 fit.

22 MR BIZOS SC: It was support of the

23 allegations that were made by the relatives of the

24 deceased, the people who had been injured, the newspaper

25 reports, the television reports, the radio reports who had



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1 made similar allegations. Do you agree?  
 2 GENERAL PHIYEGA: I did not agree with,  
 3 and I will go to Myburgh, because Myburgh we have requested  
 4 that this matter be investigated and because I don't have  
 5 facts that tell me that that happened, I would not agree  
 6 with you.  
 7 MR BIZOS SC: Did the allegations made by  
 8 Myburgh upset you?  
 9 GENERAL PHIYEGA: Yes.  
 10 MR BIZOS SC: Did you think to yourself  
 11 possibly, that what I said on the 17th and 20th may not have  
 12 been true because some of our men, at least one of them, if  
 13 that is true, behaved not in accordance with what I thought  
 14 they all behaved in?  
 15 [14:18] GENERAL PHIYEGA: This is why, because I  
 16 was stunned and because it was an issue of concern for me  
 17 as a leader that I asked for the statement and I asked IPID  
 18 to look at it and I'd like to have an outcome, and I was  
 19 surprised that Myburgh, being on the scene, told me that I  
 20 can't point a face, I don't know the name, I haven't seen  
 21 the name tag. That's why I said investigate this matter  
 22 and let's get to the bottom of it.  
 23 MR BIZOS SC: Did it occur to you that if  
 24 Warrant-Officer Myburgh was telling the truth, you didn't  
 25 hear the whole truth before making the statements that you

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1 did on the 17th and the 20th of August last year?  
 2 MR SEMENYA SC: Well Chair, we still  
 3 don't know whether part of the truth is what is alleged in  
 4 this document.  
 5 CHAIRPERSON: Well, the question was if,  
 6 I think Mr Bizos said if it was true. That is one of the  
 7 suppositional questions again, but –  
 8 MR SEMENYA SC: Well, I heard the  
 9 question a little different.  
 10 CHAIRPERSON: Well, perhaps let him  
 11 repeat it. Perhaps you heard it correctly and I didn't.  
 12 Mr Bizos, will you repeat the question, please?  
 13 MR BIZOS SC: Yes. Did it occur to you  
 14 that if the allegations made by Myburgh to you and your two  
 15 generals was true, your statements of thanks and praise of  
 16 the 17th and the 20th may have to be amended?  
 17 GENERAL PHIYEGA: Because this is a  
 18 supposition and it's an "if" question, what I have as facts  
 19 before me still holds.  
 20 MR BIZOS SC: The two generals that you  
 21 had with you when you interviewed Myburgh, were they two  
 22 that gave you the information that prompted you to say what  
 23 you said on the 17th and 20th?  
 24 GENERAL PHIYEGA: The two generals are  
 25 part of the JOC, and I have said the information I had and

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1 the facts that I presented was a collective product of the  
 2 JOC.  
 3 MR BIZOS SC: Did you think that the  
 4 presence of the two generals with you might have inhibited  
 5 Myburgh to identify the person that pulled the trigger?  
 6 GENERAL PHIYEGA: No, I didn't think so  
 7 because Myburgh opened up to General Naidoo, who thought it  
 8 was important enough to alert me and General Mbombo.  
 9 MR BIZOS SC: Was it, the statement made  
 10 by Myburgh, contrary to the information that you had been  
 11 given up to that point?  
 12 GENERAL PHIYEGA: Certainly it is  
 13 contrary to what I knew at that point.  
 14 MR BIZOS SC: Did it occur to you that if  
 15 it had to be investigated, that you and the two generals  
 16 that may have been complicit in what happened at Marikana  
 17 were not the best persons to interview him or to  
 18 interrogate or to have him investigated?  
 19 MR SEMENYA SC: Again, Chair, there's no  
 20 evidence of complicity.  
 21 CHAIRPERSON: The one is – you know, the  
 22 way you phrase the question sounds as if you're alleging  
 23 the witness was complicit in something. I'm not sure  
 24 there's any evidence that the generals were complicit in  
 25 anything either. What she did once she interrogated him

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1 was she sent it off to IPID, or as the name indicates, the  
 2 Independent Police Investigation Directorate. So you're  
 3 not suggesting that there's any other more appropriate  
 4 agency to which she could have sent these allegations on  
 5 the statement than IPID, are you? What was wrong with  
 6 sending it to IPID? Wasn't that the thing that you would  
 7 have expected her to have done?  
 8 MR BIZOS SC: No.  
 9 CHAIRPERSON: No, well what would you  
 10 have expected her to have done?  
 11 MR BIZOS SC: With respect, when the  
 12 information came to her, she should have appointed or  
 13 requested – not appointed, requested independent persons to  
 14 investigate the contrary allegation –  
 15 CHAIRPERSON: But isn't that what IPID  
 16 is, an independent directorate, as the name implies, which  
 17 is specifically there to investigate allegations against  
 18 the police of improper and criminal conduct by members of  
 19 the police?  
 20 MR BIZOS SC: Yes.  
 21 CHAIRPERSON: So I mean if you're going  
 22 to argue later that she did the wrong thing and sent it to  
 23 the wrong agency, then I'd be very interested to hear what  
 24 the argument in support of that would be because prima  
 25 facie she did the right thing. I don't know that we are

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1 using the time available to us gainfully in investigating  
2 this point.

3 MR BIZOS SC: You see, according to your  
4 evidence you requested your commanders to look into this  
5 matter, but the commanders did not reveal the ID. Was it  
6 the function of the commanders to investigate the further  
7 matter, or on the directive of the Chairman of the  
8 Commission, the independent police?

9 GENERAL PHIYEGA: It was important for  
10 the commanders to ensure that we get this matter correctly  
11 and officially reported, and the product of what I  
12 commanded them to do is this very statement because then we  
13 managed to get a statement. On the basis of this statement  
14 we then said this matter needs to be investigated by those  
15 who police us because this is a report that comes from us  
16 as police, and that's how it goes to IPID, because the  
17 statement wasn't there.

18 MR BIZOS SC: By that time the  
19 Commission, or that there would be a commission was already  
20 in the public knowledge and yours.

21 GENERAL PHIYEGA: Correct.

22 MR BIZOS SC: The contents of the  
23 statement that was taken by the Independent Police Unit was  
24 contrary to the version put up by the senior officers,  
25 including the two that you invited to interview the

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1 witness.

