

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 72 4 APRIL 2013 PAGES 7628 TO 7772

HELD AT

CIVIC CENTRE, RUSTENBURG, NORTH WEST PROVINCE



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64 10th Avenue, Highlands North, Johannesburg
P O Box 721, Highlands North, 2037
Tel: 011-440-3647 Fax: 011-440-9119 Cell: 083 273-5335
E-mail: realtime@pixie.co.za
Web Address: <http://mysite.mweb.co.za/residents/pak06278>



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1 [PROCEEDINGS ON4 APRIL 2013]
 2 [09:38] CHAIRPERSON: The Commission resumes.
 3 National Commissioner, you're still under oath.
 4 MANGWASHI VICTORIA PHIYEGA: s.u.o.
 5 CHAIRPERSON: Mr Burger is still cross-
 6 examining.
 7 CROSS-EXAMINATION BY MR BURGER SC (CONTD.):
 8 Morning, General.
 9 GENERAL PHIYEGA: Good morning.
 10 MR BURGER SC: We finished yesterday by
 11 looking at FFF2, what I termed your second version, and I'd
 12 like today to start off by dealing with version 3. When we
 13 received FFF2 it was pointed out to your lawyers that there
 14 was something wrong with the statement, and that is by now
 15 the well-known page 7 didn't fit. What we were then given
 16 was a next instalment, and that we know as FFF3. Will you
 17 have a look at FFF3 with me, please?
 18 GENERAL PHIYEGA: Judge, may I say
 19 something before we go there? Because I want to check the
 20 proceedings of the 14th where my lawyer dealt with both the
 21 statements, whether they are still valid or are we starting
 22 another process on this matter.
 23 CHAIRPERSON: Mr Burger, you've heard the
 24 query –
 25 MR BURGER SC: No, I'm sorry, I didn't,

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1 Chair.
 2 CHAIRPERSON: I'll ask – sorry, Mr
 3 Burger, you've heard what the National Commissioner said
 4 and your answer was you didn't. National Commissioner,
 5 could you repeat what you said, please, because I think the
 6 query you've raised is one that I can't answer, but maybe
 7 Mr Burger can.
 8 GENERAL PHIYEGA: Yes, I'm trying to
 9 check whether, because on the 14th when I started my
 10 testimony my lawyers actually walked us through that. I
 11 was looking at the record of this Commission also dealing
 12 with both statements of the 12th and of the 7th. He made
 13 corrections relating to that as recorded in these
 14 proceedings of this court, of this Commission. So I just
 15 want to understand whether that correction and the
 16 agreement on what the statement is, is still valid, because
 17 we seem to be going back to where we have been.
 18 CHAIRPERSON: Well, let me try and answer
 19 the question first. My understanding is obviously what
 20 you've – whether it's valid or not is a matter we have to
 21 decide at the end of the day. You gave evidence and you
 22 corrected what you regard as mistakes in the documents we
 23 had –
 24 GENERAL PHIYEGA: Yes.
 25 CHAIRPERSON: And indicated what you say

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1 the correct version as far as you're concerned is. Now my
 2 understanding is that Mr Burger is questioning you about
 3 that. He's putting certain propositions to you that he
 4 deduces from an analysis of the two documents before the
 5 Commission, plus two further documents that he's referring
 6 to, and he's putting certain contentions to you as to how
 7 he reads the documents and the conclusions that he draws
 8 and he's questioning you about them. So it's not a
 9 question of what you said no longer being valid; what you
 10 said stands on the record as what you said.
 11 GENERAL PHIYEGA: That's what I want to
 12 know.
 13 CHAIRPERSON: He is, however, questioning
 14 you about it. He's putting certain contentions to you
 15 about it as to how he interprets the documents that we
 16 have, plus the two extra documents he's putting before us,
 17 and I think that satisfactorily answers the question you've
 18 asked us. So you know, when a witness gives evidence it
 19 doesn't become valid just because the witness has given it;
 20 it's there, it's on record. At the end of the day the
 21 court or the Commission, whoever it is, has to decide
 22 whether the evidence can be accepted, which you would say
 23 whether it's valid. Well, we haven't reached that stage by
 24 a long shot yet. What you've said is on record, but he, as
 25 he has the right to do, is questioning you about it because

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1 he thinks – or what he thinks is irrelevant – he will
 2 contend that there's a particular set of facts that are
 3 important which we have to look at, and he wants to ask you
 4 about it. I think that's a correct summary. Is that
 5 correct, Mr Burger?
 6 MR BURGER SC: Yes, indeed. Thank you,
 7 Chair.
 8 CHAIRPERSON: He wants to test your
 9 evidence in effect on this aspect.
 10 GENERAL PHIYEGA: Okay, I think, Judge,
 11 that helps me because I just wanted to know where we're
 12 starting, yes.
 13 CHAIRPERSON: You're entitled to know
 14 where we're starting, and you're entitled to know in what
 15 direction we're going to.
 16 GENERAL PHIYEGA: Okay.
 17 MR BURGER SC: General, when the problem
 18 with FFF2 was pointed out to your lawyers we were then
 19 given what we know as FFF3. May I ask you to look at that
 20 document with me, because I'd like to understand that
 21 document. It's an affidavit dated the 12th of March this
 22 year.
 23 GENERAL PHIYEGA: If you'll give me time
 24 I'll get my document. Okay, I'm with you.
 25 MR BURGER SC: That is an affidavit which

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1 you signed in Pretoria on the 12th of March 2013. Do you
 2 confirm that?
 3 GENERAL PHIYEGA: Yes.
 4 MR BURGER SC: And you took an oath when
 5 you signed this affidavit?
 6 GENERAL PHIYEGA: Yes, I did.
 7 MR BURGER SC: And may we assume that
 8 before you took the oath, you read the affidavit and you
 9 satisfied yourself that this was the truth and the whole
 10 truth?
 11 GENERAL PHIYEGA: I did not read the
 12 statement because for me it was the same statement; I was
 13 correcting an omission.
 14 MR BURGER SC: So did you swear the truth
 15 of the statement, not having read it?
 16 GENERAL PHIYEGA: I've sworn the truth of
 17 the statement because I was correcting a page 7 that I did
 18 not sign.
 19 CHAIRPERSON: Let me ask you this. I
 20 understand you didn't read the whole statement because you
 21 read it before, but page 7 was the crucial one because that
 22 wasn't there before, right.
 23 GENERAL PHIYEGA: Yes.
 24 CHAIRPERSON: Did you, on the 12th did you
 25 read page 7?

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1 GENERAL PHIYEGA: On the 12th I looked at
 2 the document, I looked at where I didn't sign and I signed,
 3 because for me it was the same statement.
 4 CHAIRPERSON: Yes, but did you read page
 5 7?
 6 GENERAL PHIYEGA: I did not read the
 7 contents. I read, I looked at where I didn't sign and I
 8 signed.
 9 MR BURGER SC: You looked at where you
 10 didn't sign, and you signed. What does that mean? Where
 11 did you not sign, where you signed on the 12th?
 12 GENERAL PHIYEGA: Remember I submitted a
 13 statement on the 7th and the statement I submitted on the
 14 7th, I was the only one who missed to sign page 7.
 15 CHAIRPERSON: When you say sign, I think
 16 you mean initialled because the –
 17 GENERAL PHIYEGA: That's the initial,
 18 yes.
 19 CHAIRPERSON: At the end of the document
 20 you signed your full signature –
 21 GENERAL PHIYEGA: I initialled, yes.
 22 CHAIRPERSON: As far as the pages were
 23 concerned before that, you simply initialled them.
 24 GENERAL PHIYEGA: Yes.
 25 CHAIRPERSON: So when you say you didn't

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1 sign page 7, I take it you mean you didn't initial page 7.
 2 GENERAL PHIYEGA: Yes.
 3 CHAIRPERSON: Well, we know you didn't
 4 because –
 5 GENERAL PHIYEGA: That's what I did.
 6 CHAIRPERSON: - exhibit FFF2A doesn't
 7 contain your initial on page 7.
 8 GENERAL PHIYEGA: In fact if I may just
 9 step back. You gave me a document yesterday where I was
 10 the only one who signed and I had omitted page 7. On the
 11 7th it was the D-day of my submission of the statement and
 12 the Commission was putting a lot of pressure. My lawyer
 13 said to me, "Send your statement," because it wasn't as yet
 14 commissioned, I said it's not yet commissioned, I must
 15 still go to the commissioner. So that statement, the
 16 statement that you circulated yesterday, you would note
 17 that it's the same statement as the one that is
 18 commissioner, but I needed to say to the Commission I am
 19 not lying when I say there's a statement, they needed to
 20 see that, and I'm sure my lawyers can sort out that because
 21 they submitted documents. I submitted that to them. On
 22 the same day I went to the commissioner to say
 23 "Commissioner, this statement needs to be commissioned,"
 24 and you'd notice that those statements are identical. He
 25 then commissioned the statement. The same commissioned

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1 statement was then submitted to the lawyers for the
 2 Commission. Then information comes on the 12th to say
 3 there's a page you did not sign. I'm given a statement,
 4 which I thought is the same statement that I submitted. I
 5 then initial and sign with the commissioner. I do submit
 6 that I didn't read it because I thought it is the statement
 7 that I've read and the contents of which I know, and then
 8 when we came here I said to my lawyer there is a
 9 discrepancy between what I consider to be my statement and
 10 the one that has been submitted, because that was a draft,
 11 and then he corrected that.
 12 MR BURGER SC: General, I don't begin to
 13 understand your explanation. It may be a function of my
 14 ignorance, but let me go slowly so that I can follow the
 15 debate.
 16 CHAIRPERSON: Sorry, before you – can I
 17 ask a question, something that's been puzzling me since
 18 yesterday. National Commissioner, presumably there must
 19 have been a page 7 originally which correctly reflected in
 20 full what you said, and we haven't got it, but we can
 21 reconstruct it. If you look at the documents with me, I
 22 think you'll follow me. Look at page 7 of FFF2A, that's
 23 the one you were handed by Mr Burger yesterday, and look at
 24 page 7 of exhibit FFF3, that's the statement of the 12th of
 25 March.

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1 GENERAL PHUYEGA: Can we work on the
 2 dates, the 12th and the 13th, can we do that?
 3 CHAIRPERSON: Sure, ja.
 4 GENERAL PHUYEGA: Because my markings are
 5 completely –
 6 CHAIRPERSON: That's okay. It's one of
 7 the 7th and one of the 12th. The one of the 7th is the one
 8 that Mr Burger handed you, which is FFF2A, and the one of
 9 the 12th is FFF3. I'm not sure if it's FFF or FF, but is it
 10 FFF? FFF, okay. Now if you look at FFF2A, it seems clear
 11 that the top two lines shouldn't be there.
 12 GENERAL PHUYEGA: Yes.
 13 CHAIRPERSON: Because they're actually on
 14 page 6, at the foot of page 6. What's also clear, if one
 15 looks at page 8 of FFF2A, that some lines are missing.
 16 GENERAL PHUYEGA: Yes.
 17 CHAIRPERSON: Because it starts in the
 18 middle of a paragraph, and it's quite clear if one looks at
 19 the document carefully that what's missing are the three
 20 lines, the first three lines of paragraph 26 which one sees
 21 at the foot of page 7 of FFF3. Are you with me?
 22 GENERAL PHUYEGA: Yes, I'm with you.
 23 CHAIRPERSON: So we can therefore
 24 reconstruct what the original page 7 must have said.
 25 GENERAL PHUYEGA: Yes.

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1 CHAIRPERSON: Now when you read your
 2 statement before signing it on the 7th of March, I take it
 3 the original, what I'll call the original page 7, must have
 4 been there.
 5 GENERAL PHUYEGA: Yes.
 6 CHAIRPERSON: Because there's some quite
 7 important stuff on page 7.
 8 GENERAL PHUYEGA: Yes.
 9 CHAIRPERSON: So if you'd read the
 10 statement and page 7 hadn't been there at all, I imagine
 11 you would have noticed it because you'd have said but look,
 12 there's important stuff here that's missing. Is that
 13 right?
 14 GENERAL PHUYEGA: That's correct.
 15 CHAIRPERSON: So we can assume that on
 16 the 7th of March you saw, you had a copy of your affidavit
 17 which contained the original page 7 -
 18 GENERAL PHUYEGA: Yes.
 19 CHAIRPERSON: - and you read the whole
 20 thing.
 21 GENERAL PHUYEGA: Yes.
 22 CHAIRPERSON: Is that correct?
 23 GENERAL PHUYEGA: It is correct.
 24 CHAIRPERSON: Then something went wrong
 25 after that. Somebody seems to have taken out what I call

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1 the original page 7, and put in this one we've got, the
 2 misfit, as Mr Burger calls it, with the two lines at the
 3 top that shouldn't be there and three lines at the bottom
 4 that are missing. Is that correct?
 5 GENERAL PHUYEGA: No, that's what I want
 6 to correct. I want to answer it.
 7 CHAIRPERSON: Well, something happened.
 8 I mean let's take it slowly. I don't misunderstand you. I
 9 mean the logical thing is, and you agree with this, is the
 10 statement you read contained the original page 7, right?
 11 GENERAL PHUYEGA: Yes.
 12 CHAIRPERSON: The original page 7 isn't
 13 there anymore. Right, so somebody took it away, took it
 14 out.
 15 GENERAL PHUYEGA: I'll explain that.
 16 CHAIRPERSON: You'll explain that.
 17 GENERAL PHUYEGA: Yes.
 18 CHAIRPERSON: I'm sorry to interrupt you,
 19 Mr Burger, but I wanted clarity on this before you proceed.
 20 GENERAL PHUYEGA: What you have as the
 21 statement of the 12th is a draft, and I'm sure the lawyers
 22 will explain that. It's a draft which was presented to me,
 23 which is a draft I had that produced the statement of the
 24 7th, because when I looked at that draft I said this draft,
 25 the way we've typed this, that's not how the issues are. I

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1 corrected it.
 2 CHAIRPERSON: But you're not answering my
 3 question. You tell us you read on the 7th –
 4 GENERAL PHUYEGA: I did.
 5 CHAIRPERSON: - a statement –
 6 GENERAL PHUYEGA: Yes.
 7 CHAIRPERSON: - which was correct, which
 8 contained the original page 7 which was correct.
 9 GENERAL PHUYEGA: Which was not correct.
 10 CHAIRPERSON: No, the original page 7 you
 11 read -
 12 GENERAL PHUYEGA: That's why I'm saying –
 13 CHAIRPERSON: - on the 7th –
 14 GENERAL PHUYEGA: Let me explain it,
 15 Judge. What you are looking at as FFF what? Of the 12th –
 16 CHAIRPERSON: I'm not talking about the
 17 12th, I'm talking about the 7th.
 18 GENERAL PHUYEGA: I want to go there
 19 because you –
 20 CHAIRPERSON: Okay, let me not interrupt
 21 you. You explain it the way you want to.
 22 GENERAL PHUYEGA: Yes. You have two
 23 statements. You have a statement of the 7th, you have a
 24 statement of the 12th. The statement of the 12th is
 25 presented to me to sign a missing page, but the statement

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1 of the 12th is a draft I corrected on the 7th. When the
 2 lawyer printed a statement for me to sign and correct 7,
 3 they give me the original draft that I had corrected and
 4 this is why I then come and say it doesn't reflect the
 5 statement I submitted finally on the 7th because I had
 6 corrected it. So they gave us a draft, not my final
 7 statement, and I thought I was signing my final statement,
 8 and the shift happens because I have corrected the draft.

9 CHAIRPERSON: I'm afraid I don't
 10 understand what you say –

11 GENERAL PHIYEGA: Let me say again –

12 CHAIRPERSON: You say, but no, no –
 13 alright, try again and then Mr Burger can ask you further
 14 questions.

15 GENERAL PHIYEGA: I'll try again –

16 CHAIRPERSON: But presumably I'll get
 17 there eventually, but you must be patient with me.

18 GENERAL PHIYEGA: Maybe let me try again,
 19 because I can also bring my laptop to show you the
 20 migration of this document and your lots of experts can
 21 look at the migration of my statement because that will
 22 then maybe just take out this mendacious sort of sense that
 23 I –

24 CHAIRPERSON: I don't think it will be
 25 necessary to get a laptop expert. You just explain it to

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1 me and let me do my best to understand. I'm sorry,
 2 probably everybody else understands; it's just my slowness
 3 of understand, but if you're patient with me I'll get there
 4 eventually.

5 GENERAL PHIYEGA: I did a statement, and
 6 I can take you through a migration, my pencil notes, my
 7 typed notes, my formatting, my final statement, engaging to
 8 say you forgot to put in that and then we factor in
 9 whatever we factor in, and on the 7th when I sat there and
 10 looked at this draft that was submitted on the 12th
 11 ultimately as the final statement, erroneously, for me to
 12 sign, I corrected this to give you what was on the 7th, and
 13 it's probably during that correction that this problem
 14 happens, but then when I sent in the statement I omit to
 15 sign a page 7. To correct that, I'm given a fresh document
 16 to say sign this document and get it commissioned so that
 17 you have all the pages signed, but I signed draft instead
 18 of the corrected version of that draft. That's what you
 19 are having here.

20 [09:58] CHAIRPERSON: Mr Burger, before you
 21 proceed, Adv Hemraj wants to ask a question.

22 COMMISSIONER HEMRAJ: General, the
 23 statement that's signed at the 12th –

24 GENERAL PHIYEGA: Yes.

25 COMMISSIONER HEMRAJ: - you say that that

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1 is the unsigned statement that was given to you as a draft?
 2 GENERAL PHIYEGA: That was the draft I
 3 corrected on the 7th, yes, and when I corrected the draft on
 4 the 7th, I think that's where all these things shift.

5 COMMISSIONER HEMRAJ: So the statement
 6 that you have that's signed the 12th was the draft that you
 7 originally –

8 GENERAL PHIYEGA: Was the original draft
 9 that I corrected to produce the 7th, that's why on the 14th
 10 we corrected the very draft to take it to the version of
 11 the 7th.

12 COMMISSIONER HEMRAJ: Thank you.

13 CHAIRPERSON: Proceed, Mr Burger. I'm
 14 sorry I interrupted you.

15 MR BURGER SC: General, may we have a
 16 look at FFF3, please? That's your affidavit of the 12th of
 17 March. You told the Commission that you had to initial
 18 somewhere, or you had to sign somewhere where you hadn't
 19 signed or initialled before.

20 GENERAL PHIYEGA: Yes.

21 MR BURGER SC: Where was that?

22 GENERAL PHIYEGA: On the statement of the
 23 12th, remember I'm given a fresh document that represents
 24 what I had signed on the 8th. I signed everything because
 25 the document I had submitted, I was told there is a page

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1 that has been omitted. I signed everything with the
 2 commissioner.

3 MR BURGER SC: You signed it, but you
 4 didn't read it?

5 GENERAL PHIYEGA: Yes, I've said so.

6 MR BURGER SC: And then the commissioner
 7 then asked you whether this "was the truth, and the whole
 8 truth, and nothing but the truth, raise your right hand and
 9 say, 'So help me God,'" you swore to it?

10 GENERAL PHIYEGA: Because truly I
 11 believed it was the statement that I had signed and it is
 12 the truth and it remains the truth.

13 MR BURGER SC: So you swore to the truth
 14 of the statement which you didn't read.

15 GENERAL PHIYEGA: I have said the
 16 statement of the 12th in my mind, in my understanding it was
 17 the statement I submitted. It was printed for me to just
 18 correct an unsigned page.

19 MR BURGER SC: Because in that statement
 20 of course we now find that page 7, the page that we were
 21 looking for in FFF2A. I'll say that again because it's
 22 important for my argument. In the affidavit of the 12th of
 23 March we now find the missing page from FFF2A.

24 GENERAL PHIYEGA: I'm not sure what you
 25 mean by that because all I can tell you is that unless

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1 somebody writes my statement and swears to say it's the
 2 truth, we will talk something else. I say to this
 3 Commission what I've presented to this Commission is my
 4 statement. If you want to put any other thing to me that
 5 is yours, it's a very different story altogether.
 6 MR BURGER SC: I won't put the question
 7 for the third time. I'll argue it off your previous two
 8 answers. Can I ask you to read with me page 7 of FFF3,
 9 please? This is the affidavit you signed on the 12th. As I
 10 understand your evidence of yesterday on whatever version
 11 we accept, this is your draft, whether you changed it later
 12 or not, but this is a first draft which was then typed as
 13 part of your statement. Is that correct?
 14 GENERAL PHIYEGA: I should correct you.
 15 This is probably my fourth or my fifth draft and I can show
 16 you all the drafts if you want to see them.
 17 MR BURGER SC: No, the import of my
 18 question is this is your draftsmanship, not that it's a
 19 first, second, or a third, but this is what you drafted at
 20 some point in time. Do I understand that correctly,
 21 General?
 22 GENERAL PHIYEGA: Yes, I did, and I did
 23 indicate to you that's with a lot of inputs.
 24 MR BURGER SC: Sorry, I didn't hear the
 25 last sentence.

