

# 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 76      18 APRIL 2013      PAGES 8084 TO 8158

#### HELD AT

CIVIC CENTRE, RUSTENBURG, NORTH WEST PROVINCE



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1 [PROCEEDINGS ON 18 APRIL 2013]  
 2 [09:34] CHAIRPERSON: The Commission resumes.  
 3 National Commissioner, you're still under oath.  
 4 MANGWASHI VICTORIA PHIYEGA: Yes, Judge.  
 5 CHAIRPERSON: Mr Ntsebeza.  
 6 CROSS-EXAMINATION BY MR NTSEBEZA SC (CONTD.):  
 7 Thank you, Mr Chairman. Commissioner, I just want to round  
 8 off where we left off yesterday, and it was on the question  
 9 of what you understood to be the reasons that were given to  
 10 you by your generals as to why there wasn't SAPS footage of  
 11 particularly scenes 1 and 2, and slide 171 of exhibit L was  
 12 one of those reasons that were apparently given to you.  
 13 Can you just, without discussing them, can you just name  
 14 for us the other reasons that you were given in relation to  
 15 which you said the generals, or the members of the SAPS  
 16 will come and testify as to why we do not have official  
 17 SAPS footage particularly of scenes 1 and 2?  
 18 GENERAL PHIYEGA: Yesterday I already  
 19 gave those reasons; you are probably asking me to repeat  
 20 them.  
 21 MR NTSEBEZA SC: Ja, if you could just  
 22 give them without discussing, let's say 1, 2, 3, 4.  
 23 GENERAL PHIYEGA: I have indicated that  
 24 part of the challenges we faced was that we had planned to  
 25 do things and our plans were disrupted. I also said that -

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1 MR NTSEBEZA SC: Can I just cut you short  
 2 there? I'd like to be able to explain some of the things  
 3 to my clients, who I indicated to you yesterday are not  
 4 very sophisticated people who understand terms like  
 5 disruption. Can you just tell us the facts to say this was  
 6 one of the reasons, for instance this is the disruption, it  
 7 took form in this kind of fashion, and then the next thing,  
 8 the next thing, the next thing.  
 9 GENERAL PHIYEGA: I will try again.  
 10 Advocate, I've said we had a plan and part of the plan  
 11 would have involved having our people with their cameras to  
 12 video and shoot pictures of the event, and those plans  
 13 would have been seeking to comply with some of our  
 14 prescripts and provisions. I again say because of what  
 15 happened on that day, our plans were disrupted, and I have  
 16 also said as a result of that, our compliance was equally  
 17 disrupted in a certain sense. That's the first reason I  
 18 would advance to you. When you spoke to me yesterday you  
 19 also asked whether, you know that slide 171 which spoke  
 20 about POP and our photographers who had to be withdrawn, I  
 21 said it was one of those aspects, and I -  
 22 MR NTSEBEZA SC: That's where I took off  
 23 this morning, when I put the question to you. That's where  
 24 I took off this morning when I put the question to you,  
 25 that that is one reason that you gave, but you seem to

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1 suggest that - because what we are wanting to establish is  
 2 why we have no footage, and we have no footage because  
 3 apparently nobody photographed the things as they happened.  
 4 Now we know why they were not photographed after there was  
 5 an intervention at half past 1 on that day when the people  
 6 were withdrawn. Now what accounts for there being no other  
 7 footage other than 171, to paraphrase?  
 8 GENERAL PHIYEGA: I was in the process of  
 9 explaining, Advocate.  
 10 MR NTSEBEZA SC: I'm sorry, I do  
 11 apologise.  
 12 GENERAL PHIYEGA: I've also said  
 13 yesterday when the Judge indicated that over and above the  
 14 photographers that were removed for their safety because  
 15 they were threatened, the Judge asked about the water  
 16 cannons, and I indicated that there would be a very good  
 17 explanation on the water cannons and -  
 18 MR NTSEBEZA SC: What would the  
 19 explanation be, Commissioner?  
 20 GENERAL PHIYEGA: I have indicated to you  
 21 that the commanders would in technical and tactical terms  
 22 explain those to say did the water cannons work. Some of  
 23 them, as I've said yesterday, I know that one had some  
 24 defects; I also know that the other one, the other person  
 25 could not quite operate, and I'm sure they will talk to

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1 those issues and they would explain them very clearly to  
 2 this Commission what their observations were in terms of  
 3 that. I've also indicated that in terms of photography on  
 4 the helicopter, General Mpembe is here, coming to testify,  
 5 he will be able to talk to those issues.  
 6 MR NTSEBEZA SC: Now thank you for that,  
 7 but we seem to be - or can I put it this way, you seem to  
 8 be missing the point of my question. The point of my  
 9 question is intended to establish from you as a  
 10 Commissioner of Police who had sent out an order for  
 11 certain things to be done, what things were said to you. I  
 12 am satisfied, and I am sure the Commission accepts that  
 13 General Mpembe will come and tell us the detail. I just  
 14 want you to tell the Commission what was told to you around  
 15 the absence of these - not detail, these footages. The  
 16 result of which information satisfied you that there were  
 17 justifiable reasons and therefore there was no disciplinary  
 18 action warranted? Do you understand where I am coming  
 19 from? And since you have mentioned slide 171, and I accept  
 20 that, I don't want any detail, the captain concerned, the  
 21 warrant officers concerned will come and testify. You have  
 22 told us about the water cannons, that the water cannons,  
 23 one of them was malfunctioning, the other one the person  
 24 was not able to operate the equipment. Now the third one  
 25 you have mentioned what General Mpembe is going to say, he

1 will simply come and talk about the helicopters. What did  
2 he say to you, what was wrong with the operation of the  
3 helicopter from the capturing of video footage perspective?  
4 No details, just what did he say to you?

5 GENERAL PHIYEGA: First let me say I  
6 thank you for recognising that I'm giving you reasons and  
7 now you're summarising the reasons that I am giving you,  
8 because when you started your question you were sort of  
9 trying to say I'm not giving you reasons. I've given you  
10 reasons, Advocate, and I've given you what I had been told.  
11 Unless if you don't accept my response, but I have tried to  
12 give you my reasons and my explanation as I understood it  
13 being given by my members.

14 MR NTSEBEZA SC: Yes, General Mpembe?

15 GENERAL PHIYEGA: General Mpembe -

16 MR NTSEBEZA SC: What did he say to you?  
17 What did he say what was wrong with the video cameras in  
18 the helicopters, or what did he say why did the helicopter  
19 video cameras not capture scene 1, scene 2 or any other?  
20 Scene 1 and scene 2 in particular.

21 GENERAL PHIYEGA: Even on that one,  
22 Advocate, I've answered you. I said to you all those  
23 technical glitches that will be reported, or technical  
24 challenges that were encountered, General Mpembe and his  
25 team will come and explain here.

1 MR NTSEBEZA SC: Have you yourself  
2 forgotten the details of what he said, or are you not able  
3 to tell us the technical details? I want to know, General,  
4 why you decided on this brace, strength of broad  
5 information which you received that there was nothing in  
6 relation to which a violation of your strict order was not  
7 complied with? Have that at the back of your mind as a  
8 basis of my questions. Now General Mpembe told you  
9 something about why we don't have footage from the  
10 helicopters. I want you to tell the Commission what he  
11 told you. Like you have told us that in respect of the  
12 water cannons these were the reasons that were given to  
13 you; one was malfunctioning, one was because the operator  
14 was not able to operate. We'll get that detail when those  
15 people come to testify. What did General Mpembe say to  
16 you?

17 GENERAL PHIYEGA: I have answered you,  
18 Advocate. I have told you that in the helicopter the  
19 technical challenges that they had that could be explained  
20 by those who understand those technical challenges, shall  
21 be done so, but I do understand that they had challenges in  
22 taking the photos for those technical challenges that they  
23 were confronted with. I have answered you on that and if  
24 you can't accept my limited understanding of those  
25 technicalities, then I am not able to advance my answer to

1 you further than this.  
2 MR NTSEBEZA SC: I don't want to draw a  
3 wrong inference from your response. Do I understand you to  
4 be saying you yourself - to use the word that is invoked -  
5 are challenged to understand what the technical details are  
6 that were explained to you?

7 GENERAL PHIYEGA: Advocate, I'm not a  
8 technical person and I sincerely have given you my answer  
9 on this one, and I know that those issues would be  
10 explained. Whether there were three helicopters, whether  
11 it was at night, whether the vision of their instrument had  
12 problems, those issues would be explained, Advocate, and  
13 let me also say I was satisfied personally with the  
14 explanations that I was given.

15 MR NTSEBEZA SC: You see, the question of  
16 - why these questions are put firstly is to establish the  
17 facts - what was said to you, how, when; secondly, for the  
18 families to say could that have been a reason for her  
19 accepting that these police officers should not be  
20 disciplined. So it is important for us to understand why  
21 you accepted the explanation by General Mpembe. Do you  
22 appreciate that?

23 GENERAL PHIYEGA: Advocate, I understand,  
24 but I've given you my reasons. Whether you accept my  
25 reasons or not, or you have a value judgment on it, again

1 it is your right to do so, but I've given you my reasons.  
2 I can't give you any reason I don't have. What I have, I  
3 have given you.

4 MR NTSEBEZA SC: Don't be upset,  
5 Commissioner.

6 GENERAL PHIYEGA: I'm not.

7 MR NTSEBEZA SC: I might be irritating,  
8 but I have to go down this road. You know, if for a very  
9 serious violation of your strict instruction by officers -  
10 which is what I tell the families, I say to the families  
11 there was a strict order from the Commissioner given two  
12 weeks before your relatives were killed by the police, and  
13 one of those strict instructions was that there must be  
14 video footage taken by the SAPS throughout an operation of  
15 crowd control, including the events that take place, and we  
16 have now isolated the events that we want to talk about,  
17 scene 1 and scene 2. Do you follow so far? When I tell  
18 them that so far it appears that we do not have video  
19 footage, which we ought to have had in terms of the  
20 Commissioner's strict instruction, they then say what is  
21 she doing about that, and then I have to say to them these  
22 are the things that became a challenge to the police.  
23 [09:54] We have talked about 171, we have talked about  
24 the water cannons, and all you have been able to tell the  
25 Commission so far is that there were technical glitches

1 with respect to the helicopter videos, but you are not  
2 giving even an indication as to what those technical  
3 glitches were, and yet you say you were satisfied with that  
4 report.

5 CHAIRPERSON: Sorry, Mr Ntsebeza. Mr  
6 Semenya has turned on his microphone.

7 MR SEMENYA SC: Chair, two objections;  
8 one, Mr Ntsebeza does not tell us whether there were any  
9 violations and the basis for that contention, but secondly,  
10 the witness has repeatedly said "I have answered that  
11 question to the best of my abilities. You may very well  
12 not accept those to be cogent but that's what they are. I  
13 can't advance it, I have no technical expertise but that's  
14 what I accepted to be the reasons why those video footages  
15 are not there."

16 CHAIRPERSON: Mr Ntsebeza?

17 MR NTSEBEZA SC: Mr Chairman, firstly the  
18 mere fact that the witness says to counsel I have given you  
19 my reasons, if you accept them it's up to you to accept  
20 them, is no basis for saying that you cannot ask further  
21 questions to try and probe that which you are in pursuit of  
22 and that's what I'm trying to do here. I'm not asking the  
23 Commissioner to give me details, you know X squared over  
24 this. I'm not asking for that kind of detail. It's either  
25 she does not remember what it was that was indicated to her

1 Whether it is or isn't is a matter we can decide later. I  
2 don't think there's any point in proceeding with this any  
3 further because - I haven't counted the number of times you  
4 asked the question but it is several times -

5 MR NTSEBEZA SC: Mr Chairman, with  
6 respect, it depends on which question I've been asking.  
7 Right now the question I'm asking is for me to be able to  
8 establish on what basis the Commissioner of Police decides  
9 not to pursue disciplinary action, on the basis of material  
10 that she doesn't understand.