2 MR SEMENYA SC: Chair, would Mr Bizos  
3 give us that statement? We don't have it, the one taken  
4 that he said which is contrary to this.

5 MR BIZOS SC: Well, I thought that the  
6 statement by the Chairperson that the independent police –

7 CHAIRPERSON: I understand that this  
8 statement was eventually taken, which we have before us -

9 MR BIZOS SC: Yes.

10 CHAIRPERSON: - taken at the behest of  
11 the witness, was sent to IPID for further investigation.  
12 That's all the information we have before us. What  
13 happened at IPID we don't know, if anything. That's the  
14 situation. There's not –

15 MR BIZOS SC: Well, let me just leave the  
16 statement out because of this. When you called the two  
17 generals, was it at your office?

18 GENERAL PHIYEGA: No, we were –

19 MR BIZOS SC: Where was it?

20 GENERAL PHIYEGA: We were at a meeting  
21 with the commanders and at that meeting, where Wouter was  
22 also in, here in Rustenburg, General Naidoo then informs me  
23 of that, and I, informs us of that and we say call the  
24 member so that we can hear this report that has been given  
25 to you, and that is on the 1st of October.

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1 MR BIZOS SC: Did you consider that  
2 Myburgh would be in all probability an important witness  
3 before the Commission?

4 GENERAL PHIYEGA: I did not, I do not  
5 know how witnesses are chosen, but it was of interest to me  
6 to get to the bottom of this matter.

7 MR BIZOS SC: The question was, did you,  
8 or the two generals and you consider that Myburgh may be an  
9 important witness before the Commission to relate what he  
10 has said in this statement?

11 GENERAL PHIYEGA: Advocate, I'll say it  
12 again, I do not know how witnesses are chosen, but I was  
13 interested in getting to the bottom of this matter.

14 MR BIZOS SC: I'm going to put to you  
15 that the meeting amongst the three of you was a most  
16 unfortunate incident because the suspicion that may arise  
17 is that he either was or he may have been reluctant to  
18 repeat what he had said in that statement before the  
19 Commission.

20 MR SEMENYA SC: There's no basis for that  
21 proposition.

22 MR BIZOS SC: No, it's an inference that  
23 we are going to –

24 CHAIRPERSON: No, it's a point you put to  
25 see what the witness says about it. Do you agree with that

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1 or do you think that's not correct?

2 GENERAL PHIYEGA: I do not agree because  
3 each member needed to make a statement of what they had  
4 seen, what they knew, long before, and Wouter Myburgh had  
5 that opportunity and if he had done a statement, a sworn  
6 statement, and hadn't mentioned this, that's why I would  
7 have been stunned to say you had an opportunity to say what  
8 you as a participating member needed to say; why are you  
9 saying it only on the 1st of October, and again you don't  
10 even give us full facts. Did you see the person? Did you  
11 see the name? I was stunned.

12 MR BIZOS SC: We are informed that  
13 hundreds of statements made by policemen in relation to  
14 their actions on the day of the 16th, in the main supporting  
15 the police version of events. Did you read any other  
16 statement than Myburgh's of those taken by the police?

17 GENERAL PHIYEGA: Yes, I have, because  
18 those statements were not even taken by us; they were taken  
19 by IPID.

20 MR BIZOS SC: Did you have interviews  
21 with other policemen to discuss their statements with them?

22 GENERAL PHIYEGA: It is not my duty to do  
23 so. I read what they have written, what IPID has taken.

24 MR BIZOS SC: Why was it your duty to  
25 call the one person who made a statement destructive of the

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1 police version?

2 CHAIRPERSON: Mr Bizos, she hadn't made

3 the statement. As I understand the evidence, he spoke to

4 one of the generals, told the general about this. The

5 general reported orally, as I understand it, the general

6 told the National Commissioner. The National Commissioner

7 happened to be at Rustenburg. The man was there as well,

8 sent for him, spoke to him, and then said right, this has

9 got to, a statement must be taken and it must go to IPID.

10 I think that's her evidence. I can understand if he'd made

11 a statement already which was already on its way to IPID or

12 been taken by IPID and she then summoned him and cross-

13 questioned him about it, then that will be a basis for the

14 questions you're now asking, but those aren't the facts.

15 MR BIZOS SC: Yes.

16 COMMISSIONER HEMRAJ: And Mr Bizos, the

17 purpose of that interview was not as you've put, to discuss

18 the statement that the witness made.

19 MR BIZOS SC: Well, to discuss the event.

20 I'll change the question. Did you discuss the evidence, or

21 the oral statement of any other policeman except Myburgh,

22 in the presence of two generals?

23 GENERAL PHIYEGA: When I spoke to Myburgh

24 there was no statement. There was an allegation –

25 MR BIZOS SC: I've already accepted that.

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1 The question is, did you interview in the presence of two

2 generals any other police officer of a lower rank who was

3 at Marikana?

4 GENERAL PHIYEGA: No. No, I didn't –

5 MR BIZOS SC: Then why did you choose

6 Myburgh –

7 CHAIRPERSON: Sorry, Mr Bizos. Were you

8 informed of any other oral statements made by any other

9 police, members of the service –

10 GENERAL PHIYEGA: No.

11 CHAIRPERSON: - which indicated that

12 things had possibly happened which were not in accordance

13 with the official police version of the matter?

14 GENERAL PHIYEGA: No, Judge.

15 MR BIZOS SC: Can you please explain why

16 Warrant-Officer Myburgh was privileged to be invited by the

17 Commissioner and two generals to speak about his experience

18 and not lots of other –

19 CHAIRPERSON: No, Mr Bizos, I think she's

20 already told us that. Firstly there weren't lots of

21 others; there weren't any others who made allegations of

22 the kind he made. She said that it was reported to her

23 that an oral statement had been made of the nature we know.

24 It's obviously a serious matter. She was at Rustenburg.

25 He was there. The two generals were there, including the

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1 one to whom he made the statement. So she sent for him,

2 spoke to him. When she'd ascertained the nature of the

3 allegation the matter was then dealt with by the taking of

4 a statement and it's been sent to IPID. So I don't think

5 the complexion you're putting on the events is correct,

6 unless I've misunderstood, but I think I've summarised it

7 accurately –

8 MR BIZOS SC: No, Mr Chairman, I will put

9 it on the basis on which – what was so special about

10 Myburgh's say-so that caused you and two generals to invite

11 him to talk to you?

