

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 75 17 APRIL 2013 PAGES 7956 TO 8083

HELD AT

CIVIC CENTRE, RUSTENBURG, NORTH WEST PROVINCE



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1 [PROCEEDINGS ON 17 APRIL 2013]
 2 [09:40] COMMISSIONER: The Commission resumes.
 3 National Commissioner, you're still under oath.
 4 MANGWASHI VICTORIA PHIYEGA: s.u.o.
 5 CHAIRPERSON: Mr Tip, you were going to
 6 cross-examine the National Commissioner, I think you said
 7 for 20 minutes. Shall I set my watch?
 8 MR TIP SC: You may set it hopefully for
 9 even less than that, Chair.
 10 CROSS-EXAMINATION BY MR TIP SC:
 11 Commissioner, you've heard that I have just a few topics,
 12 just a few propositions that I'd like to put to you, which
 13 I will do on behalf of the National Union of Mineworkers,
 14 the NUM. These propositions deal with only one very narrow
 15 aspect and that concerns the place of the NUM in the police
 16 planning in respect of the events of, leading up to and
 17 including the 16th of August last year. And before I put
 18 those few propositions to you, I just want to clarify what
 19 the basis is for them and, firstly, none of them concern
 20 the operational details of the police action or the police
 21 planning. In other words, the position that you've
 22 articulated several times in this Commission, that
 23 operational details were not part of your role in this, is
 24 something that we are perfectly comfortable with for the
 25 purpose of these propositions. More pertinent is another

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1 aspect of what you said to the Commission, which is that
 2 you were involved, to some extent, at a broad level and at
 3 a strategic level with the task that the police faced
 4 during that period and you, comfortable with the
 5 propositions being put to you on that basis, I will just
 6 ask you in respect of the small handful of matters I'm
 7 going to deal with, whether it would be consistent with
 8 your understanding of the police planning and what the
 9 police had to deal with, for you to agree to those
 10 propositions or, if not, to indicate why not. Are your
 11 comfortable with that also? You're comfortable with that,
 12 Commissioner?
 13 GENERAL PHIYEGA: Ja, I'm comfortable,
 14 yes.
 15 MR TIP SC: Yes. The first introductory
 16 proposition is that, what the operational officers of the
 17 SAPS were dealing with and the plan that they prepared had
 18 to embody various stages of deployment and various
 19 objectives that they sought to achieve through that
 20 deployment and the action that they took.
 21 GENERAL PHIYEGA: Yes, that is my
 22 understanding.
 23 MR TIP SC: And for that purpose,
 24 Commissioner, it would follow, I think, that the police
 25 would have considered quite closely what precisely the

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1 nature of the situation was that they were addressing, in
 2 other words what was really the thrust of what they had to
 3 deal with.
 4 GENERAL PHIYEGA: Yes, they did. The
 5 planning takes into account the environmental and
 6 situational assessment.
 7 MR TIP SC: And Commissioner, would you
 8 agree that the real focus of the plans and as conveyed to
 9 you and as you participated in the discussions around that,
 10 concerned the position of the strikers or the protesters
 11 who had by then assembled on the koppie and their conduct?
 12 GENERAL PHIYEGA: Yes, that was part of
 13 it but also you would recall in my submission that other
 14 stakeholders – the community, the citizens, the businesses
 15 around the place were also affected by the interaction, so
 16 it is a comprehensive view of the situation.
 17 MR TIP SC: Quite so, Commissioner, I
 18 heard that in your evidence and we're entirely in agreement
 19 with you of the comprehensive nature of what had to be
 20 done. The question, this proposition is really that the
 21 target, as it were – or perhaps that's not a good word to
 22 use – the thrust of the planning concerned the protesters.
 23 GENERAL PHIYEGA: Yes.
 24 MR TIP SC: And then really the heart of
 25 what I want to put to you is that in the course of your

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1 various discussions around the overview, the broad nature
 2 of the planning and the options that were considered and
 3 the purpose of it all, did not identify the NUM as an
 4 organisation as forming part of what the SAPS believed that
 5 it had to deal with at that time. Would that be fair?
 6 GENERAL PHIYEGA: I would respond in this
 7 matter, that these were employees of Lonmin and what Lonmin
 8 had indicated to us is that in terms of the representation
 9 of the employees they had both employees of NUM and
 10 employees of AMCU. So when we were looking at the matter,
 11 we were looking at protesters as being part of Lonmin and
 12 some we – some of the people could have been from the
 13 community. So we didn't used to take NUM and AMCU, we were
 14 looking at employees and protesters.
 15 MR TIP SC: Again Commissioner, you make
 16 a point with which we are not in dispute. Mr Zokwana has
 17 given evidence in these proceedings. You're aware, I take
 18 it, that he is national president of the NUM, is that
 19 correct?
 20 GENERAL PHIYEGA: Yes, I am aware.
 21 MR TIP SC: And he has placed evidence
 22 before the Commission of his view in relation to the nature
 23 of the protesters or strikers on the koppie.
 24 GENERAL PHIYEGA: Yes, I noted that.
 25 MR TIP SC: And he has told the

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1 Commission that it is certainly so that there were NUM
2 members amongst those on the koppie but that those members
3 had departed from the principles of the NUM and had not
4 responded to the attempts to give guidance to them. Would
5 you be roughly aware of that dimension of the events?
6 GENERAL PHIYEGA: Yes, we've heard the
7 testimony.
8 MR TIP SC: To come back to the
9 proposition which I put to you, I couched it in terms of
10 the NUM as an organisation and let me just restate it and
11 get your comment on it, if you don't mind, that when the
12 SAPS was conceptualising what it needed to do and drawing
13 up its plans and the various options that it considered,
14 the NUM as an organisation did not form part of the thrust
15 of what the SAPS believed that it had to deal with. Would
16 that be a fair way to put the matter?
17 GENERAL PHIYEGA: Maybe before I respond,
18 let me just ask for clarity in terms of that aspect. I
19 think, one, I would like to understand in terms of planning
20 operations, surely SAPS would do that alone on their side
21 because that's their remit, that's their responsibility.
22 The second part of the area that I may seek understanding
23 whether I'm interpreting you well is the dealing, what you
24 asked earlier on, dealing with protesters who were
25 employees of the mine who may be belonging to any of the

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1 unions. Am I understanding the question to be dealing with
2 those two parts?
3 MR TIP SC: Yes, Commissioner. Perhaps I
4 could seek just to recast it just to clarify –
5 GENERAL PHIYEGA: Thank you.
6 MR TIP SC: - what it is and to ensure
7 that my questions are entirely clear to you.
8 GENERAL PHIYEGA: I would appreciate
9 that.
10 MR TIP SC: Yes. Let me just do that in
11 two phases. First of all, it's common knowledge within the
12 Commission, there's no dispute whatsoever about it that
13 amongst those who were on the koppie at the relevant times
14 were members of the NUM, there were members of AMCU and
15 very likely members, employees who were not members of
16 either union.
17 GENERAL PHIYEGA: Mm.
18 MR TIP SC: It may be that there were
19 persons present who were not even employees of Lonmin.
20 That's the first part, you're happy with that? That would
21 be consistent with your discussions and your understanding
22 of the environment that the SAPS was dealing with?
23 GENERAL PHIYEGA: I'm happy.
24 MR TIP SC: And I'll just echo what I
25 said about Mr Zokwana's evidence and again I'm doing it in

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1 the most brief possible terms because it's not necessary to
2 go into great detail. He has said that those, the members
3 of the NUM on the koppie were, in effect, in transition.
4 They had departed from the principles of the NUM, they had
5 not listened to the attempts of the NUM to persuade people
6 not to participate in an unprotected strike and you
7 probably are aware that when, on the 15th of August, Mr
8 Zokwana went there in an attempt to address those on the
9 koppie he was very, very directly rebuffed. They – none of
10 the persons there wished to hear him. You're aware of
11 that, are you?
12 GENERAL PHIYEGA: Yes, I'm aware that has
13 been reported.
14 MR TIP SC: So it really is against the
15 backdrop of that factual circumstance that I'm putting the
16 proposition to you in relation to the NUM as an
17 organisation and I do this, Commissioner, with a view to
18 the fact that the Commission is, in terms of its terms of
19 reference, required to consider what these various
20 organisations that populate those terms did in relation to
21 these events. So it's the NUM as an organisation that
22 comes into the picture at that stage. Do those comments
23 sufficiently clarify the position for you, Commissioner?
24 GENERAL PHIYEGA: Yes, they are helping.
25 MR TIP SC: Thank you. Then let me just

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1 put the essential proposition once more and hopefully now
2 with that clarification you'll be able to indicate whether
3 you agree in relation to what your discussions were at the
4 time, that in the deliberations of the SAPS as to what it
5 had to do during those, that period from the 13th, 14th, 15th
6 and 16th of August, it saw it real task as dealing with the
7 problems associated with those who had gathered on the
8 koppie.
9 GENERAL PHIYEGA: I have actually said
10 yes.
11 MR TIP SC: Yes and then let me just put
12 it in these terms, that it follows from that as a corollary
13 that really the position of the NUM as an organisation did
14 not form part of that focus that was held by the police
15 operational officers in their planning for the steps that
16 they need to take. Would that – would you agree with that?
17 GENERAL PHIYEGA: My response to that
18 would still be that as the police, much as we understand
19 the background that you have put forward, we were looking
20 at employees of Lonmin that were protesting. That's first,
21 the first part. Secondly, you've also indicated that there
22 were members that were probably in transition so therefore,
23 you know, those type of dynamics would be sitting with the
24 members, not with us. So it was important for us, when we
25 start saying there should be a peaceful solution, for those

<p style="text-align: right;">Page 7964</p> <p>1 stakeholders that had a role to play, like the leaders of 2 the respective unions that we've been told represent 3 employees of Lonmin, to be engaged. So I believe this is 4 why the provincial commissioner and the commanders in the 5 environment reached out to AMCU, reached out to NUM. The 6 transitional processes were not our focus but we were 7 looking at employees and we were looking at who could 8 assist in the process of achieving this peaceful 9 resolution. 10 [10:00] MR TIP SC: Commissioner, I don't lose 11 sight of the breadth of what the SAPS was seeking to do in 12 relation to getting the engagement of the various 13 stakeholders and perhaps I can try and conclude these few 14 questions by just redefining the proposition slightly in 15 order to accommodate what you've just said, with which I 16 agree and to put it in this way, that when the police and 17 the planning and operational officers, including yourself 18 to the extent that you were engaged in an ongoing way with 19 those discussions, were looking at the environment, then 20 amongst the features that they saw was the possibility of 21 the NUM as an organisation playing a role in attempts to 22 defuse the problem. 23 GENERAL PHIYEGA: Yes, it is true. 24 MR TIP SC: And would it then also be so 25 that the SAPS in the course of its various deliberations</p>	<p style="text-align: right;">Page 7966</p> <p>1 of this is headed, Mr Chair, and I'll adopt that 2 formulation if I may, with gratitude. Commissioner, you've 3 heard what the Chairperson said and if I may just remind 4 you that at the beginning of these questions I did say that 5 we were not looking to you in terms of operational detail 6 but merely whether what I was putting to you was consistent 7 with what you understood from your discussions in terms of 8 what the police had to deal with. 9 GENERAL PHIYEGA: I did understand that. 10 MR TIP SC: Yes, and on that basis and 11 recognising that there are limitations to your involvement 12 in the details of the plan, would it be so that your 13 understanding is that it did not form part of the drawing 14 up of that plan that the NUM as an organisation had to be 15 dealt with in terms of the efforts to restore law and 16 order. Would you agree with that? 17 GENERAL PHIYEGA: Yes, I have said 18 remember our focus was on the employees of Lonmin. To the 19 extent that some of them could have been NUM members, some 20 transiting, some AMCU, that was our focus. 21 MR TIP SC: Subject to that, you agree 22 with what I said? 23 GENERAL PHIYEGA: Yes, I do. 24 MR TIP SC: Thank you, Chair. 25 COMMISSIONER: Mr Ntsebeza?</p>
<p style="text-align: right;">Page 7965</p> <p>1 did not, at the material times, see the NUM as an 2 organisation as posing a threat to law and order in the 3 environment? 4 GENERAL PHIYEGA: Advocate, maybe to save 5 that judgment, one may not have necessarily, you know, SAPS 6 may not have necessarily gotten to but what we were looking 7 for is to look for the leadership of the various 8 stakeholders to assist in the process and I can say that 9 that proposition from both parties was available. The NUM 10 participated, NUM came to address members and, as you say, 11 on the 15th there was a rejection, yes, but the – when we 12 reached out we were able to engage with the leadership of 13 both parties. 14 COMMISSIONER: Mr Tip, would it not be a 15 short way of stating your proposition, part of your 16 proposition, that Operation Platinum, which was the plan, 17 didn't involve NUM at all? 18 MR TIP SC: Yes – 19 COMMISSIONER: It wasn't directed against 20 NUM. Now whether – I'm not quite sure whether the National 21 Commissioner is aware of all the details of Operation 22 Platinum, that's a question presumably which you can ask 23 some of the witnesses to follow, but isn't that essentially 24 your proposition? 25 MR TIP SC: That's essentially where all</p>	<p style="text-align: right;">Page 7967</p> <p>1 CROSS-EXAMINATION BY MR NTSEBEZA SC: 2 Thank you, Mr Chairman, members of the Commission. Good 3 morning, Commissioner. I just greeted the Commissioner, 4 good morning Commissioner. 5 GENERAL PHIYEGA: Good morning, Advocate. 6 MR NTSEBEZA SC: Yes. You are aware that 7 I represent the families of a number of those who were 8 killed, particularly on the 16th of August. 9 GENERAL PHIYEGA: Yes, I am. 10 MR NTSEBEZA SC: And the majority or all 11 of them are present here because they are keen to get 12 answers and they are looking forward to getting answers 13 from you, if you are able to provide them. And I'm sure 14 that you will endeavour your best to let them go away from 15 here with a feeling that you have done your part in 16 elucidating for them, to the extent that you are able to do 17 so, what happened, the result of which they are now without 18 their family members. 19 GENERAL PHIYEGA: Yes, Advocate, it 20 remains our commitment as SAPS to tell our understanding of 21 the facts to the best of our ability. 22 MR NTSEBEZA SC: Now let's relax, 23 Commissioner. I would like you to lower your guard – not 24 lower your guard, but just relax. I'm asking you as a 25 person, not as an institution. Do you appreciate that the</p>

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1 family members who are here are looking to you, as a
 2 person, to assist them understand to the extent that you
 3 can make them understand what happened and why what
 4 happened, happened? You do appreciate that?
 5 GENERAL PHIYEGA: Advocate, my answer to
 6 you is that with my multidimensional being in existence –
 7 being a mother, being a National Commissioner, being a
 8 member of the community, I see myself as a person, as part
 9 and parcel of SAPS because without that connection I am not
 10 able to represent just here. So the answer I was giving
 11 you was in the context of the person within the
 12 organisation that is representing the responses here.
 13 MR NTSEBEZA SC: Yes. Yes, thank you for
 14 that and with the Commission's permission I'll just be a
 15 little bit intrusive and just – because they are keen to
 16 know whether in fact you yourself have got kids. Do you
 17 have kids? If you'll pardon me I'll make that intrusion.
 18 COMMISSIONER: Mr Ntsebeza, I don't know
 19 that that's relevant but we recently adjourned early so
 20 that she could attend her daughter's graduation, so I think
 21 that answers your question.
 22 MR NTSEBEZA SC: No, I didn't know that,
 23 Commissioner. Do you have any siblings?
 24 GENERAL PHIYEGA: Yes, I do.
 25 MR NTSEBEZA SC: Now, there have been, I

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1 would assume there have been deaths in your family, some of
 2 them tragic?
 3 GENERAL PHIYEGA: Ja, after 50 years, 50
 4 plus, of my life, I've met many of those.
 5 MR NTSEBEZA SC: And you will agree, and
 6 I hope I state the obvious here, that where deaths have
 7 been tragic they are most traumatic. You live with pain
 8 for longer than otherwise, would you accept that?
 9 GENERAL PHIYEGA: It is true.
 10 MR NTSEBEZA SC: And therefore the people
 11 I represent are people who have that pain and they will,
 12 towards the end of my cross-examination I will put to you
 13 how they feel about what happened, for your comments, but
 14 you do appreciate that as I put questions to you they will
 15 be seeking to see that you do appreciate that they have
 16 come here, still in pain, and they are expecting to get
 17 answers from you which will ease that pain.
 18 GENERAL PHIYEGA: I have said we give our
 19 commitment as an organisation and also myself as a leader,
 20 to try to the best of my ability to respond to the issues
 21 you would raise.
 22 MR NTSEBEZA SC: Yes, you keep on using
 23 the royal "we" but I'll accept that that is how you express
 24 yourself. Now, I have been looking at – and I just would
 25 like you to confirm this, you – I've been looking at

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1 details about your professional life and I've been looking
 2 at what you said about your qualifications and educational
 3 achievements and I've wondered why, in the light of all of
 4 that, you decided to become a Police Commissioner.
 5 COMMISSIONER: Mr Semenya, do you have –
 6 MR NTSEBEZA SC: But before you tell me
 7 why –
 8 COMMISSIONER: Mr Ntsebeza, Mr Semenya
 9 wishes to say something.
 10 MR SEMENYA SC: Chair, to use the
 11 expression, the reasons why the National Commissioner took
 12 the job, has no assistance in helping you determine the
 13 issues which the terms of reference have invited you to
 14 address.
 15 COMMISSIONER: Mr Ntsebeza?
 16 MR NTSEBEZA SC: Is that an objection or
 17 a comment?
 18 MR SEMENYA SC: It is an objection.
 19 COMMISSIONER: The objection is based on
 20 irrelevancy.
 21 MR NTSEBEZA SC: Well, maybe I should not
 22 say I seek the answers because I want to determine why she
 23 became Police Commissioner but I would like to confirm with
 24 the minister, I mean with the Police Commissioner, some of
 25 the facts that my learned friend led her on, indicative of

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1 her professional career and her education.
 2 COMMISSIONER: I don't think the
 3 objection related to that. It wasn't clear at the time the
 4 objection was made that that's what you intended to do but
 5 the direction – sorry, the objection was directed at a
 6 specific question you asked which Mr Semenya contends will
 7 produce an irrelevant answer.
 8 MR NTSEBEZA SC: Yes, Mr Chair –
 9 COMMISSIONER: He can't contend that
 10 evidence he led, which you wish to discuss with the
 11 witness, is irrelevant because he wouldn't have led it in
 12 the first place.
 13 MR NTSEBEZA SC: Yes, Mr Chairman, I
 14 appreciate that. That's why I say maybe I shouldn't have
 15 said I was wondering why she became Police Commissioner but
 16 before I put that – I see that you serve, if this
 17 information is correct, that quite apart from your position
 18 as the National Police Commissioner, you serve as the
 19 chairman of the Presidential Review Committee on State-
 20 owned Enterprises. Is that the position?
 21 COMMISSIONER: I think you'll find she's
 22 the chairperson of that body.
 23 MR NTSEBEZA SC: Yes. There's been a
 24 very big debate about whether "man" there refers to gender
 25 or to the Latin word manus which means the hand that holds

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1 the chair, but that's a debate for another day.
 2 COMMISSIONER: We're not going to deal
 3 with that point in our report.
 4 MR NTSEBEZA SC: But that – Commissioner,
 5 indeed you are referred to as the chairperson of the
 6 Presidential Review Committee on State-owned Enterprises.
 7 GENERAL PHIYEGA: Yes, I was.
 8 MR NTSEBEZA SC: You no longer are?
 9 GENERAL PHIYEGA: No, I'm not.
 10 MR NTSEBEZA SC: Are you still the deputy
 11 chairperson of the Independent Commission on the
 12 Remuneration of Office Bearers?
 13 GENERAL PHIYEGA: I was.
 14 MR NTSEBEZA SC: You were. Your
 15 educational qualifications are in social work and in
 16 business administration.
 17 GENERAL PHIYEGA: You are correct.
 18 MR NTSEBEZA SC: And most of your working
 19 life you have been in related fields.
 20 GENERAL PHIYEGA: Yes, you are right.
 21 MR NTSEBEZA SC: When you did your
 22 executive management programme in 1998 with the National
 23 University of Singapore, I would assume that was a course
 24 by correspondence.
 25 GENERAL PHIYEGA: By attendance.

