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 68  27 MARCH 2013  PAGES 7229 TO 7356

HELD AT

CIVIC CENTRE, RUSTENBURG, NORTH WEST PROVINCE

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27th March 2013

Marikana Commission of Inquiry

Interviews

20 National Commissioner, you're still under oath. Before Mr Bizos continues with cross-examination I'd like to ask you whether you've yet been able to obtain the letter that you promised you'd give us yesterday? Remember it was a letter about the implementation of the recommendations of the National Planning Commission. I understood you to say that you were going to contact your office. You did say you'd try to give it to us yesterday. I understand these things aren't always easy to arrange but do you think we'll be able to get it in the course of the day?

5 GENERAL PHIYEKA: Yes, it came.

6 CHAIRPERSON: FFF16, Ms Pillay?

7 MS PILLAY: That's correct Chair.

8 CHAIRPERSON: Thank you very much. Mr Bizos I take it you wish to continue with your cross-examination.

11 CROSS-EXAMINATION BY MR BIZOS SC (CONTD.): National Commissioner, I want to read you, to you a paragraph of our learned friend's opening address. Please listen carefully because I'll have to ask you a number of questions about it. I'll read, Mr Chairman, you will find this paragraph in the address of my learned friend. "Mr Chairman, members of the Commission" -

17 CHAIRPERSON: What paragraph number, I didn't -

20 MR BIZOS SC: 128 to 129 of pages - of the consolidated transcript, page 128 to 129, Mr Chairman. "Mr Chairman, members of the Commission we also deal with the applicable Standing Orders, Policy Considerations, Legislation or other instructions that are pertinent to these matters."

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27th March 2013

Marikana Commission of Inquiry

Interviews

25 GENERAL PHIYEGA: But I would need time very well.
24 MR BIZOS SC: Thank you I can hear you letter.
23 GENERAL PHIYEGA: Yes, I have signed the
22 MR BIZOS SC: Without any qualification.
21 GENERAL PHIYEGA: With qualification.
20 MR BIZOS SC: Pardon? With qualifications, what qualifications do you want to make?
19 GENERAL PHIYEGA: That the incident was unprecedented.
18 GENERAL PHIYEGA: You're caught in the with him I would appeal to him to be tolerant.
17 MR BIZOS SC: Well if I have to compete with him I would appeal to him to be tolerant.
16 MR BIZOS SC: Thank you I can hear you very well.
15 GENERAL PHIYEGA: But I would need time
14 GENERAL PHIYEGA: I'd like to have it letter?
13 GENERAL PHIYEGA: I don't have it.
12 MR BIZOS SC: It's a letter written by the witness, Mr Chairman, to all Provincial Commissioners and others, written on the 20th July 2012. Remember that letter?
11 GENERAL PHIYEGA: I'd like to have it.
10 MR BIZOS SC: You want to add that it was unprecedented. Very well. Anything else that you want to do, to say about it?
9 GENERAL PHIYEGA: No.
8 MR BIZOS SC: No. Right let us just start off with a document which you've signed which is before the Commission as Exhibit S. Do you recall it?
7 GENERAL PHIYEGA: I don't have it.
6 CHAIRPERSON: Would you remind us what Exhibit S is?
5 MR BIZOS SC: It's a letter written by the witness, Mr Chairman, to all Provincial Commissioners and others, written on the 20th July 2012. Remember that letter?
4 GENERAL PHIYEGA: I'm ready.
3 MR BIZOS SC: Sorry you'll have to speak up a little louder.
2 CHAIRPERSON: She said she'd like to have it before her which is a fair request in the circumstances.
1 MR BIZOS SC: Yes. You want to have a look at it to remind you and to acknowledge that it is your signature?

25 MR BIZOS SC: I can hear you very well.
24 GENERAL PHIYEGA: I'm ready.
23 MR BIZOS SC: Yes did you draft that letter yourself?
22 GENERAL PHIYEGA: This letter is drafted by my Operational Commander.
21 MR BIZOS SC: Did you agree with his draft?
20 GENERAL PHIYEGA: Yes, I did.
19 MR BIZOS SC: Did you consider that what you set out in relation to the rights of the people situations where they have gathered? The letter really deals with the management of crowds and what ought to happen and what ought not to happen. And you sent this to all the commanders and you expected all the people under your overall command to comply with it.
18 GENERAL PHIYEGA: Yes, I did.
17 MR BIZOS SC: More particularly and the one that is of particular relevance to this is if you have to shoot, shoot below the belt and not the upper body. Those are in effect your words are they not?
16 GENERAL PHIYEGA: You are correct.
15 MR BIZOS SC: And you expected your overall command to comply with it.
14 MR BIZOS SC: And the Standing Orders expected to be obeyed?
13 GENERAL PHIYEGA: The Standing Orders are consistent with this letter.
12 MR BIZOS SC: Now we will deal with it in greater detail later but I want you to accept for the purposes of this question that there will be evidence from experts in pathology that examines the bodies of the dead and the records of the injured. Hardly any, hardly any of the people that were killed or the people that were injured were injured below the belt. Now I don't want to have an argument, the sort of argument that you had with my learned friend, I want you to assume that qualified pathologists and experts that examined the bodies and the records of the injured people will say that the vast majority of the people that were killed or injured were not shot in the lower part of the body. Please accept that for the purposes of this evidence. If that is so has your particular order been
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<td>1</td>
<td>GENERAL PHIYEGA: Yes, I do but may I</td>
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<td>2</td>
<td>just raise something you raised earlier on? I think, I</td>
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<td>3</td>
<td>don't want to be wrong with the protocol. You have said in</td>
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<td>my answering you do not want me to answer the way I</td>
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<td>answered yesterday and I just want to know if there is a</td>
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<td>limitation in how I respond.</td>
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<td>MR BIZOS SC: Ignore that, I'm sorry,</td>
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<td>8</td>
<td>ignore it. Just answer the question.</td>
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<td>9</td>
<td>CHAIRPERSON: The request or instruction</td>
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<td>or whatever it was has been withdrawn by Mr Bizos, so just</td>
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<td>11</td>
<td>answer the questions as you consider appropriate.</td>
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<td>12</td>
<td>GENERAL PHIYEGA: Yes, I recall –</td>
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<td>13</td>
<td>CHAIRPERSON: If you have to be pressed</td>
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<td>on some answers, you will be but answer them as you</td>
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<td>consider appropriate. It's your evidence, you're the</td>
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<td>16</td>
<td>witness.</td>
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<td>GENERAL PHIYEGA: Thank you. Yes, I</td>
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<td>18</td>
<td>recall.</td>
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<td>19</td>
<td>MR BIZOS SC: The reason why you included</td>
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<td>that in your letter was because you have respect and the</td>
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<td>21</td>
<td>police have respect and the Constitution guarantees the</td>
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<td>right to life and the right not to be injured and this is</td>
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<td>why you put it in.</td>
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<td>GENERAL PHIYEGA: Yes, my organisation</td>
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<td>does so.</td>
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<td>1</td>
<td>MR BIZOS SC: The recipients of your</td>
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<td>2</td>
<td>letter must, of necessity, have understood that anything</td>
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<td>3</td>
<td>more lethal than a rubber bullet should most certainly not</td>
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<td>be directed onto the lower body of any person.</td>
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<td>5</td>
<td>MR MAHLANGU: Do I understand, the lower</td>
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<td>body?</td>
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<td>MR BIZOS SC: Not to the upper body but</td>
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<td>to the lower body. If you have to shoot, particularly with</td>
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<td>9</td>
<td>sharp ammunition or even a rubber bullet, do it on the</td>
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<td>lower part of the body.</td>
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<td>MR SEMENYA SC: Chair, that's not what</td>
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<td>the document says.</td>
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<td>CHAIRPERSON: Yes, Mr Bizos, you –</td>
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<td>MR BIZOS SC: I saw an objection, I must</td>
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<td>–</td>
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<td>16</td>
<td>CHAIRPERSON: Yes, there's an objection.</td>
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<td>Before I rule on the objection I must give you a chance to</td>
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<td>answer, mustn't it?</td>
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<td>19</td>
<td>MR BIZOS SC: I see. Mr Chairman, I'm</td>
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<td>entitled to put to the witness when she said that you</td>
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<td>mustn't shoot rubber bullets to the upper part of the body,</td>
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<td>22</td>
<td>it goes without saying that anything more dangerous than a</td>
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<td>rubber bullet must not be shot in the direction of the</td>
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<td>upper part of the body. I submit that it is a legitimate</td>
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<td>question for the witness to answer as to whether that can</td>
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| 1 | rubber rounds. I don't know if the principle of a fortiori |
| 2 | applies to such an extent that one can say that by |
| 3 | implication she also gave such an instruction in respect of |
| 4 | ammunition other than rubber rounds. So I think to be fair |
| 5 | to her you should step back a pace or two - |
| 6 | MR BIZOS SC: Yes I will do that - |
| 7 | CHAIRPERSON: And approach the matter |
| 8 | from a different angle because in fairness to her the way |
| 9 | you're pointing at the moment isn't absolutely correctly |
|10 | focused. |
|11 | MR BIZOS SC: Yes. |
|12 | (09:55) CHAIRPERSON: I anticipated - I thought |
|13 | might be your objection but if there's another objection |
|14 | that I haven't dealt with, please speak now if you consider |
|15 | it appropriate. |
|16 | MR SEMENYA SC: No, I'm covered, Chair. |
|17 | MR BIZOS SC: Let us give you the |
|18 | background which may clarify the matter for you, |
|19 | Commissioner. The purpose in your letter that they must |
|20 | shoot even rubber bullets below the belt, was probably |
|21 | motivated by the fact that a person shot with a rubber |
|22 | bullet on the chest actually died. Do you recall that? |
|23 | The name of the deceased was Tatiana and there was quite |
|24 | wide publicity that even a rubber bullet directed to the |
|25 | upper body may cause death. Do you recall that? |
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Interviews

25 the upper body.
22 a moment. Don't you think that – or do you think that your
21 rigour that we did with this document, I have not had an
20 important but we would require to engage it in a similar
19 ammunition more damaging than a rubber bullet?
18 should not be shot in the upper part of their body with
17 be, would it have been as important to you that people
16 achieves the result that you want to achieve.
15 be reformulated in a way that avoids the objection, but
14 could approach it the way I've suggested, we can move
13 I'll come back to it once
12 I've had a look at the – all these instruments were not
11 inadequate instruments to deal with a treacherous situation.
10 We'll leave the question of your view of the standing
9 orders for a moment. Section 11 of the Constitution says
8 everyone has a right to life. Section 12(1)(c), everyone
7 has the right to freedom and security of the person, read
6 with sub-paragraph (3), to be free from all forms of
5 violence from either public or private sources. Do you
4 agree with your counsel's statement that those two sections
3 of the Constitution were not adequate instruments to
2 protect the lives of people?
1 CHAIRPERSON: I don't know that that's
2 exactly what Mr Semenyana said. Mr Semenyana - I'm sorry,
1 forgive me - what he said was he referred to the
2 constitutional mandate of the police service and the
1 provisions of the various statutes dealing with police
2 conduct and then he said, the evidence, however, will be
3 that some of these instruments were not adequate to deal
2 with the treacherous situation of more than 3 000
1 belligerent protesters who were armed and resisting any

1 be read into her document or not.
2 CHAIRPERSON: Mr Semenyana, do you wish to
3 reply to Mr Bizos?
4 MR SEMENYA SC: The question cannot be
5 with reference to the document. The document does not
6 connote that meaning. We can all read it ourselves, Chair.
7 In particular, Chair, the document cannot be understood to
8 say even in self-defence you have to fire with some
9 ammunition below the – the legs.
10 CHAIRPERSON: Perhaps your question can
9 be reformulated in a way that avoids the objection, but
10 achieves the result that you want to achieve.
11 MR BIZOS SC: Yes, I'll try. Would it
12 be, would it have been as important to you that people
13 should not be shot in the upper part of their body with
14 ammunition more damaging than a rubber bullet?
15 GENERAL PHIYEGA: I think it would be
14 important but we would require to engage it in a similar
13 rigour that we did with this document, I have not had an
12 opportunity of addressing that.
11 MR BIZOS SC: We'll leave it at that for
10 a moment. Don't you think that – or do you think that your
12 order was disobeyed by the people who did the shooting at
13 Marikana on the 16th? In fact, most of the injuries were on
14 the upper body.

1 CHAIRPERSON: I think that avoids the
2 problem. Her instruction relates to rubber bullets and
3 rubber rounds. As I read it, it effectively, it follows on
4 an earlier document, exhibit T, to which it refers which
5 was issued on the 20th December 2011 and if you read that
6 document, these two documents together, T and S, they seem
7 to me to amount to what one might regard as glosses on
6 standing order general 262.
5 MR BIZOS SC: Yes.
6 CHAIRPERSON: Standing order 262 is where
5 you start. Then that, to be read as glossed as it were by
6 exhibits T and S. Exhibit S is a part of the gloss. It
5 says when you're shooting, you must only use rubber rounds,
6 as I understand it or balls, not bullets and as you say you
5 must shoot below the belt. She doesn't deal in S, because
6 it's a gloss on something else, with sharp ammunition.
5 Your question relates to sharp ammunition which is
6 something dealt with by standing order general 262 and I
5 would imagine that the point that you're aiming for - if
6 that's the right word in this context - is dealt with in
5 paragraph 11 of that standing order, in particular 11.3.
6 That, if I may be permitted to say so, is the profitable
5 line to follow in regard to the point you wish to make but
6 to put it on the basis of what she wrote in S, which is a
5 gloss on the earlier document which only deals with rubber

1 rounds is, I think, could be misleading. I'm not
2 suggesting you're doing it intentionally but perhaps if you
3 could approach it the way I've suggested, we can move
2 forward on this point.
1 MR BIZOS SC: I've had a look at the – all these instruments were not
2 adequate instruments to deal with a treacherous situation.
1 We'll leave the question of your view of the standing
2 orders for a moment. Section 11 of the Constitution says
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1 CHAIRPERSON: I don't know that that's
2 exactly what Mr Semenyana said. Mr Semenyana - I'm sorry,
1 forgive me - what he said was he referred to the
2 constitutional mandate of the police service and the
1 provisions of the various statutes dealing with police
2 conduct and then he said, the evidence, however, will be
2 that some of these instruments were not adequate to deal
1 with the treacherous situation of more than 3 000
1 belligerent protesters who were armed and resisting any

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1. CHAIRPERSON: I don't think Mr Semenya -
2. MR BIZOS SC: - that is the question that
3. I am leading up to.
4. CHAIRPERSON: I don't think Mr Semenya
5. would object to that. Maybe if you proceed with that
6. question then we can make progress.
7. MR BIZOS SC: Yes. You know the
8. provisions of the Constitution that I have read out?
9. GENERAL PHIYEGA: Yes, I do.
10. MR BIZOS SC: Are they – what were the
11. shortcomings in the training, the policies and the law and
12. the Constitution that hampered your efforts in Marikana?
13. GENERAL PHIYEGA: Because that question
14. is full of other things, may I request that we chunk it so
15. that I can respond to each area appropriately?
16. MR BIZOS SC: The summary of the evidence
17. is this, that in section 207(1) of the Constitution the
18. President gives power to appoint a National Commissioner of
19. Police with two distinct responsibilities, to control and
20. to manage the police. Was that still in - was that
21. fulfilled?
22. GENERAL PHIYEGA: Yes.
23. MR BIZOS SC: Section 207(2) of the
24. Constitution, the National Commissioner must exercise
25. control over and manage the police service in accordance