12 GENERAL PHIYEGA: Advocate, when you

13 started this line of questioning you asked me whether I

14 considered this important, and I did say yes.

15 MR BIZOS SC: Yes.

16 GENERAL PHIYEGA: And if I'm sitting in a

17 meeting with my members and one of the commanders comes to

18 me and told me about this type of thing, the first step and

19 the first decision I took was that this is important, and

20 my next question to the commander would be, has it been

21 reported and where is the report, and the commander says to

22 me, "I am hearing it for the first time today from the

23 member, and the member is here," and I think it was

24 rational, important, prudent of me to say where is that

25 member, because we are sitting here, can we hear it for

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1 ourselves from this member, and the questions that follows

2 are logical to say "Because you were there, do you know

3 this member? Have you seen this person? Can you identify

4 this member?" and I asked, "Did you make a statement? Did

5 you report it?" and because there were no answers in terms

6 of that I then asked these commanders to go and look at

7 this matter and make sure that we get a statement so that

8 we can advance this and get to the bottom of it, and by any

9 measure in my book it is prudent and it is responsible.

10 MR BIZOS SC: Yes. Mr Chairman, there is

11 a final report which was handed in this morning. We have

12 not had an opportunity of studying it –

13 CHAIRPERSON: This relates to the

14 possible tampering, is it? The report that was handed in

15 this morning –

16 MR BIZOS SC: Yes, yes.

17 CHAIRPERSON: - relates to the possible

18 tampering.

19 MR BIZOS SC: I just want to –

20 CHAIRPERSON: Or possible contamination,

21 whatever the correct word is.

22 MR BIZOS SC: Yes.

23 CHAIRPERSON: You only got it this

24 morning.

25 MR BIZOS SC: Yes.

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1 CHAIRPERSON: You haven't had a chance to  
2 study it yet.

3 MR BIZOS SC: Yes.

4 CHAIRPERSON: So you want to reserve your  
5 cross-examination –

6 MR BIZOS SC: I want to reserve my cross-  
7 examination on that because it may have some relevance if  
8 what –

9 CHAIRPERSON: Yes, you're entitled to  
10 reserve your cross-examination.

11 MR BIZOS SC: Yes.

12 CHAIRPERSON: Is there anything, any  
13 other matter that –

14 MR BIZOS SC: There are a few other  
15 matters.

16 CHAIRPERSON: You want to proceed with  
17 your cross-examination now?

18 MR BIZOS SC: Yes, please.

19 CHAIRPERSON: Well, please do so.

20 MR BIZOS SC: Yes.

21 CHAIRPERSON: Obviously, Mr Bizos, I  
22 can't expect you to cross-examine on that report you only  
23 got this morning because you've been busy cross-examining  
24 all day up to now and obviously couldn't consider it. So I  
25 won't prevent you from dealing with the matter later when

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1 you ask for leave to do so, provided the witness is still  
2 in the box.

3 MR BIZOS SC: Yes, I will –

4 CHAIRPERSON: Sorry, not in the box,  
5 she's in the –

6 MR BIZOS SC: Yes.

7 CHAIRPERSON: What I see the SABC this  
8 morning –

9 MR BIZOS SC: I promise to finish by the  
10 end of the day and I will do so.

11 CHAIRPERSON: I see, yes alright. So  
12 while she's still in the witness seat I'll allow you to –  
13 because other people are going to cross-examine her, as I  
14 understand. I'll ask you to come back to that matter, if  
15 you wish.

16 MR BIZOS SC: Yes, thank you, Mr  
17 Chairman. Now can you think of any reason to doubt the  
18 warrant-officer's statement?

19 GENERAL PHIYEGA: I'd like to underline  
20 the word "doubt" and that says to me if that be the word  
21 that you are using, it is not ruled out; we are saying  
22 investigate and gives us the facts. But I'd also say what  
23 worried me is that this is a warrant-officer talking of a  
24 constable, and why I was asking the questions that I was  
25 asking to say did you see the face, did you see the name,

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1 do you know the person, as a warrant-officer he is superior  
2 and senior to the constable and I would have expected more  
3 responsibility from the warrant-officer, and that worried  
4 me and it still remains worrying me.

5 MR BIZOS SC: It took the evidence  
6 leaders very little time to identify the two persons that  
7 Myburgh speaks of, and gave the names –

8 CHAIRPERSON: No, that's not right, Mr  
9 Bizos.

10 MR BIZOS SC: The probably or likely –

11 CHAIRPERSON: Myburgh doesn't speak of  
12 any persons. What the evidence leaders did was they did  
13 what I assumed IPID investigators would also have done,  
14 they had regard to the type of weapon used; they had regard  
15 to the fact that this person was said to come from the  
16 National Investigation Unit, and they then looked at the  
17 list of persons who fired bullets at scene 2 and then  
18 eliminated everybody but two, but Myburgh doesn't mention  
19 those two names at all. So you'll have to rephrase that  
20 question.

21 MR BIZOS SC: Yes. The document which  
22 the evidence leaders found after the matter was raised  
23 before, produced two names. Now those of us who have some  
24 knowledge of investigating techniques know that even if a  
25 person when approached to make a statement says I will not

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1 recognise him, it's almost an expected step to be taken by  
2 the investigating officer to say we have two or three  
3 suspects, we are going to put them on an ID parade, and  
4 you'd be surprised how many who claim that they will not be  
5 able to identify the suspect in fact do point them out at  
6 the identification parade. Were you aware of it, or if  
7 not, we'll put it to someone else.

8 GENERAL PHIYEGA: I think it is important  
9 to again say when it comes to investigating the police,  
10 those who police the police would have had that  
11 responsibility of isolating and whatever, otherwise it will  
12 be like I'm investigating ourselves, whereas IPID needed to  
13 do that.

14 MR BIZOS SC: Did either the one or the  
15 other of the generals with you say we will order an  
16 identification parade immediately?

17 GENERAL PHIYEGA: Once the matter is  
18 referred to IPID I'd be seen as interfering.

19 MR BIZOS SC: Did they call for an  
20 examination of the police records to see where there were  
21 other statements or a statement by Myburgh or anything like  
22 that? Did they suggest what form the investigation should  
23 take?