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1 GENERAL PHIYEGA: I said I did say to you
 2 yesterday yes, I drafted my statement and I was helped with
 3 a lot of inputs.
 4 CHAIRPERSON: You again dropped your
 5 voice in the end of that sentence. Would you please repeat
 6 it?
 7 GENERAL PHIYEGA: I said yes, I did, and
 8 I did say yesterday to you I used a lot of inputs from
 9 everybody.
 10 MR BURGER SC: General, but we assume
 11 that you used inputs on facts you do not know. If you have
 12 firsthand knowledge of a fact you won't need an input on
 13 it, correct?
 14 GENERAL PHIYEGA: You are correct.
 15 MR BURGER SC: When you speak to your
 16 Minister, you don't need General Annandale to tell you
 17 you've spoken to your Minister; you will know whether
 18 you've spoken to your Minister or not.
 19 GENERAL PHIYEGA: You are perfectly
 20 correct.
 21 MR BURGER SC: Now let's read paragraph
 22 23 of page 7.
 23 CHAIRPERSON: Page 7 of FFF3?
 24 MR BURGER SC: Of FFF3, Chair. "On the
 25 afternoon of August the 16th, 2012, I received a call from

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1 Lieutenant-General Mbombo who informed me of the decision
 2 to implement stage 3 of the plan, which information I
 3 relayed to the Minister." Is that true?
 4 GENERAL PHIYEGA: It is not true. The
 5 truth is on my statement of the 7th, because I corrected
 6 that. I corrected that draft in my statement of the 7th,
 7 and I corrected it in this Commission.
 8 MR BURGER SC: General, what I don't
 9 understand is how you write a factually wrong draft. You
 10 either spoke to the Minister or you didn't. You took your
 11 pencil and you wrote down "I spoke to the Minister."
 12 You're saying you corrected that. Why did you make the
 13 mistake in the first instance?
 14 GENERAL PHIYEGA: What you did not ask me
 15 is how I even added that sentence, that how that sentence
 16 arrived there, because if I'd migrate you through my
 17 versions, this version came here because I dictated the, I
 18 actually indicated that I want, I have omitted to put in my
 19 engagement with the Minister in the statement. I asked
 20 them to put that in the statement. I, it came to me; I
 21 said that is not represented the way it should be. I
 22 corrected it on the 7th to say my engagement with the
 23 Minister is like this, and it wasn't carried in the version
 24 of the 12th because they brought the original draft. I
 25 corrected it again in this Commission and it is the truth

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1 as I placed it on the 7th. There is no other truth that I
 2 can give you other than what I corrected in this version
 3 and the truth that is sitting on my statement of the 7th.
 4 MR BURGER SC: General, one of my
 5 functions in this Commission is to test the truth.
 6 GENERAL PHIYEGA: You can do that.
 7 MR BURGER SC: Let me repeat my question.
 8 What I don't understand is how you got this draft wrong
 9 where you had drafted that you conveyed information to your
 10 Minister if you didn't convey the information to your
 11 Minister.
 12 GENERAL PHIYEGA: Advocate, I have
 13 communicated in my statement of the 7th, I have communicated
 14 in my correction of the statement in this Commission how I
 15 communicated to the Minister. I cannot change it. That is
 16 how I have done it.
 17 CHAIRPERSON: I'm sorry to intervene
 18 again, but I still don't understand something else that I'd
 19 like to ask you about. You talked about looking at your
 20 computer. Was this, the original draft of this statement
 21 on your computer?
 22 GENERAL PHIYEGA: My original draft to
 23 the statement is there - of the statement is there. This
 24 was a further version where I requested them to put in my
 25 communication with the Minister, and when they put it in,

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1 they didn't put it in the way it was supposed to be. I
 2 corrected it on the 7th.
 3 CHAIRPERSON: Yes, yes, yes, I understand
 4 that, but you haven't answered my question. The question
 5 is, was the draft on your computer or on your secretary's
 6 computer or someone else's computer?
 7 GENERAL PHIYEGA: The draft on my
 8 computer is there. This is a secondary –
 9 CHAIRPERSON: Okay, the draft on your
 10 computer. Does that mean you typed it yourself on your
 11 computer?
 12 GENERAL PHIYEGA: It was typed for me
 13 because I requested that they factor in that, and when it
 14 was brought to me I then changed it to say that's not how
 15 it should be.
 16 CHAIRPERSON: No, no, no, you're going
 17 too fast for me. Was the original draft on your computer,
 18 typed by you on your computer –
 19 GENERAL PHIYEGA: Yes.
 20 CHAIRPERSON: - or typed by somebody else
 21 on your computer?
 22 GENERAL PHIYEGA: The original draft,
 23 typed by me, is on my computer.
 24 CHAIRPERSON: On your computer, alright.
 25 GENERAL PHIYEGA: Which I can –

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1 CHAIRPERSON: Alright.
 2 GENERAL PHIYEGA: Then I request that
 3 they factor in – I forward it and then I request that they
 4 factor in this communication.
 5 CHAIRPERSON: I see.
 6 GENERAL PHIYEGA: When it comes to me I
 7 say this is not how it is. How it is, it is in this
 8 manner. I correct the version of the 7th to say correct
 9 that because this is what I factored in.
 10 CHAIRPERSON: Alright, so you typed it on
 11 your computer.
 12 GENERAL PHIYEGA: Yes.
 13 CHAIRPERSON: You forwarded it to your
 14 secretary or somebody.
 15 GENERAL PHIYEGA: Exactly.
 16 CHAIRPERSON: Right, they then did
 17 something, brought it back to you now in hardcopy form?
 18 GENERAL PHIYEGA: Yes, because remember,
 19 the first one that I've, I relayed the softcopy that I sent
 20 to them, did not factor in the communication –
 21 CHAIRPERSON: Yes, yes, yes, I've got
 22 that.
 23 GENERAL PHIYEGA: That's why.
 24 CHAIRPERSON: You typed a draft.
 25 GENERAL PHIYEGA: Yes.

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1 CHAIRPERSON: Didn't deal with your
 2 communication with the Minister.
 3 GENERAL PHIYEGA: Yes.
 4 CHAIRPERSON: You forwarded it to your
 5 secretary -
 6 GENERAL PHIYEGA: Yes.
 7 CHAIRPERSON: - to deal with.
 8 GENERAL PHIYEGA: Yes.
 9 CHAIRPERSON: Produce a hardcopy amongst
 10 other things.
 11 GENERAL PHIYEGA: Yes.
 12 CHAIRPERSON: That is done. It was
 13 brought back to you. You then realised that the
 14 communication with the Minister wasn't dealt with. Is that
 15 right?
 16 GENERAL PHIYEGA: No, before it's even
 17 the hardcopy comes to me –
 18 CHAIRPERSON: Yes.
 19 GENERAL PHIYEGA: - I asked them to
 20 factor in on that paragraph my communication with the
 21 Minister.
 22 CHAIRPERSON: So after you'd forwarded
 23 your original draft, you then said to your secretary that
 24 by the way –
 25 GENERAL PHIYEGA: Please draft it –

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1 CHAIRPERSON: - do me a favour, please
 2 add –
 3 GENERAL PHIYEGA: Yes.
 4 CHAIRPERSON: - my communication with the
 5 Minister.
 6 GENERAL PHIYEGA: Yes.
 7 CHAIRPERSON: I take it you didn't
 8 actually dictate that paragraph or that sentence, or
 9 whatever it was; you assumed your secretary would get it
 10 right. Your secretary then produced something –
 11 GENERAL PHIYEGA: Yes?
 12 CHAIRPERSON: Did you get that back as a
 13 hardcopy or was it forwarded back to you?
 14 GENERAL PHIYEGA: I got it as a hardcopy.
 15 I corrected it; it went back.
 16 CHAIRPERSON: Okay, so you got a
 17 hardcopy.
 18 GENERAL PHIYEGA: Yes.
 19 CHAIRPERSON: And you in pen or pencil,
 20 or whatever, you corrected it.
 21 GENERAL PHIYEGA: Yes.
 22 CHAIRPERSON: And you then gave the
 23 hardcopy to your secretary and said fix it up, or words to
 24 that effect.
 25 GENERAL PHIYEGA: And it was fixed, it

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1 produced the copy of the 7th, and the copy of the 7th then
 2 had a page that was omitted, both of them, the commissioned
 3 and the non-commissioned, and then it comes back for me to
 4 sign, but the copy that is given to me is the draft that I
 5 had corrected and the draft is not corrected, and that's
 6 what I thought I had read and I understood to have been
 7 corrected.

8 MR BURGER SC: General, page 7 of FFF3
 9 has a paragraph 24. Can I read with you the last sentence
 10 of that paragraph?

11 GENERAL PHIYEGA: Yes.

12 MR BURGER SC: This is now after the
 13 tragedy. You receive the news that 34 people had been
 14 killed by the SAPS. You say, "I then related the same
 15 information to the Minister of Police telephonically, who
 16 advised me to attend to the matter personally so that I can
 17 have a first account of the incident." Is that correct?

18 GENERAL PHIYEGA: I have corrected that.

19 MR BURGER SC: That is not my question.
 20 I'm asking you –

21 GENERAL PHIYEGA: It is not correct.

22 MR BURGER SC: - is that a correct
 23 version?

24 GENERAL PHIYEGA: It is not.

25 MR BURGER SC: How did that mistake come

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1 about?

2 GENERAL PHIYEGA: I've explained it to
 3 the Judge.

4 MR BURGER SC: You don't want to add
 5 anything to that explanation?

6 GENERAL PHIYEGA: I just corrected it and
 7 put what the right information is, and you have the right
 8 information.

9 MR BURGER SC: General, did you speak to
 10 the Minister when you got the news of the 34 deaths?

11 GENERAL PHIYEGA: I did.

12 MR BURGER SC: What was the gist of that
 13 discussion? What did you say to the Minister, and what was
 14 his reaction?

15 GENERAL PHIYEGA: I gave the Minister the
 16 information and I assured him that I'm personally attending
 17 to the matter with the –

18 MR BURGER SC: Sorry, I can't hear you.
 19 And?

20 GENERAL PHIYEGA: I gave the Minister the
 21 information of what has happened here, and I indicated to
 22 him that myself and the team are attending to the issues
 23 and we will keep him posted and updating with progress,
 24 which we did with the internal briefing that we did and we
 25 continued to give him updates in terms of what was

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1 happening.

2 MR BURGER SC: Now the Minister hears of
 3 the major tragedy in democratic South Africa, 34 people
 4 killed. What's his reaction?

5 GENERAL PHIYEGA: Remember I'm talking to
 6 him over the phone, and like every other person he would
 7 have been shocked.

8 MR BURGER SC: No, I don't ask you what
 9 he would have been. I'm asking you what is his reaction on
 10 the phone as you speak to him. What does he say?

11 GENERAL PHIYEGA: I have already
 12 indicated in my statement that one of the things he wanted
 13 to understand is what we are doing, and I assured him that
 14 I'm personally with the team giving full attention to the
 15 matter and we will continue keeping him posted.

16 MR BURGER SC: Is his request as to what
 17 is being done operationally or on a public relations level,
 18 or what is the extent of that enquiry by the Minister, what
 19 are you doing?

20 GENERAL PHIYEGA: Because he's not
 21 operational he probably would be understanding precisely
 22 what we need to do. He would be knowing that we would
 23 report the matter to IPID. He would be knowing that we
 24 would ensure that all other processes that we normally do
 25 under normal circumstances, under any other conditions. He

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1 doesn't come and tell us what to do. Operationally we know
 2 what to do, and we did exactly that.

3 MR BURGER SC: General, bear with me. I
 4 didn't ask you what the Minister would not have said. I
 5 didn't ask you to hypothesise on what he might have said.
 6 My question is a simple one. What did he ask? If he asked
 7 you what are you doing, did he ask it in an operational
 8 context or on a PRO context, or what did he ask you?

9 GENERAL PHIYEGA: Maybe let me understand
 10 what you mean when you say he, did he ask it on a PR
 11 context, what is that?

12 MR BURGER SC: No, let me ask the
 13 question. What I want to know is what did he ask you? Try
 14 to remember the gist of the request.

15 [10:18] GENERAL PHIYEGA: I have indicated very
 16 clearly what I told the minister to say in Marikana a
 17 tragic thing has happened, 34 miners are killed today and
 18 we are doing everything that we're supposed to be doing, we
 19 are attending to that and I am giving it my personal
 20 attention.

21 MR BURGER SC: And he didn't ask
 22 particulars as to what was being done?

23 GENERAL PHIYEGA: I've already said to
 24 you that those questions I would have answered to say we're
 25 reporting the matter to IPID, all the things that are

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1 operational that are happening there, we handled. The
 2 minister has long said, we will do it. He does not access
 3 those operational type of issues, but he would make sure
 4 that he takes the message, relays it to Cabinet and to
 5 whoever he has to, because that is his duty. I don't pick
 6 up the phone to phone Cabinet, to phone the president, that
 7 what he do with the facts that we've given him. He then
 8 will do all the other things that he's supposed to be
 9 doing, and we would keep him posted and abreast in terms of
 10 what is happening. And maybe if I may just add is, through
 11 that information, I believe this is why there were inter-
 12 ministerial committees, it's not us who do those things.
 13 He must take the information and process it up in terms of
 14 his political and government roles.

15 MR BURGER SC: I understand the question,
 16 and may the Commission then understand it thus, that during
 17 that telephone discussion, the minister was satisfied that
 18 you will attend to the matter henceforth and that he did
 19 not give you any operational instructions at any time?

20 GENERAL PHIYEGA: As it usually happens,
 21 yes, because the minister does not give us operational
 22 instructions.

23 MR BURGER SC: And this case was no
 24 exception to the rule?

25 GENERAL PHIYEGA: You are correct.

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1 MR BURGER SC: And your statement on page
 2 7 on your today's version is then wrong, because the
 3 minister did not advise you to attend to the matter
 4 personally, you told him that you would be attending to the
 5 matter personally?

6 GENERAL PHIYEGA: What do you mean when
 7 you say it is wrong, because I did say I will attend to the
 8 matter personally? Because I do say the minister didn't
 9 instruct me attend the matter personally.

10 MR BURGER SC: No, you don't understand
 11 my question, let me repeat it. You've said the last
 12 sentence of FFF3 on page 7, paragraph 24 is wrong, and what
 13 I suggest to you is it is wrong to the extent that on this
 14 version of yours, you've said that it was the Minister of
 15 Police who advised you to attend to the matter. It
 16 happened differently. You advised him that you were
 17 attending to the matter personally, that's all I'm putting
 18 to you.

19 GENERAL PHIYEGA: Maybe language is
 20 difficult thing. Maybe I should put in Sepedi, so that -

21 MR BURGER SC: - speak through the
 22 interpreter.

23 GENERAL PHIYEGA: Yes, because then he
 24 can translate. What I said here is the following, the
 25 minister does not give us operational - does not instruct

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1 us operationally. I told the minister what had happened at
 2 Marikana. I explained everything. I also assured him that
 3 as the head of the police I will do everything that I am
 4 supposed to do, and the team that works together with me.
 5 And the minister does not give us instructions. He does
 6 not tell us go about picking up papers there - his duty as
 7 minister is to transmit what we have told him upwards to
 8 the government. There's not more than that what I can say.
 9 If you want to turn what I've said, then I'm out of it.

10 MR BURGER SC: Nee, ek verstaan dit
 11 duidelik. Ek dink ons moet in ons eerste taal praat.
 12 General, can I ask you to explain to me a passage in your
 13 evidence-in-chief please? If I may ask to look at page
 14 6791 of the record? If that can perhaps be put on the
 15 screen in front of her? My leaned friend, Mr Semanya, is
 16 busy leading your evidence before the Commission and you
 17 discuss these statements of yours and I suspect you discuss
 18 FFF3 at the time. It really starts at 6790 and it goes
 19 over to 6791.

20 CHAIRPERSON: Is it possible to have it
 21 put on the screen?

22 GENERAL PILLAY: Chair, not on the screen
 23 at the moment, but we can put it before the witness.

24 CHAIRPERSON: I understand you take the
 25 witness, but I think Mr Burger asked whether it can be put

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1 on the screen. If the answer to that is no, then it's no.

2 MR BURGER SC: Chair, I think it's
 3 probably satisfactory if the witness and I have that and if
 4 you have perhaps access to it. General, at the foot of
 5 page 6790, it's the strange pages, left-hand foot of the
 6 page and I pick it up from line 23. Mr Semanya says, "Can
 7 we now come and talk about the statement you made in
 8 relation to these proceedings, Commissioner? You made two
 9 statements which were signed and commissioned, am I right?
 10 The one dated 7 March and the other the 12 of March." You
 11 say, "That is correct." Mr Semanya says, "The second
 12 statement sought to correct typographical problems that
 13 were in the statement of the 7th of March, am I right?" You
 14 confirm that, and then Mr Semanya says, "In particular if
 15 we look at the last document, and I draw your attention to
 16 paragraph 23, where the document reads, and he now reads
 17 from, I think it's FFF3, Commissioner. "On the afternoon
 18 of August, the 16th, 2012, I received a call from
 19 Lieutenant-General Mbombo, who informed me of a decision to
 20 implement," then it goes, "stage 3 of the plan which
 21 information I relayed to the minister. Do you see that
 22 paragraph," and you say, "I see it." He says is that a
 23 correct statement appearing there, General, and you say it
 24 is not my - it's the correct statement, because my
 25 original statement doesn't read like that. But as I

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1 understand your evidence today that's a wrong statement.
 2 You did not relay that information to the minister?
 3 GENERAL PHUYEGA: I am totally lost. I
 4 will - correcting exactly that, to take the statement of
 5 the 7th, to correct this draft that was carrying that.
 6 MR BURGER SC: No, I'm also lost, so
 7 let's both stay lost on that one then, General. Then
 8 follows what I will term the fourth version, and this is,
 9 Chair, I think it was handed up as FFF4 or FFF3A, I'm not
 10 sure, but this is a replacement page 7 now, and this is
 11 what I've called the misfit which is now reintroduced in
 12 the evidence-in-chief.
 13 GENERAL PILLAY: Chair, it's FFF3A.
 14 GENERAL PHUYEGA: Do you have it?
 15 MR BURGER SC: What now happens, General,
 16 as I understand the evidence is that FFF3A, if you could
 17 perhaps just have a look at that. We've now asked to
 18 insert back into FFF3, but of course now we create a misfit
 19 again, but that's the version.
 20 GENERAL PHUYEGA: I'm so lost.
 21 MR BURGER SC: Do you confirm that?
 22 GENERAL PHUYEGA: Yes.
 23 MR BURGER SC: The final version you rely
 24 on has got a page 6 which does not follow onto page 7, and
 25 a page 7, which does not follow onto page 8, in the correct

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1 FFF3.
 2 GENERAL PHUYEGA: Yes.
 3 MR BURGER SC: Can I just then put a
 4 final question to you to get clarity on something? And
 5 it's on your role as Commander in Chief of the SAPS. Do I
 6 understand your evidence correctly that should the
 7 Commission conclude at the end of the inquiry that the SAPS
 8 had used excessive force even in self-defence at scene 2,
 9 that you, as Commander in Chief, would accept overall
 10 responsibility for that?
 11 CHAIRPERSON: Mr Semenya, do you wish to
 12 say something?
 13 MR SEMENYA SC: Yes, Chair. In our
 14 understanding there cannot be a finding that we acted in
 15 self-defence by using excessive force.
 16 CHAIRPERSON: I think the question must
 17 be reformulated. You can talk about exceeding the bounds
 18 of self-defence or exceeding the bounds of private defence,
 19 but that terminology be more accurate.
 20 MR BURGER SC: I'll try and do that.
 21 Exceeding the boundaries of self-defence, I'm told by my
 22 colleagues who do criminal law. If that finding is brought
 23 up. My question is really one on responsibility, and I'm
 24 interested in that as a citizen of the land. Will you, as
 25 Commander in Chief, accept responsibility in that event?

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1 GENERAL PHUYEGA: There are two aspects
 2 of the question you are asking me. The first you were
 3 asking about my responsibility as the Commander in Chief of
 4 the Police, appointed by the president. And in that you
 5 are talking about my overall responsibility for the
 6 service. The overall responsibility for the Service is
 7 given to me by the constitution and the Police Act, and in
 8 that I'm on record saying to this Commission saying, yes, I
 9 am the person who is finally appointed to manage and
 10 control the Service.
 11 The second part of your question, you are asking
 12 about the possible outcome and the judgment that will
 13 happen.
 14 MR BURGER SC: I say assume that to
 15 happen, I'm not asking you for anything on that.
 16 GENERAL PHUYEGA: And because it is an
 17 assumption, I wouldn't want to myself to that assumption.
 18 MR BURGER SC: That answer I don't
 19 understand. Why aren't you willing to assume that this
 20 commission may come to a conclusion adverse to the SAPS?
 21 GENERAL PHUYEGA: I haven't said - I do
 22 not think of the Commission not finding against us or for
 23 us, I'm not addressing that. I'm saying I'm the person who
 24 is in charge of the Service. At this point in time, the
 25 outcome, I don't want to address myself to.