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1. with the national policing policy in such directions as may
2. be given by the cabinet.
3. GENERAL PHIYEGA: It's true.
4. MR BIZOS SC: Section 207(2) - no, sorry,
5. section 205(3) of the Constitution, the objective of the
6. police service is to prevent, combat and investigate crime,
7. to maintain public order, to protect the security of the
8. inhabitants of the Republic and their property and to
9. uphold and enforce the law. Section 195 sets out the
10. responsibilities of the public service. Your powers are
11. also expressed in section 11 of the Police Act, the
12. National Commissioner may exercise the powers and perform
13. the duties and functions necessary to give effect to
14. section 218(1) of the Constitution. The Police Act also
15. provides that section 17 that the National Commissioner,
16. subject to section 218(1)(c) of the Commission, establish
17. and maintain -
18. CHAIRPERSON: Of the Constitution.
19. 218(1) of the Constitution, you said Commission.
20. MR BIZOS SC: Constitution, the public -
21. establish and maintain a national public order policing
22. unit. Was that in order, if you look there? Section 195
23. of the Constitution, the public administration which
24. provides for the basic values governing public
25. administration must be governed by the democratic values

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1. and principles enshrined in the Constitution, including the
2. following principles – a high standard of professional
3. ethics must be promoted and maintained, services must be
4. provided impartially, fairly, equitably and without bias,
5. public administration must be accountable, transparency
6. must be fostered by providing the public with timely,
7. accessible and accurate information. Was that available to
8. you and the police?
9. GENERAL PHIYEGA: Yes.
10. MR BIZOS SC: And two more important
11. ones, standing order 263 of crowd management, the use of
12. force must be avoided at all costs. Are you aware of that?
15. CHAIRPERSON: The use of force must be
16. avoided at all costs and members deployed for the operation
17. must display their highest degree of tolerance. Then it
18. goes on about that and then in (3) it says, if the use of
19. force is unavoidable, it must meet the following
20. requirements.
22. instructions and standard operating procedures are to be
23. observed and the code of conduct of SAPS published on June
24. 10th 2005, police must be disciplined with controlled
25. supervision. What shortcomings were there that prevented

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1. the police from avoiding the killings, what shortcomings?
2. If all those were there, what more did you need in order to
3. avoid the killings?
4. GENERAL PHIYEGA: I think the important
5. thing in responding to your question is that I would like
6. to say the situation was different. I have said the
7. situation was unprecedented.
8. MR BIZOS SC: We will deal with whether
9. or not it was unprecedented in a short while. Have you got
10. anything else to say in answer to the question?
11. GENERAL PHIYEGA: I just wanted to say
12. that the circumstances that pertained to the situation were
13. also important.
14. MR BIZOS SC: But what I want to ask you
15. is this, do you agree with the allegation made by counsel
16. for the police that the problem was that there were 3 000
17. belligerent protesters who were armed, resisting any effort
18. to disarm?
19. GENERAL PHIYEGA: I agree with that
20. statement and that is why I am talking about circumstances
21. that pertained.
22. MR BIZOS SC: But was your information
23. that there were 3 000 belligerent protesters who were
24. armed, 3 000 protesters who were armed? Was that the
25. information upon which you based your support for this
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<td>2. GENERAL PHIYEGA: Yes and it was many</td>
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<td>3. other circumstances.</td>
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<td>4. MR BIZOS SC: Now, if there were not</td>
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<td>5. 3 000 belligerent protesters who were armed and resisting</td>
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<td>6. any effort to disarm, then the instruments that your</td>
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<td>7. counsel said were inadequate may be a wrong statement to</td>
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<td>8. make.</td>
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<td>9. GENERAL PHIYEGA: That would be subject</td>
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<td>10. to different facts being presented.</td>
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<td>11. MR BIZOS SC: Yes. Well, you know, we</td>
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<td>12. don't have to keep it under the table. The South African</td>
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<td>13. Police and their witnesses couldn't make up their mind how</td>
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<td>14. many armed people there were. Here they'd obviously told</td>
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<td>15. our learned friend that there were 3 000 armed people. We</td>
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<td>16. know that elsewhere during the proceedings, Mr Semenya put</td>
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<td>17. to a witness that there were only 2 to 300 who were armed,</td>
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<td>18. there were others who were peaceful, unarmed and left</td>
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<td>19. peacefully. Which of the two versions you, as</td>
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<td>20. Commissioner, operated on?</td>
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<td>21. GENERAL PHIYEGA: I would not speculate</td>
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<td>22. on those two versions because I haven't seen alternative</td>
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<td>23. facts. I see the statement of Mr Semenya. And the second</td>
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<td>24. thing is that as police, people who are armed in any march</td>
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<td>25. would be a concern for us, as the Constitution does allow</td>
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<td>1. people to protest peacefully and unarmed. So any number of</td>
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<td>2. people, whether there are two or seven, would concern us.</td>
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<td>3. MR BIZOS SC: Please answer the question</td>
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<td>4. which I will try and make clearer. As the National</td>
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<td>5. Commissioner, were your actions premised on having to deal</td>
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<td>6. with 3 000, to use the precise words used by your counsel,</td>
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<td>7. who were armed and resisting any effort of disarming, to</td>
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<td>8. disarm, 3 000 or only 2 to 300? Which one did you operate</td>
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<td>9. on? On what numbers did you base your conduct and the</td>
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<td>10. decisions that you took?</td>
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<td>11. MR SEMENYA SC: Perhaps it is conduct of</td>
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<td>12. the police, not of the Commissioner.</td>
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<td>13. CHAIRPERSON: Well, he asked her what she</td>
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<td>14. based her conduct on. There are various answers she can</td>
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<td>15. give which I don't think either of us should suggest to her</td>
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<td>16. but I think it's a permissible question. I'm not sure what</td>
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<td>17. the answer would be, let's see. I understand the point you</td>
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<td>18. make, Mr Semenya, but I don't think it's a basis for</td>
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<td>19. stopping Mr Bizos from asking the question he's asking.</td>
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<td>20. The conduct, your conduct insofar as you were involved in</td>
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<td>21. making decisions and doing things yourself, to what extent</td>
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<td>22. was such conduct, if any, based upon an acceptance of the</td>
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<td>23. figure of 3 000 as opposed to the figure of 300? That's Mr</td>
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<td>24. Bizos's question, is that right, Mr Bizos?</td>
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<td>25. MR BIZOS SC: Thank you, Mr Chairman,</td>
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<td>1. yes.</td>
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<td>2. GENERAL PHIYEGA: Judge, the important</td>
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<td>3. thing for me is to say I, as police, whether it's two or</td>
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<td>4. three that are armed in a protest it bothers us, so it is</td>
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<td>5. immaterial whether it's 300 or 3 000. Armed protesters, by</td>
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<td>6. the law, are not allowed.</td>
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<td>7. MR BIZOS SC: The contradictory</td>
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<td>8. statements made about the number of people involved, armed</td>
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<td>9. and unarmed, are a matter of record. The instruments that</td>
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<td>10. would have been required in order to disarm and arrest 2 to</td>
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<td>11. 300 people must have been completely different to doing the</td>
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<td>12. same to 3 000 people. Would you agree with that?</td>
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<td>13. GENERAL PHIYEGA: I would refer you to</td>
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<td>14. the statement of my lawyers, section 43, because those are</td>
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<td>15. the facts that we placed before this Commission.</td>
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<td>16. MR BIZOS SC: Would the tactics for</td>
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<td>17. controlling 3 000 armed people, all of whom were armed,</td>
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<td>18. have to be different if only a select group of warriors, to</td>
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<td>19. use your counsel's words, as a separate group – would the</td>
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<td>20. tactics of necessity have to be different?</td>
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<td>21. GENERAL PHIYEGA: I may not be able to</td>
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<td>22. talk about those specific tactics and I'm sure my</td>
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<td>23. commanders will do so but we would gun towards disarming</td>
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<td>24. and dispersing those people.</td>
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<tr>
<td>25. MR BIZOS SC: You know you are the</td>
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27th March 2013 Marikana Commission of Inquiry Interviews

I'm not sure whether Mr Bizos and I'm going to ask.

CHAIRPERSON: - to which reference is

MR MPOFU: Correct.

Mkhwanazi was being cross-examined, Mr Bizos put things to

CHAIRPERSON: No, what happened was when

MR MPOFU: Yes, it was Magidiwana,

Chairperson and -

CHAIRPERSON: No, what happened was when

Mkhwanazi was being cross-examined, Mr Bizos put things to

him and handed in what amounted to a file note.

MR MPOFU: Oh yes.

CHAIRPERSON: And then subsequently the

expert summary was filed -

MR MPOFU: Correct.

CHAIRPERSON: - to which reference is

made. I'm not sure whether Mr Bizos and I'm going to ask

him, is referring to the filing of the file note in which

certain views of Mr Hendricks – I think he's a Colonel

Hendricks – were set out or whether he's referring to the

fuller expert summary that was filed later.

MR BIZOS SC: I deal with the letter I

think which gives it greater detail but the witness has

chosen not to respond, I will not -

CHAIRPERSON: I can understand that. If

you ask President Obama, who is the commander-in-chief of

the United States forces, the question about submarine

warfare, he may also say he would prefer his submarine

commanders to answer rather than answering it himself and

I'm not sure the analogy is entirely inappropriate.

MR BIZOS SC: Perhaps, with respect, I

still - why, that she may have been able to [inaudible]

that are, of running a big country. Here we were dealing

with a situation where the commander-in-chief actually went

on – well, it'll come out, of the role that she actually -

CHAIRPERSON: It's a matter for argument,

I think -

MR BIZOS SC: Yes.

CHAIRPERSON: But anyway, proceed with

your cross-examination, let me not unduly hamper you. Let

me not hamper you at all.

MR BIZOS SC: Now I want to deal with

something that my learned friend Mr Madianga dealt with but

in greater detail, that there is a regrettable trend to

indulge in what one of the writers has described as

political rhetoric. I'm not unmindful of the fact that

some of the statements were made before your appointment

but listen carefully because they form a part of the

context of the environment in which Marikana has happened.

Would you agree that statements made by people in the

executive positions in government in relation to the police

may have an impact on public statements that have been

made?

CHAIRPERSON: I don't understand that

question.

MR BIZOS SC: Sorry, I misread it -

CHAIRPERSON: I think there's a slip of

the tongue there.

MR BIZOS SC: The impact of public

statements of high profile officials on the police.

GENERAL PHIYEGA: No.

MR BIZOS SC: You can ignore them. Do

you ignore them?

GENERAL PHIYEGA: It's not a question of

ignoring them. I'm saying – I'm saying no, they would not

have an impact on how we do our work because we have

protocols, we have SOPs, we have guidelines that you were

speaking about. That is what regulates how we do our work.

MR BIZOS SC: If the Minister in the

cabinet makes a statement about the conduct of the police,

would the Commissioner, would the commanders, would the

brigadiers, would the colonels, would the captains, would

the majors, would the warrant officers ignore it?

[10:35] GENERAL PHIYEGA: We are a very
disciplined and controlled organisation. It is important

for us to operate according to norms, regulations and

standards. If those issues are to be taken into account,

they have to find their way into our regulations, into our

standards. You can't just listen to a person and start

acting otherwise. It will be ultra vires.

MR BIZOS SC: Am I wrong in remembering

you saying that the politicians give you support and

guidance, did you say that? Leadership support.

GENERAL PHIYEGA: It is correct.

MR BIZOS SC: Let me read to you -

CHAIRPERSON: Sorry, the answer – because

I must confess I thought I heard her say that the Minister

of Police -

GENERAL PHIYEGA: Yes.