11 CHAIRPERSON: Yes, yes, I understand  
12 that, but you've asked the question and you got that  
13 answer. Whether that's a good answer is a matter which can  
14 be the subject for argument later. So I suggest that you  
15 move on to the next question.

16 MR NTSEBEZA SC: Mr Chairman, I don't  
17 know whether I had -

18 CHAIRPERSON: You say you should be  
19 finished by teatime. If I don't uphold the objection we'll  
20 still be busy with this question at teatime, and I wouldn't  
21 want that either, would I?

22 MR NTSEBEZA SC: No Chairman, I know you  
23 have upheld the objection. I just want to recall whether I  
24 had a direct answer to the question as to whether the  
25 answer is that the witness, even though she didn't

1 by General Mpembe to be the reason why we don't have  
2 footage from the helicopter, or she didn't understand what  
3 General Mpembe was saying, but nonetheless she went on to  
4 accept that it is a good basis for - so she has not given  
5 any answer in relation to which there should be no further  
6 questions, so I find the objection to be unsustainable.

7 CHAIRPERSON: Yes, Mr Semenya, have you  
8 any reply to what Mr Ntsebeza said?

9 MR SEMENYA SC: The witness says, Chair,  
10 "I stand and fall by that answer." Whether we're going to  
11 spend another 10 hours with the right to probe I don't  
12 know, but the witness says "I stand and fall by that  
13 answer."

14 CHAIRPERSON: Mr Ntsebeza, you've asked  
15 the question several times; you've got an answer, which you  
16 contend is unsatisfactory. You've given the witness plenty  
17 of opportunity to give an answer which you would regard as  
18 more satisfactory. She has declined the invitation. I  
19 think there's enough material on record for you to argue  
20 the point later. If you are correct in saying the reason  
21 is bad, it will be so held. If Mr Semenya persuades us  
22 that it isn't, then it won't be, but I don't know if  
23 there's any point in carrying on. It seems we've reached  
24 the point where you're asking a question, you're getting  
25 the same answer, you say it's an unsatisfactory answer.

1 understand the technical details, nonetheless was satisfied  
2 that there is no disciplinary action warranted and  
3 therefore she accepted that report. Just that, that's just  
4 that.

5 CHAIRPERSON: I know you've asked that  
6 question once. Yes, National Commissioner, what's your  
7 answer to that?

8 GENERAL PHIYEGA: Advocate, that's your  
9 interpretation, I have said. Personally the explanation  
10 that I was given was satisfactory, and I still am saying I  
11 was satisfied, I am satisfied as the National Commissioner.

12 MR NTSEBEZA SC: Mr Chairman, I was  
13 skating on thin ice as it were in the light of your ruling,  
14 but let me move on.

15 CHAIRPERSON: You're lucky it didn't  
16 break and you didn't fall in the water, but carry on.

17 MR NTSEBEZA SC: Thank you, Mr Chairman.  
18 Now we now know that you accepted the technical details of  
19 the report given to you by General Mpembe. You didn't  
20 understand it simply because you are not technically  
21 astute, but you accepted it all the same and that is one of  
22 the reasons why you accepted -

23 CHAIRPERSON: Mr Ntsebeza, I don't think  
24 she said that, I don't think that's an accurate summary of  
25 what she said.

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1 MR NTSEBEZA SC: General, you have said  
2 that General Mpmembe will tell us what the technical details  
3 of what it is that she told you, the nature of which you  
4 decided that you are satisfied with the reasons that were  
5 given, why the helicopter footage is absent.

6 GENERAL PHIYEGA: Yes, I am saying the  
7 details, the Ts and the dotted Ts and the, the dotted Is  
8 and the crossed Ts of that matter shall be explained by the  
9 commanders that are coming to give testimony here, General  
10 Mpmembe being one of them.

11 MR NTSEBEZA SC: Alright. Now what other  
12 instruments at the disposal of the POP could have captured  
13 video footage of those scenes, other than water cannon and  
14 helicopter?

15 CHAIRPERSON: Mr Semenya, I see your  
16 microphone light is turned on.

17 MR SEMENYA SC: No Chair, we have to move  
18 on. Mr Ntsebeza told us that he's moving on. We know  
19 there were camera people who were withdrawn and to ask what  
20 other things other than the water cannons and the  
21 helicopter is really -

22 CHAIRPERSON: No, no, no, I think there  
23 is some evidence that there may also have been cameras in  
24 the Nyalas. The Nyalas haven't been covered, so I think  
25 he's entitled to ask about that.

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1 MR SEMENYA SC: No, she said there was no  
2 Nyalas, that's the point that this -

3 MR NTSEBEZA SC: I don't know whether my  
4 learned friend - I must object. My learned friend must not  
5 testify. My learned friend must raise an objection.

6 CHAIRPERSON: He's raised an objection  
7 and I'm busy dealing with it. So I think that point should  
8 be covered in the evidence by the witness and not by you.  
9 Please carry on, Mr Ntsebeza.

10 MR NTSEBEZA SC: Thank you, Mr Chairman.

11 MR SEMENYA SC: Chair, with respect, on  
12 record we can check it on the [inaudible] the witness said  
13 not the Nyala. I can point to yesterday's records where  
14 that appears.

15 CHAIRPERSON: Mr Ntsebeza, are you  
16 restricting this question now to that incident when the  
17 people left at 1:30, or are you asking about possible other  
18 people generally who were members of the police service who  
19 had video cameras? I must admit, I thought you were  
20 talking about Nyalas but it's pointed out to me that I am  
21 wrong, there weren't Nyalas there at the time, unless that  
22 in fact is the basis of your question.

23 MR NTSEBEZA SC: Mr Chairman, what I  
24 object to are objections that are raised by testifying, by  
25 Counsel saying this, this, this -

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1 CHAIRPERSON: Yes, yes, yes, and I think  
2 I indicated by what I said to Mr Semenya that I was with  
3 you on that point, but the question I'm asking you now is  
4 this question you're now asking, helicopters have been  
5 dealt with, you would say unsatisfactorily, she would say  
6 satisfactorily. Water cannons have been dealt with. The  
7 POP people who left at 1:30 have been dealt with. Now do  
8 you say there are other, or there were other video cameras  
9 held by other people, who were members of the service at  
10 the scene either at that time or at some other time in  
11 respect of which there should be footage? What exactly is  
12 the basis? The question is not clear to me.

13 MR NTSEBEZA SC: I want to establish from  
14 the witness whether she has exhausted in her testimony to  
15 me under cross-examination all the sources from which they  
16 could have got video footage.

17 CHAIRPERSON: Do you mean at any stage on  
18 that day?

19 MR NTSEBEZA SC: It was particularly to  
20 cover scenes 1 and scene 2 because that's where people  
21 died.

22 CHAIRPERSON: But on the 16th obviously.

23 MR NTSEBEZA SC: On the 16th of August.

24 CHAIRPERSON: I think that question is in  
25 order.

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1 GENERAL PHIYEGA: Advocate, using your  
2 words, I have exhausted what I know, and I am sure if there  
3 is any other thing, my members who know better in this  
4 space and who were at the field, can give further answers.

5 MR NTSEBEZA SC: And then that means, as  
6 I'm reminded by my learned friend, there were no videos,  
7 cameras on the Nyalas that were very much in evidence at  
8 scene 1 and scene 2.

9 GENERAL PHIYEGA: I've answered to the  
10 negative yesterday on that matter.

11 MR NTSEBEZA SC: Thank you. Now I'm  
12 heeding advice to move on. I would like us to look at - I  
13 understand the position to be that after an incident like  
14 this, and I believe it is in terms of Standing Order 262,  
15 there is a need for a debriefing that should take place and  
16 a record must be kept - I'm sorry, I gave the wrong  
17 reference there, it's exhibit S.

18 CHAIRPERSON: The debriefing is in 262,  
19 but the review is in, I think paragraph 3 of exhibit S.

20 MR NTSEBEZA SC: Yes, exhibit S, I'm  
21 told. I think it's in terms of the national instruction  
22 that you had sent out a fortnight or so before the events  
23 on the 16th of August. I'm trying to find this thing. It's  
24 3.5, Mr Chairman, exhibit S.

25 CHAIRPERSON: You found the document.

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1 MR NTSEBEZA SC: Thank you, thank you Mr  
2 -  
3 CHAIRPERSON: Perhaps the witness should  
4 get a chance to find her copy and look at it and then you  
5 can proceed.  
6 MR NTSEBEZA SC: Indeed, indeed, Mr  
7 Chair.  
8 MR MAHLANGU: We have it, Mr Chairperson.  
9 We have it.  
10 MR NTSEBEZA SC: You have found 3.5, Mr  
11 Chairman?  
12 CHAIRPERSON: I remember what it says.  
13 MR NTSEBEZA SC: Yes. Now just to read  
14 it for all of us, "Every time minimum force is used, a  
15 review of the action taken must always be done by an  
16 officer holding the rank of captain and above who was not  
17 part of the action and was also not on the scene." Now I  
18 canvassed this with Brigadier Mkhwanazi when he was  
19 testifying, and amongst other things that we established  
20 and he agreed was that he is that kind of officer. He is  
21 that kind of a person holding a rank of captain and above -  
22 of course he's a brigadier - he was not part of the action  
23 and was not also on the scene. Do you agree that he would  
24 have been the person to conduct that kind of internal  
25 review?

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1 [10:14] GENERAL PHIYEGA: He could have been.  
2 MR NTSEBEZA SC: And I gathered from his  
3 evidence, and nothing to the contrary has been given to us,  
4 that, (1), he did not conduct that internal review; and  
5 that none was conducted.  
6 GENERAL PHIYEGA: You are correct, but  
7 it's going to be a matter of interpretation in terms of how  
8 we handled the matter as SAPS, and to that I want to say  
9 you would also recall that the call for the Commission came  
10 almost a day after the event and we interpreted it that our  
11 preparation for the Commission would also assist us to  
12 encapsulate all those things. So we went for the  
13 preparation. That's how we interpreted it, and whether it  
14 is acceptable or not acceptable, it could be a matter of  
15 outcome and judgment, but we read it in a manner that our  
16 preparation would be able to assist us to achieve that.  
17 MR NTSEBEZA SC: Are you saying there are  
18 reasons why you didn't conduct an internal review? Are you  
19 saying there are reasons? And we'll explore what the  
20 reasons are.  
21 GENERAL PHIYEGA: I'm saying that and  
22 I've given you the reasons.  
23 MR NTSEBEZA SC: Let's take it step by  
24 step. What was the first reason?  
25 GENERAL PHIYEGA: I have said to you that

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1 on the 17th this Commission was already announced and in our  
2 interpretation the preparation for the Commission – which  
3 is the second part now – was that as we start preparing, we  
4 would be able to cater for all other aspects, and I have  
5 said thirdly that whether it is regarded as right or wrong  
6 is another issue, but we interpreted it as a way to deal  
7 with this matter.  
8 MR NTSEBEZA SC: What about the  
9 Commission and the announcement? What was it about that  
10 announcement that stopped you from conducting internal  
11 review, which in terms of your own instruction, is a must-  
12 do?  
13 GENERAL PHIYEGA: I shall again say to  
14 you, Advocate, the matter of interpretation, I've given you  
15 our interpretation of how we've given treatment to that  
16 matter.  
17 MR NTSEBEZA SC: I am seeking to avoid  
18 asking questions that might be irrelevant, so please  
19 enlighten me a little bit. What was it in the announcement  
20 that made you – forget about "we" now, the royal "we," you  
21 as a National Commissioner of Police - not insisting on an  
22 internal review to be conducted, as you had said it is  
23 something that has to happen when an incident like this has  
24 happened?  
25 GENERAL PHIYEGA: Advocate, my person