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1 MR BURGER SC: So you're not willing to
 2 accept that this Commission can make an adverse finding to
 3 the South African Police Service?
 4 CHAIRPERSON: I think she said the
 5 opposite. I think she said it's a possibility, but she's
 6 not - can only comment on the consequences. Am I
 7 understanding you correctly?
 8 GENERAL PHUYEGA: I understand what he is
 9 saying, he is saying to me assuming that this Commission
 10 finds his way, I do not say I will not accept what the
 11 Commission finds. What the Commission finds, I can't
 12 change. What the Commission finds, I will deal with it
 13 when we get there, that's what I'm saying, because at this
 14 point in time, I know will find. Whether they find for us
 15 or not for us, it's an issue that we will deal with, but
 16 may I be allowed, at this point in time, not to deal with
 17 that.
 18 CHAIRPERSON: I'm not sure if I
 19 understand what you say, but let me put it the way it seems
 20 to me what you may be saying. There are possibilities.
 21 One possibility is that the Commission will not make any
 22 findings adverse the Police. Another possibility is that
 23 the Commission may find - make findings adverse to the
 24 Police, not necessarily on the whole operation, but on
 25 parts of it. The third possibility, there may even more

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1 unfavourable findings than that, but if we make findings
 2 unfavourable to the police, of course they won't be
 3 binding, they will simply be the findings we make. We
 4 know, already, that summons have been issued by some of the
 5 – think the widows and dependants of those who died have
 6 issued summons, and I think some of the people injured, or
 7 possibly all the people injured, can have issued summons as
 8 well, and these will be matters that the Police Service
 9 will have to deal with, either fight the claims or settle
 10 in some way. Now, I think what you're saying, but if I'm
 11 wrong, please correct me, I think what you're saying is
 12 if the Commission decides against us, we will then have to
 13 decide whether we accept what the Commission says and pay
 14 the people in respect of whom adverse findings have been
 15 made against SAPS. Or you may say, well, with great
 16 respect to the Commission, we don't agree with them and
 17 we're going to contest the actions. Is that what you're
 18 saying? But you don't want to make that decision yet, you
 19 want to see what our report says, because if our report
 20 persuades you that it is correct, you'll act one way, and
 21 if you think our report is wrong, you will then have to
 22 say, well, with great respect to the Commission, they have
 23 got it wrong, we're going to go on contesting, is that what
 24 you're saying?
 25 GENERAL PHIYEGA: I think it's actually

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1 the truth, Judge, the way you are putting it, but all I
 2 was saying that at this point in time, when those things
 3 happened, we will respond appropriately the way you are
 4 saying, but I don't want to respond to it now.
 5 CHAIRPERSON: Yes, your point is you
 6 haven't made that decision yet, you'll only make the
 7 decision once the report comes out, is that fair?
 8 GENERAL PHIYEGA: Absolutely.
 9 [10:38] MR BURGER SC: Thank you General, thank
 10 you, Chair.
 11 CHAIRPERSON: Thank you, Mr Burger. Mr
 12 Malindi, are you in a position now to continue the cross-
 13 examination that stood over yesterday?
 14 MR MALINDI SC: Commissioner, could you
 15 please have regard to Exhibit WWW2? That is the statement
 16 of Gary White. Commissioner, National Commissioner,
 17 yesterday you indicated that you had not read this
 18 statement, is that correct?
 19 GENERAL PHIYEGA: Yes that is true.
 20 MR MALINDI SC: So when you provided your
 21 statement in the various versions that have been dealt with
 22 this morning FFF2 or FFF3 you had not considered what were
 23 the criticisms against your plan.
 24 GENERAL PHIYEGA: I've never read the
 25 statement other than yesterday.

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1 MR MALINDI SC: And I understood you to
 2 say to Mr Bizos that you had not read his expert witness's
 3 statement either by the time you came to testify.
 4 GENERAL PHIYEGA: Which is which one by
 5 the way?
 6 MR MALINDI SC: Mr Hendrickx.
 7 GENERAL PHIYEGA: No.
 8 MR MALINDI SC: And can I take it that
 9 you had not read the statement of Professor Heinz as well.
 10 GENERAL PHIYEGA: You are correct.
 11 MR MALINDI SC: Which I directed to you
 12 yesterday.
 13 GENERAL PHIYEGA: No.
 14 MR MALINDI SC: Okay could you please
 15 turn to page 18 of Mr White's statement? Having had the
 16 opportunity to read the statement I hope we can go quickly
 17 through the point that I said I want to highlight and get
 18 your reaction. Starting with 4.2.1 I indicated to you that
 19 he criticises you the SAPS for lack of accountability
 20 because he says you don't accept that it was the deaths and
 21 the injuries that occurred where a consequence of failure
 22 of your public policing, public order policing and crowd
 23 management strategies and tactics and you asked me why I
 24 say that. My answer is that after this, the aftermath of
 25 such a failure there's no acceptance of responsibility that

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1 appears at 4.2.2, the identification of errors of strategy
 2 and tactics and lessons learnt. Instead the SAPS' evidence
 3 to the Commission is lacking in detail and is almost
 4 entirely defensive. Do you agree with that criticism?
 5 GENERAL PHIYEGA: No I don't. That is
 6 his standpoint, we have a different standpoint and we've
 7 submitted all the documents that were required from us and
 8 we continue to be co-operative.
 9 MR MALINDI SC: On the next page, page 19
 10 at 4.2.5 the middle of the paragraph more or less, the line
 11 that starts Potchefstroom, Potchefstroom did not seek to
 12 identify - can you see that?
 13 GENERAL PHIYEGA: Yes.
 14 MR MALINDI SC: It says that however, by
 15 holding a nine day meeting at Potchefstroom which did not
 16 seek to identify errors or lessons learnt but simply sought
 17 to ensure that the police presented a consistent case at
 18 the Commissions, the SAPS can quite rightly be criticised
 19 for possible collusion and we have your answer to that, you
 20 don't agree.
 21 GENERAL PHIYEGA: Yes I don't agree. It
 22 is his criticism and he is granted that but we didn't go to
 23 Potchefstroom to collude. I've already explained that and
 24 he's correct in his last sentence, in his first, last you
 25 know that opening statement sentence in page 19 where I

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1 understand it was entered producing the presentation which
 2 is now exhibit L.
 3 MR MALINDI SC: At paragraph 4.2.8 still
 4 criticisms on lack of accountability, he criticises you for
 5 stating that the shots fired on 16 August were either
 6 warning shots or fired in self defence and the criticism
 7 essentially is that this defence was put forward without
 8 having considered each and every statement of the people
 9 who were involved there to know that each and every one of
 10 them want to put forward that kind of defence. Is that a
 11 fair criticism?
 12 GENERAL PHIYEGA: I think it's important
 13 to also say that with the commanders coming to present here
 14 I'm sure they would be able to answer a number of those
 15 things but also I know that a lot of statements are
 16 submitted by members to this Commission and the statements
 17 were not even taken by us, they were taken by IPID trying
 18 to give an account of what shots they have done and there
 19 were tests to the guns, so I take it that a lot of that
 20 information has been given for consideration and to back up
 21 the information that we've given to this Commission.
 22 CHAIRPERSON: Were you moving onto
 23 another point? Are you moving onto another point because
 24 I'd like to ask a question about the previous passage you
 25 put to the witness.

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1 MR MALINDI SC: We'll move to another
 2 point, Chairperson.
 3 CHAIRPERSON: Oh okay I'd like to ask a
 4 question about a previous passage put. Mr Malindi referred
 5 you earlier to what appears on page 19 in paragraph 4.2.5.
 6 You will see that further on in that paragraph, well after
 7 the passage he put to you, Mr White says, "I understand
 8 that Lieutenant-Colonel Scott led the Potchefstroom event,"
 9 and that was the evidence of Brigadier Mkhwanazi that he
 10 relies on. If that's the case then that's a further point
 11 of criticism. The plan for 16 August 2012 is Lieutenant-
 12 Colonel Scott's plan. Asking him to produce the
 13 presentation for the Commission was an error of judgement
 14 given that he'd planned the operation of 16 August. It's
 15 unsurprising in those circumstances, I suppose it is
 16 unsurprising in those circumstances if the presentation
 17 cast the plan in a positive light. Now what I want to ask
 18 you is did you know that Lieutenant-Colonel Scott led the
 19 Potchefstroom discussions?
 20 GENERAL PHIYEGA: Judge, that is
 21 factually incorrect. The factual correctness of this
 22 matter was that gathering was chaired by General Mbombo,
 23 Van Graan facilitated, Scott has always been our collator
 24 of information so that -
 25 CHAIRPERSON: What you're saying is the

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1 criticism is incorrect based on a faulty premise. Thank
 2 you.
 3 MR MALINDI SC: Do you agree that Scott
 4 presented that plan to these proceedings?
 5 MR SEMENYA SC: I don't understand that
 6 question, Lieutenant-Colonel Scott had not come before the
 7 Commission as yet.
 8 CHAIRPERSON: I must confess, Mr Malindi
 9 I also thought when I heard you put the question that you
 10 didn't quite mean what you said so perhaps you could
 11 rephrase the question. Lieutenant-Colonel Scott hasn't
 12 testified yet, he was one of the two officers of the police
 13 who made the presentation to the Commission but I'm not
 14 sure that you meant that either. So rephrase the question
 15 and then we can see whether Mr Semanya has any point,
 16 substance in his objection.
 17 MR MALINDI SC: I will drop that question
 18 for now, Chairperson. On page 21 the point 11 he says that
 19 fourthly a number of the statements of the high ranking
 20 officers who were involved in the operations of 9 to 16
 21 August reveal a distinct unwillingness to engage with the
 22 tragic consequences of the police action and the failure to
 23 acknowledge errors or accept responsibility for the deaths
 24 which occurred. The criticism is that in the absence of
 25 the police having conducted a debriefing session as we

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1 discussed in terms of the Standing Orders and the
 2 Potchefstroom session having been used, as you are
 3 suggesting, to achieve that result of the evaluation of the
 4 operation. None of the police officers named in this
 5 paragraph make any criticism of the police action at all.
 6 Everything seemed to have gone to plan, according to plan.
 7 Do you agree with that criticism?
 8 GENERAL PHIYEGA: Again I would say it is
 9 his criticism and observation but those police that are
 10 there fortunately will be here to answer that question.
 11 They are coming to this Commission to answer, I should not
 12 answer for them.
 13 CHAIRPERSON: Furthermore, Mr Malindi,
 14 your criticism, your question rather appears to be too
 15 broadly phrased because as appears from footnote 22 on the
 16 page to which you referred Major-General Mpembe does appear
 17 to criticise one aspect of the operation, namely the
 18 decision to proceed to koppies 2 and 3 after scene 1. So
 19 you said none of them criticised it. That's not correct,
 20 none of the others do but Major-General Mpembe appears to
 21 do so. So the question was too broadly phrased but in any
 22 event as the witness has said those questions can more
 23 appropriately be put to the police generals concerned who
 24 will have to explain what they said in the light of this
 25 criticism.

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1 MR MALINDI SC: Absolutely, Chairperson.
 2 National Commissioner, you can regard that question with
 3 the quantification that General Mpembe has made this
 4 observation and criticism under footnote 22.
 5 GENERAL PHIYEGA: I'm sure General Mpembe
 6 will talk to that criticism because I think he does have a
 7 view on the matter and he will talk to it. He is
 8 testifying here.
 9 MR MALINDI SC: My next question was
 10 going to be, as a National Commissioner are you not
 11 critical of the police producing Exhibit L and statements
 12 which only seek to reflect positively on the SAPS when
 13 their duty in terms of the Standing Order is to provide an
 14 all-embracing debriefing which contains criticisms and
 15 positive for purposes of future learning and training?
 16 GENERAL PHIYEGA: I think it is important
 17 to say we seem to be talking in forked tongues. Just a few
 18 minutes ago you were alerting me to a footnote which is 22
 19 and if I look at the presentation that we've given, it's
 20 not a presentation that actually says you know there is
 21 nothing wrong, there is something wrong or there is nothing
 22 wrong and we didn't see anything.
 23 [10:58] We've made our inputs into this Commission and
 24 I've said two, three days ago, that we certainly will learn
 25 a lot from these processes and the inputs of everybody, the

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1 experts, yourselves, ourselves, the people that came to
 2 talk here, and at this point in time I as the National
 3 Commissioner, I do believe that a lot of learnings are
 4 going to come out of here from ourselves, from others, in
 5 other ways, and I'm hoping that the report of this
 6 Commission will assist us to do so. To come with a
 7 statement that says we are not willing, we are intransigent
 8 and the mendacious statements that I'm starting to pick up
 9 here, is not correct. We are hoping that this Commission
 10 would assist us to do certain things very differently.
 11 CHAIRPERSON: Mr Malindi, if you're going
 12 to move on to another point it may be convenient to take
 13 the tea adjournment at this stage, but if you want to round
 14 this point off first, please do so.
 15 MR MALINDI SC: May I round this point
 16 off first, Chair?
 17 CHAIRPERSON: Yes.
 18 MR MALINDI SC: National Commissioner,
 19 just to round off this point, General Mpembe says in his
 20 statement – I will read paragraph 56, which is short. "I
 21 wish to state that if I had been told immediately after
 22 scene 1, but before scene 2, that people had been killed, I
 23 would have directed that police members do a show of force
 24 and contain the situation while attending to the scene
 25 around the kraal. Effectively I would have directed that

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1 we do the same thing that I had done on Monday, 13 August
 2 2012." Now on 13 August 2012, General Mpembe, when the
 3 protesters marched past him and his men, 70 men, he
 4 escorted them to the koppie where they wanted to go. Your
 5 expert Mr De Rover, and our expert Mr White, say after the
 6 incident of scene 1 there should have been a command to
 7 halt the pursuit to scene 2, gather, and reassess. What I
 8 want to put to you is that General Mpembe agrees with these
 9 experts that your plan was not as good as you have
 10 testified previously.
 11 CHAIRPERSON: No, no, no –
 12 GENERAL PHIYEGA: No -
 13 CHAIRPERSON: I don't think that's a fair
 14 question because the plan as we have it didn't involve
 15 following people who fled from scene 1 to scene 2 and
 16 taking action at scene 2. That wasn't part of the plan.
 17 That was something which arose in the head of the moment,
 18 as it were. The witness may well describe it as something
 19 that followed from what she calls the disruption, but I
 20 don't think it's part of the plan. So I don't know that
 21 that question can appropriately be put. Perhaps you'd like
 22 to think about the question while we have a cup of tea.
 23 MR MALINDI SC: We'll do it after tea,
 24 Chair.
 25 CHAIRPERSON: Right, we'll take the tea

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1 adjournment.
 2 [COMMISSION ADJOURNS COMMISSION RESUMES]
 3 [11:34] CHAIRPERSON: The Commission resumes.
 4 National Commissioner, you're still under oath.
 5 MANGWASHI VICTORIA PHIYEGA: s.u.o.
 6 CHAIRPERSON: Mr Malindi, have you
 7 reformulated the question in a way that meets the point
 8 raised?
 9 CROSS-EXAMINATION BY MR MALINDI SC (CONTD.):
 10 I have, Chairperson, and thank you for giving me the
 11 opportunity. Commissioner, I conflated two things and I
 12 wish to separate them. I conflated the plan and what I
 13 would call a wise decision that an operational commander
 14 would have taken in the circumstances of what happened
 15 between scene 1 and scene 2. Can you see the
 16 differentiation that I'm making?
 17 GENERAL PHIYEGA: I hear about the plan.
 18 The wise decision is a big word, but we'll come – I'll
 19 listen to what you're saying and see whether I understand
 20 what you're saying.
 21 CHAIRPERSON: What counsel is suggesting
 22 is that after scene 1 it would have been a wise decision
 23 not to proceed immediately to koppies 2 and 3, in other
 24 words to scene 2. Rather there should have been a
 25 cessation of activity, a reassessment of the situation

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1 before any further action is taken. I think that's what
 2 you're putting.
 3 MR MALINDI SC: That is so, Chairperson.
 4 CHAIRPERSON: That would have been a wise
 5 decision and that seems to be what Mr De Rover says should
 6 have happened, and appears also to be the view of Major-
 7 General Mpembe. That's what he calls the, what would have
 8 been a wise decision, not that a wise decision was made but
 9 if that decision had been made it would have been a wise
 10 decision. I think that's your question, is it?
 11 MR MALINDI SC: That's my question,
 12 Chairperson.
 13 CHAIRPERSON: Okay. So I hope you
 14 understand then. Now let's get counsel to rephrase, to re-
 15 put the question so you can follow it exactly.
 16 MR MALINDI SC: Thank you, Chairperson.
 17 National Commissioner, Mr De Rover at paragraph 81 of his
 18 statement talked of a halting of the operation and
 19 reassessment. Do you remember that paragraph 81, as my
 20 learned friend Mr Madlanga dealt with it with you at
 21 length?
 22 GENERAL PHIYEGA: I'll just quickly go
 23 through it again. Okay, I'm there.
 24 MR MALINDI SC: Could you just read the
 25 paragraph to yourself?

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1 MR MAHLANGU: Page number?
 2 MR MALINDI SC: 19.
 3 GENERAL PHIYEGA: Paragraph 81?
 4 MR MALINDI SC: Paragraph 81.
 5 GENERAL PHIYEGA: Yes. "At the time of
 6 scene 1 and immediately thereafter the problems with the
 7 analogue radio network conspired to prevent the overall
 8 commander to stay abreast of developments and to call a
 9 halt to police operations in a bid to regroup and reassess.
 10 It virtually goes without saying that SAPS doctrine and
 11 experience in crowd management dictates such a decision."
 12 MR MALINDI SC: And I'm going to read
 13 what Mr White says on page 47 of his statement, WW2. That
 14 is page 47, paragraph 4.8.6. I will read the whole
 15 paragraph. "First the decision to proceed with stage 3 of
 16 Lieutenant-Colonel Scott's plan after the shooting, death
 17 of 16 people was incomprehensible and negligent. There
 18 should have been a contingency plan to deal with the
 19 situation where the plan had gone wrong and people had been
 20 killed, but no such contingency appears to have existed."
 21 Now I'll read what I referred to as the wise decision that
 22 should have been taken. He says, "Nonetheless, senior
 23 officers on the ground should have reacted to the
 24 circumstances as they occurred. With 16 protesters dead
 25 and others perceived to be a threat dispersed to the open

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1 land to the west, the operation should have been
 2 immediately paused. There should have been a regrouping of
 3 the SAPS units and a process of rethinking and replanning."
 4 Now I'm suggesting to you that those two experts are in
 5 agreement with what General Mpembe says at paragraph 56 of
 6 his statement, which I read to you before tea. Now as
 7 National Commissioner coming before this Commission to talk
 8 about the good and the bad, the pros and cons of the
 9 operation, why did you not suggest to the Commission that
 10 there are points of criticism that you embrace that have
 11 come out either out of a debriefing session, or out of the
 12 Potchefstroom conference?
 13 GENERAL PHIYEGA: Let me start with your
 14 4.8.6 where you ended. I have said a lot of circumstances
 15 have informed what happened on that day, and on 4.8.6, if
 16 you read that paragraph that you've just read, it talks
 17 about 16 protesters dead, others perceived to be a threat
 18 dispersed. There is something missing there. There is a
 19 group somewhere else that is running to bushes, still
 20 armed, in terms of what we saw in the pictures. There are
 21 people who are dispersing; there are people who are running
 22 to a bushy area; there are people who are dead, and I think
 23 those circumstances, those in operation would have to be
 24 able to explain to us to say when they looked at all those
 25 circumstances, what informed the movement there, and you

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1 say General Mpembe is saying something else. He'll come
 2 here and answer, but I'm saying all those circumstances, we
 3 can't pick some and leave some. We must take all the
 4 circumstances into account so that a proper conclusion can
 5 be reached, taking everything into account.
 6 On the De Rover statement, as you're saying the
 7 critical thing there is the ability of the equipment to
 8 further facilitate decision-making. Clearly as indicated
 9 in that statement that becomes a weakness that could have
 10 conspired towards assisting facilitating a decision-making,
 11 but there are other elements and aspects of the situation
 12 that I think the operational people would answer to say
 13 with the radio not being there, what type of decision did
 14 you take, what was informing you, and they're going to come
 15 here to answer for themselves, and I think it would be
 16 wrong of me as a leader, without understanding all the
 17 weaknesses, the gaps that are there, to take a decision to
 18 say a wise decision would have been Y. I would like all
 19 those issues to be considered, to be debated, to be
 20 understood, and then I would be able to say indeed, having
 21 considered all, this is what would present a wise decision.
 22 At this point in time those people must still come and
 23 present and argue all the circumstances that I've
 24 mentioned.
 25 MR MALINDI SC: So in conclusion on this

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1 point, you are not able or prepared to say to the
 2 Chairperson and the Commissioners our expert and other
 3 experts have criticised us for not taking what would have
 4 been a wise decision between the happenings at scene 1 and
 5 scene 2, and that decision in my view was prevented from
 6 being taken for the reasons that are stated by at least De
 7 Rover, who says there were problems created by the
 8 inability to communicate what was exactly happening.
 9 You're not prepared to make that statement to this
 10 Commission?
 11 GENERAL PHIYEGA: When you started asking
 12 this question you put two words, "able" and "prepared."
 13 CHAIRPERSON: Two concepts; if you're
 14 able, you're not prepared, but if you're not able then the
 15 question of your preparedness doesn't come into it.
 16 GENERAL PHIYEGA: That's why I'm trying
 17 to use those two. Preparedness I am, once I have a full
 18 understanding, or all inputs from the experts and from the
 19 commanders and everybody, I would be prepared to take a
 20 position. What I'm not now is able to do that, because
 21 this process is still rolling out.
 22 MR MALINDI SC: I shall move the fifth
 23 point on page 22, which is paragraph 4.2.13 of Mr White's
 24 statement. It reads as follows, "Fifthly, the SAPS have
 25 provided a great deal of video evidence in relation to the

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1 events occurring before and after the shooting of 13 and 16
 2 August, but there has been no police video provided which
 3 documents the shooting incidents. This may be, as the
 4 police contend, that none exists. However, given the
 5 Standing Order 262 requirement and the principles of good
 6 public order policing, that video operators document
 7 operations, it is surprising that a fuller explanation has
 8 not been given for the absence of any such video."
 9 MR SEMENYA SC: Chair, in fairness the
 10 witness must be told that slide 170 of exhibit L does offer
 11 an explanation.
 12 MR MALINDI SC: May I take a second to
 13 consider slide 170, Chair?
 14 CHAIRPERSON: You'll need more than just
 15 one second.
 16 MR MALINDI SC: Thank you, Chairperson,
 17 for my learned friend alerting me to the relevant slide.
 18 Commissioner, it appears from this slide 170 of exhibit L
 19 that at 13:25 on 16 August 2012 the video operators
 20 withdrew for the reasons that are stated in the slide. Is
 21 there any explanation that why arrangements were not made
 22 to continue the videoing of the scene as required by
 23 Standing Orders?
 24 CHAIRPERSON: Mr Semenya, you want to say
 25 something?