CHAIRPERSON: - gives guidance and

support -

MR BIZOS SC: Well, it may be -
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<tr>
<td>1. CHAIRPERSON: You make, you've put the</td>
<td>1. do their work according to any other type of commands that</td>
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<td>2. question more broadly.</td>
<td>come from anybody.</td>
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<td>3. MR BIZOS SC: More general.</td>
<td>4. MR BIZOS SC: This statement came from</td>
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<td>4. CHAIRPERSON: And I'm not sure that she</td>
<td>4. the Deputy Minister of Safety and Security, Susan Shabangu.</td>
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<td>5. made the statement in the broad way that you've put it.</td>
<td>5. In your opinion would that adversely affect the members</td>
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<td>6. MR BIZOS SC: Well –</td>
<td>6. under your command, if you had been in command at the time,</td>
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<td>7. CHAIRPERSON: Well, let's ask her. You</td>
<td>7. about respect to the Constitution, the regulations, the</td>
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<td>8. hear the debate between Mr Bizos and myself –</td>
<td>8. Act, about shooting?</td>
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<td>9. GENERAL PHIYEGA: No, not general, the</td>
<td>9. GENERAL PHIYEGA: I first recognise the</td>
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<td>10. Minister of Police as prescribed by the Police Act and the</td>
<td>10. fact that you say this did not happen during my time,</td>
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<td>11. Constitution.</td>
<td>11. that's number 1. Secondly, that you are asking for a</td>
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<td>12. MR BIZOS SC: Yes. Now, Deputy Minister</td>
<td>12. speculative response from me and I would say again that</td>
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<td>13. of Safety and Security, Susan Shabangu, on the 9th of April</td>
<td>13. people have the right to voice their opinion and their</td>
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<td>14. 2008 is recorded as having said, “You must kill the</td>
<td>14. views but we as police are not guided by that, we are</td>
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<td>15. bastards if they threaten you or the community. You must</td>
<td>15. guided by prescripts.</td>
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<td>16. not worry about the regulations. I want no warning shots.</td>
<td>16. MR BIZOS SC: If this had been said at</td>
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<td>17. You have one shot and it must be a kill shot.”</td>
<td>17. the end of June last year when you were appointed National</td>
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<td>18. CHAIRPERSON: National Commissioner, if</td>
<td>18. Commissioner, what would you have done?</td>
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<td>19. you're look in the exhibits that were handed in yesterday,</td>
<td>19. GENERAL PHIYEGA: I will again say that</td>
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<td>20. FFF14 –</td>
<td>20. statement will not interfere with how we, as police,</td>
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<td>21. GENERAL PHIYEGA: Okay.</td>
<td>21. execute our work. We are strictly regulated by our</td>
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<td>22. CHAIRPERSON: - the publication by Mr</td>
<td>22. prescripts.</td>
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<td>23. David Bruce, you'll see the passage which Mr Bizos has read</td>
<td>23. MR BIZOS SC: What would you have done?</td>
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<td>24. is at page 14 and it's the first paragraph beginning on</td>
<td>24. Would you have called your men and said ignore this</td>
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<td>25. that page. You might like to read it first before</td>
<td>“Minister's”, in inverted commas - forget about my comment</td>
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<tr>
<td>1. answering.</td>
<td>1. - forget about this statement of the Minister, order number</td>
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<td>2. MR BIZOS SC: Have you read it?</td>
<td>2. so and so is much more powerful than her voice, ignore it?</td>
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<td>3. GENERAL PHIYEGA: Yes, I have.</td>
<td>3. Would you have done that?</td>
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<td>4. MR BIZOS SC: We'll read the rest of it.</td>
<td>4. GENERAL PHIYEGA: I would not go as far</td>
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<td>5. “I want no warning shots. You have one shot and that it</td>
<td>5. as dealing with it but I would issue an instruction that</td>
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<td>6. must be a kill shot. I will not tolerate any pathetic</td>
<td>6. says remember the protocols and the prescripts that govern</td>
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<td>7. excuses that you not been able to deal with crime. You</td>
<td>7. how you should do your work –</td>
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<td>8. have been given the guns, now use them.” What effect would</td>
<td>8. MR BIZOS SC: And ignore, and ignore the</td>
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<td>9. a statement, “You must not worry about the regulations”</td>
<td>9. Minister’s statement?</td>
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<td>10. have on members of the police force?</td>
<td>10. GENERAL PHIYEGA: Because I do not know –</td>
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<td>11. GENERAL PHIYEGA: The team I lead does</td>
<td>11. MR BIZOS SC: Would you say ignore the</td>
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<td>12. not have an alternative.</td>
<td>12. Minister’s statement?</td>
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<td>13. MR BIZOS SC: I beginning your pardon?</td>
<td>13. CHAIRPERSON: Mr Bizos, I think she was</td>
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<td>14. GENERAL PHIYEGA: The team I lead does</td>
<td>14. still answering the question, were you?</td>
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<td>15. not have an alternative –</td>
<td>15. GENERAL PHIYEGA: I do not know what</td>
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<td>16. MR BIZOS SC: I’ve asked you, I am asking</td>
<td>16. influences that statement, I have no control upon it. What</td>
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<td>17. –</td>
<td>17. I have control upon is to tell my members on how to</td>
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<td>18. CHAIRPERSON: No – no, Mr Bizos.</td>
<td>18. professionally and regimentally to follow their prescripts,</td>
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<td>19. MR BIZOS SC: Sorry –</td>
<td>19. that I have control upon. Variables that I have no control</td>
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<td>20. CHAIRPERSON: Give her a chance to finish</td>
<td>20. upon really would just be taking away our energy. I would</td>
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<td>her answer. I’m sorry, I think it best to go back to the</td>
<td>21. advise them to do their work in the manner that they’re</td>
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<td>beginning of the sentence and start again.</td>
<td>22. supposed to do it.</td>
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<td>23. GENERAL PHIYEGA: The team I lead does</td>
<td>23. MR BIZOS SC: Let’s take a couple more</td>
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<td>24. not have an alternative. They have to do their work</td>
<td>24. similar statements. Minister Mthethwa, Minister of Safety</td>
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<td>25. according to the prescripts that are written. They cannot</td>
<td>and Security in 2009, page 15 of the Bruce document,</td>
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27th March 2013

Marikana Commission of Inquiry

Interviews

exhibit FFF14 –

CHAIRPERSON: Mr Bizos, if you’re quoting the passage in italics, it’s actually November 2008.

MR BIZOS SC: I don’t believe that –

CHAIRPERSON: Yes, if that’s the passage you’re quoting, all I am saying is it’s November 2008. I don’t want to interrupt you but you said 2009.

MR BIZOS SC: Sorry.

CHAIRPERSON: There’s an earlier reference to something in 2009 but that was the change of the name of the department, I think.

MR BIZOS SC: Yes, thank you, Mr Chair.

We don’t believe that if you are faced with criminals armed with sophisticated weaponry, the police’s task would be to take out some human rights charter. Mr Chairman, whilst we are dealing with Mr Bruce, may I just place on record something about Mr Bruce? He is an expert who actually gave evidence before the Constitutional Court in the Walters case dealing with section 49. He is mentioned by name in the judgment of Justice Kriegler as an expert. I merely thought that it may be of some assistance because there were questions yesterday, given an objection, and who is Mr Bruce. I think –

CHAIRPERSON: - referred to what it says on page 3 of this exhibit where he’s described as the –

Country’s, I take it it must be one of the country’s leading experts on issues relating to the police use of force, but anyway –

MR BIZOS SC: But that’s by the way.

CHAIRPERSON: - you’ve said what you’ve said but to be fair to the witness, let’s focus on the question you were asking her so that she can give us a focused reply.

MR BIZOS SC: Yes. Do you agree with that statement?

CHAIRPERSON: In fairness, it should be pointed out to you that you were dealing with CIT heists, cash in transit heists. It was in that context in which the statement was made.

GENERAL PHIYEBA: I think it’s a statement that was made in context and I wouldn’t want to judge it and can I reserve my opinion?

MR BIZOS SC: Whatever the context may be, as National Commissioner do you believe that, in law, is a policeman entitled to kill a criminal because he is a criminal?

GENERAL PHIYEBA: I do not believe that police go out to kill people. Police –

MR BIZOS SC: Do you consider the reference, the police’s task would be to take out some human rights charter, not to take out some human rights – do you regard that as a lack of respect for the rights that are in human rights charters? Is it ironic? Is it sarcastic? Do you subscribe to it?

GENERAL PHIYEBA: I said in terms of that statement, given the context that was given, I really would like to reserve my opinion.

MR BIZOS SC: The second part of the statement is to the following effect, “Now we are saying to the police that we ourselves had an obligation as well to strengthen the arm of these task forces so that they are able, on the field, to teach those people a lesson, to fight fire with fire. There is no other way on that.” That is to be found on page 15 of the same document.

CHAIRPERSON: The witness has been looking at –. The field that’s being spoken about appears to be the killing field where criminals are killing law abiding citizens.

MR MAHLANGU: Possibly the question was asked whilst I was interpreting, Mr Chairperson.

CHAIRPERSON: The passage that was put says they, that’s the police, are able on the field to teach those people a lesson and I’m just pointing out that the field referred to is described two sentences earlier as being the killing field where criminals are killing law abiding citizens.

MR BIZOS SC: Do you agree with it?

GENERAL PHIYEBA: I’m consistent with –

MR BIZOS SC: Do you agree with it?

GENERAL PHIYEBA: I’m consistent with –

MR BIZOS SC: That there is no other way, other than killing.

GENERAL PHIYEBA: I’m consistent with my first answer. I – the context that sets out this, you know, I see a paragraph, I see whatever. I really would like to reserve my opinion on this paragraph.

MR BIZOS SC: This question of context, I’m going to put to you what we will argue, that you are actually not prepared to say anything that may be any form of criticism of any superior politician or any of your colleagues, the police can do no wrong in your mind and you’re not prepared to make any admission or condemnation on the behaviour of any of them.

GENERAL PHIYEBA: Advocate, I cannot
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MR BIZOS SC: Did you study before you accepted appointment or shortly thereafter, under what circumstances may a policeman kill a criminal?

GENERAL PHIYEGA: Before I took this appointment really I was just acquainting myself like any ordinary citizen.

MR BIZOS SC: Is a policeman expected, even though there is an armed suspect, to kill the suspect just because the suspect is armed? Have you anywhere in the law or what the duty of the policeman is under those circumstances?

[10:55] GENERAL PHIYEGA: I think you earlier on took me to a number of sections of the Constitution, our Act, to talk about right to life and I think social respect. I think any other thing that the police does, other than following the prescripts, circumstances predict what happens in that situation.

MR BIZOS SC: Did you not think that those statements and others exhort the police to kill, not to hesitate before firing, not to worry about the regulations, to teach them a lesson and to use maximum force, might that sort of talk have been influencing members of the force of various ranks to behave at Marikana in the manner in which they did on the 16th of August?

GENERAL PHIYEGA: No.

MR BIZOS SC: Well, you say no. The doctrine of maximum force is often used by members of the police and politicians and particularly Minister Mthethwa has referred to it publicly on several occasions. You can see it, Mr Chairman, in the document handed in by Kasak on pages 19 to 32.

CHAIRPERSON: We've read the document, I don't know if the witness has had an opportunity. MR BIZOS SC: You have - CHAIRPERSON: I say we've read that document.

MR BIZOS SC: Yes.

CHAIRPERSON: I'm not sure if the witness has had an opportunity to study it. It's now 11 o'clock, so perhaps it would be appropriate for you to give the witness the document that you're referring to, give her an opportunity to read the relevant passage and perhaps after 20 - because it's not fair to ask her the question before she's had a chance to look at it - and you can resume your cross-examination after the tea adjournment. Would that be in order? The Commission will now take the tea adjournment and we'll have to perhaps reassemble in half an hour.

[COMMISSION ADJOURNS  COMMISSION RESUMES]
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25 their body. The police version is that they shot them in
24 16th, 34 dead, 84 injured, most of them on the upper part of
23 Marikana we have the following situation in relation to the
22           MR BIZOS SC:          Now, if we deal with
21           GENERAL PHIYEGA:          Yes, I do see that.
20           CHAIRPERSON:          Let's all stay there.
20 threat,” on top of page 20, do you see that?
19           MR BIZOS SC:          Have you had an opportunity
18 of reading paragraphs 7 to 10?
17           GENERAL PHIYEGA:          Advocate, I've tried to
16 use my cursory speed reading –
15           CHAIRPERSON:          Under pressure.
14           GENERAL PHIYEGA:          Ja.
13           MR BIZOS SC:          Well, what are we going to
12 say is that the use of force must correspond to the
11 seriousness of the situation in relation to standing order
10 262. At 11.3, “Should use of force be unavoidable it must
9 meet the following requirements” and I want to go through
8 the requirements with you. “It must be proportional to the
7 threat,” on top of page 20, do you see that?
6           GENERAL PHIYEGA:          Yes, I do see that.
5           MR BIZOS SC:          Now, if we deal with
4 Marikana we have the following situation in relation to the
3 16th, 34 dead, 84 injured, most of them on the upper part of
2 their body. The police version is that they shot them in
1 self-defence. Would you say that having regard to those
2 injuries and the absence of any injury on any police
1 officer, the action of the police was proportional?
4           GENERAL PHIYEGA:          My response would be in
3 two parts. We are on record in my statement and in our
2 submission that indeed police acted in self-defence. On
1 the issue of proportionality, I am hoping that the debates
0 from the experts and from the commanders and the outcome of
-3 this Commission would give a judgment on that. I am not
-6 qualified and I don't feel comfortable to give an answer on
-9 the proportionality matter.
-12           MR BIZOS SC:          Don't the figures mean
-15 anything to you, Commissioner? Is it a miracle or an act
-18 of God that not a single scratch on any of the few hundred
-21 policemen and so many deaths and so many injuries and you
-24 say that that is still proportional?
-27           CHAIRPERSON:          Before you answer, National
-30 Commissioner, Mr Semenya has an objection.
-33           MR SEMENYA SC:          Well, the witness has not
-36 said it was proportional.
-39           CHAIRPERSON:          She can't answer. She says
-42 it's merely a matter beyond her competence to say it was
-45 proportional and she leaves it, presumably, I don't know if
-48 she says so in terms but she leaves it for counsel's
-51 argument and then for the report of the Commission. I
-54 understand that to be her attitude.
-57           GENERAL PHIYEGA:          And the commanders,
-60 Judge.
-63           CHAIRPERSON:          And the commanders too, so
-66 the commanders are going to be questioned about this, I
-69 take it. There's going to be argument and we will then
-72 have to give a finding –
-75           MR BIZOS SC:          I understand –
-78           CHAIRPERSON:          And her point, as I
-81 understand her, is to say well, I don't want to, I'm not
-84 really able to express an opinion on this, I accordingly am
-87 not able to answer the question. So you can't then say
-90 that she said it was proportional because she – she doesn't
-93 say whether it's proportional or not.
-96           MR BIZOS SC:          Am I not entitled to ask
-99 her, as a high ranking officer in the police force, as to
-102 whether there is, on the face of it, any sign of
-105 proportionality? I must surely be entitled to test then
-108 how she believes the situation –
-111           CHAIRPERSON:          You're entitled to answer
-114 that question but we must listen carefully to her answer
-117 before we carry on.
-120           MR MPOFU:          Chairperson, sorry, I don't
-123 want to barge in into this but our position on this
-126 particular objection is that if the witness says that the
-129 police acted in self-defence, that in itself embraces the
-132 element of proportionality because self-defence is the
-135 proportional attack on –
-138           CHAIRPERSON:          Response to a threat.
-141           MR MPOFU:          Yes, Chair, to an attacker.
-144 Correct, thank you Chairperson.
-147           CHAIRPERSON:          Mr Bizos, perhaps you can
-150 perhaps then revisit the question from the angle suggested
-153 by Mr Mpolu.
-156           MR BIZOS SC:          Yes. The defence of the
-159 police is that they acted in self-defence, that was that
-162 their lives were in immediate danger, this is why they shot
-165 the people and killed so many and wounded so many. As an
-168 intelligent head of the police, does it not appear to be
-171 strange to you that there wasn't a single scratch on any
-174 policeman and such a heavy death number due, result and
-177 injuries? This is the question. As an individual, make an
-180 honest answer. Tell us, do you feel that there is any
-183 substance in the self-defence story?
-186           GENERAL PHIYEGA:          You were saying where
-189 there is substance in the argument of police for self-
-192 defence. I say it is our submission that the police were
-195 defending themselves. Yes, there is substance.
-198           MR BIZOS SC:          The question is, how did
-201 they manage not to have a single scratch if there was this
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1 attack that they describe? Please come to terms with the
2 question.
3 GENERAL PHIYEGA: I do want to say the
4 police are trained and the police do their work
5 professionally and I think it is those type of elements
6 that assisted them to be able to do their work in that
7 manner.
8 MR BIZOS SC: Do you think you've
9 answered the question?
10 GENERAL PHIYEGA: I have answered to the
11 best of my ability the way I understood the question.
12 MR BIZOS SC: Well, we will leave it at
13 that and argue that you are an example of the attitude that
14 I'm not prepared to admit that the police did anything
15 wrong and I will - nothing that you place before me will
16 change my mind. Am I correct in that?
17 GENERAL PHIYEGA: Advocate, that's a
18 conclusion you are coming to. I personally do not agree
19 with your conclusion but I cannot make you change your
20 conclusion.
21 MR BIZOS SC: You see that the heading of
22 this article is "The existence and unlawfulness of the
23 doctrine of maximum force."
24 GENERAL PHIYEGA: Yes, I do.
25 MR BIZOS SC: Do you know of any law in

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the South African Constitution, in any Act or in any order
where maximum force is defined or directing when it may be
used?
GENERAL PHIYEGA: Not to my current
reasonable knowledge, unless I am shown otherwise.
MR BIZOS SC: Yes. You would agree that
7 to your personal knowledge, maximum force in terms of
8 paragraph 8 is not consistent with the principles set out
9 in the above laws or in SAPS standing orders, would you
10 agree with that?
11 GENERAL PHIYEGA: May I request you to
12 again phrase that statement that you are asking me to
13 indicate whether I agree or do not agree with?
14 MR BIZOS SC: I'm sorry - I'll read you
15 the paragraph that I read. "Maximum force is not
16 consistent with the principles set out in the above laws or
17 in SAPS standing orders." Maximum force is something, an
18 expression made up by the police as an excuse for killing
19 people but it's not in any law, that's what I'm putting to
20 you.
21 GENERAL PHIYEGA: I have said that our
22 protocols are clear and we operate according to our
23 protocols. What you are referring to, to say police -
24 maximum force, is something that is used by police to find
an excuse to kill people, I haven't seen it in any of our

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1 legislation.
2 MR BIZOS SC: Isn't that a defence of the
3 police in this issue, in this Commission, that we acted in
4 self-defence, we used maximum force in order to save our
5 lives? Isn't that your defence?
6 GENERAL PHIYEGA: Advocate, it doesn't
7 have a lot of the frills that you are mentioning -
8 CHAIRPERSON: National Commissioner,
9 before you carry on Mr Semenya wants to, is objecting.
10 Yes, Mr Semenya?
11 MR SEMENYA SC: The defence of the South
12 African Police Service in this Commission is that such
13 force as was used was in self-defence, we have never said
14 we used maximum force. I don't know what that means.
15 CHAIRPERSON: Mr Bizos, can you point to
16 anything in either the opening statement or exhibit L or
17 any other document in which it appears that the defence
18 advanced or to be advanced by the police in these
19 proceedings is based on the doctrine of maximum force?
20 Because that's essentially what you're putting to her.
21 MR BIZOS SC: Yes.
22 CHAIRPERSON: Mr Semenya says that's not
23 their defence but if you've got something to show that it
24 is then perhaps you must let us see it. I won't disallow
the question if you can point to something.