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1 doesn't have much to do with this, but my leadership of  
2 SAPS embraces my person, therefore I'll always answer as  
3 "we" because if you take Riah and strip out the police, I'm  
4 a different person altogether. The reason I'm here is  
5 because I'm National Commissioner of the South African  
6 Police Service, so allow me to use the "we" because I am  
7 part and parcel of what brings me here, which is the South  
8 African Police Service. So having said this –  
9 MR NTSEBEZA SC: No, I understand that.  
10 GENERAL PHIYEGA: Ja, I think it –  
11 MR NTSEBEZA SC: I accept that you say as  
12 a National Commissioner you have got the final  
13 responsibility to take decisions, and the buck – to use a  
14 colloquialism – the buck stops with you.  
15 GENERAL PHIYEGA: And you are right; I'm  
16 the National Commissioner, the buck stops with me to take  
17 decisions for the South African Police Service, not for me.  
18 MR NTSEBEZA SC: And you say to the  
19 Commission in that capacity you took the decision not to  
20 conduct an internal review because you had heard an  
21 announcement that there was going to be a commission of  
22 inquiry.  
23 GENERAL PHIYEGA: That's the part of it,  
24 the last part of it that you didn't summarise, which I've  
25 already said was that in our interpretation therefore with

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1 that decision being taken, was that our preparation – which  
 2 produced records that we're using now, which also  
 3 represents part of our reviewing, that that process would  
 4 have covered this, and I said to you it's a matter of  
 5 interpretation. It produced the same results.  
 6 MR NTSEBEZA SC: Now let's quickly go  
 7 through this and let's take it step by step. The events  
 8 took place on the 16th and you say there was an announcement  
 9 on the 17th. That's right?  
 10 GENERAL PHIYEGA: Yes, the initial  
 11 sentiment of a commission came out on the 17th in the  
 12 evening.  
 13 MR NTSEBEZA SC: I can't recall now, what  
 14 was the announcement? What did it say?  
 15 GENERAL PHIYEGA: That was not my  
 16 announcement; it was an announcement of the Head of the  
 17 State.  
 18 MR NTSEBEZA SC: Yes, I'm not being  
 19 facetious. I just want to understand what it is in that  
 20 announcement, what did it say, because I have to find out  
 21 whether it was sufficient for you to abandon what is a very  
 22 serious step which the SAPS must take after an event like  
 23 this.  
 24 GENERAL PHIYEGA: Advocate, you are  
 25 certainly not expecting me to be remembering the verbatim,

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1 whatever I know, that there was an announcement to  
 2 establish a commission. I don't have the verbatim  
 3 statement of the President.  
 4 MR NTSEBEZA SC: No, that's a fair  
 5 response. Did it say what the terms of reference of the  
 6 commission will be, who was going to head the commission,  
 7 where was it going to take place, why it was going to take  
 8 place?  
 9 GENERAL PHIYEGA: To my knowledge, and I  
 10 guess to your knowledge also, Advocate, on that day those  
 11 details were not given.  
 12 MR NTSEBEZA SC: Did the announcement say  
 13 that it was definitely going to take place, or it was the  
 14 contemplation of government to institute a commission of  
 15 inquiry?  
 16 GENERAL PHIYEGA: I think maybe what will  
 17 help us, if I may request that we be given that press  
 18 statement so that we can deal with it because I don't want  
 19 to go into summation of what was said.  
 20 CHAIRPERSON: May I make a suggestion?  
 21 As we know, the National Commissioner won't be able to  
 22 finish her evidence today because she's going to come back  
 23 when Mr Mpofu is back with us. I take it we can have the  
 24 press statement by then, and before Mr Mpofu starts asking  
 25 his questions, I'll allow you to deal with this matter in

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1 the light of the press statement, if you still wish to do  
 2 so. That seems – if I may say so, that seems a sensible  
 3 way of proceeding.  
 4 MR NTSEBEZA SC: Thank you, Mr Chairman.  
 5 Now whilst we are on the subject of interpretation, let me  
 6 put to you what I understand the internal review to be  
 7 aimed at. You can agree or disagree with me. I understand  
 8 your requirement to have been that the SAPS should get  
 9 together, analyse what took place on that day, establish  
 10 what it is that went wrong, why it went wrong, what the  
 11 facts are, what footage is available, what footage is not  
 12 available, so that as an institute, which is why you say  
 13 footage must be taken of everything. Now that is my  
 14 understanding of what an internal review is. Do you want  
 15 to comment?  
 16 GENERAL PHIYEGA: A lot of what you are  
 17 saying is right, and it is my belief that through the  
 18 process that we did, we achieved that.  
 19 MR NTSEBEZA SC: Notwithstanding the –  
 20 you see, that's why I wanted to know what was it about the  
 21 announcement of the commission that made you not to conduct  
 22 an internal review.  
 23 GENERAL PHIYEGA: I have said already  
 24 that the fact that the commission was going to take place,  
 25 it was incumbent on us to start preparing for that

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1 commission, and that's what we did, and that preparation  
 2 also assisted us to kill two birds with one stone, which  
 3 was also the other one, the stone that you are talking  
 4 about, and I'm saying again that it is a matter of  
 5 interpretation. Whether our interpretation was right or  
 6 wrong, again that would be your judgment, but from where  
 7 I'm sitting, I was satisfied with the interpretation that  
 8 we gave.  
 9 MR NTSEBEZA SC: Now I want to understand  
 10 you clearly. Are you saying that you decided to collapse  
 11 what would have been intended to be achieved by an internal  
 12 review, with preparations for this Commission because in  
 13 either way you achieve the same objective? Is that what  
 14 you are saying?  
 15 GENERAL PHIYEGA: Yes, Advocate, I've  
 16 said so.  
 17 MR NTSEBEZA SC: You see, the problem  
 18 with that, if I may say so, is that – or let me ask the  
 19 question, and is that preparation the one that was taking  
 20 place in Potchefstroom?  
 21 GENERAL PHIYEGA: You are correct.  
 22 MR NTSEBEZA SC: You see, the problem  
 23 with that - there are a number of problems but I'll just  
 24 indicate one – will be that the Potchefstroom meeting was  
 25 headed, or the preparations, they were headed by General

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1 Mpembe, were they not?  
 2 GENERAL PHIYEGA: It was General Mbombo.  
 3 MR NTSEBEZA SC: General Mbombo. Was  
 4 General Mpembe not there?  
 5 GENERAL PHIYEGA: He was there.  
 6 MR NTSEBEZA SC: And you don't consider  
 7 that the fact, I mean he was involved from the 13th right  
 8 until the 16th. Would that not, his involvement, would it  
 9 not have been a problematic involvement, given what you say  
 10 about who should conduct a review?  
 11 MR NTSEBEZA SC: No, I didn't –  
 12 MR SEMENYA SC: Is Mr Ntsebeza talking  
 13 about General Mbombo, or General Mpembe?  
 14 CHAIRPERSON: Yes, Mr Ntsebeza, you've  
 15 heard what Mr Semenya wants to know. Are you talking about  
 16 General Mbombo, or General Mpembe?  
 17 [10:34] MR NTSEBEZA SC: Right now I'm talking  
 18 about General Mpembe. I would argue that General Mbombo is  
 19 also affected and my basis would be that what the National  
 20 Commissioner of Police intended by 3.5 was that this should  
 21 be –  
 22 CHAIRPERSON: There isn't an objection  
 23 that you have to answer. There is simply a question – are  
 24 you talking about General Mpembe or General Mbombo. You've  
 25 answered the question. The question you're asking the

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1 witness is clear. Let's get her answer. I understand  
 2 where you're –  
 3 MR NTSEBEZA SC: General Mpembe.  
 4 CHAIRPERSON: - or I think I understand  
 5 where you're going to, but you don't have to tell us just  
 6 yet.  
 7 MR NTSEBEZA SC: Yes, General Mpembe.  
 8 Don't you think there probably would have been a problem  
 9 with him being part of an internal review?  
 10 GENERAL PHIYEGA: Advocate, provision 3.5  
 11 does not exclude anybody. It just says certain people who  
 12 were not part of the process would be there. So I don't  
 13 know why it would be a problem for him to be present. It  
 14 doesn't –  
 15 MR NTSEBEZA SC: That's what I'm saying.  
 16 GENERAL PHIYEGA: But this is, now I  
 17 don't understand why General Mpembe could not be there  
 18 because he's not excluded. He's not told not to be there  
 19 if a review is taking place. Then I've also said to you  
 20 that the person who was chairing there was General Mbombo.  
 21 MR NTSEBEZA SC: Well, 3.5 says the kind  
 22 of review that you say must take place, must always – must  
 23 always be done by an officer holding the rank of captain  
 24 and above, who was not part of the action and was also not  
 25 on the scene. It seems to me – correct me if I'm wrong

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1 there – that there is an attempt by you to make an internal  
 2 review as independent and impartial and unaffected by  
 3 indications of contamination as possible.  
 4 GENERAL PHIYEGA: I think again, and I'll  
 5 say to you, it is how you interpret it, because General  
 6 Mbombo in my opinion was the person who chaired.  
 7 MR NTSEBEZA SC: Yes?  
 8 GENERAL PHIYEGA: And that clause does  
 9 not exclude participation of anybody.  
 10 MR NTSEBEZA SC: Now I'll put it to you  
 11 in this way, and this is what we will argue at the end,  
 12 that when you drafted exhibit S and 3.5, your clear aim was  
 13 that when an internal review is conducted, it should be by  
 14 a person who has not been involved in any way with the  
 15 results that eventuated, and who was not there when the  
 16 thing happened.  
 17 MR SEMENYA SC: Chair, the exhibit S does  
 18 not say that. It merely refers to when that force is used;  
 19 it is common cause that General Mbombo was not there when  
 20 the minimum force was used.  
 21 CHAIRPERSON: Mr Ntsebeza, you've heard  
 22 Mr Semenya's objection. He objects to the question because  
 23 he says that's not what paragraph 3.5 says, because he says  
 24 General Mbombo wasn't part of the action and wasn't on the  
 25 scene at the time. Now what do you say about his

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1 objection?  
 2 MR NTSEBEZA SC: When earlier on Mr  
 3 Semenya wanted to know whether it's Mbombo or Mpembe, I  
 4 said let's just, let's deal with General Mpembe for the  
 5 moment. So what I am simply saying about 3.5, and I'm  
 6 trying to get into the mind of the Commissioner when she  
 7 sent that circular in that fashion, not – am I correctly  
 8 interpreting what you meant when you say in 3.5 somebody  
 9 who is uncontaminated, who has got a clear mind, was not  
 10 there when the event took place, was not part of the  
 11 action, that ideally must be the person who must conduct an  
 12 internal review? Am I correct in interpreting that?  
 13 MR SEMENYA SC: Chair, our objection is  
 14 not covered yet. My learned colleague is still going why  
 15 who is not part in any way. That's not what the provision  
 16 says.  
 17 CHAIRPERSON: - approach to be, you were  
 18 now departing from the actual wording of 3.5, but trying to  
 19 get into the Commissioner's mind, as you put it, in regard  
 20 to the objective she was seeking to achieve by this  
 21 paragraph. If it's clear that you are not sticking to the  
 22 wording of 3.5, but approaching it in a broader way, which  
 23 I understood you to be saying you were, then I'll allow you  
 24 to ask the question, but not otherwise.  
 25 MR NTSEBEZA SC: Thank you, Mr Chairman.