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1 MR NTSEBEZA SC: Yes, okay, and the post-
 2 graduate diploma in business administration in the
 3 University of Wales, was that by attendance?
 4 GENERAL PHIYEGA: By correspondence.
 5 MR NTSEBEZA SC: Now, both in terms,
 6 therefore, of your education qualifications and in terms of
 7 your profession it is manifest, and correct me if I'm
 8 wrong, that you didn't seek to qualify in the area of
 9 police and police administration. In other words, you
 10 never did any course on police administration.
 11 GENERAL PHIYEGA: The programmes I
 12 studied, one, qualifies me as a general manager and a
 13 general administrator and those skills I can carry to any
 14 organisation. As my CV tells you, I've been in the public,
 15 private as well as business basically.
 16 MR NTSEBEZA SC: Indeed.
 17 [10:20] GENERAL PHIYEGA: I've been in the
 18 public, private as well as business space.
 19 MR NTSEBEZA SC: Indeed.
 20 GENERAL PHIYEGA: And perhaps if I may
 21 just close my response to you, usually it doesn't matter
 22 which organisation I go into my skills are portable.
 23 MR NTSEBEZA SC: Yes, thank you for that
 24 answer but the question I had asked for your confirmation
 25 which seems to be so, is that by correspondence or by

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1 anything you never really did any studies in police and
 2 police administration, whether in this country or overseas.
 3 CHAIRPERSON: Mr Ntsebeza, I didn't want
 4 to stop you but it seems to be common cause that she never
 5 attended the police college or took any qualification in
 6 policing, her case is that she doesn't need it because of
 7 the nature of the job that she's doing but I don't know if
 8 you need belabour the point. I think it's common cause, is
 9 it not?
 10 MR NTSEBEZA SC: Thank you Mr Chairman, I
 11 was not seeking to belabour it but it seems to be common
 12 cause. Can we agree that it is common cause that you have
 13 no policing -
 14 GENERAL PHIYEGA: I've articulated the
 15 same in my statement.
 16 MR NTSEBEZA SC: Now let's start with
 17 what I would call the positives in what you are reported to
 18 have done when you came into the position of Police
 19 Commissioner. When the events at Marikana happened you
 20 were about 63, 64, 65 days in the job, is that right?
 21 GENERAL PHIYEGA: I didn't count, I know
 22 it's about two months.
 23 MR NTSEBEZA SC: Ja, it's about two
 24 months. And it is fair to say that you must have come into
 25 an environment where there were a number of career police

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1 persons in very senior positions, people who had been in
 2 the police force firstly and then in the police service for
 3 a number of years.
 4 GENERAL PHIYEGA: It is correct.
 5 MR NTSEBEZA SC: Now there have been
 6 events or instances in which you, and you'll correct me
 7 here if these were not your decisions but you seem to have
 8 taken commendable decisions. I take it, it is common cause
 9 that there was the even of Mr Andries Tatane who was shot
 10 and killed by the police in the course of a crowd control
 11 situation. You know about that case?
 12 GENERAL PHIYEGA: I'm aware of that.
 13 MR NTSEBEZA SC: And I would assume, am I
 14 assuming correctly that you would have known or you would
 15 have been informed of the fact that the police people
 16 involved were charged and that – ja, it's common cause that
 17 they were charged but was it –
 18 MR SEMENYA SC: It's irrelevant.
 19 MR NTSEBEZA SC: - with your knowledge
 20 and sanction?
 21 MR SEMENYA SC: Chairperson, that too is
 22 irrelevant to the proceedings governed by these terms of
 23 reference, Chair.
 24 CHAIRPERSON: There are two points
 25 actually, the first is the one Mr Semenya makes, the point

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1 of relevancy, the other is I'm not sure that if the
 2 prosecution took place her sanction was required. So if
 3 the prosecution authorities decided the policemen had to
 4 prosecuted they would prosecute them. Whether she
 5 sanctioned it or not is neither here nor there, so what is
 6 your answer to that objection?

7 MR NTSEBEZA SC: Mr Chairman, I prefaced
 8 my - this line of cross-examination by saying I want to
 9 look at some of the things that we regard as the families
 10 having been positive if they can be attributed to the
 11 National Police Commissioner. There were people who were -

12 CHAIRPERSON: I understand where you're
 13 going, coming from. He's making the point Mr Semenya in
 14 the witnesses favour that he suggests she knew about and
 15 sanctioned, alternately didn't take any steps to resist the
 16 prosecution of police officers in the Tatane incident.
 17 He's making the point in her favour, I don't think in the
 18 circumstances I should disallow the question. Carry on but
 19 keep it short, Mr Ntsebeza.

20 GENERAL PHIYEGA: I actually did not
 21 understand what you are asking me, I am aware of the Tatane
 22 matter but what is your question?

23 MR NTSEBEZA SC: Ma'am the question is
 24 were you - when you - let me ask the other question. Were
 25 those police officials, before they were charged, were they

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1 suspended?

2 MR SEMENYA SC: But she was not there,
 3 Chair, to speak - the National Commissioner was not in
 4 office -

5 CHAIRPERSON: Remember Mr Ntsebeza, that
 6 according to her statement she was appointed on the 12th of
 7 June -

8 MR NTSEBEZA SC: Yes.

9 COMMISSIONER: As you pointed out just
 10 over three, sorry just over two months before the incidents
 11 at Marikana. I'm not sure that the questions you're now
 12 asking relate to anything that happened during her term of
 13 office. If your question is intended to be a positive one,
 14 she can't take credit for anything that happened before the
 15 12th of June.

16 MR NTSEBEZA SC: When she was National
 17 Commissioner. Anyway let's talk about something when she
 18 was Police Commissioner. The case of Mido Macia, you were
 19 very much the National Police Commissioner then. This is
 20 the gentleman who is known as a taxi driver from Mozambique
 21 who was involved in an involvement with the police which
 22 was captured and went viral in Daveyton. You are aware of
 23 who I'm talking about.

24 GENERAL PHIYEGA: Yes, I'm aware of that.

25 MR NTSEBEZA SC: Now you are reported to

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1 have taken very swift action there. You are reported to
 2 have, and you will confirm this if this is so, you are
 3 reported to have suspended the officials concerned, the
 4 police officers concerned.

5 GENERAL PHIYEGA: You are correct.

6 MR NTSEBEZA SC: And whilst I do not seek
 7 to get details from you as to on what basis you did so but
 8 would it be fair to say that purely on the basis of what
 9 may have been reported to you without a thorough
 10 investigation into it, you felt that the best thing to do
 11 is for them to be removed, should be suspended from active
 12 service until -

13 GENERAL PHIYEGA: I think on that matter
 14 sufficient information and evidence in terms of our
 15 protocol were at my disposal and that allowed to take the
 16 action that I took.

17 MR NTSEBEZA SC: I don't want to probe
 18 more than it is necessary to do so, is sufficient including
 19 the video footage that went viral?

20 GENERAL PHIYEGA: It would certainly be
 21 part of, as sufficient.

22 MR NTSEBEZA SC: And those police
 23 officers may well be found not guilty down the line but for
 24 you what you saw on television, amongst others, was
 25 sufficient for you to feel that those police officers

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1 should be suspended from active duty until due process has
 2 taken place.

3 GENERAL PHIYEGA: With the bolding and
 4 underscoring of part of sufficient, because I said to you
 5 given every other thing put at my disposal, the protocols,
 6 how we work, I had enough information to be able to take
 7 that decision. So it's important to say "part."

8 MR NTSEBEZA SC: Ja, no I accept that.

9 GENERAL PHIYEGA: [Inaudible].

10 MR NTSEBEZA SC: But it is so that those
 11 police officers were suspended in spite of the fact that it
 12 was reported that they were putting up a defence, which is
 13 not unusual, it is a self-defence that the person was
 14 endeavouring to wrestle a firearm from one of the policemen
 15 which is why then he was dealt with in the way in which he
 16 was dealt with but notwithstanding that you did -

17 GENERAL PHIYEGA: The issues of self-
 18 defence and those issues and those aspects were not even
 19 part of my consideration when I took this decision. Those
 20 weren't advanced to me, they were probably advanced to
 21 their lawyers and to whoever they were talking to. They
 22 were not advanced to me.

23 MR SEMENYA SC: I am making the objection
 24 that given that matter is sub judice, unrelated to the
 25 terms of reference as a second basis of objection.

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1 CHAIRPERSON: What do you say about that,
2 Mr Ntsebeza?

3 MR NTSEBEZA SC: I'll respond with, by
4 saying I'm trying to see if there is a consistency in the
5 way in which the National Police Commissioner works either
6 before or after the events of the terms of this Commission
7 because I think the answer, I mean the question that I'm
8 going to ask next is pretty much predictable. My learned
9 friend must be patient, I won't do anything that is
10 improper.

11 CHAIRPERSON: But you're not persisting,
12 you're not persisting in the question which - in the form
13 in which you put it to which Mr Semenya objected.

14 MR NTSEBEZA SC: Mr Chairman, I was
15 merely commending the National Commissioner that in spite
16 of the fact that there was even a defence that was being
17 put up by those policemen according to reports, whatever
18 she had otherwise than just viral video footage that went
19 viral, she still was persuaded that this was a matter that
20 called for the police officers to be suspended.

21 CHAIRPERSON: Mr Semenya, the questions
22 appear to be based upon what is alleged to be an
23 inconsistent attitude adopted by the National Commissioner
24 in the case of members of the police service who are
25 accused of irregular or improper or criminal conduct and if

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1 that's the basis of the question I'll allow it to be asked,
2 provided that it's kept within a very narrow ambit.

3 MR NTSEBEZA SC: You know me, Mr
4 Chairman. You acted swiftly there, that's the whole nub of
5 what I'm saying. You made sure that those police officers
6 were suspended and irrespective of whatever they were
7 saying in their defence.

8 GENERAL PHIYEGA: I thank you for the
9 compliment.

10 MR SEMENYA SC: Chair, I must deal with
11 this other objection. What went viral, to use Mr
12 Ntsebeza's language, are police officers who have a
13 handcuffed man at the back of a van, pulling and driving
14 that thing, it has absolutely no relationship with the
15 issues that obtained in Marikana. So even the
16 inconsistency cannot manifest if those facts remains that
17 apart.

18 CHAIRPERSON: What do you say about that
19 comment, that objection which Mr Semenya raises?

20 MR NTSEBEZA SC: Mr Chairman, one can
21 only establish whether there is or is no consistency if one
22 has got a basis in relation to which one can argue on
23 consistency. I was - that answer that has been given is
24 enough for me to go onto the next question on the basis of
25 which I will show the -

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1 CHAIRPERSON: - in the question to which
2 he objected you're going onto the next question. So let's
3 hear the next question and if Mr Semenya doesn't object to
4 it, I won't have to make a ruling.

5 MR NTSEBEZA SC: Indeed, indeed Mr
6 Chairman, thank you very much. National Commissioner, the
7 families that I represent as you may have become aware, are
8 unsophisticated people, they draw parallels and you are
9 here to assist them understand that the parallels they may
10 be drawing are not to be drawn. Do you appreciate that? I
11 want you to understand where I'm going to be coming from.
12 Can I ask, in this case, the one that my learned friend
13 Semenya wants me to focus on which has our terms of
14 reference, were there any suspensions of police officers
15 who were involved in the killings?

16 GENERAL PHIYEGA: No.

17 MR NTSEBEZA SC: Were there any
18 investigations that were conducted into the killings by the
19 police?

20 GENERAL PHIYEGA: Yes, by IPID and also
21 this Commission.

22 MR NTSEBEZA SC: I'll come to what this
23 Commission is doing because I'll put it to you that what
24 this Commission does is irrelevant to what the police
25 should themselves be doing.

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1 GENERAL PHIYEGA: Advocate, you've asked
2 me a question and that's how I'm responding, that's my
3 understanding if you can accept it.

4 [10:40] MR NTSEBEZA SC: Yes, so there have been
5 no suspensions of police officers who were involved?

6 GENERAL PHIYEGA: I have said yes.

7 MR NTSEBEZA SC: None of the police
8 people who we've seen now on footage after footage,
9 shooting the people on the 16th of August with those kinds
10 of firearms at close range and those that we have seen on
11 any footage, no-one has been charged with those killings?

12 GENERAL PHIYEGA: We, as SAPS has not
13 charged any of our policemen.

14 MR NTSEBEZA SC: So no-one has been
15 arrested?

16 GENERAL PHIYEGA: The police do not
17 arrest. I've said to you IPID is doing investigation. If
18 there are - remember, police are policed by IPID and
19 investigations that would be taken on police would be taken
20 by IPID but as far as I am concerned I have not charged any
21 of the police.

22 MR NTSEBEZA SC: Let's - if there were to
23 be arrests, are you saying the arrests would be by the
24 IPID?

25 GENERAL PHIYEGA: On their instruction,

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1 we will arrest.

2 MR NTSEBEZA SC: Let me understand this.

3 I'm not very conversant. Are you saying the IPID have no

4 powers to arrest anyone they have been investigating?

5 GENERAL PHIYEGA: IPID does not have

6 cells and all those issues. They police the police and

7 they actually would ensure that if there is a matter to be

8 pursued for arrest, those issues would then take place but

9 we don't police ourselves. That is the principle I'm

10 trying to bring across.

11 MR NTSEBEZA SC: No. Commissioner, part

12 of this exercise for my clients is for them to have

13 confidence that they have fairness in the way in which the

14 police conduct themselves and in the way in which the

15 police conduct themselves in relation to other police

16 persons. Do you appreciate that?

17 GENERAL PHIYEGA: Advocate, I understand

18 you and I am on record in my testimony that the

19 Constitution of the country demands of us to give our

20 services in a fair and just manner, so we are committed to

21 that as SAPS.

22 MR NTSEBEZA SC: Yes, which is why,

23 therefore, the answer – oh, sorry – which is why,

24 therefore, I am trying to get you to appreciate why I am

25 seeking to draw parallels. Now let me ask again the

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1 question that I put to you. Are you saying to the

2 Commission that the police, when they are being

3 investigated, cannot be arrested by the IPID who do the

4 investigation?

5 GENERAL PHIYEGA: I did not say that.

6 MR NTSEBEZA SC: Then let's understand

7 what you are saying. Where they – we now know from your

8 answer that no-one was arrested.

9 GENERAL PHIYEGA: Yes.

10 MR NTSEBEZA SC: Now, any police officers

11 who were involved in the killings would have had to be

12 arrested by someone.

13 MR SEMENYA SC: It doesn't follow, Chair.

14 The question is, the police who were involved in the

15 killings had to be arrested, in the shootings, as a

16 proposition we submit only if culpability is pointed in one

17 way or another to their conduct.

18 COMMISSIONER: Mr Ntsebeza, what do you

19 say about that point from Mr Semanya?

20 MR NTSEBEZA SC: Well, Mr Commissioner,

21 members of the Commission, we have the Police Commissioner

22 saying that as a result of some evidence, including the

23 viral video footage in relation to Mr Mido Macia, certain

24 things were done. Police officers were suspended, an

25 arrest took place. Now I'm simply saying, on the basis of

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1 what the Commissioner had – I'm not saying because they

2 were culpable, or otherwise why arrest people if you know

3 already that they're guilty? On the strength of what was

4 available, there is no question about who killed 34 people

5 who died. The question is whether –

6 COMMISSIONER: I'm interested to know

7 whether there's any evidence that indicates that policeman

8 A killed deceased Z.

9 MR NTSEBEZA SC: Yes.

10 COMMISSIONER: Unless you're going to

11 arrest all of them on the basis of common purpose, unless -

12 the ballistic evidence that we've received so far, as I

13 understand it, has been rather inconclusive and that's a

14 matter we'll be exploring later but for your proposition to

15 be able to stand, you have to be able to say that there was

16 prima facie evidence that policeman A shot deceased Z and

17 that that prima facie evidence indicates that there was not

18 merely the physical act of shooting, but there was

19 culpability. Now, if you can establish those points then I

20 imagine you can proceed with the question, but the

21 objection is that merely, the mere fact that there's prima

22 facie evidence that a policeman shot somebody, that in

23 itself wouldn't justify an arrest or even, presumably, the

24 laying of a charge.

25 MR NTSEBEZA SC: Mr Commissioner,

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1 Commissioners do I understand – let me take a few steps

2 back. We all know now that on the 16th of August 34 people

3 were killed by the police.

4 GENERAL PHIYEGA: I'm not sure whether –

5 COMMISSIONER: I must ask members of the

6 auditorium please not to interrupt the proceedings by

7 shouting out things or by making comments. If that conduct

8 persists I shall have to request that those responsible for

9 it are removed from the auditorium. I'm sure no-one would

10 want that, everybody wants to be here and hear what's

11 happening but the price you pay for the right to be here is

12 to keep quiet so that the proceedings aren't disturbed.

13 MR NTSEBEZA SC: You were still saying,

14 Commissioner?

15 GENERAL PHIYEGA: Advocate, the way you

16 ask your questions –

17 MR NTSEBEZA SC: Yes.

18 GENERAL PHIYEGA: - I'm not a judge. I

19 don't know whether at this point in time I can, with my two

20 feet stand here and say 34 people were killed by police.