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1 MR SEMENYA SC: The first bullet of slide
 2 170 explains what happened, what was precipitating the
 3 withdrawal of the video operators.
 4 CHAIRPERSON: It's a matter that
 5 presumably will have to be canvassed with the video
 6 operators because if every time video operators are told
 7 they might be attacked, as indeed other members of the
 8 police on the scene might be attacked, they withdrew, then
 9 of course the whole purpose of having video recordings made
 10 of Public Order Policing operations will be defeated. But
 11 that's not a matter to be debated with this witness, I
 12 would think. Maybe it can be debated with Captain Adriaio
 13 or the video operators themselves if you call them. Are
 14 you going to call them?
 15 MR SEMENYA SC: We're going to lead such
 16 evidence as is required, Chair. I don't know if it should
 17 get there, but they are there; they will be called if –
 18 CHAIRPERSON: You see, it may be a matter
 19 in respect of which recommendations may be called for at
 20 the very least, because if it's important that there be
 21 video recordings of Public Order Policing operations, then
 22 every time there's a whiff of sulphur in the air the video
 23 operators withdraw to protect themselves, then the whole
 24 purpose of having video recordings, as I said, will be
 25 defeated and so that's a matter we don't have to debate

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1 with the present witness, but we may have to have evidence
 2 on that to enable us to make proper recommendations in this
 3 regard. So it's something you must bear in mind, please,
 4 and the evidence leaders will also presumably bear it in
 5 mind and if they think the evidence is required and you
 6 don't call the witnesses, then they have to subpoena them.
 7 Mr Malindi, would you like to continue?
 8 [11:54] MR MALINDI SC: Thank you, Chairperson.
 9 It is a matter that will be dealt with, with other police
 10 officers.
 11 CHAIRPERSON: I understand it raises
 12 difficult questions because you know, there is the question
 13 of the safety of video operators to be considered as well,
 14 but perhaps Captain White or Colonel Hendrickx or Mr De
 15 Rover can tell us what international best practice is in
 16 this regard, whether it's expected of video operators to
 17 leave the scene when there's a whiff of sulphur in the air,
 18 but that's a matter we don't have to debate this morning.
 19 MR MALINDI SC: Absolutely. National
 20 Commissioner, may we move to 4.3 on page 22? National
 21 Commissioner, the criticism here is of the mindset of the
 22 police at the scene. The criticism is that all 3000 people
 23 gathered there were characterised in a manner that left
 24 very little option in the minds of the police present that
 25 they were dealing with people that should have been the

<p style="text-align: right;">Page 7684</p> <p>1 target of police action. Such characterisation includes 2 characterising them as unruly and very aggressive, that all 3 – emphasised – are armed with extremely dangerous weapons, 4 that they were characterised as militants and similar 5 characterisation. Do you agree that when police conduct 6 crowd management, their mindset should be that of not 7 painting everyone in the group with the same brush, so to 8 speak? 9 CHAIRPERSON: Mr Semenya? 10 MR SEMENYA SC: Chair, the question calls 11 for a conjectural answer from the witness, which can't be 12 helpful. She can't opine on the mindset of those people 13 who are on the operation. She was not even there. 14 CHAIRPERSON: Mr Malindi? 15 MR MALINDI SC: Chairperson, this witness 16 is the National Commissioner. According to the prescripts, 17 as she says, the policies of crowd management, it is 18 emphasised and we will find references that approaching a 19 crowd that needs to be managed, the police must gather 20 enough information to identify and isolate people that need 21 to be acted upon differently from other people who are 22 participants, in this case in a demand for a wage increase. 23 There must have been many people who were there just 24 supporting the call for an increase in salary and should 25 not be characterised as militants, as warriors, and as</p>	<p style="text-align: right;">Page 7686</p> <p>1 CHAIRPERSON: Perhaps you can answer 2 that, National Commissioner. That's my formulation of the 3 question. Sorry, Mr Semenya? 4 MR SEMENYA SC: Chair, it did provoke 5 another objection that – 6 CHAIRPERSON: Can I overrule your 7 objection, or shall I hear you first? 8 MR SEMENYA SC: Preferably with a – 9 CHAIRPERSON: I think I've put the 10 question fairly, but if I didn't, please tell me why. 11 MR SEMENYA SC: Chair, this is an expert 12 opinion to be tested with a witness that's not an expert, 13 would provoke the second objection I'm raising. 14 CHAIRPERSON: Well, I would have thought 15 that that's a point to be raised by the witness rather than 16 by you. So shall we allow counsel to put the question? 17 The question has been put, Mr Malindi. National 18 Commissioner, do you want to answer? 19 GENERAL PHIYEGA: Judge, the, that 20 section talks about mindset and reading people's mind is 21 another thing, and the statement is made by a commander who 22 will come here, they can ask him about that statement, and 23 all I can say and repeat what I've said previously, is that 24 what in my opinion would be of concern would be any armed 25 protesters, whether there are two, 75, 300 or 3000, that</p>
<p style="text-align: right;">Page 7685</p> <p>1 aggressive, making them an easy target for police action 2 which is unwarranted. I submit that the witness in her 3 position should comment about the appropriateness of her 4 officers that Mr White mentions in this section as having 5 characterised some members of this crowd as such. 6 CHAIRPERSON: Let me put it to you this 7 way, National Commissioner. Mr White, as you see, quotes 8 the statement of Brigadier Calitz, which as he points out 9 was significantly made before the Potchefstroom meeting. 10 In that statement Brigadier Calitz used the expression, 11 talking of the protesters, "that they all acted as one 12 group, all of them associated themselves with the actions 13 of each other, all of them had a single intention and 14 goal," and so based upon that statement by Brigadier 15 Calitz, Mr White comes to the conclusion that Brigadier 16 Calitz treated the crowd as a single entity. Now I think 17 counsel is asking you to comment upon whether you as 18 National Commissioner consider it appropriate in this kind 19 of operation for – I think Brigadier Calitz was a 20 commanding officer – for commanding officers of the police 21 engaged in Public Order Policing operations, to treat the 22 members of the crowd as one group. I think that's your 23 question, Mr Malindi, is it? 24 MR MALINDI SC: Exactly, Chairperson. 25 I'm indebted to you.</p>	<p style="text-align: right;">Page 7687</p> <p>1 would concern me. 2 MR MALINDI SC: Chairperson, I will not 3 insist on an answer. It will be a matter to be argued and 4 - 5 CHAIRPERSON: I think Mr Semenya is 6 right; it's really a matter for an expert witness. This 7 witness doesn't profess to be an expert in this matter, so 8 I don't know if her answer, with respect, would carry the 9 matter any further one way or the other. 10 MR MALINDI SC: National Commissioner, I 11 will move now to page 24, Mr White's criticism of the 12 planning under paragraph 4.4. 13 CHAIRPERSON: Mr Malindi, again I don't 14 want to be unduly difficult, but these questions of course 15 will in due course be put to those responsible for the 16 planning. Is the National Commissioner likely to be in a 17 position to help us to decide whether these criticisms of 18 Mr White are correct or not? She told us she thinks it was 19 a good plan and I'm sure she does. Whether her opinion in 20 the matter is correct is a matter we'll have to decide, but 21 I'm not sure that we'll decide it on the basis of any 22 argument or views expressed by her. It's really a matter 23 for the experts to talk about, isn't that so? And for us 24 to consider what they have to say. I don't want to stop 25 you duly, but you know, I do want to safe time so that we</p>

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1 don't cover matters with the witness which, to be fair, we
 2 can't really expect her to deal with in any helpful way.
 3 MR MALINDI SC: Chairperson, I concede
 4 that the vast extent of this section, it's a matter that
 5 should be put appropriately to the generals and other
 6 officers who would be coming here. I would, however, put
 7 one or two general statements to the Commissioner and get
 8 her reaction. Now National Commissioner, you have had an
 9 opportunity to read Mr White's statement. Having done so,
 10 do you insist that the plan or plans that were developed
 11 between 10 August and 16 August, as amended and
 12 supplemented, remain the good plans that you have insisted
 13 that they were?
 14 GENERAL PHIYEGA: I really believe that
 15 we had put together a good plan, as you say, and it was
 16 disrupted.
 17 MR MALINDI SC: Like Mr De Rover says,
 18 saying the extreme cost to life was a consequence of the
 19 plans of 16 August?
 20 MR SEMENYA SC: No, there's nowhere Mr De
 21 Rover said that.
 22 CHAIRPERSON: Did De Rover say that?
 23 Where does he say that?
 24 MR MALINDI SC: I will find the
 25 reference, Chairperson. Chairperson, if you may bear with

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1 me for a second.
 2 CHAIRPERSON: Yes, I will, but I would
 3 have expected you to have had this passage in front of you
 4 before you put the question.
 5 MR MALINDI SC: Chairperson, may we go to
 6 paragraph 59? It might be helpful.
 7 CHAIRPERSON: He doesn't criticise the
 8 plan there, does he?
 9 MR MALINDI SC: I will rephrase my
 10 question, Chairperson.
 11 CHAIRPERSON: I think it would be a good
 12 idea.
 13 MR MALINDI SC: National Commissioner, do
 14 you still insist that the deaths and injuries at Marikana
 15 were not as a consequence of crowd management operations as
 16 occurred in Marikana?
 17 CHAIRPERSON: I'm not sure that that
 18 question is perhaps as clear as it should be. On the
 19 surface obviously it seems to be in order, but I think the
 20 implication is as a culpable consequence – I understand the
 21 crowd management operations led to shots being fired, led
 22 to people dying, but the question for us to decide is not
 23 simply whether there's a causal connection, but whether
 24 there's a culpable connection, and your question-
 25 admittedly you didn't use the word "culpable," but it

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1 sounds to me that it was implied. So perhaps you could
 2 reformulate it to make it clear whether you are interested
 3 in culpability or simple factual causation.
 4 MR MALINDI SC: I will make another
 5 attempt, Chairperson, and National Commissioner, you have
 6 testified that the plan was good and that the plan was
 7 disrupted. That's your evidence.
 8 GENERAL PHIYEGA: Yes, I have testified
 9 that.
 10 MR MALINDI SC: Mr White criticises the
 11 plan for various reasons. In summary he says the poor
 12 planning, the poor execution, led to the tragic death of 44
 13 people and many injuries.
 14 MR SEMENYA SC: No, Chair, Mr White does
 15 not ascribe the plan with the death of 44. The other 10
 16 had nothing to do with –
 17 CHAIRPERSON: It couldn't have dealt with
 18 the 44, as Mr Semanya says, because we're only busy with
 19 34.
 20 MR MALINDI SC: The 34.
 21 CHAIRPERSON: So let's take the other 10
 22 out. They're not linked in any way to the plan.
 23 MR MALINDI SC: We will take them out of
 24 the plan that was implemented on 16 August 2012.
 25 CHAIRPERSON: Just go back to "go" and

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1 start again.
 2 MR MALINDI SC: I beg your pardon?
 3 CHAIRPERSON: Just go back to "go" and
 4 start again.
 5 MR MALINDI SC: Yes. Mr White criticises
 6 the plan which he says it's poor, the poor planning, poor
 7 execution, led to the deaths of 34 people and many
 8 injuries. Do you still insist that the Commission should
 9 not find that the deaths were as a consequence of a poor
 10 plan?
 11 CHAIRPERSON: No, it's not as simple as
 12 that. That's a double question. Her case is it was a good
 13 plan. She says it was disrupted and that led to the
 14 problem. Whether her statements in that regard are correct
 15 is a matter that we don't have to debate now; it's one of
 16 the things we'd have to decide at the end of the evidence,
 17 but she doesn't say anything about bad planning. Her case
 18 is good planning, and so it's not fair to ask a question
 19 like that which in fact is a double question disguised as a
 20 single question. So perhaps you should reformulate it in a
 21 way that avoids that difficulty. But you don't need to
 22 take it further. Look, you know, I think we're in a bit of
 23 a stalemate. I'm not sure we're moving forward. Her case
 24 is it's a good plan, there was disruption, that's why the
 25 problems happened that happened. She's made it clear she's

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1 not really able as an expert to defend the goodness of the
 2 plan, that's a matter for the experts. Her belief is it's
 3 a good plan, and as I've said, whether she's correct or not
 4 is a matter we'll have to decide not on the basis of her
 5 evidence, but on the basis of other evidence. So I don't
 6 know, with respect, if there's any point in taking the
 7 point further with her. We know what her stance is.
 8 Whether it's correct or not we will have to decide, not on
 9 the basis of what she says, but what the other witnesses
 10 say, isn't that correct?
 11 [12:14] MR MALINDI SC: That's correct,
 12 Chairperson, I will move on. National Commissioner, may I
 13 invite you to look at Professor Christoff Heyns' statement,
 14 which I believe has been placed before you. I understand
 15 it's not an Exhibit yet, Chairperson.
 16 GENERAL PILLAY: It would be Exhibit
 17 FFF24.
 18 CHAIRPERSON: Professor Heyns' statement,
 19 which we were given yesterday, also has some annexures –
 20 three annexures. Now are you going to refer to them at
 21 all? Must we mark them also as Exhibits, or are they
 22 regarded as covered by the description FFF24?
 23 MR MALINDI SC: I should suggest that
 24 they should be covered as part of the annexure –
 25 CHAIRPERSON: Okay, so FFF24 therefore is

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1 a statement by Professor Heyns with annexures.
 2 MR MALINDI SC: With annexures.
 3 CHAIRPERSON: The statement quotes
 4 extensively from the annexures, and the annexures, I take
 5 it, is really annexed so we can verify the correctness of
 6 quotation, but anyway let's regard it all as one. Okay,
 7 carry on.
 8 MR MALINDI SC: And we will provide an
 9 in-depth of this statement with annexures where they are
 10 set out in the last page.
 11 CHAIRPERSON: It might be helpful
 12 possibly to paginate them from 1 to the end, so that we
 13 don't have to – so if we have to find something later in
 14 the middle of one of the annexures, we can find it more
 15 quickly, but anyway let's not waste time on that for the
 16 moment.
 17 MR MALINDI SC: Thank you, Chairperson.
 18 National Commissioner, could you please turn to page 4 of
 19 that statement and to paragraph 9? And if you are there,
 20 you will see that from paragraph 9 up to paragraph 13,
 21 Professor Heyns deals with the international legal
 22 framework. Can you see that?
 23 GENERAL PHIYEGA: I note it.
 24 CHAIRPERSON: Before you carry on, I must
 25 tell you I had a problem when I read Professor Heyns'

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1 statement last night. As far as I could see, he doesn't
 2 get off the fence and say at the end, whether he regards,
 3 as an expert in the field, the South African domestic
 4 legislation and other provisions as being – falling short
 5 of what is required in international law. We have the
 6 Regulation of Gatherings Act, which we know was prepared by
 7 a committee of the Goldstone Commission, decided over by an
 8 eminent jurist, who was a professor at Harvard. I've never
 9 ever seen anyone criticise that statute as being in any way
 10 deficient in terms of international law or otherwise. So
 11 that's where we start. We've then got a series of standing
 12 orders, which were compiled, as we understand it, under
 13 the direction of Mr Bizos' expert, Colonel Hendrickx.
 14 Again an endeavour to provide South African police with
 15 world best practice in this field. And then since then the
 16 standing orders have been glossed, as I put it, by two
 17 documents that we've being referred to and there are also
 18 policy documents of the police. Now, it's one thing to say
 19 these are the legal provisions that apply, and they are
 20 defective. It's another thing to say these are the legal
 21 provisions that apply, but the conduct of the police at the
 22 relevant time falls short of even the domestic provisions
 23 that apply. Now, Professor Heyns doesn't help us on that
 24 at all, so only when you go with this statement of
 25 Professor Heyns, Professor Heyns obviously is a very

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1 eminent jurist and authority in this field. We listen with
 2 great respect to what he says, but he doesn't really help
 3 us, as I see it so far, he talks about another report
 4 later, I think, but on the points that I put to you, so is
 5 there any point at this stage in canvassing these matters
 6 with the witness.
 7 MR MALINDI SC: Chairperson, it's only
 8 one point that relates to policy formulation which I'm sure
 9 the commissioner, National Commissioner will say they
 10 embrace the adoption of international frameworks and in the
 11 development of crowd management policy going forward, they
 12 will embrace that. That will be the only value of
 13 Professor Heyns.
 14 CHAIRPERSON: I don't want to stop you, I
 15 just tell you my difficulty I had when I read these papers
 16 last night, and I'll hope you'll bear that in mind as you
 17 proceed.
 18 MR MALINDI SC: Thank you.
 19 CHAIRPERSON: I think I'm correct in
 20 saying Professor Heyns, is he still the professor, he is
 21 still in the chair, in fact at the University of Pretoria.
 22 So he is not only special rapporteur to the United Nations,
 23 he also is a South African jurist.
 24 MR MALINDI SC: He still is, Chairperson.
 25 CHAIRPERSON: So he's obviously in a very

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1 good position to help us if there are points in that regard
 2 which we need assistance on, but my only problem was
 3 reading what you put before us so far, he doesn't give us
 4 that instruction that perhaps is necessary we should
 5 receive. So – anyway, I won't stop you further, but you
 6 understand my difficulties?
 7 MR MALINDI SC: I do, I do, Chairperson.
 8 National Commissioner, do you accept as the policy engineer
 9 of the SAPS in your current position –
 10 CHAIRPERSON: I don't think it's fair to
 11 call her the policy engineer, I mean, she's the Commander
 12 in Chief, she's got various people working under her, but I
 13 mean if she wants to plead guilty to formulating the
 14 policy, I won't stop her, but I doubt very much whether
 15 that what's she's going to say. She certainly never said
 16 anything of that kind up to now, and to call her the policy
 17 engineer is I think, subject to what Mr Semenya will say,
 18 is inappropriate in the circumstances. So perhaps you can
 19 say the person ultimately responsible for policy, you could
 20 put it that way, but that's a different concept, isn't it?
 21 MR SEMENYA SC: No, even that, Chair,
 22 will be inconsistent with the Provision of the
 23 Constitution. Policy is that of the Minister. She is
 24 enjoined to implement policy, she's not the policy maker.
 25 CHAIRPERSON: You are correct, Mr

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1 Semenya, I was wrong. Thank you for correcting me. I take
 2 it that matters of policy being in issue, we will in due
 3 course see the minister sitting in the witness chair and
 4 you can ask him about the policy, but you can't ask – you
 5 can ask questions, but they would be a waste of time, I
 6 would think. Rather address them to the appropriate
 7 person.
 8 MR MALINDI SC: Thank you, Chairperson,
 9 that was an unfortunate exaggeration of - the National
 10 Commissioner.
 11 CHAIRPERSON: I also feel in error to
 12 some extent, and I'm glad that we've both been corrected.
 13 MR MALINDI SC: Commissioner, this will
 14 be a short discussion between the two of us on Professor
 15 Heyns. I have pointed to the paragraphs that Professor
 16 Heyns contends are international frameworks that countries
 17 are encouraged to embrace. Is that something – I'm sure
 18 agree with me that in your policy implementation within the
 19 SAPS, and in particular crowd management you will embrace?
 20 GENERAL PHIYEGA: As a consumer of policy
 21 designed by the minister, as corrected in this environment,
 22 I do hope that when that policy comes to us, those
 23 considerations are taken into account.
 24 MR MALINDI SC: Like the other experts,
 25 Professor Heyns has indicated that this is his preliminary

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1 statement and he would provide a fuller statement at the
 2 appropriate time and he will urge the Commission to make
 3 recommendations along the lines of international
 4 frameworks, it's something that you will also embrace?
 5 GENERAL PHIYEGA: I do believe that his
 6 input, like many other inputs of the experts would be part
 7 of the medley of inputs that are going to bring out an
 8 outcome for this Commission, and we'll look into those.
 9 MR MALINDI SC: And if you look at page
 10 14 of his report, the preliminary report, paragraph 41.5,
 11 you will see that he states that international standards in
 12 respect of the use of force by the police centres around a
 13 certain proportionality. Firearms should be used only to
 14 prevent grievous bodily harm and death. Very little force
 15 may be used intentionally, only if the objective is to
 16 protect life and that harmful measures are inadequate. Can
 17 you see that?
 18 CHAIRPERSON: Is it suggested that
 19 paragraph 11 of standing order general 262 is not in
 20 accordance with what's stated in paragraph 3.1.5 of
 21 Professor Heyns' report. It talks about minimum force
 22 should be used, reasonable, - seriousness of the situation,
 23 the threat posed. I mean are these matters you can raise
 24 with the National Commissioner? Is there any point in fact
 25 in debating it with her, unless there's something specific