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1 MR BIZOS SC: Yes -
2 CHAIRPERSON: But if you can't, then I
3 think I -
4 MR BIZOS SC: The statement by the
5 witness herself on the 17th in the second last paragraph,
6 exhibit FFF5, "Police retreated" -
7 CHAIRPERSON: On page? Sorry -
8 MR BIZOS SC: - "systematically and were
9 forced to utilise maximum force to defend themselves."
10 CHAIRPERSON: Yes, I hear you reading it.
11 Where is it in the statement?
12 MR BIZOS SC: On page, on the second page
13 of exhibit – penultimate paragraph of exhibit FFF5, her own
14 words.
15 CHAIRPERSON: Yes - yes, I see, I see.
16 MR BIZOS SC: I accept that -
17 CHAIRPERSON: National Commissioner -
18 GENERAL PHIYEGA: I've seen it.
19 CHAIRPERSON: You see FFF5, page 2, three
20 lines from the foot.
21 GENERAL PHIYEGA: Mm.
22 CHAIRPERSON: “The police were forced to
23 utilise maximum force to defend themselves.” That's the
24 passage on which Mr Bizos relies. Perhaps you could repeat
the question so that she can give a focused answer.
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25 GENERAL PHIYEGA: It is my answer to you, to say the police used that maximum force in self-defence and the words that are sitting in this statement which is a media statement, are not necessarily sitting in any legislation. Some may be, some not.

24 CHAIRPERSON: No, no, I’m afraid that’s not really sufficient, where you get them from. I understand your answer but the question is, where did you get the words from?

23 GENERAL PHIYEGA: If I can – these are Indian words, they don’t come from any legislation.

22 MR BIZOS SC: The Minister, Mr Nathi Mthethwa, at a time he was the Minister of Safety of Security and now is still Minister of Police, which is the same ministry isn’t he?

21 GENERAL PHIYEGA: Correct, sir.

20 MR BIZOS SC: In an interview with the Weekend Argus in July 2009, “We are saying in dangerous situations we will be flexible so that the police can use maximum force.” And in full – I only have a –

19 CHAIRPERSON: Sorry to interrupt you, are you quoting again from paragraph 10 on page 20 of exhibit FFF17?

18 MR BIZOS SC: Precisely, Mr Chairman, I continue reading it –

17 CHAIRPERSON: I think in fairness to the witness, she must get an opportunity to look at it.

16 MR BIZOS SC: Let me read it. “We are saying in such dangerous situations we’ll be flexible so that the police can use maximum force without these surprises happening. When criminals shoot the police, they boast about that, while the police are here to protect the public and to protect the property of the country. As long as section 49 is there, these criminals will have a field day, said Mr Mthethwa.” You are aware of that statement having been made by our Minister?

15 GENERAL PHIYEGA: I am not.

14 MR SEMENYA SC: Chairperson –

13 CHAIRPERSON: Yes, Mr Semenya?

12 MR SEMENYA SC: We have followed the footnote, annexure B there, which is referenced to that statement. When we go to the link which is identified there, this quote does not exist at all.

11 CHAIRPERSON: I’m sorry, what page of exhibit FFF17 are you referring to?

10 MR SEMENYA SC: 40 there.

9 CHAIRPERSON: Yes.

8 MR SEMENYA SC: In square brackets it says “[Annexure B]”. When we go to annexure B with that link, that quotation does not exist in the document.
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<td><strong>CHAIRPERSON:</strong> Yes, yes, I see that. Yes, 1 to you. My answer to you is for them to use the necessary 2 force to defend themselves.</td>
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| **MR BIZOS SC:** We’ll investigate that, Mr 3 Chairman, we will go to the person that wrote it. There 4 may be an explanation which we cannot - 5 **CHAIRPERSON:** The point is that until 6 that’s cleared up, it’s not fair to put - 7 **MR BIZOS SC:** I will not - 8 **CHAIRPERSON:** - to the witness a 9 statement made by the Minister in respect of which there 10 appears to be a question mark. 11 **MR BIZOS SC:** - I will defer further 12 cross-examination. 13 **MR BIZOS SC:** Page 24 of FFFF14, we find 14 the following - we just want to find the passage because I 15 have it in notes and I want to find it in the document, Mr 16 Chairman. 17 **MR BIZOS SC:** Let me read from my notes - 18 **CHAIRPERSON:** made on the 8th of July - 19 2011? 20 **CHAIRPERSON:** Are you referring to the 21 passage - 22 **MR BIZOS SC:** Yes. 23 **CHAIRPERSON:** Are you referring to the 24 page on page 24. 25 **MR BIZOS SC:** Yes, that’s where we are. 26 Yes, let me read it from there. “There must be a good 27 appreciation of the distinction between the need to use 28 maximum force against violent criminals and minimum force 29 in dealing with fellow citizens.” Are you aware that the 30 Minister made such a statement? 31 **GENERAL PHIYEGA:** No, I’m not aware. 32 **MR BIZOS SC:** Yes. If he did use maximum 33 force, as you did, what did you mean by maximum force? 34 **GENERAL PHIYEGA:** I will not be able to 35 talk for the Minister but I, in my statement, was saying 36 the police had to use the necessary force to defend 37 themselves. 38 **MR BIZOS SC:** We were forced to utilise 39 maximum force. What did you mean by maximum force? You 40 used the words, what did you mean? 41 **GENERAL PHIYEGA:** I’ve just answered to 42 say the context I used was to say they must use the 43 necessary force to defend themselves. That’s what I meant. 44 **MR BIZOS SC:** Doesn’t it mean in police 45 circles, maximum force, kill them? 46 **GENERAL PHIYEGA:** That is not my answer 47

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| **MR BIZOS SC:** Yes. 1 Yes, I am the National 2 Commissioner. Yes, I take overall responsibility for 3 policing. 4 **MR BIZOS SC:** You attended a meeting on 5 the 16th – on the 13th in the evening at Marikana. 6 **GENERAL PHIYEGA:** Yes, I did. 7 **CHAIRPERSON:** It was the Monday, the same 8 day - 9 **MR BIZOS SC:** It was the 13th. 10 **CHAIRPERSON:** - that the incident took 11 place on the field near the railway line. 12 **MR BIZOS SC:** Yes. 13 **CHAIRPERSON:** Where two policemen were 14 killed and I think another wounded and some civilians 15 killed - 16 **MR BIZOS SC:** Well, what day were you at 17 a meeting in Marikana in order to discuss Mr Scott’s plan? 18 **GENERAL PHIYEGA:** I was never in a 19 meeting where Mr - I was discussing Mr Scott’s plan. 20 **CHAIRPERSON:** My understanding of her 21 evidence is, when she was told what happened on the field 22 by the railway line she – the killing of two policemen, 23 wounding of another and the killing of civilians and so on 24 - 25 **MR BIZOS SC:** Marikana -
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1 CHAIRPERSON: - she then went to
2 Marikana.
3
4 MR BIZOS SC: Yes -
5 CHAIRPERSON: That was on the Monday the
6 13th.
7
8 MR BIZOS SC: Yes.
9
10 MR BIZOS SC: Let me get clarity. Was there a meeting on the evening of the 13th which you
attended at Marikana?
11 GENERAL PHIYEGA: Yes, I have.
12
13 MR BIZOS SC: Who else was there?
14 GENERAL PHIYEGA: I have indicated in my
15 statement, we can go to that.
16
17 MR BIZOS SC: Go to that and tell us please?
18 GENERAL PHIYEGA: I would need some time
19 to go there.
20
21 MR BIZOS SC: Yes, it's paragraph, from paragraph 14 on, are those the people? General Mbombo -
22 GENERAL PHIYEGA: From paragraph 12.
23
24 MR BIZOS SC: Not paragraph 14?
25 GENERAL PHIYEGA: I would like to read it from paragraph 12.

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1 CHAIRPERSON: - she then went to
2 Marikana.
3
4 MR BIZOS SC: Yes?
5 GENERAL PHIYEGA: “On the 13th of August
6 2012 at about 15:00 or much later, I received a call from
7 the Provincial Commissioner of the North-West, Lieutenant-
8 General Mbombo. She informed me that in the week before
9 the 14th of August 2012 a situation had developed in
10 Marikana and more particularly at Lonmin Platinum Mine, which claimed the lives of four people, including two
11 security guards. This necessitated the deployment of more
12 police officers to keep the peace. She advised me that
13 violence has escalated, resulting in further deaths of five
14 people. These casualties included four - two police
15 officers. I regarded the information that had been given
16 to me by General Mbombo as sufficiently grave to cause me
17 to travel to Marikana. I left Marikana on the same day,
18 for Marikana on the same day, accompanied by the Provincial
19 Commissioner of Gauteng, General Mzwandile Petros, and we
20 arrived at around 18H00. We met with Lieutenant-General
21 Mbombo, Major-General Mpmembe, Brigadier Calitz, the
22 operational commander at the time” - and I have indicated
23 in my verbal submission here that because it was at the JOC
24 there could have been other people.
25 CHAIRPERSON: It may cut things short if I point out -
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25           GENERAL PHIYEGA:          I didn't hear you.
24           MR BIZOS SC:          Pardon?
23           GENERAL PHIYEGA:          I didn't hear you.
22 Marikana.
21 party to what your force, in your language, were doing at
20           MR BIZOS SC:          You had made yourself a
19 responsibility and overall control of this organisation.
18 matrix relationship is very crucial as I address my taking
17 individual responsibility within a collective.  So that
16 to that matter to say there is discipline, there is
15 talk right at the beginning, our opening statement attests
14 the roles of the individuals and even in our submission we
13 delegate authority to other people.  And furthermore, my
12 have responsibilities to carry.  So at any given time, as I
11 block.  It is made up of individuals who know that they
10 service employs 200 000 members and it is not a monolithic
9 your authority?
8           GENERAL PHIYEGA:          My authority is first
7           MR BIZOS SC:          To whom did you delegate
6 responsibility part and my qualification is this, the
5           CHAIRPERSON:          You've heard that now.  He
4 discussions and taken an interest in a particular
3           MR BIZOS SC:          Yes, she took part in the
2           CHAIRPERSON:          He suggests that your
1 don't do?

25           MR BIZOS SC:          Yes.
24           CHAIRPERSON:          Is that the question?
23           GENERAL PHIYEGA:          I didn't hear you.
22           MR BIZOS SC:          Pardon?
21           GENERAL PHIYEGA:          I didn't hear you.
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<td>1 have said through my delegated authority my tentacles go right down to the last sweeper in the organisation. So I am connected to the organisation. The delineation you are trying to make does confuse me a bit because even the matters that you are mentioning, I am linked to through the same principle that I've mentioned earlier on of my connectivity with the sweeper.</td>
<td>1 Major-General Annandale implemented the hostage negotiation concept and called in the SAPS crisis negotiators to engage with the protesters. During the early hours of the morning on Tuesday, the 14th of August 2012, I carried out a site visit of the area with Sinclair from Lonmin Mine for orientation purposes. From 05:30 I started working on an operational strategy which would provide the operational concept for a deployment over the next three days, as approved by the senior command of the JOC.” Now lapses of memory are not unusual in proceedings such as that we are engaged in. Had you forgotten about your meeting on Monday evening and the decisions that were taken there, earlier on when you denied that you took part in any meeting and you denied that you discussed the plan?</td>
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<td>8 MR BIZOS SC: National Commissioner, I have a document before me, a statement of one Duncan George Scott which has not yet been put in, Mr Chairman – which has been put in but not given an exhibit but –</td>
<td>15 CHAIRPERSON: Mr Bizos, I’m not sure that that question is quite fair in the circumstances. What paragraph 7 that you’ve read says is that there was a discussion about what was called peaceful resolution and it was said that the strategy, if successful, would defuse the situation without the need for tactical intervention. In the next paragraph which you read, Colonel Scott says that he started working on the operational strategy from 05:30 the next morning. That obviously relates to the tactical intervention to which he refers in the previous paragraph.</td>
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<td>10 MS PILLAY: That’s correct, Chair.</td>
<td>16 MR BIZOS SC: But the middle of paragraph 8, working on an operational strategy which provides the operational concept for deployments over the next three days, as approved by the senior command of the JOC.</td>
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<td>12 CHAIRPERSON: When we came on the podium this morning we were given, it was one of the documents that was on the table.</td>
<td>17 GENERAL PHIYEGA: Yes.</td>
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<td>13 MR BIZOS SC: It needs an exhibit number.</td>
<td>17 GENERAL PHIYEGA: Yes.</td>
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<td>14 MS PILLAY: FFF18, Ms Pillay?</td>
<td>18 MR BIZOS SC: Read paragraph 7 please?</td>
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<td>18 MR BIZOS SC: Read paragraph 7 please?</td>
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<td>17 CHAIRPERSON: I’m correct in saying this hasn’t been an exhibit before?</td>
<td>18 MR BIZOS SC: Read paragraph 7 please?</td>
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<td>18 MS PILLAY: It hasn’t been marked as an exhibit before.</td>
<td>19 GENERAL PHIYEGA: “After the initial briefing, police briefing, the National Commissioner and her delegation went to a meeting with the Lonmin management. Thereafter the National Commissioner’s delegation returned and – returned and a second meeting was held that evening at 23H00 with the operational officers.</td>
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<td>19 CHAIRPERSON: Right, so this will be marked exhibit FFF18. Has the witness got a copy?</td>
<td>19 GENERAL PHIYEGA: “After the initial briefing, police briefing, the National Commissioner and her delegation went to a meeting with the Lonmin management. Thereafter the National Commissioner’s delegation returned and – returned and a second meeting was held that evening at 23H00 with the operational officers.</td>
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<td>20 GENERAL PHIYEGA: Yes.</td>
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<td>21 MR BIZOS SC: Would you please turn to paragraph 6 on page 4 and please read it out loud and clear for all to hear?</td>
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25 Colonel Scott made up his own plan on the 14th, or his first
24 discussion on the 13th.
23 MR BIZOS SC: Do you agree, do you agree
22 GENERAL PHIYEGA: Yes, I do.
21 MR BIZOS SC: I don't agree.
20 GENERAL PHIYEGA: I think that's a better
19 MR BIZOS SC: Perhaps paragraph 71 of
18 exhibit L, slide 71 may refresh your memory that those
17 matters that are set out in the various stages 1 to 6, that
16 they may have been discussed on Monday night.
15 MR SEMENYA SC: Chairperson, the calendar
14 date on that slide is the 14th of August 2012.
13 CHAIRPERSON: I accept that but Mr Bizos
12 asks to put to the witness that that's the way you read it and
11 instead of a verbatim recording, it is very difficult to
10 remember as you put the matters but I can say issues around
9 a peaceful negotiation have always been top of our mind and
8 we discussed that and I can say in the, at that evening we
7 continued to discuss about a peaceful resolution.