21 Those findings and the report that you are considering here

22 are going to give us the outcome –

23 MR NTSEBEZA SC: No.

24 GENERAL PHIYEGA: - because we also know

25 that there must be an analysis of those guns, who shot from

<p style="text-align: right;">Page 7988</p> <p>1 where, who shot who, I don't know about that and it would 2 be very dangerous of me to dabble in saying yes to a 3 statement like you are putting, to say we all know that 34 4 people were killed by the police. It is not my space and I 5 think I am not qualified to do so. And I would like to 6 say, Advocate, we have seen a lot of footage. You know 7 that this Commission is looking at a lot of reports. I've 8 seen medico-legal reports submitted here, I am not in a 9 position to say yes to such a bold, broad question and I'd 10 like to respond to your questions but to put me in such a 11 position to answer such a big, vague question, it's very 12 difficult. And through you, Judge, I really would like to 13 respond to fair questions. I don't want to respond to 14 unfair questions.</p> <p>15 COMMISSIONER: I'm here to protect you 16 against being asked unfair questions and if an unfair 17 question is asked, your counsel will object and I will rule 18 on it, but it sounds as if – Mr Ntsebeza, are you 19 persisting in the question which the witness has described 20 in the terms which you've heard or are you going to put the 21 question in a more focused way, which can't be accused of 22 being unfair?</p> <p>23 MR NTSEBEZA SC: In the interests of 24 progress, Mr Chairman, I want to put it to the National 25 Commissioner that I find her response most extraordinary.</p>	<p style="text-align: right;">Page 7990</p> <p>1 people or assaulted them, they see them being suspended and 2 being charged. They don't see that happening here and they 3 think that there's an inconsistency and a problem and 4 that's why they presumably have instructed you to ask the 5 questions you're asking and I'm not unsympathetic to that 6 approach but I don't think the way you're putting the 7 questions are calculated to elicit a complete and 8 comprehensive answer to those concerns that your clients 9 have raised but perhaps you can carry on dealing with the 10 matter. I'm not stopping you from dealing with the topic 11 but I think that –</p> <p>12 MR NTSEBEZA SC: I appreciate that, Mr 13 Chairman.</p> <p>14 COMMISSIONER: - more focused questions 15 may help us.</p> <p>16 MR NTSEBEZA SC: Just for the record, Mr 17 Chairman, what I said was let me take a few steps back, 18 because I was seeing that I was going into the detail, or I 19 was being expected to give the detail as to what ballistic 20 evidence says about who killed who and I don't want to go 21 there because this is neither the witness nor the place for 22 us to be doing that analysis. The only thing that I wanted 23 to establish from the National Police Commissioner is 24 whether she is confirming what I assumed is common cause, 25 both from the police themselves in their opening statement</p>
<p style="text-align: right;">Page 7989</p> <p>1 COMMISSIONER: No, Mr Ntsebeza, it's not 2 for you to make comments. You're here to ask questions. 3 The proposition you put was that 34 people have been killed 4 by the police, you were leading up to the point – therefore 5 people should have been arrested for it.</p> <p>6 MR NTSEBEZA SC: Mm.</p> <p>7 COMMISSIONER: Now, I suggest to you one 8 of the problems is, the ballistic evidence is inconclusive, 9 as I understand it, at the moment and it's not possible to 10 say, certainly on the information before us now, that 11 policeman A was responsible for the death of protester Z 12 and therefore if there's prima facie evidence that it was 13 in circumstances where there was culpability on the part of 14 policeman A, policeman A can be arrested. Absent that kind 15 of evidence, the problem arises to which the witness has 16 referred, that who must she suspend and on what basis? Who 17 is to be arrested by IPID and on what basis? Now, unless I 18 know the answer to those questions, the questions you put 19 do have the effect of being, shall I say, inappropriate at 20 this stage of the hearing.</p> <p>21 MR NTSEBEZA SC: No, Mr Chairman, 22 Commission members, I – okay.</p> <p>23 COMMISSIONER: I can also understand 24 where your clients are coming from. They see in other 25 cases, people being, who are charged with having killed</p>	<p style="text-align: right;">Page 7991</p> <p>1 and from, from everything that has been said here, that it 2 is not in issue that the police were responsible for the 3 deaths of the 34 people.</p> <p>4 COMMISSIONER: Mr Ntsebeza, one of your 5 clients is very distressed. She's being helped out of the 6 auditorium. It's three minutes to 11, it'll probably be 7 best for us to take the tea adjournment at this stage.</p> <p>8 [COMMISSION ADJOURNS COMMISSION RESUMES]</p> <p>9 [11:24] COMMISSIONER: The Commission resumes. 10 Is she now back or is she no longer in the auditorium? 11 Obviously she was very – there's something, something which 12 was distressing her very much. Do you know what the 13 situation is?</p> <p>14 MR NTSEBEZA SC: Thank you, Mr Chairman 15 and Commission members. I'm advised that she is not in the 16 auditorium anymore and may I, whilst doing so, Mr Chairman, 17 make this humble submission. The first one is, on enquiry 18 I have established that her upset was after the Chairman 19 came across as saying that the house will be cleared 20 because there is heckling. It was explained, of course, to 21 her by my instructing attorneys that the Chairman has to 22 maintain the decorum of the proceedings and that there is a 23 need for – for the Chairman and the Commission members to 24 make sure that the proceedings happen in an environment 25 where there are no hecklings. What we are seeking to plead</p>

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1 with the Chairman and the Commission members is for it to
 2 be taken into account that – which, as I put some of the
 3 questions on the basis that the people are seeking answers
 4 to what, for them, are not clear issues and whilst it is
 5 correct that the Chairman must make sure that the
 6 proceedings proceed in circumstances where there are no
 7 interruptions of one sort or another, it may well happen
 8 that now and again, either because of their understanding
 9 of what the answers are or whatever, that there will be the
 10 occasional exclamation, in which event the Chairman will
 11 still have to do what the Chairman will have to do, but if
 12 the Chairman is able to say “I warned you” without saying
 13 “I’ll throw you out.”

14 COMMISSIONER: Yes, yes. That’s - what
 15 I’m now saying can be interpreted very slowly. I said that
 16 we expect people here, as a return for being in here the
 17 auditorium, that they will remain quiet and not make
 18 audible comments – they can make comments to themselves but
 19 they mustn’t make audible comments which disturb the
 20 proceedings and I said if that happened I would have to
 21 consider asking the person concerned to leave – not
 22 everybody, but just the person concerned.

23 I also said that I had a lot of sympathy for what
 24 was clearly the attitude of the families who have
 25 instructed you to ask the questions that you were asking

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1 and where I thought your questions were too widely framed,
 2 I said I wasn’t going to stop you, that line of inquiry,
 3 provided the questions were more focused. So I hope I
 4 conveyed my sympathy to the families, my understanding of
 5 where they’re coming from, but I did say and I want to say
 6 it again that we can’t have this Commission proceeding if
 7 it’s interrupted all the time by loud exclamations of
 8 discontent or even approval from members of the auditorium
 9 and I hope people will understand that. But a lot of
 10 trouble has been taken to see to it that the members of the
 11 families can be here because it’s regarded as important,
 12 they should be able to be here but the need for the
 13 proceedings to proceed with decorum, without audible
 14 interruptions is there and I’m sure everybody will
 15 understand that.

16 I’d also like to say that shortly after we
 17 adjourned I enquired as to the position of the lady who was
 18 distressed and I was assured that a social worker was going
 19 to attend to her, to give her attention and assistance to
 20 overcome the quite palpable distress that she was
 21 experiencing and I hope that when she has recovered
 22 sufficiently, she’ll be able to come back into the
 23 auditorium but I also want to ask whether there’s any
 24 danger – I suppose there is, to some extent – any danger of
 25 other people being as distressed as she was. I don’t know

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1 how we can avoid that because I can understand the feelings
 2 of the members of the family, which we have to be as
 3 sympathetic to as we can be. Is there any comment you wish
 4 to make in that regard, Mr Ntsebeza?

5 MR NTSEBEZA SC: No, Mr Chairman, I think
 6 you have said everything that can possibly be said about
 7 this. I just wanted all of us, including the words from
 8 the Chair again, for the boundaries to be drawn, people to
 9 understand that you have a duty and a function to perform
 10 but also for the Chair and the Commission members and every
 11 one of us to know that this – I’m literally walking on
 12 eggshells and there should be that level of latitude that
 13 is allowed in order for us to be able to get to where we
 14 want to get to with as little interruption as it possibly
 15 can be.

16 I am not aware, other than that, now that the
 17 Chair has indicated to the extent that he has and it has
 18 been interpreted, whatever the perception may have been
 19 that the Chair is unsympathetic, seems to be addressed.
 20 You know, Archbishop Tutu used to say perceptions are facts
 21 to those who believe them and –

22 COMMISSIONER: I’ve heard him say that
 23 too. You and I, both in different capacities, had long
 24 experiences working with him, haven’t we?

25 MR NTSEBEZA SC: Yes.

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1 COMMISSIONER: We both share that view
 2 that he’s expressed so well.

3 MR NTSEBEZA SC: Indeed.

4 COMMISSIONER: National Commissioner, I
 5 have to remind you, you’re still under oath.

6 MANGWASHI VICTORIA PHIYEGA: Yes, I am.

7 CHAIRPERSON: Mr Ntsebeza?

8 CROSS-EXAMINATION BY MR NTSEBEZA SC (CONTD.):
 9 Thank you. Thank you, Chairman.

10 COMMISSIONER: Continue with your cross-
 11 examination.

12 MR NTSEBEZA SC: Maybe let’s start there.
 13 What do you understand being under oath to mean to you,
 14 National Commissioner?

15 GENERAL PHIYEGA: If I use my biblical
 16 understanding, it’s to tell the truth and nothing else but
 17 the truth.

18 COMMISSIONER: I think you’ll forgive me
 19 if I add something else. It’s the truth, the whole truth
 20 and nothing but the truth. I’m sure you understood that,
 21 you just didn’t say it.

22 GENERAL PHIYEGA: Mm.

23 MR NTSEBEZA SC: You would agree that
 24 that means that the truth is, would sometimes be something
 25 which, because the truth is binding on your conscience,

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1 something which you would say irrespective of consequences.
 2 If it is the truth, it is the truth. Some people will say
 3 speak the truth and shame the devil.
 4 GENERAL PHIYEGA: As I've said, I
 5 understand it to be the classical meaning of truth and the
 6 biblical meaning of truth.
 7 MR NTSEBEZA SC: You wouldn't have, for
 8 instance, suppressed certain things that you know to have
 9 happened in a particular way but you would feel you don't
 10 have to disclose them here because they may have
 11 repercussions.
 12 GENERAL PHIYEGA: I still again say I
 13 understand the meaning of the truth.
 14 MR NTSEBEZA SC: I take that question to
 15 be yes, that response to be yes, you wouldn't suppress
 16 facts or conceal facts which you knew but which would be
 17 compromising.
 18 GENERAL PHIYEGA: I'm comfortable in
 19 saying I will tell the truth.
 20 MR NTSEBEZA SC: Alright. We'll come
 21 back to this question of [inaudible]. Now, let's just be
 22 clear about what you were saying before lunch and I want us
 23 to take it step by step because I don't want again to show
 24 where it is common cause. Do you accept it as common
 25 cause, and please listen to me carefully, do you accept it

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1 as common cause that on the 16th of August 34 mineworkers
 2 were killed by the police?
 3 GENERAL PHIYEGA: I understand that 34
 4 miners were killed. By who, I would not go that far.
 5 MR NTSEBEZA SC: Now, the police made a
 6 presentation here which you signed off. It's called
 7 exhibit what – exhibit L. Can we put up exhibit L, what's
 8 this, 269? Can you zoom? I'm asked by my juniors whether
 9 you can zoom. I understand you must expand or whatever, or
 10 increase the size. Can you read –
 11 COMMISSIONER: The piece on the screen,
 12 at least on our screen, doesn't contain the full text. I
 13 take it you're referring to Thursday –
 14 MR NTSEBEZA SC: There, yes, yes – thank
 15 you, Mr Chairman.
 16 COMMISSIONER: Two lines from the foot.
 17 It reads, "Thursday, 30 protesters were killed by the
 18 police" and it goes on, "on the scene, four more later died
 19 in hospital." And I take it, it's not intended suggest
 20 that those four who died in hospital somehow didn't die as
 21 a result of injuries sustained at the hands of the police.
 22 So your point is that the police presentation, in effect,
 23 admits –
 24 MR NTSEBEZA SC: Exactly.
 25 COMMISSIONER: - 34 people died on or

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1 after the 16th, having been killed, as it's put, by the
 2 police.
 3 MR NTSEBEZA SC: Exactly. Do you see
 4 that?
 5 GENERAL PHIYEGA: Yes, I do.
 6 MR NTSEBEZA SC: In fact, the four who
 7 died in hospital must be assumed, on the phrasing of that
 8 sentence, that they died as a consequence of the infliction
 9 of death on the miners by the police. Do you agree?
 10 GENERAL PHIYEGA: I see that.
 11 MR NTSEBEZA SC: And do you agree –
 12 COMMISSIONER: Do you agree? And I take
 13 it – let's leave those four out for the moment.
 14 GENERAL PHIYEGA: Mm.
 15 COMMISSIONER: It's clear 30 died on the
 16 scene, killed by the police. That's what it says. "30
 17 protesters were killed by the police on the scene."
 18 GENERAL PHIYEGA: I see that. Yes, I've
 19 seen it.
 20 COMMISSIONER: That's common cause,
 21 that's what the police say. The four is a matter of
 22 interpretation. The evidence, I think, indicates that they
 23 died as a result of injuries sustained as a result of being
 24 shot by the police but I don't think you need, for the
 25 purposes of your argument or your cross-examination I mean

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1 –
 2 MR NTSEBEZA SC: Yes.
 3 COMMISSIONER: - the four. The 30 would
 4 be enough for you to move forward.
 5 MR NTSEBEZA SC: Indeed, M'Lord. And
 6 Commissioner, look, this is a police presentation and I
 7 proceed on the basis that you were advised about what the
 8 police were going to put up here, it is something that you
 9 sanctioned as the highest officer in the police service.
 10 GENERAL PHIYEGA: Mm-mm.
 11 MR NTSEBEZA SC: So the police are not
 12 putting it in issue as to who killed those mineworkers.
 13 They say, we killed them.
 14 GENERAL PHIYEGA: I note what is written
 15 here and I accept our report but I think what is important
 16 is the question that you had asked me earlier on.
 17 MR NTSEBEZA SC: The question I asked you
 18 before lunch –
 19 GENERAL PHIYEGA: Yes.
 20 MR NTSEBEZA SC: - especially when I said
 21 let me –
 22 COMMISSIONER: You weren't cross-
 23 examining yesterday when we had lunch, Mr Ntsebeza.
 24 MR NTSEBEZA SC: Oh ja, before tea.
 25 GENERAL PHIYEGA: Before tea.

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1 MR NTSEBEZA SC: Before tea, sorry Mr
 2 Chairman. The question I had asked before tea was to get
 3 your consensus that it is common cause that 34 people were
 4 killed by the police on the 16th of August and you said you
 5 did not know who they were killed by.
 6 GENERAL PHIYEGA: My understanding was
 7 that the context of that question was based on you asking
 8 me whether I have suspended or fired people based on that.
 9 I think we must take the entire context because where we
 10 got to was because of that question and I was saying, that
 11 is I have not suspended anybody. Then we went into the
 12 discussion of this exercise.
 13 MR NTSEBEZA SC: Yes. Which is why I
 14 felt that we were mixing a lot of things. You were talking
 15 about liability, culpability and all of that.
 16 GENERAL PHIYEGA: Mm.
 17 MR NTSEBEZA SC: And I sought to clear a
 18 very basic, or what I thought was basic, but now after
 19 seeing exhibit 11 slide 269, can we proceed on the basis
 20 that that is not now an issue after – exhibit L.
 21 GENERAL PHIYEGA: We can proceed.
 22 [11:44] MR NTSEBEZA SC: Thank you, Commissioner.
 23 Now, you have also seen footage of at least scene 1 where
 24 the police killed the mineworkers.
 25 GENERAL PHIYEGA: Yes, I have.

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1 MR NTSEBEZA SC: Just like we have seen
 2 the footage of the Mozambican being dragged in the – behind
 3 the wheels in a police van, subsequent to which it was
 4 reported that he had died. So footage has been part of
 5 what you know about what happened on the 16th of August.
 6 GENERAL PHIYEGA: Yes, you are correct.
 7 MR NTSEBEZA SC: You also have seen
 8 footage of the shooting on the 16th, where 16 protesters, in
 9 terms of exhibit L267, the fourth bullet, "The third
 10 attempt succeeded in breaching the police POP line where
 11 the armed protesters were shot at by the TRT line,
 12 protecting themselves against a perceived threat. 16
 13 protesters were killed and 13 wounded. Most protesters
 14 were shot inside the neutral area where they had moved past
 15 the POP line of defence." The question therefore, for your
 16 confirmation or otherwise, is this, it is an undeniable
 17 fact even on the police version, whatever the basis is that
 18 they did so, that they killed 16 mineworkers at that point
 19 in scene 1. Are we together on that one?
 20 GENERAL PHIYEGA: I have already said
 21 yes.
 22 MR NTSEBEZA SC: No, you said yes to the
 23 34. I just wanted to make sure that footage – you see the
 24 question is that you have seen footage where these 16
 25 people were killed.

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1 GENERAL PHIYEGA: I shall again say yes.
 2 MR NTSEBEZA SC: And it is nice for you
 3 to say yes. Just say yes when I put something to you that
 4 is incontrovertible –
 5 COMMISSIONER: The witness is entitled,
 6 in appropriate circumstances, to qualify her answer and
 7 can't be bullied into saying either yes or no, but there
 8 are some questions which should only be answered yes or no,
 9 but that's not an invariable rule.
 10 MR NTSEBEZA SC: Mr Chairman, I'm just
 11 trying to ease the witness to realising that sometimes it
 12 would be quicker for us to - if we agreeing on those things
 13 that we should be agreeing. Now, you have your reasons and
 14 I'm not seeking to query your reasons but I'm saying is
 15 where you deal with these two comparable situations there
 16 is bound to be questions and perceptions by those who are
 17 affected if there is no – to use a popular word these days
 18 – rational explanation as to why certain things were done
 19 and why certain things were not done. You – that's a
 20 general proposition.
 21 GENERAL PHIYEGA: I've heard your
 22 statement, I will wait for the question.
 23 MR NTSEBEZA SC: Now, let me clear up a
 24 question that I didn't understand your answer to be earlier
 25 on. Did you say that the IPID do or do not have a power of

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1 arrest? Do they or do they not have the power to arrest
 2 other police officers?
 3 GENERAL PHIYEGA: They police the police
 4 and therefore they can arrest the police. We will give
 5 them the space to arrest the police.
 6 COMMISSIONER: May I ask you a question,
 7 may I ask you a question about that just to clear things in
 8 my mind? I take it the members of IPID are all peace
 9 officers, that they have the power of arrest, powers of
 10 arrest –
 11 GENERAL PHIYEGA: They can.
 12 COMMISSIONER: - which all peace officers
 13 have.
 14 GENERAL PHIYEGA: They can.
 15 COMMISSIONER: Is that correct? Are
 16 there officers in IPID? Are some of the members of IPID,
 17 are they commissioned officers in the police service?
 18 GENERAL PHIYEGA: Not in the police
 19 service, they are IPID.
 20 COMMISSIONER: No, the reason I ask the
 21 question is, you know that generally speaking if a police,
 22 a member of the police service wants to arrest someone in
 23 circumstances where a warrant is necessary, police officers
 24 generally are justices of the peace and they have the power
 25 to issue warrants of arrest.