<p style="text-align: right;">Page 8112</p> <p>1 Commissioner, your aim in sending out a circular that calls 2 in peremptory terms for an internal review was a noble one, 3 because you wanted that review to be conducted by a person 4 who would approach the internal review, in other words the 5 observation of what happened, without having been involved 6 in any way in the events that subsequently took place, and 7 earlier on I said Brigadier Mkhwanazi fits that bill 8 perfectly. Are we together? 9       GENERAL PHIYEGA:       We are together, but we 10 are not interpreting the same, and I have mentioned the 11 interpretation right at the beginning because that clause 12 does say a person who is above the level of captain, that's 13 one, and the operative thing, who was not part of the 14 action, and I have said that the interpretation is going to 15 take us this way and that way because we may not agree, but 16 when I look at General Mbombo, she was not part of the 17 action. I must put it in because I'm trying to – you want 18 to get into my space and I'm giving you my space. 19       MR NTSEBEZA SC:       Let's forget about 20 General Mbombo. I'm just simply saying to you as a general 21 proposition, what you sought to achieve there was a product 22 that would be conducted, whether it would be as a 23 consequence or of an exercise, by a person who was not 24 involved, and your words was "not part of the action," and 25 therefore would be independent and be impartial in</p>	<p style="text-align: right;">Page 8114</p> <p>1 probably argue it later. 2       CHAIRPERSON:       What do you say about it, 3 Ntsebeza, about his objection? 4       MR NTSEBEZA SC:       I don't understand the 5 objection, quite frankly. I don't. 6       CHAIRPERSON:       You'd better repeat it, Mr 7 Semenya, in language that Mr Ntsebeza can understand. 8       MR SEMENYA SC:       Chair, I repeat that we 9 are again in that cul-de-sac where the witness says this is 10 my interpretation of that provision. Mr Ntsebeza clearly 11 holds a view that somebody more ideal, like Brigadier 12 Mkhwanazi, would have been the one suited to do it. The 13 witness says, I don't share that, and in that revolving 14 door, that's the objection. 15       MR NTSEBEZA SC:       I didn't understand the 16 witness to be disagreeing that Brigadier Mkhwanazi, for 17 exactly those qualifications that the witness says, is fit 18 for a person to conduct the internal review, was not that 19 kind of idea that – 20       CHAIRPERSON:       The complaint really is 21 that we're in a cul-de-sac. Now the question I take it 22 isn't really who was the ideal person to do it. I'm sure 23 there were lots of persons above the rank of captain who 24 would have been ideal. The fact is she chose a particular 25 person to conduct something that wasn't strictly speaking a</p>
<p style="text-align: right;">Page 8113</p> <p>1 approaching the subject matter of review. Do we agree with 2 that as a general proposition? That's what you wanted to 3 achieve. 4       GENERAL PHIYEGA:       I will again try and 5 put what I said there. I said I articulated the level and 6 I articulated the specifications in terms of what is 7 required of that person. That person should not have been 8 part of the action. What you are doing, you are extending 9 many things, and that's the interpretation that I said we 10 may not perhaps agree on the interpretation, but my 11 interpretation is really to say this person must be above 12 the level of captain; (2), must not have been part of the 13 action. 14       MR NTSEBEZA SC:       Like for instance 15 Brigadier Mkhwanazi on all available information at this 16 stage. He was above captain; he was not part of the 17 action; he was not involved in any way on that day. He's 18 the ideal person to have conducted this internal review. 19 Do we agree on that? 20       GENERAL PHIYEGA:       Advocate, what I said 21 exactly - 22       MR SEMENYA SC:       Chair, are we going to go 23 into that cul-de-sac again? The witness has repeated told 24 what 3.5 says, how she interprets it, Whether that 25 provision calls for somebody ideal, Mr Ntsebeza will</p>	<p style="text-align: right;">Page 8115</p> <p>1 review anyway, it was actually something else. The 2 question is whether that's subject to criticism. In any 3 event, even if one looks at 3.5, it turns to some extent on 4 the meaning of the action. If you give "action" a broader 5 meaning, including being involved in the formulation of the 6 plan, which arguably was flawed, then there's a good reason 7 why General Mbombo shouldn't have done it. Furthermore, 8 she was in charge, as I understand it; she replaced General 9 Mpmembe that morning as the person in charge. These are all 10 matters that can be dealt with in argument, but are we 11 really not in a cul-de-sac, as Mr Semenya suggests at this 12 stage? I don't want to stop you, but I'm just putting 13 these points to you so you can deal with them. 14       MR NTSEBEZA SC:       No, I would rather go 15 down a thoroughfare. 16       CHAIRPERSON:       No, Chair, this circular is 17 about the use of rubber bullets. It's not about whether 18 somebody was drawing a plan, with respect. 19       CHAIRPERSON:       It's actually, that 20 paragraph talks about the use of minimum force and the plan 21 involved the possible use of minimum force, but in any 22 event, let's see what Mr Ntsebeza says, because I was 23 really putting a point in your favour to him that we're in 24 a cul-de-sac, suggesting he might move in, but if you don't 25 want me to put that to him, it's too late, I've put it. Mr</p>

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1 Ntsebeza, how do you answer?

2 MR NTSEBEZA SC: Mr Chairman, I will heed

3 your advice that some of these things are better placed in

4 argument than –

5 CHAIRPERSON: I understand where you're

6 coming from. If you are going to argue these points,

7 you've got to criticise the National Commissioner –

8 MR NTSEBEZA SC: Yes.

9 CHAIRPERSON: You want to give her a

10 chance to deal with it, but I think you, if I may say so, I

11 think you've probably done that.

12 MR NTSEBEZA SC: Yes, yes, yes.

13 CHAIRPERSON: And I'm not sure if a few

14 moments ago I actually expressed what I intended to say.

15 Whether this was a review strictly so called in terms of

16 3.5, is one issue. What they were doing is they were

17 investigating the whole matter, compiling their

18 presentation for the Commission. They obviously regarded

19 that as achieving the same purpose as a review. Whether

20 that was desirable or sensible is a matter that will be the

21 subject of argument, but I don't think we need spend more

22 time on it now.

23 MR NTSEBEZA SC: Indeed. Indeed.

24 CHAIRPERSON: Yes.

25 MR NTSEBEZA SC: I'm in agreement.

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1 CHAIRPERSON: Alright.

2 MR NTSEBEZA SC: I want to get out of the

3 cul-de-sac into a thoroughfare.

4 CHAIRPERSON: Alright.

5 MR NTSEBEZA SC: We will submit that the

6 proper way to have done this - and that again is a matter

7 of argument – would have been for you to ensure that a

8 thorough review was conducted as you have prescribed, and

9 that those would be the results that you would bring to the

10 Commission, rather than collapse the two processes, because

11 they are two distinct processes. The one is an

12 introspection, the other one is a preparation to specific

13 terms of reference. What's your comment to that?

14 GENERAL PHIYEGA: You would know that I

15 wouldn't agree, but I said it's a matter of interpretation.

16 MR NTSEBEZA SC: I put it to you again,

17 or I also put this to you that it is inconceivable that no

18 internal review of the nature that you contemplate in 3.5

19 was not held.

20 [10:54] GENERAL PHIYEGA: I still say –

21 MR SEMENYA SC: Chair, I don't know how

22 that can be inconceivable when you know it didn't happen,

23 that's the review.

24 CHAIRPERSON: Yes, Mr Semanya concedes

25 that there wasn't a review, as I understand his comment,

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1 but –

2 MR NTSEBEZA SC: But there was a review.

3 CHAIRPERSON: But he says there wasn't.

4 His whole basis of his objection is there wasn't a review.

5 MR NTSEBEZA SC: That there wasn't.

6 CHAIRPERSON: Was not a review.

7 MR NTSEBEZA SC: Yes.

8 CHAIRPERSON: So therefore he says your

9 question has to be reformulated, to put his objection

10 gently. We're back in the cul-de-sac if you suggest, he

11 says there wasn't a review, there was this conference - if

12 one can call it that - to prepare, which covered all sorts

13 of matters, but he says it wasn't a review. He says

14 therefore the question you asked is infelicitously phrased,

15 although he doesn't put it so gently as that. So perhaps

16 you can go back and have another go at reformulating the

17 question.

18 MR NTSEBEZA SC: Mr Chairman, there is a

19 witness in –

20 CHAIRPERSON: I know that you're dealing

21 with a point that you regard as important. I don't want to

22 stop you.

23 MR NTSEBEZA SC: Yes. No, no, no, no, I

24 understand what you say.

25 CHAIRPERSON: I simply don't want us to

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1 go down cul-de-sacs and not be able to come out again, and

2 I don't want us to waste time on undue repetition, but

3 subject to those two parameters, carry on.

4 MR NTSEBEZA SC: No, what I am testing

5 with you, Commissioner, and this is what I seek you under

6 oath to commit yourself to, and I will put the question

7 now. Other than what happened at Potchefstroom - now we

8 know that was not an internal review – are you saying under

9 oath that there was no internal review whatsoever? The one

10 that is contemplated in your instruction, exhibit S; under

11 oath.

12 CHAIRPERSON: Mr Ntsebeza, all her

13 evidence is under oath. You don't have to rub in "under

14 oath" all the time. If there's an insinuation, it's not

15 nice.

16 MR NTSEBEZA SC: Mr Chairman, I'm sorry,

17 Mr Chairman, sometimes witnesses have to be reminded.

18 GENERAL PHIYEGA: Advocate, let me start

19 off by saying, clearly you don't trust even my oath. I

20 just want to confirm again to you that when I said to the

21 Judge this morning, "Yes, I'm still under oath," I mean it.

22 MR NTSEBEZA SC: And the internal review

23 –

24 CHAIRPERSON: I don't think you've

25 answered the question he asked you, was apart from what

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1 happened at Potchefstroom, which is conceded that it wasn't  
 2 the internal review, was there anything else amounting to  
 3 an internal review in relation to these events? That's his  
 4 question. Is that right, Mr Ntsebeza?

5 GENERAL PHIYEGA: My answer is yes.

6 CHAIRPERSON: That sounds as if it opens  
 7 up a door down a road which is not a cul-de-sac, but which  
 8 you can explore after tea. We'll take the tea adjournment.

9 MR NTSEBEZA SC: Indeed, Mr Chairman.

10 [COMMISSION ADJOURNS COMMISSION RESUMES]

11 [11:25] CHAIRPERSON: The Commission resumes. I  
 12 see a document has been placed on our – is this from you,  
 13 Mr Semenya? No, not guilty?

14 MR GUMBI: No, Chairperson –

15 CHAIRPERSON: Someone has given us some  
 16 documents. What are they?

17 MR GUMBI: Yes, it's on behalf of POPCRU.

18 CHAIRPERSON: I see. Are you going to  
 19 cross-examine in due course?

20 MR GUMBI: Yes.

21 CHAIRPERSON: I see, I understand.

22 MR GUMBI: That's why we just put this  
 23 document in advance –

24 CHAIRPERSON: And did you give a copy to  
 25 the witness and to Mr Semenya?

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1 MR GUMBI: Yes, even to my colleagues,  
 2 copies have been distributed.