2012

19 MR BIZOS SC: The basic design was agreed
to the night before if the three paragraphs are read
together, Mr Chair.
18 CHAIRPERSON: Maybe the way to do it is
17 to put to the witness that that's the way you read it and
16 ask her whether she agrees and take it from there.
15 MR BIZOS SC: Do you agree, do you agree
14 that there was discussion, was - what was to happen in the
13 next three days during your meetings on the evening and
12 of the 13th?
11 GENERAL PHIYEGA: I don't agree.
10 MR BIZOS SC: Were the following words
9 used during your discussions the night before - a basic
8 design, negotiate, pursue a peaceful resolution and if that
7 fails, a tactical intervention? Were those words used
6 during that night?
5 GENERAL PHIYEGA: I think it is important
4 to note that in a conversation such as that one where there
3 isn't a verbatim recording, it is very difficult to
2 remember as you put the matters but I can say issues around
1 a peaceful negotiation have always been top of our mind and
24 we discussed that and I can say in the, at that evening we
23 continued to discuss about a peaceful resolution.

2011

23 MR BIZOS SC: In my testimony I've
22 spoken of a JOC as a multi-faceted unit that brings
21 together multi-faceted commanders, operators, in one room
20 and Scott could never have alone developed this plan. He
19 worked with those he was with in the JOC and he indicates
18 in his statement that on the 14th in the morning they
17 started working on this plan.
16 [12:45] MR BIZOS SC: You and your counsel have
15 repeatedly told us about the unprecedented loss of life
14 that occurred on the 16th of August.
13 GENERAL PHIYEGA: Yes.
12 MR BIZOS SC: I assume that you mean loss
11 of life as a result of police conduct.
10 GENERAL PHIYEGA: I'm talking about
9 unprecedented loss of life, not only for the 16th, for the
8 entire period. It was a lot.
7 MR BIZOS SC: But it is said in the
6 context of what happened in Marikana on the 16th.
5 GENERAL PHIYEGA: Yes, it remains
4 unprecedented.
3 MR BIZOS SC: May I ask you to speak up
2 so that I can hear you? I'm -
1 GENERAL PHIYEGA: Yes, it was
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<tr>
<td>1. the past?</td>
<td>1. misquote my friend but I’ll try my best to remember what he said, others were not armed, they peacefully left the scene.</td>
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<td>2. GENERAL PHIYEGA: I will also respond with a quote that says an organisation that doesn’t learn does not grow. Then I will agree.</td>
<td>4. GENERAL PHIYEGA: I think you would also read somewhere in our documents and I think even in the statements that those that were walking away, most of them were putting down their weapons.</td>
</tr>
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<td>3. MR BIZOS SC: What do you remember about Sharpeville?</td>
<td>8. MR BIZOS SC: I want to deal with numbers. Was the plan to disarm 200 to 300 or 3 000?</td>
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<td>7. GENERAL PHIYEGA: People who died.</td>
<td>10. GENERAL PHIYEGA: Advocate, those details my commanders will deal with but the plan was to encircle, disarm and disperse those who were there.</td>
</tr>
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<td>8. MR BIZOS SC: I beg your pardon?</td>
<td>13. MR BIZOS SC: I’m going to put to you that the film that we have seen shows the vast number of people unarmed. Do you accept that? You can, because my learned friend would have objected if I had put it wrongly.</td>
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<td>9. GENERAL PHIYEGA: We did say so, Judge.</td>
<td>15. MR BIZOS SC: People who died. Do you remember how many?</td>
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<td>11. MR BIZOS SC: Mostly in the back.</td>
<td>17. MR BIZOS SC: I want you to accept for the purpose of my next question that, that I have correctly described the number of people, that the majority that are</td>
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<td>12. MR BIZOS SC: There were 180 people.</td>
<td>18. GENERAL PHIYEGA: I’m following.</td>
</tr>
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<td>19. GENERAL PHIYEGA: I’m post-50, I don’t remember.</td>
<td>20. MR BIZOS SC: Do you know what the police defence was?</td>
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<td>22. GENERAL PHIYEGA: Yes, I recall.</td>
<td>21. GENERAL PHIYEGA: I think short of counting, I would be very irresponsible to say majority/minority.</td>
</tr>
<tr>
<td>23. MR BIZOS SC: Mostly in the back.</td>
<td>24. MR BIZOS SC: You’re not going to accept an assurance from me that that is what the evidence before the Commission is?</td>
</tr>
<tr>
<td>24. GENERAL PHIYEGA: I’m understanding.</td>
<td>25. GENERAL PHIYEGA: No, because I wasn’t even on the scene.</td>
</tr>
<tr>
<td>25. MR BIZOS SC: And the people who were wounded were mostly wounded in the back.</td>
<td>26. CHAIRPERSON: Mr Bizos, just to get clarity at the moment, there are two possible aspects in respect of which this point is important. The first is what actually happened. The second is what the witness’s understanding was at the relevant time.</td>
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<tr>
<td>1. wounded were mostly wounded in the back.</td>
<td>1. shown on the film and on the evidence that is going to be led were unarmed.</td>
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<td>2. GENERAL PHIYEGA: I’m following.</td>
<td>3. GENERAL PHIYEGA: I think short of counting, I would be very irresponsible to say majority/minority.</td>
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<td>3. MR BIZOS SC: Do you know what the police defence was?</td>
<td>6. MR BIZOS SC: You’re not going to accept an assurance from me that that is what the evidence before the Commission is?</td>
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<tr>
<td>4. GENERAL PHIYEGA: No, I don’t.</td>
<td>9. GENERAL PHIYEGA: No, because I wasn’t even on the scene.</td>
</tr>
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<td>5. MR BIZOS SC: They acted in self-defence and they were praised for their actions by Dr Verwoerd and his Minister of Police.</td>
<td>11. CHAIRPERSON: Mr Bizos, just to get clarity at the moment, there are two possible aspects in respect of which this point is important. The first is what actually happened. The second is what the witness’s understanding was at the relevant time.</td>
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<td>10. MR BIZOS SC: They were putting down their weapons.</td>
<td>16. MR BIZOS SC: Yes.</td>
</tr>
<tr>
<td>11. MR BIZOS SC: Yes, that may be. That may be. Whilst you raise this question, how many people did you have to deal with – 300 or 3 500 in this, in Marikana?</td>
<td>17. CHAIRPERSON: Now, are you busy with the former or the latter?</td>
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<td>12. GENERAL PHIYEGA: Judge, I’ve already answered that question.</td>
<td>19. MR BIZOS SC: At this stage I –</td>
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<tr>
<td>13. CHAIRPERSON: I think counsel is entitled to ask it again if it’s relevant to this phase of his cross-examination.</td>
<td>20. CHAIRPERSON: At this stage of your cross-examination.</td>
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<td>14. GENERAL PHIYEGA: Then I will refer to our opening statement.</td>
<td>22. MR BIZOS SC: - for an acceptance that there were unarmed –</td>
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<td>15. MR BIZOS SC: 3 000 in the opening statement, all fully armed in the first version.</td>
<td>24. CHAIRPERSON: So you’re not concerned so much with what she understood at the time, as what the</td>
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<tr>
<td>1</td>
<td>MR BIZOS SC:</td>
<td>You have praised your</td>
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<td>2</td>
<td>police officers to the sky on the 17th and the 20th.</td>
<td>police officers to the sky on the 17th and the 20th.</td>
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<td>3</td>
<td>CHAIRPERSON:</td>
<td>The expert engaged by your police force says from still and</td>
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<td>4</td>
<td>Now the actual facts I</td>
<td>video images taken by SAPS between 12 and 16th August 2012,</td>
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<td>5</td>
<td>think are quite conveniently stated in paragraph 56 of Mr</td>
<td>the militancy of a relatively small number of protesters,</td>
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<td>6</td>
<td>de Rover's statement which you might read, but that of</td>
<td>around 300 out of 400, was quite apparent – 300 out of</td>
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<td>7</td>
<td>course is – he talks about a relatively small number of</td>
<td>4,000, I'm sorry, yes. This is your expert –</td>
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<td>8</td>
<td>protesters, around 300 out of 4,000, then he goes on to</td>
<td>GENERAL PHIYEGA: Yes.</td>
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<td>9</td>
<td>describe how they're dressed –</td>
<td>MR BIZOS SC: - employed by your police</td>
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<td>10</td>
<td>MR BIZOS SC:</td>
<td>force, who must have been given this information by your</td>
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<td>11</td>
<td>Yes.</td>
<td>colleagues, contrary to what you said on the 17th and the</td>
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<td>12</td>
<td>CHAIRPERSON:</td>
<td>20th that they faced 3,000 people and that you congratulated</td>
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<td>13</td>
<td>Because that appears to be</td>
<td>them for what they had done. Please do not try and avoid</td>
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<td>14</td>
<td>what the police now accept because that's what the expert</td>
<td>the question. Assume that your expert is correct, what</td>
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<td>15</td>
<td>says, but I take it if you put it to her that way she'll</td>
<td>were you planning for, 3,000, 3,050, 4,000 or 4,050 or of a</td>
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<td>16</td>
<td>accept it too but still the question is, are you concerned</td>
<td>couple hundred, what were you planning for?</td>
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<td>17</td>
<td>with what actually was the position or what she thought at</td>
<td>GENERAL PHIYEGA: You've dealt with a lot</td>
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<td>18</td>
<td>the time?</td>
<td>of things here and I can't just go yes, no – 16-24.</td>
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<td>19</td>
<td>MR BIZOS SC:</td>
<td>CHAIRPERSON: I think it's a question</td>
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<td>20</td>
<td>No, I want to put, let me</td>
<td>with a whole lot of sub-paragraphs -</td>
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<td>21</td>
<td>put the question.</td>
<td>GENERAL PHIYEGA: Absolutely.</td>
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<td>22</td>
<td>MR BIZOS SC:</td>
<td>CHAIRPERSON: Would you like to deal with</td>
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<td>23</td>
<td>Having regard to the</td>
<td>them one by them?</td>
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<td>24</td>
<td>evidence that I have mentioned to you and what the Chairman</td>
<td>GENERAL PHIYEGA: I would like to -</td>
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<td>25</td>
<td>of the Commission has said, were you planning the</td>
<td>CHAIRPERSON: Would you like to deal with</td>
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<td>dispersal and arrest of 3,000 people when the plan that</td>
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<td>was being put together from the Tuesday morning, if you</td>
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<td>will, to the Thursday, how many people in your view were</td>
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<td>there that were armed and had to be dispersed, disarmed and</td>
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<td>arrested – between 2 to 300 or 3,000 or 3,500 or, as one of</td>
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<td>the generals says, 4,500? What figure did you work on?</td>
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<td>6</td>
<td>GENERAL PHIYEGA: Advocate, I think this</td>
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<td>7</td>
<td>Commission would benefit really intensely from listening to</td>
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<td>those who were on the scene when it comes to the type of</td>
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<td>9</td>
<td>questions you are asking. I cannot speculate. I can only</td>
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<td>say –</td>
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<td>11</td>
<td>MR BIZOS SC: Commissioner –</td>
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<td>12</td>
<td>GENERAL PHIYEGA: - what I've answered</td>
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<td>13</td>
<td>you is based to the best of knowledge that I have but the</td>
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<td>14</td>
<td>intricacies that you are asking me can best be answered by</td>
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<td>those who are positioned to better do so. I can't</td>
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<td>16</td>
<td>speculate on such serious issues. And I have said in our</td>
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<td>statement, we have said 3,000, that's my understanding, the</td>
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<td>18</td>
<td>best knowledge that is here but I'm sure my commanders,</td>
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<td>when they come here with the statements that are given,</td>
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<td>20</td>
<td>they would be able to – those details, granular matters,</td>
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<td>21</td>
<td>they would be able to deal with because those are related</td>
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<td>22</td>
<td>to the scene.</td>
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<td>23</td>
<td>MR BIZOS SC: You as the leader have</td>
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<td>24</td>
<td>taken responsibility for what has happened.</td>
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<td>25</td>
<td>GENERAL PHIYEGA: Correct.</td>
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<tbody>
<tr>
<td>1</td>
<td>CHAIRPERSON: The Commission will take</td>
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<td>2</td>
<td>the lunch adjournment and resume – please, if people make</td>
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<td>3</td>
<td>noises, I'm giving you a warning now, if people make noises</td>
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<td>4</td>
<td>from the auditorium while the Commission is in session I</td>
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<td>5</td>
<td>will ask that they be asked to leave. I don't want to do</td>
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<td>6</td>
<td>that because I'm sure everybody wants to hear what's</td>
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<td>7</td>
<td>happening but there's a minimum of behaviour that's</td>
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<td>8</td>
<td>expected from those who are in the auditorium and I expect</td>
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<td>people please to respect that. This is an important aspect</td>
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<td>of the matter. It's only fair to everybody that the</td>
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<td>Commissioner be given an opportunity to deal fully with</td>
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<td>this very important question and for that reason I'm now</td>
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<td>adjourning until 2 o'clock.</td>
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**[COMMISSION ADJournS COMMISSION RESUMES]**


National Commissioner, you're still under oath.

MANGWASHI VICTORIA PHIYEGA: s.i.o.