<p style="text-align: right;">Page 8004</p> <p>1 GENERAL PHIYEGA: Mm.</p> <p>2 COMMISSIONER: That used to be the case</p> <p>3 when I was on the bench, I take it it's still the case.</p> <p>4 Generally – so therefore police members of the service who</p> <p>5 wants warrants of arrest don't have to go to a magistrate –</p> <p>6 they do sometimes, but they don't have to go to a</p> <p>7 magistrate. They can very often get warrants from police</p> <p>8 officers who are justices of the peace. Now, are there</p> <p>9 members of IPID who are justices of the peace who can, in</p> <p>10 appropriate circumstances, issue warrants of arrest when</p> <p>11 they are applied for by the investigating officers who are</p> <p>12 investigating particular cases, who are members of IPID?</p> <p>13 GENERAL PHIYEGA: Because they are police</p> <p>14 of police, I take it that they have the capacity to do so</p> <p>15 and I'm sure they can be called to, again, affirm or not</p> <p>16 affirm what I'm saying because they have to arrest us when</p> <p>17 we are wrong.</p> <p>18 COMMISSIONER: You're in the same boat</p> <p>19 that I am, you think that is the case, we're not quite sure</p> <p>20 but we can easily find out.</p> <p>21 GENERAL PHIYEGA: I am saying they have</p> <p>22 to – I confirm that they have to arrest us if we are wrong.</p> <p>23 COMMISSIONER: Yes. They don't need your</p> <p>24 permission?</p> <p>25 GENERAL PHIYEGA: No.</p>	<p style="text-align: right;">Page 8006</p> <p>1 National Commissioner of Police?</p> <p>2 GENERAL PHIYEGA: None whatsoever, other</p> <p>3 than them policing us and arresting us. They are</p> <p>4 independent.</p> <p>5 MR NTSEBEZA SC: Are they not answerable</p> <p>6 to you?</p> <p>7 GENERAL PHIYEGA: No.</p> <p>8 MR NTSEBEZA SC: Who are they accountable</p> <p>9 to?</p> <p>10 GENERAL PHIYEGA: To the Minister of</p> <p>11 Police.</p> <p>12 MR NTSEBEZA SC: I see. Neither</p> <p>13 administratively nor in any other way are they answerable</p> <p>14 to you, albeit as National Commissioner?</p> <p>15 GENERAL PHIYEGA: No.</p> <p>16 COMMISSIONER: Mr Ntsebeza, I understand</p> <p>17 that IPID is regulated by legislation and we will endeavour</p> <p>18 to get the legislation during the lunch adjournment and so</p> <p>19 I suggest, if it's necessary for you to do so –</p> <p>20 MR NTSEBEZA SC: Correct.</p> <p>21 COMMISSIONER: - to move on because what</p> <p>22 you're asking really is what are the legal provisions</p> <p>23 applicable in the case of IPID.</p> <p>24 MR NTSEBEZA SC: Mm.</p> <p>25 COMMISSIONER: They are in legislation,</p>
<p style="text-align: right;">Page 8005</p> <p>1 COMMISSIONER: And if they, if a member</p> <p>2 of IPID arrests a member of the police service, then either</p> <p>3 with or without a warrant, the member of IPID would</p> <p>4 presumably take the arrested accused to the local police</p> <p>5 station.</p> <p>6 GENERAL PHIYEGA: Yes.</p> <p>7 COMMISSIONER: To be put in the police</p> <p>8 cells, is that correct?</p> <p>9 GENERAL PHIYEGA: Yes, Judge.</p> <p>10 COMMISSIONER: And I take it the arrested</p> <p>11 person would be duly received and lodged in the cells and</p> <p>12 entered in the cell register without demur.</p> <p>13 GENERAL PHIYEGA: Absolutely.</p> <p>14 COMMISSIONER: I don't know whether that</p> <p>15 clarifies the problem, your point, Mr Ntsebeza? I hope</p> <p>16 [inaudible].</p> <p>17 MR NTSEBEZA SC: In fact, I'm advised</p> <p>18 that in terms of the IPID Act, the IPID has got specific</p> <p>19 powers of arrest.</p> <p>20 GENERAL PHIYEGA: Yes.</p> <p>21 MR NTSEBEZA SC: I think in terms of</p> <p>22 section 20-something.</p> <p>23 GENERAL PHIYEGA: Mm.</p> <p>24 MR NTSEBEZA SC: Now, what is the</p> <p>25 relationship between the IPID and your office as the</p>	<p style="text-align: right;">Page 8007</p> <p>1 perhaps the evidence leaders can assist us otherwise we'd</p> <p>2 have to use our own resources.</p> <p>3 MR NTSEBEZA SC: Yes.</p> <p>4 COMMISSIONER: But we hope to have them</p> <p>5 by the end of lunch time and, if necessary, we'll give you</p> <p>6 a copy. If necessary, you can then return to the matter –</p> <p>7 MR NTSEBEZA SC: Thank you, Mr Chairman.</p> <p>8 COMMISSIONER: - if there's anything that</p> <p>9 needs to be covered.</p> <p>10 MR NTSEBEZA SC: Thank you, Mr Chairman.</p> <p>11 So you are saying they are independent, certainly they are</p> <p>12 independent of being manipulated by you as Police</p> <p>13 Commissioner?</p> <p>14 GENERAL PHIYEGA: I do not have those</p> <p>15 powers.</p> <p>16 MR NTSEBEZA SC: You say, however, they</p> <p>17 are answerable to the Minister of Police.</p> <p>18 GENERAL PHIYEGA: Yes, I said so.</p> <p>19 MR NTSEBEZA SC: Do you understand that</p> <p>20 relationship to be that he is just the Minister responsible</p> <p>21 for police services or is it an oversight responsibility on</p> <p>22 the part of the Minister?</p> <p>23 GENERAL PHIYEGA: Your question is not</p> <p>24 clear to me. I –</p> <p>25 COMMISSIONER: I don't want to interrupt</p>

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1 you unduly but if we're going to have the legislation, many
 2 of these questions you're asking I think will be answered
 3 by the legislation. You will be able, if I may say so, to
 4 cross-examine the witness more effectively perhaps if
 5 you're armed with the statute, then you'll be able to check
 6 her answers against what the statute says and if her
 7 answers are wrong, well, then you can deal with it but if
 8 it's convenient for you I'd like to suggest to you, you
 9 leave this matter over till after lunch unless you've got
 10 no other cross-examination material at the moment.
 11 MR NTSEBEZA SC: Okay. No, I accept the
 12 indication from the Chair. Now, your own appointment is in
 13 terms of the Constitution, I believe section – is it
 14 section 207 -
 15 GENERAL PHIYEGA: Mm.
 16 MR NTSEBEZA SC: - of the Constitution.
 17 Section 207(1), "The President, as head of the National
 18 Executive, must appoint a woman or a man as the National
 19 Commissioner of the police service to control and manage
 20 the police service." Is that the section in terms of your
 21 appointment?
 22 GENERAL PHIYEGA: Yes.
 23 MR NTSEBEZA SC: Now, you are appointed
 24 to exercise control over and manage the police service in
 25 accordance with the National Policing Policy and the

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1 directions of the cabinet member responsible for policing.
 2 GENERAL PHIYEGA: Yes.
 3 MR NTSEBEZA SC: So you have, in terms of
 4 this and I suppose national legislation, you have a
 5 relationship with the Minister or the cabinet member
 6 responsible for policing and when you exercise control over
 7 and manage a police service, it is in terms of the National
 8 Policing Policy and the directions of the Minister of
 9 Police.
 10 GENERAL PHIYEGA: Yes.
 11 MR NTSEBEZA SC: Now when it says
 12 "directions of the Minister of Police," what do you
 13 understand that to mean?
 14 GENERAL PHIYEGA: Directions, that
 15 section actually even talks about policies, so it's
 16 important to look at those because in terms of policies,
 17 those policy directives I get from the Minister.
 18 MR NTSEBEZA SC: Typically what would the
 19 directions from the national Minister be to you? You are
 20 appointed by the President but the Constitution says you
 21 must get directions from the cabinet member responsible.
 22 What kind of directions?
 23 COMMISSIONER: She said policy
 24 directions, as I understand it.
 25 MR NTSEBEZA SC: Policy directions?

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1 GENERAL PHIYEGA: Yes.
 2 MR NTSEBEZA SC: Is that what you
 3 understand the position to be, that the Minister would be
 4 giving you policy directions?
 5 GENERAL PHIYEGA: That's what the
 6 Constitution and the Act also demand.
 7 MR NTSEBEZA SC: Now, you must be
 8 familiar with the provisions of the South African Service
 9 Police Act, 68 of 1995 and I will –
 10 COMMISSIONER: The South African Police
 11 Services Act.
 12 MR NTSEBEZA SC: Yes, I think that's what
 13 it is called –
 14 COMMISSIONER: You said something else –
 15 never mind. It's the South African Police Services Act.
 16 MR NTSEBEZA SC: Yes.
 17 COMMISSIONER: What's the number of the
 18 Act?
 19 MR NTSEBEZA SC: Is it services?
 20 COMMISSIONER: Yes. What's the number
 21 and year?
 22 MR NTSEBEZA SC: Oh, 68 of 1995, sorry.
 23 68 of 1995.
 24 GENERAL PHIYEGA: Yes.
 25 [12:04] MR NTSEBEZA SC: And you are aware of the

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1 provisions where, if there is an expression of a loss of
 2 confidence by the cabinet member responsible for policing
 3 in the National Commissioner, that would form a basis for
 4 that cabinet member approaching the President for the
 5 establishment of a board of inquiry into whatever it is
 6 that the national Minister is dissatisfied with. Are you
 7 aware of that provision? I think it's in sections 6 to 8
 8 of that Act where the whole issue about what leads to
 9 disciplinary action against a National Police Commissioner.
 10 You are aware of that?
 11 GENERAL PHIYEGA: Yes, I'm aware.
 12 MR NTSEBEZA SC: Without asking you to
 13 express whether you are aware of the facts, that would be
 14 in terms of – that would have been the section that would
 15 have been relied upon for the removal of your predecessor,
 16 or don't you want to express a view?
 17 GENERAL PHIYEGA: I –
 18 MR SEMENYA SC: We can't see any
 19 relevance of that question, Chair.
 20 COMMISSIONER: Mr Ntsebeza, there's an
 21 objection from Mr Semanya, as you heard, on the ground that
 22 the question is not relevant to any of the issues arising
 23 under the terms of reference.
 24 MR NTSEBEZA SC: Mr Chairman, the
 25 relevance thereof is, one, whether the witness is aware of

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1 the section in terms whereof she can be removed from office
 2 with the intervention of the Minister and whether,
 3 therefore, that has got an effect on how she conducts
 4 herself towards the Minister. If she's aware that, for
 5 instance, her predecessor was removed because of the act of
 6 intervention of the Minister in the manner described in the
 7 Act, then that has implications about how you conduct
 8 yourself, she conducts herself, so –
 9 COMMISSIONER: Mr Semenya, do you wish to
 10 reply to what Mr Ntsebeza said?
 11 MR SEMENYA SC: [Inaudible].
 12 MR NTSEBEZA SC: I'm not asking for the
 13 facts of that case –
 14 COMMISSIONER: I understand. Your
 15 question relates simply to the question of whether she's
 16 aware of those provisions, is that correct? Am I
 17 understanding you correctly?
 18 MR NTSEBEZA SC: Yes, whether she's aware
 19 of those provisions and whether she's aware that those are
 20 the provisions that would have been used for the removal of
 21 her predecessor.
 22 COMMISSIONER: Alright.
 23 MR SEMENYA SC: We have a problem to the
 24 second part. Whatever answer it is, is irrelevant to the
 25 terms of reference –

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1 COMMISSIONER: Ja, ja. I'll allow the
 2 first half of the question, I won't allow the second.
 3 Carry on. It's actually a double question anyway, which we
 4 don't encourage.
 5 MR NTSEBEZA SC: Yes.
 6 COMMISSIONER: I'll allow you to ask the
 7 first question and not the second.
 8 MR NTSEBEZA SC: Thank you, Mr Chairman.
 9 I think the first question, Chair, has been answered.
 10 GENERAL PHIYEGA: I've already answered
 11 you on the first question –
 12 MR NTSEBEZA SC: Yes, yes, you have.
 13 GENERAL PHIYEGA: I said yes, I am aware
 14 and that instrument would be used for anybody, whoever
 15 becomes a Commissioner of Police.
 16 MR NTSEBEZA SC: And I think that answers
 17 the second question to which there has been an objection,
 18 but it's okay.
 19 COMMISSIONER: - indication she's
 20 answered the second question because she says that
 21 provision would be used against anyone holding the office,
 22 so that would presumably include [inaudible]. So let's
 23 move on.
 24 MR NTSEBEZA SC: You see that is why,
 25 Commissioner, I asked you whether you understand that when

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1 you take an oath of office like you have done, but
 2 particularly when, in proceedings of this nature, you take
 3 an oath to speak the truth, the whole truth and nothing
 4 else but the truth, it would have to be also in relevance
 5 to issues which, though they are the truth, may have
 6 repercussions for your position as National Commissioner.
 7 Do you understand what I'm saying?
 8 GENERAL PHIYEGA: Advocate, whatever I
 9 do, whether I'm in this Commission, whether I'm outside
 10 this Commission, by virtue of being in this position I
 11 understand the significance, the importance of my actions
 12 as I act officially. So it really – the truth in terms of
 13 this Commission I've committed to and what I do as part of
 14 my being a commissioner affects everything I do.
 15 MR NTSEBEZA SC: Now I'm putting this
 16 question to you because I'm not going to explore in much
 17 detail, as counsel for Lonmin did when he was cross-
 18 examining you, but I want to put a proposition to you that
 19 the whole discrepancy about a page, a page that was a fit
 20 and a misfit and a fit again and all of that, is the
 21 following and it hinges on a very delicate balance that has
 22 to be struck between whether or not you acted as a result
 23 of being instructed to do a particular thing or whether you
 24 acted without instruction. Let me put the questions as I
 25 understood them. Now you went down this far, but my

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1 proposition is premised on these critical areas as I
 2 understood it. There is a statement in paragraph 24 which
 3 you said when you say you talked to Lieutenant General
 4 Mbombo who informed you about the tragedy, et cetera, and
 5 then you say, "I then related the same information to the
 6 Minister of Police telephonically who advised me to attend
 7 to the matter personally so that I can have a first-hand
 8 account of the incident." Remember that statement? Do you
 9 remember that statement?
 10 GENERAL PHIYEGA: I remember that
 11 statement which I corrected.
 12 MR NTSEBEZA SC: Just take it step by
 13 step. I don't want you to say, you see – you remember that
 14 statement.
 15 MR SEMENYA SC: No, Chair –
 16 GENERAL PHIYEGA: No –
 17 MR NTSEBEZA SC: Now there is a
 18 statement, however, and I understand that you disown –
 19 COMMISSIONER: Mr Ntsebeza, before you
 20 carry on –
 21 MR NTSEBEZA SC: I didn't realise -
 22 COMMISSIONER: I know you didn't, that's
 23 why I'm telling you. Mr Semenya has turned on his light,
 24 he wants to say something.
 25 MR NTSEBEZA SC: Okay.

<p style="text-align: right;">Page 8016</p> <p>1 COMMISSIONER: I think we should give him 2 the courtesy of giving him a hearing before we proceed 3 further. Mr Semenya? 4 MR SEMENYA SC: No, the witness had 5 qualified that she remembers the statement and she 6 corrected it. Mr Ntsebeza was taking issue with that. The 7 objection was that the question was asked and answered. 8 MR NTSEBEZA SC: I'm sorry, Mr Chairman. 9 First of all, I did not mean to be discourteous to Mr 10 Semenya. Elsewhere he sits next to me, now he sits very 11 far from where I sit so I didn't really hear that he was – 12 COMMISSIONER: No, I don't think he meant 13 to be – I don't think, certainly I didn't intend to suggest 14 you were discourteous and I'm sure he didn't intend that 15 either. He realised that sitting where he does, he can't – 16 you can't see him when he turns on his microphone. So we 17 can put discourtesy to the side. His complaint is he says 18 the question has been asked and answered. 19 MR NTSEBEZA SC: No – no, I accept that 20 qualification. She said she withdrew it. No, I proceed on 21 that basis. In fact - and these circumstances were 22 exhaustively dealt with by, I think Schalk Burger, the 23 Lonmin counsel, but the statement I understand you became 24 comfortable with after correcting it was, read the 25 following and that – the same paragraph 24 – in what has</p>	<p style="text-align: right;">Page 8018</p> <p>1 GENERAL PHIYEGA: You did. 2 MR NTSEBEZA SC: - to you, but I accept 3 what you say in the context of what you are saying, but 4 what I am actually getting at is this, that debate in this 5 Commission about a fit, a misfit, how you made the 6 statement, who made the statement and all of that has been 7 so exhausted, I don't want us to get there. Do you 8 understand that? And I accept what you are saying as to 9 what, how you came to make the statement but it was tested. 10 What we may make of it is another thing. What I am putting 11 to you and which is what I will argue on behalf of the 12 families, seeks to say that the two statements have one 13 critical difference between them. The first statement I 14 read to you purports to say you were advised by the 15 Minister as to what you must do. Now you say you corrected 16 that statement and I'm not going to quarrel with you but 17 the statement that now you were comfortable with – and when 18 I say you were comfortable with, I'm not seeking to 19 insinuate anything other than that you were happy that the 20 statement then says you advised the Minister and the other 21 way around. Do you understand what I'm saying? Do you get 22 that, that the critical difference is that in the one 23 statement that had to be withdrawn for whatever reason, 24 that won't be canvassed, and the statement that eventually 25 at your insistence was accepted to be what you say is your</p>
<p style="text-align: right;">Page 8017</p> <p>1 come to be known as a misfit page but I'm not going to go 2 into that. What you were quite content to be associated 3 with is that you say, "I then related the same information 4 to the Minister of Police telephonically and advised him 5 that I shall be attending to the matter personally." 6 Right? Do you remember that that is the statement you were 7 very keen to – it was your evidence? 8 GENERAL PHIYEGA: Advocate, I think 9 before I even go there, you're making very serious 10 overtures because that in the statement that you are 11 talking about were dealt with by my lawyers on the very 12 first day when I came here to make my presentation they 13 were raised by Schalk Burger, by Adv Burger, we went back 14 to that to correct the very same thing. What bothers me 15 with what you're saying, you are then saying there is a 16 statement and I came to be comfortable with some version 17 and I want to say to you, the version that you say I came 18 to be comfortable with is actually my statement and I've 19 explained to this Commission the process, how I got to my 20 statement which is a statement that you received even the 21 first time. So I don't understand this whole issue to say 22 there was a statement and then I came to be comfortable 23 with it and those are the overtures that bothers me. 24 MR NTSEBEZA SC: Well, I was getting 25 worried when you said I'm making overtures -</p>	<p style="text-align: right;">Page 8019</p> <p>1 statement, the critical difference is that the statement 2 that you withdraw is the one that purports to say the 3 Minister told you what you must do. You must go and act, 4 attend to the matter personally, go and get a first-hand 5 account of the incident. That's the statement you 6 withdrew. The other one which goes in is where you say you 7 advised the Minister that you would be attending to the 8 matter personally. 9 COMMISSIONER: Sorry to interrupt you, Mr 10 Ntsebeza. There are in fact two differences. You said 11 there's one difference. There are two differences. The 12 other difference is in paragraph 23 where she talks of an 13 earlier call that she'd received from Lieutenant General 14 Mbombo. 15 MR NTSEBEZA SC: Yes, 23. 16 COMMISSIONER: Who informed her – in the 17 one, in the version which I think she is comfortable with, 18 to use your expression, she said "On the afternoon of 19 August 16, 2012 I received a call from Lieutenant General 20 Mbombo who informed me of the decision to implement a 21 dispersal operational plan." The other statement, which 22 she's explained and it's dealt with in her evidence, read 23 slightly differently. "On the afternoon of August 16, 2012 24 I received a call from Lieutenant General Mbombo who 25 informed me of the decision to implement stage 3 of the</p>