24 GENERAL PHIYEGA: I'm not aware of that,  
25 but they never tell me how they are conducting the

<p style="text-align: right;">Page 7545</p> <p>1 investigation, because we are the subject of investigation.  2 MR BIZOS SC: You're aware of the terms  3 of the Commission, that the Commission is enjoined to look,  4 among other things, what steps, if any – I just want to use  5 the exact words, Mr Chairman – that they have to  6 "Investigate the conduct of the South African Police  7 Services in particular, the nature, extent, and application  8 of any Standing Orders, policy considerations, legislation  9 and other instructions in dealing with the situation which  10 gave rise to the incident." Then 1.2.4, "whether by act or  11 omission it directly or indirectly caused loss of life or  12 harm to persons or property," and if you have a look at the  13 last paragraph of your statement, the last sentence, "I  14 therefore register my sincere condolence to the families of  15 all who tragically lost their lives. Heartfelt sympathy to  16 those who sustained injuries," I assume that you would have  17 wanted to add "or died, or the relatives of those who  18 died," –  19 CHAIRPERSON: That's the previous  20 sentence where she –  21 MR BIZOS SC: Which is in there, yes.  22 CHAIRPERSON: - where she gives  23 condolences to the families of all who tragically lost  24 their lives." So the people who died are dealt with in  25 that sentence –</p>	<p style="text-align: right;">Page 7547</p> <p>1 some of the outcomes of this Commission to point us to some  2 of those because as I said what we've tried to do is to do  3 our work in accordance to our prescripts and our protocols.  4 If there are omissions, then I'm sure this Commission can  5 point to some of those as we, as all parties has indicated  6 they are being engaged, are being engaged or –  7 MR BIZOS SC: Including the police?  8 CHAIRPERSON: I don't think what you said  9 was recorded because you lent forward and nodded your head.  10 I think you said yes or exactly or something like that.  11 GENERAL PHIYEGA: No, I didn't say yes  12 exactly, Judge. I said by my own admission in this  13 statement I am saying this Commission is meant to sincerely  14 take all inputs of the various parties, what we have tried  15 to do was use our protocols and prescripts to do our work  16 in accordance with that. If there were weaknesses,  17 conscious or unconscious, I am sure that this Commission  18 would be able to highlight those and those would form  19 future lessons for us.  20 MR BIZOS SC: Documents, videos, videos  21 that are missing for during the period that the alleged  22 attack on the police took place are missing. Is there  23 anything that you heard that was brought to your attention  24 during those proceedings which led you, that's the police,  25 were prematurely congratulated for the work that they did?</p>
<p style="text-align: right;">Page 7546</p> <p>1 MR BIZOS SC: Yes.  2 CHAIRPERSON: And the injured people are  3 dealt with in the last sentence.  4 MR BIZOS SC: Yes. No, that's – thank  5 you, Mr Chairman - "as a result of actions and omissions by  6 any of the parties." Those are your words, "as a result of  7 actions or omissions by any of the parties." You have been  8 in the witness box and facts and figures have been brought  9 to your attention. Is there any act or omission of the  10 police that you can think of which was unlawful and not in  11 accordance with the provisions of our Constitution, our  12 legislation, and the Standing Orders?  13 GENERAL PHIYEGA: First let me just say  14 what is also important, I mean I talk about, "I therefore  15 register my sincere condolences to the families of all,"  16 and I would say a lot of the questioning that I've received  17 from you has been on the 34, not all, and I really meant  18 all -  19 MR BIZOS SC: No, I accept that.  20 GENERAL PHIYEGA: - when I said that.  21 MR BIZOS SC: I accept that. The  22 gravamen of the question is are there any actions taken by  23 the police or any omission by the police which you think  24 the police are responsible for?  25 GENERAL PHIYEGA: I am looking forward to</p>	<p style="text-align: right;">Page 7548</p> <p>1 MR SEMENYA SC: Chair, we don't know of  2 any videos that are missing. Perhaps Mr Bizos could –  3 MR BIZOS SC: I can't hear my learned  4 friend.  5 CHAIRPERSON: He said we don't know of  6 any documents that are missing.  7 MR SEMENYA SC: Videos.  8 CHAIRPERSON: Sorry, videos. I beg your  9 pardon. He says we don't know of any videos that are  10 missing. That's the point he made.  11 MR BIZOS SC: I'll change it, that there  12 is a gap on the video material available during the four-  13 minute period that is vital.  14 MR SEMENYA SC: Chairperson, without more  15 specificity –  16 CHAIRPERSON: Speak up. Mr Bizos can't  17 hear you.  18 MR SEMENYA SC: Without sufficient  19 specificity I won't be able intelligently to follow the  20 answer because I don't know what gaps are being referred to  21 in that question, in the four minutes of what footage.  22 MR BIZOS SC: I thought that it was  23 common cause that there isn't any video showing any  24 protester attacking the police –  25 CHAIRPERSON: No, that's not my</p>