CHAIRPERSON: I see that some thoughtful person has given us some more reading matter in the form of an article by Mr Haysom. Presumably we will hear more about it, but before we do that, you were going to answer
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Marikana Commission of Inquiry

Interviews

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1 the question that you were asked by Mr Bizos before we took
2 the adjournment. Do you want him to repeat it, if he can
3 still remember it, or –
4 GENERAL PHIYEGA: Yes, Judge –
5 CHAIRPERSON: Or will you be able to
6 answer it without it being repeated?
7 GENERAL PHIYEGA: No, I would request
8 that he repeats it again.
9 CHAIRPERSON: Mr Bizos, can you remember
10 the question that you asked?
11 MR BIZOS SC: I ask my colleagues to
12 refresh my memory, as I can’t.
13 CHAIRPERSON: Alright.
14 MR BIZOS SC: I’ll try and –
15 CHAIRPERSON: No, in fairness to the
16 witness I think you should do it.
17 MR BIZOS SC: Yes, I’ll try and break it
18 up.
19 CHAIRPERSON: Thank you.
20 CROSS-EXAMINATION BY MR BIZOS SC (CONTD.):
21 National Commissioner, you know that we have differences in
22 the evidence about the number of armed people at Marikana.
23 GENERAL PHIYEGA: I have gathered that,
24 Sir.
25 MR BIZOS SC: Yes, the people that

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briefed you immediately after the event – and when I say
immediately, between the 16th and the 20th – what did they
tell you? That there were 3000 armed people at Marikana?
GENERAL PHIYEGA: Yes.
MR BIZOS SC: Now that is a lot of armed
people, and that must have influenced your view of the
conduct of the police, or the propriety of the conduct of
the police, before you exonerated them on the 17th and on
the 20th?
GENERAL PHIYEGA: I think the information
has been consistent, and we also are aware that in the
process there were talks around how the crowd reacted,
groups, large groups, so it’s a lot of information that was
informing the –
MR BIZOS SC: Please answer the question.
CHAIRPERSON: She is answering the
question. Let her carry on. Carry on.
MR BIZOS SC: Were you told that there
were 3000 armed people, by your commanders?
GENERAL PHIYEGA: I’ve answered yes.
MR BIZOS SC: Yes, did you believe them
that there were 3000 armed people at Marikana?
GENERAL PHIYEGA: To the best of my
knowledge and trusting the bona fides of my commanders,
yes.

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1 MR BIZOS SC: And was that one of the
2 reasons why you praise your police force in very generous
3 terms on the 17th and on the 20th?
4 GENERAL PHIYEGA: No.
5 MR BIZOS SC: On what did you base your
6 praise?
7 GENERAL PHIYEGA: I am on record having
8 said I praise them for having performed their duty in a
9 professional manner, following protocol, following
10 prescripts, spending many hours working. That’s what I
11 praised them for.
12 MR BIZOS SC: If subsequent evidence
13 shows that the majority of the people at Marikana were not
14 armed, would you suspect that you were not told the truth?
15 GENERAL PHIYEGA: I’m on record this
16 morning saying it doesn't matter whether it's one, whether
17 it’s three, members who protest armed, remain our concern
18 as police.
19 MR BIZOS SC: It’s a question of
20 credibility, Commissioner. If your force told you that
21 they faced 3000 armed people, and there is evidence that
22 was not true, surely you have to change your mind
23 about the veracity and the honesty of the people that told
24 you that they faced 3000 armed people?
25 GENERAL PHIYEGA: Advocate, I don’t think

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this has got to do with my personal credibility. I have
responded and I’ve said any time there is an illegal
protest, and that illegal protest has people who are
carrying arms, we remain fairly concerned as police.
MR BIZOS SC: We’re not talking about any
-.
CHAIRPERSON: Mr Bizos, I fear there may
be a misunderstanding between you and the witness. You
spoke about credibility, which she took as being a
suggestion that her own credibility was on the line. I
didn’t understand your question to be to that effect.
MR BIZOS SC: No.
CHAIRPERSON: Am I correct?
MR BIZOS SC: No, it’s the credibility of
the informers to her.
CHAIRPERSON: Yes, yes. She was
concerned, I think, that her credibility is being attacked.
MR BIZOS SC: Yes.
CHAIRPERSON: And you understand he’s
suggesting that the people who gave you the information,
their credibility is under attack. So perhaps Mr Bizos
should rephrase the question, because we’ve had this
interruption –
GENERAL PHIYEGA: Yes.
CHAIRPERSON: - and then you can deal
GENERAL PHIYEGA: The difference it would not make.

MR BIZOS SC: I beg your pardon?

GENERAL PHIYEGA: The difference that it would not make. I would note the number, 2700, 5000, 3000.

- MR BIZOS SC: No, but you judged your force and praised them –

GENERAL PHIYEGA: I haven’t finished –

MR BIZOS SC: If you found out –

GENERAL PHIYEGA: I haven’t finished responding to you –

MR BIZOS SC: - that the information that was given to you –

CHAIRPERSON: Mr Bizos, sorry, let her finish her answer. Please, let her finish her answer and then you can ask a question.

MR BIZOS SC: Yes.

CHAIRPERSON: Proceed, National Commissioner.

GENERAL PHIYEGA: Advocate, you’re talking about numbers. You’re throwing them forward, more, less, even, whatever. I’m saying the numbers as you suppose would not be an issue for me. What would be an issue for us as police and for me as the National Commissioner, is whether these members are armed in a protest that is supposed to be peaceful and they are supposed not to be armed. That’s a very serious concern for me.

MR BIZOS SC: Whether you were told the truth about the numbers, or you were lied to, makes no difference to you?

GENERAL PHIYEGA: Sir, I presume where we are having the difference is what is a nexus for me and what is a nexus for you. The nexus for me is whether these members are marching legally, (1), and whether they are armed.

MR BIZOS SC: If you were lied to by 2700 people, it made no difference to you?

GENERAL PHIYEGA: At this point in time I would say to you I don’t believe that anyone of us here would even be able to put an audit of the numbers of people that are there. We are all having guestimates; as you have put it some are saying 4500, some are saying 3000. It was a large crowd.

MR BIZOS SC: Why don’t you want to answer the question whether it makes any difference to you whether your, the people under you misrepresented the position to you by 2700 people that were allegedly armed?

GENERAL PHIYEGA: And against the, in our statement we have stated what to the best of our knowledge are the facts, and misrepresentation to my mind even at this point in time doesn’t appear.

MR BIZOS SC: Right, National Commissioner, we go on to the next point. You say that this was unprecedented.

GENERAL PHIYEGA: Yes, I did say.

MR BIZOS SC: Did you have regard to what happened in Uitenhage on the 21st of March 1985?

GENERAL PHIYEGA: In my statement I do mention that post 1994 where I am talking about the statistics of the new South African Police Service, we have never encountered anything like that, and this is why I even gave statistics to say in the past three years we’ve handled 33000 unrests. Some were peaceful, some were not peaceful. In the 18 years of existence of this country we’ve handled close to 150000, and we have never experienced anything like this.

MR BIZOS SC: History prior to 1994 is, do you believe that what happened before during the apartheid regime is a good example to look at so that we do not repeat the same mistakes?

GENERAL PHIYEGA: I think in a rational environment all those issues are taken into account.
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<td><strong>MR BIZOS SC:</strong> Should we look to the history of the past in order to avoid a repetition of that unfortunate history?</td>
<td><strong>MR BIZOS SC:</strong> Should we look to the periods that we’re talking about people didn’t have the right to protest, and maybe if I can continue, and they, you know, our Constitution is so articulate, yes, you have the right to protest and you have the right to do it peacefully, without being armed.</td>
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<td><strong>GENERAL PHIYEGA:</strong> I’m sure there are relative references that have to be used, because I’m using precisely the 18 years to show that a lot of experience, and good experience, has been amassed by the police and we have continued to sustainably manage this type of protest because of experience and the training, new approach that we’ve had as police, and this is why I’m saying this is unprecedented given the new South African Police Service.</td>
<td><strong>MR BIZOS SC:</strong> Well, on the one version there were 2000, at least 2700 people there that were not armed, and according to Mr Semenya they dispersed peacefully. Now in view of your answer, it may be that those who were armed could possibly be called criminals.</td>
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<td><strong>MR BIZOS SC:</strong> I will repeat the question.</td>
<td><strong>GENERAL PHIYEGA:</strong> But you do say they walked away.</td>
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<td><strong>MR BIZOS SC:</strong> Do you believe that it is not necessary for us to look to the prior history, prior ’94, in order not to commit the same mistakes that were committed by the apartheid regime police?</td>
<td><strong>MR BIZOS SC:</strong> After the shooting, after the gas, after the helicopters.</td>
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<td><strong>GENERAL PHIYEGA:</strong> I’ve already responded to you, Sir. Under rational circumstances you can use history.</td>
<td><strong>GENERAL PHIYEGA:</strong> And I also said earlier that, Advocate, that remember, we were dealing with a mix of things. There was an illegal protest. There were people who were armed in that protest, and ours really was just to encircle them, to disarm them, and to disperse them.</td>
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<td><strong>MR BIZOS SC:</strong> We can?</td>
<td><strong>CHAIRPERSON:</strong> That’s what we were here to do.</td>
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<td><strong>MR BIZOS SC:</strong> Under rational circumstances you can use history.</td>
<td><strong>MR BIZOS SC:</strong> Yes, I relied on what was put by my learned friend to the witness, Mr Chairman, but now that I am reminded, I’ll amend the question. Either before or after the shooting many unarmed people left voluntarily. They were not armed. The plan that the police put up in order to disperse 3000 people on the subsequent evidence and the evidence of the expert for the police, shows that in truth and in fact there were people, protesters who were not armed. If they were shot at, if they were gassed, if they were victims of stun grenades, for fear from helicopters and the killing of other people gathered a little bit in front of them, all this, all this is attacking people who had committed no crime. They’re not criminals. Would you agree?</td>
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<td><strong>MR BIZOS SC:</strong> Do you say rational or irrational?</td>
<td><strong>GENERAL PHIYEGA:</strong> I’m sure this irrational?</td>
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<td><strong>MR BIZOS SC:</strong> Yes, I relied on what was put by my learned friend to the witness, Mr Chairman, but now that I am reminded, I’ll amend the question. Either before or after the shooting many unarmed people left voluntarily. They were not armed. The plan that the police put up in order to disperse 3000 people on the subsequent evidence and the evidence of the expert for the police, shows that in truth and in fact there were people, protesters who were not armed. If they were shot at, if they were gassed, if they were victims of stun grenades, for fear from helicopters and the killing of other people gathered a little bit in front of them, all this, all this is attacking people who had committed no crime. They’re not criminals. Would you agree?</td>
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<td><strong>CHAIRPERSON:</strong> That’s what we were here to do.</td>
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<td><strong>GENERAL PHIYEGA:</strong> Mmm.</td>
<td><strong>MR BIZOS SC:</strong> After the shooting, after the gas, after the helicopters.</td>
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<td><strong>MR BIZOS SC:</strong> Rational. Because in Uitenhage on the 21st of March 20 protesters died, or were killed, and numerous others were injured and the defence was self-defence and Mr Louis Le Grange, the then Minister of Police and Law &amp; Order said, “We were forced to use maximum force to defend ourselves. The police had no alternative,” sorry, “the police had no alternative but to open fire in self-defence.” The common factor was that no policeman had a scratch. Then during the uprising in Soweto from 1976, a couple of years thereafter, the South African Police killed a few hundred people at different times in marches or gatherings in Soweto and other urban areas throughout the country. Their defence was always, we did it in self-defence. There wasn’t a scratch on any policeman. We don’t want to follow that example, do we?</td>
<td><strong>MR BIZOS SC:</strong> After the shooting, after the gas, after the helicopters.</td>
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<td><strong>MR BIZOS SC:</strong> Absolutely not, and the South African Police Service is not.</td>
<td><strong>MR BIZOS SC:</strong> Yes, I relied on what was put by my learned friend to the witness, Mr Chairman, but now that I am reminded, I’ll amend the question. Either before or after the shooting many unarmed people left voluntarily. They were not armed. The plan that the police put up in order to disperse 3000 people on the subsequent evidence and the evidence of the expert for the police, shows that in truth and in fact there were people, protesters who were not armed. If they were shot at, if they were gassed, if they were victims of stun grenades, for fear from helicopters and the killing of other people gathered a little bit in front of them, all this, all this is attacking people who had committed no crime. They’re not criminals. Would you agree?</td>
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<td><strong>MR BIZOS SC:</strong> Is it a mere coincidence that their defence appears to be the same?</td>
<td><strong>MR BIZOS SC:</strong> After the shooting, after the gas, after the helicopters.</td>
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<td><strong>GENERAL PHIYEGA:</strong> Maybe I could say, to talk to my response to you, is that we are in a new dispensation where people can march, and during those two periods that we’re talking about people didn’t have the right to protest, and maybe if I can continue, and they, you know, our Constitution is so articulate, yes, you have the right to protest and you have the right to do it peacefully, without being armed.</td>
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27th March 2013

Marikana Commission of Inquiry

Interviews

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1  Commission will make a finding on that. I’m not able to
give an opinion now -

2  MR BIZOS SC: The Commission wants your
help.

3  GENERAL PHIYEGA: I’m not able to give
you an opinion. I’m not fit to give that type of answer.

4  MR BIZOS SC: Why are you not fit to give
an opinion?

5  GENERAL PHIYEGA: Number 1, I was not on
the scene, and secondly, this Commission has taken a lot of
submissions that I’m not privy to and a lot of input from
members, from us, from experts, from anybody, and I think
after good consideration of everything, that type of
question can be answered.

6  MR BIZOS SC: For the sake of
completeness I want to deal with what happened in the Vaal
Triangle where my learned friend Mr Semenya and I were on
the same side of the people of the Vaal Triangle. Again
the police shot into a march in the Vaal Triangle. They
killed nine people. They injured quite a number. A
commission of inquiry was held. Judge Richard Goldstone
ordered that six of them should be charged with murder by
the attorney-general. Unfortunately the attorney-general
of the time in the early 90s didn’t charge them. Indeed,
during the apartheid regime people could shoot and kill
people at demonstrations with impunity. Will you accept
that in our Constitutional Order that is not permitted and
those who actually kill people without justification should
be punished?

7  GENERAL PHIYEGA: Yes, I do, and that is
the type of organisation I’m serving.

8  MR BIZOS SC: Do you think that your
organisation had regard to the history of the past when
they did what they are said to have done, on either
version, at Marikana?

9  GENERAL PHIYEGA: I would not be able to
say, to answer on that, but I’d be able to say to you when
the organisation did what they did, what they took into
account are the laws, the prescripts, the SOPs, the
guidelines that demands them to give citizens a service.

10  MR BIZOS SC: In your statement,
paragraph 6, you stated, and I quote, “It is common
knowledge that I have no previous experience as a police
officer.” You said that?

11  GENERAL PHIYEGA: Very correct.

12  MR BIZOS SC: Why did you say that?

13  GENERAL PHIYEGA: It is a fact.

14  MR BIZOS SC: And what is the relevance
of that fact?

15  GENERAL PHIYEGA: It’s transparent and

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1  it, if I’m giving my CV and my résumé, it is important for
me to tell the truth and I’m being prudent and I’m sharing
what I am.

2  MR BIZOS SC: Did you include it in your
statement as a possible excuse for your performance in
relation to what may have happened at Marikana?

3  GENERAL PHIYEGA: Advocate, that’s your
interpretation. I’ve said I shared my CV.

4  MR BIZOS SC: I don’t understand your
answer - this is why I sought advice from my learned friend
on my right – neither does he. What do you mean by what
you’ve said?