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1 plan, which information I relayed to the Minister." So
 2 there are actually two differences. You said there was
 3 one. I don't know if there's any significance in fact in
 4 the point but the correct –
 5 [12:24] MR NTSEBEZA SC: Yes, there are, Mr
 6 Chairman, I agree with you but the point really that I want
 7 to canvass with the witness is the extent to which the
 8 relationship between her and the Minister is one where, if
 9 the earlier statement had been accepted, then a number of
 10 consequences might come out of it.
 11 MR SEMENYA SC: Chair -
 12 COMMISSIONER: I've got the earlier
 13 witness statement. That's not correct either, as I
 14 understand it. The statement that she is unhappy with was
 15 actually the statement of the 12th of Marc, as I understand
 16 it. In fact, what she said is the earlier version, the one
 17 of the 7th of March which had that misfit page but we won't
 18 go there –
 19 MR NTSEBEZA SC: Yes.
 20 COMMISSIONER: - but that actually
 21 contains what she describes as the original text, as it
 22 were, which she said was correct as opposed to the other
 23 one. So it's not the earlier statement, it's the later
 24 statement, if you know what I mean.
 25 MR NTSEBEZA SC: Yes, but do you

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1 appreciate where I'm coming from relative to what, between
 2 the two of you and the Minister happened? In the one
 3 instance the Minister is supposed to have told you – the
 4 polite word used is "advised" – to attend to the matter
 5 personally so that you can have a first-hand account of the
 6 incident. In other words, there would have been a
 7 conversation in which the Minister then said, you know, you
 8 must go and attend to this personally.
 9 GENERAL PHIYEGA: I've heard it, I'll
 10 wait for the question.
 11 MR NTSEBEZA SC: Okay. The other one is
 12 just advising – Minister, this is the information I have
 13 and I'll be attending to it personally.
 14 GENERAL PHIYEGA: I've heard, I'm waiting
 15 for the question.
 16 MR NTSEBEZA SC: Yes. Don't be in a
 17 hurry, you'll get the question.
 18 GENERAL PHIYEGA: Okay.
 19 MR NTSEBEZA SC: Now, if the first
 20 statement remained – not that the Commissioner doesn't have
 21 the power to call the Minister, it can subpoena the
 22 Minister, but if the first statement had remained, the
 23 Minister, there would have been a legitimate basis to call
 24 the Minister here to –
 25 MR SEMENYA SC: Chair –

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1 COMMISSIONER: Mr Semenya?
 2 MR SEMENYA SC: Chair, I think Mr
 3 Ntsebeza is not heeding the caution. He now calls the
 4 earlier statement a first statement and I think, Chair, you
 5 correctly pointed out that the first statement or the
 6 earlier statement is the statement of the 7th which does not
 7 convey that meaning.
 8 MR NTSEBEZA SC: Well, in fairness, my
 9 first statement was the first proposition I put. Shall I
 10 put it this way? If the statement that you withdrew in
 11 which it is manifest that you are conveying the evidence
 12 that the Minister is the one who advised you to attend to
 13 this matter, is the one who said you must do it personally
 14 so that you can have first and second – first-hand account
 15 of the incident – if that was the statement there would be
 16 a basis of the Minister to be examined, to be called here,
 17 to be examined about the detail of his advice to you, you
 18 appreciate that?
 19 GENERAL PHIYEGA: I think what is very
 20 good is that you say "if that was the statement." At least
 21 you have my statement, so I did not have to deal with the
 22 "if that was the statement."
 23 MR NTSEBEZA SC: Is that your answer?
 24 GENERAL PHIYEGA: I didn't hear your
 25 question?

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1 MR NTSEBEZA SC: Is that your answer?
 2 GENERAL PHIYEGA: Yes.
 3 MR NTSEBEZA SC: I see. I'll continue to
 4 hypothesise this. If it is so that the statement I posed
 5 to you where you purport to be advised by the Minister
 6 states –
 7 COMMISSIONER: Sorry, Mr Ntsebeza, before
 8 you carry on. Mr Semenya, whom you can't see from where
 9 you're sitting, has turned his microphone on.
 10 MR SEMENYA SC: Chair, the witness says
 11 there is no basis for the hypothesis because the fact is
 12 established. That is not her statement, was never her
 13 statement. Her statement is, as she correctly pointed it
 14 in the statement dated the 7th. My learned colleague now
 15 wants to question further on a hypothesis which has been
 16 contradicted by actual factual evidence which the witness
 17 is giving.
 18 COMMISSIONER: Mr Ntsebeza, what do you
 19 say about that objection?
 20 MR NTSEBEZA SC: My understanding of the
 21 cross-examination of this witness relevant to those, cannot
 22 leave any impression on anyone that there is a reasonable
 23 basis to conclude - which is the function of this
 24 Commission anyway – to conclude that there is a fact
 25 established. The only fact that is established is that she

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1 says that is the statement that I regard as my own
2 statement.

3 COMMISSIONER: What you were saying is,
4 the hypothesis upon which Mr Semenya relies, we only have
5 the ipse dixit of this witness to establish the hypothesis
6 and you want to challenge it, is that correct?

7 MR NTSEBEZA SC: That's exactly the
8 point. That's why I – yes.

9 MR SEMENYA SC: Chair, Mr Ntsebeza cannot
10 have any basis of suggesting he will reveal evidence
11 contradictory of the fact, the ipse dixit of the witness.

12 COMMISSIONER: Well, let's see how he
13 answers that. How do you answer that, Mr Ntsebeza?

14 MR NTSEBEZA SC: I don't need to lead any
15 evidence, Mr Commissioner. The cross-examination of this
16 witness relevant to misfit page and – was so exhaustive
17 that it would be the bravest counsel to say it is now
18 established as a fact, other than the ipse dixit of the
19 witness that that is the statement. It has created so much
20 doubt that there has to be a finding made –

21 COMMISSIONER: Mr Ntsebeza, what you've
22 also got of course is the fact that she – I know she's
23 explained it but she did sign an affidavit on the 12th which
24 contained the passage that you rely on. Now she's
25 explained, she has sought to explain that and one of the

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1 questions, if it becomes an issue for us to decide, one of
2 the questions we'd have to decide is whether her
3 explanation can be accepted in the light of all the
4 evidence.

5 MR NTSEBEZA SC: Indeed.

6 COMMISSIONER: So I'm afraid I will – I
7 must disallow the objection. I'll allow you to ask the
8 question but please phrase your questions carefully so that
9 we don't spend further time on debates which may or may not
10 generate more heat than light.

11 MR NTSEBEZA SC: Now, you were correct
12 that you did explain yourself in the cross-examination that
13 was exhaustive on the question of what should or should not
14 be accepted to be the correct version of what happened,
15 that I accept. If, however, this Commission on evaluating
16 your answers - the questions that were put, the fit page,
17 the misfit page - were to come to the conclusion that what
18 you regard as the statement that must be accepted is a
19 statement that relieves you of the burden and relieves the
20 Minister of the burden of having to come here and explain
21 why was it that the Minister advised you to act as you did
22 –

23 COMMISSIONER: Is that question entirely
24 fair? I mean her evidence, as I understand, is she's not
25 changing it because of the consequences to which you refer,

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1 her case is – rightly or wrongly and as you say, we may
2 have to decide that if it becomes relevant, but her case is
3 that frankly the statement of the 12th of March, even though
4 she did sign it and swear to it, was in fact incorrect,
5 that the true factual position is set out in the page which
6 she – the amended page which is in the first statement of
7 the 7th of March. So her case is, I'm just seeking to
8 correct the facts because the statement of the 12th of March
9 in that respect is incorrect. So it's not quite as
10 complicated as you put it but – so I suggest you
11 reformulate your question again.

12 MR NTSEBEZA SC: Mr Chairman, maybe I
13 should return to this at a later stage.

14 COMMISSIONER: I didn't hear you? You
15 dropped your voice. You said maybe I should?

16 MR NTSEBEZA SC: Return to this aspect
17 later on.

18 COMMISSIONER: At a later stage.

19 MR NTSEBEZA SC: At a later stage, yes.

20 COMMISSIONER: Alright, when you reach
21 the later stage you can consider how you return to it.

22 MR NTSEBEZA SC: Thank you, Mr Chairman.
23 Now, I would like us to consider exhibit S. Do you have
24 exhibit S?

25 GENERAL PHIYEGA: Yes.

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1 MR NTSEBEZA SC: I'm sure you have been
2 asked a number of questions on exhibit S. Do you have
3 exhibit S?

4 GENERAL PHIYEGA: Yes, I do.

5 MR NTSEBEZA SC: Now I'm really not
6 intending to be long here because I'm sure you have been
7 asked exhaustively about this. This was under your
8 signature on the 20th of August, I mean the 20th of July
9 2012, about three weeks before the –

10 GENERAL PHIYEGA: You are correct.

11 MR NTSEBEZA SC: And your instruction to
12 provincial commissioners, divisional commissioners,
13 provincial heads, deputy national commissioners, chiefs of
14 staff, was in terms of 2.2.3, fairly clear or indeed phase
15 3 minimum force. Do I understand your instruction to be
16 that in crowd management public order policing policy had
17 to be conducted firstly with minimum force?

18 GENERAL PHIYEGA: You are right.

19 MR NTSEBEZA SC: That rubber bullets were
20 to be used only as a last resort and then to be skip fired
21 at the crowd, by which I understand you shoot at the
22 ground.

23 GENERAL PHIYEGA: The instruction does
24 talk to that.

25 MR NTSEBEZA SC: Yes. And my reading

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1 thereof was that sharp ammunition should be prohibited.
 2 MR SEMENYA SC: Chair, that sharp
 3 ammunition is prohibited, I don't understand that question.
 4 COMMISSIONER: I understand the question,
 5 I'm not sure it's correct. I'm not sure the proposition
 6 upon which it is based is correct. I have no difficulty
 7 understanding the question, my problem is seeing on what
 8 it's based. Where's the prohibition, Mr Ntsebeza?
 9 MR NTSEBEZA SC: Well, perhaps –
 10 COMMISSIONER: - mention sharp ammunition
 11 but clearly it's a gloss, is it not, or an amplification
 12 perhaps of standing order 262.
 13 MR NTSEBEZA SC: That's the trouble with
 14 English, M'Lord – Mr Chairman. You know in my language if
 15 you say something is the last resort, the last resort means
 16 the last resort. If rubber bullets are the last resort,
 17 the inference should be that you are prohibiting sharp
 18 ammunition. Rubber bullets, and the witness has agreed,
 19 are to be used only as a last resort. Even then they
 20 should be skip fired at the ground. Perhaps my learned
 21 friend has got another interpretation for last resort.
 22 MR BIZOS SC: Mr Chairman, I'm sorry to
 23 intervene but this is a matter that has been raised on a
 24 number of occasions. I want to take this opportunity of
 25 referring the Commission to the case in the Constitutional

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1 Court where Justice – well, the whole court in dealing with
 2 a section 49 case actually said yes, there is self-defence
 3 but self-defence is a defence, is not a licence to shoot
 4 indiscriminately, in very clear and strong words by Judge
 5 Kriegler. So that the idea that self-defence is excluded
 6 from proportionality, last resort, is a false premises,
 7 with respect. I have kept quiet in the past but it is
 8 always raised as an objection that if you, if the defence
 9 is self-defence you can behave like a cowboy.
 10 MR SEMENYA SC: Chair –
 11 COMMISSIONER: - more properly called
 12 private defence –
 13 MR BIZOS SC: Well, it's –
 14 COMMISSIONER: - is a doctrine which has
 15 its own requisites and qualifications and certainly a
 16 licence to act as a cowboy you will not find in any of the
 17 textbooks or judgments on –
 18 MR BIZOS SC: It's a figure of speech, Mr
 19 –
 20 COMMISSIONER: - the rules of private
 21 defence.
 22 [12:44] MR BIZOS SC: It's a figure of speech.
 23 It's not a licence to kill.
 24 COMMISSIONER: I'm not sure that that's
 25 being suggested but anyway, Mr Semenya? I don't know

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1 whether, I take it Mr Bizos was intervening as a sort of
 2 third party or negotiorum gestor or on behalf of – or
 3 amicus or something – on behalf of Mr Ntsebeza, but what
 4 exactly is your objection?
 5 MR SEMENYA SC: Chair, just for the
 6 record we have, as the South African Police Service, never
 7 contended that self-defence is a licence to kill or
 8 anything like that.
 9 COMMISSIONER: It is, as I understand it,
 10 set out effectively in the last sentence of exhibit L, is
 11 that "The aggression of the crowd – I'm quoting – "left the
 12 SAPS with no other choice than to act in private defence,
 13 defending their own lives and the lives of others." Your
 14 case is, as I understand it - whether it will be upheld at
 15 the end of the day is something we don't know the answer to
 16 yet – is that your clients acted in accordance with the
 17 rules applicable to the defence of private defence.
 18 MR SEMENYA SC: Indeed, Chair.
 19 COMMISSIONER: So Mr Ntsebeza, now that
 20 we've had this discussion, repeat your question because I'm
 21 not sure what the debate is about at this stage as far as
 22 it relates to your question.
 23 MR NTSEBEZA SC: Well, maybe to
 24 accommodate the nub of the objection I may just as well put
 25 it to the witness that is it a correct inference which one

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1 would draw from your circular that if you say in crowd
 2 control situations the POP policing is correctly conducted
 3 if the last resort should be the resort to rubber bullets
 4 in the circumstances described and that therefore the
 5 inference is that your circular was seeking to prohibit the
 6 usage of sharp ammunition in crowd control.
 7 MR SEMENYA SC: Crowd control –
 8 COMMISSIONER: Mr Ntsebeza, I'm not sure
 9 that that proposition is correct. As I read the exhibit S
 10 it deals with the operational functioning of the public
 11 order police, which is a division of the police and it says
 12 in paragraph 2, "In terms of the operational functioning of
 13 POP, particularly in terms of the use of force, the
 14 following is relevant" and then certain things are set out
 15 in paragraph 2 which we see in the main, on the second page
 16 which explains what the continuum of force consists of.
 17 And then para 3 then elaborates on the use of shotguns and
 18 rubber rounds and so forth, but this document, 3.3 talks
 19 about POP operational commanders. Now this document seems
 20 to me prima facie, subject to what you're going to say, to
 21 relate to the POP. Now the evidence we have is the POP are
 22 armed with non-lethal equipment. They were in the front
 23 line and they were presumably doing everything that is set
 24 out in exhibit S, or trying to. The people behind who
 25 actually fired the fatal shots, weren't members of the POP,

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1 as I understand the evidence, they were members of other
 2 units. So I'm not sure that one can rely on exhibit S in
 3 support of a proposition that people other than members of
 4 the POP are not allowed to use sharp ammunition, but that's
 5 just a prima facie view which I put to you to get the
 6 benefit of your submissions but inasmuch as they point
 7 against you, if it's correct, perhaps I should give Mr
 8 Semenya a chance to add something if he wishes, so that you
 9 can then reply to the prima facie point I put to you and
 10 whatever Mr Semenya may wish to add.

11 MR SEMENYA SC: And also, Chair, that
 12 this document cannot purport to remove the right of self-
 13 defence if circumstances in law –

14 COMMISSIONER: It can't remove the right
 15 to act actually in private defence because self-defence is
 16 you're defending yourself, private defence is you're
 17 defending someone else. Those are the points that you have
 18 to deal with, Mr Semenya. So before you reply, a point
 19 emerging from a discussion between Mr Tokota and myself is
 20 the heading of this exhibit is "Public order police, POP,
 21 use of force during crowd management." It only would
 22 appear to relate to the use of force during crowd
 23 management by the public order police.

24 MR NTSEBEZA SC: Thank you, Mr Chairman.
 25 Our submission will be that this was a public order police

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1 operation, that's the first point, so this circular applies
 2 to what happened on the 16th. Secondly, exhibit what's this
 3 – exhibit L slide 211 shows – and this is a point I think
 4 we made earlier, shows the munitions which were expended on
 5 scene 1 and one will see that the POP had their own fair
 6 share of the usage of sharp ammunition.

7 COMMISSIONER: I see that but are you
 8 contending that a member of the POP who has perhaps a side
 9 gun, is not allowed to use his side gun to defend himself
 10 or to defend his colleagues in circumstances where the
 11 principles applicable to the doctrine of private defence
 12 would apply?

13 MR NTSEBEZA SC: No, I'm not contending
 14 that anyone, under whatever circumstances, is not entitled
 15 to engage in legitimate self-defence.

16 COMMISSIONER: Because aren't you –

17 MR NTSEBEZA SC: What I'm saying is the
 18 public order policing or public order police, trained in
 19 the terms that Brigadier Mkhwanazi confirmed they are
 20 trained in, should – and we are not talking about side-arms
 21 here if we have regard to that slide, we're talking about -
 22 heavy calibre firearms that were used. We even side-arms,
 23 they were not restricting themselves to the usage of side-
 24 arms, they were using heavy calibre firearms if that
 25 evidence is anything to go by and it's evidence that has

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1 been placed before you by the police themselves.

2 COMMISSIONER: You are certainly borne
 3 out by 211 which indicates that members of the POP unit
 4 fired 5.56mm bullets and 7.62mm. I understand 9mm are
 5 side-arms, the other two are not –

6 MR NTSEBEZA SC: They would be side-arms
 7 –

8 COMMISSIONER: So you're certainly borne
 9 out by the document but the real question is, do you
 10 contend that the circular which the witness signed, exhibit
 11 S, which appears as far as one can read the small print at
 12 the top, was probably drafted by Lieutenant General
 13 Masemola, are you suggesting that that document forbids the
 14 POP people to use sharp ammunition in circumstances where
 15 they are defending themselves and the principles of private
 16 defence apply?

17 MR NTSEBEZA SC: I would not go that far.
 18 That's why –

19 COMMISSIONER: Okay, well, if you don't
 20 go that far then I think your question has to be
 21 reformulated because, as I heard it, it seems as if it did
 22 go that far but let's not debate that further. Reformulate
 23 your question in the light of the concession you now made
 24 and let's proceed.

25 MR NTSEBEZA SC: Now would you accept the

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1 position that that exhibit S does not contemplate the usage
 2 of sharp ammunition except only in the circumstances where
 3 it is in defence of personal life and life of others?