<p style="text-align: right;">Page 7549</p> <p>1 understanding. I don't think there's any common cause in 2 the matter. There certainly are matters that aren't 3 recorded on video, but whether videos were actually taken 4 of them and somehow have disappeared or been suppressed or 5 whatever, that is not something that's been before the 6 Commission.</p> <p>7 MR BIZOS SC: Well, if there are – 8 CHAIRPERSON: If there's evidence of that 9 –</p> <p>10 MR BIZOS SC: If there is no video 11 evidence when it is categorically stated in the orders that 12 what happened is to be recorded, then I am entitled to put 13 the question.</p> <p>14 CHAIRPERSON: Well, I don't know that you 15 can talk then about a gap. I can understand there may for 16 some or other reason have been a failure to operate the 17 video camera in the right direction at the relevant time. 18 That's one possibility. The other possibility of course is 19 that videos were taken and suppressed or concealed or 20 destroyed or whatever, but there's no evidence directly on 21 the point at the moment. Maybe it's a matter you can raise 22 with some of the other witnesses when they come, but you 23 certainly can't proceed on the basis that it's common cause 24 that there's a gap because that's not correct.</p> <p>25 MR BIZOS SC: I'll amend –</p>	<p style="text-align: right;">Page 7551</p> <p>1 policemen, or are they suspended from duty? 2 GENERAL PHIYEGA: We have a very clear 3 disciplinary process and code and it follows the laws of 4 this country, of saying people have to be proved innocent. 5 We can't prejudge anything. When reports are made we 6 investigate and disciplinary processes do take place in the 7 police.</p> <p>8 MR BIZOS SC: Yes. 9 CHAIRPERSON: Mr Bizos, this sounds like 10 a new line of enquiry. 11 MR BIZOS SC: More or less the final. 12 CHAIRPERSON: Well anyway, perhaps we 13 could take the tea adjournment at this stage. It's 3 14 o'clock. How long are you going to be with this point? I 15 see you've got a couple of pages in front of you – 16 MR BIZOS SC: Yes, it's two and one-third 17 pages. 18 CHAIRPERSON: Alright. Well, I don't 19 know at what rate you – 20 MR BIZOS SC: We'll finish it today. 21 CHAIRPERSON: I don't know at what rate 22 you've gone through your pages so far. Let's take the tea 23 adjournment and try to reassemble at quarter past 3. 24 [COMMISSION ADJOURNS COMMISSION RESUMES] 25 [15:24] CHAIRPERSON: The Commission resumes.</p>
<p style="text-align: right;">Page 7550</p> <p>1 CHAIRPERSON: I understand this is an 2 area that you may wish to explore, but I don't think you 3 can explore it with this witness in the way you're 4 proposing to do.</p> <p>5 MR BIZOS SC: Yes, very well. There is 6 nothing that you heard or saw before this Commission that 7 cast any doubt upon the praise that you showered on the 8 police in your statements of the 17th and the 20th? 9 GENERAL PHIYEGA: Advocate, I shall again 10 say I'm sure the learnings from this Commission would point 11 us to a number of areas and we are looking forward to that.</p> <p>12 MR BIZOS SC: Yes. I assume that you 13 will agree that no serious misconduct on the part of the 14 police has been unearthed by the police department. 15 [14:58] CHAIRPERSON: What do you mean by the 16 police department? The directorate responsible for 17 investigating allegations of malfeasance and other improper 18 conduct by the police is the Independent Police 19 Investigation Directorate. Now I don't know whether that's 20 the department you mean, or whether you mean other sections 21 of the police. So perhaps you must reformulate the 22 question more voluminously.</p> <p>23 MR BIZOS SC: What is the police practice 24 if allegations are made against the police? As a matter of 25 practice are they all allowed to continue working as</p>	<p style="text-align: right;">Page 7552</p> <p>1 National Commissioner, you are still under oath. 2 MANGWASHI VICTORIA PHIYEGA: s.u.o. 3 CHAIRPERSON: Mr Bizos, you said you were 4 coming to the last two and a half pages of your cross- 5 examination. 6 CROSS-EXAMINATION BY MR BIZOS SC (CONTD.): 7 Less than that now, thank you, Mr Chairman. Commissioner, 8 we agree with you fully that nobody should be condemned in 9 accordance with the – and there should be no prejudging. 10 Why did you prejudge what happened on the 17th and the 20th? 11 GENERAL PHIYEGA: I have said I presented 12 facts that were given to me and I did say at the end of my 13 statement if there are any further investigations in this, 14 into the matter, we shall be very supportive thereof, and I 15 do not consider that to have been prejudging. 16 MR BIZOS SC: That decision of yours 17 would have excluded any police officer's suspension and any 18 disciplinary proceedings against any police officer. 19 GENERAL PHIYEGA: I don't understand that 20 question. 21 MR BIZOS SC: You as the Commissioner and 22 your generals could not possibly either suspend or try and 23 discipline any officers that took part in Marikana as a 24 result of what you had to say on the 17th and the 20th. 25 GENERAL PHIYEGA: True, because there</p>

<p style="text-align: right;">Page 7553</p> <p>1 were no facts presented to me that showed that there was an 2 individual that needed to be disciplined.</p> <p>3 MR BIZOS SC: You are continuing to speak 4 about facts furnished by the police, but anything else is 5 allegations made by others, other than the police.</p> <p>6 GENERAL PHIYEGA: I shall continue to say 7 what I've said earlier on, to say the bona fides of the 8 facts that were presented to me by my members, officers and 9 commanders, are the facts that I can rely on to answer and 10 talk to you about what you are talking to me about.</p> <p>11 MR BIZOS SC: Commissioner, you haven't 12 responded to the question, that it appears that for you 13 policemen furnish facts; all others merely make 14 allegations.</p> <p>15 GENERAL PHIYEGA: That has not been my 16 evidence to this Commission.</p> <p>17 MR BIZOS SC: I thought that's what you 18 had said, what the facts given to you by the police. Was 19 that a mistake? Or the allegations made by the police.</p> <p>20 GENERAL PHIYEGA: Advocate, I have never 21 said all the information that was given by others or read 22 in the newspapers or seen in the TV are just allegations. 23 I have not given that type of evidence here.</p> <p>24 MR BIZOS SC: Are you familiar with the 25 provisions of section 13 of the Standing Orders General</p>	<p style="text-align: right;">Page 7555</p> <p>1 GENERAL PHIYEGA: I have said that my 2 understanding and the way I saw processes flowing out was 3 that our preparation and the presentation that we made much 4 earlier to this Commission was part of collating all the 5 information that we were having about what took place 6 there.</p> <p>7 MR BIZOS SC: 13(3), "A thorough 8 evaluation must be conducted and, if possible, video 9 coverage must be shown of the debriefing." Are you aware 10 of that order?</p> <p>11 GENERAL PHIYEGA: Yes, I am.</p> <p>12 MR BIZOS SC: Was an evaluation made by 13 those that had to do it?</p> <p>14 GENERAL PHIYEGA: My understanding was 15 that a lot of that information was collated, it was shared, 16 it was put into the presentation, and I think in that 17 process evaluation did take place.</p> <p>18 MR BIZOS SC: "All good practices, as 19 well as shortcomings, must be recorded," this is 20 subparagraph (4). "All good practices, as well as 21 shortcomings, must be recorded as part of a learning 22 process to enhance good practices and address or prevent 23 recurrences of identified mistakes." Yes, seven months 24 have passed since the tragedy of Marikana. Have the police 25 done anything to comply with the provisions of this Order?</p>
<p style="text-align: right;">Page 7554</p> <p>1 262, paragraph 13? Debriefing, are you familiar with that 2 section?</p> <p>3 GENERAL PHIYEGA: Which section are you 4 referring to?</p> <p>5 MR BIZOS SC: Let's start with subsection 6 (1), 13(1), "The CJOC must ensure that debriefing takes 7 place after each event or gathering, and that record is 8 kept thereof." Are you aware of that provision?</p> <p>9 GENERAL PHIYEGA: Yes, I am.</p> <p>10 MR BIZOS SC: Where is that report? Did 11 you receive a report or a record of the debriefing?</p> <p>12 GENERAL PHIYEGA: I haven't received a 13 report of that.</p> <p>14 MR BIZOS SC: Did you not call for a 15 report?</p> <p>16 GENERAL PHIYEGA: No, I did not ask for 17 it.</p> <p>18 MR BIZOS SC: Why not?</p> <p>19 GENERAL PHIYEGA: Because I was aware 20 that we are starting to prepare for this Commission and the 21 information that we were sharing in preparation for this 22 Commission represented much of that.</p> <p>23 MR BIZOS SC: Do you see anything in the 24 order exempting the CJOC from complying with an order 25 merely because a commission was appointed?</p>	<p style="text-align: right;">Page 7556</p> <p>1 GENERAL PHIYEGA: Advocate, this is work- 2 in-progress because this process now has a Commission and a 3 lot is happening at this Commission, and I have said 4 earlier on today that when this Commission concludes I'm 5 sure we'd be able to tie up everything and be able to deal 6 with some of those provisions.</p> <p>7 MR BIZOS SC: National Commissioner, the 8 Orders, the Constitution, the legislation, you are required 9 to investigate and you are required to come to this 10 Commission with answers – with answers, not we'll wait to 11 hear what the Commission has to say. The Commission 12 requires answers from you, among others.</p> <p>13 GENERAL PHIYEGA: I have given a lot of 14 answers to this Commission, but I also am aware that there 15 is a lot of work-in-progress that will inform the 16 finalisation of this matter.</p> <p>17 MR BIZOS SC: Do you agree that the Terms 18 of Reference by clear implication require the police to 19 come with at least some answers?</p> <p>20 GENERAL PHIYEGA: I absolutely agree, and 21 I am sure that when the line of police members that are 22 going to be questioned here, the questions that we're 23 supposed to answer, we would have done some bit of justice 24 to answering those questions.</p> <p>25 MR BIZOS SC: Commissioner, not only have</p>