3 CHAIRPERSON: I see. Thank you very  
 4 much. National Commissioner, you're still under oath.

5 MANGWASHI VICTORIA PHIYEGA: s.u.o.

6 CHAIRPERSON: Mr Ntsebeza.

7 CROSS-EXAMINATION BY MR NTSEBEZA SC (CONTD.):

8 Thank you, Mr Chairman. Commissioner, you have just been  
 9 reminded you are under oath. Please understand where I'm  
 10 coming from. For now your evidence is that there was no  
 11 internal review. Now I just want to be absolutely certain  
 12 that we are not going to be surprised during the course of  
 13 this Commission, or –

14 CHAIRPERSON: Mr Ntsebeza, I'm sorry to  
 15 interrupt you. I'm not sure that you're paraphrased what  
 16 she said correctly, unless I misunderstood. I understood  
 17 her to say – well, with the aid of that intervention from  
 18 Mr Semenya, that the Potchefstroom gathering wasn't an  
 19 internal review, but you then asked her, "Was there any  
 20 other thing that amounted to a review," and I understood  
 21 her to say yes. That I suggested to you opened up a door  
 22 of a new avenue of enquiry, which wouldn't be a cul-de-sac,  
 23 but so it's not correct to say that strictly speaking she  
 24 said there was no review, because the answer given was as I  
 25 believe I correctly paraphrased it, and if I misunderstood,

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1 then you must correct me, National Commissioner. Did I  
 2 correctly state what you had said?

3 GENERAL PHIYEGA: You understood me well,  
 4 Judge. I am saying we may not agree on the interpretation.  
 5 I would not agree with the statement that the Advocate is  
 6 making that there was no review.

7 CHAIRPERSON: No, hang on. No, no, I'm  
 8 not – maybe I did misunderstand. Apart from Potchefstroom  
 9 – that was the question –

10 GENERAL PHIYEGA: Yes.

11 CHAIRPERSON: Potchefstroom was not a  
 12 review, was not intended to be a review, but I think you  
 13 said you thought in the circumstances it wasn't necessary  
 14 to have a review because of Potchefstroom. Whether you  
 15 were right or wrong, you say that's a subject on which  
 16 people may disagree. But apart from the Potchefstroom  
 17 exercise, the question you were asked before we adjourned,  
 18 by Mr Ntsebeza, was, was there anything else amounting to  
 19 an internal review, and I understood you to say yes. Did I  
 20 misunderstand you?

21 GENERAL PHIYEGA: Maybe let me try and  
 22 restate my facts clear, Judge. What I said right at the  
 23 beginning is to say the review in a sense that the Advocate  
 24 is putting, as a result of the discussion, the preparation  
 25 for us, we went into a preparation which in our opinion and

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1 interpretation encapsulated the processes and produced the  
 2 common outcome.

3 CHAIRPERSON: And that was the  
 4 Potchefstroom, what I can call the Potchefstroom exercise?

5 GENERAL PHIYEGA: Yes.

6 CHAIRPERSON: Right, now what Mr Ntsebeza  
 7 then asked you was apart from the Potchefstroom exercise,  
 8 was there anything else – anything else – amounting to a  
 9 review. Is that correct, Mr Ntsebeza?

10 MR NTSEBEZA SC: Exactly, Mr Chairman.

11 CHAIRPERSON: Now what is your answer to  
 12 that?

13 GENERAL PHIYEGA: Apart from the  
 14 Potchefstroom review, there is nothing else because the  
 15 Potchefstroom review is something else for us.

16 MR NTSEBEZA SC: Yes, and as National  
 17 Commissioner, if there was any other review other than the  
 18 one you have qualified, the Potchefstroom gathering, you  
 19 would know about it.

20 GENERAL PHIYEGA: The Potchefstroom  
 21 review – the Potchefstroom meeting represents what I say  
 22 encapsulated what we did to prepare and all those things,  
 23 so the other issue that you are talking about is not in  
 24 question at this point in time.

25 MR NTSEBEZA SC: Yes, so I just wanted to

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1 find out if – because I don't want to misquote you and say  
 2 the Commissioner, as the head of the police service, told  
 3 the Commission now that there was no other review. Now if  
 4 there had been any other review by now, certainly you will  
 5 be able to say to the Commission yes, the - you would know  
 6 about it if there had been any other review.

7 GENERAL PHIYEGA: If there is any other  
 8 thing, indeed I would know.

9 MR NTSEBEZA SC: I'm asking because you  
 10 never know with this Commission, sometimes there is a Mr X,  
 11 a Mr Y, and I just want to make sure that we are not going  
 12 to be surprised down the line and somebody says, "Oh no,  
 13 there was another review, actually the Commission knows  
 14 about it." If you're sure there will not be anything like  
 15 that?

16 GENERAL PHIYEGA: If there's a Mrs Q  
 17 factor, I probably would know.

18 MR NTSEBEZA SC: Stranger things have  
 19 happened, but let me go on. Now I indicated to you that  
 20 part of the reason that the families are here is for them  
 21 to get a sense of what happened, and to reconcile  
 22 themselves with what happened, to the extent that that is  
 23 possible, and we agreed that you understand that. Now on  
 24 the 14th of March this year, I think when you began to give  
 25 evidence, I think you conceded – you'll correct me if I'm

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1 wrong – that there was no thorough investigation or fact-  
 2 finding mission by SAPS to discover what had gone wrong.  
 3 Did I understand you correctly?

4 GENERAL PHIYEGA: I do not recall that  
 5 conceding that you're talking about. However -

6 MR NTSEBEZA SC: Right, let me put it  
 7 historically this way. Let's check with each other whether  
 8 we all accept that it was on the 16th of August 2012 that  
 9 people died, 34 people died and those people were  
 10 mineworkers.

11 GENERAL PHIYEGA: You are correct.

12 MR NTSEBEZA SC: And on the 20th of  
 13 August, which is about four days thereafter, you met with  
 14 your officers, and a video was put up by my learned friend  
 15 in which the full content of your speech was recalled where  
 16 you were addressing your officers.

17 GENERAL PHIYEGA: Yes.

18 MR NTSEBEZA SC: Now I'm not criticising,  
 19 but these are some of the things that do not go down well  
 20 with the families, and I'll tell you at what point it  
 21 became a sticking point for them. One of the things that  
 22 you said, and evidence leader Madlanga SC went at length on  
 23 this, was that you told the officers that, "Whatever  
 24 happened, we represent the best of responsible policing."  
 25 Do you recall that?

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1 GENERAL PHIYEGA: I certainly do.

2 MR NTSEBEZA SC: You also said all, and  
 3 this is now four days after the event, no investigation  
 4 that we know of have concluded anything, but you say there  
 5 to the police officers, "All we did was to do our job and  
 6 to do it in the manner that we are trained, that we know it  
 7 should be done responsibly, caringly, and focusing on that  
 8 which is our core responsibility." Now at the end of the  
 9 briefing you thanked the police officers and told them, and  
 10 asked them to applaud themselves. Now what was it that you  
 11 wanted them to applaud themselves for?

12 GENERAL PHIYEGA: Perhaps, I don't know  
 13 whether I haven't done sufficient to explain that to the  
 14 Commission, because I've done so already, you said about Mr  
 15 Madlanga on that.

16 MR NTSEBEZA SC: Maybe let me lay the  
 17 ground for my further questioning this. Mr Madlanga was  
 18 not representing the families. You see, the families have  
 19 a high regard of you as a person who does not prejudge, or  
 20 they would like to believe that you don't prejudge a  
 21 situation, and to them – and I put this to you for your  
 22 comment – almost only 96 hours after the killings, you go  
 23 public and in your statement to people, who to them had  
 24 killed their families, you say to them, "You have done  
 25 nothing wrong." They just don't understand that. What is

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1 your comment?

2 GENERAL PHIYEGA: Okay, Advocate, you  
 3 would – I'd like you to get into my boots on the 20th.  
 4 Marikana is very unstable after about, from the 9th, with  
 5 processes that have been taking place. We have mobilised  
 6 police to come and assist the citizens, including the  
 7 workers, the employers, the ordinary community members, so  
 8 that we can come and restore public order and normal lives  
 9 for the various stakeholders continue. On the 20th, on the  
 10 day that you say I, the day in question, already 44 people  
 11 have lost their lives, and I still have to talk to officers  
 12 who are also part and parcel of the entire environment of  
 13 Marikana. Let me go to the statement that you are talking  
 14 about. I requested this very Commission to play the entire  
 15 statement because I recognised that anecdotally pieces of  
 16 the statement were played in the media in a manner that  
 17 actually butchered the meaning and the sense of what I was  
 18 saying, and again the interpretation of what I was saying,  
 19 I'm the person that can tell what I was saying, and I'll  
 20 say it again to you today. You have asked me about –

21 MR NTSEBEZA SC: How could you ask them  
 22 to applaud themselves?

23 GENERAL PHIYEGA: Yes. Just before you  
 24 asked me that, you alluded to the fact that in my statement  
 25 I spoke about responsible execution of their job, the

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1 focus, the caring, and indeed that was spoken to because of  
2 the prescripts that the police followed.

3 [11:45] I've said to this Commission that I divorce that  
4 from the outcomes, the unintended outcomes of the 16th,  
5 because I was not talking, I did not praise death on that  
6 day, and I am on record saying that, and I shall say that  
7 to you again.

8 MR NTSEBEZA SC: Commissioner, Ben Okri,  
9 the artist/poet, says there is a lot that goes into words,  
10 because words are tools of communication, and if you say I  
11 must put myself in your shoes, I can give you 101  
12 suggestions as to what you could have done on that day.

13 You could have said there this matter, tragic as it is, is  
14 going to be fully investigated, and then once the  
15 investigation is complete, whatever action ought to be  
16 taken will be taken. Would that not have been a more  
17 responsible thing to say?

18 GENERAL PHIYEGA: I think I would argue  
19 that I did say some of those things, and again it's how you  
20 paraphrase and how you interpret, and I'm happy you're  
21 saying words can be used, and you say you can use many  
22 words to say other things, but I have shared with you my  
23 true meaning and what I stood for when I said what I was  
24 saying. You may not agree with me, but I want to say why I  
25 even requested that that statement be played in full. I

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1 commission will inform us. I am not prejudging the  
2 situation at all. It wasn't my intention, and I haven't  
3 done so.

4 MR NTSEBEZA SC: I will argue that you  
5 clearly indicated to the police by a statement that says  
6 they must applaud themselves, that it was at the height of  
7 irresponsibility from a person in your position to say you  
8 must applaud yourselves for having killed 34 people  
9 yesterday –

10 CHAIRPERSON: That is a rather broad  
11 paraphrase of what she said, isn't it? You're not quoting  
12 her ipsissima verba, are you? Because I've got the  
13 statements in front of me and I can't see it there, but if  
14 it is I've missed something, but the reference to  
15 applauding yourselves, where do you get that?

16 MR NTSEBEZA SC: Of course, Mr Chairman,  
17 I accept the correction because there is nowhere in the  
18 statement which says that, and I have tried to establish  
19 from the witness what the police were to applaud for  
20 themselves. Can I just rephrase it and put it this way –

21 CHAIRPERSON: Rephrase it. I'm sure you  
22 can do it in a way that doesn't cause a problem.

23 MR NTSEBEZA SC: Now according to the  
24 families – and you must accept that these are people who  
25 don't know prescripts, regulations, this, that, and the

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1 believed that I recognise the severity of the situation. I  
2 spoke about the severity of the situation. I spoke about  
3 my feelings of –

4 MR NTSEBEZA SC: Nowhere in that  
5 statement did you say at this point we can't jump to any  
6 conclusions; the matter is under investigation, it will be  
7 thoroughly investigated and that is all that we can say at  
8 this stage. You boldly say, "You have done nothing wrong."

9 GENERAL PHIYEGA: No. It is not –

10 MR NTSEBEZA SC: Mr Interpreter, I want  
11 you to emphasise on my question, saying there is nowhere  
12 where she says "Let us not jump into conclusion, because  
13 the matter is still under investigation."

14 MR MAHLANGU: I'm sorry, if you may  
15 repeat the question again, Sir.

16 MR NTSEBEZA SC: That "Let us not jump  
17 into conclusion as to," in other words something that says  
18 let's not apportion blame, let's not say this, let's be  
19 patient; an investigation is going to go on, and that's  
20 all.