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1 that's to be put in that regard? So then if it's not your
 2 case, that standing order - why waste time asking these
 3 questions?
 4 MR MALINDI SC: Chairperson, it's merely
 5 because he will come with a fuller statement and having
 6 considered the evidence, he may have set up commentary.
 7 There's no contention that there's inconsistency. Both –
 8 CHAIRPERSON: What's in the fuller
 9 statement can be put to the police witnesses, but I mean
 10 absent that, there's nothing to be put to the witness for
 11 the moment, surely, is there?
 12 MR MALINDI SC: I agree, Chairperson,
 13 save to say that there's common cause that the South
 14 African policies on crowd management as Garry White has
 15 also said, they are fairly compatible with international
 16 standards. Chairperson, I'm going to jump around just
 17 looking at a few things that I think should be canvassed in
 18 full before I end my cross-examination.
 19 National Commissioner, yesterday I suggested to
 20 you that some senior police officers were informed by
 21 Lonmin that there will be a protest on the 10th of August
 22 2012. Do you remember that?
 23 GENERAL PHIYEGA: Yes, I recall that.
 24 MR MALINDI SC: Okay. I just want to put
 25 that more accurately and in doing so I'd like you to look

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1 at Exhibit L, slide 12. So what I wanted to put to you
 2 stands there and it reads that, "on 9 August 2012, the
 3 Marikana police station received information about a
 4 protest the following day. The Public Order Policing unit
 5 of Rustenburg was notified about the protest march in order
 6 to provide assistance. VISPOL, known as visible policing
 7 of the Marikana police station, supported by POP of
 8 Rustenburg, which totalled 29 members were mobilised to
 9 handle the gathering and the march on Friday, 10 August
 10 2012." In regard to knowledge of senior police officers,
 11 I'm referring to this statement of Major General Naidoo,
 12 it's not an exhibit yet. I will just read a paragraph that
 13 is relevant. It's not a long paragraph.
 14 It says, "On Saturday 2012, 08/11, that's 11
 15 August 2012, at approximately 10h00, I received a telephone
 16 call from the Provincial Commissioner North West Province,
 17 Lieutenant General Mbombo, in connection with unrest at the
 18 Lonmin mine in Marikana, Rustenburg cluster. She had
 19 received a call from the Lonmin mine management in
 20 connection with a situation of unrest and instructed, I can
 21 assist the cluster with additional resources to address the
 22 situation. I immediately contacted Brigadier Calitz, the
 23 Provincial Head Operational Response Services, as Major
 24 General Mpmembe, the Deputy Provincial Commissioner
 25 Operational Services was on vacation leave. I instructed

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1 Brigadier Calitz to supplement the deployment of Public
 2 Order Police personnel at the Lonmin mine on a 24 hour
 3 basis until Monday so that the situation can be adequately
 4 policed."
 5 [12:34] I just wanted to clarify that statement of how
 6 the protest was initially reported. National Commissioner
 7 you have been asked many questions about your interactions
 8 with the Minister of Police. Do you record communications
 9 with the Minister in any form?
 10 GENERAL PHIYEGA: I've already answered
 11 that question and I've said I use a multiplicity of ways.
 12 CHAIRPERSON: You didn't answer the
 13 question. The question is do you record them, with other
 14 words once you've communicated with the Minister is there
 15 any record thereafter of the nature of the communication?
 16 And I think that's the question Counsel is asking you.
 17 GENERAL PHIYEGA: Judge, this is why I
 18 talk about multiplicity of ways, when I talk to the
 19 Minister on a cell phone I don't come and write minutes of
 20 my cell phone communication but when I sit in a meeting
 21 with him that is structured I would have an agenda and then
 22 we'll have minutes. In some instances if we are
 23 communicating by email there'll be an email. So I wouldn't
 24 - you know the recording it's diverse, it's a multiplicity.
 25 MR MALINDI SC: Do you also note them in

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1 any form like a diary?
 2 GENERAL PHIYEGA: I think the answer that
 3 I have given it, I don't record to say on this day I phoned
 4 the Minister, on this day I said to the Minister.
 5 MR MALINDI SC: In this instance of
 6 communicating about the incidents of Marikana if you come
 7 across any record whether by email or a note in a diary or
 8 any document you'll be prepared to make it available to the
 9 Commission?
 10 GENERAL PHIYEGA: I have shared the
 11 written communication that I have, the internal
 12 communication that I sent, copied him on when I sent to
 13 President otherwise I don't remember writing anything,
 14 which I've submitted to the Commission, as an internet
 15 communication.
 16 MR MALINDI SC: And if you communicated
 17 by SGENERAL there will be records?
 18 GENERAL PHIYEGA: If I did that there
 19 would be - I mean SGENERAL are -
 20 MR MALINDI SC: In response to one of the
 21 questions you indicated that you were invited as SAPS by a
 22 mine whose economic activity was being affected. Did you
 23 record your response to say that accurately? My learned
 24 friend, Judge Bizos' question.
 25 GENERAL PHIYEGA: I don't understand your

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1 question.
 2 MR MAHLANGU: I'm sorry, Mr Chairperson,
 3 if the question could be repeated. I didn't follow it
 4 either.
 5 MR MALINDI SC: In response to a question
 6 by my learned friend, Mr Bizos you said something to the
 7 effect that SAPS were invited by a mine, I take it Lonmin
 8 by the mine Lonmin whose economic activity was being
 9 affected. Do you remember that answer?
 10 GENERAL PHIYEGA: Yes I do and you've
 11 just referred to slide 12 which that started showing how we
 12 got involved as SAPS, that's what it is. And I'm sure you
 13 also - you touched a little bit on that Naidoo's statement,
 14 the statement of General Mbombo will also touch on that.
 15 MR MALINDI SC: And you did so because
 16 Lonmin was one of the stakeholders in this whole incident,
 17 am I correct?
 18 GENERAL PHIYEGA: We did so because
 19 Lonmin is an economic citizen of this country. Before the
 20 Commission happened, they're an economic citizen and we
 21 have to protect and ensure that they are able to undertake
 22 their economic activity like any other one under an
 23 environment that where there is law enforcement, where
 24 there is public order, that's what we did. The Commission
 25 wasn't there, we were not looking at ourselves as police

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1 but they were just economic citizens of this country.
 2 MR MALINDI SC: Now in line with Clause 3
 3 of the standing orders 3, sub 2, you would have considered
 4 it in the same breath the community of Nkaneng as part of
 5 those stakeholders or role players to whom you should have
 6 visited in order to achieve the objectives of proactive
 7 conflict resolution.
 8 GENERAL PHIYEGA: Our being here was to
 9 take care of citizens of this country, economic, social and
 10 otherwise.
 11 MR MALINDI SC: National Commissioner, in
 12 conclusion may I put a few statements which will be what we
 13 will argue, amongst others, at the end of the Commission?
 14 Firstly that the SAPS failed to gather information and
 15 intelligence that would have made them foresee and prepare
 16 to meet or respond adequately to the incidents of 10 to 16
 17 August 2012.
 18 MR SEMENYA SC: Chair.
 19 CHAIRPERSON: Mr Semenya.
 20 MR SEMENYA SC: In fairness we must be
 21 told in what respect the intelligence that was gathered was
 22 inadequate. I know where the statement comes from but it's
 23 not explained in what respect it was inadequate.
 24 CHAIRPERSON: Before we even get there
 25 can we expect this witness to answer that? I can

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1 understand operational commanders can be asked about how
 2 the intelligence gathering was done, information they got
 3 but is there any point in asking this witness about that?
 4 Any answer she gives would be of a hearsay nature, that's
 5 what she was told. Is it going to help us take the matter
 6 forward in any way? You see you don't have to put all your
 7 questions of the police service's actions to this witness.
 8 Obviously in fairness you have to put them to
 9 representatives of the police so they can deal with them
 10 but I'm not sure that generalised statements of this kind,
 11 put to this witness are going to help us forward. I don't
 12 want to discourage you from asking questions but I would
 13 want to discourage you from asking questions that aren't
 14 going to help us at all.
 15 MR MALINDI SC: Chairperson, I agree
 16 totally that the ten or so propositions that I would put to
 17 this witness will be a repetition of what we've already put
 18 to her and it was just in the usual style of advocacy that
 19 you give a witness an opportunity to -
 20 CHAIRPERSON: If it's the only witness
 21 called by the police I could understand that but your
 22 expert, most of these points if not all come your expert
 23 statement, your expert's going to give evidence, he's going
 24 to be cross-examined by Mr Semenya, the police are going to
 25 have experts or an expert to deal with his evidence. The

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1 operational commanders will in a sense be experts
 2 themselves, able to deal with the matter. So I wouldn't
 3 have thought there'd be any prejudice to the police if you
 4 don't put these questions to this witness but if Mr Semenya
 5 wants you to put the questions I won't stop you. Do you
 6 want him to put all these points to the witness?
 7 MR SEMENYA SC: I don't know what they
 8 are Chair but if they are of the nature that I'm objecting
 9 to I'll repeat my objections.
 10 CHAIRPERSON: - You're putting these
 11 questions, you're going have objections, we will just waste
 12 time. I mean let's use the time gainfully and not
 13 wastefully.
 14 MR MALINDI SC: Chairperson, it will be a
 15 waste of time, she will not be able to respond to them
 16 considering her response to what I have put to her about
 17 what our experts will say. We rest our cross-examination.
 18 CHAIRPERSON: Thank you, thank Mr
 19 Malindi. Mr Mpofo?
 20 MR MPOFU: Thank you, Chairperson.
 21 Chairperson, what I propose to do seeing that it's close to
 22 lunch, I was in any event going to start with some
 23 preliminary matter before I get to the cross-examination
 24 proper. So could I just deal with that before the lunch?
 25 CHAIRPERSON: Cross-examine until 1

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1 o'clock and then we'll stop.
 2 CROSS-EXAMINATION BY MR MPOFU: I'll take
 3 it from the - thank you, Chairperson. Good afternoon,
 4 General.
 5 GENERAL PHIYEGA: Good afternoon.
 6 MR MPOFU: As I've just indicated I just
 7 want to deal with some preliminary issues, just to kind of
 8 situate the discussion that you and I are going to have and
 9 I just want to start on a positive note to say that you and
 10 I know each other but for the sake of protocol I represent
 11 the injured and arrested people.
 12 GENERAL PHIYEGA: Let me also agree that
 13 I know you but I represent the police.
 14 MR MPOFU: Yes that's - now I just want
 15 to say one thing emanating from the fact that I know you
 16 and speaking for myself just that knowing the person that
 17 you are I do not believe the suggestion that you laughed at
 18 the people who were affected by this tragedy. Can you
 19 accept that?
 20 GENERAL PHIYEGA: Advocate Mpofo, I've
 21 actually debunked that right at the beginning of my
 22 testimony.
 23 MR MPOFU: Yes I know you did but the
 24 real point I wanted to make is that to some of the people
 25 who are affected, who don't know you as well as I do they

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1 may believe that and I just wanted to say that you need,
 2 not here, in a kind of a public fashion, maybe even
 3 thereafter to engage with them somehow and deal with those
 4 kinds of issues, would you accept that?
 5 GENERAL PHIYEGA: I appreciate your
 6 statement.
 7 MR MPOFU: Thank you. The other thing
 8 that I want to - the other point I want to make is that the
 9 - we are also are not coming from the point of view that
 10 says that the police presence in the Marikana situation was
 11 unnecessary because it clearly was. Do you accept that as
 12 well?
 13 GENERAL PHIYEGA: I note it.
 14 MR MPOFU: Yes. Will take a lot of - a
 15 great issue with what they did once they were there and the
 16 last such preliminary issues that I'm sure all of us on all
 17 sides and even on the bench appreciate the difficulty of
 18 the tasks that you and SAPS have and the unenviable task of
 19 fighting crime in South Africa.
 20 GENERAL PHIYEGA: I appreciate that, but
 21 I just want to add to that that also law enforcement and
 22 maintenance of public order is part of our regiment.
 23 MR MPOFU: Yes. Now if you look at, you
 24 don't have to look at it now but if you look at FFF1 which
 25 sort of sets out the policies of public order policing and

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1 giving us a kind of historical background to those
 2 policies, you'll notice that the set of recognised what one
 3 might call three dimensions of the public policing mix if
 4 you like.
 5 GENERAL PHIYEGA: I'd like to walk with
 6 you. Which document are we dealing with?
 7 MR MPOFU: The black one.
 8 GENERAL PHIYEGA: Okay, the police.
 9 Thank you we have it.
 10 MR MPOFU: And I think there is another
 11 document which is more detailed which I think is what Mr
 12 Malindi was looking for yesterday which is actually Exhibit
 13 R.
 14 GENERAL PHIYEGA: What is it called?
 15 MR MPOFU: It's the sort of model around
 16 us saying, along the same lines, it's called Policy
 17 Guidelines, Policing and Public Protest, Gatherings and
 18 Major Events from the Ministry of Police.
 19 GENERAL PHIYEGA: Okay.
 20 MR MPOFU: You might have it in front of
 21 you but for the purposes of what I'm going to put to you
 22 FFF1 would be sufficient.
 23 GENERAL PHIYEGA: Okay.
 24 MR MPOFU: And I say if you look at the
 25 introduction in FFF1, I've distilled what I've called these

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1 three dimensions, there is clearly the security dimension
 2 which is what you and I are going to deal with at length.
 3 There's also what one might call socio economic dimension
 4 and there's also a political dimension insofar as these
 5 changes that I put owe themselves to the decisive break in
 6 1994. Would you agree with that?
 7 [12:54] GENERAL PHIYEGA: I note the dimensions.
 8 MR MPOFU: Pardon? Sorry, I missed that.
 9 GENERAL PHIYEGA: I say I note the
 10 dimensions that you are mentioning.
 11 MR MPOFU: Yes, and that - or maybe
 12 before we deal with each one of those, let me just also
 13 give you some other signposts. It's also so that if you
 14 were to use the metaphor of a person, SAPS would have the
 15 head, which is you and other people that I'm going to
 16 mention, and the body who are the commanders, and the limbs
 17 who are the foot soldiers, so to speak. If you'll just
 18 work with me on that imagery.
 19 GENERAL PHIYEGA: I think they will be
 20 the body, but I'm just not sure whether I'm sitting at the
 21 neck or at the head, but we will get there when you
 22 explain.
 23 MR MPOFU: Thank you. Yes, actually it's
 24 a very complex person that we are defining, more so because
 25 there are three heads, isn't it? There's you, there's the

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1 Minister, and there's the President, and you all sit at the
 2 head, so to speak.
 3 GENERAL PHIYEGA: You see, that's why I'm
 4 saying those, that analogy, you know, I don't think we're a
 5 deformed body. We'll just have to talk to say where's the
 6 head, where's the neck, the chin, and all those issues.
 7 MR MPOFU: But as far as the top of the
 8 organisation is concerned, would you agree with this
 9 triangular formulation, that there's the President, who by
 10 the way appoints you and has the right to hire and fire
 11 you, there's the Minister whose role has already been
 12 explained, and then there's yourself at the top there.
 13 GENERAL PHIYEGA: Yes, we are three and I
 14 think those roles are clearly articulated, policy,
 15 operations, all those things, and I think your discussion
 16 with probably take me there.
 17 MR MPOFU: Yes, and then another triangle
 18 that we are going to deal with is at the level of what one
 19 might call the regulatory framework there is the
 20 Constitution, there's the legislation, and there are the
 21 Standing Orders. That's what one might call broadly
 22 speaking the regulatory framework that governs your work.
 23 GENERAL PHIYEGA: True.
 24 MR MPOFU: And then coming to your role,
 25 it has two major dimensions, one being the head of the

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1 police, or let's call it the policing function, but also
 2 being the accounting officer in terms of the PFMA. Is that
 3 correct?
 4 GENERAL PHIYEGA: That role is clearly
 5 articulated. It says I manage and I control, and those
 6 things intermingle between those two functions, and I think
 7 it is safer for us to stick with the management and
 8 control. We can bring a management dictionary to see what
 9 sits in management, what sits in control.
 10 MR MPOFU: Chairperson, if I can just
 11 finish this point. Yes, no, no, I think we are on the same
 12 page. All I'm asking you is whether the control side of
 13 things would relate more to the policing activities, and
 14 what you call the managing would relate more to your role
 15 as accounting officer/DG, you know, the PFMA issues. You
 16 know what I mean.
 17 GENERAL PHIYEGA: I think that's where we
 18 get a divergent view on the matter because management and
 19 control and the way you put it, you almost divorce things
 20 that should not be divorced.
 21 MR MPOFU: Okay, let me put it this way.
 22 Your role as the person who's at the helm on the policing
 23 side is well-known; it's what has been discussed here for a
 24 number of days. Agreed?
 25 GENERAL PHIYEGA: Mmm.

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1 MR MPOFU: But is it so that in addition
 2 to that, you have a role as the accounting officer of the
 3 department in terms of the PFMA?
 4 GENERAL PHIYEGA: Advocate, each
 5 department has a remit, which is the core business of that
 6 department. It's either education, policing, social
 7 welfare, and all those things, but to do that, as you
 8 manage you infuse resources, people, physical, monetary and
 9 all that, but all those resources are geared towards
 10 ensuring that the core business takes place. This is why
 11 I'm saying it is artificial for us to try and say you can
 12 put them apart. You have to look at it from that concept
 13 that is put in the Constitution that says you manage and
 14 you control policing, which is the core remit of a
 15 department.
 16 MR MPOFU: No, General, we don't have to
 17 spend time on this. Let me help you. In the Defence Force
 18 for example –
 19 GENERAL PHIYEGA: Yes.
 20 MR MPOFU: - the head of the Defence
 21 Force is the head of the Army, like you are the head of the
 22 police. Agreed?
 23 GENERAL PHIYEGA: Mmm.
 24 MR MPOFU: But the head of the Defence
 25 Force is not the accounting officer in terms of the PFMA.

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1 That duty falls to what, somebody called the secretary for
 2 Defence.
 3 GENERAL PHIYEGA: Mmm.
 4 MR MPOFU: In the police on the other
 5 hand you execute both the task that would be
 6 complimentarily executed by the head of the Defence Force,
 7 but you are also the accounting officer in terms of the
 8 PFMA, yes or not?
 9 GENERAL PHIYEGA: Advocate, this debate
 10 is very important.
 11 MR MPOFU: Yes.
 12 GENERAL PHIYEGA: And this is why I say
 13 to you we are debating a function and a structure. That's
 14 where you, that's the debate. In the Defence, as you put
 15 it, they have decided that the way they structure
 16 themselves is in that manner, but in the police, you know,
 17 because you could well be arguing to say somebody is in
 18 charge of support services, somebody is in charge of the
 19 core business. That's what I would read in defence. You
 20 can't -
 21 MR MPOFU: Are you the accounting
 22 officer?
 23 GENERAL PHIYEGA: I beg your pardon?
 24 MR MPOFU: Are you the accounting officer
 25 in terms of the PFMA act of 1999?

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1 GENERAL PHIYEGA: I am the account
 2 officer –
 3 MR MPOFU: Thank you. Okay, Chairperson,
 4 can –
 5 CHAIRPERSON: Perhaps we can take the
 6 lunch adjournment, now that you've achieved the point you
 7 wanted to achieve. We will take the lunch adjournment,
 8 resume at 2 o'clock.
 9 [COMMISSION ADJOURNS COMMISSION RESUMES]
 10 [14:02] CHAIRPERSON: The Commission resumes.
 11 National Commissioner, you're still under oath. Mr Mpofu.
 12 MR MPOFU: Thank you Chairperson.
 13 General, we are still dealing with the PFMA. Am I correct
 14 that I didn't expect us to have problems in this area
 15 because it's an area that I regard you as an expert in
 16 somehow, particularly in view of the fact that you were
 17 appointed by the President before your current job to chair
 18 the restructuring of the state owned enterprises which
 19 deals broadly speaking with what one might call the PFMA
 20 accountability environment. Am I wrong in that assumption?
 21 GENERAL PHIYEGA: It's true though most
 22 SOEs don't use the PFMA.
 23 MR MPOFU: Well I don't think that's
 24 correct. The large ones at least the ones that are in
 25 schedule 1 of the PFMA which are the well known ones are

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1 all and in schedule 2, all fall under the PFMA but I don't
 2 want to debate on it.
 3 GENERAL PHIYEGA: Okay.
 4 MR MPOFU: The real issue is I just
 5 wanted to deal with one crucial issue which I think has
 6 characterised some of your answers which is the sort of
 7 deferring some of the issues to your subordinates. Do we
 8 understand where we are?
 9 GENERAL PHIYEGA: I hear you, I'm waiting
 10 for the question.
 11 MR MPOFU: And I must preface that by
 12 saying I obviously understand that you cannot answer for
 13 eye witness accounts of things that happened in your
 14 absence that I accept. Okay are we together there?
 15 GENERAL PHIYEGA: Mm.
 16 MR MPOFU: However, the fact that certain
 17 powers may or may not be delegated to other people as you
 18 would know in terms of the PFMA and other legislation does
 19 not absolve you, you as the ultimate accounting officer of
 20 your own responsibility. Would you agree with that broad
 21 statement?
 22 GENERAL PHIYEGA: I think I should
 23 qualify my response to you to say I don't think in all the
 24 answers that I was giving it was about absolving, it was
 25 about saying if you are looking for specific responses that

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1 are operational those members would be able to do so.
 2 MR MPOFU: Yes, it was about which I said
 3 I understand but it's also about some statements that you
 4 made particularly in relation to General Mbombo that she
 5 had full delegated powers and so on, you remember those
 6 kinds of statements?
 7 GENERAL PHIYEGA: It is very true she
 8 does have those mandates to run this province.
 9 MR MPOFU: Ja, okay I don't want to bore
 10 you with legal statements but do you appreciate that it is
 11 not - you cannot delegate everything, you still remain with
 12 some responsibility.
 13 GENERAL PHIYEGA: I did not think in what
 14 I was saying I ever gave the supposition that I don't - I
 15 am not overall responsible for policing.
 16 MR MPOFU: Okay anyway let me just accept
 17 what you're saying but just for the sake of certainty do
 18 you - in Section 44 of the PFMA says that - Section 44.2D
 19 Chairperson, Section 44.2D of the PPFMA says the following,
 20 "A delegation or instruction to an official in terms of
 21 sub-section one which is the one that gives you the power
 22 to delegate. D does not divert the Accounting Officer of
 23 the responsibility concerning the exercise of the delegated
 24 power or the performance of the assigned duty." Do you
 25 accept that as a statement of the true situation?