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1 you not come here with answers, with no answers, you've  
2 come here to try and avoid personal responsibility. You  
3 have evaded answering important questions put to you. You  
4 have attempted to hide behind the organisation of  
5 bureaucracy to avoid answering straight questions. Instead  
6 of helping this Commission to seek the truth, you have  
7 pretended to be ignorant of key details and you have  
8 frustrated attempts to get to the bottom of what happened  
9 at Marikana. I don't expect you to say yes, but it's my  
10 duty to put to you what we're going to submit to the  
11 Commission.

12 CHAIRPERSON: Mr Semenya, I see you've  
13 got your light on. Do you want to say something?

14 MR SEMENYA SC: Yes. I can accept there  
15 is permissible limits at which my learned colleague can say  
16 they will predicate their argument finally, but attacking  
17 the, or even accusing remotely the witness of mendacity is  
18 not one of those parameters that are permissible.

19 CHAIRPERSON: Mr Semenya, he says he's  
20 going to argue at the end of the case that that's the  
21 position, and he's giving the witness an opportunity to  
22 admit it or deny it. It's unlike she'll admit it. It's  
23 more likely she'll deny it. It may be a formal thing, but  
24 he says that's what he's going to argue at the end and he  
25 must give her a chance to deal with it. I think in the

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1 circumstances I must allow him to put the question.

2 MR BIZOS SC: Thank you, Mr Chairman.  
3 Finally you'll be pleased to hear I don't –

4 CHAIRPERSON: Do we have her answer to  
5 that?

6 GENERAL PHIYEGA: Yes.

7 CHAIRPERSON: Does she admit the  
8 catalogue of submissions you –

9 MR BIZOS SC: I don't expect her to –

10 CHAIRPERSON: No, no, we must have an  
11 answer.

12 MR BIZOS SC: Yes.

13 GENERAL PHIYEGA: Judge, thank you for  
14 that because really, it's a character assassination. I've  
15 spent very valuable time at this Commission. I've answered  
16 to the best of my ability. That I did not give you the  
17 answers that you wanted, I gave you the answers as I  
18 understood them and the facts as I knew them. I cannot  
19 make you, you know, conclude the way you do. It's your  
20 conclusion, but I want to say I do not agree with your  
21 conclusion. I came here as an honest contributor to this  
22 Commission and I've answered to the best of my ability.

23 MR BIZOS SC: Do you recall that when you  
24 finished your statement, a female person in the audience  
25 broke down and took some time for her to be helped to stop

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1 crying? You remember that?

2 GENERAL PHIYEGA: Yes, I do.

3 MR BIZOS SC: Do you remember that it was  
4 immediately after you offered sympathy to those affected?

5 GENERAL PHIYEGA: Yes, I do.

6 MR BIZOS SC: Have you ever heard the  
7 expression "Sympathy without admission of wrongdoing is an  
8 empty gesture?"

9 GENERAL PHIYEGA: I'm hearing it today.

10 MR BIZOS SC: Did it occur to you that  
11 your expression of sympathy without regret at what may have  
12 happened to her relative may have caused her to wail?

13 GENERAL PHIYEGA: I may not be able to be  
14 in her shoes, but I can be in my shoes to say very  
15 honestly, earnestly, and from the depth of my heart, my  
16 sympathy goes to all members of families who were affected  
17 by this tragedy, and it remains the truth that I shall say  
18 to this Commission.

19 MR BIZOS SC: Finally at the end of this  
20 Commission when we argue, we will say that you failed to  
21 take this Commission into your confidence. We will argue  
22 that you have placed the narrow and parochial interests of  
23 the police above the interests of justice in this country.  
24 Mr Chairman, that is the end of my cross-examination.  
25 Thank you for your patience.

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1 CHAIRPERSON: Do you want to comment on  
2 the last submission Mr Bizos made?