4 GENERAL PHIYEGA: Exhibit S, in my
 5 understanding, lays out procedures for POP in the use of
 6 rubber bullets. You spoke of prohibiting and that exhibit
 7 does not talk about that.

8 MR NTSEBEZA SC: I will return to this
 9 towards the end of my cross-examination. I want to explore
 10 another aspect but Mr Chairman, guided by you and the City
 11 Press reporter –

12 COMMISSIONER: An aspect you can explore
 13 in two minutes or –

14 MR NTSEBEZA SC: Indeed –

15 COMMISSIONER: - can you lay the
 16 foundation of it in two minutes –

17 MR NTSEBEZA SC: Yes, I could.

18 COMMISSIONER: Or would like me to
 19 perhaps adjourn now?

20 MR NTSEBEZA SC: I could, I could. It's
 21 3.3 –

22 COMMISSIONER: Tell me when it's
 23 convenient to take the adjournment.

24 MR NTSEBEZA SC: Thank you, Mr Chairman.
 25 3.3 of that same exhibit S is what I would like us to go

<p style="text-align: right;">Page 8036</p> <p>1 into. Now I'm sure this must have been put to you on a 2 number of occasions but I want to just put it to you for 3 purposes of exploring what you have done or have not done 4 consequent upon that injunction not having been carried 5 out. You've read now the 3.3. 6 GENERAL PHIYEGA: Yes, I have. 7 MR NTSEBEZA SC: It seems to me that it 8 is an injunction from you that must be carried out without 9 exception. 10 GENERAL PHIYEGA: You are correct. 11 MR NTSEBEZA SC: The video footage should 12 be taken off the crowd throughout the phases and including 13 during the use of minimum force. Now, are there any 14 exceptions to this rule that you can think of? 15 GENERAL PHIYEGA: The instruction does 16 not have exceptions. 17 MR NTSEBEZA SC: And so far, is it your 18 knowledge – certainly it is what I know – that there is, 19 and I have to be careful here how I put it, there is no 20 footage that shows from the SAPS a video footage taken of 21 the crowd throughout the phases and including during the 22 use of minimum force. 23 GENERAL PHIYEGA: Yes, I do and I'm on 24 record having said, you are right, we had a plan which 25 would have made sure that we complied fully. That plan was</p>	<p style="text-align: right;">Page 8038</p> <p>1 injunction that you gave in terms of 3.3 of your letter 2 about the taking of video footage during this, in an 3 operation such as this one and we had agreed that there is 4 no exception to this rule, it must be stuck to, you had 5 written it for it to be complied with. Now there is no 6 footage of the nature envisaged in paragraph 3.3 of exhibit 7 S. In other words everything that happens up to and 8 including the shootings themselves, both in scene 1 and 9 scene 2, we do not have that footage from the police. Do 10 you agree with that? 11 GENERAL PHIYEGA: Yes, I do. 12 MR NTSEBEZA SC: When did you discover 13 that there was no footage? 14 GENERAL PHIYEGA: When we were preparing 15 for the submission. 16 MR NTSEBEZA SC: How did you discover 17 that to be so? 18 GENERAL PHIYEGA: I'm sure those who were 19 responsible for the operation can tell so, but I know that 20 there were gaps in the information and the footage that had 21 supported the information. 22 MR NTSEBEZA SC: Perhaps I did not make 23 myself clear. How did you discover, I'm sure to your 24 shock, that there was no video footage particularly of the 25 happenings, police footage of the happenings at scene 1 and</p>
<p style="text-align: right;">Page 8037</p> <p>1 disrupted. 2 MR NTSEBEZA SC: Yes, I'm aware of that 3 evidence. 4 GENERAL PHIYEGA: And as a result, 5 compliance was also disrupted. 6 MR NTSEBEZA SC: Mr Chairman, 7 Commissioners, maybe through the Commission, can we explore 8 this after lunch? 9 COMMISSIONER: The Commission will take 10 the lunch adjournment. 11 [COMMISSION ADJOURNS COMMISSION RESUMES] 12 [14:13] MR NTSEBEZA SC: Yes Mr Chairman, I have. 13 CHAIRPERSON: So I don't have to lend you 14 my copy? 15 MR NTSEBEZA SC: No, I do have a copy, Mr 16 Chair. 17 CHAIRPERSON: National Commissioner, 18 you're still under oath. Mr Ntsebeza. 19 MANGWASHI VICTORIA PHIYEGA: s.u.o. 20 CROSS-EXAMINATION BY MR NTSEBEZA SC (CONTD.): 21 Thank you very much, Mr Chairman. 22 CHAIRPERSON: I take it this is almost 23 the last lap of your marathon race. 24 MR NTSEBEZA SC: I wish it was less than 25 a marathon. We were on the - we were exploring the</p>	<p style="text-align: right;">Page 8039</p> <p>1 scene 2? 2 GENERAL PHIYEGA: I have said when we 3 were busy preparing. 4 MR NTSEBEZA SC: Is that - 5 CHAIRPERSON: Mr Ntsebeza, you can't see, 6 I can, Mr Semanya wants to say something. 7 MR NTSEBEZA SC: Yes. 8 MR SEMENYA SC: We have exhibit L slide 9 170, second bullet point. Slide 170, the second bullet 10 point. 11 CHAIRPERSON: Yes, we've looked at that 12 before, that's the explanation why video operators at POP 13 didn't stay on the scene. We've gone through that before. 14 Mr Ntsebeza, do you see that? The whole purpose in getting 15 a record which is set out in paragraph 3 of exhibit S can 16 apparently be frustrated when there's a whiff of sulphur in 17 the air. That seems to be the explanation but carry on 18 with your cross-examination. 19 MR NTSEBEZA SC: Yes, I was wanting to 20 establish whether that's an objection or evidence testified 21 from the bar. 22 CHAIRPERSON: I think to be fair, I think 23 Mr Semanya was trying to helpful so I don't think we should 24 - 25 MR NTSEBEZA SC: No, I don't think it's</p>

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1 helping Mr Chairman, thank you very much, I'm grateful for
2 his offer to help. I'm asking how this witness came to the
3 knowledge that there is no video footage.
4 CHAIRPERSON: I think somebody told her,
5 I mean it wasn't like old Mother Hubbard, she went to the
6 cupboard and found it was empty, the video things weren't
7 there. I take it somebody told you, is that right?
8 GENERAL PHIYEGA: Yes, Judge.
9 CHAIRPERSON: Who told you?
10 GENERAL PHIYEGA: My commanders as we
11 were preparing.
12 CHAIRPERSON: Yes, that's the answer Mr
13 Ntsebeza.
14 MR NTSEBEZA SC: Yes, it's very nice for
15 you when it comes from a witness because I can't submit on
16 a basis of an assumption. We have assumed a number of
17 things and to our shock we found that our assumptions were
18 not correct [inaudible].
19 GENERAL PHIYEGA: But maybe, Advocate, I
20 can just go back to what you asked me earlier on. I did
21 say to you the disruption and that's part of the
22 disruption.
23 MR NTSEBEZA SC: So is your answer to a
24 question that I have not yet asked, is your answer that
25 there was no video footage because there was a disruption?

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1 CHAIRPERSON: No Mr Ntsebeza, I'm sorry,
2 before the interpreter interprets, you've used this phrase
3 no video footage. Now I didn't stop you before but I
4 should have done. The fact is we've got video footage but
5 it's not complete. So the correct formulation of the
6 question is, the answer as to why there was incomplete
7 video footage and possibly important segments of the action
8 are not recorded on video was because - that's the way to
9 phrase the question surely.
10 MR NTSEBEZA SC: Mr Chairman, I take
11 that, in fact I think I tried to qualify it twice to say in
12 scene 1 and scene 2 and you know the injunction is very
13 clear here, you must cover everything. Now the video
14 footage coming from the SAPS of the shootings in scene 1
15 and scene 2 is non-existent, certainly it has never been
16 sent to this Commission. We accept that, both of us. Is
17 that what you said, you accept there is no video footage
18 from the SAPS, specifically scene 1, scene 2 shootings?
19 GENERAL PHIYEGA: I'd like to say when
20 you talk about scene 1 and scene 2 there could be some
21 snippets of other things other than the shooting, so it's
22 important for me to understand whether we just talk about
23 the shooting or any other things that could have been
24 recorded before that for instance in scene 1.
25 MR NTSEBEZA SC: Yes. Do we accept that

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1 we are agreed that there is no video footage of the
2 shootings by the police or of the activities that resulted
3 in the shooting of people in scene 1 and in scene 2? Like
4 for instance the video footage that we've had from the
5 media that graphically shows us and everybody else how the
6 shootings took place, that kind of footage we do not have
7 from the police, which should have been done in terms of
8 exhibit S.
9 GENERAL PHIYEGA: Advocate, I'm asking
10 this question that I asked earlier on because if for
11 instance you go to scene 2, I called for an investigation
12 because there's some footage or photographs that are taken
13 by POP in that scene, even if it's after, so I want you to
14 really be explicit in your qualification to say are you
15 talking about any other footage, any other photography that
16 could have taken place and I'm saying it is sketchy. So
17 I'm asking for that very, very specific question. Are we
18 talking about the shooting or any other footage that may be
19 there? That's what I'm seeking to understand so that I can
20 answer you properly.
21 MR NTSEBEZA SC: Well, I probably assumed
22 wrongly that in the three weeks that you have been
23 testifying, that you now know that there are shootings that
24 took place in scene 1 and there are shootings that took
25 place in scene 2 and that in relation to those shootings

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1 there is no video footage taken by the police.
2 GENERAL PHIYEGA: It is correct.
3 MR NTSEBEZA SC: Now when I say there is
4 no video footage, I mean there is no video footage that has
5 been made available to the Commission.
6 GENERAL PHIYEGA: It is my knowledge,
7 that.
8 MR NTSEBEZA SC: And will we be making a
9 correct conclusion that the police did not bring that
10 footage to the Commission because it is non-existent?
11 GENERAL PHIYEGA: Every footage that we
12 have and information that we had we submitted to this
13 Commission. So if it is not there, it is not there.
14 MR NTSEBEZA SC: I just want to make sure
15 that that is an answer. As you stand or sit there before
16 God, is that your evidence? You're under oath, you say
17 there is no such footage because it does not exist?
18 GENERAL PHIYEGA: Not to my knowledge.
19 CHAIRPERSON: I think a more correct
20 formulation of the answer would be that to the best of your
21 knowledge all the video footage which the police has, has
22 been handed over to the evidence leaders because I mean you
23 got some but whatever you got, do you say that to the best
24 of your knowledge all the video footage the police have
25 that's relevant to what happened has been made available to

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1 the evidence leaders?
 2 GENERAL PHIYEGA: I've already said so,
 3 Judge, and I'll repeat it.
 4 CHAIRPERSON: Ja, okay.
 5 MR NTSEBEZA SC: And even though I was
 6 keen to find out from you how and why it is before I was
 7 directed to exhibit L, slide number 170 for the explanation
 8 that is given there, it is your understanding that there is
 9 no video footage because of a reason.
 10 GENERAL PHIYEGA: I think I've already
 11 answered that one, I said we've submitted what we had.
 12 MR NTSEBEZA SC: Yes, no I understand, I
 13 accept that. What I'm asking is whether you say that video
 14 material has not been submitted because it doesn't exist.
 15 Now the question I said, I ask is, is there a reason that
 16 you have been given and I'm talking about you now, you as
 17 the head of the police.
 18 GENERAL PHIYEGA: I've already answered
 19 that. I said to you that our processes of doing that were
 20 disrupted and we have so reported to this Commission.
 21 MR NTSEBEZA SC: Yes.
 22 GENERAL PHIYEGA: And what was reported
 23 to this Commission is what I have been informed as the head
 24 of police.
 25 MR NTSEBEZA SC: Yes, I have been

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1 following your testimony throughout and disruption I think
 2 is a phrase you have used frequently. Now what I do want
 3 to get from you is not really terminology that you use, I
 4 just want you to narrate a story. You know in paragraph 30
 5 of your statement, now I don't know what exhibit number
 6 this is, you say you learnt about the announcement of the
 7 Commission by the President and having done so, members
 8 were invited to Potchefstroom to prepare for the submission
 9 to the Commission. "As the National Commissioner I took it
 10 upon myself to visit the members to establish the progress
 11 of the preparations." Do you remember that?
 12 GENERAL PHIYEGA: You are correct.
 13 MR NTSEBEZA SC: Is it at the
 14 Potchefstroom meeting that you found out that there is no
 15 police video footage -
 16 GENERAL PHIYEGA: Yes, as we were
 17 preparing, I said.
 18 MR NTSEBEZA SC: Was Brigadier Mkhwanazi
 19 there?
 20 GENERAL PHIYEGA: I'm not quite sure but
 21 I'm sure members who were - the commissioner who was
 22 chairing that meeting can indicate who was there.
 23 MR NTSEBEZA SC: Now I just want to
 24 picture in my own mind and assist me to do this, as the
 25 National Commissioner you know that about a fortnight ago

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1 you had said video footage of everything, you have
 2 circulated, nobody does not know, at least a fortnight is
 3 too short a time for everyone to have read. So must I
 4 assume that you enquired where is video footage, where's
 5 our own video footage of this thing as it happened? Did
 6 you do that?
 7 GENERAL PHIYEGA: You would know that as
 8 we prepare, questions would be asked to say do we have
 9 video footage of that. I will give you an example. An
 10 example would be for instance a press conference that was
 11 held by the Provincial Commissioner, we didn't have a video
 12 footage of that, we would ask is there video footage, no we
 13 don't have and we would go and check whether we can get it
 14 from any of the television that may have been there. So we
 15 would ask in various areas to say do we have photography,
 16 do we have video footage, so it's a normal question that
 17 we'd ask to say what have you got to back up the
 18 information that we are receiving.
 19 MR NTSEBEZA SC: Did you yourself ask for
 20 video material that you were expecting in terms of your own
 21 instructions should have been taken?
 22 GENERAL PHIYEGA: I have said in this
 23 Commission that the person who was overall responsible for
 24 that, because I visited one day, the person who was overall
 25 responsible, chairing that process, was the Provincial

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1 Commissioner so I went there to be briefed and I was fully
 2 briefed and I left there understanding what I'm
 3 understanding and if there were questions to be asked
 4 further and instructions to be given, she would have the
 5 responsibility to do so.
 6 [14:33] MR NTSEBEZA SC: Is your answer no?
 7 GENERAL PHIYEGA: I have already, I have
 8 answered you.
 9 MR NTSEBEZA SC: Did you hear the
 10 question?
 11 GENERAL PHIYEGA: Yes, I did.
 12 MR NTSEBEZA SC: Do you still remember
 13 the question?
 14 GENERAL PHIYEGA: Yes, I do.
 15 MR NTSEBEZA SC: Is your answer that you
 16 have given a response to the question? Please answer the
 17 question again. Did you, as Commissioner of Police who had
 18 issued that circular a fortnight before these events, ask
 19 anyone whether there is video material that should have
 20 been taken in terms of that instruction?
 21 GENERAL PHIYEGA: I have answered you
 22 because I did not have personally to do so. I have given
 23 you my answer to say that question would arise in that
 24 meeting that was chaired by the Provincial Commissioner as
 25 the person who was in charge of the total operation. And

<p style="text-align: right;">Page 8048</p> <p>1 therefore, Advocate, it wasn't – in my opinion it wasn't 2 necessary for me to be asking that. I would ask questions 3 where it is relevant. 4 MR NTSEBEZA SC: Perhaps let me try and 5 explain where I come from, Commissioner, because I don't 6 want to be unfair to you. I want to be able to make 7 submissions to the Commission because I am able to relate 8 it to evidence that a witness has given and sometimes it 9 may get, take a time to get there. All I want to know is a 10 factual narration of what you did, what you did not do, so 11 that I can draw the inferences. Am I correct in inferring 12 from your answer that you did not ask anyone? 13 GENERAL PHIYEGA: I have answered you to 14 say because I was not in charge of the operation, the 15 person who's in charge of the operation can answer you on 16 those issues. I had gone to be briefed on the preparations 17 for this Commission and I was briefed. 18 COMMISSIONER: Is the position, you went 19 to Potchefstroom, when you got there or sometime after you 20 got there you were told that there were gaps, significant 21 gaps in the video material? 22 GENERAL PHIYEGA: That is correct. 23 COMMISSIONER: Presumably you didn't 24 consider it necessary to ask about that further because of 25 what you'd been told, is that correct?</p>	<p style="text-align: right;">Page 8050</p> <p>1 MR SEMENYA SC: Chair, can Mr Ntsebeza 2 assist all of us by pointing us to the transcript so that 3 we can know, in its context, all those answers that 4 Brigadier Mkhwanazi had given? 5 COMMISSIONER: Can you refer the question 6 – Mr Ntsebeza, have you got that information at hand? 7 MR NTSEBEZA SC: I don't have it at hand, 8 unless my learned friend is saying it is not so, that's my 9 recollection – 10 COMMISSIONER: No – no, I think he says 11 he – you know, it was a long time ago and I think he feels 12 that he'd like to have the actual transcript in front of 13 him but if you haven't got the reference then presumably – 14 MR NTSEBEZA SC: I don't have the 15 reference here – 16 COMMISSIONER: Presumably it can be 17 obtained later. 18 MR NTSEBEZA SC: My juniors will look and 19 find it after another half an hour, but I will come back to 20 it. I was only – I was proceeding on the basis that it is 21 between us, it is common cause, only the witness would -. 22 What I want to establish from you, and I'll come back to 23 what I seek to infer from Brigadier Mkhwanazi, is it so 24 that you also did not make an enquiry yourself about where 25 the footage is, how the footage is not being shown, the</p>
<p style="text-align: right;">Page 8049</p> <p>1 GENERAL PHIYEGA: Because – that's number 2 1, that because of what I'd been told but because I also 3 know that a person who is in charge of operations is going 4 to make sure that we get every other necessary footage that 5 we have to back up what we are submitting and to make 6 available for the Commission. I knew that that would 7 happen. 8 MR NTSEBEZA SC: Let me tell you what 9 Brigadier Mkhwanazi said in relation to this footage. 10 GENERAL PHIYEGA: Mm. 11 MR NTSEBEZA SC: He says when they got 12 there, there they were shown media video footage and then 13 again he went on to say he was told that there was police 14 video footage but it was not flighted, it was not shown and 15 when I asked him whether he had asked for that footage to 16 be shown, given that in terms of this exhibit S it's 17 something that ought to have been there, he said he did not 18 and then we went into the whole question of why didn't he 19 seek to establish where this video footage is. Do you 20 understand? 21 MR SEMENYA SC: Chair – 22 MR NTSEBEZA SC: Now why I want – 23 COMMISSIONER: No, no, Mr Ntsebeza. Mr 24 Semenya wants to say something. 25 MR NTSEBEZA SC: Oh –</p>	<p style="text-align: right;">Page 8051</p> <p>1 reasons - 2 COMMISSIONER: That question has been 3 asked by you and answered by the witness. She said she 4 didn't, because she assumed that the Provincial 5 Commissioner who was in charge of the gathering in 6 Potchefstroom would do the necessary. I think she has 7 answered that question already. If you have another 8 question which builds on that, then you can ask it but I 9 don't think you should ask that question again. 10 GENERAL PHIYEGA: Can I just say 11 something, Judge, but I've also said that the information 12 that we have as SAPS, to the best of my knowledge we 13 submitted all the information that we needed to submit to 14 this Commission. 15 MR NTSEBEZA SC: Yes. 16 GENERAL PHIYEGA: If there's any other 17 information and footage that you are talking about, I am 18 not aware of. 19 MR NTSEBEZA SC: But both of us are 20 agreed that that footage which you have submitted to the 21 Commission, falls far short of what is required in terms of 22 exhibit S. 23 COMMISSIONER: I think that point has 24 been made also, Mr Ntsebeza, and I think she's agreed with 25 it before and there's no point in getting her to agree with</p>

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1 it again. She's unlikely to contradict the agreement that
2 she's already given.