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1 GENERAL PHIYEGA: I accept that but it is
 2 important to contextualise that because then you read that
 3 with the Police Act in terms of my capacity and
 4 responsibilities to also assign certain delegated
 5 authorities to whatever, that's on the accounting side of
 6 function.
 7 MR MPOFU: Alright well okay then I'll
 8 accept that invitation and let's therefore go to Section 15
 9 of the Police Act as you are inviting me to do. Are you
 10 there? Okay the first section, I won't read it. It deals
 11 roughly with the delegation but the important words are the
 12 last few words there which says that "you can delegate to a
 13 body or another person who or which shall exercise such
 14 power subject to the direction of the commissioner
 15 concerned." In other words whether it was delegated by you
 16 or the Provincial Commissioner. Do you accept that as a
 17 statement of The Affairs?
 18 GENERAL PHIYEGA: Mm.
 19 MR MPOFU: Right and then the next
 20 section is - sub-section is the important one. Sub-section
 21 two. It says "the delegation of any power by the National
 22 or Provincial Commissioner under Sub-section One may be
 23 withdrawn by such a commissioner and any decision taken by
 24 anyone under such delegated power may be withdrawn or
 25 amended by such commissioner and shall until it is so

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1 withdrawn or amended be deemed to have been taken by the
 2 National or Provincial Commissioner concerned." And the
 3 implication of that is whether you accept therefore that at
 4 least in the eyes of the law if a decision resides with you
 5 and you have delegated it to somebody until such time that
 6 you have withdrawn it, it would be deemed to have been
 7 performed by you.
 8 GENERAL PHIYEGA: I do not have a choice,
 9 it's written like that.
 10 MR MPOFU: Yes and that you may or not
 11 know this once again, you'll forgive me if I use legal
 12 terms but these are also every day terms but that it is in
 13 that context prohibited to pass the buck on the one hand or
 14 to abdicate the powers, statutory powers confirmed on
 15 oneself.
 16 GENERAL PHIYEGA: I'm not sure what you
 17 are talking about because the correct concept we use here
 18 in my understanding would be delegation. Passing the buck
 19 and doing whatever I can't quite contextualise what you're
 20 referring to.
 21 MR MPOFU: Okay as I say those are legal
 22 terms, which we'll argue at the end but effectively what it
 23 means is passing the buck refers to a situation where an
 24 official or statutory body that is given particular power
 25 sort of refers it in total to another official or statutory

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1 body. That's the one example and abdication refers to the
 2 situation where that statutory body or person simply does
 3 not perform that duty like giving a license of something
 4 like that.
 5 GENERAL PHIYEGA: And this is why I'm
 6 saying for me a consumable concept would be delegation
 7 because it doesn't talk any of those abdications or
 8 whatever because I haven't met that in the prescripts of
 9 how I should do my job.
 10 MR MPOFU: Alright I'll give you an
 11 example. Do you accept that this was a national operation
 12 that we're discussing here?
 13 GENERAL PHIYEGA: It was a provincial
 14 operation.
 15 MR MPOFU: Okay do you accept that you as
 16 National Commissioner, or rather that the only two people
 17 who may deploy the National Public Order Police is you or
 18 the President?
 19 GENERAL PHIYEGA: And the Provincial
 20 Commissioner in the province.
 21 MR MPOFU: No, I'm talking about the
 22 deployment. The Provincial Commissioner has what is called
 23 "Operational Command" of POP in a particular province but
 24 the deployment, in terms of Section 17 of the Act, your
 25 function.

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1 GENERAL PHIYEGA: I think it is important
 2 to read this with also how it is interpreted in prescripts.
 3 If you to 262 it does start talking about how we deal with
 4 that type of issue in the province. Now I think I'm just
 5 saying I want to bring more clarity to this whole matter.
 6 Yes, the Act says that but in the province the Provincial
 7 Commissioner can say these POP members that are in North
 8 West I want to see them in Taung because there is something
 9 happening in Taung, they can do that.
 10 MR MPOFU: Look let's try and cut this
 11 short. Section 218 1K of the Constitution says that
 12 "subject to directions of the Minister of Safety and
 13 Security the National Commissioner shall be responsible
 14 for," and then it lists a whole lot of things. K. "And
 15 the establishment and maintenance of a national POP, a
 16 National Public Order policing unit to be deployed in
 17 support of and at the request of a Provincial Commissioner.
 18 Are we together so far? Okay, are we still together,
 19 General?
 20 GENERAL PHIYEGA: Yes, let's continue.
 21 MR MPOFU: And then Section 17.2 of the
 22 Act, of the Police Act which obviously derives from that,
 23 actually it starts by a direct reference to what I've just
 24 read and then it says "the National Commissioner may deploy
 25 the National Public Order policing unit or any part thereof

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1 at the request and in support of a Provincial Commissioner
 2 taking into account the reason for the request, the
 3 personnel, equipment and so on. And sorry, what I'm
 4 getting at really, what I'm getting at is that's how - I
 5 just wanted to give you an example of the power, you are
 6 not able, you cannot delegate that particular power to a
 7 Provincial Commissioner. Do you understand that?
 8 GENERAL PHIYEGA: I will tell you how we
 9 work -
 10 MR MPOFU: No.
 11 GENERAL PHIYEGA: Because it's important
 12 for you to understand it. We have a mixed approach,
 13 whether it's centralised and whether it's decentralised POP
 14 management approach. I'm overall responsible but I cannot
 15 hold hand of Provincial Commissioners to be able to deal
 16 with the Taungs, with the Marikanas and all those. On a
 17 first response basis a Provincial Commissioner must have
 18 the capacity to do so otherwise I would be failing the
 19 citizens of this country and this is why delegation is
 20 important in particular areas including even how you deploy
 21 your POP responses. In the province the provincial have
 22 people that are delegated to their provinces who they can
 23 deploy to Taung, to Marikana, to wherever and I can recall
 24 them at any time, nationally, all of them.
 25 MR MPOFU: Yes, I'm sorry I think we're

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1 talking at cross purposes. All I'm saying just, in fact
 2 the last part of your answer assists me. Just as much as
 3 you can recall all of them nationally at least
 4 theoretically, you may not have been there yourself, but
 5 that the deployment is done by the National Commissioner,
 6 whether it's you or somebody else but the deployment in
 7 terms of the act, of the national POP is a functionality of
 8 the National Commissioner. Do you accept that?
 9 GENERAL PHIYEGA: Yes, and let's
 10 continue.
 11 [14:22] MR MPOFU: And the only point I was
 12 really making is this, that since this section says that
 13 you do that deployment at the request of a Provincial
 14 Commissioner who must satisfy certain criteria. That must
 15 be exercised by you because you can't very well delegate,
 16 the Provincial Commissioner will have to satisfy you to
 17 satisfy herself or himself. Do you understand that?
 18 GENERAL PHIYEGA: I think, Advocate, when
 19 I was saying this continues, to say nationally when I have
 20 deployed to Gauteng, to Mpumalanga, to wherever, I delegate
 21 them the responsibility on the first line of response to be
 22 able to - I can't come and say Zukiswa, deploy to Taung and
 23 to Rustenburg. All I was saying to you is that nationally
 24 I have the overall responsibility. In terms of delegation,
 25 I deploy to the provinces.

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1 MR MPOFU: Yes.

2 GENERAL PHIYEGA: They have the powers to

3 deploy further. If we could just agree on that line and

4 continue –

5 MR MPOFU: Ja.

6 GENERAL PHIYEGA: - of how deployment

7 works within the delegation process, then we would be on

8 the same page.

9 MR MPOFU: Ja, I totally agree.

10 CHAIRPERSON: I think Mr Mpfu is

11 interested in inter-provincial deployments. Is that

12 correct? So obviously you'd delegate certain powers

13 relating to the North West province to the North West

14 Provincial Commissioner, but insofar as she wants help from

15 outside the North West province, in terms of the section

16 she's got to request it. Now the section seems to indicate

17 it must be, she must request it from you.

18 GENERAL PHIYEGA: Yes.

19 CHAIRPERSON: Now if you say you

20 delegated your functions under that section to somebody

21 else, the question is to whom did you delegate it. Mr

22 Mpfu says you couldn't have delegated to the North West

23 Provincial Commissioner because then she'd be requested

24 from herself, which doesn't make sense. Now insofar as

25 there's inter-provincial deployment, are you saying that

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1 you delegated say to the Gauteng Provincial Commissioner

2 the power to send POP people from Gauteng to North West at

3 the request of the North West Provincial Commissioner, or

4 what are you saying?

5 GENERAL PHIYEGA: Okay, my last response,

6 and, is to say nationally I'm responsible, I can recall

7 anybody, all of them all at once to come national. I have

8 mentioned the first line of response which has got to be

9 managed by the Provincial Commissioners within the

10 environments, and within that I delegate the responsibility

11 to say when it comes to your first line of response in your

12 own province, you have the responsibility to do so, and you

13 do not have to come back to me. But if you want to

14 "massify," have a force multiplier and "massify" and cross

15 the provinces, the mandate comes back to me and this is why

16 you would recall in my testimony to say part of what I have

17 done, one of the record that you are having is that on the

18 15th I spoke to the other commissioners and asked them to

19 assist with capacity, because capacity, if her capacity is

20 insufficient she must talk to me to say "I have

21 insufficient capacity; assist me."

22 CHAIRPERSON: Does that clarify the point

23 you're seeking to make, Mr Mpfu?

24 MR MPOFU: Yes, Chairperson. It's okay.

25 General, just so that you don't think we misunderstand each

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1 other, I accept that once what I have called the original

2 deployment is done to a province, then that, the Provincial

3 Commissioner of that place, whether 20 of them will go to

4 Taung and so on, that is their functionality. What I was

5 talking about is the original deployment, is your national

6 function in terms of section 17.

7 GENERAL PHIYEGA: I thought we had agreed

8 on that one.

9 MR MPOFU: Ja. Alright, and then the

10 other, the only other way in which what I'd call the

11 original deployment at a national level can be done, is in

12 terms of section 17(5) which says, "The President may, in

13 consultation with the Cabinet, direct the National

14 Commissioner to deploy the National Public Order Policing

15 unit in circumstances where a Provincial Commissioner is

16 unable to maintain public order and the deployment of the

17 unit is necessary to restore public order." You accept

18 that that's the only other way in which the national

19 deployment of POP can be done?

20 GENERAL PHIYEGA: I note that.

21 MR MPOFU: Thank you. Now I'm assuming

22 that in this case the section 17(5) was not used, so it was

23 the other one where you, the deployment came from you

24 originally. Let's put it that way.

25 GENERAL PHIYEGA: You are correct.

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1 MR MPOFU: Ja, you see, what I'm busy

2 with now, Commissioner, is trying to understand what I

3 would call the accountability matrix of the major role-

4 players. We've agreed so far that at the top it's the

5 President who may do certain things, even operationally,

6 such as deploying units, but the President obviously has

7 another role as the Head of State. So when he appoints

8 you, he's not appointing you in terms of this act. It's

9 just because he's the President of the country. You accept

10 that? And just before you answer that, the section of the

11 Constitution that determines your appointment says, is in

12 so many words, it says, "The President as Head of State may

13 appoint a woman or a man as National Commissioner," blah-

14 blah-blah.

15 GENERAL PHIYEGA: Yes, I follow.

16 MR MPOFU: Right, so that's the

17 President. Then the Minister is, as you have explained

18 earlier to my learned friend Mr Madlanga, responsible for

19 the political direction of the department. In fact the

20 Constitution also uses exactly those words. The political

21 direction might be not the exact word, but the Constitution

22 specifies in the four sections that deal with the police,

23 of the Constitution.

24 GENERAL PHIYEGA: Including policy, I

25 presume you are encapsulating that.

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1 MR MPOFU: Ja, it's – I was just looking
 2 for the heading and it says "Political responsibility,"
 3 which, yes it does include policy-making, and it says that
 4 that person may determine national policing policy.
 5 GENERAL PHIYEGA: Yes.
 6 MR MPOFU: And so on. But you are not
 7 completely out of the policy-making matrix yourself because
 8 in terms of section 25 of the Police Service Act it says,
 9 "The National Commissioner may issue national orders and
 10 instructions regarding all matters," and so on, and so on,
 11 so which generally speaking is part of policy, isn't it?
 12 MR SEMENYA SC: No, it's not.
 13 GENERAL PHIYEGA: It's a consumption of
 14 policy.
 15 MR SEMENYA SC: Objection; it's not.
 16 MR MPOFU: Can the witness answer for
 17 herself?
 18 MR SEMENYA SC: No, my learned colleague
 19 can't put that incorrect proposition of law –
 20 CHAIRPERSON: Mr Semenya, you have an
 21 objection. What is your objection?
 22 MR SEMENYA SC: That it is an incorrect
 23 supposition of –
 24 MR MPOFU: It's not an objection, he
 25 answered.

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1 CHAIRPERSON: You see, if you're putting
 2 a proposition of law to the witness and Mr Semenya wishes
 3 to submit that the proposition of law is incorrect, then he
 4 can object because you can't put things to the witness if
 5 they're incorrect –
 6 MR MPOFU: Of course.
 7 CHAIRPERSON: And he wants to argue that,
 8 so let's let him argue it first and then if he's right
 9 we'll uphold him, and if he isn't, we won't. But –
 10 MR MPOFU: Okay, Chairperson, maybe I can
 11 shorten it by putting it like this. Firstly it's not a
 12 proposition of law; secondly it's not an objection, he just
 13 answered the question.
 14 CHAIRPERSON: Well, I doubt if he'll be
 15 guilty of that, but put the question again in a form that
 16 doesn't involve a proposition of law and we can perhaps
 17 proceed.
 18 MR MPOFU: Let me put it – I'll take one
 19 step back, General. Remember before lunch we agreed that
 20 what I termed the regulatory framework that governs your
 21 work includes three things, the Constitution, legislation,
 22 and national orders. Remember that?
 23 GENERAL PHIYEGA: I remember that.
 24 MR MPOFU: And you agreed with me.
 25 GENERAL PHIYEGA: I noted.

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1 MR MPOFU: No, General, please, do you
 2 agree or don't you agree? Or do you agree?
 3 GENERAL PHIYEGA: It is important for me
 4 to walk with you based on the questions. You've put a
 5 proposition forward. I've said I've noted it and you're
 6 going to use that. You're saying that is the basis you're
 7 laying and you are coming to ask me questions on the basis
 8 of that, and I'm noting it.
 9 MR MPOFU: No, I'm sorry.
 10 GENERAL PHIYEGA: The three pillars.
 11 MR MPOFU: Yes, you remember that. No,
 12 all I'm doing, General, I just don't want to move forward
 13 thinking we are walking together, as you put it, if we are
 14 not. The question is did you agree with me before lunch
 15 that the regulatory framework is constituted of three
 16 things, the Constitution, legislation, and the national
 17 orders, or not? [Inaudible]
 18 GENERAL PHIYEGA: Advocate, I will again
 19 say I note, and it is particularly because now you are
 20 saying I make policy. I consume policy. I don't make
 21 policy. I consume policy and I make regulations and SOPs
 22 and instructions and directives and guidelines, based on
 23 the policy that I consume.
 24 MR MPOFU: Alright, look, I don't want to
 25 debate semantics with you. Do you accept that the function

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1 of issuing national orders and instructions regarding all
 2 matters which fall within your responsibility in terms of
 3 the act and the Constitution, is your job?
 4 GENERAL PHIYEGA: Yes, as we do policy.
 5 MR MPOFU: And in that "we" you're
 6 including yourself?
 7 GENERAL PHIYEGA: "We" would include me.
 8 MR MPOFU: Thank you. Now – okay, sorry,
 9 we were just moving with the, what I call the
 10 accountability matrix. We've dealt with the President,
 11 with Minister. We're dealing with yourself, and then of
 12 course underneath you, immediately underneath you are the
 13 Provincial Commissioners.
 14 GENERAL PHIYEGA: Yes, and the Deputy
 15 National Commissioners and the Divisional Commissioners,
 16 they fall on the same line.
 17 MR MPOFU: And the law provides that
 18 those people in that line that you've just defined, should
 19 be appointed by you yourself.
 20 GENERAL PHIYEGA: You are correct.
 21 MR MPOFU: And the reason for that must
 22 be that if something goes wrong, you can't say well you
 23 know, I don't know what this Provincial Commissioner was
 24 doing, and all that, because those people are answerable to
 25 you because they are appointed by you. You have the right

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1 basically to hire and fire them.
 2 GENERAL PHIYEGA: I agree.
 3 MR MPOFU: Okay, and all of you for
 4 certain purposes are answerable to the Minister.
 5 GENERAL PHIYEGA: Yes, we are.
 6 MR MPOFU: Right, and then just for the
 7 sake of completion - and I'm now almost confining it to the
 8 issue that we are discussing here - after the Provincial
 9 Commissioner, the next important person would be the CJOC,
 10 correct? The overall commander.
 11 GENERAL PHIYEGA: There are Deputy
 12 Provincial Commissioners and there are Heads of Functions.
 13 MR MPOFU: Ja, no sorry, that's why I
 14 qualified the question by saying I'm now not asking in
 15 general, I'm just asking in relation to this particular
 16 operation, that after the Provincial Commissioner the next
 17 senior person in terms of the line of accountability would
 18 be the CJOC, correct?
 19 GENERAL PHIYEGA: I am saying in the same
 20 manner that you mentioned our structure, myself, it's the
 21 Provincial Commissioners, it's the Deputy National
 22 Commissioners, and the Divisional Commissioners. In the
 23 province it's the Deputy, it's the Provincial Commissioner
 24 and the Deputy Provincial Commissioners who are as exactly
 25 the - it's important, Dali, for you to understand the

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1 structure. You can't just say CJOC. So CJOC may be
 2 linked, there could be a CJOC that is operating in Taung,
 3 another one in Mafikeng, another one in whatever. There
 4 could be that type of thing because -
 5 MR MPOFU: Okay, okay -
 6 GENERAL PHIYEGA: - commander-in-charge
 7 at a particular operation.
 8 MR MPOFU: I accept that.
 9 GENERAL PHIYEGA: So let's not confuse
 10 those things.
 11 MR MPOFU: Okay, I accept that. Okay, I
 12 think maybe I didn't ask the question clearly. I accept
 13 that -
 14 GENERAL PHIYEGA: Maybe can I just say
 15 something -
 16 MR MPOFU: Sorry -
 17 GENERAL PHIYEGA: Can I just say
 18 something -
 19 MR MPOFU: No, sorry -
 20 GENERAL PHIYEGA: - so that we go to the
 21 definition of the CJOC.
 22 MR MPOFU: I just wanted to move on.
 23 It's not that important. All I'm saying is this, that I
 24 accept what you're saying in terms of the structure that is
 25 there on the board at the police headquarters, but I'm

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1 talking to you about an operation by operation, in a
 2 particular operation.
 3 GENERAL PHIYEGA: Okay.
 4 MR MPOFU: There's obviously nobody
 5 called the CJOC who's just there for life. The CJOC is in
 6 relation to a particular operation.
 7 GENERAL PHIYEGA: Then we talk -
 8 MR MPOFU: All I'm asking you is in a
 9 particular operation, would the line of command as we have
 10 traced it then fall in relation to that operation to the
 11 CJOC where there is a JOC?
 12 GENERAL PHIYEGA: Yes, thank you for that
 13 clarity. Yes, when we start talking about an operation,
 14 that operation would, she would appoint the person who's in
 15 charge of the operation and that person would report to
 16 her.
 17 MR MPOFU: Thank you, and the next level
 18 would be the operational commander, correct?
 19 GENERAL PHIYEGA: Mm.
 20 MR MPOFU: To assist you, in this case it
 21 was Calitz, Brigadier Calitz.
 22 GENERAL PHIYEGA: Yes.
 23 MR MPOFU: Okay, thank you. That's all.
 24 I just wanted to understand the hierarchy. Now some of
 25 those people that we have mentioned are going to testify.

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1 I'm doing this so that I don't put questions to you which
 2 maybe belong to the other parts of the chain. Do you know
 3 whether or not the Minister is going to testify?
 4 GENERAL PHIYEGA: I have no clue what
 5 witnesses have been invited here.
 6 [14:42] MR MPOFU: Okay, that I accept but
 7 whether or not witnesses have been invited or not invited
 8 or not invited, this is somebody that you work with on a
 9 daily basis, do you know whether or not he is planning to
 10 come and testify?
 11 GENERAL PHIYEGA: No, I don't know.
 12 MR MPOFU: Okay, then you'll forgive me
 13 if I might put some questions in the off chance that he
 14 never comes here.
 15 CHAIRPERSON: Well, counsel did say when
 16 I asked her sometime ago whether he would testify and she
 17 said, as I understood it, that if matters of policy arose,
 18 he would. So I assume that still stands, it hasn't been
 19 countermanded.
 20 MR MPOFU: Thank you, Chairperson. While
 21 we are still on the decision making matrix, did you - well
 22 we know that you attended Potchefstroom once, correct?
 23 GENERAL PHIYEGA: You're correct.
 24 MR MPOFU: And the document there shows
 25 the product of Potchefstroom which is Exhibit L, did you

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1 approve it?