3 [15:44] GENERAL PHIYEGA: Judge, I want to say I  
4 came before this Commission; I've answered to the best of  
5 my ability the questions that have been put to me. I am  
6 consistent with the statements I made right from the 20th  
7 that the South African Police Service shall fully cooperate  
8 with this Commission, and I trust that my other members  
9 that will be coming to this Commission will continue to do  
10 so, and I thank the opportunity of having been able to  
11 respond to the best of my ability to Adv Bizos. That he  
12 did not believe what I'm saying, accept my responses, I do  
13 understand his standpoint.

14 CHAIRPERSON: Well, I'm not sure one can  
15 say what he believed or didn't believe. He's an advocate  
16 putting a case, so I think that's where it ends. I'd like  
17 to ask a question before Mr Malindi starts cross-examining,  
18 and that is in regard to the reference of the Myburgh  
19 statement to IPID, I take it you didn't do that yourself,  
20 you asked someone else to do it for you?

21 GENERAL PHIYEGA: Are you meaning the  
22 statement of Myburgh or the other –

23 CHAIRPERSON: Yes, the statement of  
24 Myburgh.

25 GENERAL PHIYEGA: Ja, all the statements



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1 were not taken by us –

2 CHAIRPERSON: No, no, no, the statement

3 of Myburgh which was referred to, that statement was taken,

4 you caused it to be taken –

5 GENERAL PHIYEGA: Yes.

6 CHAIRPERSON: - after you had the

7 interview with him at Rustenburg, remember?

8 GENERAL PHIYEGA: Yes.

9 CHAIRPERSON: And you said that statement

10 was referred to IPID.

11 GENERAL PHIYEGA: Yes.

12 CHAIRPERSON: I'm saying I take it you

13 didn't refer it yourself, personally hand it to IPID or

14 telephone somebody at IPID and say the statement was

15 coming.

16 GENERAL PHIYEGA: No, I didn't take it

17 myself.

18 CHAIRPERSON: No, no, that's not what I

19 mean –

20 GENERAL PHIYEGA: The commissioner of

21 North West can explain better the process they followed.

22 CHAIRPERSON: Yes, I see.

23 MR BIZOS SC: I deliberately finished, or

24 would have finished anyway, but I was informed that Mr

25 Budlender – oh, he's changed his mind. He wanted to bring

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1 something to the attention of the Commission.

2 CHAIRPERSON: Mr Malindi, are you ready

3 to cross-examine? I understood that you wished to cross-

4 examine the National Commissioner on behalf of the Human

5 Rights Commission.

6 MR MALINDI SC: I am ready, Chairperson.

7 CHAIRPERSON: Proceed. Yes, probably for

8 good order I should indicate that I decided to ask Mr

9 Malindi to cross-examine next because I understand there's

10 a particular line he wishes to follow. Thereafter I was

11 informed that Mr Mpofo wants to cross-examine, thereafter

12 Mr Ntsebeza, thereafter, I think it's Mr Tip, and

13 thereafter Mr Burger on behalf of Lonmin, thereafter Mr

14 Bruinders on behalf of AMCU, who indicates he may or may

15 not have questions to ask, but that's the order that I

16 determined. So Mr Malindi, please proceed.

17 MR MALINDI SC: Thank you, Chairperson.

18 CHAIRPERSON: I'm not indicating Mr

19 Bruinders will necessarily be the last cross-examiner.

20 That's the order I worked out in the meanwhile. I

21 understand there may be other parties as well. I'd be

22 grateful if they could agree among themselves if they wish

23 to cross-examine and the order that they would consider

24 appropriate, convey that to the evidence leaders and

25 therefore it can be conveyed to me, but that's what's going

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1 to happen now. Mr Malindi, please proceed.

2 CROSS-EXAMINATION BY MR MALINDI SC:

3 National Commissioner, may I take you back to item 13 of

4 the Standing Orders, the debriefing section? Do you agree

5 with me that the term "debriefing" may be defined as

6 reporting on the mission or a task?

7 GENERAL PHIYEGA: Yes.

8 MR MALINDI SC: In the process of a

9 thorough evaluation, as stated in this item, good practices

10 will be noted. Do you agree that it may be for

11 commendation of units or individuals who have acted

12 excellently in the process?

13 GENERAL PHIYEGA: It could well be.

14 MR MALINDI SC: Do you agree as well that

15 sub (4) of item 13 talks to shortcomings that must be

16 recorded?

17 GENERAL PHIYEGA: Correct.

18 MR MALINDI SC: The value thereof is also

19 that improper conduct will be rectified. Do you agree?

20 GENERAL PHIYEGA: Certainly, and

21 continuous improvement.

22 MR MALINDI SC: And as sub (5) indicates,

23 by means of in-service training in crowd management

24 techniques, etcetera.

25 GENERAL PHIYEGA: Yes.

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1 MR MALINDI SC: If this is done, the SAPS

2 will improve its crowd management techniques, and it's

3 something that you would prescribe to?

4 GENERAL PHIYEGA: Yes, that falls under

5 the ambit of what I call continuous improvement.

6 MR MALINDI SC: If you look at the SAPS'

7 expert witness, Mr De Rover, paragraph 10 –

8 CHAIRPERSON: This is exhibit FFF11.

9 MR MALINDI SC: It is FFF11, Chairperson.

10 If you could turn to paragraph 10 thereof, you will see

11 that it says that law enforcement organisations such as our

12 SAPS "seek interaction with the communities they serve and

13 render public account for their decisions, actions, and

14 omissions, during public meetings and through public

15 reports and media." Do you agree with that statement of

16 [inaudible]?

17 GENERAL PHIYEGA: Yes, I do.

18 MR MALINDI SC: That statement is

19 consistent with the openness and transparency that you also

20 seek in [inaudible]?