5  GENERAL PHIYEGA: What I was asked to do,
what I did here and what I led, what I responded to when I
was here, I was talking about my curriculum vitae, where
I’ve been, what I am, what I do. The -

6  MR BIZOS SC: Not as an excuse?

7  GENERAL PHIYEGA: The interpretation you
are giving, that is not mine, Sir, and I don’t agree with
it.

8  MR BIZOS SC: You say no?

9  GENERAL PHIYEGA: I don’t agree with it.

10  MR BIZOS SC: Does that mean that you
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18  GENERAL PHIYEGA: It is a fact.

19  MR BIZOS SC: And what is the relevance
of that fact?

20  GENERAL PHIYEGA: It’s transparent and

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1  16th?

2  GENERAL PHIYEGA: I don’t understand that
question.

3  MR BIZOS SC: Which part don’t you
understand?

4  GENERAL PHIYEGA: Totality of it.

5  MR BIZOS SC: Do you believe that your
lack of experience may make you less responsible for what
happened?

6  GENERAL PHIYEGA: No.

7  CHAIRPERSON: I’m not quite sure I
understand your question. I don’t understand what’s meant
by responsible in this context. A person can be
vicariously responsible for things done by his or her
subordinates, without any personal blame for what was done.
A person can also be personally responsible for things that
happened, if one has, the person has blame of some sort.
Now you said, “Do you take responsibility in your personal
capacity and in your official capacity?” Now
responsibility in her official capacity would, I take it,
be probably vicarious responsibility, or vicarious
liability. Responsibility in her personal capacity would
of course be something else. That’s the way you introduced
this topic. Now you’re talking about responsible, so
perhaps I think – I don’t know whether the witness needs
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<td>1. explanation, but I would like it, what you mean by responsible, because there are different forms of responsibility. I think to be fair one should know what form you’re busy with in the question.</td>
<td>1. the police force, the police - no, I mustn’t use military terms – the police service will be, insofar as it’s a legal entity, will be responsible for that, even if she’s free of any personal blame at all. If of course she was somehow involved personally and was involved in conduct which attracts personally liability to her, she would be of course responsible, legally responsible in her own right, not only in her official capacity. Now that’s a distinction which is blurred by the way you ask the question. That’s the first point.</td>
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<td>MR BIZOS SC: Well, there is a third type of joint responsibility together with others. Do you feel that in view of your participation in authorising, in making yourself, identifying yourself with your commanders with what happened, makes you responsible for what happened, if indeed any wrongful act was committed?</td>
<td>2. The second point is you still haven’t explained what you meant by responsible. But anyway, I suppose I shouldn’t have said that without giving Mr Bizos a chance to reply. I’m not sure that she’s ever admitted she authorised anything. That’s the point Mr Semenya makes. You stated it is something that was self-evident on the table already. I’m not sure that that assumption is necessarily justified. The second point is you still haven’t explained what you mean by responsible. Do you mean in asking her the question, “Do you think you’re personally responsible because of what you did?” or “Do you think you’re responsible because your subordinates did it and in the course and scope of their duties and you’re the head of the organisation, and in that sense you are vicariously responsible?” So I think you should deal with those two points, if I may say so, before you proceed with the question.</td>
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<td>MR SEMENYA SC: Chair, the question assumes a fact not in evidence. There was never any - CHAIRPERSON: There are two problems with the question. The first is, it assumes a fact not in evidence, and secondly it still doesn’t explain what’s meant by responsible. But anyway, I suppose I shouldn’t have said that without giving Mr Bizos a chance to reply. I’m not sure that that assumption is necessarily justified. The second point is you still haven’t explained what you mean by responsible. Do you mean in asking her the question, “Do you think you’re personally responsible because of what you did?” or “Do you think you’re responsible because your subordinates did it and in the course and scope of their duties and you’re the head of the organisation, and in that sense you are vicariously responsible?” So I think you should deal with those two points, if I may say so, before you proceed with the question.</td>
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<td>3. There are the people who are responsible for any wrongdoing at Marikana on the 16th. I wanted to give an opportunity to say I am responsible or I am not responsible. CHAIRPERSON: Is that what you – MR BIZOS SC: Whether – CHAIRPERSON: I’m sorry, Mr Bizos – MR BIZOS SC: Whether it’s vicarious – CHAIRPERSON: No, no, I think to be fair</td>
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<td>CHAIRPERSON: There are two problems with the question. The first is, it assumes a fact not in evidence, and secondly it still doesn’t explain what’s meant by responsible. But anyway, I suppose I shouldn’t have said that without giving Mr Bizos a chance to reply. I’m not sure that that assumption is necessarily justified. The second point is you still haven’t explained what you mean by responsible. Do you mean in asking her the question, “Do you think you’re personally responsible because of what you did?” or “Do you think you’re responsible because your subordinates did it and in the course and scope of their duties and you’re the head of the organisation, and in that sense you are vicariously responsible?” So I think you should deal with those two points, if I may say so, before you proceed with the question.</td>
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<td>CHAIRPERSON: Answer the question in your own way.</td>
<td>10. CHAIRPERSON: Answer the question in your own way.</td>
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<td>MR BIZOS SC: No, no, I think to be fair</td>
<td>10. CHAIRPERSON: Answer the question in your own way.</td>
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<td>MR BIZOS SC: Whether it’s joint, or any other responsibility, responsibility is a responsibility.</td>
<td>10. CHAIRPERSON: Answer the question in your own way.</td>
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<td>CHAIRPERSON: You know, I understand that, but I think to be fair to the witness you should indicate what kind of responsibility you’re asking her about because obviously if the police acted in the course and scope of their duties, and acted wrongly, she will be - well, not necessarily in her personal capacity but she as</td>
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<td>11. CHAIRPERSON: Ja, I’d love to answer that, Judge, and I’m saying, I’ve explained that and it’s coming back again, because I’ve spoken about my role, I’ve spoken about the delegation of authority, I’ve spoken about all that, but this is coming back again and I’m going to go back exactly there to say there are levels of responsibility, and I’ve also spoken about the fact that I’m not talking about a monolithic block. There are individuals in this and there are levels, that whole issue of cascading responsibilities and whatever, I’m overall responsible and in charge, but inside that there are certain processes, and I’ve already answered and articulated those. That’s why I say the question is loaded.</td>
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27th March 2013

Marikana Commission of Inquiry

Interviews

[14:43] MR BIZOS SC: I must ask you this question, because I don’t know precisely what you mean by what you have said. Did you know of the plan and its strategy, and did you approve it?

GENERAL PHIYEGA: I have answered that the plan I did not participate in. Those that had the responsibility to do so did it. I do not know it.

MR BIZOS SC: You plead ignorance?

GENERAL PHIYEGA: That’s a deep word. No.

MR BIZOS SC: Please speak up.

GENERAL PHIYEGA: Advocate, when you say I don’t know that you don’t need to know. The question is, did you participate in the plan?

MR BIZOS SC: No, I’m asking in answer to your previous answer –

CHAIRPERSON: No, no, no, that’s a fair question by her. When you say, “Do you plead ignorance?” do you mean, do you say you did not know? That’s the question she asks and I think she’s entitled to an answer before she gives you her own answer.

MR BIZOS SC: That’s precisely what I mean, and the question was that she knew of the plan and strategy and approved it. It’s a simple question which requires a simple answer.

GENERAL PHIYEGA: I know that there are people who must do the plan and know the intricacies of that, and these are the people who were in the JOC. I do not have to know those details.

MR BIZOS SC: Did you know what the plan said and what the strategy was to be followed in pursuance of that plan?

GENERAL PHIYEGA: I know that whatever plan they have to do, they will do it within the prescripts that they are supposed to do it.

MR BIZOS SC: And if they fail to do it, do you feel that you are responsible? If they fail to do it, even though you may have approved of it, do you say that you are not responsible?

MR SEMENYA SC: Again, Chair, there’s no evidence of the Commissioner approving any plan, and she has repeatedly given that answer.

MR BIZOS SC: Are you saying that you didn’t know what the plan was?

GENERAL PHIYEGA: In my job I do not need to know that.

CHAIRPERSON: That’s not an answer. I know that you don’t need to know. The question is, did you know?

GENERAL PHIYEGA: I said, I have answered to say on the 14th when the plan was done I was not there and I don’t know what was sitting in the plan, because I don’t need to know.

MR BIZOS SC: Did you hear that your colleagues, or your commanders say that the 16th was D-day?

GENERAL PHIYEGA: I’ve never heard that. We’ll take it up with you later on certain other documents that we will produce. In your statement in paragraph 7 to 11, includes a number of facts and figures about the SAPS in general. It’s entirely unclear to us why you have included police population ratios, but I wish to deal specifically with paragraph 11, which deals with the significant prevalence of police attacks in killings. Providing figures on attacks of police in 2010 and 2012, 907, together with fatalities, 174. You then mentioned the support structures in place for the members and their families. Have I summarised your statement correctly?

GENERAL PHIYEGA: Yes.

MR BIZOS SC: Why did you include this information in your statement?

GENERAL PHIYEGA: It made logical sense for me to talk about it.

MR BIZOS SC: What was its relevance to what you were speaking about?

MR BIZOS SC: As a strategic head of police, as you said from 9, 8, 10, I was talking about the capacity, what we have, how we are, comparing with others, because even the experts that are presenting here are doing similar comparisons. That’s what I was talking about.

MR BIZOS SC: Did you believe that if you brought to the Commission’s attention the troubles that the police had, that that may be a reason for justifying what they did at Marikana?

GENERAL PHIYEGA: That is not true.

MR BIZOS SC: Well, according to the Independent Police Investigation Directorate, in 2011 to 2012 financial year there were some 720 deaths as a result of police action. You included the figures of the police fatalities. Why did you not include figures of deaths and injuries caused by police actions in the same period?

GENERAL PHIYEGA: For my understanding, are these deaths in cells or deaths where?

MR BIZOS SC: It includes the deaths, including the deaths of people in police custody.

GENERAL PHIYEGA: I think what would also help us is whether the 720, just for my understanding to be able to respond, were these people dying of natural causes, death because of police, illnesses, and all those. What’s the breakdown?
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<td>MR BIZOS SC: The term used by the organisation is “the result of police action.” I don’t think they included illness or other natural causes.</td>
<td>CHAIRPERSON: What I’m asking you is that from scene 1 or scene 2 -</td>
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<td>GENERAL PHIYEGA: What my memory serves me, which may not be the best memories, that that type of figure, when I saw it in IPID, it talks about deaths in cells and there is a breakdown of some of those numbers. I just don’t have my numbers with me now.</td>
<td>MR BIZOS SC: I’m not promising that there will be, because we are not acting for the people who have told, or that we heard from -</td>
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<td>MR BIZOS SC: The question is this. Why didn’t you mention the number of police deaths, which are regrettable and we don’t want to be understood that we consider deaths of policemen of any lesser sadness or importance than deaths of other citizens, but what I am concerned about in your statement, that it may give the impression that what happened at Marikana, and more particularly what happened a few days before with the death of two policemen, as regrettable as it may be, that Marikana may be considered as an act of revenge again people protesting and not being compliant with police directions.</td>
<td>CHAIRPERSON: Okay, so you can’t answer my question.</td>
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<td>GENERAL PHIYEGA: Advocate, why I have that really is to talk about police and their work, and this is why I even added EHW, which is our employee health and wellbeing, to say under this strenuous task, how do we help police to continue to be able to do their work. I wasn’t comparing deaths, and that’s the true reason why I added that paragraph. What you’re raising is a completely new dimension.</td>
<td>MR BIZOS SC: Yes.</td>
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<td>MR BIZOS SC: Did you mention the number of police deaths, which are regrettable and we don’t want to be understood that we consider deaths of policemen of any lesser sadness or importance than deaths of other citizens, but what I am concerned about in your statement, that it may give the impression that what happened at Marikana, and more particularly what happened a few days before with the death of two policemen, as regrettable as it may be, that Marikana may be considered as an act of revenge again people protesting and not being compliant with police directions.</td>
<td>CHAIRPERSON: Yes.</td>
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<td>GENERAL PHIYEGA: No, that was never in my thoughts.</td>
<td>MR BIZOS SC: I cautiously said -</td>
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<td>MR BIZOS SC: Yes well, there may be evidence before the Commission which may suggest that there was an element of it, but we won’t take it any further with you at this stage. You know that -</td>
<td>CHAIRPERSON: Yes, thank you.</td>
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<td>CHAIRPERSON: Mr Bizos, this evidence you’re talking about, does that relate to scene 1 or scene 2 or both? Because I can understand -</td>
<td>MR BIZOS SC: - it’s what I have been informed by other parties here that they have evidence of this. If it’s there, they will lead it and we will argue it. According to paragraph 75 of Colonel De Rover’s affidavit - Mr De Rover, FFF11, Chairman -</td>
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<td>MR BIZOS SC: No, the -</td>
<td>MR BIZOS SC: Not from us. This is why I cautiously -</td>
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<td>CHAIRPERSON: I can understand -</td>
<td>CHAIRPERSON: Oh, okay.</td>
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<td>MR BIZOS SC: The two police deaths.</td>
<td>MR BIZOS SC: I cautiously said -</td>
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<td>CHAIRPERSON: No, no, no, no, I understand the killing on the 13th. The question is whether what happened on the 16th was somehow in revenge for that. I’m saying, or you’re saying there’s going to be evidence about that, or may be.</td>
<td>CHAIRPERSON: Yes, thank you.</td>
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<tr>
<td>Mr De Rover correct or not?</td>
<td>CHAIRPERSON: What paragraph are you referring to?</td>
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<td>MR BIZOS SC: STF stands for?</td>
<td>MR BIZOS SC: 75. TRT stands for what?</td>
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<td>GENERAL PHIYEGA: Task Force.</td>
<td>GENERAL PHIYEGA: Tactical Response. NIU stands for?</td>
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<td>MR BIZOS SC: Are they all under your command?</td>
<td>MR BIZOS SC: Yes, they are under my command under ORS, that is a division of SAPS.</td>
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<td>GENERAL PHIYEGA: Yes, he’s right.</td>
<td>MR BIZOS SC: He makes a statement, which I want to read to you. “These three units have no responsibility or equipment for frontline handling of crowd management situation, neither is that their task.” Is Mr De Rover correct or not?</td>
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<td>MR BIZOS SC: Yes.</td>
<td>CHAIRPERSON: Mr Bizos, I see you’re looking for something.</td>
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25 So that is tactically done by those people.
24 the divisional commissioners, the provincial commissioners.
23 permission that I've given, the various people would do so,
22           GENERAL PHIYEGA:          Under the broad
21 Marikana?
20 second the Tactical Response Units, TRT, NIU and STF, to
19           MR BIZOS SC:          Was it your decision to
18 for mobilisation of capacity.
17           GENERAL PHIYEGA:          Yes, I gave permission
16 finished up were done on your recommendation?
15           MR BIZOS SC:          - for units from other
14 areas and the –
13           GENERAL PHIYEGA:          Yes, I did.
12           MR BIZOS SC:          - the units that eventually
11           GENERAL PHIYEGA:          finished up were done on your recommendation?
10           GENERAL PHIYEGA:          Yes, I gave permission
9           MR BIZOS SC:          for mobilisation of capacity.
8           MR BIZOS SC:          Was it your decision to
7           GENERAL PHIYEGA:          Under the broad
6            19 MR BIZOS SC:          The three units that I
5           GENERAL PHIYEGA:          It is true that I have
4           MR BIZOS SC:          So the fact that there were
3 units, TRT, NIU and STF, with your initiative or
2 participation?
1           GENERAL PHIYEGA:          I did.
0           CROSS-EXAMINATION BY MR BIZOS SC (CONTD.):
22           MANGWASHI VICTORIA PHIYEGA:          s.u.o.
21 You're still under oath, National Commissioner.  Mr Bizos.
20 Unit.
19           GENERAL PHIYEGA:          Operational Response
18           MR BIZOS SC:          Are they responsible for
17 Public Order Policing?
16           GENERAL PHIYEGA:          Just before we
15 adjourned we've read a paragraph that talks about the
14 responsibility of those units.  They are not responsible –
13           MR BIZOS SC:          I'll appreciate it if I
12 have an opportunity to get the two documents that I asked
11 for before putting the question.
10           CHAIRPERSON:          Right, we'll take the tea
9 for before putting the question.
8           MR BIZOS SC:          I'm in your hands.  Mr De Rover.
7           GENERAL PHIYEGA:          It is true that I have
6           MR BIZOS SC:          Did you give permission and
5           GENERAL PHIYEGA:          In a primary sense,
4           MR BIZOS SC:          We're not talking about the
3 order is supported.
2           MR BIZOS SC:          We're not talking about the
1 order is supported.
0           MR BIZOS SC:          Do you have it in front of
25 responsibility of those units.  They are not responsible –
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MR BIZOS SC: Their speciality is to deal with bank robberies. Yes?