21 MR MAHLANGU: Thank you.

22 GENERAL PHIYEGA: I do say in my  
23 statement that there is a commission that has been  
24 announced and that we as the police will fully cooperate,  
25 and that in my sense does tell that the outcome of that

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1 next thing – what they have come to hear and see in some of  
2 the footage, and what they have now come to know is that 34  
3 people got killed on that day and they were killed by the  
4 police, and I think yesterday we established that the  
5 authorship of the killing is not contested. Now what they  
6 want to grapple with is that you as the head of the police  
7 service, barely 96 hours after that event, where on the  
8 face of it, it appears that people were mowed down, 16 of  
9 them, with machinegun fire and some other sharp ammunition.

10 As laypersons they see this and they say these people are –

11 MR SEMENYA SC: Chair, maybe Mr Ntsebeza  
12 can stop embellishing his questions.

13 GENERAL PHIYEGA: Ja.

14 MR SEMENYA SC: There were no machineguns  
15 used for the deaths of the 16 people.

16 CHAIRPERSON: I think you'd better take  
17 machineguns out of it because they weren't there on the  
18 16th. Reformulate your question, using the weapons that  
19 were there.

20 MR NTSEBEZA SC: I had not gone as far as  
21 calling them weapons of mass destruction, but I understand.  
22 But the families are seeing their people being gunned down,  
23 or have now come to establish that they were gunned down in  
24 the way in which they were. Now I don't want to query the  
25 defences that are being put up by SAPS as to why it was

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1 done, and possibly what you now understand to be the  
2 justification for that. I am not exploring that. I'm  
3 simply saying 96 hours after the event you come and  
4 virtually saying what you did, whatever happened was  
5 representing the best of responsibly policing; it was done  
6 responsibly, caringly, and then I think what really went to  
7 them, which is why they couldn't understand, was that there  
8 was this place where you say they must applaud themselves.  
9 They regard this as, especially now that it was flighted on  
10 the 14th of March at your instance, as amounting to rubbing  
11 salt into the wounds, and therefore they would like you to  
12 explain how you could, after only four days, conclude that  
13 the killing of their loved ones was something in relation  
14 to which the police could applaud themselves.

15 GENERAL PHIYEGA: Advocate, I cannot find  
16 fault in how you interpret what I was saying. However, I  
17 cannot say what I said in your words; I can say it in my  
18 words. I'm reminded of the Bible; we can read the same  
19 verse and we will interpret it differently, and I want to  
20 say indeed you may have read what you read, what, you may  
21 interpret what you interpret in what I was saying, but I  
22 want to say to you again that on that day when I spoke to  
23 the members, 44 people were dead in Marikana; a lot of  
24 property was damaged; public order was under challenge, and  
25 indeed what I was saying to these members is that you've

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1 been here for many days, you have worked overtime, night  
2 and day, we have experienced a very tragic outcome, that  
3 was unintended. I've said so over and over again, and  
4 their job was not finished, they still needed to maintain  
5 order and to ensure that Marikana gets back to stability.  
6 They were equally traumatised, as I've said in my speech,  
7 like every other citizen in this country. They too needed  
8 to be spoken to, as much as the families and other people  
9 needed to be spoken to. The nation was talking. The  
10 nation was mourning. We were mourning too, and the key  
11 contextualisation of what I was saying is the most sad  
12 thing I have experienced throughout this process. It was  
13 never that, and I shall say that today, I will repeat it  
14 over and over again. Being a human being I can never  
15 applaud death.

16 MR NTSEBEZA SC: And you'll not call upon  
17 others to do so?

18 MR SEMENYA SC: Chair, really. Really.  
19 Can that be a valid question?

20 CHAIRPERSON: She says "I wouldn't  
21 applaud death." He's making the point that she was asking  
22 others to applaud and he's suggesting it was, what it was  
23 for. I think it's clear what she's going to say in reply,  
24 but I'll allow the question. Let's wait for the answer.

25 MR NTSEBEZA SC: You wouldn't call upon

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1 others to applaud that kind of thing?

2 GENERAL PHIYEGA: For the record, the  
3 South African Police Service would not applaud death, as  
4 you are suggesting. I had not called them upon to do so  
5 and they did not do so.

6 MR NTSEBEZA SC: I'm not going to win  
7 this one about you saying "we" or SAPS. I was asking about  
8 you as a human being, but I understand what you are saying.  
9 Let me give you an insight into what those who instruct me  
10 regard what you were doing on the 20th as. You may have  
11 taken a view on that day, on the 20th, that those who were  
12 killed by the police were themselves not injurious and the  
13 police had to defend themselves and if they died in the  
14 process, that was tough luck. Now that is some of the  
15 thinking why the families are saying is borne out by what  
16 you say on the 20th of August. What's your comment?

17 GENERAL PHIYEGA: Advocate, I shall again  
18 say, very intense interpretation by yourself. Words such  
19 as "tough luck" were very far from the statement that I  
20 made.

21 [12:05] I shall put it to you again in my response to say  
22 as a leader I had no intention of applauding death, neither  
23 did I ask the police to applaud the tragedy.

24 MR NTSEBEZA SC: I would also like to  
25 elicit your comment - in consultation some of the thoughts

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1 that have been conveyed to me by those who instruct me, is  
2 that you felt obliged to go and talk to the police in those  
3 terms because you needed to appease them so that it should  
4 come from the person in authority in public endorsing what  
5 they did.

6 GENERAL PHIYEGA: I shall again say like  
7 the Bible you take out a verse and you interpret it, and I  
8 would say that is not the interpretation.

9 MR NTSEBEZA SC: And the thinking is that  
10 you were in 63 days in office and with no thorough  
11 investigation as to the pros and cons of what led to the  
12 first post-apartheid massacre of that scale, you had to be  
13 known to be taking a position, and under pressure you went  
14 and made that statement.

15 GENERAL PHIYEGA: Advocate, that's your  
16 conclusion, not mine. I've given you my standpoint. I've  
17 told you why I was talking to the police, and I have been  
18 very articulate in terms of what I was saying. If indeed  
19 you are able to think differently, again I would give it to  
20 you; that's your own way of doing it, but that's not my  
21 way.

22 MR NTSEBEZA SC: In fact just so that it  
23 should not appear that I say those who instruct me, those  
24 who instruct me, the families after - or let me put it this  
25 way. On the 14th of March when you were being led and the

<p style="text-align: right;">Page 8136</p> <p>1 video was flighted, what the families found to amount to 2 rubbing in the salt into the wound instead of putting on 3 the plaster, was what appeared to them to be an insincere 4 apology and an expression of condolences, given the context 5 in which that video opens. You applaud the police, you ask 6 them to applaud themselves. They know the police have 7 killed their relatives. They may or may not have a 8 defence, but for them they were killed in ways that they 9 cannot comprehend, and then you say, you applaud them, and 10 then having said that and the video having been played to 11 the end where they see that that is the toll, then you say, 12 you express condolences to them.</p> <p>13 MR SEMENYA SC: Chair, we request the 14 protection for the witness. She has repeatedly since this 15 morning explained to us what the document says, what she 16 meant by it, and we're just again in the same pit.</p> <p>17 CHAIRPERSON: Mr Semanya, Mr Ntsebeza is 18 expressing [inaudible] the attitude of his clients as 19 they've communicated it to him, and he wants to give her a 20 chance to deal with it. I don't think I should disallow 21 the question. Let's get the answer.</p> <p>22 MR MAHLANGU: The question was, Sir? 23 MR NTSEBEZA SC: The question was, your 24 expression of condolences in the context, I mean in the 25 same context you flight a video, you go through it, the</p>	<p style="text-align: right;">Page 8138</p> <p>1 broke down and was escorted out of the auditorium, was Ms 2 Songstress Notugile Nkonyene, the sister of Mr Pumzile 3 Sokanyile.</p> <p>4 MR MAHLANGU: The first one? 5 MR NTSEBEZA SC: Songstress, that's the 6 name, an English name, Songstress Notugile Nkonyene. Now 7 I'm just giving you an array so that you can understand why 8 this is happening. Mr Sokanyile was supporting 11 people 9 in total, including his sister, and he was the man who was 10 shot across the river on the 13th of August. I'm not 11 wanting us to go into details, but at an inspection I 12 understand there may well – at an inspection there was an 13 indication that one of the mineworkers was shot on the 13th 14 of August across the river, and just identifying the 15 context. Now shortly after the family learned of the death 16 of Mr Sokanyile, their mother had a heart attack and died. 17 Now that is the answers that she's looking for, for 18 instance, and she may have a view which may or may not be 19 supported by evidence, that Sokanyile's death was not 20 justified. We are not exploring that, but that's what she 21 has in her head now, and she hears you saying, barely 96 22 hours after these events, because you say what was in your 23 mind was also including this death, of the 44 deaths, she 24 just cannot reconcile that with a position that you take, 25 after having seen this, flighted this video, she's sitting</p>
<p style="text-align: right;">Page 8137</p> <p>1 tenor of what you say there is that as is understood by the 2 – I know what you said, but as is received by the families, 3 and they felt that that was an insincere expression of 4 condolences.</p> <p>5 GENERAL PHIYEGA: Advocate, let me put it 6 this way. I'm aware that in this forum there would be 7 contest of opinions. It is the character of a legal forum 8 such as this one. But I want to put it to you that I'm 9 human, and that which you are saying can never take away 10 from me the personality and the humanness in me. Inasmuch 11 as you can try and flog this to make it as negative as you 12 wish it to be, my apology was truly sincere. If it is not 13 accepted, again I cannot force it, but I can state it, and 14 what I stated in my opening statement remains.</p> <p>15 MR NTSEBEZA SC: Sometimes, Commissioner, 16 we have to go beyond words and seek to touch the 17 heartstrings of all of us. This is no attempt to 18 sensationalise anything. I'm simply reflecting the 19 families' feelings consequent upon the video that you 20 flighted and what you said thereafter. Let me tell you for 21 instance that the person who broke down, you remember that 22 someone broke down in the course of that presentation and 23 had to be escorted out? You remember that?</p> <p>24 GENERAL PHIYEGA: Yes, I do. 25 MR NTSEBEZA SC: Now that person who</p>	<p style="text-align: right;">Page 8139</p> <p>1 there, she knows that the person who died was a breadwinner 2 and then you say, "I express my condolences to you." She 3 can't accept that's a sincere expression of condolences.</p> <p>4 CHAIRPERSON: What is the question, Mr 5 Ntsebeza? 6 MR NTSEBEZA SC: The question is, are you 7 able to understand where she comes from, and what is your 8 position relevant thereto? 9 GENERAL PHIYEGA: I'll repeat what I've 10 said, Advocate. Indeed we can flog this thing up and down 11 negatively and positively. I am human and I am, I have 12 feelings and I understand, and my apology was very, very 13 considered, and I will again say to you police shall never 14 applaud death. I did not applaud death, neither did the, 15 did I ask the police to applaud death, and you being the 16 representative of the family may assist us even further to 17 take to the family my sincere condolences and apologies 18 that I've expressed, because I am saying to you in response 19 that they were meant, and that statement that I said in my 20 opening statement is true and it stands like that.</p> <p>21 MR NTSEBEZA SC: Commissioner, you can 22 rest assured that I'm doing my best here to try and get the 23 best for the families, but at the same time I'm not 24 intending to be unfair to you. 25 GENERAL PHIYEGA: You are.</p>