2 GENERAL PHIYEGA: It was prepared and I

3 agree with it.

4 MR MPOFU: Ja, no, that's a different

5 thing, that means you approved of it, when you say I agree

6 with it. Did you approve it? Did you give your approval?

7 GENERAL PHIYEGA: I do approve of it,

8 because whatever comes here is what we as police say here

9 is our –

10 CHAIRPERSON: There may be a distinction.

11 If you say – if I say I approve of something, means I've

12 heard about it and I agree with it. If I say I approved

13 it, that means normally it came before me before it was put

14 into operation and I approved it in the sense that I signed

15 it and said it can go forward. So there's a difference

16 between approving of something which is normally

17 retrospective, although not always retrospective, and

18 approving something which is normally prospective, in the

19 normal sense. Is that the distinction you're trying to put

20 to –

21 MR MPOFU: Exactly, Chair, except just to

22 say that in the second example that the Chair gave, you

23 don't necessarily have to sign it off, you might have

24 signed it or you may not.

25 GENERAL PHIYEGA: And perhaps this is why

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1 I was answering the way I was, because there's nowhere that

2 I signed, but I am fully behind, in agreement with the

3 document that we submitted to the Commission as our

4 productive policy.

5 MR MPOFU: Was it presented to you for

6 your approval before it was presented to the Commission?

7 Maybe I should put it that way?

8 GENERAL PHIYEGA: Yes.

9 MR MPOFU: Thank you. And is that the

10 same with the opening statement that was given on behalf of

11 SAPS?

12 GENERAL PHIYEGA: Yes.

13 MR MPOFU: And obviously your own

14 statements that have been debated here, you approved them

15 and signed them – and even signed them?

16 GENERAL PHIYEGA: I said it is my

17 statement, yes.

18 MR MPOFU: Right. And the other – the

19 statements that you read on the 17th, you've also attested

20 to its Genesis as to how it came about. The real question

21 I want to ask you is this document, this set of documents

22 which you either approved or prepared or whatever, you have

23 testified in relation to the statement of the 17th that you

24 stand by that statement. Do you also stand by all the

25 other documents?

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1 GENERAL PHIYEGA: Advocate Mpfu, the

2 documents that have been submitted here on behalf of SAPS

3 as our evidence, whether it's L, whether it's the opening

4 statement and all those, those are the official documents

5 that we stand by. It is our official submissions to this

6 Commission.

7 MR MPOFU: And once again I'll assume

8 that plural, which I didn't actually include you, yourself.

9 CHAIRPERSON: The first person plural,

10 not the second or third person plural?

11 MR MPOFU: The real we, yes.

12 GENERAL PHIYEGA: Perhaps let me just

13 say, when we say we, when you started, we said do you know

14 each other, I said I'm here leading the police, I am part

15 of the police.

16 MR MPOFU: Yes, no, but just so that we

17 don't run into that problem again. There will be questions

18 which I ask you where I'll expect you to answer for

19 yourself, as it were, but if it arises I'll clear up the

20 distinction.

21 GENERAL PHIYEGA: I'll appreciate that.

22 MR MPOFU: The operation at Marikana has

23 been described variously by all the colleagues that have

24 gone before me, catastrophic and so on. My only addition

25 that I'd like to ask from you is whether you agree that

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1 post apartheid, this was the biggest and most significant

2 operation that the police have embarked on?

3 GENERAL PHIYEGA: It is true, because I

4 have said in the 18 years of the South African Police

5 Service this is unprecedented.

6 MR MPOFU: Yes, and to your knowledge,

7 with that qualification, they can't have been many at

8 least, operations which – the decision making in relation

9 of which involved almost all the people that I've mentioned

10 in the decision-making matrix in one way or another. The

11 President, the Minister, you, Provincial Commissioner and

12 so on, agreed?

13 GENERAL PHIYEGA: I don't get your

14 question because for instance if I say we have dealt with

15 something like a 150 plus, this thing – type of protests,

16 how should one understand your question?

17 MR MPOFU: No, you've already answered my

18 question by saying that it is true that the biggest and

19 most significant. All I was asking you now –

20 CHAIRPERSON: Sorry, according to Exhibit

21 L, at one point there were over 600 members of the Police

22 Service deployed to Marikana to deal with the situation.

23 Now I take it there's never been another operation in the

24 last 18 years where as many as a public order –

25 MR MPOFU: The number is actually 800,

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1 Chair.

2 CHAIRPERSON: 800. Where as many as that

3 have been deployed in the Public Order Policing Operation

4 in the 18 years. Would that be correct?

5 GENERAL PHIYEGA: Judge, there could have

6 been and I'd like to go to our records to grow and check

7 that, because really the outcome is something else.

8 CHAIRPERSON: Yes, I understand.

9 GENERAL PHIYEGA: But the operation we

10 have dealt – in this 150, if you start analyzing that, we

11 have dealt with many other large operations. The outcome

12 is different. So and I think we shouldn't use the outcome

13 as an indicator, we must say what type of operations have

14 we dealt with and then we can analyse the 150 000 plus, to

15 say are the areas where we've pulled 600, 8 000, a 100, and

16 all that, so I think we are outcome anchored.

17 MR MPOFU: Yes.

18 GENERAL PHIYEGA: That's why I would not

19 agree with that -

20 MR MPOFU: Yes, no, I won't belabour the

21 point, General. That's why I qualified it by saying to

22 your knowledge, because you could answer to what you know

23 now. I mean if you're going to go and check that's another

24 matter. All I was saying is, to your knowledge, has there

25 been any in the 18 years another operation which involved

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1 more than 800 police officials, which also in its

2 constitution involved all the decision makers, the

3 president somehow, the minister somehow, not yourself, the

4 national commissioner and the provincial commissioner, of

5 that significance?

6 CHAIRPERSON: Mr Semenya wants to say

7 something. Mr Semenya?

8 MR SEMENYA SC: Chair, there is no

9 evidence of a decision taken by the president in relation

10 to the operation. There is no evidence of the minister

11 taking any decision in relation to the operation. So the

12 proposition my learned colleague is putting to the witness

13 is incorrect and cannot be put.

14 CHAIRPERSON: What do you say about that,

15 Mr Mpofu?

16 MR MPOFU: Chairperson, I will produce

17 the evidence, but for now let me just say this –

18 CHAIRPERSON: Mr Semenya is entitled to

19 say that in the absence of evidence to that effect, I

20 shouldn't allow you to put the question. I understand you

21 tell me you've got the evidence, and perhaps at some stage,

22 but I think Mr Semenya won't be pleased if allow you to ask

23 the question in anticipation on the basis that you may have

24 some evidence later that will justify it.

25 MR MPOFU: He may be pleased if remind

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1 you and him, Chairperson, which I'm proposing to do now.

2 CHAIRPERSON: Okay, well remind us of

3 something first, then maybe we can consider whether the

4 questions are appropriate. We, and I.

5 MR MPOFU: Chairperson, there is evidence

6 – I'm just looking for the Exhibit number in the so-called

7 Ramaphosa emails that suggests two things and I'll

8 reformulate the question to say if that evidence is

9 correct, but just at the concrete level, let me put the

10 following two propositions.

11 GENERAL PILLAY: It's BBB4.

12 MR MPOFU: Yes.

13 GENERAL PILLAY: No, no, I'm sorry,

14 that's the Lonmin email.

15 MR MPOFU: Chairperson, if that doesn't

16 satisfy Mr Semenya, then I'll deal with it after tea.

17 MR SEMENYA SC: No, it doesn't.

18 MR MPOFU: Okay.

19 CHAIRPERSON: Well, he wants to have his

20 tea first, before you deal with the point. So you better

21 deal with something else before 3 o'clock.

22 MR MPOFU: Okay, Chairperson, but just so

23 that we are on the same page, the one basis for relying on

24 – at least as far as the minister is concerned, is that in

25 at least one of statements –

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1 CHAIRPERSON: May I interrupt you, there

2 was of course, the evidence Mr Sekoana, that on the Sunday

3 he spoke to – it was direct evidence, he spoke the

4 minister, told the minister there was a law and order

5 problem and not just a wage dispute problem –

6 MR MPOFU: And he promised.

7 CHAIRPERSON: That apparently the

8 security forces, if that's the right word, security staff

9 of Lonmin were inadequate to deal with the situation and

10 said that reinforcements were required from the SAPS and

11 the minister undertook to look at the matter and do the

12 necessary, as far as I remember the evidence. So there is

13 that evidence. That is of course doesn't mean the minister

14 took a decision of course, merely made a promise

15 apparently, if that evidence is correct. And it wasn't

16 challenged by counsel, you remember, for the minister.

17 MR MPOFU: Yes –

18 CHAIRPERSON: And then, but of course you

19 haven't got any evidence about a decision by the president,

20 which that another part of point that you're putting?

21 MR MPOFU: No, that's why I'm taking it

22 bit by bit. I'm saying as far as the minister is

23 concerned, that's part of the answer. Another part of the

24 answer –

25 CHAIRPERSON: It's not a decision, that's

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1 simply a promise, and we were told by this witness that the
 2 subsequent deployments that took place were not – there was
 3 no contact between her and the minister in regard thereto,
 4 as far as I remember the evidence.
 5 MR MPOFU: No, Chairperson, with the
 6 greatest of respect, the witness has said that among other
 7 things, she was given political direction or directions or
 8 whatever terminology she used by the minister on a regular
 9 basis.
 10 CHAIRPERSON: That's true. I see it's
 11 now 3 o'clock. Mr Semenya, it's now 3 o'clock. Go and
 12 have your tea. We all our tea and we'll resume this matter
 13 when – after the tea adjournment when hopefully you'll have
 14 all your ducks in a row, we're able to proceed speedily and
 15 expeditiously.
 16 [COMMISSION ADJOURNS COMMISSION RESUMES]
 17 [15:18] CHAIRPERSON: The Commission resumes.
 18 National Commissioner, you're still under oath.
 19 MANGWASHI VICTORIA PHIYEGA: s.u.o.
 20 CHAIRPERSON: Mr Mpofu, have you and Mr
 21 Semenya come right on the matter you were debating?
 22 MR MPOFU: We have indeed, Chairperson.
 23 CHAIRPERSON: I see we've been given
 24 copies of BBB4 –
 25 MR MPOFU: Yes, that is the answer –

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1 CHAIRPERSON: - that you've been dealing
 2 with earlier, so you want to go back to that now or do you
 3 want to carry on with the line you were busy with when we
 4 adjourned?
 5 MR MPOFU: No, that is part of the
 6 answer, Chairperson.
 7 CHAIRPERSON: Alright.
 8 MR MPOFU: I'm going to put the question
 9 on a particular basis. Chairperson, if I could invite you
 10 and the other Commissioners to go to –
 11 CHAIRPERSON: Before you carry on, I take
 12 it that the National Commissioner has got copies of exhibit
 13 BBB4?
 14 MR MPOFU: Yes, I think we've put a copy
 15 – we didn't. Have you got BBB4? Have you got? Is it yes?
 16 GENERAL PHIYEGA: No, I don't have.
 17 MR MPOFU: Sorry, National Commissioner.
 18 But in any event, while we are – can you turn to 289E?
 19 Thank you. Please forgive me, Commissioner. Have you got
 20 – or rather, General. You've got BBB4 in front of you?
 21 GENERAL PHIYEGA: Yes.
 22 CROSS-EXAMINATION BY MR MPOFU (CONTD.):
 23 Yes, can you turn – if you look at the pre-numbered pages,
 24 289E, which is like the second page from the back, are you
 25 there?

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1 GENERAL PHIYEGA: Yes, I am there.
 2 MR MPOFU: Okay, we have agreed with Mr
 3 Semenya that I'll put the section that I'm relying on and
 4 then pose the question on the basis of that. If you look
 5 at number 2 of that email, it says, "I have just had a
 6 discussion with Susan Shabangu in Cape Town," and then
 7 number 2 says, "She is going in to cabinet and will brief
 8 the President as well, and get the Minister of Police,
 9 Nathi Mthethwa, to act in a more pointed way." You see
 10 that part?
 11 GENERAL PHIYEGA: Yes, I do.
 12 MR MPOFU: Yes, and the only question
 13 then that I'm going to put is firstly to say assuming that
 14 what you've said there is correct, would you agree that the
 15 two persons mentioned there had some knowledge – assuming,
 16 or sorry, another assumption, assuming the "acting in a
 17 more pointed way" relates to the operation, would you agree
 18 that those two persons at least have knowledge of the
 19 operation, of the action?
 20 MR MOTAU SC: Chairperson, we wish to
 21 raise an objection. Our learned friend must lay a basis to
 22 indicate that the more pointed way is linked to the
 23 operation. Without that, Chairperson, we submit there's no
 24 basis.
 25 MR MPOFU: No, can I respond,

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1 Chairperson.
 2 CHAIRPERSON: Yes.
 3 MR MPOFU: Yes, thank you. No, I'm
 4 sorry, I'm sure my learned friend was not listening
 5 properly. That's why I used two assumptions before asking
 6 the question. I said assume that that is true, and (2),
 7 assume that the "more pointed way" related to the
 8 operation, so I can't lay any basis except to say assume.
 9 I think from the nodding of Mr Motau that objection is
 10 withdrawn. Can you please answer, General? There is a new
 11 one?
 12 CHAIRPERSON: There was one objection,
 13 and we now move to the next. Yes, Mr Semenya?
 14 MR SEMENYA SC: How can a witness be
 15 called to assume the meaning of an email is X, without any
 16 basis being put for it? "Pointed way" can't have a meaning
 17 other than that meaning which the writer had written. Mr
 18 Mpofu can't assume a meaning for it and then challenge the
 19 witness to comment on it.
 20 CHAIRPERSON: I don't know what "pointed
 21 way" means. I don't think it means pointing a gun. It
 22 could simply mean in a more focussed way or in a more
 23 direct way or something like that. So it's a bit vague –
 24 MR MPOFU: Vigorous.
 25 CHAIRPERSON: Or vigorous, yes. It's a

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1 bit vague, you know. If it means pointing a gun this
 2 didn't matter, but that's not – there's no basis for
 3 assuming it means that.
 4 MR MPOFU: Not, and that's not what I'm
 5 contending at all, Chairperson. All I'm saying is that you
 6 would act in a more pointed way would mean that they would
 7 act differently than they had acted before, in a more
 8 pointed way, and all I'm asking the witness to do is to
 9 assume that that pointed way included the operation, the
 10 good side of the operation, not all the problems. But it's
 11 some action, whatever it is.
 12 CHAIRPERSON: It's imperative, it's more
 13 pointed. So it's different from the way they're acting up
 14 to now, and it's presumably more satisfactory from the
 15 point of view of the writer of the letter –
 16 MR MPOFU: That's correct.
 17 CHAIRPERSON: - than the previous, so you
 18 can't put it higher than that, can you?
 19 MR MPOFU: That's right.
 20 CHAIRPERSON: Alright, we'll rephrase
 21 your question and let's see whether Mr Semenya is prepared
 22 to put his imprimatur on it.
 23 MR MPOFU: Yes. Okay, General, we know
 24 that this email was written on the 15th of August at about
 25 3PM, and we know that it's preceded by other emails where

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1 it was where Mr Ramaphosa had said that he was going to go
 2 and meet with Minister Shabangu in Cape Town regarding the
 3 Marikana issue, and this, the meeting had just happened
 4 according to the email and it says that –
 5 GENERAL CHABEDI: Chair –
 6 MR MPOFU: Sorry.
 7 GENERAL CHABEDI: May I just mention that
 8 the email on page 289 of the exhibit that's being referred
 9 to does not refer to a meeting.
 10 CHAIRPERSON: 289, there are actually
 11 five pages marked from A to F, so which page are you
 12 referring to?
 13 GENERAL CHABEDI: I'm referring to E,
 14 289E.
 15 CHAIRPERSON: So what do you say about
 16 that?
 17 MR MPOFU: No, Chair, I –
 18 CHAIRPERSON: Wait, let's hear –
 19 MR MPOFU: I can dispose of it.
 20 CHAIRPERSON: Well, I don't know what the
 21 objection is yet, so I can't deal with it until I know what
 22 it is. Please elaborate on your objection.
 23 GENERAL CHABEDI: While Mr Mpofo refers
 24 to a meeting, the email refers to a discussion and there's
 25 nothing to infer from that email that there was a meeting.

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1 A discussion could have taken place –
 2 CHAIRPERSON: Now it didn't have to be
 3 inter praesentes, but perhaps he can put the question in a
 4 way which doesn't presuppose that it was an inter
 5 praesentes discussion. I'm sure it doesn't matter if it
 6 was inter praesentes or in some other way. Anyway, carry
 7 on, Mr Mpofo, but try and avoid that objection because I
 8 don't want to have to dispose of it.
 9 MR MPOFU: Yes. The two persons, namely
 10 Mr Ramaphosa and Minister Shabangu, had just had a
 11 discussion. Ja, and she – she is the Minister – was going
 12 in to cabinet and would brief the President as well and get
 13 the Minister of Police, Nathi Mthethwa, to act in a more
 14 pointed way, and while we are there, the first part of the
 15 email relates to – okay, let me not get into that now.
 16 That's what comes from the email, and all I'm saying to you
 17 now is assume that that evidence will be confirmed to be
 18 true, but I said make a second assumption, which is that
 19 the "acting in a more pointed way" somehow related to the
 20 actions which were taken by the police, whether those
 21 actions were the entire operation or part of it, or
 22 whatever, but it was –
 23 CHAIRPERSON: No, I'm sorry, Mr Mpofo,
 24 that's the problem I have with the question. On the plain
 25 reading it seems to me the action in a more pointed way

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1 seems to be the action by the Minister, and one's got to
 2 read the sequence of emails in context. What happened
 3 apparently, as we've seen, was that Minister Shabangu was
 4 saying that what was happening in Marikana –
 5 MR MPOFU: Of the labour dispute.
 6 CHAIRPERSON: - was a labour dispute. In
 7 view of the fact that there had been a strike, not just a
 8 strike but a strike apparently enforced by intimidation,
 9 there had been murder and so forth, the Lonmin people took
 10 the attitude that it was a law and order matter, and Mr
 11 Ramaphosa was apparently requested to speak to Minister
 12 Shabangu about that, explain to her it wasn't just a labour
 13 dispute, it was a law and order matter, which he apparently
 14 did.
 15 MR MPOFU: No –
 16 CHAIRPERSON: Listen –
 17 MR MPOFU: No, that's wrong, Chairperson.
 18 Sorry. That's the same subject which I was avoiding
 19 deliberately, but let's not put it - the issue was to say
 20 it is not a labour dispute, not just a labour dispute. I
 21 said that –
 22 CHAIRPERSON: Oh, okay, not a labour
 23 dispute, okay. But then the further point is that Mr
 24 Ramaphosa does say in one of the emails, the one in fact at
 25 page 289F, that he also spoke to the Minister of Safety &

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1 Security, which I take it is a reference to the Minister of
 2 Police, Mr Mthethwa. So what these emails indicate is that
 3 Mr Ramaphosa spoke to Minister Shabangu, who undertook
 4 according to Mr Ramaphosa to speak to the Minister Mthethwa
 5 to get him to act in a more pointed way, but he'd also
 6 spoken to Minister Mthethwa as well and had said to him, as
 7 he put it, "We are essentially dealing with a criminal
 8 act." That's the background.
 9 MR MPOFU: Yes.
 10 CHAIRPERSON: Okay, now if we're agreed
 11 on that you can proceed to ask a question which is –
 12 MR MPOFU: Which deals with all these
 13 points of objection. Thank you, Chairperson. Right, and
 14 all I'm putting to you, General, is that the two persons
 15 that the Minister of Minerals was referring to, what she
 16 was going to discuss with them was the Marikana issue.
 17 That's what comes out of what the Chair and myself have
 18 said. So if we assume that that is so, then, and that the
 19 action involved whatever it is that you and him were
 20 discussing, what you called "political direction," and what
 21 he discussed with Mr Zokwana, which is about the deployment
 22 of numbers in Marikana - are we still together so far?
 23 When I say assume, you see I'm saying it might well be that
 24 next month or whenever it is, one of these people come here
 25 and says these emails are not, they were just manufactured

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1 by somebody. So let's rule all that on the side and assume
 2 that it is so. That's all I'm saying.
 3 GENERAL PHIYEGA: I'll wait for you to
 4 finish.
 5 MR MPOFU: Yes, now the real question was
 6 this, that it would have been to your knowledge the first
 7 time that there is an operation of such a magnitude that,
 8 as the Chair said, it had more than 800 police officials
 9 and in some way or another involved the decision makers in
 10 the decision matrix that I had mentioned to you, who are
 11 mentioned in this correspondence, to your knowledge.
 12 CHAIRPERSON: Mr Semenya wants to say
 13 something.
 14 MR SEMENYA SC: Chair, Mr Mpofo is not
 15 resolving our difficulties. There's no decision maker in
 16 relation to the operation at Marikana evidenced by any of
 17 these documents pointing to the President.
 18 MR MPOFU: No, I didn't mention the word
 19 "decision" deliberately because Mr Semenya before tea - I
 20 thought the tea would have helped – had objected to it
 21 correctly. That's why I have not mentioned the word
 22 "decision" in the question.
 23 MR SEMENYA SC: You said "In this
 24 decision matrix."
 25 MR MPOFU: No, okay. No, when I said the