GENERAL PHIYEGA: It is one of their specialities.

MR BIZOS SC: Cash in heist, transit -

CHAIRPERSON: Cash in transit heists, I think you -

MR BIZOS SC: I'm so sorry, yes.

GENERAL PHIYEGA: Yes.

MR BIZOS SC: Terrorists.

GENERAL PHIYEGA: Yes.

MR BIZOS SC: And hostage situations.

GENERAL PHIYEGA: Yes.

MR BIZOS SC: They may be, the specialised unit members, and in case anyone wants to check that I do not confuse this august gathering.

MR BIZOS SC: I beg your pardon?

GENERAL PHIYEGA: I accept the numbers you've given. I didn't see it.

MR BIZOS SC: I beg your pardon?

GENERAL PHIYEGA: I trust that it is sitting there.

MR BIZOS SC: Yes. I trust that it is sitting there.

MR BIZOS SC: Are you prepared to accept the rates of nearly two to one. Would you accept that?

GENERAL PHIYEGA: I do. That's why I'm saying I trust that it is sitting there. We didn't open the presentation now.

MR BIZOS SC: Yes. Subject to your qualification it is clear, if the figures are correct, that the rate of nearly two to one. Would you accept that?

GENERAL PHIYEGA: I know we are dealing with statistics, but I still would request that those that were on the field on that day, those that were responsible for actually commissioning these people, because they're coming here, I would like them to answer those questions so that I do not confuse this august gathering.

MR BIZOS SC: Well, you have to oversee their actions as the leader of the police. You have to oversee their actions, don't you?

GENERAL PHIYEGA: I do, but I think it is also responsible of me to say I know that they are responsible for all those tactical operational issues and I know they are coming here to answer.

MR BIZOS SC: Would not the leader of the police have been well advised to ask why are there twice as many policemen that are usually used in war-like situations, twice as many as people who are used, who are trained to control crowds? Wouldn't it have been an important question? Are you declaring war on this crowd, or do you want to control it? Why are all these war-like and killing people being invited in such large numbers to Marikana?

MR SEMENYA SC: Chair -

CHAIRPERSON: Yes, Mr Semenya?

MR SEMENYA SC: My learned colleague's hyperbole is not warranted. NIU, STF and the other unit are not war-like units that are killing people.

MR BIZOS SC: Trained to kill people, if that -

CHAIRPERSON: You accept that they're trained to kill people?

MR SEMENYA SC: No, they're not trained to kill people?
27th March 2013

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25 situation where high-risk confrontation with individual
24 I'd again say they are there to support personnel in
23           GENERAL PHIYEGA:          Talking from prescripts
22           CHAIRPERSON:          Carry on.
21 answer.
20           MR BIZOS SC:          Well, I'll expect an
19 you've won on that point –
18           CHAIRPERSON:          I've already, I said you
17           MR BIZOS SC:          I don't mind putting "if
16 necessary." But why are there, when we have a crowd
15 situation, why do we have twice as many people who's
14 training is to arrest terrorists, or to arrest hijackers,
13 to arrest people who are likely to put up resistance and it
12 may become necessary for them to be killed?  The question
11 necessary." But why are there, when we have a crowd
10           MR BIZOS SC:          I don't mind putting "if
09 you've won on that point –
08           MR BIZOS SC:          Well, I'll expect an
07 answer.
06           CHAIRPERSON:          Carry on.
05           GENERAL PHIYEGA:          Talking from prescripts
04 I'd again say they are there to support personnel in
03 situation where high-risk confrontation with individual
02 to kill people. They're trained for law enforcement. If
01 death is a result of their duty, it's unfortunate, but
00 they're not trained to kill people.

1 to make more POP members available for the Marikana
incident. You were the head of the police. Were you
asked, yes or no?
1 GENERAL PHIYEGA:          If the answer is yes or
0 no, it makes it difficult. I was asked about capacity –
0 MR BIZOS SC:          What is so difficult about
0 yes or no? Were you asked, or were you not asked?
0 GENERAL PHIYEGA:          I think I've answered.
0 MR SEMENYA SC:          Chairperson, the witness
0 has to be given an opportunity to give an answer. My
0 learned colleague doesn't need to shout at her.
1 CHAIRPERSON: Mr Bizos, I think she was
1 still busy with her answer and you did raise your voice. I
1 know sometimes as the afternoon goes on, one gets a bit
1 excited, but –
1 MR BIZOS SC:          Yes, I'll try and control
1 myself.
1 CHAIRPERSON:          Yes, please. Thank you.
1 MR BIZOS SC:          What is so difficult about
0 yes or no? Were you or were you not?
1 GENERAL PHIYEGA:          The answer I'm supposed
to give you, you may be looking for another answer, but I
1 must give you the answer that is true and fact. I was
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<td>1 capacity is not only POP, it’s also other things, and it is</td>
<td>1 CHAIRPERSON: So you were then able to</td>
<td>1 CHAIRPERSON: Sorry, National</td>
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<td>2 important for me to give that answer in a comprehensive</td>
<td>2 deal with the matter in the way you’ve suggested.</td>
<td>2 Commissioner, may I ask you a question on this topic? I’d like to understand how it worked. Is what happened that</td>
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<td>3 fashion.</td>
<td>3 GENERAL PHIYEZA: Yes.</td>
<td>3 you were asked to authorise the mobilisation of the</td>
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<td>4 CHAIRPERSON: Sorry, National</td>
<td>4 CHAIRPERSON: Thank you.</td>
<td>4 capacity, and did you phone the, or somehow contact the</td>
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<td>5 Commissioner, may I ask you a question on this topic? I’d</td>
<td>5 MR BIZOS SC: Was there any urgency about</td>
<td>5 provincial commissioners and say, look here, there’s a</td>
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<td>6 like to understand how it worked. Is what happened that</td>
<td>6 the selection of the training or balance of the people that</td>
<td>6 problem in North West province, the provincial commissioner</td>
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<td>7 you were asked to authorise the mobilisation of the</td>
<td>7 were required to be considered?</td>
<td>7 in North West province needs extra capacity, would you</td>
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<td>8 capacity, and did you phone the, or somehow contact the</td>
<td>8 GENERAL PHIYEZA: Can you repeat your</td>
<td>8 please help her out, without specifying send POP people or</td>
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<td>9 provincial commissioners and say, look here, there’s a</td>
<td>9 question?</td>
<td>9 send NIU people or whatever, so that what would then happen</td>
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<td>10 problem in North West province, the provincial commissioner</td>
<td>10 MR BIZOS SC: At this meeting, was it</td>
<td>10 would be the provincial commissioner in the North West</td>
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<td>11 in North West province needs extra capacity, would you</td>
<td>11 conveyed to you that it was urgent for you to send people</td>
<td>11 would have then, as it were, carte blanche to phone her</td>
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<td>12 please help her out, without specifying send POP people or</td>
<td>12 in support?</td>
<td>12 colleagues and say send me so many POPs or send me as many</td>
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<td>13 send NIU people or whatever, so that what would then happen</td>
<td>13 GENERAL PHIYEZA: There wasn’t that sense</td>
<td>13 Pops as you can, send me NIUs, send me TRTs, STFs, and so</td>
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<td>14 would be the provincial commissioner in the North West</td>
<td>14 of urgency. There was a process of addressing capacity.</td>
<td>14 on? In other words, was the decision as to which units to</td>
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<td>15 would have then, as it were, carte blanche to phone her</td>
<td>15 MR BIZOS SC: Was there any reason given</td>
<td>15 send for in effect delegated to her with corresponding</td>
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<td>16 colleagues and say send me so many POPs or send me as many</td>
<td>16 for the urgency?</td>
<td>16 authorisation to her colleagues to comply with her request?</td>
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<td>17 Pops as you can, send me NIUs, send me TRTs, STFs, and so</td>
<td>17 GENERAL PHIYEZA: The reason for</td>
<td>17 Is that how it worked, or was it more detailed than that in</td>
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<td>18 on? In other words, was the decision as to which units to</td>
<td>18 increasing capacity has always been as the issue escalates</td>
<td>18 the way that Mr Bizos suggests?</td>
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<td>19 send for in effect delegated to her with corresponding</td>
<td>19 you would, if you look at our records, where this whole</td>
<td>19 GENERAL PHIYEZA: It is not detailed,</td>
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<td>20 authorisation to her colleagues to comply with her request?</td>
<td>20 thing started, we started with a very small number, but as</td>
<td>20 Judge. On the 15th of August at a meeting that I had with</td>
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<td>21 Is that how it worked, or was it more detailed than that in</td>
<td>21 escalation came, it always became a need for the JOC to</td>
<td>21 the National Management Forum, after that meeting I saw</td>
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<td>22 the way that Mr Bizos suggests?</td>
<td>22 increase capacity.</td>
<td>22 urgency by the following day, the 16th?</td>
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<td>23 GENERAL PHIYEZA: Yes.</td>
<td>23 MR BIZOS SC: Did anybody at that meeting</td>
<td>23</td>
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<td>24 MR BIZOS SC: Did anybody at that meeting</td>
<td>24 suggest that the reinforcements were needed as a matter of</td>
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<td>25 suggest that the reinforcements were needed as a matter of</td>
<td>25</td>
<td>25 urgency by the following day, the 16th?</td>
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<td>1 GENERAL PHIYEZA: No.</td>
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<td>2 MR BIZOS SC: So the identity of the</td>
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<td>3 people chosen had nothing to do with you. Is that what you</td>
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<td>4 are telling us?</td>
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<td>5 GENERAL PHIYEZA: No, my concern was</td>
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<td>6 capacity.</td>
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<td>7 MR BIZOS SC: I’m sorry, I didn’t</td>
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<td>8 understand the answer. Please speak up.</td>
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<td>9 GENERAL PHIYEZA: I said no, my concern,</td>
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<td>10 as I’ve already mentioned, was capacity.</td>
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<td>11 MR BIZOS SC: Now the choice of weapons</td>
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<td>12 that were going to be used at Marikana on the 16th, whose</td>
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<td>13 decision was that?</td>
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<td>14 GENERAL PHIYEZA: The commanders that</td>
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<td>15 were there that have the responsibility to do so, would</td>
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<td>16 have done so.</td>
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<td>17 MR BIZOS SC: If they had asked you, or</td>
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<td>18 if it had come to your notice that they were going to use</td>
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<td>19 R1s or R4s and R5s in order to control the crowd – not to</td>
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<td>20 manage, to control the crowd – would you have allowed it?</td>
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<td>21 GENERAL PHIYEZA: I think it’s important</td>
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<td>22 for me as a leader to respect the expertise and the</td>
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<td>23 responsibilities that the commanders have.</td>
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<td>24 MR BIZOS SC: You would not exercise any</td>
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<td>25 judgment or make inquiries as to what sort of weapons were</td>
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GENERAL PHIYEGA: I say I’m noting it in his report.

MR BIZOS SC: You mean you see it now?

The question was, had it come to your notice before you came into the witness box?

GENERAL PHIYEGA: In the report, I’m saying I saw the report before it came here, but I noted it in the report.

MR BIZOS SC: Have you done anything about it?

GENERAL PHIYEGA: Our focus is on this Commission, and when this Commission finishes we will consolidate all the inputs, the recommendations, the observations that come out of here, as SAPS and consider all those.

MR BIZOS SC: Yes, finally on this issue, I want to read to you – sorry, Mr Interpreter, I interrupted you.

MR HANABE: Thank you, Senior Counsel.


CHAIRPERSON: Mr Bizos, I’m sorry to interrupt you. It’s quite a lengthy document, it’s an important article on the issue.

MR BIZOS SC: It is, or we consider it an important article, as far as I can see.

CHAIRPERSON: It seems to be quite an urgent and must be effected without delay.” Did that agreement, or that came between the, in discussions of SAPS and Mr De Rover come to your notice?

GENERAL PHIYEGA: This report is not an agreement between SAPS and De Rover. De Rover is an expert and De Rover is not being fed by us to regurgitate what we want him to say. He has assessed the situation; he has required information from us, which we have given. He has put his expert knowledge in this document and I think we would read it with a lot of keenness as we go forward, and it’s some of the things that we’ll look into.

MR BIZOS SC: Has this come to your notice?

GENERAL PHIYEGA: I note it in his statement.

CHAIRPERSON: Mr Bizos, I think it seems to be 4 o’clock. It would appear from para 94 of Mr De Rover’s affidavit that he is of the view, I think, that a number of areas, there are a number of areas where SAPS may want to consider alterations to, amongst other things, its equipment, which presumably includes the weapons it uses, and he says, “I’ve been made aware of the fact that a number of deliberations have been put in motion immediately following Marikana. I will at a later stage when my personal position permits, also offer my observations on these areas.” So it would appear that this process isn’t very far advanced at this stage.

MR BIZOS SC: No, that’s right.

CHAIRPERSON: But perhaps insofar as it’s necessary to explore it a little bit further, that may appropriately be done tomorrow morning at half past 9.

MR BIZOS SC: May I just finish, because I’m going to go on to a new topic tomorrow.

CHAIRPERSON: Yes, of course.

MR BIZOS SC: And it will not take more than a few minutes, Mr Chairman.

CHAIRPERSON: Alright, well try to do it as briefly as you can.

MR BIZOS SC: Yes. The expert says that they arrived at a conclusion. Did that conclusion come to your notice?

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