3 MR NTSEBEZA SC: I will take your
4 assurance, Mr Chairman. Now, that being the position, I do
5 have to ask you – and please bear with me – only a
6 fortnight before that you issue a very clear, clear
7 injunction to everybody, including the person who would be
8 doing the presentation there, and in view of what you had
9 said in that circular wasn't it necessary for you to ask
10 further, from whoever was giving an account?

11 GENERAL PHIYEGA: I'm on record as
12 saying, Advocate, that to my understanding and to the best
13 of my knowledge we've submitted (a), all what we had.
14 Secondly, I've already responded to you today to say to
15 you, part of what is the limitation of the footage that you
16 are talking about is also articulated in our submission and
17 I have verbally equally said to this Commission that our
18 work had been disrupted. The incompleteness has a reason
19 and a rationale for it.

20 COMMISSIONER: That's not the question.
21 Let me intervene here for a moment. I don't think that's
22 quite an answer to the question but let me approach the
23 matter from a slightly different angle. I take it that it
24 must have been very frustrating for you that there wasn't
25 video material covering the whole operation. You had asked

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1 in your – or instructed, in fact, in your letter exhibit S
2 that video material should be taken of – those were the
3 exact words – that video footage is taken of the crowd
4 throughout the phases and including during the use of
5 minimum force. So that was your instruction and obviously
6 it was designed to ensure that when there as an incident of
7 any kind where minimum force was used, there would be no
8 scope for arguments and disputes and months and months of
9 expensive commission hearings to ascertain what happened
10 because it could all be made clear in a short while by
11 looking at video footage. Now that instruction you gave
12 was obviously not complied with for whatever reason and
13 that must have been, I would think, a source of frustration
14 for you. Would that be a fair assessment?

15 GENERAL PHIYEGA: Judge, you are right.
16 Not only frustration but concern and that is why I asked,
17 we had to look for – why did we not do that and we
18 articulate that to say part of our photographer, the
19 disruption did also disrupt the compliance.

20 COMMISSIONER: Yes, I understand. That's
21 where Mr Ntsebeza comes from when he says didn't you
22 consider it necessary to ask but I think you've covered
23 that point before.

24 GENERAL PHIYEGA: I have.
25 COMMISSIONER: Now there are two, of

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1 course, aspects to this matter. The one is you assume, I
2 take it, that everything was done as you were told, that
3 all the video material that you had was handed over, that's
4 what you were told and you say to the best of your
5 knowledge that is the case. Of course there is another
6 possibility and that is the possibility that some people in
7 the police force who hadn't obeyed in accordance with the
8 highest standards, who were aware of video material which
9 showed them doing things they shouldn't have done, would
10 have had a motive to do away with or hide or conceal or
11 destroy such footage. Now it's clear from what you say
12 that you don't believe that that's the case.

13 GENERAL PHIYEGA: Mm.
14 COMMISSIONER: And I can understand why
15 that's your attitude but I think what Mr Ntsebeza is trying
16 to examine is whether there's any scope for that
17 possibility being also correct. Am I interpreting you
18 correctly, Mr Ntsebeza? If the interpretation is wrong,
19 well then someone else can do the interpreting – do I
20 construe the thrust of your cross-examination correctly?

21 MR NTSEBEZA SC: Well, that pretty much
22 was the direction in which I was going.
23 COMMISSIONER: Alright, well now that
24 I've moved the four-wheeled vehicle a little bit further
25 forward, would you like to proceed?

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1 GENERAL PHIYEGA: Judge, to that I would
2 say not to our attention, not to our knowledge and I think
3 that's how best I can answer that.

4 COMMISSIONER: [Inaudible] was based on
5 the assumption that what you told us was correct, namely
6 that to the best of your knowledge all the video material
7 was available. You then gave an explanation about the
8 disruption as to why there wasn't other video material.
9 All I'm suggesting to you, that there is another
10 possibility which obviously this Commission has to
11 investigate. Whether that was correct or not is a matter
12 we will have to look at. That's the only point I was
13 making.

14 GENERAL PHIYEGA: Judge, I'd like to say
15 that would be an assumption in my book too and if it has to
16 be investigated and there is need for that, that would be
17 in the right of this Commission to do so.

18 MR NTSEBEZA SC: Yes. Now the question
19 actually that I was asking, especially now in view of what
20 you are saying, is, two weeks before the happenings on the
21 16th of August and a couple of weeks also thereafter, a
22 circular you had sent had not been complied with. You are
23 given a report in which it is manifest or from which it is
24 manifest that there's no video footage of the nature that
25 you envisaged in the circular. [The question I was asking

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1 is, wasn't that an occasion for you to seek to find out
 2 from those who were giving the report, get more detail, and
 3 if it was a reason for you to get more detail why didn't
 4 you go after detail?
 5 GENERAL PHUYEGA: You assume that we
 6 didn't. I say we did, that's why we are explaining in the
 7 report why that did not happen.
 8 MR NTSEBEZA SC: Later – earlier on I had
 9 referred to your use of the royal “we.” I'm just asking
 10 you, at the end of the day you are not the leadership, I'm
 11 asking you because at the end of the day the buck stops at
 12 some place and you are the National Commissioner, you are
 13 the one who sent the circular. Did you yourself say okay,
 14 just who was in charge of the water cannon videos, the
 15 helicopter videos, the ordinary police videos, the videos
 16 in the Nyalas and all of this. I just want to get those –
 17 I, I, I, Riah, I want these people here, I just want to
 18 find out what it is. Are you saying to the Commission you
 19 yourself did not, as far as Commissioner –
 20 COMMISSIONER: Mr Ntsebeza, I think
 21 you've asked that question and she said I didn't because
 22 the Provincial Commissioner, obviously in whom she has
 23 great faith, I take it, she was certain was going to go in
 24 for that, so I think that's your answer. Am I right?
 25 GENERAL PHUYEGA: That's one –

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1 COMMISSIONER: You've been given that
 2 several times.
 3 GENERAL PHUYEGA: I have said so already
 4 to say those types of videos you will get from the
 5 operations leaders but secondly, the explanation that was
 6 given to me that is reflected in the report, I, Riah,
 7 accept.
 8 COMMISSIONER: The other explanation, of
 9 course, only deals with these people who were on the
 10 ground.
 11 GENERAL PHUYEGA: Mm.
 12 [14:53] COMMISSIONER: We've had a lot of
 13 evidence about some of the other videos, you know the water
 14 cannon videos – the water cannon people didn't run away at
 15 the first smell of sulphur and they had video cameras on
 16 their water cannons and there were people in the air.
 17 GENERAL PHUYEGA: Yes.
 18 COMMISSIONER: And all that video
 19 material we've had doesn't take us too far. People seem to
 20 be pointing their cameras in the wrong place at the wrong
 21 time, all that kind of thing. In other words, it may well
 22 have been it all happened quite innocently you know,
 23 unfortunately, in a non-sinister way but the explanation
 24 you were given only covers the POP video operators. It
 25 doesn't explain why all this other video material either

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1 isn't there because the cameras didn't function at the
 2 right time or didn't have batteries or whatever it was,
 3 although the instructions also say somewhere that people
 4 must make sure the batteries are working, the cameras are
 5 working before something is done. So these other aspects
 6 that aren't covered by the explanation you were given – and
 7 I think that's where Mr Ntsebeza is going. I'm trying to
 8 get things moving a bit but – if he's offended I apologise.
 9 Am I right, Mr Ntsebeza? He's not listening to me, he
 10 doesn't know -
 11 MR NTSEBEZA SC: I was listening. It's
 12 called multi-tasking, Mr Chairman.
 13 COMMISSIONER: That's the point, the
 14 explanation you were given doesn't cover the whole field.
 15 GENERAL PHUYEGA: Mm.
 16 COMMISSIONER: It covers part of it but
 17 there are other aspects that aren't covered by it and is
 18 that part of what you're onto, Mr Ntsebeza?
 19 MR NTSEBEZA SC: Yes, Mr Chairman. In
 20 fact if I may follow up, you see my learned friend directed
 21 my attention to slide 170 of exhibit L. Do you have it in
 22 front of you?
 23 GENERAL PHUYEGA: Yes, I do.
 24 MR NTSEBEZA SC: Can you read it to the
 25 Commission?

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1 GENERAL PHUYEGA: Let me see -
 2 COMMISSIONER: Just read it, Mr Ntsebeza,
 3 I can read it. “Captain Adrio informed the video operators
 4 of POP about the information. This information is in the
 5 previous bullet, that “Captain Adrio informed both the
 6 video operators of the SAPS” – so there's only two of them
 7 involved – “that a journalist had reported to him that the
 8 video operators of POP who were in civilian clothing were
 9 identified as ‘police spies’ by the protesters and might be
 10 killed if they remained in the general media group.
 11 Captain Adrio informed the video operators of POP about the
 12 information. Based on this information they withdrew from
 13 the scene and returned to the JOC.”
 14 MR NTSEBEZA SC: Thank you, Mr Chairman,
 15 you have saved the Commissioner reading. Now, the
 16 Commissioner has – I mean the Chairman has kindly read what
 17 I said you must read. Now is that the reason that you did
 18 not seek a reason why that injunction was not carried to
 19 the letter?
 20 GENERAL PHUYEGA: It is the response to
 21 why 3.3 did not take place, by the way, where you started,
 22 to say in terms of the instructions 3.3 should have
 23 happened, what went wrong? And that is –
 24 COMMISSIONER: Sorry, that's correct
 25 because 3.3 deals with the POP people.

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1 GENERAL PHIYEGA: Exactly.

2 COMMISSIONER: That deals with the duties

3 of the POP –

4 GENERAL PHIYEGA: Yes.

5 COMMISSIONER: - video operators.

6 GENERAL PHIYEGA: Yes.

7 COMMISSIONER: Yes, but of course the

8 further point is that there were other video operators as

9 well, or there were supposed to be. The water cannons were

10 supposed to have video cameras, working video cameras

11 fitted to them which were supposed to come on automatically

12 when the water cannon was activated. There were people in

13 the sky in the helicopters who took videos which, with the

14 greatest respect, don't take us very much further. So I

15 would have imagined that you might well have considered

16 saying to them, well, I understand now why the POP video

17 operators didn't do anything, but there were other video

18 cameras as well, what about them? Now, did you not ask

19 about that?

20 GENERAL PHIYEGA: I'm aware, for

21 instance, that when we asked about the water cannon, the

22 water cannon operation, the operation of the water cannon,

23 they could not operate that and I'm sure those who were in

24 operations will come and tell you that they were not able

25 to operate the camera on the water cannon. And I'm sure

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1 those who were on the – on the helicopter, I'm sure General

2 Mpmembe when he comes here he'll be able to talk to that

3 also.

4 MR NTSEBEZA SC: Commissioner, do you say

5 – as my attention was drawn to it by your counsel – that

6 the explanation given in slide 170 is the reason or one of

7 the reasons that were given as to why there was no footage

8 in scene 1 and in scene 2 from the SAPS?

9 GENERAL PHIYEGA: I'm on record saying

10 so.

11 MR NTSEBEZA SC: So your explanation is

12 that, which we accepted and I would assume reasonably so,

13 is that the POP didn't do a job which you wanted them to do

14 because an unnamed journalist told them that they might be

15 killed?

16 COMMISSIONER: Captain Adrio who conveyed

17 the information –

18 MR NTSEBEZA SC: Yes.

19 COMMISSIONER: That's what 17 –

20 MR NTSEBEZA SC: Yes, but then Captain

21 Adrio, from what I understand, conveyed it to her as a

22 basis.

23 COMMISSIONER: Captain Adrio received the

24 information from the journalist and he then conveyed that

25 information to the two video operators, as a result of

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1 which they withdrew.

2 MR NTSEBEZA SC: Yes.

3 COMMISSIONER: That's what that says.

4 MR NTSEBEZA SC: And that was the

5 explanation that was given to the Commissioner and the

6 Commissioner accepted as a rational and a reasonable basis,

7 is that right?

8 GENERAL PHIYEGA: Because it is true, our

9 videographers could not do their job because they were seen

10 as people who were spying on the crowd and they had to

11 retreat and therefore, Advocate, they could not do their

12 job.

13 MR NTSEBEZA SC: Is that an exception to

14 your rule? If you are labelled police spies you can

15 withdraw from the scene and not photograph anything?

16 GENERAL PHIYEGA: If the life of the

17 police is in danger and their work is disrupted to video

18 what they were supposed to be videoing, it is responsible

19 for me and responsible for the commanders to act

20 accordingly to ensure that lives are further saved. It was

21 important. And let me also say Captain Adrio is in

22 communications and he understands precisely the dangers of

23 those people that are supposed to do the work that they are

24 supposed to do and this has been reported to this

25 Commission as a problem, the disrupting factor.

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1 MR NTSEBEZA SC: So the police withdraw

2 from a police operation which would have given them an

3 ability to video an operation that had not even begun,

4 because if you look at that slide, the timing of that slide

5 is at half past one. They withdraw from a duty that they

6 would have had to do almost three hours before it happened.

7 Our police who are there to protect us and maintain law and

8 order and are responsible also for making sure that they

9 have video footage of what might turn out to be an incident

10 that needs a recordal to obviate the very thing that we are

11 doing, because they are told that they may be police spies,

12 leave the area more than two hours before the operation

13 starts. Is that what you accepted as rational and

14 reasonable?

15 GENERAL PHIYEGA: Advocate, I'm going to

16 try and – you gave a long question, I'm going to try to cut

17 it into pieces when I respond to you.

18 COMMISSIONER: May I suggest that you do

19 so after tea. It sounds as if the answer is going to be

20 that you did regard it as a rational and reasonable

21 explanation and you're going to say why, is that correct?

22 GENERAL PHIYEGA: I'll definitely do so.

23 COMMISSIONER: Alright. Now, one of the

24 points I wanted to make to Mr Ntsebeza is that, you know,

25 this is all very much second and third hand. I understand

<p style="text-align: right;">Page 8064</p> <p>1 you're probing her acceptance of the explanation, I 2 understand that but the real question will come up when – I 3 take it he's coming to give evidence – Captain Adrio comes 4 to give evidence and he deals with this directly and 5 perhaps one of the generals or a brigadier or somebody who 6 was on the scene is questioned about this, the matter can 7 then be gone into fully in relation to all the surrounding 8 circumstances and where the NIU were and who were supposed 9 to protect the general media group and all that kind of 10 stuff can then be gone into. So I'm afraid a detailed 11 discussion of it now isn't really going to help us, but let 12 us have our tea and when we've finished the National 13 Commissioner will give her explanation as to why she 14 accepted this a reasonable and rational explanation and 15 then we can move on. Is that an appropriate way of going –</p> <p>16 MR NTSEBEZA SC: No, we can take the – 17 COMMISSIONER: Can you give us an 18 indication, I know it's difficult because you can't take 19 injury time into account but how long do you anticipate you 20 will still be with your cross-examination? 21 MR NTSEBEZA SC: I had thought that I 22 would be done by one o'clock. 23 COMMISSIONER: You thought you'd be done? 24 MR NTSEBEZA SC: I thought I would be 25 done by lunch time.</p>	<p style="text-align: right;">Page 8066</p> <p>1 something that featured in your consideration of the 2 reasons that there was no official SAPS footage made 3 available to the Commission. 4 GENERAL PHIYEGA: You are right by saying 5 it's one of those. I've already touched on – 6 MR NTSEBEZA SC: Yes. 7 GENERAL PHIYEGA: - some of the other 8 things that the Judge alluded to and I'm sure the 9 operations people would be able to give it in more detail 10 around these matters. 11 MR NTSEBEZA SC: Yes. And in summarising 12 the position, the position is this, at 25 past one two POPS 13 video camera people get withdrawn from the scene because 14 they have been identified as police spies. That's what is 15 there. 16 GENERAL PHIYEGA: It is true, because the 17 situation was unsafe for them they had to be withdrawn and 18 safety became an issue. 19 MR NTSEBEZA SC: And those two for their 20 safety, from what I understand you to be saying, are 21 withdrawn and they return to the joint operations centre. 22 GENERAL PHIYEGA: I'm sure there would be 23 more detailed – that is recorded as such but the operations 24 people would give you more details about what they did and 25 at what point they returned to the joint operations centre</p>
<p style="text-align: right;">Page 8065</p> <p>1 COMMISSIONER: Yes, but lunch time has 2 come and gone. 3 MR NTSEBEZA SC: Today. 4 COMMISSIONER: Are you talking about 5 lunch time tomorrow now? I know it's difficult to answer 6 the question but can you give us a sort of an idea? Are 7 you likely to finish this afternoon? 8 MR NTSEBEZA SC: I would like to finish 9 this afternoon. 10 COMMISSIONER: Okay, let's drink our tea 11 with more enjoyment than otherwise in the light of that 12 information. 13 [COMMISSION ADJOURNS COMMISSION RESUMES] 14 [15:28] COMMISSIONER: The Commission resumes. 15 National Commissioner, you're still under oath. Mr 16 Ntsebeza? 17 MANGWASHI VICTORIA PHIYEGA: s.u.o. 18 CROSS-EXAMINATION BY MR NTSEBEZA SC (CONTD.): 19 Thank you, Mr Chairman. Commissioner, we now are at a 20 stage – by the way, the Chairman was correct in saying that 21 there will be, hopefully there would be people who will 22 specifically testify to the whole narrative about police 23 spies. What I sought to establish and you will correct me 24 here if I'm wrong, is whether what was drawn to my 25 attention by counsel for SAPS, being 171 – exhibit L170, is</p>	<p style="text-align: right;">Page 8067</p> <p>1 and the people who are going to testify after me will talk 2 quite at length to that. 3 MR NTSEBEZA SC: You can be sure we will, 4 we will cross that bridge when we come to it, until 5 somebody says we'll double-cross that bridge when we come 6 to it. What I want to put – what I've always been trying 7 to get to you, Commissioner, is that you have an 8 instruction which is put in unequivocal terms that video 9 footage, without exception, must be taken throughout and 10 during the operation. There is an allegation at half past 11 one, even as the generals – General Annandale and everybody 12 else – are meeting just to discuss what is going to be 13 done, a meeting that lasts until about half past one, 2 14 o'clock, the operation is going to start at half past 15 three. Is it your evidence that you accepted as a basis 16 for the absence of video footage, what is being said in 17 slide 170? 18 GENERAL PHIYEGA: I've already said yes 19 and I shall say yes again. 20 MR NTSEBEZA SC: Now, the next question I 21 ask and I may ask you it as well, didn't you feel that it 22 was a reason that needed further interrogation from you? 23 GENERAL PHIYEGA: Advocate, my yes is 24 informed and my yes is *06-54 regard it as being 25 substantiated, so I'm saying yes, taking all issues into</p>

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1 account and the question you are asking, I would say I have
2 done what I thought it would be reasonable for me to
3 actually be able to say yes.