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1 – okay, in the hierarchy that I had outlined to you
 2 earlier, that's really all I'm talking about. To your
 3 knowledge there was never such a significant operation,
 4 correct?
 5 GENERAL PHIYEGA: Not correct.
 6 MR MPOFU: Okay, when was the other
 7 operation?
 8 GENERAL PHIYEGA: I've indicated already
 9 that if you take that 150 000 and break it down, we have
 10 deployed many, many, you know, officers, and I can just
 11 point to one. We've dealt with the World Cup. We've dealt
 12 with many, many protests that were well over 3000 people,
 13 the marches of E-toll and all those type of things. So the
 14 magnitude and numbers debate you are putting forward, I am
 15 saying it is not true.
 16 MR MPOFU: Okay.
 17 GENERAL PHIYEGA: Outcome is a very
 18 different thing, but the magnitude and the numbers that we
 19 deploy, there are well, many other areas that we've dealt
 20 with where we have deployed quite large –
 21 MR MPOFU: Okay. Okay, so whenever you
 22 say in your statement that this operation was
 23 unprecedented, should we assume that you only main only in
 24 relation to outcome?
 25 GENERAL PHIYEGA: You are correct. We've

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1 never had such an outcome.
 2 MR MPOFU: Good. Thank you.
 3 CHAIRPERSON: Mr Mpofo, can I ask a
 4 question?
 5 MR MPOFU: Yes.
 6 CHAIRPERSON: We're dealing with the
 7 question of the respects in which this operations was
 8 unprecedented, and I understand you to say that certainly
 9 one respect was the number of fatalities, there had never
 10 been anything like that for the last 18 years.
 11 GENERAL PHIYEGA: Exactly.
 12 CHAIRPERSON: The next question was the
 13 number of police involved and you say no, no, that's not a
 14 factor because we've had other instances, E-toll protests
 15 and that kind of thing, where we've had significantly more
 16 than 800 police around to deal with the situation.
 17 GENERAL PHIYEGA: Yes.
 18 CHAIRPERSON: On this particular occasion
 19 we didn't just have a large number of police; we also had
 20 police from the Special Task Force being brought in, the
 21 National Intervention Unit being brought in, and the
 22 Tactical Response Team. Now had you ever to your knowledge
 23 had a case before where there was a Public Order Policing
 24 operation involving not just a large number of members of
 25 the service, but the Special Task Force being specially

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1 sent in, the National Intervention Unit being specially
 2 sent in, and the Tactical Response Team being specially
 3 sent in? Or was this an unprecedented operation also in
 4 that respect?
 5 GENERAL PHIYEGA: Yes, there are, and
 6 I'll give you an example. The World Cup, for instance, we
 7 had snipers on the roofs. You had NIU, you had TRT, you
 8 had Task Force. Even if it was classified as a middle,
 9 almost peaceful event, so it, we deploy for situational
 10 circumstances. So we do have that.
 11 MR MPOFU: Okay, last attempt –
 12 CHAIRPERSON: Sorry, may I ask you
 13 another question flowing from that? In the Standing Order
 14 there's reference to threat assessments and you then have
 15 three levels, level 1, level 2, level 3. Do I understand
 16 you correctly that in the case of these World Cup events,
 17 though you had all these people present, the events were
 18 classified as level 2?
 19 [15:38] GENERAL PHIYEGA: I wouldn't be, you know
 20 because anything can happen, if a bomb happens there -
 21 CHAIRPERSON: You know that but -
 22 GENERAL PHIYEGA: You have to go to a
 23 high level.
 24 CHAIRPERSON: Yes I understand but you
 25 see the standing order says that you have to have a threat

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1 assessment.
 2 GENERAL PHIYEGA: Yes.
 3 CHAIRPERSON: And then obviously the
 4 level has to be determined, so that has to be assessed.
 5 GENERAL PHIYEGA: Okay.
 6 CHAIRPERSON: So this case do we know
 7 what level was assessed? I take it was 3, Marikana?
 8 GENERAL PHIYEGA: Yes.
 9 CHAIRPERSON: Right. So the question
 10 then and this is the last question I am going to ask you on
 11 this point, try to find out the respects in which it was
 12 unprecedented. Now was this unprecedented in the sense
 13 that all those bodies that I've mentioned were present that
 14 intervention unit, tactical response team, special task
 15 force they were present and it was a level, it was an event
 16 which was assessed as being level 3? Was it unprecedented
 17 also in that respect that those factors were present?
 18 GENERAL PHIYEGA: I'd like to just, in
 19 responding, Judge, to go to, I think it was slide 12 that
 20 we spoke about how this thing started and how it ended,
 21 it's a very different, there had been a progressive
 22 development in this whole and the threat assessment goes
 23 with the development and grows of this situation. When we
 24 come to the 16th a lot of property has been damaged and the
 25 resistance, the violence of the group when you look at the

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1 13th you look at those, so all those threat issues are taken
 2 into account when you start planning for an intervention.
 3 CHAIRPERSON: Those factors are taken to
 4 account, the assessment is done and I understand the
 5 assessment increases as you go on. But by the morning of
 6 the 16th we've got these, we've got the STF, NIU, TRT there,
 7 you've got 800 policemen, it's now level 3 by that time and
 8 this is before a shot has been fired, before anyone's died.
 9 Now was it already at that stage unprecedented as far as we
 10 know since 1994?
 11 GENERAL PHIYEGA: You've asked me a
 12 question, Judge, earlier on to say what is unprecedented,
 13 the outcome or the operation.
 14 CHAIRPERSON: The way I've now framed the
 15 question eliminated the outcome. It deals with the
 16 situation as it was on the morning of the 16th of August.
 17 GENERAL PHIYEGA: Ja I'm going to, I'm
 18 going to there. I'm just starting off by saying you asked
 19 me a question to say what is unprecedented. What is
 20 unprecedented for us is the outcome because we are saying
 21 we have used our tested methods to do what we normally do
 22 but the outcome was very different and then I'll go to the
 23 question that you've asked me. To say in the morning is it
 24 unprecedented, absolutely not. In the morning we are
 25 assessing the developments, we are seeing the threat

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1 assessments that are taking place, we're looking at a plan
 2 to deal with 3000 to encircle, to disarm, to arrest and as
 3 questions were asked in the past two, three days looking at
 4 260 the question has been asked to say NIU and others
 5 they're there to support in case things happen differently,
 6 that's only why it's not unprecedented, they were there to
 7 give support to our POP.
 8 CHAIRPERSON: Thank you. Mr Mpofo, would
 9 you like to proceed?
 10 MR MPOFU: Yes, Chairperson, I'm glad to
 11 see I'm not the only one who asked the last question and
 12 not the last question. But -
 13 CHAIRPERSON: It sounds as if these
 14 things are infectious.
 15 MR MPOFU: Thank you. General, okay
 16 accepting everything you've said can we put this matter to
 17 rest as follows. Until the first shot was fired on the 16th
 18 everything that happened before that was not unprecedented
 19 in your estimation, correct?
 20 GENERAL PHIYEGA: That was a normal
 21 operation.
 22 MR MPOFU: Good, thank you. Alright and
 23 up to that stage when it was a normal operation, in other
 24 words until the first shot was fired the -
 25 CHAIRPERSON: To be fair I don't, I

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1 didn't understand her to say it was a normal operation.
 2 MR MPOFU: That's exactly -
 3 CHAIRPERSON: What she said it wasn't
 4 unprecedented -
 5 MR MPOFU: No she said normal, Chair.
 6 CHAIRPERSON: Did she?
 7 MR MPOFU: She just said now.
 8 GENERAL PHIYEGA: All I'm saying is it's
 9 an operation that we need to manage you know, it's not
 10 unprecedented, we have police, we have POPS, we have CARS,
 11 we have barbwire, we have everything, we would do it in De
 12 Doorns if we have to do it.
 13 MR MPOFU: Yes but you said it was a
 14 normal operation, the judge simply didn't hear you, didn't
 15 you?
 16 GENERAL PHIYEGA: Meaning exactly what
 17 I've explained now.
 18 MR MPOFU: Yes and to the extent that it
 19 was a normal, rather operation until the first shot was
 20 fired the regulatory framework of SAPS would obviously then
 21 be able to deal with this?
 22 GENERAL PHIYEGA: And this is why I have
 23 said our plan was much in place to assist us to do so until
 24 it was disrupted.
 25 MR MPOFU: Okay, I'll take that as a yes.

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1 When was the plan disrupted, at what point?
 2 GENERAL PHIYEGA: You would know that
 3 when we pulled our barbed, when we pulled the barbed wire
 4 there was, before we could even finish to put the barbed
 5 wire around the police, for us to be able to make our
 6 announcements, at the first point where we were going to
 7 pull, I think it's Nyala 4, there was a disruption and even
 8 at the end when we finished these people that we're talking
 9 about are they outside the fence or inside the fence. Were
 10 we given time to talk, to warn, to guide the protesters,
 11 no.
 12 MR MPOFU: No please. Okay, let me start
 13 by this, what was the disruption before we even say when.
 14 GENERAL PHIYEGA: I'm sure the plan,
 15 we'll start talking about what we were going to do. All
 16 I'm saying is that part of what was going to happen was to
 17 allow the police to unroll their wire, to talk to the
 18 protesters to say now come forward, put your arms down,
 19 walk away. That's what was going to happen.
 20 MR MPOFU: No. No, what was going to
 21 happen or what should have happened in terms of the
 22 regulations is that a warning should have been communicated
 23 to the people. As you know even, before the democratic
 24 order the, even the apartheid police would say you have
 25 three minutes, the fact that they didn't take three minutes

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1 before they moved in is another matter, but the
 2 communication of what is going to happen and so on would
 3 have happened and your plan, which is a post apartheid plan
 4 obviously involved communications with the protestors
 5 didn't it?
 6 GENERAL PHIYEGA: Were the police given
 7 that time because you put it lightly.
 8 MR MPOFU: No. No, General, please lets
 9 be serious.
 10 GENERAL PHIYEGA: I am.
 11 MR MPOFU: What time -
 12 CHAIRPERSON: I don't think that's an
 13 inappropriate comment.
 14 MR MPOFU: Well I -
 15 CHAIRPERSON: I don't think she's was
 16 being frivolous, just carry on without making comments like
 17 that.
 18 MR MPOFU: Okay. General, please help
 19 me. What time do you need to speak into a loudhailer and
 20 say whatever you want to say according to the plan?
 21 GENERAL PHIYEGA: Dali, I'm sorry,
 22 Advocate.
 23 MR MPOFU: Okay, Chairperson.
 24 GENERAL PHIYEGA: I'm sure commanders
 25 come here, they explain minute by minute but what I want to

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1 say to you, you'd argue that they had the opportunity to do
 2 that was usurped. The disruption usurped us that very time
 3 that you're talking about. That thing we wanted to do and
 4 that thing we would have done had we not been disrupted and
 5 when that operation is being discussed here you will get
 6 very clear details of when we were going to do that and how
 7 that disruption came through, we would have really loved to
 8 do exactly what you are saying.
 9 MR MPOFU: Alright we'll discuss this
 10 topic in -
 11 CHAIRPERSON: Sorry, sorry can I ask a
 12 question. I think what Mr Mpofo is trying to get you to do
 13 is to say what form the disruption took. What did the
 14 protestors do which amounted to a disruption? So can you
 15 answer that please?
 16 GENERAL PHIYEGA: Judge, let me not
 17 contaminate this space because those who were there will
 18 actually talk about, they've given me a report, I must
 19 stand to say what we had wanted to do what Mr Mpofo is
 20 mentioning could not happen because of this disruption and
 21 I'll allow them to actually give you more details.
 22 CHAIRPERSON: Did they not tell you what
 23 form the disruption took?
 24 GENERAL PHIYEGA: As I'm saying, Judge,
 25 let me not contaminate that space.

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1 CHAIRPERSON: If one looks at exhibit L,
 2 the relevant slides appear to be 189 and 192 and then it
 3 looks as if we have to go on to look at 193 and following.
 4 Now what 189 says is that after Mr Mathunjwa had left, have
 5 you got that, sorry I mustn't be to, at 15:35 after Mr
 6 Mathunjwa left having, so slide 189, have you got that?
 7 GENERAL PHIYEGA: Yes.
 8 CHAIRPERSON: When Mr Mathunjwa left some
 9 of the media, second bet, some of the media reports a
 10 Captain Dreyer that they sensed a change in the protestors
 11 mood and were withdrawing out of fear for their own safety.
 12 They also report and they saw a protestor in the group
 13 concealing a firearm in a blanket, the media retreated to a
 14 neutral area behind the police lines. So the protestors
 15 haven't anything, except the media have seen a change in
 16 their mood. The next bullet, at this point all
 17 negotiations and discussions stopped. This information is
 18 given to Brigadier Calitz, then the next, over the page we
 19 see 192, slide 192 at 15:40 that's to say five minutes
 20 later Brigadier Calitz gave a command to Colonel Makubela
 21 to start with the deployment of the barbed wire. When the
 22 first Nyala started to deploy the barbed wire one of the
 23 representatives came to the front window of the negotiation
 24 Nyala and made a statement. Now the point appears to be,
 25 if I'm understanding Mr Mpofo, that the protestors didn't

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1 do anything apart from evidencing a change of mood,
 2 whatever that means, in other words the body language
 3 changed, the protestors didn't do anything until after the
 4 wire was deployed and his point is going to be, because
 5 he's put it to other people, his point is going to be that
 6 the disruption took the form of deploying the wire which
 7 caused a change, which caused the protestors to do
 8 something and that that's why he disputes that there was a
 9 disruption by the protestors. Am I putting your case
 10 correctly, Mr Mpofo?
 11 MR MPOFU: More than correctly,
 12 Chairperson.
 13 CHAIRPERSON: How can that be more than
 14 correctly? So that's his point, so I tried to explain to
 15 you which perhaps I shouldn't have done, but I tried to
 16 explain to you where he's coming from, perhaps he can take
 17 over and finish his questions. If I've cleared the ground
 18 for you properly.
 19 MR MPOFU: You have, Chairperson. I'll
 20 just add one detail. If you go to slide 139 it says the
 21 northern, I'm sorry I'm reading at the block comments, on
 22 comments, Chairperson. The third bullet. So the northern
 23 Nyala is to angle slightly towards the west to assist in
 24 protecting a possible advance towards the informal
 25 settlement. So that was foreseen, not only did it happen

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1 that when the wire is pulled the people would move towards
 2 the informal settlement. They've actually foreseen, so how
 3 could that be a disruption when it's part of the plan?
 4 GENERAL PHIYEGA: I would still speak
 5 where I said, Judge, to say let me not contaminate this
 6 space, people who pulled the Nyalas and the what my
 7 understanding which remains firm, based on the information
 8 that I've been given is that there is a disruption, I'm
 9 sure they'll talk to all these notes and other things.
 10 They were there on the ground.
 11 CHAIRPERSON: Mr Mpofo, it seems as if,
 12 the points I've put to Mr Malindi, apply here as well. The
 13 best the witness can do is to tell us what her
 14 understanding was which is based on hearsay and we're not
 15 getting any further by analysing her understanding. The
 16 sensible thing to do is wait till her informants come and
 17 deal fully with them I would think, but -
 18 MR MPOFU: Chair, Chair -
 19 CHAIRPERSON: I don't want to dictate to
 20 you what to do but it seems the sensible way forward if I
 21 may say.
 22 MR MPOFU: Yes, no, no that I accept and
 23 in fact I'm going to move on to something else. Except to
 24 say that when Mr Bizos was asking you questions, more than
 25 five times your answer was that yes you're right but the

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1 plan was disrupted. So what you are saying now is that you
 2 don't know what that disruption was, that's all I want to
 3 establish.
 4 GENERAL PHIYEGA: What you are asking me,
 5 I need the gritties of where, which Nyala was put and all
 6 that, I wasn't there and I'm saying those people should
 7 talk to the statements that are here. But that the plan
 8 was disrupted is a fact I stand by.
 9 MR MPOFU: Okay, Chair. Thank you,
 10 General, that will be for argument. The - I just want to
 11 start a topic which I'm sure we won't be able to finish.
 12 But I want to preface it by saying that the topics that I
 13 want to deal with, particularly because of this referring
 14 to the generals and so on, I'm going to say, deal with you
 15 mainly with the topics that involve you and your personal
 16 responsibility.
 17 GENERAL PHIYEGA: Okay.
 18 MR MPOFU: And the topic that I want to
 19 deal with now is the tampering report which you
 20 commissioned and maybe - usually I'll do this at the end,
 21 usually I'll do this at the end of the discussion but I'll
 22 do it upfront just for good measure. Where I'm going with
 23 this is to say that that investigation, the report that you
 24 have presented is not worth the paper it's written on and
 25 that you were going through the motions with that

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1 investigation and I suppose I don't, I won't ask you to
 2 comment because I have to lay the basis.
 3 GENERAL PHIYEGA: No I have to comment
 4 there.
 5 MR MPOFU: Okay if you insist.
 6 GENERAL PHIYEGA: Advocate, that's your
 7 judgment and you're entitled to it. But I made efforts to
 8 explain that and I've given reports to this commission.
 9 MR MPOFU: Are you satisfied with the
 10 report, is the matter now closed?
 11 GENERAL PHIYEGA: Yes, I am.
 12 MR MPOFU: Now just explain this to me.
 13 Do you know how this issue of the planting of weapons were,
 14 how it started? The -
 15 [15:58] GENERAL PHIYEGA: The commission, I have
 16 a report that details all those things.
 17 CHAIRPERSON: Mr Mpofu, I think it's a
 18 little bit misleading to use the word planting as if that's
 19 an accepted fact.
 20 MR MPOFU: Okay.
 21 CHAIRPERSON: We're read the report, we
 22 understand the explanation, whether it's satisfactory will
 23 be the subject of argument. Whether some of these facts
 24 should have been disclosed to the evidence leaders earlier
 25 will be a matter for argument. But I'm not sure that you

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1 can state as a fact that weapons were planted. So the, I
 2 think you should -
 3 MR MPOFU: - allegation.
 4 CHAIRPERSON: In a -
 5 MR MPOFU: I'm putting it as an
 6 allegation.
 7 CHAIRPERSON: - Fashion, yes.
 8 MR MPOFU: I'll put - yes, particularly
 9 because the allegation was originally made by me. So in
 10 the - during the cross-examination of Captain Mohlaki I put
 11 to him that certain weapons which showed at a particular
 12 point did not show at another point and that the second
 13 point was darker than the other point and so on. I'm just
 14 giving you background.
 15 GENERAL PHIYEGA: Mm.
 16 MR MPOFU: And then in re-examination Mr
 17 Madlanga produced pictures which basically confirmed what I
 18 had put to the Captain and in the after - or during Mr
 19 Madlanga's dealing with the matter in the afternoon Mr
 20 Semenya then revealed that you had instituted an
 21 investigation. Just giving you that background. Can you
 22 accept that?
 23 GENERAL PHIYEGA: I'm not quite sure of
 24 who you were examining but I know that when we did that it
 25 was when Botha was giving testimony. Yes.

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1 MR MPOFU: The - okay.
 2 CHAIRPERSON: I suggest you round off
 3 this point before we take the adjournment.
 4 MR MPOFU: Chair, yes, Chairperson, I'll
 5 round off the aspects of the point because the point is -
 6 CHAIRPERSON: You'll return to it on the
 7 morrow when this aspect has been rounded off.
 8 MR MPOFU: When it has been rounded off,
 9 thank you, Chairperson. One of the criticisms which we
 10 will discuss tomorrow about the report and that's why I'm
 11 giving you this background is that the tampering issue was,
 12 had arisen in relation to the alleged planting of weapons
 13 on dead bodies, do you understand that?
 14 GENERAL PHIYEGA: Maybe I don't
 15 understand your question because I would tell you what made
 16 me to request the investigation. It was because I was
 17 seeing two sets of pictures of the LCSD and our ones and I
 18 would also say those pictures of the LCSD were not with us,
 19 they were the pictures that were commissioned by the
 20 evidence leaders. So I wanted to understand where the
 21 disparity was.
 22 MR MPOFU: Okay sure. General, I'm not
 23 quibbling with whatever happened when you saw pictures
 24 during Botha's testimony and so on. I'm saying here, in
 25 this commission, on the 5th of November I think it was, when

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1 Captain Mohlaki was giving evidence that discussion was
 2 about the alleged planting of bodies on, or rather of
 3 weapons on dead bodies and we were assured by your counsel
 4 that that matter was being investigated by you.
 5 GENERAL PHIYEGA: Okay.
 6 MR MPOFU: Whether it was the only thing
 7 investigated is irrelevant. But that matter which
 8 concerned us here was being investigated by you. Do you
 9 understand that?
 10 GENERAL PHIYEGA: I understand that.
 11 MR MPOFU: Thanks. Now one of the things
 12 we'll explore tomorrow is the fact that the report that you
 13 have presented here gives an explanation which is
 14 unacceptable for other reasons but it deals with the
 15 weapons that were allegedly removed from injured persons
 16 and I just want to leave you with that thought to say that
 17 the report that deals with the subject matter of the issue
 18 that was raised here by me and Mr Madlanga and other people
 19 is not, if you say this is the final report well then this
 20 matter, that matter has not been investigated.
 21 GENERAL PHIYEGA: I note what you are
 22 saying and I'll read for tomorrow.
 23 MR MPOFU: Thank you, Chairperson.
 24 CHAIRPERSON: It's appropriate for us now
 25 to take the adjournment. The commission will adjourn until

1 09:30 tomorrow. We will sit until 12:30 because there are
2 a number of people who have to leave at 12:30 to catch
3 various aeroplanes. So 09:30 tomorrow until 12:30.

4 [COMMISSION ADJOURNED]

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