21 GENERAL PHIYEGA: Yes.

22 MR MALINDI SC: And if you could look at

23 paragraph 11 of the same statement, FFF11, and that

24 statement says that allegations of any misconduct are

25 promptly, thoroughly and impartially investigated. Do you

<p style="text-align: right;">Page 7565</p> <p>1 agree with that statement?</p> <p>2 GENERAL PHIYEGA: Yes, I do.</p> <p>3 MR MALINDI SC: And item 13 of the</p> <p>4 Standing Orders required of your organisation to have</p> <p>5 conducted a debriefing immediately after the incident. Am I</p> <p>6 correct with that?</p> <p>7 GENERAL PHIYEGA: You are correct.</p> <p>8 MR MALINDI SC: And the President</p> <p>9 announced on 17 August that a commission of inquiry will be</p> <p>10 established to investigate the events of Marikana. Am I</p> <p>11 correct?</p> <p>12 GENERAL PHIYEGA: Yes, you are correct.</p> <p>13 MR MALINDI SC: Why was the debriefing as</p> <p>14 required by item 13 of the Standing Orders not conducted</p> <p>15 immediately after the event and before the announcement</p> <p>16 that the commission of inquiry will be instituted?</p> <p>17 GENERAL PHIYEGA: You would be aware that</p> <p>18 this event of the 16th went, you know the collation of</p> <p>19 information and data went right into the early morning of</p> <p>20 the 17th and at that point in time there was a demand for us</p> <p>21 to report what has happened. Actually a lot of the media</p> <p>22 lingered around, asking us to report as early as 11PM on</p> <p>23 the 16th, and at that point in time the counting of those</p> <p>24 people who were in hospital, those who were dead, was not</p> <p>25 completed. On the 17th when we made our report on the</p>	<p style="text-align: right;">Page 7567</p> <p>1 this I can't be here and with the Minister at the same</p> <p>2 time, so I anticipate that we will be able to commence at 1</p> <p>3 o'clock tomorrow. So those who eat lunch, I suggest you</p> <p>4 eat lunch before 1. We'll start at 1 and at least we'll</p> <p>5 get in half a day's hearing, I hope, or something</p> <p>6 approximating half a day's hearing tomorrow. So, but those</p> <p>7 who are coming from far away need only be here at 1 because</p> <p>8 nothing will be happening before then. I see Mr Mpofo has</p> <p>9 turned his microphone on. I don't know whether Mr Malindi</p> <p>10 has turned it on or left it on. He left it on. Yes, Mr</p> <p>11 Mpofo?</p> <p>12 MR MPOFU: Chairperson, if you could</p> <p>13 kindly give me one minute just to raise a matter which may</p> <p>14 or may not be relevant for your meeting tomorrow. I was</p> <p>15 going to raise it before I start my cross-examination, but</p> <p>16 I think it might be opportune to do so now. Chairperson,</p> <p>17 it's related to the application, although it still stands,</p> <p>18 whether or not the application is successful, and I don't</p> <p>19 expect any of the parties, at least those others, to oppose</p> <p>20 the matter.</p> <p>21 An issue was raised, Chairperson, by the Human</p> <p>22 Rights Commission, which we've been discussing, about the</p> <p>23 possibility of arranging for what we call simultaneous</p> <p>24 interpretation, which would half the time of the</p> <p>25 Commission, particularly with the kinds of witnesses that</p>
<p style="text-align: right;">Page 7566</p> <p>1 11th(?), it was a collation of all the facts that came from</p> <p>2 the scene, and as I've already stated, it was a collective</p> <p>3 account of the JOC, and it is on that very same day, that</p> <p>4 evening, that the President again announces the commission,</p> <p>5 which already without us knowing the Terms of Reference,</p> <p>6 extends this role and start saying as you do whatever you</p> <p>7 do, take into account the fact that there is a commission</p> <p>8 coming. So part of the debriefing in its original and pure</p> <p>9 form, and the preparation for the Commission, I understand</p> <p>10 it to have been a process of working towards that, and some</p> <p>11 of the documents, the presentation that was presented much</p> <p>12 earlier here, which forms part of the inputs we are making</p> <p>13 to the Commission, was part of that process, as we</p> <p>14 understood it.</p> <p>15 CHAIRPERSON: Mr Malindi, perhaps this is</p> <p>16 an appropriate time, if it's convenient for you, to take</p> <p>17 the adjournment. I want to announce that we will be</p> <p>18 adjourning until 1 o'clock tomorrow afternoon. The reason</p> <p>19 is that I have a meeting scheduled with the Minister of</p> <p>20 Justice at 10 o'clock tomorrow morning. It's the only</p> <p>21 appointment I could get. As you know, he and I are charged</p> <p>22 with the responsibility of deciding whether the venue</p> <p>23 should be changed, and we will be meeting tomorrow at 10</p> <p>24 o'clock specifically to discuss that matter and see whether</p> <p>25 we could reach a decision on it. In the circumstances of</p>	<p style="text-align: right;">Page 7568</p> <p>1 are anticipated and Lonmin and others. In a nutshell,</p> <p>2 Chair, the reason why it's linked to –</p> <p>3 CHAIRPERSON: I can see your point. If</p> <p>4 you're having a witness giving evidence, let's say in</p> <p>5 isiXhosa, you can't have simultaneous translation –</p> <p>6 MR MPOFU: That's correct, yes.</p> <p>7 CHAIRPERSON: But if you have witnesses</p> <p>8 who are all going to give evidence in English –</p> <p>9 MR MPOFU: Yes.</p> <p>10 CHAIRPERSON: - then simultaneous</p> <p>11 translation, if it's possible, will certainly shorten the</p> <p>12 proceedings significantly.</p> <p>13 MR MPOFU: Cut probably by half, ja.</p> <p>14 CHAIRPERSON: Yes. What is proposed, and</p> <p>15 what the Minister and I will be considering, is a possible</p> <p>16 move to the municipal premises at Centurion and one of the</p> <p>17 matters that will, that if we decide to move there, then</p> <p>18 one of the matters that I will ask those concerned with the</p> <p>19 logistics of the Commission to investigate, is whether it's</p> <p>20 possible to have simultaneous translation, as you have</p> <p>21 suggested, for the reasons you've given.</p> <p>22 MR MPOFU: Yes, Chairperson, and yes,</p> <p>23 that's more or less what the issue is, and the only issue</p> <p>24 I'd like to add is that we've for the sake of completion</p> <p>25 taken the courtesy to discuss the matter with the</p>

1 translators, with the interpreters, and they don't foresee  
2 any problem. In fact they welcome the idea. Thank you,  
3 Chairperson.

4 CHAIRPERSON: Thank you for the motion.  
5 I'll convey that to the Minister as well. Of course it  
6 depends upon whether we decide to move, but that's  
7 something on which we will only know the answer in due  
8 course. At this stage then the Commission will adjourn  
9 until 1 o'clock tomorrow afternoon.

10 [COMMISSION ADJOURNED]

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