4 COMMISSIONER: I'm sorry, I think before
5 the tea adjournment I promised you that I'd give you an
6 opportunity to give what was called a rational and
7 reasonable explanation as to why you believe the
8 explanation. I don't think I kept that promise, so would
9 you like to give that now?

10 GENERAL PHIYEGA: Okay. I think, Judge,
11 first and foremost I do need to say, when my understanding
12 and my testimony to this Commission was that we as the
13 police had done everything to plan for the operation of the
14 16th, amongst many other things that were planned for would
15 have been exactly the process of taking photos, videos, for
16 that event. I've also said, Judge, to the Commission that
17 the event of the 16th was not the first that we were dealing
18 with. I am on record saying in the past three years we've
19 dealt with over 33 000 of footage*08-39 and a lot of what
20 we were doing there to plan and to get ready, used a lot of
21 experiential knowledge, expertise that we've gathered over
22 and over and over again. I've also said, thirdly, that the
23 fact that our tested norms, experience and expertise did
24 not do what it – did not achieve or release or bring the
25 outcomes that we were used to, told a very different story

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1 Are you saying I must go back to them and say the
2 Commissioner says their operators were withdrawn because
3 they were suspected to be police spies two hours before the
4 operation started? Is that what I must tell them?

5 GENERAL PHIYEGA: I think what you should
6 tell them is that we did not have any report from any of
7 the media people there that their lives were threatened
8 directly but you can tell them that the members of the
9 police who were doing this work were actually threatened.

10 MR NTSEBEZA SC: Are you talking about
11 Warrant Officer IT Ndlovu?

12 GENERAL PHIYEGA: I may not be sure of
13 the names but I'm sure my commanders would be able to tell
14 you about exactly which warrant officers were affected
15 here.

16 MR NTSEBEZA SC: Now that's the detail
17 that the Chairman correctly indicated we will investigate
18 at that time. You have taken disciplinary action or you
19 have ordered disciplinary action to be taken against
20 members of the SAPS whenever it is necessary for you to do
21 so.

22 GENERAL PHIYEGA: You are correct.

23 MR NTSEBEZA SC: And you have done so
24 after you have evaluated whatever evidence is there.

25 GENERAL PHIYEGA: Yes, it is demanded of

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1 and this is why I said to this Commission that in our
2 understanding the circumstances and happenings of that day,
3 in our definitions were seriously very not like the other
4 circumstances that we have encountered. The plan that we
5 thought would do what it normally do under managing
6 protests, did not do what it was supposed to do and where
7 the unprecedented nature of risk*10-25 of this matter of
8 the 16th comes into play. Our plan was disrupted and
9 therefore it yielded outcomes that we had never intended.
10 And I've also said that in terms of this the compliance
11 issues as you, as the Advocate was talking about in terms
12 of our normal way of taking pictures and all this, a number
13 of issues interrupted with those processes. It was an
14 unnatural situation in terms of our policing. Thank you.

15 MR NTSEBEZA SC: I have indicated –

16 COMMISSIONER: Yes, Mr Ntsebeza?

17 MR NTSEBEZA SC: Thank you, Mr Chairman.

18 I have indicated to you that, by no fault of your own, the
19 people I represent are unsophisticated. They want to
20 compare situations. One of the things that I know about
21 this action, I hear what you say about this action but one
22 of the things that they say is this is an event which the
23 world media who were there were able to capture, dangerous
24 as that situation was. Now, why is it that the police were
25 not able similarly to capture what happened at scene 1?

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1 me to do so.

2 MR NTSEBEZA SC: Indeed you do so because
3 you want to be satisfied that, amongst other things, that
4 when orders are sent out, when instructions are sent out,
5 they must be adhered to, right.

6 GENERAL PHIYEGA: You are right and also
7 that whatever I do must be fair and just.

8 MR NTSEBEZA SC: I was asking all these
9 questions because I want to know whether, in this instance,
10 you ever thought of disciplinary action against any of the
11 members of the South African Police Service who failed to
12 comply with your instruction as carried out in exhibit S.

13 GENERAL PHIYEGA: I think you would agree
14 with me, Advocate, that this Commission, when it is done
15 and when the outcomes of this Commission are put before us,
16 we as the police will take the opportunity to evaluate
17 everything and I am on record saying relevant remedies
18 would be taken.

19 MR NTSEBEZA SC: Is the suggestion that
20 even if you are satisfied on investigation of facts, you
21 will not take action until this Commission has done its
22 work? Is that how you conceive the work of this
23 Commission?

24 MR NTSEBEZA SC: I shall not pre-empt the
25 outcome of all these processes.

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1 MR NTSEBEZA SC: I will come to that when
 2 I deal with the whole question of internal review, but I
 3 would like you to indicate to the Commission how it is so
 4 that when you would seek to satisfy yourself about why
 5 exhibit S, with regard to the taking of video footage, was
 6 not complied with, you are not entitled to take
 7 disciplinary action against the members involved. Are you
 8 suggesting that you would be interfering with the work of
 9 this Commission if you did so?

10 GENERAL PHIYEGA: (a) –
 11 MR SEMENYA SC: Chair?
 12 COMMISSIONER: Mr Semenya?

13 [15:48] MR SEMENYA SC: Chair, there is no prima
 14 facie indication of misconduct necessitating disciplinary
 15 action where an explanation is given that I did not execute
 16 the instruction following information from the Brigadier
 17 that our lives were in danger, we have been identified as
 18 police spies and withdrew for that reason. There would be
 19 no basis at all for any disciplinary action.

20 MR NTSEBEZA SC: Maybe let me take a few
 21 steps back and seek to lay a basis, which is what I think
 22 my learned friend wants. I don't understand you to be
 23 suggesting that the public order police on the 16th of
 24 August would have relied for video footage on two people.
 25 You are not suggesting that, are you?

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1 GENERAL PHIYEGA: I'm not understanding
 2 you. Maybe let me understand you fully. When you say
 3 you're not understanding me to be saying that, what are you
 4 understanding me to be saying?

5 MR NTSEBEZA SC: You see, there is an
 6 endeavour to explain the absence of footage -

7 GENERAL PHIYEGA: Yes.
 8 MR NTSEBEZA SC: - by you being referred
 9 to, to what is indicated at slide 170 and 170 tells us that
 10 operators from POP who operate videos were withdrawn at
 11 half past one, 25 past one because they were suspected of
 12 being spies because their lives were in danger. Now, that
 13 standing alone, is that one of the reasons that you were
 14 given as a basis for saying, Commissioner, we don't have
 15 video footage of what happened two hours after we had
 16 withdrawn our video cameras?

17 GENERAL PHIYEGA: I've already said yes
 18 to that, Advocate.

19 MR NTSEBEZA SC: Yes. Just checking
 20 again, Commissioner. Now, are you saying therefore that as
 21 far as public order policing on that day was concerned, for
 22 the entire operation they relied on those two video
 23 cameramen?

24 GENERAL PHIYEGA: I've already indicated
 25 that, responding to the Judge on the water cannon cameras,

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1 and I've said those again were a platform and I'm sure the
 2 –

3 MR NTSEBEZA SC: Were what?
 4 GENERAL PHIYEGA: Were another – yes,
 5 I've spoken about the water cannon.
 6 MR NTSEBEZA SC: Mm.
 7 GENERAL PHIYEGA: You and the Judge also
 8 referred to the helicopters –

9 MR NTSEBEZA SC: Yes.
 10 GENERAL PHIYEGA: And I've said the
 11 commanders and the operators who will come and explain in
 12 technical and detailed terms what worked, what didn't work
 13 in terms of those and then I said given all those, I was
 14 satisfied with the explanation I was given.

15 MR NTSEBEZA SC: Yes. You – I may have
 16 missed it in reading the transcripts, did you say why, from
 17 those other sources there wasn't, according to what you
 18 were told – I know that the real people will come, I mean
 19 not the real people, the people who were involved will come
 20 but you yourself and look, please understand that I'm
 21 looking at you as the administrator who has to decide
 22 whether disciplinary action here is warranted, like you
 23 have decided in another matter where you have appointed a
 24 chairman of a disciplinary inquiry even though there are
 25 proceedings of a criminal nature. Now I'm asking you the

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1 question –

2 GENERAL PHIYEGA: I'm not sure –
 3 MR NTSEBEZA SC: Are you saying that you
 4 are not in a position to tell us what you were told led to
 5 the absence of video material or is it because I didn't
 6 pick it up in the transcripts?

7 GENERAL PHIYEGA: Maybe I don't
 8 understand your question. There are two things in the
 9 question that you've asked. You've spoken about me
 10 appointing a chairperson of a disciplinary inquiry, I don't
 11 know which one that is. I would like to understand, that's
 12 one. And secondly, you raised the issue around the
 13 helicopters and other things and just before tea the Judge
 14 asked a question, I gave my understanding around the water
 15 cannon and the helicopter.

16 MR NTSEBEZA SC: If I were dragged to
 17 come to the question of the other appointment, I would, but
 18 let me just make this point. What I'm seeking to say to
 19 you is, you evaluated information that came to you as to
 20 why there's no video footage. Am I right in that?

21 GENERAL PHIYEGA: You are correct, I've
 22 said so.
 23 MR NTSEBEZA SC: One of the reasons
 24 there's no video footage we have dealt with, the people
 25 were withdrawn at half past one, 25 past one. The other is

<p style="text-align: right;">Page 8076</p> <p>1 that there are technical people who will come and testify 2 as to why the water cannons, the helicopters, Nyalas and 3 everything else which ought to be able to take video 4 footage, didn't. Did I understand you well? 5 GENERAL PHIYEGA: Yes, I have confirmed 6 that there could be, there were other platforms that could 7 have contributed to the footage- the water cannons and the 8 helicopters, not the Nyalas. 9 MR NTSEBEZA SC: Yes, okay. In other 10 words, you have information that you were given by 11 technical people as to why the other sources of video 12 footage have not produced video footage as expected? 13 GENERAL PHIYEGA: Yes, I have said so and 14 I have said when General Annandale comes here, he will 15 explain in much detail and in depth what happened to the 16 water cannon. I have said earlier on before we left that 17 General Mpembe will talk to the footage on the helicopters. 18 I said so earlier on. 19 MR NTSEBEZA SC: Mm. And there will be 20 somebody you say who will come and say why there is no 21 video footage for scene 1 and for scene 2. 22 GENERAL PHIYEGA: The issues we are 23 talking about are meant to give you footage for those two 24 areas and therefore, by implication, the explanation that 25 would be given would be why there isn't footage for those</p>	<p style="text-align: right;">Page 8078</p> <p>1 GENERAL PHIYEGA: Judge? 2 COMMISSIONER: You said someone will come 3 and give evidence as to why there isn't video footage, 4 police video footage for scene 1. Who will that be, do you 5 know? That could be General Mpembe or General Annandale, 6 who is it going to be? 7 GENERAL PHIYEGA: I'm saying the 8 commanders that were in charge of the operations. General 9 Annandale is one of them, General Mpembe is one of them, 10 all those people that are coming to follow me would be able 11 to do that. 12 COMMISSIONER: So what you're telling us, 13 there will be evidence from the commanders explaining the 14 lack of police footage for scene 1 and scene 2? 15 GENERAL PHIYEGA: Precisely, and it will 16 be intertwined and those commanders would be able to 17 explain that. 18 COMMISSIONER: That's what I understood 19 you to say. Mr Ntsebeza, it's now four o'clock, you're 20 obviously not going to finish by the time we adjourn. 21 MR NTSEBEZA SC: Indeed, indeed Mr 22 Chairman. 23 COMMISSIONER: How long do you think you 24 are likely to be tomorrow? I know it's difficult and I 25 know there's injury time and all sorts of problems, just –</p>
<p style="text-align: right;">Page 8077</p> <p>1 two scenes. 2 MR NTSEBEZA SC: Yes, I think I 3 understood that but what I'm asking is whether you are 4 saying, just like you said General Mpembe will come, is 5 there somebody who is going to come to tell us why we don't 6 have police footage of scene 1? 7 GENERAL PHIYEGA: You confuse me because 8 I thought when we talked about the video footage, we are 9 talking, the context of this question is around footage of 10 scene 1 and scene 2. I understood through all this 11 discussion that we were talking about that and therefore 12 when I say there'll be somebody, those people will be 13 coming to talk, I thought we were saying these are the 14 possible platforms for the footage, we discussed that – 15 COMMISSIONER: I understood her to say – 16 sorry. 17 GENERAL PHIYEGA: Ja. Sorry, Judge. 18 COMMISSIONER: I understood her to say 19 that there will be evidence explaining lack of footage of 20 scene 1, lack of police footage of scene 1, I think she 21 said General Annandale would deal with that, is that right? 22 MR NTSEBEZA SC: She hasn't said who it 23 is. That's what I was trying to get to. 24 COMMISSIONER: Is that correct, National 25 Commissioner?</p>	<p style="text-align: right;">Page 8079</p> <p>1 MR NTSEBEZA SC: I would like the General 2 to go home, so really I – 3 COMMISSIONER: You see you've got to go – 4 I understood you to say you're going to go back to page 7 5 of FFF2. You cross-examined on it and you said you'd come 6 back to it, you left it to come back to. 7 MR NTSEBEZA SC: Yes. 8 COMMISSIONER: You said you were going to 9 come back to the IPID Act and the situation relating to 10 that. You haven't done that either, have you? So those 11 two things are still outstanding. 12 MR NTSEBEZA SC: I've got quite some – 13 yes, quite some – 14 COMMISSIONER: Are you likely to finish 15 before – subject to injury time which I understand is a 16 matter over which you have no control – are you likely to 17 finish by tea tomorrow? 18 MR NTSEBEZA SC: I would like to finish 19 by tea. 20 COMMISSIONER: Alright. Now may I ask, I 21 understand Mr Gumbi wants to cross-examine as well, is that 22 correct?? 23 MR GUMBI: Yes indeed, Chair. 24 COMMISSIONER: How long do you think 25 you're going to be, Mr Gumbi?</p>

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1 MR GUMBI: 30 minutes or so, Chairperson.
 2 COMMISSIONER: Sorry?
 3 MR GUMBI: 30 minutes will suffice.
 4 COMMISSIONER: 30 minutes?
 5 MR GUMBI: Yes.
 6 COMMISSIONER: Thank you. Anybody else
 7 want to cross-examine?
 8 MR NTSEBEZA SC: - one hour.
 9 MR BIZOS SC: Mr Chairman, I want to
 10 bring something to your attention. The witness promised us
 11 that there would be a response to exhibit FFF21 by Monday
 12 morning past. We didn't have anything from the police. I
 13 raised it with my learned friends, they appeared to have –
 14 well, they were non-committal. The attorney told me that
 15 he didn't know.
 16 COMMISSIONER: Remind me what FFF21 was?
 17 MR BIZOS SC: This was the parliamentary
 18 presentation –
 19 COMMISSIONER: Oh yes, oh yes.
 20 MR BIZOS SC: - of the Institute of
 21 Security Studies.
 22 COMMISSIONER: Yes, I remember that.
 23 MR BIZOS SC: Mr Chairman, you asked what
 24 we will submit are some very pertinent questions and the
 25 information that the witness promised us is of some

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1 importance and we would not –
 2 COMMISSIONER: So you haven't got it yet?
 3 MR BIZOS SC: We haven't got it and –
 4 COMMISSIONER: Mr Semenya, can you help
 5 us on this?
 6 MR SEMENYA SC: We are investigating how
 7 far the process is. It may very well be that the
 8 information is here and I will communicate that to my
 9 learned colleague, Mr Bizos.
 10 COMMISSIONER: Mr Bizos, you understand
 11 that even though the National Commissioner may leave
 12 tomorrow, she will have to come back when Mr Mpofo returns,
 13 which will be on Monday I think. So you will then get an
 14 opportunity, if it's necessary to deal with that
 15 outstanding matter.
 16 MR BIZOS SC: I would like – I don't know
 17 whether to appeal to the witness or to my learned friend
 18 but I appeal to both to let us have the information that
 19 they promised that I would have had two days ago because we
 20 want to use it because when Mr Mpofo finishes, we want to
 21 question her on the further information that may be, that
 22 may be provided and we would like to take instructions. We
 23 don't want to wait until the last minute and I would appeal
 24 to all of them that the promised information should be
 25 filed as soon as possible.

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1 COMMISSIONER: Well, they've heard your
 2 appeals and I'm sure your appeals have not fallen on deaf
 3 ears. Anybody else apart from Mr Gumbi who wants to cross-
 4 examine tomorrow? Mr Gumbi said he's going to be about
 5 half an hour. Alright, we'll see – very well, yes, I
 6 understand also, Mr Semenya, that you've indicated that
 7 when this witness, on the assumption that this witness
 8 finishes tomorrow, you need time to take instructions to
 9 consult further with General Annandale before you call him.
 10 MR SEMENYA SC: Indeed, Chair.
 11 COMMISSIONER: It seemed to me from what
 12 you said that that meant that we would not be able to sit
 13 on Friday.
 14 MR SEMENYA SC: Indeed, Chair.
 15 COMMISSIONER: So I mention that so that
 16 when this witness finally goes and in anticipation of
 17 coming back for Mr Mpofo, we will then adjourn. That may
 18 well be some time tomorrow. We won't sit on Friday, so
 19 those who wish to make travel plans may find that
 20 information of use. Mr Ntsebeza?
 21 MR NTSEBEZA SC: Thank you, Mr Chairman,
 22 I just wanted to be fair and give my learned friend the
 23 reference I made which I couldn't have – my juniors have
 24 found it, about my cross-examination of Brigadier Mkhwanazi
 25 and all that goes with it. By the way, I had made travel

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1 plans for today, Mr Chairman, but there you are. The
 2 reference is to page 3546, day 33, 21st January 2013. It
 3 will be pages –
 4 COMMISSIONER: Sorry, you've got the
 5 pages?
 6 MR NTSEBEZA SC: Pages 3546 to 3558.
 7 COMMISSIONER: I'm sure Mr Semenya is
 8 grateful for that information.
 9 MR NTSEBEZA SC: Thank you, Chair.
 10 COMMISSIONER: I'm sorry that your travel
 11 plans proved to be made for the wrong day but I don't think
 12 that –
 13 MR NTSEBEZA SC: Thank you, Mr Chairman.
 14 COMMISSIONER: - it's appropriate to
 15 allocate blame for that. We will adjourn now until half
 16 past nine tomorrow morning.
 17 [COMMISSION ADJOURNED]
 18 .
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 23 .
 24 .
 25 .

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