<p style="text-align: right;">Page 8140</p> <p>1 MR NTSEBEZA SC: So please, there is no 2 attempt to sensationalise anything, and the only way we can 3 get to understanding what it is all about is when we ask 4 questions. I'm going to hand up a statement, media 5 statement, that the attorneys who instruct me were asked by 6 the families to distribute to media houses, in which they 7 contextualise how they received your expressions of 8 condolences on that very day. 9 CHAIRPERSON: I take it you want this to 10 be an exhibit, Mr Ntsebeza? 11 MR NTSEBEZA SC: Yes, indeed – 12 CHAIRPERSON: It will be FFF26. 13 MR NTSEBEZA SC: Mr Chairman, just for 14 the record, may I just read the statement? It's four 15 paragraphs; it's not long. "Statement on behalf of the 16 deceased miners' families represented before the Marikana 17 Commission of Inquiry. The Socio-Economic Rights Institute 18 of South Africa (SERI) Law Clinic has been instructed to 19 release the following statement on behalf of the families 20 of the striking miners killed by the police on the 16th of 21 August 2012." First paragraph – 22 MR SEMENYA SC: Chair, may we ask, is 23 this going to be evidence that will be tendered, that will 24 be tested, or what? 25 CHAIRPERSON: [Inaudible].</p>	<p style="text-align: right;">Page 8142</p> <p>1 MR NTSEBEZA SC: Yes, there's one witness 2 – 3 CHAIRPERSON: This is – you know, we are 4 here, as our motto indicates, to ensure that there's truth, 5 restoration, and justice. There's obviously an emotional 6 aspect about this, not entirely evidential one, but I think 7 I'd be failing in my duty if I do not allow this question 8 to be asked and the witness to be afforded the opportunity 9 to answer it. 10 MR NTSEBEZA SC: Thank you, Mr Chairman. 11 The first paragraph, "The families of those killed during 12 the Marikana massacre do not accept National Police 13 Commissioner Riah Phiyega's 'condolences' offered yesterday 14 before the Marikana Commission of Inquiry. What we want, 15 and will continue to demand, is a full-throated apology 16 from Commissioner Phiyega and an acknowledgement of 17 responsibility for having killed our family members. We 18 also demand an undertaking that those police officers found 19 to have participated in the killing of our family members 20 will be disciplined, and, where appropriate, prosecuted. 21 A video presented to the Commissioners yesterday 22 showed Commissioner Phiyega congratulating her police 23 officers on the Marikana Killings. 24 We are outraged and humiliated that Phiyega's 25 'condolences' were offered immediately after she was shown</p>
<p style="text-align: right;">Page 8141</p> <p>1 MR NTSEBEZA SC: This is - 2 CHAIRPERSON: Sorry, my machine wasn't 3 on. Mr Semanya has asked whether this is evidence that's 4 going to be tested. I said the question is obviously 5 directed to you, not to me, so what is your answer? I 6 suppose the question would be that this was a statement 7 issued on behalf of your clients on the 15th of march, in 8 which you ask for certain things, particularly what you 9 call a full-throated apology" – 10 MR NTSEBEZA SC: Yes. 11 CHAIRPERSON: And you'd like to know the 12 reaction of the witness to the demand that was made. 13 MR NTSEBEZA SC: Yes. 14 CHAIRPERSON: Is that what this is about? 15 MR NTSEBEZA SC: That's the only basis – 16 CHAIRPERSON: Alright, I'll allow – 17 MR SEMENYA SC: Chair – 18 CHAIRPERSON: Yes? 19 [12:25] MR SEMENYA SC: Chair, this document 20 deals even with the death of the police officers, and I 21 can't see how a media statement can be made to say even the 22 Commissioner's condolences in respect of the police lives 23 that were lost was insincere. 24 CHAIRPERSON: Isn't that an answer that 25 she must give rather than –</p>	<p style="text-align: right;">Page 8143</p> <p>1 on tape thanking her officers for killing our loved-ones. 2 On the video, Phiyega also encouraged the officers to 3 applaud themselves. That she would seek to glorify the 4 killings in this way is beyond all comprehension. 5 We according reject Phiyega's 'condolences' 6 offered yesterday. She clearly thinks the police did 7 nothing wrong, and has communicated this to the SAPS as a 8 whole. Such a view has no place in a society which values 9 life, and mourns its loss." 10 Now there are obviously areas, as Mr Semanya 11 indicated, in relation to which you may not be ad idem with 12 in the statement. This is an opportunity for you to make a 13 comment on some of the aspects, or on the statement itself, 14 but I'm putting it to you as a statement that the families 15 collectively said we must put out there because this is how 16 we feel, as a result of what we saw today at the 17 Commission. 18 GENERAL PHIYEGA: I fully addressed 19 myself to most of those issues in the statement and my 20 condolences as expressed on the 15th stand. 21 MR NTSEBEZA SC: Regrettably this whole 22 period has taken, as you said, 44 lives. Two of those were 23 members of the police service. Can I ask you, have you 24 made contact with the families of those police officers 25 consequent to their death?</p>



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1 GENERAL PHIYEGA: Yes, I have.  
 2 MR NTSEBEZA SC: There were also members,  
 3 I think security services. Have you made any contact with  
 4 them?  
 5 GENERAL PHIYEGA: I personally haven't.  
 6 I met some of them here.  
 7 MR NTSEBEZA SC: When you make that  
 8 distinction, am I to understand that the other members, I  
 9 mean the family members of the police service members, the  
 10 contact was intimate in the sense of you met them, face to  
 11 face meeting with them?  
 12 GENERAL PHIYEGA: You are right, because  
 13 I'm their employer.  
 14 MR NTSEBEZA SC: Have you sent any  
 15 letters, expressions of condolences to the security force  
 16 members, the security company –  
 17 CHAIRPERSON: The security people worked  
 18 for Lonmin –  
 19 MR NTSEBEZA SC: Lonmin security people –  
 20 CHAIRPERSON: The security people worked  
 21 for Lonmin.  
 22 MR NTSEBEZA SC: Lonmin, yes.  
 23 CHAIRPERSON: Who were killed on the 12th,  
 24 I think.  
 25 MR NTSEBEZA SC: Yes, yes, Mr Chairman.

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1 GENERAL PHIYEGA: There has been contact  
 2 with the, my members in the region, by my members in the  
 3 region.  
 4 MR NTSEBEZA SC: But you yourself have  
 5 not sent any, say letter under your hand, expressing  
 6 condolences?  
 7 GENERAL PHIYEGA: To who, by the way?  
 8 MR NTSEBEZA SC: To the families of these  
 9 two security people who were killed on the 12th.  
 10 GENERAL PHIYEGA: I think there's been  
 11 collaboration, as I say, between my members, I think the  
 12 mine also as employers have reached out. I personally  
 13 haven't.  
 14 MR NTSEBEZA SC: And the families of the  
 15 34 who were killed, the miners?  
 16 GENERAL PHIYEGA: I haven't.  
 17 MR NTSEBEZA SC: Isn't that a more – I  
 18 don't want to say sincere because I don't want to, I'm  
 19 trying to find a word that – isn't that more an ideal way  
 20 of reaching out that will not –  
 21 GENERAL PHIYEGA: I think, Advocate, it  
 22 is important for me to also say when I said the situation  
 23 was unprecedented, I meant it in many ways. When Marikana  
 24 happened we could hardly even go and support as police the  
 25 gatherings that were talking place because the community

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1 actually told us that police should not come, but we didn't  
 2 completely stay away. We understood the sentiment. We  
 3 stood back, but we realised that we need to continue doing  
 4 our job, and we need to reach out, and we've done so. This  
 5 is why we can even now engage with the community. But as  
 6 police we understood the sentiments and respected them.  
 7 MR NTSEBEZA SC: I mean the way I  
 8 understand things, there could have been other means of  
 9 communication from the office of the National Commissioner.  
 10 There were funerals of the deceased families that were held  
 11 all over at different places and times, and even if you  
 12 felt that there was the tension that there was, I want to  
 13 suggest to you that your impartiality would have been  
 14 demonstrated, particularly in the light of what you've said  
 15 about the Commission still having to do its job and  
 16 allocate blame here and there, the ideal thing in those  
 17 circumstances would have been for you to do what people who  
 18 express condolences do, send flowers, send telegrams, send  
 19 letters of condolences.  
 20 GENERAL PHIYEGA: Advocate, hindsight is  
 21 always the best intelligence, but what I want to say to you  
 22 also, that it is also right to respect people's space and  
 23 to respect their feeling. If that is demanded, you have to  
 24 be large enough in your heart to respect that. Perhaps my  
 25 presence, perhaps my intrusion, as you have articulated the

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1 rejection in the statement now, I still respect it, but we  
 2 will continue reaching out. We are not inhuman. We are  
 3 not animals in SAPS.  
 4 MR NTSEBEZA SC: And so the position as  
 5 you have expressed in the video, that level of extension of  
 6 condolences is what you stand by? Or after the video,  
 7 after you had seen, with -  
 8 GENERAL PHIYEGA: My sentiment, my  
 9 meaning, my condolences have been well expressed and I  
 10 think I've no other word for it now.  
 11 MR NTSEBEZA SC: Let's move on, and this  
 12 is my last question. 34 people are killed, 84 are injured,  
 13 and this is on the 16th, and we agree that there has not  
 14 been an incident quite like this in post-apartheid South  
 15 Africa where so many people were killed and injured by the  
 16 police in a single incident. Do you accept that?  
 17 GENERAL PHIYEGA: I do, and I think we  
 18 also should add that all those unprecedented circumstances  
 19 that came with it, it would be responsible of us to  
 20 recognise that to say neither did we ever as police face so  
 21 many armed protesters.  
 22 MR NTSEBEZA SC: I will not go into what  
 23 I understand you said in response to a similar question to  
 24 Mr Mpfu, but I'm sure we will argue that. It seems to me  
 25 that's a confrontation, but what I wanted to really explore

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1 with you, and if you could actually give me your views  
2 about whether you have considered this – on the 13th five  
3 people were killed in a skirmish.

4 CHAIRPERSON: I don't know if it was  
5 five. There's a question mark over the fifth member who  
6 was stabbed in front outside her house, but certainly four  
7 were killed.

8 MR NTSEBEZA SC: Four.

9 CHAIRPERSON: A fifth person died.  
10 Whether it was in the skirmish or not is a matter that we  
11 may have to decide on.

12 MR NTSEBEZA SC: Okay. Now two of those  
13 were your members; two of them were mineworkers. Now I  
14 will not explore with you, but you can be sure we'll  
15 explore it with those who are involved, the question of  
16 whether the people who were involved as your members on the  
17 13th, were also involved on the 16th. But what I want to  
18 raise with you is this - it does appear to me that after  
19 the 13th, 14th, 15th, there was relative calm for almost 48  
20 hours. Is that your understanding of the position?  
21 Nothing happened really on the 14th. You know this is an  
22 industrial action basically.

23 MR TIP SC: Chair, I object to that. On  
24 the 14th a NUM shop steward Mr Twala was killed 60 metres  
25 away from the koppie and for that to be described as

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1 "nothing really happened" is perhaps unfortunate.

2 [12:45] MR NTSEBEZA SC: I'm so sorry, I didn't  
3 mean to offend my friend, my learned friend. I was seeking  
4 to include the body with the skull, the ox skull; that was  
5 48 hours from that incident. That's why I said there was  
6 relative calm; the people are coming and going to the  
7 koppie, from the koppie, until this happens.

8 CHAIRPERSON: Yes, but it was an illegal  
9 gathering attended by people. It wasn't just an industrial  
10 dispute. An illegal gathering was taking place, which was  
11 attended by a substantial number of people with dangerous  
12 weapons, clashing weapons and so on. But anyway, so to  
13 call that relative calm is perhaps something approximating  
14 to a misnomer. I think I understand the thrust of what you  
15 want to ask, so please ask it appropriately and not in a  
16 way that provokes the kind of –

17 MR NTSEBEZA SC: Now okay, put it this  
18 way – there doesn't appear, after the discovery of Mr  
19 Twala's body, there doesn't appear to have been anything  
20 violent, the nature of which could raise eyebrows between  
21 that time and when in the, until about half past 3 on the  
22 16th.

23 GENERAL PHIYEGA: Advocate, let me just  
24 say again, I'll use my interpretation now. You are talking  
25 about four deaths on the 13th. We are talking about another

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1 death on the 15th. We are talking about death before those  
2 dates. We are talking about 44 deaths today. We are  
3 talking about deaths that are making us sit in this  
4 Commission to talk about loss of life, and in your  
5 question, after lives have been lost, you want to talk to  
6 this nation about relative calm when life is already lost  
7 and property damaged. I'm perplexed.

8 MR NTSEBEZA SC: Well, talk about you  
9 turning a question on its head. Anyway, I am intending  
10 nothing further than suggest that between what can be  
11 attributed to an act of violence, the death of Mr Twala, 48  
12 hours before the gunning down of the first victims on the  
13 16th, that is a 48-hour period, in that period your members  
14 are there in the koppie, mineworkers armed with assegais  
15 and sticks and some of them unarmed, go backwards and  
16 forwards from the koppie to where they sleep, and then on  
17 the following day, 15th, they come and go back to sleep;  
18 they come back on the 16th. Nothing happens. I mean the  
19 police do not say look, you are not going to come back here  
20 now with your arms, and that's the relative calm. I'm not  
21 trivialising what happened. What do you think triggered  
22 the sudden burst of gunfire that killed 16 people at once  
23 and then subsequently in the other koppie? Just your  
24 thoughts.

25 GENERAL PHIYEGA: Advocate, I shall say

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1 again that level of trivialisation perplexes me and bothers  
2 me deeply. The seriousness of processes that had been  
3 taking place in Marikana, if we are going to ignore them  
4 and just give that type of meaning, I would be extremely  
5 bothered as the National Commissioner of Police and as a  
6 citizen of this country.

7 MR NTSEBEZA SC: What would bother you?  
8 It's an enquiry. I just want – you know what perplexes me,  
9 I know now what perplexes you, is what you consider to be  
10 my trivialisation on this, but the police go, I mean  
11 mineworkers armed and what, you know, they go to the  
12 mountain, they come back to where they sleep, they sleep,  
13 they come back on the 15th, they go to the mountain and in  
14 the end, the end of the day they go back to sleep, and then  
15 they come back again in the morning. You know, the police  
16 officers are there. The Nyalas are there. Everything is  
17 there. What do you think accounts for that, you as  
18 Commissioner? I know you were not there; I was not there,  
19 and I will put those questions to those who were there, but  
20 the National Commissioner of Police –

21 GENERAL PHIYEGA: I'm happy with the  
22 conversation of outsiders, me and you, we were not on site,  
23 and I'm saying I'm still perplexed that after property and  
24 lives were lost, and these miners and protesters that are  
25 armed to the teeth, going up and down, as the police, if

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1 you were in my shoes, would you be bothered? Wouldn't you  
 2 be bothered? Because my duty with the police officers is  
 3 to ensure that those members can protest anytime, anyhow,  
 4 to express their views, but we would be very concerned if  
 5 they are armed, that's number 1, particularly in a protest  
 6 that is not even agreed upon. It will remain our issue to  
 7 ensure that we assist to disarm them so that they can  
 8 continue to protest, exercise their right in a manner that  
 9 the Constitution allows them to do so, but when they are  
 10 armed, we would be very concerned.

11 MR NTSEBEZA SC: Now as I conclude, let  
 12 me relieve you of being perplexed because that concern,  
 13 that very concern that you have, is a concern that I have.  
 14 I actually explored that concern in my cross-examination of  
 15 Brigadier Mkhwanazi. Can I just put the following for your  
 16 comment and then I'll be over. I said to Brigadier  
 17 Mkhwanazi as the person who is head of POP, or who has done  
 18 training of POP, confronted with that situation, could have  
 19 sent a negotiator, a negotiator who would not negotiate as  
 20 the negotiator who – the negotiator would seek to do one  
 21 thing, would be to promote peaceful protest. I said to him  
 22 one of the ways in which that could be done would be  
 23 Brigadier would have gone there to say listen, or whoever  
 24 was in charge, would have negotiated for in a democracy, to  
 25 say if you want to be on this mountain forever, you are

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1 welcome to do so, but you cannot be here armed, and if you  
 2 are insisting on being here armed, a number of consequences  
 3 will arise. I even suggested to him that he could have  
 4 flooded that place with about 4 000 POP police, brought 15  
 5 water cannons instead of two, etcetera, etcetera. So I did  
 6 put to Brigadier Mkhwanazi what I thought could have been  
 7 done differently. That was the way in which I was showing  
 8 my concern about people being armed in protest. I was  
 9 suggesting that there were ways in which that could have  
 10 been dealt with, without the kind of loss of life that we  
 11 had. Do you want to comment?

12 MR SEMENYA SC: No, Chair –

13 GENERAL PHIYEGA: Yes, I want to –

14 MR SEMENYA SC: The evidence is  
 15 different. There were attempts to ask the people on the  
 16 koppie to disarm.

17 MR NTSEBEZA SC: It's what I put to  
 18 Brigadier Mkhwanazi -

19 CHAIRPERSON: - Mr Ntsebeza's question.  
 20 Mr Ntsebeza's question was when the people didn't disarm,  
 21 the matter should have been dealt with differently by  
 22 strengthening the POP side of things, the use of non-lethal  
 23 weapons. That's his question. It was put to Brigadier  
 24 Mkhwanazi. He's now putting it to the National  
 25 Commissioner, and I take your point about attempts were

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1 made to negotiate, attempts were made to get people to  
 2 disarm, but Mr Ntsebeza says faced with that – as I  
 3 understand him – faced with that situation, it should have  
 4 been dealt with differently, and he suggested a way it  
 5 should have been dealt with and he wants the witness's  
 6 comment. Am I understanding you correctly, Mr Ntsebeza?

7 MR NTSEBEZA SC: Absolutely, Mr Chairman.

8 CHAIRPERSON: Alright, okay. So you  
 9 heard what Mr Ntsebeza said –

10 GENERAL PHIYEGA: I heard.

11 CHAIRPERSON: He wants to know what – I  
 12 can't remember what Brigadier Mkhwanazi's answer was, but  
 13 let's hear yours.

14 GENERAL PHIYEGA: My comment would be  
 15 there had been a lot of negotiation throughout the process,  
 16 and also there were also undertaking and promises that, you  
 17 know, there will be a dropping of their weapons on the 16th,  
 18 and if we had been given chance to continue with our plan,  
 19 further engagement would have taken place because then the  
 20 plan would have been rolled out in the manner that we had  
 21 it, and I'm saying to you, Advocate, the intention was  
 22 never that outcome. The outcome was the product of a  
 23 disrupted plan.

24 MR NTSEBEZA SC: Ja, Commissioner, I  
 25 think then you do understand that I am not trivialising the

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1 fact that there were 34 deaths and, in fact 44 deaths.  
 2 It's something that I've covered, and we are agreed that  
 3 you have your own view and we have our own view. We'll  
 4 pursue these with the people who were involved on the day,  
 5 and Mr Chairman, you will be happy to know that that was my  
 6 last comment. That's the end of my cross-examination.

7 CHAIRPERSON: Thank you, Mr Ntsebeza.

8 There's one question I want to ask the Commissioner before  
 9 we adjourn, but Mr Gumbi, you were going to cross-examine  
 10 next –

11 MR GUMBI: Thank you, Chairperson –

12 CHAIRPERSON: But as you heard, Mr  
 13 Semenya requires tomorrow, or at least a full day to  
 14 prepare for his next witness. You've given us a  
 15 substantial amount of reading matter which we will have to  
 16 read, as will the witness, so I don't think we can - in the  
 17 circumstances I don't think we can have you cross-examining  
 18 today. So what I'm going to ask you to do is when the  
 19 National Commissioner comes back, before Mr Mpofo proceeds  
 20 with his cross-examination, if you could then cross-examine  
 21 her yourself on the basis of this material, which I take it  
 22 you've given to her as well.

23 MR GUMBI: Yes, Chairperson.

24 CHAIRPERSON: And your idea is that she  
 25 should be conversant with this material, as we should all

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1 be, before you question her. Is that correct?  
 2 MR GUMBI: That's correct, Chairperson.  
 3 CHAIRPERSON: I see. Alright, thank you.  
 4 There's something that I just want to ask the National  
 5 Commissioner. National Commissioner, you remember the  
 6 evidence you gave about FFF2 and FFF3, your statement. Now  
 7 Mr Burger covered it very extensively in cross-examination.  
 8 What appeared from the evidence was that your original  
 9 statement, FFF2, had a misfitting page 7, as it was  
 10 described, and you explained that to us. You had, I think  
 11 you said had the original statement typed on your computer  
 12 and you forwarded it to your secretary and then various  
 13 things happened and things went wrong. I take it there  
 14 must be an original page 7 which is not a misfit, which was  
 15 there on the 7th of March. That must be either in the  
 16 "sent" section of your computer, or in your secretary's  
 17 computer, or both. Would you endeavour to obtain a copy of  
 18 that for us? It's the original page 7, the fitting page 7  
 19 that was there on the 7th of March either from your computer  
 20 or your secretary's –  
 21 GENERAL PHIYEGA: The one that we  
 22 amended?  
 23 CHAIRPERSON: Sorry?  
 24 GENERAL PHIYEGA: The one that I amended?  
 25 CHAIRPERSON: Yes, yes. In other words,

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1 the original one that was there, because obviously when the  
 2 document was originally in the computer and it was printed,  
 3 all the pages fitted, if you know what I mean. So there  
 4 must be an original 7.  
 5 GENERAL PHIYEGA: Okay.  
 6 CHAIRPERSON: So if you could arrange for  
 7 that please to be prepared and we could have it on Monday,  
 8 I'd be grateful.  
 9 MR NTSEBEZA SC: Mr Ntsebeza, you're  
 10 raising your left hand. What does that mean?  
 11 MR NTSEBEZA SC: There will be no cross-  
 12 examination. Commissioner, I'm just, Mr Chairman, I'm  
 13 instructed that the Commissioner had indicated that there  
 14 is available five drafts of the statement that became a  
 15 point of contention. Now I –  
 16 [13:05] CHAIRPERSON: She didn't say five; she  
 17 said various drafts.  
 18 MR NTSEBEZA SC: Various drafts. Now I  
 19 don't know whether they are available, because it appears  
 20 that she said they are available in electronic form or in  
 21 whatever form, perhaps if those drafts could be made  
 22 available.  
 23 CHAIRPERSON: May I suggest that you  
 24 discuss it with Mr Semenya after we adjourn and then see to  
 25 it, ensure that the necessary arrangements are made.

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1 There's one thing I think I should place on record, and  
 2 that is that the next witness after the National  
 3 Commissioner is going to be General Annandale and if I  
 4 understand the position, Mr Semenya has to get certain  
 5 instructions from this witness which he needs for his  
 6 preparation with General Annandale. Because she's under  
 7 cross-examination, technically he's not permitted to do so,  
 8 but he raised it with me and in the presence of the  
 9 evidence leaders, and we came to the conclusion that on the  
 10 basis that he will only confine himself to the material  
 11 which he needs for General Annandale, and he won't discuss  
 12 the evidence with the witness at all while she's under  
 13 cross-examination, I would give him permission to do that  
 14 and I think it's important I place it on record. The  
 15 Commission will adjourn until 10 o'clock on Monday.  
 16 [COMMISSION ADJOURNED]  
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